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**Aggressive Measures for Aggressive Schemes:
Human Rights Perspectives**

by

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Summary

The focus of this thesis is the EU Directive on mandatory disclosure rules on intermediaries that make available potentially aggressive cross-border tax arrangements. Its avowed purpose is to arrest base erosion and to address fairness in taxation. It closely follows the BEPS Action 12 principles and has been incorporated in the existing DAC regime as DAC6.

As with the rest of the information exchange directives that preceded DAC6, its conflict or collision with human rights (as enshrined in the human rights instruments including the EU Charter of Fundamental Rights and the European Convention on Human Rights) has been the subject of debate.

The thesis continues the discussion on the balancing of the collision between tax measures and human rights. In DAC6, regulators will impose a duty upon intermediaries (and on taxpayers, in few cases where intermediaries are excused) to disclose certain information at the earliest possible stage of tax planning. Such an aggressive approach to regulation reflects the resolve of Member States to fix a systemic problem in the international tax system which businesses, particularly large multinational enterprises, exploit through aggressive or abusive tax avoidance. It is clearly a paternalistic approach to regulation and overrides the freedom and initiative of businesses. It confirms that the default legal or regulatory regime placed a higher value on the power to tax over human rights.

The thesis concludes that the tension or collision between human rights and the sovereign power of taxation is receptive to adjustments or balancing based on a mutual recognition of the ultimate aim of building a just and civilized society.

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Abbreviation list

BEPS	Base Erosion and Profit Shifting
CJEU	Court of Justice of the European Union
DAC	Directive on Administrative Cooperation
DOTAS	Disclosure of Tax Avoidance Schemes
ECHR	European Convention on Human Rights
ECOFIN	Economic and Financial Affairs Council (EU)
ECtHR	European Court of Human Rights
EU	European Union
GAAR	General Anti-Avoidance Rule
MDR	Mandatory Disclosure Rules
MNE	Multinational Enterprise
LPP	Legal Professional Privilege
OECD	Organization for Economic Co-operation and Development
SAAR	Specific Anti-Abuse Rule

1. Introduction

1.1 Background

Controlling society is a function of the law¹. Every democratic society is confronted with tensions between competing values (or opposing views of those values) that the law reorders. Constitutional law normally defines the default regime or hierarchy of these values in specific areas of the law for an orderly arrangement of societal expectations.

In taxation, tensions exist between opposing values and interest brought about by the enactment of laws implementing BEPS Action Plans that substantially changed or adjusted the goal posts in the international taxation system. Legal questions and implementation issues could thus be expected, and courts will most likely be confronted with controversies involving the application and balancing of these values, and reorder them, if necessary, or provide the impetus for legislative reform to adopt the new norm in line with the rule of law. Expanding the rhetoric in this debate to include human rights arguments is highly relevant as the current literature shows.²

One BEPS recommendation that could spawn legal questions that have human rights implications is BEPS Action 12 – Mandatory Disclosure Rules (MDR).

Unlike the rest of the recommendations, BEPS Action 12 is a pre-emptive or proactive measure³ that requires taxpayers to provide regulators with information that the latter will use to establish whether a scheme or arrangement is abusive or aggressive for the primary purpose of curing the flaw in the system that leads to such schemes. An alternative paradigm is to say that Action 12 proposes aggressive measures to counteract a serious area of concern.

Aggressive schemes indeed call for aggressive measures. The competing interest of governments and taxpayers indicate that the former is not left

¹ See, Lon L. Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 BYU L. Rev. 89 (1975), available online at: <https://digitalcommons.law.byu.edu/lawreview/vol1975/iss1/> accessed on May 8, 2018.

² P. Pistone & P. Baker, General Report, in *The Practical Protection of Taxpayers' Fundamental Rights*, p. 35 (IBFD 2015), Online Books IBFD, available at https://online.ibfd.org/linkresolver/static/ifacahier_2015_volume2_general_report?WT.z_nav=crosslinks (last access 24 April 2018); Pasquale Pistone, *The EU Law Dimension of Human Rights in Tax Matter* in Cécile Brokelind (editor), *Principles of Law: Function, Status and Impact in EU Tax Law*, Amsterdam: IBFD, 2014, Amsterdam: IBFD, pp 91-123.

³ It may also be described as a “procedural attack” on avoidance; see, Victor Thuronyi, Kim Brooks, Borbala Kolozs, *Comparative tax law / Alphen aan den Rijn: Kluwer Law International*, 2016 2. ed, p 175.

without any remedy should it believe that taxpayers are acting in contravention with good faith, honesty and fairness. The government has within its reach all the resources to enforce collection of taxes for the maintenance of a civilized society. And in case of issues that impact international economic relations, governments are quick to act on collective action problems through treaties and even through soft law formulation under the auspices of international organizations. It is therefore clear that in this competing claims, governments and taxpayers are not on an equal footing.

Human rights, of which taxpayer rights is a genus⁴, ultimately compensates for the lack of a countervailing power of a taxpayer in his relationship with the government as it exercises the power of taxation⁵.

There is sufficient literature on topics relating to the intersection of taxation and human rights⁶, including human rights vis-à-vis transparency and exchange of information agreements⁷. Several articles have also treated the aspect of forced disclosure of tax avoidance arrangements⁸. This thesis discusses and analyses the human rights implication of MDR for intermediaries and taxpayers in the light of the adoption of DAC6⁹, a Directive that introduced the BEPS Action 12 recommendations into EU law.

1.2 Aim

As stated in the preceding paragraph, this thesis will study the interface between human rights and DAC6. Considering that DAC6 is a new development in the public management of tax avoidance, the thesis meets one of the recognized aims of tax research which is to contribute in the analysis of the fit¹⁰ of such law in the legal system in quest of a better law and society.¹¹

⁴ “At their core, taxpayer rights are human rights” in Nina Olson, *A Brave New World: The Taxpayer, Experience in a Post-Sequester IRS*; available at https://taxpayeradvocate.irs.gov/Media/Default/Documents/NTA_Woodworth_TaxNotes_0603.pdf accessed on May 14 2018.

⁵ Taxation is recognized as an attribute of sovereignty and an inherent power of government. The other state powers include the police power and the power of eminent domain.

⁶ Examples: *Observatory on the Protection of Taxpayers’ Rights*, 2015-2017 General Report on the Protection of Taxpayers’ Rights, 26 April 2018, <https://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR-General-Report.pdf>, accessed on May 20, 2018; P. Pistone & P. Baker, *supra* fn 2; Pasquale Pistone, *supra* fn 2.

⁷ For example, Xavier Oberson, *Legal protection of the taxpayer in International exchange of information in tax matters: towards global transparency*, Elgar, 2015, pp 209-244.

⁸ Examples: Jasna Voje, *EU Implementation of BEPS Action 12 in Light of Human Rights Requirements*, 57 Eur. Taxn. 5 (2017), Journals IBFD; Philip Baker, *The BEPS Project: Disclosure of Aggressive Tax Planning*, 43 Intertax, Issue 1, Published: 2015 pp 85–90.

⁹ Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, adopted as a legislative act on May 25, 2018, <http://data.consilium.europa.eu/doc/document/ST-9389-2018-INIT/en/pdf>; The formal title of DAC is Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0016>

¹⁰ or “fit for purpose”

¹¹ Sjoerd Douma, *Legal Research in International and EU Tax Law*, Kluwer, 2014, pp 17, 26.

Accordingly, the basic research question of this thesis is whether or not intermediaries and taxpayers have effective protection under human rights law from any intrusive effects of MDR envisaged under BEPS Action 12 and now adopted in the EU via DAC6 and to analyse how such human rights could interact with the power to tax in order to improve or evolve the law.

1.3 Method and Material

The traditional (dogmatic) method will be used in interpreting the relevant sources of law and jurisprudence.

The thesis will lay down the basis for the research by starting with BEPS Action 12, as the template upon which DAC6 is built, and then continuing with the salient features of DAC6. The final part of the thesis will place selected areas of DAC6 before a human rights lens. The analysis will identify the potential conflicts between the substantive and procedural aspects of DAC6 and human rights. In the process, an attempt will be made to balance or reconcile the conflicting interest or rights, guided by the jurisprudence of the CJEU and ECHR. The result of this exercise will offer insights on the implementation issues of DAC6 could be useful in guiding further discussion or research.

This thesis is based on materials researched or studied during the course studies up until June 1, 2018. Internet sources were accessed at various times until June 1, 2018. The following databases accessed via Lund University were primarily relied upon in the research: IBFD Tax Research Platform, Westlaw and HeinOnline.

1.4 Delimitation

Only the salient features of DAC6 and Action 12 will be taken up. The human rights section of the thesis will build upon that brief account of DAC6 and Action 12. Only the major human rights impacted by DAC6 are discussed. These are the right to property, right to privacy and right to fair trial, including the related rights that are included or implied in those rights such as the right to personal data protection and the right against self-incrimination. The thesis will not analyse the right to privacy that relates to legal professional privilege considering that DAC6 respects the privilege within the limits or conditions defined in the relevant national law. There is therefore no anticipated conflict on the substantive aspect of the two rights although it raises issues of legal certainty in view of the variances in the scope of LPP regimes in Member States' respective national laws.

1.5 Outline

The thesis will be written as follows:

Chapter 2 will explain DAC6 after a brief treatment of BEPS Action 12 being the template for DAC6. Chapter 3 will discuss taxation and human rights, in general, and then proceed with a disquisition of the individual human rights that are relevant to DAC6. The potential conflict between the rules and the human rights will be identified and attempt will be made to balance the interest and reconcile the conflict. The conflict and collision will be discussed in turn starting with the right to property, followed by the right to privacy and finally the right to fair trial. Chapter 4 will contain the conclusion and final observations.

