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**Tipping of Justitia's Scale:  
The Compatibility of Mandatory Disclosure for Intermediaries  
with the Right against Self-Incrimination  
and the Right to Confidentiality**

by

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**HARN60 Master Thesis**

Master's Programme in European and International Tax Law

2017/2018

1 June 2018

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## ACKNOWLEDGEMENTS

*I express my gratitude to my supervisor Sigrid Hemels for the expressive and thought-provoking seminar on Administrative Cooperation that inspired me to choose this topic for my Master thesis and the many useful comments she gave me along the way.*

*Furthermore, I would like to thank Cécile Brokelind, Marta Papis-Almansa and all my classmates who challenged and taught me more than I ever thought I could learn in the past year.*

*And last but not least, I would like to dedicate this thesis to Oskar Henkow. The most brilliant, kind and inspirational mentor and teacher who will not be forgotten.*

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## Abstract

Human rights are the basis by which the dignity of the human being is guaranteed. This is especially important in the relationship between persons and governments, who on the one hand have great power in form of legislation over these persons, but on the other hand must ensure the protection of human rights. A problem may arise when these two opposing forces of the State collide,<sup>1</sup> as the individual will bear the consequences of that collision. In the instance of the recently adopted amendment of the Directive on Administrative Cooperation ('DAC6') this very tension between the States' power to legislate may lead to a conflict with its obligation to protect human rights.

The aim of this paper is to establish whether the new mandatory disclosure rules for intermediaries under the DAC6 are compatible with human rights, specifically the right against self-incrimination (*nemo tenetur*) and the right to confidentiality. Using the legal dogmatic research method, the law as it stands will be explained in order to ensure that the interrelationship between the DAC6, the right against self-incrimination and the right to confidentiality are properly understood. The DAC6 as adopted on 25 May 2018 will then be analysed in light of the European Convention of Human Rights and Charter of Fundamental Rights of the European Union. This analysis will be supported by case law of both the Court of Justice of the European Union and the European Court of Human Rights. The implications for both intermediaries and taxpayers will be examined.

Based on the findings of this paper, the research question can be answered in the affirmative. The DAC6 mandatory disclosure rules are compatible with the right against self-incrimination and the right to confidentiality. This was assessed by identifying the main implications for intermediaries and taxpayers respectively. Legal professional privilege ('LPP') can only be claimed when the intermediary is a professional bound by LPP and offering his or her services to the client in criminal proceedings. The taxpayer can theoretically claim *nemo tenetur* when the tax authorities are investigating a taxpayer for criminal charges. In both instances, the paper concludes that the DAC6 does not automatically cast doubt on the legality on the taxpayer's actions when implementing a reportable cross-border arrangement.

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<sup>1</sup> Gregor Heissl, 'Human rights collisions', *European Human Rights Law Review*, Vol. 1, 2016, pg.35. Available from: Thomson Reuters Westlaw, (last accessed 27.05.2018).

## List of Abbreviations

<b>AML</b>	Anti-Money Laundering Directive (EU) 2015/849
<b>APAs</b>	Advanced Pricing Arrangements
<b>Art.</b>	Article
<b>BEPS</b>	Base Erosion and Profit Shifting
<b>CFREU</b>	Charter of Fundamental Rights of the European Union
<b>CJEU</b>	Court of Justice of the European Union
<b>DAC</b>	Directive on Administrative Cooperation
<b>DAC1</b>	Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC
<b>DAC2</b>	Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation
<b>DAC3</b>	Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation
<b>DAC4</b>	Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation
<b>DAC5</b>	Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities
<b>DAC6</b>	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
<b>ECHR</b>	European Convention on Human Rights
<b>ECnHR</b>	European Commission of Human Rights
<b>ECOFIN</b>	Council of European Finance Ministers
<b>ECtHR</b>	European Court of Human Rights
<b>Ed.</b>	Editor
<b>Eds.</b>	Editors

<b>e.g.</b>	<i>exempli gratia</i> (for example)
<b>EU</b>	European Union
<b>Ibid.</b>	<i>ibidem</i> (in the same place)
<b>i.e.</b>	<i>id est</i> (that is)
<b>LPP</b>	Legal professional privilege
<b>MDR</b>	Mandatory Disclosure Rules
<b>MNEs</b>	Multinational Enterprises
<b>no.</b>	number
<b>OECD</b>	Organisation of Economic Co-operation and Development
<b>para.</b>	Paragraph
<b>paras.</b>	Paragraphs
<b>PE</b>	Permanent establishment
<b>pg.</b>	page
<b>pp.</b>	pages
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UK</b>	United Kingdom
<b>Vol.</b>	Volume

# Chapter 1: Introduction

## 1.1 Fighting Tax Avoidance with Transparency

The 2008 global financial crisis had a worrying destabilizing effect on the public's confidence in national and European systems and their institutions.<sup>2</sup> This led to incisive and pertinent questions being asked by the public not only about the legitimacy of the financial markets, but also what kind of measures would be implemented by policy makers as a consequence.<sup>3</sup> With markets in upheaval and governments desperately trying to secure public funding to finance bailouts to pull the economy out of recession, strict austerity measures were introduced in many countries in order to limit unnecessary expenditure. Simultaneously, increasing taxes were used to raise more funds. The latter measure of raising taxes was not popular as public debate on fair taxation and prevention of tax evasion suggested stricter enforcement to ensure compliance by all tax contributors.<sup>4</sup> The European Union ('EU') and its Member States thus aimed to improve the level of confidence in the tax regime by improving its effectiveness and equity.<sup>5</sup>

The question about how to create a fairer tax system was, however, challenging as aggressive tax schemes and harmful practices by taxpayers in the EU were accelerated by the ever-increasing mobility and free trade of the single market. These two factors were brought about amongst others by the removal of trade barriers and borders as well as a multiple and separate accountability to each different tax authority. The latter allowed taxpayers to capitalise on the asymmetry of information between the tax authorities and taxpayers. Hence, the EU and its Member States rose to the challenge by improving effectiveness and equity by way of exchanging information between tax authorities within the EU, with the aim to both prevent and respond to tax avoidance and evasion.<sup>6</sup>

Both the Organisation for Economic Co-Operation and Development ('OECD') and the EU saw the need to address this issue. The OECD initiated a unique project to counter, *inter alia*, the mismatch of information and abusive behaviours by taxpayers by creating a framework called the Base Erosion and Profit Shifting ('BEPS') Project with 15 Actions plans to tackle tax avoidance

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<sup>2</sup> Felix Roth, 'The Effect of the Financial Crisis on Systemic Trust', *Intereconomics*, Vol. 44, Issue 4, 2009, pg.205. Available from: Springer Verlag. Available under: <https://www.ceps.eu/system/files/article/2009/09/203-208-Roth.pdf>, (last accessed 29.05.2018).

<sup>3</sup> *Ibid.*, pg.203.

<sup>4</sup> Alicja Majdanska & Pedro Guilherme Lindenberg Schoueri, 'Tax Compliance in the Spotlight – The Challenges for Tax Administrations and Taxpayers', *Bulletin for International Taxation*, 2017, pg.630. Available from: IBFD, (last accessed 27.05.2018).

<sup>5</sup> Menita Giusy De Flora, 'Protection of the Taxpayer in the Information Exchange Procedure', *Intertax*, Vol. 45, Issue 6-7, 2017, pg.447. Available from: Kluwer Law International, (last accessed 27.05.2018).

<sup>6</sup> *Ibid.*, pg.447.



in 2015.<sup>7</sup> The EU, who is not only a member in its own right but also by way of the individual memberships in the OECD of the Union's Member States,<sup>8</sup> was also pro-active by adopting legislation of its own in 2011 introducing a certain level of exchange of information between the respective EU tax authorities to address the issue of aggressive tax planning.<sup>9</sup> The advantage of this initiative was that it was binding on all Member States and not only considered soft law like the Action Plans by the OECD.

Between 2011 and 2018 the EU extended its legislative measures relating to the exchange of information between tax authorities on the basis of the EU Council Directive on Administrative Cooperation 2011/16/EU<sup>10</sup> ('DAC1') several times. This was done to further enhance mutual cooperation between tax administrations in the Member States as the measures enforcing tax obligations were outdated.<sup>11</sup> In particular, it became clear that more was needed beyond exchanging information in order to advance taxation enforcement. There was a need for transparency to ensure that the information received by tax authorities would actually increase their oversight of harmful tax practices.<sup>12</sup> The sixth amendment to the directive<sup>13</sup> ('DAC6') was thus formally adopted on 25 May 2018 by the Council of European Finance Ministers ('ECOFIN') regarding the mandatory disclosure of aggressive tax planning schemes from intermediaries.<sup>14</sup> By implementation of this aggressive tax measure, the EU aims to provide a comprehensive

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<sup>7</sup> Sigrid Hemels, '13 Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims', in Wattel, P. J., Marres, O. & Vermeulen, H. (eds.), *European Tax Law General topics and direct taxation (Student Edition)*, 7 ed., Vol. 1, Deventer, Wolters Kluwer, 2018, p.3.

<sup>7</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, O.J. of 11 March 2011, L 064, p.1.

<sup>8</sup> The OECD and the EU, [website], 2016, <https://eeas.europa.eu/delegations/paris-oecd-and-un-en/12350/The%20OECD%20and%20the%20EU>, (last accessed 29.05.2018).

<sup>9</sup> Ana Paula Dorado & Augusto Silva Dias, 'Chapter 8 Information Duties, Aggressive Tax Planning and *nemo tenetur se ipsum accusare* in the light of Art. 6(1) of ECHR', in Miguel Poiars Maduro, Pasquale Pistone *et al* (eds.), *Human Rights and Taxation in Europe and the World*, IBFD, 2011, pg.133.

<sup>10</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, O.J. of 11 March 2011, L 064, p.1.

<sup>11</sup> José Manuel Calderón Carrero & Alberto Quintas Seara, 'The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning', *Intertax*, Vol. 44, Issue 3, 2016, pg.206. Available from: Kluwer Law International, (last accessed: 29.05.2018).

<sup>12</sup> Alicja Majdanska & Pedro Guilherme Lindenberg Schoueri, 'Tax Compliance in the Spotlight – The Challenges for Tax Administrations and Taxpayers', *Bulletin for International Taxation*, Vol. 71, No.11, 2017, pg.630. Available from: IBFD, (last accessed 29.05.2018).

<sup>13</sup> 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 as adopted on 25 May 2018, 7160/18 (not yet published in the Official Journal), hereinafter DAC6.

