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Sweden's implementation of DAC 6 – A proportionate measure to prevent tax avoidance and evasion in the form of aggressive tax planning

by

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Summary

After the financial crisis in 2008, governments became more aware about how multinational enterprises exploited gaps in the architecture of the international tax system in the globalized world to artificially shift profits to places where there was little or no taxation. It is estimated that base erosion and profit shifting cost countries 100-240 billion USD in lost revenue annually which is equal to 4-10% of the global corporate income tax. There are over 135 countries collaborating on the implementation of 15 measures to tackle tax avoidance. Action 12 of OECD/G20 inclusive framework on BEPS provides recommendation of rules which are designed to require intermediaries and, in some cases, relevant taxpayer to disclose information on potentially aggressive tax planning arrangements. The European Union has further adopted the amending directive DAC 6, which is based on Action 12. The main purpose with DAC 6 is to prevent tax avoidance and evasion in the form of aggressive tax planning. The implementation of the EU directive means that member states of EU are obliged to implement mandatory disclosure rules for cross-border arrangements. The DAC 6 has been criticized for broad and vague formulation of central words which creates uncertainty for the application. Further, broadly worked hallmarks and wide information required to be filed creates danger for disproportionality. The paper intends to investigate whether the Swedish implementation of the directive is a proportionate measure to prevent tax avoidance and evasion in the form of aggressive tax planning. In order to do so, the DAC 6 is first described, since the Swedish implementation is based on the directive. The Swedish government's interpretation is further explained as well as the expected benefit and costs of the rules. The principle of proportionality is then described, both its status in law, and how the CJEU have approached the principle. The result of the essay is that levying substantial administrative burden on intermediaries and relevant taxpayers for legitimate but undesirable arrangements, is not likely proportionate.

Preface

Thanks to all teachers and fellow students at Lund University which I have had a great pleasure to get to know and gain knowledge from. I would also like to express gratitude to my family and friends for being supportive during this master thesis. Special thanks to Sigrid Hemels for being my thesis supervisor. Finally, I would like to thank Cécile Brokelind and Lund university for the master's programme in European and International Tax Law. This year has been challenging, fun and educative.

Abbreviation list

BEPS - Base Erosion and Profit Shifting

CIT - Corporate Income Tax

DAC 6 - Council Directive 2018/822/EU of 25 May 2018

EBIT – Earnings Before Interest and Tax

EU – European Union

EUR - Euro

MDR – Mandatory Disclosure Rules

MNE – Multinational Enterprises

MS – Member State

SEK – Swedish Crowns

SFL – Swedish Tax Precedures Act

TEU – Treaty on European Union

USD – United States Dollar

1.Introduction

1.1 Background

Different countries national tax systems were mainly designed before the era of globalisation and after the closed national economy model. Globalisation has generally been seen as prosperity and well-being, but since the financial crisis in 2008, the governments needed to increase their tax revenue. The governments became more aware about how MNE's exploited gaps in the architecture of the international tax system in the globalized world to artificially shift profits to places where there is little or no activity or taxation by aggressive tax planning strategies. The most famous and talked-about cases have been Starbucks, Amazon, Google and IKEA, also the "double Irish with a Dutch sandwich" is very well spoken scheme.[1] Another contributed factor to aggressive tax planning may be considered to be tax competition between different states. Tax competition means that states try to attract taxpayers and capital to their country by offering more beneficial tax treatment.[2]

The international society consider aggressive tax planning to be a serious problem. Following were stated in G20 Leaders Declaration:

> "Cross-border tax evasion and avoidance undermine our public finances and our peoples trust in the fairness of the tax system. Today, we endorsed plans to address these problems and committed to take steps to change our rules to tackle tax avoidance, harmful practices and aggressive tax planning."[3]

The work to counteract aggressive tax planning is conducted on both national and international level.[4] It is estimated that base erosion and profit shifting (BEPS) cost countries 100-240 billion USD in lost revenue annually, which is equal to 4-10% of the global CIT.[5] In order to prevent MNE's BEPS practice, over 135 countries are collaborating on the implementation of 15 measures to tackle tax avoidance, improve coherence of international tax rules and establish a more transparent tax environment.[6] BEPS Action 12 report provides recommendation of rules designed to require intermediaries and relevant taxpayers to disclose

[1] Panayi (2015) p.14 ff.; Hilling, A. och Ostas (2017) p. 42; dir. 2017:38 p. 3.
[2] Panayi (2015) p. 4 f.; Dahlberg (2014) p. 32 f.
[3] G20 Leaders' Declaration, Saint Petersburg Summit, 5-6 September 2013, para 6.
[4] European Commission. < https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52012SC0404>17/4.
[5] OECD.com <http://www.oecd.org/tax/beps/about/> 31/3.
[6] OECD.com <http://www.oecd.org/tax/beps/about/> 31/3.

aggressive tax planning arrangements. The recommendations aims to achieve a balance between the need for early information on aggressive tax planning schemes with a requirement that the disclosure is appropriately enforceable, targeted and avoids placing too much administrative burden on taxpayers.[7] The report also sets out recommendations for the development and implementation of more effective information exchange between different countries tax administrations.[8] The EU has further adopted the amending Directive DAC 6[9] which is based on OECD's Action 12. The implementation of the amending directive DAC 6 by the EU means that MS's of the EU are obliged to implement MDR for at least cross-border arrangements.[10] One of the main purpose with DAC 6 is to prevent tax avoidance and evasion in the form of aggressive tax planning.[11] Tax avoidance is defined by OECD as the arrangement of the taxpayer's affairs in the way which intended to decrease his or her tax liability. Although the arrangement may be completely legal, it is usually in the contradiction with the intention of the law it claims to follow.[12] Tax evasion is illegal arrangements where the tax liability is ignored or hidden. In cases of tax evasion, taxpayer pays less tax than he or she is legally obligated to by hiding information or income from the tax authorities.[13] Aggressive tax planning can be defined as a transaction which result in an undesirable tax benefit in the eyes of the legislator but cannot be classified as tax evasion within the national GAAR. Such a tax benefit can arise by using differences in different countries national legislation.[14]

A major issue with DAC 6 is the broadly and vague choice of central words and phrases like intermediary and relevant taxpayer which creates application difficulties and uncertainty for persons to know who is obliged to file information on a reportable cross-border arrangement and where.[15] DAC 6 sets out a minimum standard which means that some member states might go further than others.[16] DAC 6 leaves it open for member states to implement penalties against the violation of national rules that implement DAC 6. The penalties should be