2. Mandatory Disclosure of Potentially Aggressive and Abusive Tax Avoidance Schemes by Intermediaries

2.1 Introduction

The urgency of addressing the role of intermediaries¹² in the arrangement, structuring or organizing of potentially aggressive or abusive tax avoidance schemes has long been recognized by international organizations like the OECD and even by the EU as a supranational organization adversely affected by BEPS and in so far as such cross-border schemes affect its internal market.

Transparency initiatives in the past were directed at ways to combat tax havens. Data after data confirmed the enormous amount of money that is kept in tax havens by persons who evade and avoid taxes with the help of intermediaries.

A series of leaks reignited the importance and urgency¹³ of the initiative to impose upon intermediaries (particularly, tax lawyers and tax advisors) a duty¹⁴ to disclose aggressive tax avoidance schemes or arrangements which they created or participated in creating for clients. The Panama Papers for example exposed the role the law firm Mossack Fonseca in facilitating opaque transactions. Taken to task for its role in facilitating tax evasion, the

¹² Tax intermediaries is a collective term used by the OECD to refer to tax advisers and financial institutions. See OECD, Study into the Role of Tax Intermediaries (2008). Glossary at p 88, https://read.oecd-ilibrary.org/taxation/study-into-the-role-of-tax-intermediaries_9789264041813-en#page90; Tax intermediaries are considered as “usual suspects” in the invention of tax minimization, even, evasion structures as the interrogatory nature of an article suggests: USUAL SUSPECTS? Co-conspirators in the business of tax dodging, <https://www.greens-efa.eu/files/doc/docs/d6bd745c6d08df3856eb6d49ebd9fe58.pdf> accessed on May 20, 2018.

¹³ Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, SWD/2017/0236 final - 2017/0138 (CNS), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0236>, p 4.

¹⁴ If the remedies to tax avoidance were placed in a spectrum with voluntary or self-regulation on one end and government regulation on the right, this aggressive measure pushes the remedies to the extreme end of the government regulation spectrum. The Action Plan characterizes MDRs and other disclosure initiatives as mutually reinforcing measures (see par 34 of BEPS Action 12); Also see, Bronżewska, Katarzyna, *Cooperative Compliance: a new approach to managing taxpayer relations*, Amsterdam: IBFD, 2017; A. Majdańska & P. Schoueri, *Tax Compliance in the Spotlight – The Challenges for Tax Administrations and Taxpayers*, 71 Bull. Intl. Taxn. 11 (2017), Journals IBFD.

said firm released a statement in an apparent self-defence with a sweeping indictment on the culpability of the finance and banking system itself.¹⁵

Data that are exposed by whistle-blowers or in leaks give the OECD a strong policy-based argument as well as the moral ascendancy to continue its work on MDR for Intermediaries building upon its earlier reports “Tackling Aggressive Tax Planning through Improved Transparency and Disclosure – Report on Disclosure Initiatives” in 2011¹⁶ and “Study into the Role of Tax Intermediaries in 2008”¹⁷. OECD’s study that was commenced in 2006 had early on recognized “advance disclosure” as a one of several possible response strategies against aggressive tax avoidance that targets the supply side of the market.¹⁸

BEPS Action 12 was the logical result of that continuing project.

2.2 BEPS Action 12 on MDR (DAC6’s Template)

In 2015, OECD delivered its BEPS Final Reports containing the strategies aimed at fixing the international tax system. The Reports while not legally binding were considered as soft law¹⁹. As such soft law, countries who are part of the consensus are expected to implement the proposed BEPS measures that are either minimum standards²⁰ or mere recommendatory best practices that may or may not be implemented by those countries.

BEPS Action 12 built its recommendations using the experiences from several countries that already tackled head-on the issue about the role of intermediaries in tax avoidance practices. These legal laboratories include OECD and G20 countries like United States, Canada, South Africa, the United Kingdom, Portugal, Ireland, Israel, and Korea²¹. The United Kingdom

¹⁵ See the statement at <http://www.mossfon.com/media/wp-content/uploads/2016/04/Statement-Regarding-Recent-Media-Coverage-4-1-2016.pdf> accessed on May 8, 2018, “...approximately 90% of our clientele is comprised of professional clients, such as international financial institutions as well as trust companies and prominent law and accounting firms, who act as intermediaries and are regulated in the jurisdiction of their business. These clients are obliged to perform due diligence on their clients in accordance with the KYC and AML [Know Your Customer and Anti-Money Laundering respectively] regulations to which they are subject.”

¹⁶ Tackling Aggressive Tax Planning through Improved Transparency and Disclosure – Report on Disclosure Initiatives (OECD, Paris, February 2011) , available at <http://www.oecd.org/ctp/exchange-of-tax-information/tacklingaggressivetaxplanningthroughimprovedtransparencvanddisclosure.htm>; The strategies listed included the following: (a) mandatory early disclosure; (b) additional reporting; (c) questionnaires; (d) co-operative compliance; (e) rulings; and (f) penalty linked disclosure, at p 13.

¹⁷ Study into the Role of Tax Intermediaries, OECD, Publication Date: 8/04/2008; available at <http://www.oecd.org/tax/administration/studyintotheroleoftaxintermediaries.htm>

¹⁸ Id., at p 21; “Advance disclosure - Canada, South Africa, the UK and the USA have statutory rules that require disclosure of certain schemes or arrangements to the revenue body in advance of the tax-return process – typically when the scheme is promoted.”

¹⁹ <http://www.oecd.org/ctp/beeps-frequentlyaskedquestions.htm>

²⁰ Of 15 Actions, the OECD identified Actions 5, 6, 13 and 14 as minimum standards to be implemented by countries participating in the BEPS Inclusive Framework.

²¹ BEPS Action Plan, par 36.

was an early mover in this area having introduced its MDR system called Disclosure of Tax Avoidance Schemes (DOTAS) in 2004²².

BEPS Action 12, like the earlier initiatives before it, did not insist on setting minimum standards. It left to governments who joined the BEPS consensus the decision on whether to implement and translate into hard law the recommendations under BEPS Action 12. Clearly, Action 12 contains the building blocks for institutionalizing a mandatory disclosure regime and therefore has persuasive value in guiding law-making initiatives in this area.

The following sections briefly explain the salient features of MDR based on the Action 12 principles. These principles are then further treated in a subsequent sub-chapter 2.3 to demonstrate the actual adoption of the principles into DAC6.

2.2.1 The Functions of MDR

As its name suggests, MDRs are rules that place a legal obligation to report or to disclose information about potentially aggressive and/or abusive tax planning arrangement on intermediaries under pain of penalty, and which information are shared via exchange of information agreements between or among tax administrators who have a common interest in the processing of the information or intelligence.

OECD considers MDR as one of the three fundamental pillars²³ upon which it intends to fix or reconstruct the failing international tax system. Tax administrators have long felt the need for a regime fix as they continued to grapple with minimal success to curtail the creative ways by which big corporate taxpayers especially MNEs are able to shift profits to other jurisdictions to minimize or, worse, to entirely avoid paying any tax at all, as they watch helplessly their tax base erode or their tax collection decline. Transparency will supply the government such necessary and relevant information it requires to correct the failure in the system and effectively implement the corrective measures.

²² See, Guidance - Disclosure of tax avoidance schemes (DOTAS), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701190/DOTAS-March.pdf accessed on May 30, 2018.

²³ The plan was structured around three fundamental pillars: introducing coherence in the domestic rules that affect cross-border activities; reinforcing substance requirements in the existing international standards, to ensure alignment of taxation with the location of economic activity and value creation; and improving transparency, as well as certainty for businesses and governments. - OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers meeting - Reforms to the international tax system for curbing avoidance by multinational enterprises, <http://www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm> accessed on May 5, 2018.

Consistent with the BEPS pillars, the main objective of an MDR regime is “to increase transparency by providing the tax administration with early information regarding potentially aggressive or abusive tax planning schemes and to identify the promoters and users of those schemes”²⁴ and to deter them from using those schemes in the expectation that they will “think twice about entering into a scheme if it has to be disclosed”²⁵. This is the deterrent function of MDR. It is analogous to a yellow light that warns drivers to slow down in anticipation of an upcoming full stop (red) light. The analogy could even be taken further by considering MDRs as similar to a “Speed Radar Ahead” sign that effectively changes the behaviour of the driver who, by reason of the sign, re-checks his speed limit (analogous to evaluating if one’s position is within the boundaries of acceptable tax avoidance). The driver who does not check if he is within the legal limit and continues to step on the gas despite the early warning would be analogous to a situation where one continues to structure one’s audit position aggressively even in the light of badges or indications that it goes beyond reasonable tax planning and is in fact a wanton disregard of one’s moral compass as a citizen - unfazed despite the threat of sanctions.

MDR also has a disincentivizing function. Intermediaries may lose appetite to create tax avoidance schemes because of the pressure that is created by the disclosure obligation and the prospect of a defeated scheme after having devoted valuable expertise and resources in devising them. Intermediaries will be expected to shy away from playing around with the mismatches and inconsistencies in the tax rules if they know they will not recoup their “investment” in the light of a clear threat that such service will be defeated or rendered inutile by a subsequent amendatory law.²⁶ This ability to come up with timely remedial legislation is the third function or purpose of an MDR.

2.2.2 The Design of MDR

For an MDR to operate efficiently, the OECD recommends a guidance list structured around the following questions: Who has to report? What has to be reported? When is the information reported? What other obligations (if any) should be placed on promoters and/or scheme users? What are the consequences of non-compliance? and How to use the information collected?

2.2.2.1 Who has to report?

²⁴ BEPS Action 12, Final Report, p 11.

²⁵ Id., p13.

²⁶ Id., p18.