<sup>14</sup> Thomas van der Vliet & Suzanne Hop, 'EU Council Reaches Agreement on New Mandatory Transparency Rules for Intermediaries and Taxpayers', *GT Alert*, April 2018, pg.1. Available from: <https://www.gtlaw.com/en/insights/2018/4/eu-council-reaches-agreement-on-new-mandatory-transparency-rules-for-intermediaries-and-taxpayers>, (last accessed 29.05.2018).

framework under the new DAC6 by which detection of as many tax avoidance schemes as possible is enabled.<sup>15</sup>

However, concurrent to the rapid expansion of far-reaching tax administration powers, there has not been a corresponding increase of legal protection for taxpayers. The human rights are supposed to act as one of the most important safeguards for individuals as implemented by both the EU and its Member States, as is also manifested in customary international law. Taxpayers should effectively be able to rely upon these fundamental rights.<sup>16</sup> It is, therefore, of utmost importance to ask whether the implementation of the new mandatory rules for intermediaries still ensures taxpayers' access and claim to their human rights, specifically as concerns the right against self-incrimination and the right to confidentiality.

## 1.2 Research Objective

The objective of this paper is to assess whether the mandatory disclosure rules ('MDRs') for intermediaries in light of the newly amended Directive of Administrative Cooperation 2011/16/EU infringe on the human rights of EU citizens. Thus, the research question of this paper is the following:

*Are the mandatory disclosure rules for intermediaries set out in the DAC6 compatible with both the right against self-incrimination and the right to confidentiality?*

The following three questions will assist in answering the research question:

1. *What does the right against self-incrimination mean?*
2. *What does the right to confidentiality mean?*
3. *What are the implications for intermediaries and taxpayers under the adopted mandatory disclosure regime (DAC6)?*

## 1.3 Method and Materials

As mentioned above, the legal question this thesis will present and attempt to answer is whether the new mandatory disclosure rules for intermediaries in the DAC6 are compatible with both the right against self-incrimination and the right to confidentiality. The focus will therefore be the human rights concerning self-incrimination and confidentiality in relation to the new obligation to

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<sup>15</sup> European Union: Council of the EU, 'Corporate tax avoidance: Transparency rules adopted for tax intermediaries' (Press Release) (Brussels, 25 May 2018), 288/18.

<sup>16</sup> Pasquale Pistone, 'Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law', *World Tax Journal*, Vol. 6, No. 1, 2014, pp.4-5. Available from: IBFD, (last accessed 29.05.2018).

disclose on potentially aggressive cross-border tax arrangements. The research and analysis have been based on legal dogmatic research on current positive law from an internal perspective.

The research has been largely grounded in sources of law such as the EU Treaties, the Charter of Fundamental Rights of the European Union ('CFREU') and the European Convention on Human Rights ('ECHR'). The viability of relying on the new Directive 2016/343/EU<sup>17</sup> ('the Directive on Presumption of Innocence') for the MDRs will be assessed. Additionally, doctrinal articles by several academic scholars, e.g. Pasquale Pistone and Philip Baker, were consulted to create diverse perspectives on the issue at hand. Furthermore, comments published by the EU Commission and other EU institutions were consulted to increase the understanding of the aim behind the new MDRs, although these working papers and guidelines are considered to be soft law and therefore not legally binding. The material has been collected, analysed and interpreted from 1 March up until the 31 May 2018.

## 1.4 Delimitations

As the focus of this paper is the compatibility of the obligation of mandatory disclosure by intermediaries with both the right against self-incrimination and the right to confidentiality, the following delimitations are applied. The paper will only deal with the sixth amendment relating to mandatory disclosure by intermediaries, thereby scoping the discussion on the subsequent automatic exchange of information of the mandatory disclosed information out as it is deemed irrelevant to the topic in question. Although the OECD BEPS Action Plan 12 has been the source of inspiration of the DAC, the focus of this paper will be legislation relating to the European Union. The 'Guidelines for a Model for A European Taxpayer's Code' are also not legally binding on the EU Member States and had been legislated prior to the political adoption of the new DAC amendment relating to mandatory disclosure by intermediaries. The Taxpayer's Code therefore does not specifically address taxpayers' rights regarding the adopted DAC6 and will consequently be disregarded.

Moreover, as the paper will only deal with rights and obligations of intermediaries and taxpayers, the implications for tax authorities will not be discussed. When discussing the right against self-incrimination, issues relating to, e.g. DNA testing and finger printing, will not feature because the emphasis will firmly lie on verbal and written disclosures. In addition, as the right to confidentiality is often said to be intertwined with the right to privacy, the paper will not deal with the former as it is a topic in itself. Lastly, the right against self-incrimination and the right to confidentiality are only tested against direct tax measures relating to mandatory disclosure of tax information as indirect tax measures are dealt with in separate EU legislation.

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<sup>17</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, O.J. of 11 March 2016, L 65/1.

## 1.5 Overview

Chapter 2 outlines the newly adopted DAC6 regarding mandatory disclosure by intermediaries for reportable cross-border arrangements. At first the historic development of the DAC from 2011 to 2018 will be given to be able to contextually place the significance of the DAC6. Furthermore, details regarding the new EU legislation will be discussed relating to its scope, hallmarks identifying the threshold for mandatory disclosure, reporting parties, timing and types of penalties.

Chapter 3 aims to provide an answer to the first question of what the right against self-incrimination means. The relevant legal sources studied and described are namely the ECHR, CFREU and the Directive on Presumption of Innocence, each one encompassing the right against self-incrimination either implicitly under the right to a fair trial or explicitly in a provision. According to case law, the meaning of the right against self-incrimination in combination with the right to remain silent is the protection of accused persons in criminal proceedings. When the defendant is forced to provide incriminating evidence or is treated adversely after refusing to testify in criminal proceedings, the right against self-incrimination and the right to remain silent can be invoked.

Chapter 4 answers the second question of what the right to confidentiality means. The right to confidentiality is implicitly inserted under the right to respect for private and family life. This fundamental human right can be found in Article 8 of the Convention and Article 7 of the Charter. The meaning of the right to confidentiality is especially crucial when determining whether a person who is bound by legal professional privilege ('LPP') can claim the right when refusing to disclose certain information relating to clients under the information duties. The right to confidentiality is, however, not an absolute right and can be restricted in instances the State claims the interest of public security, safety, health or morals and the prevention of crime.

Chapter 5 aims to answer the third question which refers to the human right's implications for intermediaries and taxpayers under the new DAC6. The claiming of LPP will in most cases not be possible as the DAC6 is considered to be an ordinary tax procedure. This would change when the tax authorities would act on the information provided under the MDRs and begin criminal proceedings against the taxpayer. The right against self-incrimination is theoretically claimable, but not even before disclosing any information regarding a reportable cross-border arrangement.

Chapter 6 is the concluding chapter of this paper that outlines the findings of the research question and what can be determined thereof. The research question referring to whether the new MDRs are compatible with the right against self-incrimination and the right to confidentiality can be answered in the affirmative. Future possible avenues of research are also presented.

## Chapter 2: The Extended Obligation for Taxpayers under EU Tax Law

### 2.1 The Historic Development of DAC6

Since its inception, EU legislation was guided by the idea of enhancing trade and breaking down barriers between its Member States. In the field of direct taxation, the competence to legislate remains primarily with individual Member States according to Article 5 of the Treaty on European Union<sup>18</sup> ('TEU'). The TEU entrenches the principle of formal territoriality by taxing worldwide income of both natural and juridical residents.<sup>19</sup> However, the State's limited sovereignty in other tax jurisdictions in combination with the potential harmful role of intermediaries as evidenced by the Panama Papers and Lux Leaks<sup>20</sup>, tax authorities seemed to be constantly one step behind. States argued that if there is freedom of establishment of entities and the free movement of citizens, these freedoms needed to be matched by more appropriate cross-border fiscal measures. This would allow multi-national enterprises ('MNEs') to be properly taxed as they could no longer aggressively coordinate and plan their tax liabilities. It is generally accepted that taxation issues can be categorised as follows: (i) ordinary tax planning that complies fully with legislation; (ii) aggressive tax planning or tax avoidance that is legal but might go against the spirit of legislation; and (iii) tax evasion which includes tax fraud and the refusal to pay tax penalties. In all three cases the rule of law needs to be upheld in light of national constitutions and EU law.<sup>21</sup>

The need for the EU to step in and take on shared competence according to Article 5(3) TEU seemed apparent. Thus, by making use of the subsidiarity principle, the new framework in the EU Council Directive on Administrative Cooperation 2011/16/EU ('DAC1') was designed especially for cross-border transactions involving one or more taxpayers and was published in March 2011, repealing and replacing the outdated former Directive on Mutual Assistance 77/799/EEC<sup>22</sup> (hereinafter 'old Directive') through Article 28 of the DAC1. The old Directive had still acknowledged the refusal of handing over information to tax authorities under banking secrecy.<sup>23</sup> It included exchanges of information on request as well as spontaneous exchanges and provisions

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<sup>18</sup> European Union, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, 26 October 2012, 2012/C 326/01.

<sup>19</sup> Sigrid Hemels, '13 Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims', in Wattel, P. J., Marres, O. & Vermeulen, H. (eds.), *European Tax Law General topics and direct taxation (Student Edition)*, 7 ed., Vol. 1, Deventer, Wolters Kluwer, 2018, pg.1.

<sup>20</sup> Jasna Voje, 'EU Implementation of BEPS Action 12 in Light of Human Rights Requirements', *European Taxation*, Vol. 57, no. 5, 2017, pg.192. Available from: IBFD, (last accessed 27.05.2018).

<sup>21</sup> Ana Paula Dorado & Augusto Silva Dias, 'Chapter 8 Information Duties, Aggressive Tax Planning and *nemo tenetur se ipsum accusare* in the light of Art. 6(1) of ECHR', in Miguel Poiaras Maduro, Pasquale Pistone *et al* (eds.), *Human Rights and Taxation in Europe and the World*, IBFD, 2011, pp.132-133.

<sup>22</sup> Council Directive 77/799/EEC of 19 December 1977, O.J. of 27 December 1977, L 336, p. 15.