[7] OECD.com (http://www.oecd.org/tax/beps/beps-actions/action12/) 31/3
[8] OECD.com (https://www.oecd.org/tax/beps/beps-actions/action12/)" What are we doing to solve it? 31/3
[9] Council Directive (EU) 2018/822 by 25 May 2018.
[10] Council Directive 2018/822/EU of 25 May 2018.
[11] Council Directive 2018/822/EU of 25 May 2018, preamble para. 1.
[12] OECD.com http://www.oecd.org/ctp/glossaryoftaxterms.htm. 19/5 2020.
[13] OECD.com http://www.oecd.org/ctp/glossaryoftaxterms.htm. 19/5 2020.
[14] Hilling & Hilling, Regleringsteknik i syfte att motverka aggressiv skatteplanering, p. 51.
[15] See for instance Prop. 2019/20:74, p.47.
[16] < https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=19686.

effective, proportionate, and dissuasive.[17] If the penalties do not fulfil the requirement for being effective proportionate and dissuasive, there is a risk that intermediaries and relevant taxpayers report information about arrangement that is subsequently discarded in order to avoid sanctions for under-reporting or non-reporting. This serves no purpose, even from the tax authorities' perspective, given that the national tax agency will have to spend resources on totally irrelevant material.[18] Further issues with DAC 6 is the fact that it is all-encompassing in nature in terms of broadly hallmarks, wide information required to be filed, the obligation to monitor reportable cross-border arrangements and the requirement to coordinate between intermediaries and taxpayers which creates danger for disproportionality.[19] The case law by the CJEU states that, when there is a choice between different appropriate measures, recourse must be had to the least burdensome and the disadvantages which are caused must not be disproportionate to the goals pursued.[20]

1.2 Aim

The purpose of this paper is to investigate whether the Swedish implementation of the DAC 6 is a proportionate measure to prevent tax avoidance and evasion in the form of aggressive tax planning.

1.3 Method and material

In order to fulfil the purpose of this paper, legal dogmatic research method will be used. Legal dogmatic method concern researching current positive law laid down in written and unwritten European or international rules, concepts, principles, case law and literature.[21] The starting point is the commonly accepted sources of law which in the context of tax law can be described as followed.[22] The written legislation, regard the demand that the interpretation

[17] Council Directive 2018/822/EU of 25 May 2018, preamble para.15.
[18] See for instance Prop. 2019/20:74; and Nevia Čičin-Šain (2019) European Union/International - New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer? Chap. 2.2.2. IBFD.
[19] Nevia Čičin-Šain (2019) European Union/International - New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer? Chap. 2.2.2. IBFD.
[20] *Jippes and Others*, C-189/01 paragraph 81, and *ERG and Others*, C-379/08 and C-380/08 paragraph 86).
[21] Sjoerd Douma (2014) p. 18.
[22] Kleineman (2018) p. 21 ff.

must accommodate within the legislation, a very heavy status in tax law and constitute an independent authoritative source of law.[23] There is no formal precedent for previous case law in Sweden, even though there is an informal one in tax law.[24] Therefore, precedents have like legislation a heavy position and are considered to be an independent authoritative source of law.[25] Preparatory work or other public investigations legal value can vary depending on character of the legislation. In cases of vague legislation, the value of the preparatory work is higher, and in cases of clear legislation, the value is lower.[26] If there is a conflict between the legislation and the preparatory work, the legislation takes precedence in general.[27] Since the future Swedish legislation is based on the directive, the Swedish supreme court and others must interpret the legislation on the back of the DAC 6 wording and purpose.[28]

In order describe the Swedish implementation, the paper will describe the Swedish governments interpretation and approach of DAC 6. Since Sweden have not yet implemented the national legislation on the directive DAC 6, there is limited available material. The paper will use DAC 6 and preparatory work in order to describe the Swedish implementation. Other than DAC 6 and preparatory work, the paper will use opinions by expert's and doctrines in order to gather the material needed to be able to analyse if Sweden's implementation is compatible with the proportionality principle. The paper will Further use case law by the CJEU in order to describe their view on the proportionality principle.

1.4 Delimitation

As mentioned in chapter 1.1, the amending directive DAC 6 is based on OECD's BEPS report action 12.[29] Since this paper focus on Sweden's implementation of MDR and Sweden is not legally obliged to follow OECD's recommendations[30], thereby, this paper do not make any further description of OECD or action 12. DAC stands for directive on administrative cooperation and it is an amending directive, which means that DAC 6 is based on previous

[23] Kleineman (2018) p. 28–33.
[24] Tjernberg (2018) p. 57.
[25] Tjernberg (2018) p. 55
[26] Se Tjernberg (2018) s. 84.
[27] Tjernberg (2018) p. 84 f., p. 97 f.
[28] C-212/04 Adeneler v ELOG, EU:C:2006:443, para 108–111.
[29] See chapter 1.1.
[30] https://www.oecd.org/gov/regulatory-policy/irc10.htm 07/05.

DAC but have been changed, developed and expanded.[31] Because of the page limit of this paper, there will be no further descriptions of previous DAC. Neither any other countries implementation will be described in order to determine if the Swedish implementation is compatible with the proportionality principle. Sweden intends to implement DAC 6 though the preparatory work, prop.2019/20:74, since there is no legislation implemented, there is no case law to use from the Swedish Court. In order to answer the question if the Swedish proposal is a proportionate measure to prevent tax avoidance and evasion in the forms of aggressive tax planning, different opinions from experts will be described. The expert's opinions are selected from different branches in order to get a more balanced view. The DAC 6 will apply retroactive of the reporting requirement, which the proportionality analysis will not take into consideration in this paper. Neither the human rights subject will be considered in this paper. There are other measures already taken by Sweden in order to combat tax avoidance and evasion in the form of aggressive tax planning, for example the implementation of ATAD and the national GAAR. The paper will not describe these regulations in own chapters but will take it into consideration in the analysis. Except the penalty fee in DAC 6, additional fees might apply due to national legislation. The paper will not describe national addition fees further, but it will be taken into consideration in the analysis.

1.5 Outline

In order to determine if the Swedish implementation is a proportionate measure to prevent tax avoidance and evasion in the form of aggressive tax planning, it is important to clearly establish who carries the burden of filing information on a reportable cross-border arrangement and what the penalties are in case of violation of the rules. Since the Swedish rules are based on an EU directive, the paper starts by describing DAC 6 in chapter 2, and then how the Swedish government has interpreted and approached the directive in chapter 3.

Chapter 3 will also contain the expected consequences of the Swedish implementation which include the expected benefits and costs of MDR. Finally, criticism aimed at the Swedish MDR and the penalties will be described in order to be able to determine if it is a

[31] European Commission. Administrative cooperation in (direct) taxation in the EU.

proportionate measure to prevent tax avoidance and evasion in the form of aggressive tax planning.

Chapter 4 will start describing the principle of proportionality as stated in both EU and Swedish legislation. Further the CJEU reasoning and understanding of the principle of proportionality will be described because at the end, it is the CJEU who is going to decide whether the implementation is proportional. Chapter 3 and 4 will finish with a summarized analysis and the aurthors own view which will be the ground for the conclusions in chapter 5.