BEPS Action 12 presents two approaches in assigning the responsibility of reporting under the MDR based on the experience of the countries that have MDR regimes in place. A transaction-based approach, which is used in the United States, places a joint obligation on the taxpayer and promoter to disclose the required information. A second approach that is used in the United Kingdom and Ireland is called a promoter-based approach. As the name clearly implies, it is the promoter or intermediary that carries the main obligation of reporting. BEPS Action 12 thus carries these different approaches and presents two options on the question “Who has to report?”. One options which follows the transaction-based approach is for both the promoter and the taxpayer to have the obligation to disclose separately. The second option is for either the promoter or the taxpayer to disclose which more closely resembles the promoter-based approach.²⁷

2.2.2.2 What has to be reported?

The basic guidance in determining the nature and extent to which information will be collected and reported to the regulators is tied to the purposes of MDR. They should be limited to the specific information necessary to achieve said purposes. BEPS Action 12 refers to it as the “reportable scheme”.

This exercise requires a delicate balancing considering the multiple aims of MDR. A narrow funnel for schemes that have to be reported could result in a lot of potentially aggressive avoidance schemes escaping regulatory ex-ante review. On the other hand, an overly broad funnel could result in an overload of taxpayer information as to be rendered useless for lack of resources to analyse data. BEPS Action 12 thus recommends filters, thresholds²⁸ and hallmarks to manage the data flow.

Thresholds are intended to “filter out irrelevant disclosures and may [...] reduce some of the compliance and administration burden of the regime by targeting only tax motivated transactions that are likely to pose the greatest tax policy and revenue risks”²⁹. The main benefit test is the most common threshold. BEPS Action 12 explains the test as follows: “Under such a threshold the arrangement must satisfy the condition that the tax advantage is, or might be expected to be, the main benefit or one of the main benefits of entering into the arrangement. Such a test compares the value of the expected tax advantage with any other benefits likely to be obtained from the

²⁷ Id., p 33.

²⁸ Id., p 37.

²⁹ Id., par 80.

transaction and has the advantage of requiring an objective assessment of the tax benefits”.³⁰

Hallmarks on the other hand provide identifying features that regulators watch out for which if present would trigger the reporting obligation. Hallmarks are either generic or specific. Both hallmarks are recommended to be included in a regulatory checklist to guide regulators.³¹

BEPS Action 12 gives the following as examples of generic hallmarks: “Confidentiality” hallmarks where the promoter or adviser requires the client to keep the scheme confidential; “Premium fee” or “contingent fee” hallmarks where the amount the client pays for the advice can be attributed to the value of the tax benefits obtained under the scheme; “Contractual protection” where the parties agree an allocation of risk in respect of a failure of the tax consequences of the scheme; and “Standardised tax product” intended to capture widely-marketed schemes.³² Generic hallmarks thus provide the regulator “information about formulaic and mass-marketed transactions in addition to those that are new and innovative.”³³

BEPS Action 12 recognizes that generic hallmarks could increase the transactional cost on both the taxpayers (reporting cost) and regulators (processing cost) but shows the potential of identifying new and inchoate innovative schemes. The presence of hallmarks therefore deters and disincentivizes intermediaries and on the part of regulators provides them a rapid alert system to introduce corrective measures without giving the aggressive scheme an opportunity to be mass-produced or industrialized. The specific hallmarks on the other hand counterbalances the potential over-breadness of generic hallmarks since they present opportunities for striking a balance between costs and capacity issues for regulators.³⁴

Considering the fact that capturing transactions that are reportable rely on defining the circumstances that give rise to tax avoidance, the challenge for countries intending to formulate legislation incorporating the BEPS MDR principles is how ensure administrative feasibility without unduly burdening taxpayers with possibly irrelevant reportorial requirements.

³⁰ Id., par 37.

³¹ Id., par 91; BEPS Action 12 distinguishes the hallmark as follows: “Generic hallmarks target features that are common to promoted schemes, such as the requirement for confidentiality or the payment of a premium fee. Generic hallmarks can also be used to capture new and innovative tax planning arrangements that may be easily replicated and sold to a variety of taxpayers. Specific hallmarks are used to target known vulnerabilities in the tax system and techniques that are commonly used in tax avoidance arrangements such as the use of losses.”

³² Id., pp 39-41.

³³ Id., p 45.

³⁴ Id., p 38.

2.2.2.3 When information is reported?

Considering that time is of the essence in MDR reporting, BEPS Action 12 recommends the reckoning period for the reporting obligation immediately to start at the time the scheme is made available. BEPS Action 12 identifies other events that would trigger the reporting obligation but if the objectives of MDR were to be met the most logical event should be linked to its availability because at that point the potential risk that the MDR seeks to avoid becomes identified. The specific time period (or deadline) as a matter of governance should also be short to emphasize the importance and urgency of the information being sought. However, BEPS Action 12 recognizes an adjustment in the time frame if the responsibility to report is shifted to the taxpayer.³⁵

For taxpayer it should only be fair that the reporting duty be reckoned from actual implementation of the scheme of which he is a participant as he would not be aware of the point at which time the intermediary or promoter has made the scheme available to its clients, or that by the time he is made aware of the duty to report that event (the “making available”) has already passed.

2.2.2.4 What other obligations (if any) should be placed on promoters and/or scheme users?

BEPS Action 12 recommends the incorporation of a monitoring system by using scheme reference numbers to identify taxpayers for subsequent risk assessment and by requiring intermediaries to provide regulators a list of clients who are using the scheme.³⁶

2.2.2.5 What are the consequences of non-compliance?

To give teeth to the deterrent function of the MDR, BEPS Action 12 recommends the imposition of pecuniary and non-pecuniary penalties for failure to comply with MDR provision.³⁷ Penalties are however one area of the MDR that have issues with taxpayer rights. BEPS Action 12 thus recommends that such provisions should be coherent with general domestic law provisions.

2.2.3 Comments

³⁵ Id., p 49

³⁶ Id., p 53

³⁷ Id., p 57

2.2.3.1 Fairness

One policy argument or reason that underlies the necessity of implementing an MDR and the entire BEPS recommendations that is not expressly mentioned in BEPS Action 12 is that of fairness. Fairness in taxation easily figures out in any debate about tax avoidance. It is thus no wonder that while the BEPS Report failed to mention fairness, it was mentioned during the presentation of the Final Report with the following statements attributed to OECD Secretary-General Angel Gurría: “But beyond this, BEPS has been also eroding the trust of citizens in the fairness of tax systems worldwide. The measures we are presenting today represent the most fundamental changes to international tax rules in almost a century....”³⁸

2.2.3.2 Abuse

The failure to point to fairness in taxation, or the lack of it in the current international tax system, can however be assumed as implied in BEPS Action 12’s consistent referral to the aggressive measures targeted by MDR as constituting abuse. “Abuse” was used 15 times in the Action Plan and was specifically used as an alternative concept to aggressive tax avoidance.³⁹

- aggressive or abusive transactions, arrangements, or structures
- potentially aggressive or abusive tax planning schemes⁴⁰ or strategies⁴¹
- potentially aggressive or abusive tax avoidance schemes⁴²
- abusive tax transactions⁴³
- aggressive (or potentially abusive) tax planning⁴⁴

As may be clearly observed from Action 12’s linguistic expression, OECD suggests that governments cover abusive transactions in the reporting obligations. The reasonable inference is that the Action Plan is equating the concept of abuse with aggressiveness.

BEPS Action 12 however did not recommend a definition of “abuse” for purposes of MDR. The same is true with the concept of “aggressive tax avoidance”. The lack of any attempt to clarify or unify the concept of tax

³⁸ See the press release: “OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers meeting; Reforms to the international tax system for curbing avoidance by multinational enterprises”; Available at <http://www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm> Accessed on May 5, 2018.

³⁹ BEPS Action 12 p 9.

⁴⁰ Id., p 9.

⁴¹ Id., p 13.

⁴² Id., p 18.

⁴³ Id., p 18.

⁴⁴ Id., p 85.

avoidance and the various degrees of avoidance could result in implementation issues due to arguments on whether or not a particular act or event falls into the category of “aggressive” or “abusive” or “acceptable” plans. The lack of effort to unify the concept is understandable considering that attempting to define avoidance by itself is difficult⁴⁵, and it should be much more difficult to unify the concept in a manner that is applicable to all jurisdictions considering that each jurisdiction has its own legal tradition and evidentiary rules that directly affect the determination of certain transactions as being “avoidance” or an avoidance that was “aggressively” pushed and therefore unacceptable. As Thuronyi et al. explains: “Tax avoidance transactions provide a classic test of statutory interpretation.”⁴⁶

Further comments on the lack of a unified concept of avoidance and abuse will also be presented in the chapter dealing with the intersection between DAC6 and Human Rights in relation to issues about legality.

2.3 EU Directive on MDR (DAC6)

2.3.1 Background

The adoption into legislation of DAC6 based on the OECD-recommended MDR is no surprise considering that, as explained in the Working Paper⁴⁷, the legislative proposal was high on the EU and wider international agenda. Furthermore, in its conclusions of 25 May 2016, on an external taxation strategy and measures against tax treaty abuse, the Council of the EU invited the European Commission "to consider legislative initiatives on Mandatory Disclosure Rules inspired by Action 12 of the OECD BEPS project with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes". The EU also participates in OECD and its Members States are members of the OECD. They are thus fully aware of the parallel OECD transparency initiatives. Members States like the UK also have feasible MDR regimes that could be transplanted to other Member States' local laws in so far as they involve domestic schemes.

MDR also fits into the framework Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC) considering that the information

⁴⁵ See also, C. J. Finnerty & P. Merks et al., *Fundamentals of International Tax Planning* 49 et seq. (R. Russo ed., IBFD Pub. 2007).p 60.

⁴⁶ See Thuronyi, *supra* fn 3, p 129.