<sup>23</sup> *Ibid.*, Article 8.

that would effectively leave tax authorities in a stronger position to fight cross-border tax avoidance and evasion.<sup>24</sup>

Over the years, the DAC provided common minimum guidelines and furthermore was amended four times with another formally adopted amendment by the Council of the European Union waiting for publication in the Official Journal of the EU. The original directive, DAC1, included automatic exchanges of five non-financial categories of information (including income from employment, director's fees, pensions, life insurances and immovable property) in Article 8 and came into force on 1 January 2013. The first amending Council Directive 2014/107/EU<sup>25</sup> ('DAC2') added the automatic exchange of financial account information as part of a common reporting standard (CRS), e.g. interests, dividends, gross proceeds from sales or redemptions and account balances which had to be enforced by each Member State as of 1 January 2016 by inserting Article 8(3a) of the DAC1. When subsequently transfer pricing issues made headlines, specifically concerning MNEs, the third amendment was adopted by way of Council Directive (EU) 2015/2376<sup>26</sup> ('DAC3') relating to the implementation of a centralised directory as of 2018, presenting an opportunity for an automatic exchange of advanced cross-border rulings and advanced pricing arrangements (APAs) as of 1 January 2017 (Article 8a). The third amending Council Directive (EU) 2016/881<sup>27</sup> ('DAC4') introduced Article 8aa with the mandatory exchange of information by tax authorities received from MNEs in form of Country-by-Country Reporting ('CbCR'). The fifth amendment, Council Directive (EU) 2016/2258<sup>28</sup> ('DAC5'), only came into force on 1 January 2018. It allowed tax authorities access to anti-money-laundering information as obligated to be reported under the anti-money laundering ('AML') Directive 2015/849/EU.<sup>29</sup>

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<sup>24</sup> Sigrid Hemels, '13 Administrative Cooperation in the Assessment and Recovery of Direct Tax Claims', in Wattel, P. J., Marres, O. & Vermeulen, H. (eds.), *European Tax Law General topics and direct taxation (Student Edition)*, 7 ed., Vol. 1, Deventer, Wolters Kluwer, 2018, pg.5.

<sup>25</sup> Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, O.J. of 16 February 2014, L 359, pg.1.

<sup>26</sup> Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, O.J. of 18 December 2015, L 332, pg.1.

<sup>27</sup> Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, O.J. of 3 June 2016, L 146, pg.1.

<sup>28</sup> Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, O.J. of 16 December 2016, L 342, pg.1.

<sup>29</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, O.J. of 5 June 2015, L 141, pg.73.

## Timeline of DAC Amendments

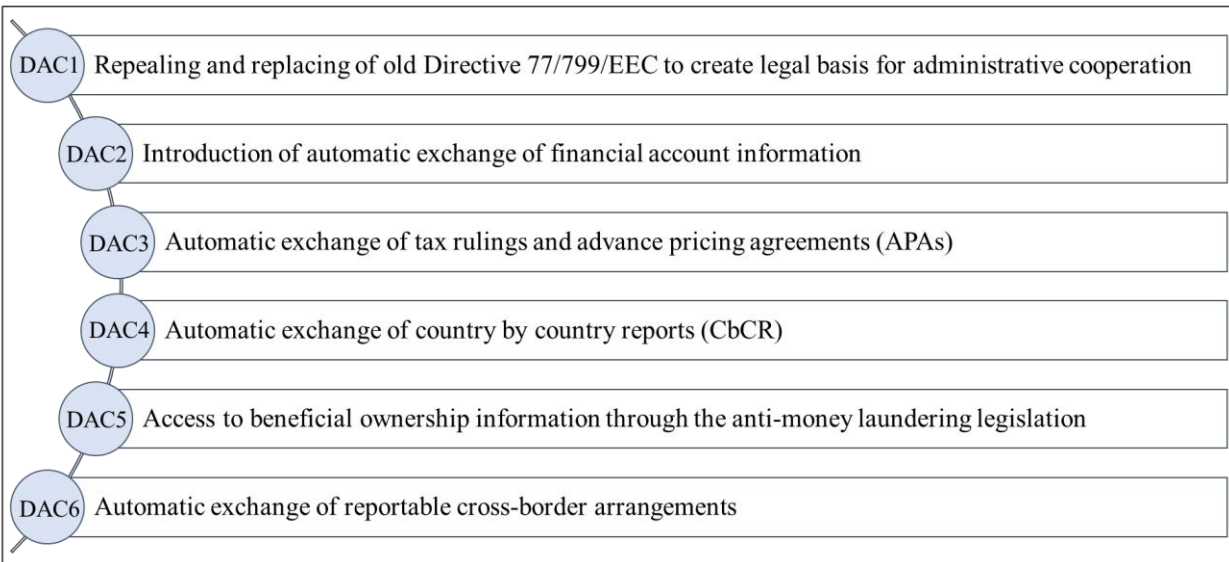


Figure 1 provides a chronological overview of the six EU directives relating to administrative cooperation between Member States' tax authorities.

The newest formally adopted amendment is the DAC6 on mandatory disclosure for intermediaries which was compiled by the EU Commission on 21 June 2017 and is based on BEPS Action Plan 12.<sup>30</sup> It was politically agreed upon on 13 March 2018 and only recently formally adopted by the Council of European Finance Ministers ('ECOFIN') on 25 May 2018. To date, the DAC6 has not been published in the Official Journal of the European Union. The main purpose is to expand the scope of the DAC1 to incorporate increased transparency obligations for tax intermediaries in line with the previous measures taken to fight aggressive tax planning as part of the prevention of corporate tax avoidance.<sup>31</sup> Keeping its common purpose, all EU measures have to be for the benefit of enhancing the correct functioning of the internal market.<sup>32</sup> In the EU Commission's opinion the new measure will increase the administrative burden for tax authorities, intermediaries and/ or taxpayers, nevertheless, it is said to be a necessary evil so that tax authorities in each Member State can actively respond to tax practices that are not in line with the intention of the underlying legislation.<sup>33</sup> Ultimately, the EU intends for the mandatory disclosure of cross-border reportable arrangements to have a deterring effect on intermediaries who are in a position to create and market

<sup>30</sup> PwC Tax Policy Bulletin, *EU proposes mandatory disclosure of tax information for reportable cross-border arrangements*, 31.08.2017, pg.1.

<sup>31</sup> European Commission, 'Commission welcomes adoption of far-reaching new transparency rules for tax advisers in the EU' (Press Release) (Brussels, 13 March 2018) IP/18/1841.

<sup>32</sup> *DAC6 2018* (EU) Preamble 10.

<sup>33</sup> *Ibid.*, Preamble 2.

tax avoidance schemes.<sup>34</sup> Success of similar strong tax measures in domestic legislation relating to mandatory disclosure rules has been shown in the United Kingdom (UK), Portugal and Ireland.<sup>35</sup>

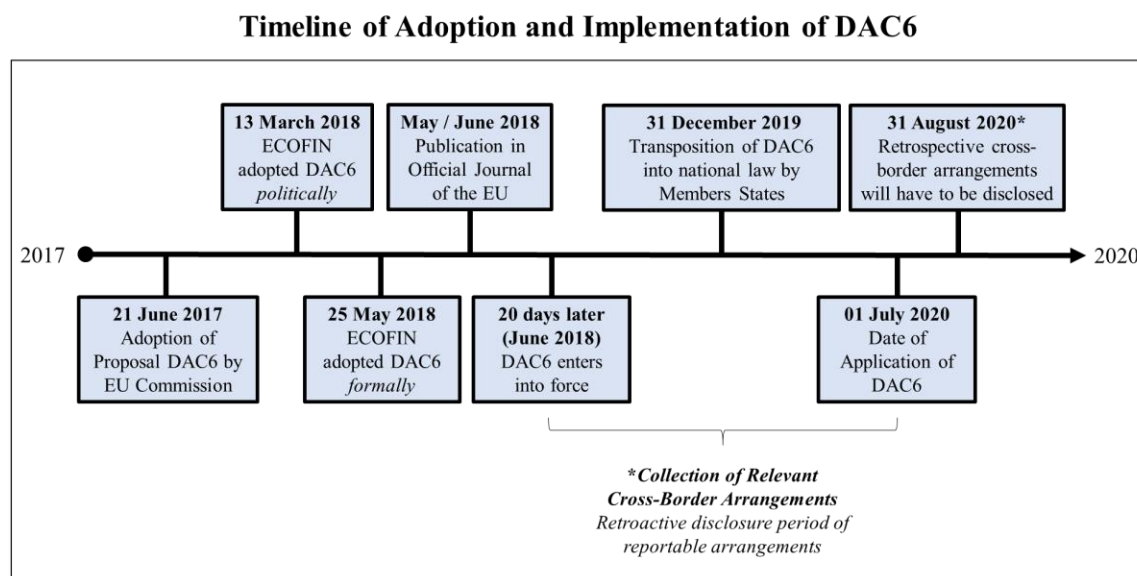


Figure 2 provides a detailed timeline of the legislative process of adopting and implementing DAC6.

## 2.2 DAC6 regarding Mandatory Disclosure by Intermediaries

### 2.2.1 Scope of DAC6

The new rules regarding mandatory disclosure by intermediaries is a further step for the European Commission to come down on aggressive cross-border tax planning and facilitate the prevention of corporate tax avoidance.<sup>36</sup> The DAC6 is thus equipped to obligate intermediaries, or in certain cases even taxpayers themselves, to disclose reportable cross-border tax arrangements to the relevant tax authorities.<sup>37</sup> This will include cross-border schemes between two or more EU Member States and a Member State and a third country (non-EU country).<sup>38</sup> The newest insertions are the definitions in Article 3 and Article 8ab of the DAC which will have to be adopted into

<sup>34</sup> DAC6 2018 (EU) Preamble 7.

<sup>35</sup> PwC Tax Policy Bulletin, *EU proposes mandatory disclosure of tax information for reportable cross-border arrangements*, 31.08.2017, pg.1.

<sup>36</sup> European Union: Council of the EU, 'Corporate tax avoidance: Transparency rules adopted for tax intermediaries' (Press Release) (Brussels, 25 May 2018), 288/18.

<sup>37</sup> DAC6 2018 (EU) Preamble 8.

<sup>38</sup> *Ibid.*, Article 3 point 18 'cross-border arrangement'.



domestic legislation by each Member State and will enter into force by 31 December 2019.<sup>39</sup> Interestingly, the EU Commission suggests referring back to soft law created by the OECD for illustrative and interpretative means to ensure consistent application of the DAC6 in all Member States.<sup>40</sup>

### 2.2.2 Threshold for Mandatory Disclosure

It is necessary to scrutinize which potentially aggressive tax schemes would fall within the scope of the DAC6 to conclude whether the new MDRs guarantee legal certainty for the reporting party.<sup>41</sup> To assess whether a tax arrangement is, or a series of tax arrangements are, reportable<sup>42</sup>, one must ensure that one is dealing with a cross-border arrangement as explained in the newly added Article 3 point 18 of the DAC. According to the EU Commission, cross-border arrangements are to limit the DAC6s scope to target arrangements that stretch across Member States' borders<sup>43</sup> thereby decreasing the administrative burden for tax administrations. If a minimum of two Member States or, alternatively, at least one Member State and a non-EU country are part of the arrangement, at least one of the following conditions (a) – (e) set out in point 18 must be met. By virtue of (a) the tax residence status of the parties involved, (b) dual residency for tax purposes of any party, (c) parties involved by means of a local permanent establishment ('PE') or (d) by means of an offshore PE. The last condition relates to an arrangement that has a tax-related impact in at least two tax jurisdictions regarding automatic exchange of information or identifying beneficial ownership.