2 Directive on Administrative Co-operation (DAC 6)

2.1 Purpose of DAC 6

The purpose of DAC 6 is to achieve automatic exchange of information regarding cross-border arrangements which might are considered to be aggressive tax planning.[32] The information exchanged according to DAC 6 shall give tax authorities early information on new aggressive tax planning schemes and to what extent the schemes are used.[33] Tax authorities shall be able to use the information in matters of tax, for example, risk-based selections for tax audit or other investigation measures for control in particular cases. Further to control that other information for tax purposes that is reportable actually is reported and correct, but also for more general analysis of the tax system that might lead to legal positions or that the tax authorities initiate the legislature if there is a need to change the law.[34]

2.2 DAC 6

2.2.1 Introduction

DAC 6 implies member states to exchange information with each other regarding certain cross-border arrangements on the tax area, so called reportable cross-border arrangements through automatic exchange of information. The European Commission shall also have access to some of the information. In order for the exchange of information to work, it is critical that member states implement obligations for themselves to exchange information with other countries.[35]

In order for the arrangement to be reportable, the arrangement have to be cross-border and contain at least one of the hallmarks set out in Annex IV. Some rules are designed to target arrangements which are trying to circumvent reporting under automatic exchange of

[32] Council Directive 2018/822/EU of 25 May 2018, preamble (4).
[33] Council Directive 2018/822/EU of 25 May 2018, preamble (7).
[34] Council Directive 2018/822/EU of 25 May 2018, preamble (2).
[35] Council Directive 2018/822/EU of 25 May 2018, preamble (6).

information by financial accounts or aimed at providing beneficial owners with shelter of non-transparent foreign structures. The last mentioned correspond to large extent the mandatory disclosure rules inspired by the approach for avoidance arrangements outlined with the BEPS action 12 report.[36]

In order to increase the prospects for the effectiveness of DAC 6, MS's should implement penalties against the violation of domestic rules that implement the directive. Such penalties should be effective, dissuasive, and proportionate.[37]

2.2.2 Definitions

After the preamble, DAC 6 starts defining different terms as follows. "Cross-border arrangement" means an arrangement that concern more than one MS or a MS and a third country where one or more of the following conditions is met:

a) not all of the participants in the arrangement are tax resident in the same jurisdiction;
b) at least one of the participants in the arrangement is tax resident in more than one jurisdiction at the same time;
c) at least one of the participants in the arrangement carries on business in another jurisdiction though a PE located in that jurisdiction and the arrangement forms part or the whole of the business of that PE;
d) at least one of the participants in the arrangement carries on activity in another jurisdiction without being tax resident or creating a PE situated in that jurisdiction;
e) an arrangement which has a possible impact on the automatic exchange of information or identification of beneficial ownership.[38]

"Reportable cross-border arrangement" is defined as any cross-border arrangement that contains one or more of the hallmarks set out in Annex IV.[39] "Hallmark" means a characteristic or element of a cross-border arrangement that contain an indication of potential risk of tax avoidance as listed in the Annex IV.[40]

[36] Council Directive 2018/822/EU of 25 May 2018, preamble (4).
[37] Council Directive 2018/822/EU of 25 May 2018, preamble (15).
[38] Council Directive 2018/822/EU of 25 May 2018, Art. 1 b, para. 18.
[39] Council Directive 2018/822/EU of 25 May 2018, Art. 1 b, para. 19.
[40] Council Directive 2018/822/EU of 25 May 2018, Art. 1 b, para. 20.

An "intermediary" means any person which designs, markets, organises or makes available for implementation or manage the implementation of a reportable cross border arrangement.[41] Intermediary also mean any person that, regard to the relevant facts and circumstances and based on available information and the relevant competence and understand required to contribute such services, know or could reasonably expected to know that they have undertaken to contribute, direct or by mean of other persons, assistance, aid or advice with respect to design, market, organise or making available for implementation or managing the implementation of a reportable cross border arrangement. Any individual shall have the right to bring evidence that such person did not know and could not reasonably be expected to know that that person was elaborating in a reportable cross border arrangement. For the purpose what is mentioned above that person may refer to all related facts and circumstances as well as accessible information and their expertise and understanding.[42]

In order to be an intermediary, a person must meet at least one of the additional conditions:

a) be tax resident in a MS;
b) have a PE in a MS though which the service to the arrangement are provided;
c) be incorporated in or governed by the laws of a MS;
d) be registered with a professional association affiliated to legal, taxation or consultancy services in a MS.[43]

"Relevant taxpayer" is defined as any person to whom a reportable cross border arrangement is at disposal for implementation, or any person who is ready to implement a reportable cross border arrangement or has implemented the first step of a reportable cross border arrangement.[44]

"Associated enterprise" is defines as a person who is related to another in at least one of the following ways:

a) a person take part in the management of another person by being in a situation to exercise a significant influence over that other person;

[41] Council Directive 2018/822/EU of 25 May 2018, Art. 1 para. 21 (1).
[42] Council Directive 2018/822/EU of 25 May 2018, Art.1 para. 21 (2)
[43] Council Directive 2018/822/EU of 25 May 2018, Art.1 para. 21 (3)
[44] Council Directive 2018/822/EU of 25 May 2018, Art.1 para 22.

b) a person take part in the control of another by a holding that exceeds 25% of the voting rights;
c) a person takes part of another person in the capital through right of ownership that exceeds 25% of the capital either direct or indirect;
d) a person is entitled to at least 25% of the profits of another person.[45]

If the same person take part, as referred to in a-d, in the management, control, capital or profits of more than one person, every person concerned shall be regarded as associated enterprises.[46] For the purpose of this paragraph, a person who acts together with another person in respect of the capital ownership or voting rights of that entity that are held by that other person.[47] If a person take part indirect as referred to under point c, the ownership shall be determined by multiplying the rates of holding through successive tiers. Further, if a person is holding more than 50% of the votes, the person shall be deemed to hold 100%.[48] Finally, an individual's family members shall be treated as a single person.[49]

There are two types of reportable cross-border arrangements, "marketable arrangement" which means a cross-border arrangement that is designed, marketed, ready for implementation or made at ones disposal for implementation without the need to be substantially customised. The second type of reportable arrangement is "bespoke arrangement" which means any cross-border arrangement that is not a marketable arrangement.[50]

2.2.3 Who bears the burden of disclosure

The primary obligation to disclose information on a reportable cross-border arrangement to the tax agency lies with the intermediary.[51] If there is more than one intermediary, all intermediaries involved in the arrangement are obliged to report unless proof that the