⁴⁷ See, Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU, *supra*, fn 13.

collected under an MDR regime are meant to be shared⁴⁸. DAC provides for the mandatory automatic exchange of information, where the information is available, in respect of five non-financial categories of income and capital, with effect from 1 January 2015: 1) income from employment, 2) director's fees, 3) life insurance products not covered by other Directives, 4) pensions, and 5) ownership of and income from immovable property. DAC has accommodated five further revisions to cover specific types of information in its fold. The earlier updates covered the automatic exchange of information on financial accounts in 2014 (DAC2)⁴⁹, tax rulings/advance pricing arrangements in 2015 (DAC3)⁵⁰, country-by-country reporting in (DAC4)⁵¹ and anti-money-laundering information (DAC5)⁵² in 2016.

The current revision is therefore labelled as “DAC6” and embodies the two primary objectives that Member States seek to achieve which are to lay down rules for mandatory disclosure to national competent authorities of potentially aggressive tax planning schemes with a cross-border element⁵³ ("arrangements") by the "intermediaries" (e. g. tax advisers or other actors that are usually involved in designing, marketing, organising or managing the implementation of such "arrangements"), and to ensure that national tax authorities automatically exchange this information with the tax authorities of other Member States by using the mechanism provided for in the DAC.⁵⁴

2.3.2 Salient Features of DAC6

The design of DAC6 is discussed below following the structure of 2.2.2:

2.3.2.1 Who has to report? When information is reported?

Under paragraph 1 and 1a, Article 8aaa of DAC, the reporting obligation follows the promoter-based approach by placing the obligation on the intermediary within 30 days reckoned from the day the reportable cross-

⁴⁸ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0016>; BEPS Action 12, Chapter 4.

⁴⁹ Council Directive 2014/107/EU of 16 December 2014 as regards the automatic exchange of financial account information between Member States based on the OECD Common Reporting Standard (CRS) which prescribes the automatic exchange of information on financial accounts held by non-residents.

⁵⁰ Council Directive (EU) 2015/2376 of 8 December 2015 as regards the mandatory automatic exchange of information on advance cross-border tax rulings.

⁵¹ Council Directive (EU) 2016/881 of 25 May 2016 as regards the mandatory automatic exchange of information on country-by-country reporting (CbCR) amongst tax authorities.

⁵² Directive 2016/2258/EU as regards access to anti-money-laundering information by tax authorities.

⁵³ i.e. EU Member State – to EU Member State or EU Member State to third country.

⁵⁴ ECOFIN Note dated March 9, 2018, Interinstitutional File:2017/0138 (CNS) Re Mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements - Political agreement, ST 6804 2018 INIT - 2017/0138 (CNS), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6804_2018_INIT&qid=1527600767439&from=EN accessed on May 12, 2018.

border arrangement is made available (or ready) for implementation, or when the first step in the implementation of the reportable cross-border arrangement has been made, whichever occurs first. Intermediaries are also required to report within the same time frame any reportable information in arrangements where they provided aid, assistance or advice whether directly or indirectly.

Article 3 (21) of the DAC defines an intermediary as “any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement”. The class of persons embraced by that term also includes “any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know⁵⁵ that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.” The intermediary should be operating in the EU.⁵⁶

The Directive adopts the BEPS Action 12 recommendation to grant an exemption on the reporting requirement to intermediaries who invoke legal professional privilege if available under national laws or rules of court/rules of evidence⁵⁷. In such an event, the reporting obligation is shifted to the notified intermediary or the taxpayer itself to report the information.⁵⁸

2.3.2.2 What has to be reported?

The Directive covers any cross-border arrangement⁵⁹ that is characterized with at least one of the listed hallmarks.

⁵⁵ The Directive grants the possibility of contesting the presumption of knowledge in the succeeding paragraph that states: “Any person shall have the right to provide evidence that such person did not know and could reasonably not be expected to know that this person was involved in a reportable cross-border arrangement. For this purpose, a person may refer to all relevant facts and circumstances as well as available information and its relevant expertise and understanding.” The burden of proof therefore lies with the person classified by tax authorities as an intermediary.”

⁵⁶ Any of the following is an intermediary for purposes of the directive: (a) be resident for tax purposes in a Member State; (b) have a permanent establishment in a Member State through which the services with respect to the arrangement are provided; (c) be incorporated in, /or governed by the laws of, a Member State; (d) be registered with a professional association related to legal, taxation or consultancy services in a Member State.

⁵⁷ In evidentiary rules, attorneys and legal advisors cannot testify on matters learned in confidence with the client. The client may however consent to the disclosure since the privilege belongs to him/her. DAC6 makes that obligation mandatory such that domestic laws implementing it becomes an exception to the confidentiality rule “by law”, see discussions in Jonathan Auburn, *Legal Professional Privilege: Law and Theory* / Oxford; Portland, Or.: Hart Publishing, 2000, p 50; R. G. Toulson & C. M. Phipps, *Confidentiality*, Sweet & Maxwell, 1996, p 48.

⁵⁸ Article 8aaa, par 2 of DAC; BEPS Action 12, par 76, p 36.

⁵⁹ Defined: "cross-border arrangement" means an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions are met: (a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction; (b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction; (c) one

The Directive adopted the use of threshold or filter via the main benefit test to capture only those that are potentially aggressive schemes. Thus, under Annex IV of DAC6 the following hallmarks may only be taken into account where they fulfil the "main benefit test": Generic hallmarks - confidentiality, premium/contingent fee and contractual protection, standardized tax product; Specific hallmarks - loss schemes, converting income schemes, circular transactions; and Specific hallmarks related to cross-border schemes involving deductible cross-border payments made between two or more associated enterprises that benefit from a preferential tax regime or a tax exemption (including being subject to a zero, or almost zero corporate tax rate.) The rest of the hallmarks may be taken into account without having to meet the main benefit test. These include transactions involving double dip depreciation, double dip double tax relief, undervalued asset transfers, where the recipient is not tax resident in any jurisdiction, where the arrangements designed to circumvent rules on the automatic exchange of financial information and beneficial ownership and specific hallmarks concerning transfer pricing such as arrangements involving the use of unilateral safe harbour rules, the transfer of hard-to value intangibles, or intragroup cross-border transfer of functions, risks or assets.⁶⁰

2.3.2.3 What are the consequences of non-compliance?

DAC6 did not define the specific penalties for non-compliance with the legal duty to submit reportable information and left the setting of such penalties to the discretion of Member States. The only minimum requirement it imposed is for the penalties to be “effective, proportionate and dissuasive.”⁶¹ Considering the different legal traditions and the different national settings, proportionality of penalties could eventually lead to each Member State having different amounts of penalties for the same level of breach.

2.3.2.4 How to use the information collected?

or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment; (d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction; (e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership; Article 3 (18), DAC.

⁶⁰ The test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage; Annex IV of DAC.

⁶¹ Article 25a of DAC states: “Penalties - Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8aaa, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.”

The information collected will be automatically shared among the Member States.⁶²

DAC6, explains clearly the public interest justification for sharing the information collected from intermediaries or taxpayers⁶³. In brief, it recognizes the capability of intermediaries to create or arrange sophisticated tax-driven structures or schemes that take advantage of the increased mobility of both capital and persons within the internal market. Sharing data with other Member States ensures that they are able to be proactive in addressing the loopholes exploited by intermediaries through aggressive schemes. Absent such information sharing system, it will take time to identify novel schemes and to coordinate efforts in coming up with a common strategy to make sure the scheme will not be duplicated anywhere in the EU.

2.3.3 Comments

2.3.3.1 Aggressive Tax Avoidance Undefined

One notable observation on this law is that it did not include in its definition of terms the meaning of tax avoidance, or of acceptable tax planning vis-à-vis aggressive tax planning for purposes of the law. Accordingly, tax authorities and taxpayers have only the hallmarks to refer to in order to assess whether they have gone outside the boundaries of the acceptable. The omission is intentional, and it is clearly explained in one of the premises of the preamble:

Aggressive tax planning arrangements have evolved over the years to become increasingly more complex and are always subject to constant modifications and adjustments as a reaction to defensive counter-measures by the tax authorities. Taking this into consideration, it would be more effective to endeavour to capture potentially aggressive tax arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning. These indications are referred to as 'hallmarks'.
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The Commission posited that any attempt to define aggressive tax planning would almost be “an exercise in vain”⁶⁵. The only way tax avoidance in

⁶² Article 20, par 5, DAC.

⁶³ Premise 11, DAC6.

⁶⁴ ECOFIN Note, *supra* fn 54, p 13.

⁶⁵ Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, COM(2017) 335 final, p 13.

DAC6 will be properly understood is to rely on its judicial interpretation by the CJEU⁶⁶.

2.3.3.2 Aggressive Tax Avoidance vs. Abusive Tax Avoidance

It is also noted that the Directive did not adopt the BEPS formulation of describing the MDR as a measure that targets potentially aggressive or abusive transactions, arrangements, structures, schemes or strategies, or potentially aggressive or abusive tax avoidance schemes or abusive tax transactions.

The Directive sticks to the singular adjective “aggressive” and leaves out “abusive” in its formulation in contrast to the approach in BEPS Action 12.

It is submitted that the lack of statutory definition and the exclusion of abusive in the terminology of the Directive could result in uncertainty in the implementation of the measure due to possible challenges on the precise meaning of the concept independent of the hallmarks. The lack of attempt to offer a definition confirms the observation of most tax scholars that EU law has no homogenous concept on avoidance.⁶⁷

Also, while grandfathering rules can reduce the risk of over-reporting from the get go, the hallmarks could benefit from a firmer foundation if the fundamental concept of aggressive tax avoidance or unacceptable tax planning that demonstrates its general contours was formally defined.

The uncertainty is further complicated by a reservation that the “absence of reaction by a tax administration to a reportable cross-border arrangement shall not imply any acceptance of the validity or tax treatment of this arrangement”.⁶⁸ While it is true that DAC6 is not a clearance system, defining a time frame within which a determination on whether a reported arrangement is to be defeated or taken-down should follow or be consistent with administrative feasibility or good administration.