If one of the conditions holds true, in the absence of 'arrangement' being defined, the next step is to assess whether it is a "reportable cross-border arrangement"<sup>44</sup>. Only if one or more of the general or specific hallmarks in Annex IV to the DAC6 can be identified to characterise a cross-border arrangement, a reportable arrangement exists and the threshold to disclose is exceeded. By relying on hallmarks to characterise a reportable cross-border arrangement that could potentially fall within the scope of tax abuse or avoidance, the Commission considers legislation to be more efficient and flexible to the constant changes of aggressive tax planning arrangements. Thereby,

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<sup>39</sup> DAC6 2018 (EU) Article 2(1).

<sup>40</sup> *Ibid.*, Preamble 13.

<sup>41</sup> European Union: European Commission, *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*, 21 June 2017, SWD(2017) 236 final, pg.38. Available at: <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-236-F1-EN-MAIN-PART-1.PDF> [last accessed 27.05.2018].

<sup>42</sup> DAC6 2018 (EU) amending Article 3 by adding point 19.

<sup>43</sup> European Union: European Commission, *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*, 21 June 2017, SWD(2017) 236 final, pg.38. Available at: <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-236-F1-EN-MAIN-PART-1.PDF> [last accessed 27.05.2018].

<sup>44</sup> DAC6 2018 (EU) amending Article 3 by adding point 19.

the need to define the concept of aggressive tax planning falls away.<sup>45</sup> General and some specific hallmarks will, however, only be considered where they fulfil the main benefit test:

“That test will be satisfied if it can be established that the main benefit or one of the main benefits which, [...], a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.”<sup>46</sup>

### 2.2.2.1 Generic Hallmarks linked to main benefit test (Annex IV)

#### *Category A*

There are three generic hallmarks that can be found in Annex IV that target mass marketed schemes. These three hallmarks linked to the main benefit test heavily rely on the nature of the contract between the intermediary and taxpayer.<sup>47</sup>

The first hallmark relates to the condition of confidentiality that is either demanded by the intermediary or client to limit the implemented schemes exposure to authorities. Similarly, if the fee received by the intermediary is either dependent on the amount received from a tax advantage or reliant on getting a tax advantage, the generic hallmark would trigger a mandatory disclosure. The third hallmark addresses schemes that are identical and need no considerable altering to be sold to other taxpayers.<sup>48</sup>

### 2.2.2.2 Specific Hallmarks (Annex IV)

#### *Category B*

Category B addresses specific hallmarks that are coupled with the main benefit test that are considered red flags for tax authorities and focusses on customised arrangements.<sup>49</sup> Loopholes or weaknesses in the tax system are covered by Category B and include (i) utilization of acquired

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<sup>45</sup> DAC6 2018 (EU) Preamble 9.

<sup>46</sup> *Ibid.*, Annex IV ‘Hallmarks’, Part I.

<sup>47</sup> European Union: European Commission, *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*, 21 June 2017, SWD(2017) 236 final, pp.39. Available at: <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-236-F1-EN-MAIN-PART-1.PDF> [last accessed 27.05.2018].

<sup>48</sup> DAC6 2018 (EU) Annex IV ‘Hallmarks’, Part II, A. ‘Generic hallmarks linked to the main benefit test’.

<sup>49</sup> European Union: European Commission, *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*, 21 June 2017, SWD(2017) 236 final, pp.39-40. Available at: <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-236-F1-EN-MAIN-PART-1.PDF> [last accessed 27.05.2018].

losses, (ii) reclassifications of income to capital and (iii) arrangements “[...] involving interposed entities without other primary commercial function or transactions [...]”<sup>50</sup> that round-trip funds.

### *Category C*

There are specific hallmarks concerning cross-border transactions that result in double non-taxation due to lack of cooperation between jurisdictions.<sup>51</sup> These include (i) hybrid mismatches resulting in stateless income or when income taxed at a low or preferential rate or is exempt in both jurisdictions, (ii) depreciation deductions employed in more than one country, (iii) double relief for double taxation, or (iv) in the situation of a transfer of an asset in which substantial differences of payables are considered as payment.

### *Category D*

Category D hallmarks identify features of a reportable arrangement that are used to circumvent the obligation to disclose material for the automatic exchange of information by obscuring or separating beneficial from legal ownership structures. Additionally, weak governance can be exploited to evade the duty to disclose.

### *Category E*

Last of all, when it comes to specific transfer pricing hallmarks, a reportable arrangement exists if a scheme involves “unilateral safe harbour rules”<sup>52</sup> that allow the reporting party to be exempt from certain administrative obligations to simplify or avoid disclosing information.<sup>53</sup> Further, any intangibles transferred that cannot be reliably compared or accurately valued and lastly transfers of functions and/or risks and/or assets under certain conditions.

## **2.2.3 Persons obligated to disclose**

The reporting obligation has been assigned to generally fall on intermediaries provided for exceptions.<sup>54</sup> An intermediary is defined as “any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border

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<sup>50</sup> DAC6 2018 (EU) Annex IV ‘Hallmarks’, Part II, B.3.

<sup>51</sup> European Union: European Commission, *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*, 21 June 2017, SWD(2017) 236 final, pg.39. Available at: <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-236-F1-EN-MAIN-PART-1.PDF> [last accessed 27.05.2018].

<sup>52</sup> DAC6 2018 (EU) Annex IV ‘Hallmarks’, Part II, B.3.

<sup>53</sup> Alain Charlet, Caroline Silberztein & Gérard Pointe, ‘Transfer Pricing Study on the feasibility of introducing safe harbour provisions in ECOWAS countries’, *European Commission*, 2016, pg.4. Available at: [https://ec.europa.eu/europeaid/sites/devco/files/summary-transfer-pricing\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/summary-transfer-pricing_en.pdf), (last accessed 30.05.2018).

<sup>54</sup> Article 8ab(1) of the DAC.

arrangement”<sup>55</sup> and could, e.g. be a lawyer, tax advisor, accountant.<sup>56</sup> The definition is very broad and as the directive refers to “any person” it includes legal entities, individuals or any other entity lacking a legal personality (e.g. transparent partnerships). In order to qualify as an intermediary, the person must additionally either:

- (i) be a tax resident of one of the Member States;
- (ii) provide services relating to the arrangement by way of a permanent establishment in a Member State;
- (iii) be incorporated in or ruled by the laws of a Member State; or
- (iv) be a registered professional who is a member of an association for legal, taxation or consultancy services in a Member State.<sup>57</sup>

### *No qualifying intermediary*

If none of the additional requirements are met for the above intermediary’s definition, there is no identifiable intermediary who can be obligated to comply with the new MDRs. Certain situations could be considered grey areas, e.g. if the taxpayer has an in-house reportable arrangement or there is only one intermediary who is, however, bound by LPP. These issues will be discussed in Chapter 5. Even so, if no qualifying intermediary can be identified, the burden to report the arrangement will fall to the taxpayer.

### *Multiple Intermediaries*

Should there be several intermediaries involved in a reportable arrangement, each qualifying intermediary who has taken part in producing and realizing the arrangement for the taxpayer has the obligation to report the scheme.<sup>58</sup> The exception to the reporting obligation is only accepted, if an intermediary can provide proof that the same information has already been disclosed to the tax authorities by another intermediary.<sup>59</sup> It is questionable why the legislators did not deal more specifically with situations of multiple intermediaries as this is often the case in practice.<sup>60</sup> It seems the administrative burden becomes disproportionate to the aim of the adopted measure.

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<sup>55</sup> DAC6 2018 (EU) adding to Article 3 DAC point 21.

<sup>56</sup> European Union: Council of the EU, ‘Corporate tax avoidance: Transparency rules adopted for tax intermediaries’ (Press Release) (Brussels, 25 May 2018), 288/18.

<sup>57</sup> DAC6 2018 (EU) adding to Article 3 DAC point 21.

<sup>58</sup> *Ibid.*, adding to Article 3 DAC point 21.

<sup>59</sup> Article 8ab(4) & (5) of the DAC.

<sup>60</sup> PwC Tax Policy Bulletin, *EU proposes mandatory disclosure of tax information for reportable cross-border arrangements*, 31.08.2017, pg.6.

#### **2.2.4 Content required to be disclosed**

The exact information that needs to be provided by the reporting party is stated in Article 8ab(14) of the DAC. It includes information such as (a) details relating to the persons involved, (b) identified hallmarks of the reportable arrangement, (c) a summarised report explaining the arrangement with (f) the expected value of the arrangement and (g) other Member States affected by the reportable arrangement.

#### **2.2.5 Time of Disclosure**

The new MDRs are effectively to be used as a preventative measure, therefore the identified intermediaries must provide the requested information to the relevant tax authorities within 30 days at the earlier of (i) the day the reportable arrangement becomes available to the taxpayer, (ii) is ready for implementation or (iii) the day the first step of the implementation is made.<sup>61</sup> The tax authorities then have to automatically exchange the data relating to the mandatory disclosure every term with the relevant tax authorities of other Member States.<sup>62</sup> For practical purposes, a central directory will function as a common “server” for all tax authorities to upload to and access the data.<sup>63</sup> Reportable arrangements between the 20<sup>th</sup> day following DAC6’s publication in the Official Journal of the European Union and 1 July 2020 will have to be disclosed to the authorities retrospectively.<sup>64</sup> This would mean that as of June or July 2018 (depending on the publication) all tax advice should already be monitored and information on reportable cross-border arrangements gathered by the identified intermediaries or taxpayers to ensure the future obligation to disclose by 31 August 2020.

#### **2.2.6 Types of Penalties**

Article 25a of the DAC has been replaced in the DAC6. It states that penalties should be dealt with by each Member State as they see fit. The Member States must then, however, ensure that the penalties are practically enforced, proportionate to the misdemeanour and have a deterring effect on the intermediary or appropriate taxpayer. It is questionable how Member States can legitimately enforce penalties arising from non-compliance during the period between the entry into force of the DAC6 and 1 July 2020 as will be discussed in Chapter 5.

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<sup>61</sup> Article 8ab(1) of the DAC.

<sup>62</sup> Article 8ab(13) of the DAC.

<sup>63</sup> Article 21(5) of the DAC.

<sup>64</sup> Article 8ab(12) of the DAC.