[45] Council Directive 2018/822/EU of 25 May 2018, Art.1 para 23.
[46] Council Directive 2018/822/EU of 25 May 2018, Art.1 para 23.
[47] Council Directive 2018/822/EU of 25 May 2018, Art.1 para 23.
[48] Council Directive 2018/822/EU of 25 May 2018, Art.1 para 23.
[49] Council Directive 2018/822/EU of 25 May 2018, Art.1 para 23.
[50] Council Directive 2018/822/EU of 25 May 2018, Art.1 para 24-25.
[51] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 1.

arrangement has already been reported is available.[52] There may be cases where an EU based intermediary is not involved in a reportable cross-border arrangement, for example, if the intermediary is located outside of EU or where a waiver for legal professional privilege apply.[53] In such cases, the obligation to disclose a reportable cross-border arrangement falls on any other intermediary involved in the arrangement or if there is no such intermediary, on the relevant taxpayer.[54] If the intermediaries benefit from a waiver for legal professional privilege, the intermediary must notify the relevant taxpayer or any other intermediary to which the obligation is rolled on of their disclosure responsibility.[55]

In cases where the reporting obligation falls on the relevant taxpayer, and it arises in more than one MS, the information should only be reported with the competent authority of the MS that features first in the list below:

a) the MS where the relevant taxpayer is resident for tax purposes;
b) the MS where the relevant taxpayer has a PE benefiting from the arrangement;
c) the MS where the relevant taxpayer receives income or generate profits, even though the relevant taxpayer is not tax resident or have a PE in any MS;
d) the MS where the relevant taxpayer carries on activity, even though the relevant taxpayer is not tax resident or have a PE in any MS.[56]

A situation might therefore arise, where a relevant taxpayer has an obligation to report in a jurisdiction where they are neither tax resident nor operating through a PE.

If there is more than one relevant taxpayer, the obligation to report falls on the taxpayer which agreed the reportable cross-border arrangement with the intermediary or, if there is no such intermediary, with the taxpayer that manages the implementation of the arrangement.[57]

2.2.4 What to report and When

The person or persons with whom the reporting obligation lies is required to report the information with the competent authority of the MS within 30 days beginning:

[52] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 9.
[53] Council Directive 2018/822/EU of 25 May 2018, Art. 1 para. 21 and art. 8ab para. 5.
[54] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 5.
[55] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 6.
[56] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 7.
[57] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 10.

a) the day after the reportable cross border arrangement is made available for the purpose of implementation; or
b) the day after such an arrangement is ready for implementation; or
c) when the first step of the implementation of the reportable cross border arrangement has been done, which ever occur first.[58]

Persons that do not qualify as an intermediary, but have aided a reportable cross-border arrangement[59] will be required to report information within 30 days beginning on the day after they directly or by means of other persons provided aid, assistance or advice.[60]

The information that will be communicated by the competent authority of a MS shall contain the following:

a) the identification of the intermediaries and taxpayers involved;
b) the hallmark or hallmarks that generated the reporting obligation;
c) a summary of the arrangement;
d) the date on which the first step of the implementation was made or will be made;
e) details of the relevant domestic tax rules;
f) the value of the reportable cross-border arrangement;
g) identification of any other person or MS likely to be affected by the arrangement.[61]

2.2.5 Hallmarks

In order for an arrangement to be reportable, the arrangement must be cross-border and contain one of the hallmarks set out in Annex IV. The hallmarks set out in category A to E cover a wide range of characteristics and features that are considered to present an indication of potential tax avoidance. DAC 6 also includes a main benefit test which certain hallmarks must meet to trigger a reporting obligation.

The Annex IV consists of two parts, part one "main benefit test", and part two "categories of hallmarks. The main benefit test will be achieved if it can be established that the main benefit

[58] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 1.
[59] Intermediaries referred to in DAC 6 second paragraph of point 21 of Article 3.
[60] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 1.
[61] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab para. 14.

or one of the main benefit which, regard to the relevant facts and circumstances, an individual may reasonably expect to obtain from an arrangement is the receiving of a tax advantage.[62]

Part two is divided between category A to E. Category A, "Generic hallmarks linked to the main benefit test" contain confidentiality clause, success fee and standardized documentation and/or structure.[63]
Under category B, "Specific hallmarks linked to the main benefit test" falls:
1) An arrangement where a participator in the arrangement takes contrived steps which consist in acquire a loss making company and the use of the losses in order to reduce tax liability, including though a transfer of losses to other jurisdictions or by acceleration of the use of the losses.[64]
2) Arrangement which consist conversion of income into other classification of revenue such as capital, gifts or other categories of revenue which are taxed at a lower rate or exempt from tax.[65]
3) Arrangements where circular transactions resulting in round tripping of funds though involving interposed entities without any commercial function or transaction that cancel or offset each other or that have similar features.[66]

Category C, "Specific hallmarks related to cross-border transactions" includes arrangements that involves deductible cross border payments to associated enterprises where the recipient is subject to zero or almost zero tax rate, a full tax exemption or a preferential tax regime for tax purposes.[67] Further under category C, arrangement where:
-deductions for the same depreciation on the asset are declared in more than one jurisdiction.
-double taxation relief is claimed in respect of the same income or capital in more than one jurisdiction.
-arrangement that includes transfer of assets with material difference in price used for tax purposes.

[62] Council Directive 2018/822/EU of 25 May 2018, Annex IV, part 1–2.
[63] Council Directive 2018/822/EU of 25 May 2018, Annex IV, part 2 A.
[64] Council Directive 2018/822/EU of 25 May 2018, Annex IV, part 2 B, p.1.
[65] Council Directive 2018/822/EU of 25 May 2018, Annex IV, part 2 B, p.2.
[66] Council Directive 2018/822/EU of 25 May 2018, Annex IV, part 2 B, p.3.
[67] Council Directive 2018/822/EU of 25 May 2018, Annex IV, part 2 C, p.1.

Category D, "Specific hallmarks concerning automatic exchange of information and beneficial ownership" include arrangements that may undermine the reporting obligation under the laws implementing EU legislation or any similar agreements on the automatic exchange of financial account information, including third countries, or that takes advantage of absence of such legislation or agreement. Such arrangements include at very least:

a) the use of an account, investment or product that is not, or intendent not to be a financial account but has features that are similar to those of a financial account;
b) the transfer of assets or financial account to the use of jurisdictions that are not obligated by the automatic exchange of financial accounts information with the resident state of the relevant taxpayer;
c) the change of classification of income and capital into payments or products that are not object to the automatic exchange of financial account information;
d) the conversion or transfer of a financial account or institution or the assets therein into a financial account or institution or assets not object to report under the automatic exchange for financial account information;
e) the use of legal entities, structures or arrangements that eliminate or aim to eliminate reporting of account holders or controlling individuals under the automatic exchange of financial account information;
f) an arrangement that undermine or take advantage of weakness in the due diligence procedures used by financial institutions to comply with the obligations to report financial account information. This include the use of inadequate jurisdiction or weak regimes of enforcement of anti-money laundering legislation or weak transparency requirements for legal persons or arrangements.[68]

Further, category D include arrangement including a non-transparent legal or beneficial ownership chain with the use of persons, arrangements or structures that do not carry on an economic activity with adequate staff, equipment and assets; and that are incorporated, resident, managed or established in any jurisdiction other than the residence jurisdiction of the beneficial owners; and where the beneficial owners are made unidentifiable.[69]

[68] Council Directive 2018/822/EU of 25 May 2018, Annex IV, part 2, D, p.1.
[69] Council Directive 2018/822/EU of 25 May 2018, Annex IV, part 2, D, p.2.