2.3.3.3 Fairness

⁶⁶ The CJEU has defined the contours of tax avoidance in several cases.

⁶⁷ See, P. Piantavigna, *Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies*, 9 *World Tax J.* (2017), *Journals IBFD*; F.J.G.M. Vanistendael, *Is Tax Avoidance the Same Thing under the OECD Base Erosion and Profit Shifting Action Plan, National Tax Law and EU Law?*, 70 *Bull. Intl. Taxn.* 3 (2016), *Journals IBFD*; Irma Mosquera Valderrama et al, *Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency*, *Intertax*, Volume 46, Issue 2, 2018.

⁶⁸ 6a, Art 8aaa of DAC

Mentioning “fairness”⁶⁹ in DAC6 strengthens the argument against tax base erosion perpetrated by taxpayers and their advisors.⁷⁰

Fairness is also viewed as a democracy issue⁷¹ by civil society considering that most modern constitutions aspire towards the just redistribution of wealth and opportunities and the realization of social justice – that those that have less in life should have more in law. Bastian Obermayer, the journalist who received the Panama and Paradise Papers, laments the apparent helplessness of governments to influence the super-rich of society who seem to be constructing their own legal system while the 99% remain powerless to do anything about it.⁷² There is therefore reason to be concerned that unfair and abusive tax practices could further widen the gulf of inequality with wealth becoming concentrated in the hands of a few using the benefits of the fiction created by corporate law – which could foment social discontent, unrest, disorders, internal conflict (and, even “result to a World War III”⁷³).

⁶⁹ Recital (6) of DAC6 states: The disclosure of potentially aggressive tax planning arrangements of a cross-border dimension can contribute effectively to the efforts for creating an environment of fair taxation in the internal market. xxx.”; ECOFIN takes this up very clearly in its document: “4. One of the priorities that the June 2014 European Council set for the Union for the next five years is to “guarantee fairness: by combatting tax evasion and tax fraud so that all contribute their fair share.” Moreover, the December 2014 European Council concluded that “there is an urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at the global and EU levels. In June 2016 the European Council stated that “the fight against tax fraud, evasion and avoidance, and against money laundering remains a priority xxx 7.All delegations agree on the principle that disclosure of potentially aggressive tax planning arrangements of a cross-border dimension can contribute effectively to an environment of fair taxation in the internal market and that tax authorities share the disclosed information with their peers in other Member States. See ECOFIN Note, *supra*, p. 2.

⁷⁰ For an authoritative analysis of the principle of fairness in EU tax law, see S.J.C. Hemels (2014). *Fairness: A Legal Principle in EU Tax Law?* in C. Brokelind (ed.), *Principles of Law: Function, Status and Impact in EU Tax Law*, *supra* fn 2, at pp 413-437.

⁷¹ “... when a society’s rules, agreed on and supported by all, do not apply to those whose power and wealth allow them to circumvent them”, democratic principles are undermined; See Frederik Obermaier, Bastian Obermayer, “The 99% and the Future of Tax Havens”, in *The Panama Papers Breaking the Story of How the Rich and Powerful Hide Their Money*, p 304.

⁷² *Id.*

⁷³ See, Avi-Yonah, Reuven S. and Xu, Haiyan, *Evaluating BEPS in Tax Sovereignty in the BEPS Era* in Sergio André Rocha Allison Christians (eds), *BEPS Era*, Alphen aan den Rijn: Wolters Kluwer, [2017], p 97; Avi-Yonah, Reuven S. and Xu, Haiyan, *Evaluating BEPS* (January 15, 2016). U of Michigan Public Law Research Paper No. 493. available at SSRN: <https://ssrn.com/abstract=2716125> or <http://dx.doi.org/10.2139/ssrn.2716125>, p 1.

3. Human Rights Perspectives on Mandatory Disclosure Rules on Intermediaries

3.1 Taxation and Human Rights

3.1.1 General Considerations

The power to tax and human rights are two societal values that are in constant tension and collision. This seemingly irreconcilable conflict however is an inherent part of democratic discourse ultimately aimed at finding a path towards a just and humane society.⁷⁴

Taxation is an inherent power of the state. Human rights on the other hand represent fundamental rights, rights that belong to every human being. Its normative function is well-established in international treaties and embedded or transplanted in national constitutions in the form of bill of rights.

The tension is exacerbated by an increasingly globalized and borderless world. Globalization and the digital economy put pressure on governments and business to maximize gains from the opportunities presented by international trade. Governments enter into trade deals to set up the condition for free trade, and businesses exploit opportunities by penetrating other markets based on arrangements that are made possible through intergovernmental cooperation or agreements.

The public interest to collect taxes which taxpayers/citizens (corporates included) are legally and morally bound to pay for the support of a civilized society thus collides with the right of said citizens to pay only that amount of tax that is fairly and legally due and to seek redress if the taxing power has been or is being exercised abusively.

⁷⁴ Baker reinforces this claim: Some would say that taxation and human rights is an oxymoron. An oxymoron is, of course, the conjunction of two otherwise apparently irreconcilable concepts. I personally do not believe that taxation and human rights are in any way irreconcilable or conflicting; I think human rights are a fundamental aspect of taxation. Human rights limit what governments can do to their citizens - to people affected by their decisions. I think at the moment we are at a very exciting stage, where we are seeing the extension of human rights principles into the tax field, to provide limits to what governments can do to taxpayers. It is part of the balance between the powers of the State and the rights of taxpayers'. Philip Baker, *Taxation and Human Rights*, GITC Review November 2001 available at http://taxbar.com/wp-content/uploads/2016/01/gitc_review_v1_n1.pdf, p 8, accessed on May 16, 2018; also see Clement Endresen, *Taxation and the European Convention for the Protection of Human Rights: Substantive Issues*, 45 Intertax, Issue 8/9, 2017, pp. 508–526, at p 518: “True enough, the kind of services that taxpayers expect society to provide, cannot exist without a government that has the means to effectively impose and collect taxes. Taxation is in the interest of all – including all taxpayers. Thus, legal security in this context must be balanced against the principle of effectivity, and the solutions to legal security issues in this realm may well differ from the solution to parallel questions in a different legal context.”

Collisions⁷⁵ may even occur between two persons claiming a human right. In the taxation context, this could happen in the case of a corporate taxpayer who claims to be exercising his right to minimize tax liability (as an inherent attribute of the right to property). The exercise of that right may conflict with the right of others (citizens or peoples) to health, food, water, education, culture and other human rights that may only be promoted and remedied by states through public expenditure financed through taxes⁷⁶.

As mentioned in the Introduction, these tensions and collision are resolved by a balancing of these rights, or in the case of conflicting human rights, a reconciliation⁷⁷ of those rights, in policy-making and eventually in hard cases that reach the courts.

This chapter looks at these collisions or tensions and suggest ways to avoid, minimize or reconcile them.⁷⁸

3.1.2 Human Rights in the EU

Apart from the fact that all 28 Member States of the EU are party to the ECHR, the EU legal system has early on repeatedly acknowledged that the ECHR holds a ‘special significance’ for EU law.⁷⁹

EU’s recognition of human rights as a foundational principle was codified in Article 6, TEU:

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

[...]

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result

⁷⁵ According to Heissl, there are four criteria at stake in collision cases: (a) human rights of (b) a minimum of two human rights subjects—(c) for one of which, at least, a positive obligation exists—(d) that cannot be satisfied at the same time, See Gregor Heissl in Human rights collisions, *European Human Rights Law Review* 2016, 1, 34-47, 35.

⁷⁶ The collision between two human rights (e.g. right to property, as an argument for tax avoidance v. right of others to health that a government is mandated to promote) is aided by an understanding of fairness as a concept drawn from the ideas of great legal philosophers like Hart and Rawls; see, Hemels, *supra* fn 70.

⁷⁷ Since human rights are indivisible, a human right cannot trump another human right; For example, rules to solve conflicts of laws, such as the *lex posterior* or the *lex specialis* principles, are not applicable in collision because if they were, Heissl posits, the “young” and very “special” right to the protection of personal data would always be given priority over “older” or more “general” rights which would lead to absurdity; Heissl, *id.*, p 37.

⁷⁸ One possible framework is that presented in Heissl’s work where he proposes three steps for solving fundamental rights’ collisions: avoidance of collisions, diminishment of collisions and determination of the precise value; Heissl, *Id.*, p 38. This paper will borrow from that theory as far as applicable.

⁷⁹ Beginning with the Nold case; Judgment of 14 May 1974, Case 4/73, *Nold v Commission*, EU:C:1974:51

from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The CJEU further elucidated the rule of law and human rights as such foundational principles in *Advocaten voor de Wereld VZW*:

*It must be noted at the outset that, by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union.*⁸⁰

The Charter, which under Article 6 TEU, have the same legal value as the Treaties, makes it clear however that the rights and freedoms recognized in the Charter are not absolute. Rights may be limited or restricted subject to the requirements of the general interest and the principle of proportionality.⁸¹

3.2 DAC6 and Human Rights

DAC6 expressly declares that it respects the fundamental rights and observes the principles recognised under the EU Charter in particular.⁸²

The Directive indeed contains several specific safeguards for the protection of human rights and taxpayer rights as shown in its deference to the legal professional privilege (which is a subset of the right to privacy) under paragraph 2 of Article 8aaa. The intermediary is also granted the right to controvert a finding that a person is an intermediary under par 21, sub-par 2 of Article 3.

Human rights that are affected by DAC6 could eventually be tested in actual controversies brought before the CJEU resulting from the interaction of regulators vis-à-vis the affected intermediaries and taxpayers. As a counter-

⁸⁰ Judgment of 3 May 2007, C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, EU:C:2007:261 at par 45.