## 2.3 Conclusion

In conclusion, the new DAC6 provides for detailed rules regarding reportable arrangements by either intermediaries or if necessary the taxpayer himself. It is questionable whether the EU can legitimately demand the disclosure of cross-border arrangements that are legal.<sup>65</sup> The broad definitions of both “intermediary” and “reportable cross-border arrangements” and the comprehensive procedural rules could effectively become disproportionate to the aim that the DAC6 is trying to achieve, namely to curb corporate tax avoidance. The choice of stating hallmarks instead of defining “aggressive tax planning” is also debatable. On the one hand, hallmarks are characteristics that are more flexible to address the ever-changing aggressive tax schemes. On the other hand, arrangements that are considered to be in line with the wording and spirit of the law can fall within the scope of the DAC6 which infringes on the principle of legal certainty.

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<sup>65</sup> Ana Paula Dorado & Augusto Silva Dias, ‘Chapter 8 Information Duties, Aggressive Tax Planning and *nemo tenetur se ipsum accusare* in the light of Art. 6(1) of ECHR’, in Miguel Poiars Maduro, Pasquale Pistone *et al* (eds.), *Human Rights and Taxation in Europe and the World*, IBFD, 2011, pg.145.

## Chapter 3: The Right against Self-Incrimination

### 3.1 The Legal Sources for the Protection of Taxpayers' Rights

Chapter 3 will focus on the right against self-incrimination (*nemo tenetur*) which forms part of the right to a fair trial. Thus, this chapter will explore the answer to the first question, ‘*What does the right against self-incrimination mean?*’ and by discussing the rights in the context of the ECHR, the CFREU and the newly adopted Directive 2016/343/EU on strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

### 3.2 The European Convention on Human Rights

#### 3.2.1 The Convention

The role of human rights and fundamental freedoms played a pivotal role in Europe, but also on an international level at least since World War II.<sup>66</sup> The initiative towards international collaboration resulted in the ECHR being adopted as an international treaty in 1950 by the Council of Europe (not to be confused with the European Council of the EU) and was binding on all signatory countries to the Convention. This agreement was first of its kind to enforce the rights that were specified in the Universal Declaration of Human Rights from 1948.<sup>67</sup> By way of the Convention, the European Commission of Human Rights (‘ECnHR’) (introduced in 1954 and no longer in force due to Protocol No.11 in 1998) and the European Court of Human Rights (‘ECtHR’) were established to ensure that human rights would not stay an abstract concept to most persons, but rather be enforceable against a national state written down in a legal framework. The Court itself has been recognized with apprehension as the Convention awarded the ECtHR judges extensive powers to rule on issues regarding the protection of persons and thereby infringing on the sovereignty of national courts that had the power to rule on its own constitutional human rights.<sup>68</sup>

The Convention is a brief document laying out civil and political human rights of persons. Each country must then obey by Article 1 of ECHR which ensures the practical implementation of the Convention in domestic law. Additionally, Article 1 necessitates that each contracting country of the Convention “shall” secure the rights and freedoms set out in Section I of the Convention to

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<sup>66</sup> Catherine Barnard & Steve Peers (ed.), *European Union Law*, Oxford, OUP Oxford, 2014, pp.226-227.

<sup>67</sup> Council of Europe, *European Court of Human Rights*, [website], Available at: <https://www.coe.int/en/web/tirana/european-court-of-human-rights>, (last accessed 15.05.2018).

<sup>68</sup> Catherine Barnard & Steve Peers (ed.), *European Union Law*, Oxford, OUP Oxford, 2014, pp.226-227.

everyone in within their borders.<sup>69</sup> This effectively includes all natural and juristic persons in the scope of the Convention and there is no distinction made between residents and non-residents. Generally, the Convention is also considered to be a text that must be interpreted in the light of the current political and socio-economic situation.<sup>70</sup>

### 3.2.2 The Convention: Article 6 Right to a fair trial

The first human right under consideration can be found under Article 6 of the Convention on Human Rights and reads in the English language version as follows:

*“Article 6: Right to a fair trial*

*1. In the determination of [...] any criminal charge against him, everyone is entitled to a fair [...] hearing [...] by [a] tribunal [...].”*

Articles 6(2) and 6(3) are in this instance irrelevant and will not be discussed further in this paper as they deal with specific guarantees for criminal proceedings.

It becomes very clear that the Convention only permits the protection of procedural civil rights and obligations as well as charges that are made in criminal proceedings against a defendant. The ECtHR has often stated in cases relating to criminal charges that certain rights, such as the right to remain silent and the right against self-incrimination (*nemo tenetur*), are implied due to a teleological interpretation of Article 6(1) of ECHR and in line with generally accepted international standards pertaining to the right to a fair trial.<sup>71, 72</sup> Therefore, when determining whether the case relates to civil rights and obligations or criminal charges, both meanings are autonomous in nature in reference to the Convention and not linked to any other meaning found in domestic law.<sup>73, 74</sup> The underlying reason for using the teleological interpretation method is to ensure that the principle of effectiveness holds true rather than that the human rights are dealt with in an abstract manner.<sup>75</sup>

The true basis of the right against self-incrimination lies, *inter alia*, in protecting the taxpayer against the threat of undue coercion by the tax authorities whereas the right of silence guarantees

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<sup>69</sup> Winfried H.A.M. van den Muijsenbergh & Sam Rezai, ‘Corporations and the European Convention on Human Rights’, *The Global Impact and Implementation of Human Rights Norms*, Global Business & Development Law Journal, Vol. 25, 2012, pg.46.

<sup>70</sup> See *Marckx v. Belgium*, Application No.6833/74, ECHR, 13.06.1979, para.41.

<sup>71</sup> See *Abas v. Netherlands*, Application No.27943/95, ECHR, 26.02.1997.

<sup>72</sup> The ECHR first presented its inclusion of the right against self-incrimination to Article 6 in the case *Funke v. France*, Application No.10828/84, ECHR, 25.02.1993.

<sup>73</sup> For civil rights or obligations see for example the case *Georgiadis v. Greece*, Application No.21522/93, ECHR, 1997, 29.05.1997, para.34.

<sup>74</sup> For criminal charges see for example the case *Adolf v. Austria*, Application No.8269/78, ECHR, 1982, 26.03.1982, para.30.

<sup>75</sup> See *Sakhnovskiy v. Russia* [GC], Application No.21272/03, ECHR, 02.11.2010, paras.99-107.



that no adverse inferences are drawn by the defendant's refusal to testify in proceedings related to criminal charges.<sup>76</sup> The latter should not rely on evidence obtained under duress from the accused taxpayer. This would presumably never be in the best interest of the taxpayer and thereby challenge the will of the taxpayer. In light of this paper though, the right against self-incrimination in terms of Article 6 is specifically applicable to the instance where the legally enforceable mandatory disclosure of tax information is rejected by the obligated reporting party. This will in turn result in an administrative offence and will lead to tax penalties that are administrative or criminal in nature for the non-compliant reporting party. Therefore, pursuant to the case law of the ECtHR, both the right to remain silent and right against self-incrimination can cause headaches for the tax authorities as information duties are one of the most important tools available to them to ensure compliance but could inadvertently result in an infringement of the human right in Article 6 of the Convention.<sup>77</sup>

### 3.3 The Charter of Fundamental Rights of the European Union

#### 3.3.1 The Charter

For decades the Treaties of the EU did not include a codified text relating to fundamental freedoms. In order to have the fundamental rights protected, it fell to the CJEU to rule on cases relating to such rights.<sup>78</sup> Therefore, the CJEU was quick to declare fundamental rights as part of the general principles guiding the EU. Otherwise individuals would have been bound by national constitutions as the CJEU could only rule on issues relating to EU principles and legislation and the EU principle of supremacy would have weakened.<sup>79</sup> During deliberations of the Treaty of Nice as early as 1999, the European Council introduced the idea of solidifying the legitimacy of the EU by presenting an EU Charter of Rights.<sup>80</sup> It should however take another 10 years for the EU to reaffirm the fundamental principles in a new set of catalogued fundamental rights by way of the CFREU (or 'the Charter') when the Lisbon Treaty came into force in 2009.<sup>81</sup> Additionally, the EU formally acceded to the ECHR by way of the Lisbon Treaty, although up till this day the EU is not a signatory party to the Convention due to legal and political hindrances. Nonetheless, the Charter forming part of EU primary law afforded an even higher protection than the ECHR with subtitles relating to six fundamental values: (i) dignity, (ii) freedom, (iii) equality, (iv) solidarity, (v)

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<sup>76</sup> Andrew Ashworth, 'Self-Incrimination in European Human Rights Law – A Pregnant Pragmatism?', *Trust law in the 21st century; The future of self-incrimination: fifth amendment confessions & guilty pleas*, Cardozo Law Review, 2008, pg.754.

<sup>77</sup> See *Funke v. France*, Application No.10828/84, ECHR, 25.02.1993.

<sup>78</sup> Catherine Barnard & Steve Peers (ed.), *European Union Law*, Oxford, OUP Oxford, 2014, pg.226.

<sup>79</sup> *Ibid*, pp.228-229.

<sup>80</sup> *Ibid.*, pg.25.

<sup>81</sup> *Ibid.*, pg.226.

citizen's rights and (vi) justice.<sup>82</sup> In Article 6 of the TEU, the EU recognises the Charter which is elevated to the same legal value as the treaties and in paragraph 3 even declares that the CJEU has the power to go beyond the rights written down in the Charter in an effort to ensure an adequately high level of protection for Union citizens.<sup>83</sup>

To ensure the legality of any EU law and implementation of Directives or Regulations into national law, the EU and Member States must always ensure that it is not in conflict with the fundamental rights. This creates a balance between the power handed to EU institutions by way of limitation and therefore empowering EU citizens.<sup>84</sup> The Charter is applicable to all EU citizens when it comes to EU matters which is defined in Article 20 of the TFEU as meaning any natural or juridical person who is a national of a Member State belonging to the EU, can claim their rights under the Charter.<sup>85</sup>

### 3.3.2 The Charter: Article 47 Right to a Fair Trial

Under *Title VI Justice* of the CFREU, Article 47 guarantees the right to an effective remedy and to a fair trial. The first paragraph relates to an effective remedy based on Article 13 of the ECHR. The following English translation of Article 47 mirrors Article 6(1) of the ECHR and reads:

*“Article 47(2): Right to a fair trial*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.”*

Paragraph 3 ensures legal aid to persons lacking financial resources to have access to justice. Both paragraphs 1 and 3 are irrelevant for the purpose of this paper as they do not implicitly refer to the right against self-incrimination.

The CJEU has heavily relied on the case law of the ECtHR regarding the right against self-incrimination as the Charter has not been in effect for such a long period as the Convention has.<sup>86</sup>

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<sup>82</sup> Catherine Barnard & Steve Peers (ed.), *European Union Law*, Oxford, OUP Oxford, 2014, pg.238.

<sup>83</sup> *Ibid.*, pg.235.

<sup>84</sup> *Ibid.*, pg.230.