3 Sweden's implementation

3.1 Introduction

According to the Swedish parliament[70], EU directives should be implemented into national law at minimum level.[71] In a report[72], the parliamentary committee on industry and trade announce that the government should implement EU directives into national law in a way that doesn't disfavour Swedish corporations competitiveness. Further if there is a reason to overstep the minimum level, the effects for the corporation shall be declared in a clear way.[73] In accordance with the DAC 6, Sweden implements definitions of the terms "cross-border arrangement" and "reportable cross-border arrangement" but not a definition of "arrangement" or "tax benefit".[74] The terms intermediary and relevant taxpayer is central in the new MDR since it is either the intermediary or the relevant taxpayer who is obligated to file information on reportable cross-border arrangement to the tax agency. The Swedish implementation contain definitions of the terms which are equal to the ones in DAC 6.[75]

3.2 Who bears the burden of disclosure

Numerous experts[76] argue that the proposal can be interpreted as employees are personal responsible for reporting a reportable cross border arrangement.[77] The administrative court of Stockholm claims that the wording of the legislation should make it clear that physical persons, employed by law and audit firms are not personal responsible to report.[78] The wording of the legislation should also make it clear that, employees of group companies using reportable cross border arrangement are not personal responsible.[79] The Swedish government mean that even if it is a physical person or a group of psychical persons employed at a law or audit firm who provide a reportable cross border arrangement, they are doing it within their employment. In other words, physical persons are not personal obliged to file a reportable

[70] See announcement rskr. 2018/19:166
[71] Prop. 2019/20:74, p.41.
[72] bet.2018/19:NU7 point 7.
[73] Prop. 2019/20:74, p.41.
[74] Prop. 2019/20:74, p.74 and 82.
[75] Prop. 2019/20:74, p.47 and 54.
[76] Näringslivets Regelnämnd, Näringslivets Skattedelegation and others.
[77] Prop. 2019/20:74, p. 49.
[78] Prop. 2019/20:74, p. 49.
[79] Prop. 2019/20:74, p. 49.

cross border arrangement if it is within their employment. The obligation to report in such case is the employer.[80]

The Swedish bank association argues that banks and other financial institutes in their daily activity, such as open bank accounts, ensure payments and deposits are not considered to be a reportable intermediary which reasonably should have known that it is part of a reportable cross border arrangement.[81] They mean that this needs to be explained in the wording of the legislation and that a single bank cannot be obliged to investigate if every transaction is a part of a reportable cross border arrangement.[82] The Swedish government explains that a bank can possibly fall under the second category of reportable intermediaries if the bank contributes with daily services such as open accounts or grant a loan. In order for the bank to fall under the second category of reportable intermediaries, a banker needs to know or reasonably should have known that the bank committed, direct or through other persons contributed to design, market, organise or makes available for implementation or manage the implementation of a reportable cross border arrangement.[83] If the banker only contributes with daily services without having access to further information, the banker should not fall under the definition of intermediary.[84] Other examples of intermediaries that falls under the second category of intermediaries may be corporate lawyers or tax departments which contributes with advice regarding a reportable cross border arrangement to another company within the group.[85]

Ikano Bank AB have asked the Swedish government to explain who is obliged to file information on a reportable cross border arrangement in a branch structure. Ikano Bank is tax resident in Sweden but has six branches in different member states. The Swedish government means that if there is no intermediary, or the intermediary is unable to file information, the relevant taxpayer is obliged to file information. The relevant taxpayer shall primarily file information in the state of residence, if the relevant taxpayer is not tax resident in any MS, the information should be filed to the MS where the relevant taxpayer has a PE.[86] The obligation to file information in a MS depends on the connection on which the relevant taxpayer have to

[80] Prop. 2019/20:74, p. 49.
[81] Prop. 2019/20:74, p. 50 -51.
[82] Prop. 2019/20:74, p. 51.
[83] Prop. 2019/20:74, p. 51.
[84] Prop. 2019/20:74, p. 51.
[85] Prop. 2019/20:74, p. 52.
[86] Prop. 2019/20:74, p.64 f.

that MS. If the relevant taxpayer is tax resident in one MS and have a PE in another MS, information should only be filed in the MS where the relevant taxpayer is tax residence.[87]

DAC 6 states that if an intermediary is liable to file information on a cross border arrangement in more than one MS, the information shall only be filed in one MS, primary where the intermediary is tax resident.[88] The Swedish government has approached this paragraph by first defining who is reportable intermediary, and only if the reportable intermediary doesn't have stronger connection to another MS, the reportable intermediary is obliged to file information on cross border arrangement in Sweden.[89] As mentioned previously[90], it is similar for the relevant taxpayer's liability when it comes to filing a reportable cross border arrangement in more than one MS. Filing information shall only be done in one MS, primary in the state of tax resident.[91] The Swedish government has approached this by only relevant taxpayer with a certain connection to Sweden, is obliged to file information to the Swedish tax agency.[92]

According to article 8ab. 5 of DAC 6, MS may take necessary measures to give some intermediaries the right to a waiver regarding filling information on a reportable cross border arrangement. In cases where the reporting obligation would breach the privilege of a legal profession under national law, MS shall take necessary measures to require intermediaries to inform without delay, any other intermediary, and if there is no such intermediary, the relevant taxpayer of the reporting obligation under paragraph 6.[93] The interpretation of the waiver of legal professional privilege in DAC 6 is divided. Some interpret the waiver as MS can give full exemption to report for some legal professions.[94] The Swedish government interprets this regulation as the intermediary is allowed to be given a waiver in some cases, but only when it is a breach of the legal professional privilege to file information on a reportable cross border arrangement. The Swedish proposal contains one exception, when the intermediary is obstructed to file information because of the confidentiality for lawyers.[95]

[87] Prop. 2019/20:74, p.65.
[88] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab. Para 3.
[89] Prop. 2019/20:74, p.62.
[90] See chapter 2.2.
[91] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab. Para. 7.
[92] Prop. 2019/20:74, p.64.
[93] Council Directive 2018/822/EU of 25 May 2018, Art. 8ab. Para. 5.
[94] Prop. 2019/20:74, p. 58.
[95] Prop. 2019/20:74, p.42.