⁸¹ Article 52 - Scope of guaranteed rights, 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. 2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties. 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

⁸² DAC6 Preamble, par 17.

aggressive tool designed to function as an early warning system to check on aggressive and abusive schemes, legal questions may eventually be raised by these affected parties objecting to the scope or manner by which the DAC6 provisions have been exercised by tax authorities. The subsequent automatic exchange of tax information under the existing DAC framework will also be a source of conflict when tax authorities begin inquiring on transactions which said parties could claim as impinging their human rights and fundamental freedoms.

Human rights-based arguments that could be raised include the right to privacy, right to fair trial, right against self-incrimination, even the right to property.

The following section discusses these anticipated collisions.

3.2.1 Right to Property

The right to property yields to the power of taxation. It is “arguably the most visible, persistent and almost universal interference” to property right.⁸³ This is the natural consequence of the social contract based on the common notion that when men set up society from the theoretical state of nature they agreed to place a higher value on the duty to support government and its acts directed at serving the common good and general welfare enforced through the power of taxation. This so called “tax exceptionalism” can be seen from the reasoning of judges in earlier jurisprudence. The oft quoted opinion of US Supreme Court Justice Holmes in his dissent in the Philippine Cigar Case that “taxes are what we pay for civilized society...”⁸⁴ is one. That “taxes are the lifeblood of government, and their prompt and certain availability an imperious need”⁸⁵, is another.

“No tax, no society. No society, no property rights⁸⁶”, aptly sums up this fundamental concept.

The reality however is that it is not as simple as it seems to be. The balancing between society’s interest to take a slice of a person’s property as one’s contribution to society building or to protect the prevailing way of life and a person’s interest to resist unwarranted intrusions to his property rights or to

⁸³ Cecile Brokelind, *The Role of the EU in International Tax Policy and Human Rights: Does the EU Need a Policy on Taxation and Human Rights*, in *Human Rights and Taxation in Europe and the World*, Georg Kofler, Miguel Poiates Maduro, Pasquale Pistone eds) Amsterdam: IBFD, cop. 2011, p 116.

⁸⁴ Dissent of Justice Holmes in *Compania General de Tabacos v. Collector*, 275 U.S. 87 (1927) full text available at <https://supreme.justia.com/cases/federal/us/275/87/case.html>, cited in T. R Reid, *A Fine Mess: A Global Quest for a Simpler, Fairer, and More Efficient Tax System*, Penguin Press 2017, p 36.

⁸⁵ *Bull v United States*, 295 US 247, 259 (1935).

⁸⁶ Endresen, *supra* fn 74, p 509.

object to any oppressive means of collecting such contribution is a difficult exercise.

Balancing and managing this collision is further complicated by the relative power of the main protagonists. The modern society is a complex system that has spawned MNEs that operate globally and has gradually turned into behemoths possessing wealth that could compare to the GDPs of most countries.⁸⁷ These corporations have the resources to hire the best minds in the tax advisory business to maximize wealth creation by minimizing or rationalizing costs, of which tax due to the government is one. They can also engage the best lawyers and policy advocates to defend their positions and take the government head-on on any issue before regulators and the courts, or in legislatures.⁸⁸

With multiple revenue streams pouring in from global operations, the main concern of MNEs is to protect corporate assets for the benefit of its stakeholders. Tax planning is therefore clearly an inherent attribute of the exercise of a property right. A property owner has the right to take steps to preserve the value of his property well-aware of the uncertainty of the future.

Tax planning preserves or increases corporate wealth that further creates wealth through investments. Tax planning, minimization or avoidance is thus critical to a firm's long-term competitive success.⁸⁹

In the case of DAC6 as a tax avoidance monitoring tool, these companies (or intermediaries helping them in tax planning) could argue that while the need to pay taxes is in the general interest, the further obligation to report cross-border tax avoidance arrangements is a method that is unnecessary and

⁸⁷ The article '*Business's Role in Human Rights in 2048*', Robert D. Haas, (26 Berkeley J. Int'l L. 400, 2008) at p. 400 elucidates: "You may be surprised to learn that 44 of the largest economic entities in the world are corporations according to a website called the Kassandra Project. • Wal-Mart, with revenue of \$351 billion, ranked just behind Greece and Austria as the 28th largest economy in the world • Exxon Mobil and Royal Dutch Shell follow right behind Wal-Mart and round out the top 30. • Toyota Motor's revenues, which rank #42, are only slightly smaller than the GDP of Thailand (#39). • At number 59, Citigroup ranked just ahead of Pakistan, a country with a population of 169 million people. These statistics are more than just interesting trivia. They illustrate the power and impact that global corporations have to affect the lives of people around the world. They underscore the reality that the 'nation-state' is no longer the preeminent source of economic power. In addressing pressing international problems--human rights, the environment, poverty, and so on--we need to throw away our mental maps that assigned that role to governments. Like it or not, corporations have a role to play as well." Available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1358&context=bjil> accessed May 20, 2018.

⁸⁸ It is submitted that self-regulation may have its merits over a paternalistic approach to regulation in this area; Pistone and Baker, *supra*, fn 2, at p 26 point out the efficiencies of Cooperative Compliance especially for large taxpayers: "1.6. Cooperative compliance - Several of the branch reports refer to the introduction in recent years of a system of cooperative working between the tax authorities and, generally, large businesses. These systems of cooperative compliance offer potentially attractive efficiencies and cost saving both for the tax administration and for the taxpayers concerned. However, concern has sometimes been raised that the opportunity to enter into these arrangements is offered on a discriminatory basis, or that pressure may be put on certain businesses to enter into these arrangements. Such arrangements are discussed, for example, in the reports from Denmark and Spain; in both cases the arrangements are voluntary on the part of the business concerned."

⁸⁹ See, Herrington & C.H. Lowell, *The Evolving World of Global Tax Planning: Part I*, 24 Intl. Transfer Pricing J. 1 (2017), Journals IBFD.

disproportionate to the aim of revenue collection (or protecting the national tax base from erosion).

Under Article 1, Protocol 1 of the ECHR and the Article 6 of the EU Charter⁹⁰, DAC6 only becomes a valid restriction to the exercise of the right to the use and enjoyment of property if it is in the “public interest”. The ECHR provision states:

ARTICLE 1. Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The parallel provision under the EU Charter states:

Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

ECHR jurisprudence clarifies that that second element of paragraph 2 (“to secure the payment of taxes”) does not preclude an inquiry into an alleged unwarranted intrusion by the government on a person’s right to property as it

⁹⁰ Since the businesses most affected here are those of intermediaries and corporate taxpayers, the correlative right to economic initiative under Article 16 of the Charter is relevant also. The Charter provision declares: The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.; See also Andrea Usai, *The Freedom to Conduct A Business in the Eu, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration*, 14 German L.J. 1867, 1874–75 (2013): “...the CJEU found that the freedom to pursue a trade or a business is a general principle of EU law....(t)he right to economic initiative is protected by the CFR and by the Member States' constitutional traditions and as a general principle of EU law. xxx”; Peter Oliver, *Companies and their fundamental rights: a comparative perspective*, I.C.L.Q. 2015, 64(3), 661-696, 695-96: “Companies must enjoy the fundamental rights essential to their functions and purpose, namely the right to property and the right to run a business (where such a right exists) as well as the right to a fair trial. xxx.”

may be reviewed for compliance with the requirements of “fair balance” and “reasonable relationship of proportionality.”⁹¹

It is clearly gleaned from the initiatives of the EU and its Member States, as well as international organizations like the OECD, that aggressive tax avoidance is a societal ill that requires an immediate solution. Based on that felt need for reform to attack avoidance, there should therefore be no question that the measures to require intermediaries or taxpayers to report potentially aggressive schemes is in the public interest⁹².

In that regard, the relevant inquiry is therefore whether or not the offensive (used here in the context of a pre-emptive strike) or aggressive measure hurdles the proportionality requirement by finding a ‘fair balance’ between the public interest and human rights.⁹³ Establishing the proportionality between the means employed and the public interest aim contained in the law that restricts the right of the person to his property requires an examination of the following issues: (1) whether the deprivation had a ‘public interest’ aim, respectively a ‘legitimate aim’; (2) whether the measure was proportionate in relation to the aim" pursued; and (3) whether the measure was lawful, i.e. ‘provided for bylaw’ and by ‘the general principles of international law’.⁹⁴

If DAC6 is a measure with a valid public interest aim, does it however hurdle the Rule of Law requirement?

In *Shchokin v. Ukraine*, the ECHR ruled that the Rule of Law is upset by the deficiencies in law making. It clarified the Rule of Law⁹⁵ principle:

Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. It follows that the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary.

⁹¹ *Theory and Practice of the European Convention on Human Rights* / edited by Pieter Van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak, Fifth edition, Cambridge: Intersentia, [2018] p 883.

⁹² Early on, the prevention of tax evasion has been recognized as a legitimate objective; *Id.*, p 869.

⁹³ *Id.*, p 871.

⁹⁴ *Id.*, p 868.

⁹⁵ Hilling and Ostas discuss this in their book as the third idea of the Rule of Law; See Axel Hilling, Daniel T. Ostas, *Corporate Taxation and Social Responsibility*, Stockholm: Wolters Kluwer, [2017], p 38; also see Marton Varju, *The Rule of Law and Human Rights in the EU - European Union Human Rights Law, The Dynamics of Interpretation and Context*, Elgar, 2014, p 28.