<sup>85</sup> See Article 54 of the TFEU in which juristic persons are equated with natural persons.

<sup>86</sup> Giuseppe Marino, 'Chapter 10: Limitation of Administrative Penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights', in Roman Seer & Anna Lena Wilms (eds.), *Surcharges and Penalties in Tax Law*, IBFD, 2015, pp.135-136.

It is, however, expected that the CJEU will play an increasingly bigger role in future when it comes to EU fundamental rights.<sup>87</sup>

### 3.4 Directive 2016/343/EU on the Presumption of Innocence

Besides implementing the Charter (*primary law*), the Union has also introduced several directives (*secondary law*) that relate to criminal proceedings in the EU.<sup>88</sup> The latest one is the Directive on Presumption of Innocence of the European Parliament and of the Council published on 9 March 2016 that sets out *de minimus* rules<sup>89</sup> strengthening procedural rights of accused persons<sup>90</sup> concerning the presumption of innocence and the right to be present at the trial. The aim of the Directive is to enhance judicial cooperation in criminal proceedings within the Union which is based on the principle of mutual recognition of national court or other judicial judgements.<sup>91</sup> In practice, however, the principle has not always been able to be implemented as Member States lacked trust in each other's criminal judicial systems, although all Member States are bound by the CFREU and the ECHR.<sup>92</sup> The Directive must have been transposed into national law by all Member States before 1 April 2018<sup>93</sup> and therefore can be relied upon via national law by persons in the EU.

A limiting factor is that the Directive only applies to natural persons<sup>94</sup> in criminal proceedings as defined by the CJEU without prejudice against case law from the ECtHR.<sup>95</sup> It is also unclear how the Directive can be interpreted in light of the case law of both the CJEU and the ECtHR, because Preamble 11 excludes sanctions relating to taxes or tax surcharges.

In conclusion, the legal relevance of the Directive in relying on fundamental rights seems questionable in the situation where a taxpayer wants to assert his or her right against self-incrimination under the new MDRs.

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<sup>87</sup> Philip Baker, 'Some Recent Decisions of the European Court of Human Rights on Tax Matters (and Related Decisions of the European Court of Justice)', *European Taxation*, Vol. 56, no. 8, 2016, pg.351. Available from: IBFD, (last accessed 31.05.2018).

<sup>88</sup> Fair Trials & LEAP, 'EU Directive on the Presumption of Innocence: Implementation Toolkit', 2017, pg.4. Available at: [https://www.fairtrials.org/wp-content/uploads/2017/06/Presumption-of-Innocence-Toolkit\\_2.pdf](https://www.fairtrials.org/wp-content/uploads/2017/06/Presumption-of-Innocence-Toolkit_2.pdf), (last updated Spring 2017).

<sup>89</sup> *Directive on Presumption of Innocence 2016* (EU) Preamble 9.

<sup>90</sup> *Ibid.*, Preamble 10.

<sup>91</sup> *Ibid.*, Preamble 3.

<sup>92</sup> *Ibid.*, Preamble 5.

<sup>93</sup> *Ibid.*, Article 14.

<sup>94</sup> *Ibid.*, Preamble 12.

<sup>95</sup> *Ibid.*, Preamble 11.

### 3.5 Conclusion

The right against self-incrimination (*nemo tenetur*) is a fundamental human right that can be found in Article 6 of the Convention, Article 47 of the Charter and Article 7 of the Directive on Presumption of Innocence. The Convention is applicable to all signatory countries that are party to the Convention, whereas both the Charter and Directive on Presumption of Innocence are only applicable within the EU. The Directive is not applicable in tax proceedings. The right against self-incrimination either implicitly falls under the right to a fair trial or is explicitly stated. However, in either cases, the meaning of the right against self-incrimination is the protection of persons who are unduly coerced to disclose information to public authorities. It is in combination with the right to remain silent that tax authorities must be aware of their limitations when requesting information from the taxpayer.

## Chapter 4: The Right to Confidentiality

### 4.1 The Legal Sources for the Protection of Taxpayers' Rights

Chapter 4 will answer the second question, *'What does the right to confidentiality mean?'*. The right to confidentiality is encompassed in the general right to respect for private and family life and has been established by both the ECtHR and the CJEU.

### 4.2 The Convention: Article 8 Right to respect for private and family life

The second human right under consideration in this paper is written down in Article 8 of the Convention on Human Rights and reads in the English language version as follows:

*"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."*

Article 8 is visibly separated into two parts with the first paragraph ensuring the right to respect for private and family life, home and correspondence for persons by the State. In the second paragraph the right set out in the first part is restricted and it is laid out in which situations- namely in the interests of public security, safety, health or morals and the prevention of crime- the State may interfere with the right set out in Article 8(1). Therefore, the ECtHR has established a two-stage test where they first assess whether the applicant's claim actually falls within the ambit of Article 8(1) and only when it is an acceptable right thereunder does the Court examine whether the State's intervention into that right could objectively be justified. Overall, the Court has given Article 8 a very broad scope with some specific rights implicitly found in the article with the aim to "protect against arbitrary interferences with private and family life, home and correspondence."<sup>96</sup>

The primary focus of this chapter is the protection of the right to confidentiality relating to "correspondence", as it becomes vital for the relationship between a person bound by legal professional privilege ('LPP') and his or her client. For the sake of this paper, persons bound by

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<sup>96</sup> ECHR, *Guide on Article 8 of the Convention – Right to respect for private and family life*, 2017, pp.7-8.

LPP will be referred to as lawyers. “Correspondence” includes any hardcopy<sup>97</sup> or digital files<sup>98</sup> and electronic data<sup>99</sup> belonging to a lawyer. A lawyer’s work is of utmost importance in a democratic society when defending accused persons. Hence, the correspondence between the two parties should be kept confidential in order to create trust between the lawyer and his or her client. The confidentiality between the two parties may also be called LPP and is an obligation bestowed upon a lawyer to his or her client. The right to confidentiality between a client and his or her lawyer is therefore also closely linked to Article 6 which deals with the right to a fair trial.<sup>100</sup>

Article 8(1) of the Convention furthermore expands to the right of respect of home which includes the office or firm of a lawyer.<sup>101</sup> This has the implication that very clear and specific rules<sup>102</sup> must be adhered to when searching a lawyer’s premises as it may be an infringement on the lawyer’s obligation of professional secrecy.<sup>103</sup> Especially in cases in which public authorities sought incriminating evidence<sup>104</sup> on a lawyer’s client, it was considered to be a breach of LPP.<sup>105</sup>

As mentioned above, an interference by public authorities must be justified in accordance with Article 8(2) of the Convention by either being “in accordance with the law”<sup>106</sup>, pursuing “legitimate aims”<sup>107</sup> and to be “necessary in a democratic society”. “Interference” can mean any interception, monitoring, seizure or censorship<sup>108</sup> and the concept of necessity refers to an important social need for the infringement and that it is proportionate to the objective of the measure taken.

### 4.3 The Charter: Article 7 Respect for private and family life

Article 7 relating to the right to respect for private and family is the equivalent legislative text to Article 8 of the Convention and states the following in the English language version:

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<sup>97</sup> See for example *Niemietz v. Germany*, Application No.13710/88, ECHR, 16.12.1992, paras.32-33; *Roemen and Schmit v. Luxembourg*, Application No.51772/99, ECHR, 25.02.2003, para.65.

<sup>98</sup> See *Petri Sallinen and Others v. Finland*, Application No.50882/99, ECHR, 27.09.2005, para.71.

<sup>99</sup> See *Wieser and Bicos Beteiligungen GmbH v. Austria*, Application No.74336/01, ECHR, 16.10.2007, paras.66-68; *Robathin v. Austria*, Application No.30457/06, ECHR, 03.07.2012, para.39; *Vinci Construction and GTM Génie Civil et Services v. France*, Application No. 63629/10, 60567/10, ECHR, 02.04.2015, para.69.

<sup>100</sup> See *Michaud v. France*, No. 12323/11, ECHR, 06.12.2012, paras.118-119.

<sup>101</sup> See for example *Buck v. Germany*, Application No.41604/98, ECHR, 28.04.2005, paras.31-32; *Niemietz v. Germany*, Application No.13710/88, ECHR, 16.12.1992, paras.30ff.

<sup>102</sup> See *Petri Sallinen and Others v. Finland*, Application No.50882/99, ECHR, 27.09.2005, para.90.

<sup>103</sup> See *André and Another v. France*, Application No.18603/03, ECHR, 24.07.2008, para.41.

<sup>104</sup> *Ibid.*, para.47.

<sup>105</sup> See *Smirnov v. Russia*, Application No.71362/01, ECHR, 07.06.2007, paras. 46 & 49.

<sup>106</sup> See *Robathin v. Austria*, Application No.30457/06, ECHR, 03.07.2012, paras.40-41.

<sup>107</sup> See *Tamosius v. the United Kingdom*, Application No.62002/00, ECHR, 19.09.2002; *Michaud v. France*, No. 12323/11, ECHR, 06.12.2012, paras.99 & 131.

<sup>108</sup> See *Golder v. United Kingdom*, Application No.4451/70, ECHR, 21.02.1975, para.43.

*“Article 7 Respect for private and family life*

*Everyone has the right to respect for his or her private and family life, home and communications.”*

The use of the word “communications” is representative of the fact that the EU wants to encompass not only correspondence, but any form of communication which is in line with the rapid change in technological communication options. There is also no second part that explicitly states the restriction to the said right. Nonetheless, the CJEU has again been profoundly relying on the case law of the ECtHR regarding the protection of this right.<sup>109</sup>

#### **4.4 Conclusion**

The right to confidentiality is implicitly inserted under the right to respect for private and family life. This fundamental human right can be found in Article 8 of the Convention and Article 7 of the Charter. The meaning of the right to confidentiality is especially crucial when determining whether a person who is bound by LPP can claim the right when refusing to disclose certain information relating to clients under the information duties. The right to confidentiality is, however, not an absolute right and can be restricted in instances the State claims the interest of public security, safety, health or morals and the prevention of crime.

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<sup>109</sup> EU Network of Independent Experts on Fundamental Rights, ‘Commentary of the Charter of Fundamental Rights of the European Union’, 2006, pg.78. Available at: <https://sites.uclouvain.be/cridho/documents/Download.Rep/NetworkCommentaryFinal.pdf>.