3.3 Penalties

According to DAC 6, MS should implement penalties against violation of MDR.[96] Penalties can be levied on private individuals, MNE's and bigger law and audit firms.[97] The penalties implemented should be effective, proportionate, and dissuasive.[98]

There is a possibility to set the penalties in relation to the size of the corporation's results, for instance EBIT (Earnings Before Interest and Tax).[99] EBIT is calculated on the corporations operating profit which means profit without including financial transactions.[100] It is used in the Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.[101] Since the profits of a corporation can be zero or negative, the Swedish government believe it is less appropriate to use for differentiation.[102] They argue that there is also a potential risk that the reportable cross-border arrangement have affected the profits of the intermediary or relevant taxpayer.[103]

The size of the penalties may also be set in relation to the value of the reportable cross-border arrangement. Information regarding the value of the arrangement may not always be available since an intermediary may be obliged to report before there is even a relevant taxpayer.[104] There is further no certainty that the arrangement with the highest transaction value is the arrangement of most interest for the tax agency.[105]

Sweden has chosen to divide the penalties into four different levels based on the size of the corporation's net revenue.[106] When calculating the net revenue of the intermediary and relevant taxpayer, only their own net revenue is included, even if the corporation is part of a bigger group.[107] The Swedish government argues that penalties based on the net revenue of the single corporation is common and simple for the tax agency to apply and it also makes it

[96] Council Directive 2018/822/EU of 25 May 2018, preamble para 15.
[97] Prop. 2019/20:74, p. 147.
[98] Council Directive 2018/822/EU of 25 May 2018, preamble para. 15.
[99] Prop. 2019/20:74, p. 148.
[100] Prop. 2019/20:74, p. 148.
[101] Prop. 2019/20:74, p. 148.
[102] Prop. 2019/20:74, p. 148.
[103] Prop. 2019/20:74, p. 148.
[104] Prop. 2019/20:74, p. 146.
[105] Prop. 2019/20:74, p. 146.
[106] Prop. 2019/20:74, p. 148 - 149.
[107] Prop. 2019/20:74, p. 148.

predictable for intermediaries and relevant taxpayers.[108] The penalty for private individuals and corporations with net revenue less than 1 434 008 EUR[109] is 956 EUR for relevant taxpayer and 1 912 EUR for intermediaries. For corporations with net revenue between 1 434 008 – 7 170 039 EUR, the penalty is 1 434 EUR for relevant taxpayer and 2 868 EUR for intermediary. The penalties are 2 868 EUR for relevant taxpayer and 5 736 EUR for corporations with net revenue between 7 170 039 – 47 800 259 EUR. For corporations with net revenue of over 47 800 259 EUR, the penalty is 7 170 EUR for relevant taxpayer and 14 340 EUR for intermediary.[110] By doing this diversification, the Swedish government means that the risk of the penalties to be unproportionate high regarding the intermediary and the relevant taxpayers financial ability will be minimized.[111] Further, penalties cannot be charged if the reportable cross border arrangement is reported in time and the report consists deficits of miner relevance.[112] It is the tax authorities who bear the burden of proof in question on penalties.

3.4 Consequences

As mentioned, previous, the purpose with the DAC 6 is to counteract aggressive tax planning within the EU.[113] By counteract aggressive tax planning, the legislator hopes to achieve more equal taxation and an increase of neutral competitiveness between companies using aggressive tax planning and the companies who do not. Eventually MDR will lead to a more balanced tax base and an increase of trust towards the tax system.[114]
The Swedish government acknowledges the fact that it is difficult to calculate the losses in tax revenue because of aggressive tax planning. They use OECDs/G20s appreciation in order to get a view of Sweden's loss of tax revenue because of aggressive tax planning.[115] As mentioned in the beginning of this paper, OECD/G20 appreciate that the loss of tax revenue because of aggressive tax planning constitute about four to ten percent of the global CIT. The Swedish government believes that Sweden is in the lower area and thereby the loss of tax

[108] Prop. 2019/20:74, p. 149.
[109] SEK/EUR = 0,096.
[110] Prop. 2019/20:74, p. 149 – 150.
[111] Prop. 2019/20:74, p. 149.
[112] Prop. 2019/20:74, p. 150.
[113] See chapter 1.1 and 2.
[114] Prop. 2019/20:74, p. 179.
[115] Prop. 2019/20:74, p. 179.

revenue constitutes around 478 002 594 EUR.[116] With the assumption that MDR will lead to decrease of aggressive tax planning by 10 percent, Sweden will increase their tax revenue by 47 800 259 EUR.[117]

The Swedish government means that the number of concerned intermediaries as a result of DAC 6 will be around 4300, (1 616 audit firms, 120 law firms, 375 tax consultants, 100 banks, 2 000 accounting firms and 50 other intermediaries.[118] The total amount of reportable cross-border arrangements to be filed by intermediaries will be around 60 000 according to the Swedish government's calculation. With the assumption that it will take two hours to file a reportable cross-border arrangement and the cost is 65 EUR per hour, the total cost for intermediaries will be around 7 839 243 EUR.[119]

According to the Swedish government, the increase of costs for intermediaries will land on the relevant taxpayer. This means that the relevant taxpayers' costs will increase with the same amount as the intermediaries because of MDR. They argue that MDR will eventually lead to less tax planning consultancy, and thereby to less costs for the relevant taxpayer.[120] The number of reportable cross-border arrangement for relevant taxpayers are estimated to be 35 000.[121] With the assumption that the cost for the relevant taxpayer is the same as for the intermediary, the total cost is estimated to be around 4 588 825 EUR for relevant taxpayers.[122] The Swedish tax agency appreciate the costs for the development of it – system to be 5 736 031 EUR and then 286 801 EUR in operation costs. Beside the costs for development of it-system, several non - recurring costs like webpage and internal education will be added and they are estimated to be 95 601 EUR. Further, the Swedish tax agency have estimated annually costs for MDR to be 4 780 026 EUR.[123] The Swedish government estimation is similar, they believe that the annually costs will be 3 824 021 EUR.[124]

[116] Prop. 2019/20:74, p. 188.
[117] Prop. 2019/20:74, p. 188.
[118] Prop. 2019/20:74, p. 181.
[119] Prop. 2019/20:74, p. 181.
[120] Prop. 2019/20:74, p. 183.
[121] Prop. 2019/20:74, p. 184.
[122] Prop. 2019/20:74, p. 184.
[123] Prop. 2019/20:74, p. 185.
[124] Prop. 2019/20:74, p. 186.

3.5 Criticism

Several experts argue that the term intermediary according to DAC 6, and thereby the Swedish translation in the preparatory work is very broad.[125] The Court of Gothenburg mean that it is obvious that vague phrases will lead to application problems. The term relevant taxpayer is vague and unprecise. The Court of Sundsvall argues that the term should be clearer in order to prevent application difficulties. They mean that the relevant taxpayer who implements the first step of a reportable arrangement is confusing.[126] NSD and others[127] claim that the broad and vague MDR can lead to lack of predictability and thereby to overreporting and increase of administrative costs for intermediaries and relevant taxpayers.