Even assuming that the interpretation by the domestic authorities was plausible, the Court is not satisfied with the overall state of domestic law, existing at the relevant time, on the matter in question. It notes that the relevant legal acts had been manifestly inconsistent with each other. As a result, the domestic authorities applied, on their own discretion, the opposite approaches as to the correlation of those legal acts. In the Court's opinion the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue, upset the requirement of the 'quality of law' under the Convention and did not provide adequate protection against arbitrary interference by the public authorities with the applicant's property rights.⁹⁶

This principle is also recognized in CJEU case law. In *Halifax*, it was reiterated that: “... Community legislation must be certain and its application foreseeable by those subject to it [...]. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them [...].”⁹⁷

One stakeholder had in fact raised this issue at the consultation phase stating that “any proposal could potentially violate the European Convention on Human Rights as tax avoidance by its inherent nature involves a subjective assessment and does not provide for legal certainty for taxpayers.”⁹⁸ The final draft of DAC6 was also the subject of an Opinion Statement⁹⁹ that claimed potential non-compliance with the Rule of Law principle based on the observation that the “design of certain aspects of the proposal leaves scope for uncertainty with the result that there might be divergent implementation in the Member States. Definitions need to be clear and concise, as rules that are too widely drawn are overly burdensome for taxpayers and unhelpful for tax authorities, which stand to receive a massive amount of disclosure, but very little useful information; in particular the definitions of ‘cross-border arrangement’, ‘taxpayer’ and ‘made available’.” It also pointed out that describing the parameters for the imposable penalties by using the words

⁹⁶ *Shchokin v. Ukraine*, ECtHR, 14 October 2010, Application nos. 23759/03 & 37943/06.

⁹⁷ Judgment of 21 February 2006, C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise*, EU:C:2006:121.

⁹⁸ General Comments attributed to the Council of Bars and Law Societies of Europe (CCBE) recorded at p 83 COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT, *supra* fn 13, p 83.

⁹⁹ Opinion Statement PAC 3/2017 on the European Commission's Proposal for a Council Directive Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (COM/2016/025 final – 2016/010 (CNS)), European Taxation, p 554, 555.

“effective, proportionate and dissuasive” could result to varying interpretations by Member States.¹⁰⁰

As to whether the measure was proportionate in relation to the aim being pursued, the question to be asked is whether the current anti-avoidance rules and measures are sufficient to combat aggressive tax avoidance. Considering the wide margin of appreciation that the ECHR allows in favour of national legislature (and assuming the CJEU follows that tradition), DAC6’s clear backdrop on the worsening problem of aggressive tax avoidance the magnitude of which has been further documented in the Panama and Paradise papers, DAC6 could be found proportionate to the aim sought. CFE’s position as an affected stakeholder however is that the measure is disproportionate on the claim that the multiple initiatives based on the BEPS project already promise to address or resolve the BEPS loopholes thereby “effectively superseding the need for EU-wide mandatory disclosure”¹⁰¹.

It is submitted that an argument based on the non-compliance with the Rule of Law principle and the proportionality principle has its merits. DAC6 appears to be overreaching and in the process unduly intruded on the property right of the intermediary or the taxpayer by further burdening them with legal duties despite the capability of the current system to address the tax avoidance problem. These aggressive steps appear to be unnecessary based on how the MDR is perceived. One news release¹⁰² expressed that MDRs are necessary because “they may cover information that might otherwise fall through the cracks in the common reporting standard.” Loosely opting for the modal verb “may” creates apprehension on the part of intermediaries and taxpayers that MDR could eventually turn into a fishing expedition.

The rule of law flaw is also apparent from the unresolved issue of finding a singular concept of tax avoidance at the EU level. The uncertain remains in DAC6 having opted not to define tax avoidance and to rely on hallmarks.

¹⁰⁰ Id., p 554.

¹⁰¹ CFE cites the EU anti-avoidance legislation (i.e. the EU AntiTax Avoidance Directives (2016/1164) (ATAD 1 & 2),⁴ the Directive on administrative cooperation on advance cross-border rulings (DAC 3),⁵ the Directive on administrative cooperation on country-by-country reporting (DAC 4), and the Proposed Directive on Double Taxation Dispute Resolution Mechanisms); Id., p 555.

¹⁰² “According to the European Commission, mandatory disclosure rules are necessary because they may cover information that might otherwise fall through the cracks in the common reporting standard. Furthermore, forewarned is forearmed. European officials want information about potential schemes as early as possible so they can track the arrangements and fix loopholes sooner rather than later. In the wake of the Panama Papers and Paradise Papers, European leaders are emphasizing speed and unity. According to the European Commission, an EU-wide law is necessary because national laws would not have the same power or reach”, News Analysis: The EU’s Tax Transparency Tighrope Act. (16 March 2018), Journals Tax Analysts (accessed 5 April 2018)

Even the main benefit rule also appears to conflict with the conception of abusive tax avoidance that was laid down in *Cadbury Schweppes*.¹⁰³

All these point to lack of compliance with the Rule of Law.

In this conflict of societal values, it could be argued that DAC6 should give weight or even give way to the right to property of intermediaries and taxpayers, unless the conflicts are minimized by adjusting the law, including among others by restating a clear statutory definition of tax avoidance.

3.2.2 Right to Privacy and related rights

The tension between DAC6 and the right to privacy is also supposed to be tilted in favour of the citizen considering the clear statement of the general rule under Article 8, par. 2 of the ECHR¹⁰⁴: no interference by a public authority with the exercise of said right. DAC6 operates as an exception to that general rule. The issue that arises therefore is whether or not DAC6 meets the following conditions for exception: (1) that it is in accordance with law, (3) that it is necessary in a democratic society, (2) that it is in the interest of the economic well-being of the county.

The objection based on privacy is directed both to the manner of being forced to disclose a specific area of the tax plan under pain of administrative penalties and to the manner by which Member States automatically share¹⁰⁵ the tax information to other Member States without an opportunity to be heard prior to the exchange. Both the intermediary and the business are affected by this invasion into the private sphere of business operation which is generally

¹⁰³ In *Cadbury Schweppes* - the first litigation brought to the CJEU involving CFC rules, and said to be the cornerstone of the theory of abuse of rights in the field of direct taxes and EU law – the court explained that CFC taxation is a restriction on the freedom of establishment and restated the right of companies to exploit tax advantages in the internal market on the basis of the earlier *Centros* ruling, and that such restriction may only be justified on the ground of prevention of abusive practices through the creation of **wholly artificial arrangements** which do not reflect economic reality. Other than that, the rights emanating from the Treaty will always trump rights originating from a Member State's constitution or from the exercise of a State's sovereign power (on the basis of a partial surrender of such sovereignty to the EU institutions); See Judgment of 12 September 2006, C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, EU:C:2006:544.

¹⁰⁴ Article 8 – Right to respect for private and family life - 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹⁰⁵ For an analysis of the CJEU case law on the automatic exchange regime, see Ine Lejeune and Liesbeth Vermeire, *The Influence of the EU Charter of Fundamental Rights on ECJ Case Law on the International Exchange of Information*, European Taxation; Filip Debelva, Irma Mosquera, *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions*, 45 *Intertax*, Issue 5, (2017), pp. 362–381.

protected under Article 7 of the Charter and the parallel provision in Article 8 of the ECHR.

The right to protection of personal data¹⁰⁶ that is expressly recognized under the Charter¹⁰⁷ is also threatened by the collection of any sensitive personal data in the process of reporting which are retained in the servers of tax authorities for eventual sharing with Member States. The General Data Protection Regulation (GDPR)¹⁰⁸ lays down the conditions for allowing an interference to a person's right to data protection which conditions are similar to those required under Article 8 of the ECHR on the right to privacy. Art. 23 of the GDPR provides that "Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: [...] (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security."

The CJEU has ruled on issues relating to DAC (prior to DAC6) and diminished the collision by adjusting the degree to which these intrusions may be allowed. Thus, in *Sabou*¹⁰⁹ – the CJEU clarified that tax authorities are not allowed to proceed with any steps under the DAC information exchange process without notifying the person who owns the data when the process has moved past the administrative investigation process and has entered the prosecution phase. The ECtHR however does not follow this distinction in its

¹⁰⁶ Also referred to as "informational privacy" – see Van Dijk, *supra* fn 91, p 672.

¹⁰⁷ Article 8 -Protection of personal data - 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority; The right to data protection is a right embraced by the right to privacy. The right is expressly recognized in the Charter and there is no equivalent right in the ECHR.

¹⁰⁸ Art 23 of the REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation),

¹⁰⁹ Judgment of 22 October 2013, C-276/12, *Jiří Sabou v Finanční ředitelství pro hlavní město Prahu*, EU:C:2013:678: "40 All the Member States which submitted observations to the Court argued that a request for information by one Member State sent to the tax authorities of another Member State does not constitute an act giving rise to such an obligation. They rightly consider that, in tax inspection procedures, the investigation stage, during which information is collected and which includes the request for information by one tax authority to another, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment. 45 None the less, there is nothing to prevent a Member State from extending the right to be heard to other parts of the investigation stage, by involving the taxpayer in various stages of the gathering of information, in particular the examination of witnesses."

Othymia Investments judgment¹¹⁰ where it said that such notification was required even during the investigation phase, unless a notice can be dispensed with (e.g. if there is a risk that the taxpayer would destroy information) and such non-notification is justifiable and proportional.¹¹¹

The Sabou case is also distinguished from the Berlioz¹¹² case insofar as the latter involved a holder of information ordered to disclose the same to the tax authorities while Sabou involved objection on taxpayer information that has been exchanged in contemplation of an audit or investigation. It is thus correct to grant the party directly ordered in the Berlioz case with a remedy to question the foreseeable relevance of the information being requested which the requested authority itself had to determine.

With regard to the legal professional privilege, DAC6 adopted the BEPS recommendation to respect the right to confidentiality via the legal professional privilege of intermediaries, if such privilege exists in the Member State concerned, so that there is no tension or collision in this area¹¹³. DAC6 however mandated the waiver of that privilege by the taxpayer who is the real possessor of that privilege.