# Chapter 5: The Compatibility of the Tax Obligation with the Fundamental Rights

## 5.1 The Crossroads between Taxation and Human Rights

The doctrine encompassing human rights has always bestowed certain intrinsic rights on persons. These rights are inextricably linked to the very being of a person and should not be relativized or distinguishable from the person itself.<sup>110</sup> The protection of fundamental human rights is thus legally protected by means of three separate levels of jurisdictions in and around Europe. The first level is undoubtedly the constitution of each Member State that guard fundamental rights enshrined in the respective Bill of Rights.<sup>111</sup> On the supranational level, the Union level with the Court of Justice of the European Union ('CJEU') in Luxembourg, reinforced the fundamental rights that were declared to be part of the general principles of EU law and later codified.<sup>112</sup> The third human rights instrument operates on an international level. The European Convention of Human Rights ('ECHR')<sup>113</sup> is enforced by the European Court of Human Rights ('ECtHR') in Strasbourg.<sup>114</sup>

Direct taxation policy on the other hand is not typically considered to fall within the scope of the EU. It is often still alleged to fall strictly under each countries jurisdiction and although it forms part of the legislative body, taxation has been a means for governments to optimally raise public funding to supply necessary socio-economic improvements. Historically, taxation has been perceived as having a primary economic function. Human rights, therefore, usually only played an inferior role in discussions revolving around taxation.<sup>115</sup>

Nonetheless, "taxation and human rights are linked through protection of the taxpayer's rights"<sup>116</sup> and consequently taxation does not fall outside of the scope of human rights. The legitimacy and proportionality of national measures relating to taxation have been assessed on an ongoing basis

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<sup>110</sup> See the Vienna Declaration and Program of Action (1993) UN Doc. A/CONF.157.23.

<sup>111</sup> See Article 1 European Convention of Human Rights.

<sup>112</sup> The Charter of Fundamental Rights of the European Union, OJ C 326 (26 Oct. 2012), available at: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf?](http://www.europarl.europa.eu/charter/pdf/text_en.pdf?)

<sup>113</sup> The European Convention on Human Rights, Nov. 4, 1950, available at: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>114</sup> Johan Callewaert, 'The Privilege against Self-Incrimination in European Law', *The Rights of the Defence in European Law* (ERA Forum), Vol. 5, Issue 4, Springer-Verlag, 2004, pg.488.

<sup>115</sup> Emmanuel Ekiba Bagenda, *A Human Rights Approach to Taxation*, Africa Tax Spotlight (Newsletter), 2011 Volume 2, pp.3-4.

<sup>116</sup> Giuseppe Marino, 'Chapter 10: Limitation of Administrative Penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights', in Roman Seer & Anna Lena Wilms (eds.), *Surcharges and Penalties in Tax Law*, IBFD, 2015, pp.134-135.



by both the ECtHR<sup>117</sup> and only recently the CJEU. Within the case law of the ECtHR pertaining to issues surrounding taxation, it has been declared according to the *Ferrazzini* case<sup>118</sup> that cases exclusively dealing with taxation such as ordinary tax disputes between the tax authorities and a taxpayer<sup>119</sup> will, nevertheless be found inadmissible by the Court for the sole reason that the rights and obligations are not considered to be civil in nature. On the other hand, taxation cases relating to penalties set according to the tax liability<sup>120</sup> or fiscal cases that involved different types of “criminal charges”<sup>121</sup> were considered to fall within the scope of the legislation referring to fundamental rights.

## 5.2 Limitations on the Mandatory Disclosure Obligations

In order to address the third question, ‘*What are the implications for intermediaries and taxpayers under the adopted mandatory disclosure regime (DAC6)?*’, Chapter 5 will discuss the implications for both intermediaries and taxpayers at a Union level in the context of the right against self-incrimination and the right to confidentiality.<sup>122</sup> In order to make things easier, this chapter will only refer to intermediaries and taxpayers that fall within the scope of the DAC6.

## 5.3 The Implications for Intermediaries

The adopted mandatory disclosure of reportable cross-border tax arrangements will have a significant impact on intermediaries who qualify to fall within the adopted DAC6, not only by way of increased administrative burden, but also from a human rights perspective. The EU Commission has been called upon to come up with this new measure that is based on Action Plan 12 of the OECD BEPS projects<sup>123</sup> against the current harmful tax practices<sup>124</sup>, but has also stated in the Preamble 17 of the DAC6 that the Directive is in line with the fundamental rights set out in the CFREU and the general EU principles. Preamble 18 further claims that this new measure is proportionate to achieve the aim of the EU Commission which is to deter intermediaries from developing harmful cross-border tax schemes.

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<sup>117</sup> Clement Endresen, *Taxation and the European Convention for the Protection of Human Rights: Substantive Issues*, Intertax, Volume 45, Issue 8 & 9, Kluwer Law International, 2017, pg.525.

<sup>118</sup> See *Ferrazzini v. Italy* [GC], Application No.44759/98, ECHR, 12.07.2001.

<sup>119</sup> Philip Baker, ‘Should Article 6 ECHR (Civil) Apply to Tax Proceedings?’, *Intertax*, Vol. 29, Issue 6-7, 2001, ppg206. Available from: Kluwer Law International, (last accessed 27.05.2018).

<sup>120</sup> See *Jussila v. Finland* [GC], Application No.73053/01, ECHR, 23.11.2006.

<sup>121</sup> See *Dukmedjian v. France*, Application No.60495/00, ECHR, 31.01.2006.

<sup>122</sup> Jasna Voje, ‘EU Implementation of BEPS Action 12 in Light of Human Rights Requirements’, *European Taxation*, Vol. 57, no. 5, 2017, pg.196. Available from: IBFD, (last accessed 27.05.2018).

<sup>123</sup> *DAC6 2018* (EU) Preamble 4.

<sup>124</sup> *Ibid.*, Preamble 2.

The main issue arising for intermediaries are the potential consequences relating to the right to confidentiality which has been discussed in Chapter 4 before. Article 8 of the ECHR and Article 7 of the CFREU both relate to the right to confidentiality which may only be restricted on the following three justification grounds: if it is (i) in accordance with the law, (ii) a necessary safeguard for a democratic society and (iii) proportionate.

### *The Right to Confidentiality*

The issue arises when the intermediary is a legal professional bound by LPP. As every Member State defines LPP differently, there is a vast disparity between who can claim LPP in the EU. This should be considered by Member States when transposing the DAC6 to ensure that intermediaries bound by LPP cannot easily shift the administrative burden of disclosure to another intermediary not bound by LPP or the taxpayer by claiming professional secrecy.<sup>125</sup> For the sake of simplification, intermediaries bound by LPP will be referred to as lawyers.

One theoretical scenario is that the lawyer successfully defends his obligation of confidentiality towards his or her client (the taxpayer). In that case, the obligation to report would fall to any other intermediary involved in developing the reportable cross-border arrangement or if no other intermediary exists, the lawyer would have to inform the client of his or her duty to disclose the arrangement to the relevant tax authorities. The other scenario would be that the lawyer cannot refuse to disclose the reportable arrangement to the relevant tax authorities by insisting on LPP.

At this point, it is unclear how the Court will rule in such a case without any further facts. As the DAC6 has not entered into force yet, no case law exists regarding mandatory disclosure obligation. Therefore, to examine the implications for the intermediary who is a lawyer, it is necessary to refer to similar Directives and case law that relate to LPP. When referring to Article 2 of the Anti-Money Laundering ('AML') Directive 2015/849<sup>126</sup> it is stated that legal professionals must adhere to the disclosure requirements under the AML Directive in situations where the legal professional offers legal services that do not fall under the obligatory LPP. This is in line with case law by both European Courts. The ECtHR ruled in 2012 in the case *Michaud v. France* that LPP only applies when the legal advice is given in the context of a judicial proceeding. In another case<sup>127</sup> brought before the CJEU, the judges also concluded that the AML Directive does apply to legal professionals such as lawyers, unless the latter were assisting the client in legal proceedings.

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<sup>125</sup> Jasna Voje, 'EU Implementation of BEPS Action 12 in Light of Human Rights Requirements', *European Taxation*, Vol. 57, no. 5, 2017, pg.199. Available from: IBFD, (last accessed 27.05.2018).

<sup>126</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5 June 2015.

<sup>127</sup> Judgement of 26 June 2007, *Ordre des barreaux francophones et Germanophone and Others*, C-305/05, EU:C:2007:383.

In conclusion, as the AML Directive is part of the same measures implemented by the Union regarding increased transparency as the adopted DAC6, it would be prudent to assume that an intermediary who is a lawyer cannot claim LPP when trying to circumvent the obligation to disclose a reportable arrangement in the ordinary process required by the DAC6. The right to confidentiality is thus generally not breached and therefore cannot be relied upon by the intermediary.

## 5.4 The Implications for Taxpayers

When turning the attention to the relevant taxpayer for whom the reportable arrangement has been developed and implemented, the right against self-incrimination is essential. A general positive implication of the adopted mandatory disclosure regime for taxpayers can include the minimization of the risk of double taxation as all relevant tax authorities are aware of where the taxable income is generated and therefore (usually) taxed. However, the new DAC6 is far more perceived as a burden for strategically planning taxes and results in high costs and less legal certainty of whether the arrangement will be allowed to be implemented by the tax authorities.<sup>128</sup>

There is also the human rights' issue of the right against self-incrimination for the taxpayer. Following from the previous subchapter (5.2.1), when the reporting obligation falls to the taxpayer because the intermediary cannot disclose the arrangement, the issue arises of whether the taxpayer can invoke his right against self-incrimination and thereby circumvent his obligation to disclose the reportable arrangement. This would result in no reportable cross-border arrangement being disclosed to the relevant tax authorities.

### *Case Law*

As mentioned in Chapter 3, *nemo tenetur* can only be claimed in a criminal proceeding when the investigation by the relevant tax authorities or the State. A relatively straight-forward case *J.B. v. Switzerland*<sup>129</sup> was brought before the ECtHR on the basis that the applicant had refused to provide documents for a tax evasion proceeding he was accused in. Tax evasion is considered to be illegal and therefore the proceeding was a criminal proceeding in which the taxpayer would be fined. The Court agreed with the applicant's claim to his right under Article 6(1) of the ECHR. It reiterated that *nemo tenetur* ensured that an accused person could not be forced to comply with the authorities request for additional documentation. Instead the authorities could access the evidence by other means.

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<sup>128</sup> Niels Diepvens & Filip Debelva, 'The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights under Pressure', *EC Tax Review*, Issue 4, 2015, pg.215. Available from: Kluwer Law International, (last accessed 27.05.2018).

<sup>129</sup> See *J.B. v. Switzerland*, Application No.31827/96, ECHR, 03.05.2001.