FAR and others[128] claims that the delimitation of the term intermediary will have no effect in practice. They argue that the legislation needs the wording that an intermediary is not obliged to report if the person has not contributed in designing, managing or makes available for implementation of a reportable cross border arrangement as a complement.[129]

FAR argue that vague MDR combined with high penalties will lead to fear for intermediaries to advice, even though the arrangement is completely legal.[130] Further, FAR mean that MDR will target intermediaries with less knowledge and they may be qualified to report without their own knowledge.[131]

FAR note that the tax authorities already have great possibility to receive information about potential aggressive tax planning through declarations. They argue that the information will not have any effect on the tax agencies work since the information will be gathered regardless of the MDR. According to FAR, the tax authorities need for additional information is not proportionate to the penalties and the increase of administrative burden that MDR will lead to.[132]

[125] Prop. 2019/20:74, p. 47.
[126] Prop. 2019/20:74, p. 54.
[127] Näringslivets skattedelegation, FAR Swedish Private Equity & Venture Capital Association.
[128] FAR, Swedish Private Equity & Venture Capital Association.
[129] Prop. 2019/20:74, p. 46.
[130] Opinion, FAR (2019), p. 4.
[131] Opinion, FAR (2019), p. 4.
[132] Opinion, FAR (2019), p. 6.

The Administrative Court of Stockholm further claim that there is a difference in treatment between the different categories of intermediaries. The Swedish government mean that there is a need for the second category of intermediary in order to counteract circumvention of the rules.[133] Further, they argue that the second category of intermediary is mainly for the purpose of catching the intermediaries whose knowledge in reportable cross border arrangement is greater, hence they might be able to circumvent the rules.[134]

FAR and others[135] mean that the penalties might be unproportionate high in relation to the benefit achieved by the arrangement since there is no connection between the penalties and the outcome of the arrangement.[136] The Srf consultancies argue that there is a risk that intermediary and relevant taxpayers will be charged with penalties for miner formality mistakes.[137]

The Administrative Court of Stockholm argue that an effective penalty system might be achieved with lower fees because in some cases additional tax charge might be levied on the intermediary or the taxpayer.[138] Some experts[139] mean that high penalties will result in a lot of information being reported that lack interest for the tax agency.[140] The Swedish tax agency argue on the other hand, that its motivated with high penalties, since it will be difficult to identify the reportable intermediaries or relevant taxpayers and it can only be done afterwards [141]

AB Volvo argue that if an international group of companies do not file information on a reportable cross-border arrangement by mistake, several companies within the group may be levied with penalty fees. This is a result of the application treat every company within the group as independent and not as one group whole.[142]

[133] Prop. 2019/20:74, p. 50.
[134] Prop. 2019/20:74, p. 50.
[135] Swedish Private Equity & Venture Capital Association, Föreningen Svensk Sjöfart, AB Volvo and Srf.
[136] Prop. 2019/20:74, p. 151.
[137] Prop. 2019/20:74, p. 150.
[138] Prop. 2019/20:74, p. 145.
[139] Föreningen Svensk Sjöfart, Näringslivets Skattedelegation and Sveriges advokatsamfund.
[140] Prop. 2019/20:74, p. 145.
[141] Prop. 2019/20:74, p. 145.
[142] Prop. 2019/20:74, p. 149.

Numerus experts[143] mean that the costs for the intermediary is underestimated since only the time it takes to report is in the calculation, not the time it takes to figure out if an arrangement is reportable or not. They argue that the costs for determining if an arrangement is reportable may be essential because of the uncertainty with the rules.[144]

Wallenstam, Epiroc AB and others[145] argue that there are flaws in the estimation of the benefit of MDR and the costs that comes with it. They mean that the gathered material in order to calculate the benefits and costs of MDR are inadequate and it is hard to get accurate picture of the total value of MDR.[146]

3.6 Summarized analysis

The primary obligation to file information on a cross-border arrangement lands on the intermediary. The intermediary is primary the employer, but if a physical person designs, organises, markets or makes available for implementation or manages the implementation of a reportable cross-border arrangement outside of their employment, the individual is personally obliged to file information.[147]

A bank may fall under the second category of intermediary. If the bank knows or reasonably should have known that the bank committed, direct or through other persons contributed to design, market, organise or makes available for implementation or manage the implementation of a reportable cross border arrangement, the bank fall under the second category of intermediary. If the bank only contributes with daily services without any further knowledge, the bank is not obliged to file information.[148]

If there is more than one intermediary, all intermediaries are obliged to file information unless proof that the arrangement has already been reported is available. So, if an intermediary already has filed information on a reportable cross-border arrangement in another MS and can

[143] NSD and others.
[144] Prop. 2019/20:74, p. 182.
[145] Förvaltningsrätten i Göteborg, Kammarrätten i Göteborg, Kammarrätten i Sundsvall, Näringslivets skattedelegation (NSD), Näringslivets regelnämnd (NNR), Företagarna, Småföretagarnas riksförbund, Sveriges byggindustrier, SRF konsulternas förbund, Sveriges advokatsamfund.
[146] Prop. 2019/20:74, p. 179.
[147] See chapter 3.2.
[148] See chapter 3.2.

prove it, neither that intermediary nor anyone else is obliged to file information in Sweden. An intermediary is obliged to file information on a cross-border arrangement in Sweden only if the reportable intermediary do not have stronger connection to another MS. If there is no intermediary or the intermediary benefit from a waiver for legal professional privilege, the obligation to file information lands on the relevant taxpayer. The relevant taxpayer is only obliged to file information in Sweden if they do not have stronger connection to another MS.[149]

Lawyers are generally obliged to file information on a reportable cross-border arrangement, only when it is a breach of the confidentiality for lawyers, they are obstructed to file. If that is the case, they must inform the relevant taxpayer who the obligation to file information lands on.[150]

The penalties in case of absence of filing a reportable cross-border arrangement is set in relation to net revenues between 956 – 7 170 EUR for relevant taxpayers and between 1 912 – 14 340 EUR for intermediaries.[151]

In my opinion, if there is no obligation for the intermediary to be personally obliged outside of their employment, the MDR would be too easy to circumvent. At the same time, it would be problematic if the employer would carry the responsible for what the employees do outside of their employment. It would also be problematic to put the obligation on the relevant taxpayer in case of intermediaries advising outside of their employment since generally, it is the intermediary who have the greater knowledge on the regulations. According to the author, it would be problematic to exclude certain businesses, for instance banking from the reporting obligation. The focus of the reporting obligation should not be determined by where you work rather than what you do at work. If there was no obligation to file information for banks, other branches may consider to be discriminated. It is not more than fear that if you qualify to file information on a reportable cross-border arrangement it do not matter if you work at an audit firm or a bank.