3.2.3 Right to Fair Trial and the Right Against Self-Incrimination

This right is enshrined in both the Charter and the ECHR.

The ECHR guarantees the following: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law¹¹⁴”. The parallel provision in the Charter guarantees, inter alia, that: “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal” and that “[e]veryone shall have the possibility of being advised, defended and represented”.¹¹⁵

¹¹⁰ Othymia Investments BV v. the Netherlands, ECtHR 15 June 2015, Application no. 75292/10.

¹¹¹ R. García Antón, The Fragmentation of Taxpayers’ Rights in International Dispute Resolution Settings: Healing Anxieties through Judicial Dialogue, 10 World Tax J. (2018), Journals IBFD; P. Baker, Some Recent Decisions of the European Court of Human Rights on Tax Matters (and Related Decisions of the European Court of Justice), 56 Eur. Taxn. 8 (2016), Journals IBFD.

¹¹² Judgment of 16 May 2017, C-682/15, Berlioz Investment Fund SA v. Directeur de l’administration des Contributions directes, EU:C:2017:373.

¹¹³ The issue that may arise here however is that of uneven implementation considering the variances in the LPP regimes of the Member States. Some Member States grant legal advice privilege to lawyers only while others recognize a legal advice privilege to non-lawyers.

¹¹⁴ Article 6 - Right to a fair trial, ECHR.

¹¹⁵ Article 47 - Right to an effective remedy and to a fair trial, Charter.

In the process of implementing DAC6, a taxpayer's right against self-incrimination¹¹⁶ may be violated. However, its occurrence appears to be farfetched considering that the processes are intended to facilitate tax collection, and aggressive and invasive as they are, they are not criminal in nature following the doctrine laid down by the ECtHR in Ferrazinni¹¹⁷ so long as the disputes arising from the implementation of DAC6 involve "pure tax issues. Ferrazinni however did not stop the ECtHR from entertaining tax cases especially in those cases where in its assessment tax penalties imposed on the taxpayer have a punitive and therefore criminal nature¹¹⁸ thereby removing them from the Ferrazinni rule¹¹⁹. The only conceivable way for a DAC6 case get out of Ferrazinni's fences arises in a situation where an intermediary or taxpayer fails or refuses to disclose a reportable cross-border transaction and the resulting penalty imposed is to such a degree as to be deemed a criminal penalty based on the Engel criteria.¹²⁰ This is indeed plausible considering the "criminal" head under the ECHR has an autonomous meaning. Such autonomy cannot be overridden by the mere expedient of characterizing such penalty as, not a punishment, but a deterrent¹²¹.

The BEPS Action Plan 12 defended the compatibility of its recommendations with the human right not to incriminate oneself. It explained that "the information that a taxpayer is required to provide under a mandatory disclosure regime is generally no greater than the information that the tax administration could require under an investigation or audit into a tax return."¹²²

It is submitted however that there is no comparison between a taxpayer under audit or under investigation after a post audit of his transactions and an intermediary who is neither under audit nor under investigation but who is caught in the "fishing net" without even implementing the schemes yet (as

¹¹⁶ The right to be silent or right of non-self-incrimination is implied from the right to fair trial; See Funke v. France, ECtHR 25 February 1993, Application no. 10828/84; Van Dijk, *supra*, fn 91 p 577; P. Pistone & P. Baker, *supra*, p 22, 36, 39

¹¹⁷ Ferrazinni v Italy, ECtHR 12 July 2001, Application no. 44759/98; Baker presents an opposite view, see Philip Baker, *Should Article 6 ECHR (Civil) Apply to Tax Proceedings?* 29 Intertax, Issue 6/7, pp. 205–211 (2001)

¹¹⁸ Bendenoun v. France, ECtHR 24 February 1994, Application no. 12547/86; See Grau Ruiz, Maria Amparo, *Decisions of the ECHR Affecting Domestic Laws in the Financial and Tax Field* 18 Lex ET Scientia Int'l J. 9 (2011), pp. 9-17.

¹¹⁹ Van Dijk, *supra* fn 91, p 517.

¹²⁰ Van Dijk, *supra*, fn 91, p 527; Engel And Others v The Netherlands, ECtHR, 8 Jun 1976, Application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, pars 60, 81.

¹²¹ The relevant DAC6 provision states: "... The penalties provided for shall be effective, proportionate and dissuasive."; Depending on the fines imposed by Members States which would vary considering the diversity of the legal traditions and economic situation, DAC6 fines when cumulated for continuing failure to comply in challenged disclosures could reach large amounts; Dourado and Dias perceive this possibility in their review of the Portuguese law on MDR, see *Information Duties, Aggressive Tax Planning and nemu tenetur se ipsum accusare in the light of Art. 6 (1) of ECHR*, in *Human Rights and Taxation in Europe and the World*, Georg Kofler, Miguel Poiates Maduro, Pasquale Pistone eds) Amsterdam : IBFD, cop. 2011, p 143.

¹²² BEPS Action Plan 12, par 179; Id., Annex B.

“making available” is enough to make them liable to comply with the mandatory reporting requirement). While the magnitude of the BEPS problem has been discussed extensively and acknowledged in both academic and policy papers, the aggressiveness of the policy responses in this area of regulatory compliance may be pushing it too far unless the affected parties have a clear concept of tax avoidance that is defined in legislation.

Considering that criminal law concepts have been used in the interpretation of the fair trial guarantee enjoyed by taxpayers, the criminal law concept of absence of a crime until it is committed may also be applied here. There is no crime when there is no law defining and punishing it. In the same manner, it could be claimed that there should be no breach of tax law or even of the norms if there is no clear definition of what exactly constitutes a breach of the law in the form of aggressive tax avoidance. Such definition in law will also guide the taxpayer to adapt his behaviour towards compliance and to plan his business strategy with clear goal posts in plain view.¹²³

More importantly, clearly defining the concept of tax avoidance in the law will balance the tension between the State and the taxpayer. In the end, feeding the discourse on the issue of aggressive and abusive tax avoidance with a human rights perspective should satisfy the expectations of the protagonists in this collision. For business and its advisors, it would mean fully understanding the scope of the law at the time it is promulgated¹²⁴ taking it away from the realm of a “living document” and freeing them from the burden of factoring in uncertainty in their management of the legal risks.

¹²³ Bleichrodt makes this claim: By virtue of the wording of Article 7 the ‘penalty’ must be imposed following a conviction for a ‘criminal offence’. The Court takes this as a starting-point. It seems to be obvious that the meaning of the words ‘criminal offence’ is closely related to the notion of ‘criminal charge’ in Article 6. Thus, it is appropriate to argue that Article 7 is also applicable to those disciplinary and administrative convictions which come within the scope of Article 6. [...] It may, therefore, be concluded that the terms ‘criminal offence’ and ‘criminal charge’ have the same scope.”; See Van Dijk, *supra*, fn 91, at page 657 (Chapter 11- No Punishment Without Law).

¹²⁴ Regulatory laws are not supposed to be considered as “living documents” similar to foundational or constitutional laws that could be given a dynamic interpretation to adjust to the unmistakable will of the demos. For laws that target specific behaviour, precision is necessary to comply with the rule of law. Regulations define the specific act to be controlled or intervened upon and they should be amended by express act if circumstances change.

4. Conclusion

DAC6 may be challenged on human rights grounds. Intermediaries and taxpayers may rely on the enforcement of their right to property, right to privacy and right to fair trial, among other human rights. The ensuing tensions created by DAC6 as it cuts off or scare away potential tax avoidance practices at infancy requires a continuing strategy to balance, reconcile or avoid the tensions. The CJEU could be expected to use such a balancing or reconciling exercise within the parameters of the current doctrine on abuse in direct tax law as laid down in *Cadbury Schweppes*.

It is not the intention of DAC6 to discourage taxpayers from using the expertise of intermediaries in tax planning, but the chilling effect of the said law may lead to the demise of this particular segment of the advice business. Intermediaries and taxpayers may consider DAC6 as denying them the right to economic initiative (embraced by the right to property) that is potentially affected by paternalistic laws like DAC6. The imposition of a reporting obligation despite the existence of GAARs and SAARs to deter an act that has not been formally defined in the law except for a list of indicators of transactions to be avoided may be considered a burden to intermediaries and taxpayers alike and an interference on their freedom to engage in business with minimum justified interference.

While the Panama Papers and Paradise Papers exposed an image of insensitivity on the part of some intermediaries and while MNEs continue to justify their actions in taking advantage of the opportunities for tax arbitrage, policy makers should continue to rely on judicial and statutory anti-avoidance rules as proportionate but effective tools in resolving the BEPS problem and the underlying issues of fairness and inequality.

Managing and minimizing these tensions and collisions (or reconciling or finding the balance between conflicting values) through bright-line rules on tax avoidance tempered with voluntary compliance mechanisms should guide the way forward.

The thesis presents opportunities for further research. A comparative study between MDRs and voluntary compliance regimes including Cooperative Compliance and CSR could be undertaken. The controversial issue of incentivizing whistle-blowers as a method of exposing abusive practices in tax planning and as an alternative to MDRs is also a new area for research¹²⁵.

¹²⁵ For perspectives, please see Ana Paula Dourado, 'Debate: Whistle-Blowers in Tax Matters: Not Public Enemies', 46 *Intertax*, Issue 5, pp. 422–426 (2018) and Daniel Gutmann, 'Debate: The Difficulty in Establishing an Appropriate Legal Framework for Whistle-Blowers', 46 *Intertax*, Issue 5, pp. 427–428, (2018).

Finally, the impact of not harmonizing the treatment of the legal professional privilege is worth studying further in view of the resulting unequal treatment of intermediaries who are pure tax advisors but whose seat is in a jurisdiction that denies legal advice privilege to such advisors and grants it exclusively to lawyers or attorneys.

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