In another case referred to the ECtHR by the Dutch Supreme Court in *Van Weerelt v. Netherlands*<sup>130</sup> a taxpayer had refused to disclose information as required by the Dutch tax authorities under the old Council Directive 77/799/EEC<sup>131</sup> concerning mutual assistance due to the threat of self-incrimination. The ECtHR agreed with the Dutch Supreme Court and reasoned that information that could only be directly obtained from the taxpayer, could not then later be used to impose punitive charges such as a fine or used in a criminal proceeding against the taxpayer. Therefore, there was no infringement of Article 6(1) of the ECHR. It becomes apparent that a taxpayer can only assert his or her right against self-incrimination when threatened with a fine, penalty or other criminal charge and only then refuse to disclose certain information. At this point, it is worth venturing to a discussion about when an ordinary tax proceeding can result in a criminal charge.<sup>132</sup>

The question then is how to determine when *nemo tenetur* is applicable as the term ‘criminal charge’ is broad and not limited to formal criteria (e.g. whether penalties are considered as unreasonably high or substantial).<sup>133</sup> In the *Engel and Others v. the Netherlands*<sup>134</sup> case, the phrase ‘criminal charge’ was determined by the sitting judges on the basis of the so-called *Engel* criteria. The *Engel* criteria required the following:

- (i) judges should enquire how the offence in question is characterized in the domestic law of the relevant country;
- (ii) only then the nature of the offence would be considered and lastly
- (iii) the seriousness of the offence would be examined.

Although the criteria are not necessarily cumulative, it can occur that the examination by the judges result in the affirmation that in all three instances it is considered a criminal charge.<sup>135</sup>

Furthermore, the determination of the precise instance when it becomes a criminal proceeding is of paramount importance in order to know as of what point Article 6 of the Convention can be relied upon. In the case law of the ECnHR, *Abas v. Netherlands*<sup>136</sup> specifically revolved around this question. A taxpayer who brought the claim to the ECnHR had moved to Ireland where he

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<sup>130</sup> See *Van Weerelt v. Netherlands*, Application No.784/14, ECHR, 16 June 2015.

<sup>131</sup> Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

<sup>132</sup> Jasna Voje, ‘EU Implementation of BEPS Action 12 in Light of Human Rights Requirements’, *European Taxation*, Vol. 57, no. 5, 2017, pg.198. Available from: IBFD, (last accessed 27.05.2018).

<sup>133</sup> See *Bendenoun v. France*, Application No.12547/86, ECHR, 24.02.1994.

<sup>134</sup> See *Engel and Others v. The Netherlands*, Application No.5100/71, 5101/71, 5102/71, 5354/72, 5370/72, ECHR, 08.06.1976.

<sup>135</sup> Ana Paula Dorado & Augusto Silva Dias, ‘Chapter 8 Information Duties, Aggressive Tax Planning and *nemo tenetur se ipsum accusare* in the light of Art. 6(1) of ECHR’, in Miguel Poiars Maduro, Pasquale Pistone *et al* (eds.), *Human Rights and Taxation in Europe and the World*, IBFD, 2011, pg.137.

<sup>136</sup> See *Abas v. Netherlands*, Application No.27943/95, ECHR, 26.02.1997.

followed his job as a pilot and thereby claiming to cease to be resident in The Netherlands. The Dutch tax inspector, however, requested further information supporting the claim that the taxpayer was no longer a Dutch tax resident. As part of the opening of a preliminary judicial investigation into the taxpayer's claim, the latter's family home was searched, and documents seized. From these documents the tax inspector inferred that the taxpayer was in fact still a Dutch tax resident, thus, bringing charges of fraud and tax evasion against the taxpayer for which he got convicted of, sentence for 2 years in jail and received an additional 500.000 Dutch guilders fine. The ECnHR ruled in favour of the taxpayer after having heard the facts of the case. They examined whether the criminal proceedings had commenced when the tax inspector had written the letter asking for further information or only when the search of the family home was conducted. This was done by examining whether the taxpayer had already been charged with a "criminal offence" in light of the autonomous meaning in Article 6(1) of the Convention. The judgement therefore stated that the taxpayer was only "substantially affected" by the investigation (the home search) and therefore Article 6(1) of ECHR was applicable from the moment of the commencement of the investigation. The enquiry happening before the home search was concluded as being part of an ordinary tax investigation and therefore not part of the criminal proceedings.

The criteria of "substantially affected" determining the commencement of a criminal proceeding, was yet again confirmed in the case *Allen v. the United Kingdom*<sup>137</sup>. The Court, however, also established that *nemo tenetur* cannot be relied on in any given situation when being requested to provide information. *Nemo tenetur*, however, does go hand in hand with the right to remain silent when being questioned by the tax authorities.<sup>138</sup>

## 5.5 Conclusion

To conclude Chapter 5, the main implications for intermediaries and taxpayers have been discussed respectively. The claiming of LPP will in most cases not be possible as the DAC6 is considered to be an ordinary tax procedure. This would change when the tax authorities would act on the information provided under the MDRs and begin criminal proceedings against the taxpayer. Other implications of the new DAC6 can include, e.g. the penalties imposed for non-compliance during the transition period of the DAC6. As the DAC6 is not in force yet, the legitimacy of imposing a penalty for non-compliance can be called into question. In the recent *Berlioz* case, the Court ruled that monetary penalty must allowed to be challenged by the affected taxpayer under the principle of effective judicial protection manifested in Article 47 of the CFREU.<sup>139</sup> Another

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<sup>137</sup> See *Allen v. the United Kingdom*, Application No.76574/01, ECHR, 10.09.2002.

<sup>138</sup> Ana Paula Dorado & Augusto Silva Dias, 'Chapter 8 Information Duties, Aggressive Tax Planning and *nemo tenetur se ipsum accusare* in the light of Art. 6(1) of ECHR', in Miguel Poiars Maduro, Pasquale Pistone *et al* (eds.), *Human Rights and Taxation in Europe and the World*, IBFD, 2011, pg.140.

<sup>139</sup> Grand Chamber Judgement of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373.

reservation relates to cross-border arrangements that have been designed for a longer period already and are only finalised after the 20<sup>th</sup> day of the DAC6 publication in the Official Journal of the European Union. The relevant intermediaries and taxpayers will have to consider whether changing the scheme structure so not to invite a tax investigation into the arrangement at a later stage.

## Chapter 6: Findings & Conclusion

### 6.1 Findings

The aim of this paper was to assess whether the mandatory disclosure obligation for intermediaries in light of the adopted amendment to the Directive of Administrative Cooperation 2011/16/EU is compatible with both the right against self-incrimination and the right to confidentiality of taxpayers. Three questions were used to assess the legal issue and come to a reasonable conclusion.

The adopted DAC6 is a bold and aggressive step in the Commission's intention to curb harmful tax practices most of which are developed and implemented by intermediaries for taxpayers.<sup>140</sup> The amending Directive sets out detailed legislative text concerning reportable cross-border arrangements that will have to be disclosed even retroactively by either intermediaries or in certain cases by the taxpayer possibly as early as August 2018.<sup>141</sup>

In order to assess the compatibility of the DAC6 with the relevant fundamental human rights, it was necessary to understand the scopes of both the right against self-incrimination and the right to confidentiality in light of the ECHR and the CFREU. *Nemo tenetur* is only effectively claimable by a taxpayer when he or she is "substantially affected" by the investigation of the relevant tax authorities. In other words, if the taxpayer is threatened with a criminal charge or proceeding as a consequence of disclosing requested information to the tax authorities, he or she may claim protection under the right against self-incrimination on the basis of both the ECHR and CFREU.<sup>142</sup>

The right to confidentiality was explained in Chapter 4 as part of the general right to respect for private and family life and has been established by both the ECtHR and the CJEU. The right to confidentiality in the context of the adopted mandatory disclosure regime can be narrowed down to the LPP- an obligation on a lawyer towards his or her client.

The final question about the implications of the mandatory disclosure obligations for intermediaries and taxpayers at a Union level was discussed in Chapter 5 in the context of the right against self-incrimination and the right to confidentiality.<sup>143</sup> The analysis of the case law has brought to light that both European Courts require that the measure of obliging the reporting party

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<sup>140</sup> DAC6 2018 (EU) Preamble 2.

<sup>141</sup> Pie Geelen, Shee Boon Law & Sachin Sachdeva, *EU adopts directive on mandatory disclosure of aggressive tax planning schemes: key take- aways*, Global Tax Alert, DLA Piper, last accessed on: 23.03.2018.

<sup>142</sup> Ana Paula Dorado & Augusto Silva Dias, 'Chapter 8 Information Duties, Aggressive Tax Planning and *nemo tenetur se ipsum accusare* in the light of Art. 6(1) of ECHR', in Miguel Poiaras Maduro, Pasquale Pistone *et al* (eds.), *Human Rights and Taxation in Europe and the World*, IBFD, 2011, pg.137.

<sup>143</sup> Jasna Voje, 'EU Implementation of BEPS Action 12 in Light of Human Rights Requirements', *European Taxation*, Vol. 57, no. 5, 2017, pg.196. Available from: IBFD, (last accessed 27.05.2018).

to disclose in the procedural process must not go beyond the necessary steps to achieve the optimal purpose of the DAC6.

## 6.2 Conclusion

The case law of the ECtHR and CJEU has dealt with the legal question when *nemo tenetur* and the right to confidentiality can be applied. The implication of successfully claiming LPP for the intermediary will allow a relief for that specific intermediary, but it is questionable whether the professional secrecy obligation can be demanded at all. The ECHR case law clearly outlines that LPP cannot be invoked in an ordinary tax process required by the DAC6, unless the intermediary is representing the taxpayer in a criminal proceeding.

The legal protection against the threat of self-incrimination of the taxpayer can theoretically be raised when dealing with the new mandatory disclosure regime. The taxpayer has the right to assert his or her right against self-incrimination if the threat of criminal charges and/or proceedings on the basis of the reported arrangement is apparent. However, there is no indication of whether the tax authorities will introduce criminal proceedings or impose penalties due to information disclosed under the DAC6. Therefore, the taxpayer will have to comply with the MDRs and may only be able to ask for a written confirmation from the tax authorities. With the implementation of the DAC6, intermediaries' as well as taxpayers' access and claim to their human rights, specifically as concerns the right against self-incrimination and the right to confidentiality, is ensured, but mostly found to be irrelevant under the common procedural rules set out in the DAC6.

The delimitations of scope of this paper allows for future research to be done in the field of the mandatory disclosure by intermediaries. After transposition of the DAC6 into national law of each Member State, cases relating to issues with the implemented DAC6 will be referred to the CJEU and applications made to the ECtHR. The new case law can then be analysed and compared to the findings of this paper. Following on from the newly enforced GDPR, the question arises and needs further research whether the right to data protection is compatible with the DAC6.



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Figure 1 provides a chronological overview of the six EU directives relating to administrative cooperation between Member States’ tax authorities.

Figure 2 provides a detailed timeline of the legislative process of adopting and implementing DAC6.

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