[149] See chapter 3.2.
[150] See chapter 3.2.
[151] See chapter 3.3.

It is my opinion that penalties will not be levied on intermediaries and relevant taxpayers for miner formalities mistakes. However, the author sees a great risk that the broad definition of intermediary will target intermediaries without their own knowledge which may lead to penalties will be levied on persons without their knowledge of the obligation to file information. The author further sees a risk for mistakes and misunderstanding between the intermediary and the relevant taxpayer which could lead to penalties for relevant taxpayers in cases where there is no reportable intermediary. The penalties in such cases could be very high if the relevant taxpayer consist of several companies in the same group and arrangement. Since the net revenue of companies which operates in several countries can be very high, and the value of the reportable cross-border arrangement can vary, it is the authors opinion that it would be more proportionate to set the penalties in relation to the value of the arrangement instead of net revenue.

It is the authors opinion that MDR will not only target arrangements that are considered to constitute aggressive tax planning. The vague formulations and broad definitions of central words will create uncertainty of the application which will lead to arrangements that is completely legal and non-controversial will be reported even though it is not necessary. The over – reporting will lead to increase of costs, both for the intermediary, relevant taxpayer, and the tax agency.

A legal arrangement which may considered to be aggressive, and the legislator wants to stop, why not change current law, or implement new. It is obvious that the legislator, in question of the MDR, acknowledges several arrangements which contain some of the hallmarks to be undesirable. It is the authors opinion that it would make more sense to change the law instead of imposing additional administrative burden on intermediaries and relevant taxpayers. As mentioned in the beginning of this paper, measures must be had to the least burdensome and the disadvantages which are caused must not be disproportionate to the goals of the legislation. It is the authors opinion that MDR is not likely to be in line with the principle of proportionality since less restrictive measures could achieve the aims pursued.

4 The Principle of proportionality

4.1 Introduction

Proportionality regulates how governments exercise their powers.[152] The principle of proportionality means that, to achieve its aim with a legislation, governments shall only take the measures needed and no more.[153] Proportionality principle is enshrined in the TEU which states:

> "The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties"[154]

The principle is also enshrined in Swedish law. According to the Swedish legislation, decisions may only be taken under SFL[155] if the reason for the decision is balanced with the infringement. The committee directive to the Swedish MDR included the task to accurate balance between the benefit of MDR and the administrative costs that comes with it for the reportable intermediary or relevant taxpayer and the tax agency.[156] Also the OECD declare the importance of the balance between the benefit of MDR and the increase of administrative costs.[157] The Swedish proposal compatibility with the principle of proportionality has been questioned.[158]

4.2 The CJEU's view on proportionality

The goal of DAC 6 is, as previously mentioned, to prevent tax avoidance and evasion in the form of aggressive tax planning. The purpose of preventing tax avoidance may be invoked as justification ground for restrictive national law. In order to be accepted as a legitimate ground by itself by the CJEU, the national tax law must be designed to only target artificial arrangements which is found in several cases by the CJEU.[159] However, it was first in case C-196/04 Cadbury Schweppes the CJEU did elaborate what exactly it takes an artificial

[152] Jermsten (2018) p. 218; https://ec.europa.eu/regional_policy/en/policy/what/glossary/p/proportionality
[153] https://ec.europa.eu/regional_policy/en/policy/what/glossary/p/proportionality
[154] TEU, Article 5.
[155] Skatteförfarandelagen.
[156] Dir. 2017:38 p. 10.
[157] OECD.com
[158] NSD (2019) p. 1; FAR (2019) p. 3, p. 6, p. 15, p. 18
[159] Case C-264/96 ICI, para. 26; and Case C-324/00 Lankhorst-Hohorst, para. 37

arrangement to be.[160] The case concerned compatibility of British CFC rules with the freedom of establishment. The CJEU deemed the restriction to be justified, given the need to prevent tax avoidance, but only in cases where it targeted wholly artificial arrangements which did not reflect economic reality, with the view to escape the tax normally due on the profits generated by the activities which were carried out on national territory.[161]

The decision of Cadbury Schweppes implies that MS's are allowed to have rules that aim at hindering transfer of taxable profits out of a jurisdiction in an artificial manner. In its decision, the CJEU identified the circumstances which are required in order for a transfer of profits to be qualified as wholly artificial arrangement. There must firstly be a subjective element, in other words, an intention to achieve a tax advantage.[162] Secondly, it must be evident from the objective circumstances that no genuine establishment has been made and no real business is being conducted in any other MS's.[163] According to Hilling, situations where a national law is justified by several justification grounds combined, for instance both tax avoidance and the need to maintain a balanced allocation of taxing rights, the requirement that such law only targets artificial arrangements no longer applies.[164]

In cases where a national rule is considered to be justified by the CJEU, the rule must also pass the proportionality test.[165] The purpose of the proportionality test is to ascertain that the purpose of the rule is achieved and that the rule does not overreach. A restrictive tax rule must be structured in such a way that free movement is not obstructed to a greater extent than what is necessary for attaining the aim of the rule.[166] The proportionality test consists in balancing the effect of the law with its purpose.[167] The duration, nature and extent of the tax rule must be proportional to the end which the law aims to attain.

[160] Case C-196/04 Cadbury Schweppes; and Terra & Wattel, European Tax Law 2018.
[161] Case C-196/04 Cadbury Schweppes, para 55.
[162] Case C-196/04 Cadbury Schweppes, para. 64.
[163] Case C-196/04 Cadbury Schweppes, para. 64.
[164] Hilling, M. (2013) Justifications and proportionality: An analysis of the ECJ´s assessment of national rules for the prevention of tax avoidance, Intertax, p. 307.
[165] Case C-55/94 Gebhard, para. 37; and Ståhl, Persson Österman, Hilling and Öberg, EU-skatterätt (Iustus 2011) pp. 149–151.
[166] Case C-524/04 Thin Cap Group Litigation, para. 64.
[167] Case C-169/91 Council of the City of Stoke-on-Trent, para. 20.; and Zalasinski, Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law, 35 Intertax 310–312 (2007).

The CJEU made it clear, as to the proportionality test, that requiring the taxpayer to prove that the transaction were genuine and proper and that the compensation did not exceed normal levels, was in line with the principle of proportionality.[168] However, the fact that the national rule in the SIAT case was applied when the taxation level in the jurisdiction where the service provider was based was appreciably more advantageous than the Belgians, which meant that it could be applied also in the absence of objective proof verifiable by third parties that the transaction were part of an artificial arrangement.[169] The CJEU also noted that it was impossible to determine the scope of the rule with sufficient precision and its applicability did remain as a matter of uncertainty.[170] Thus the CJEU found that the rule failed to fulfil the principle of legal certainty and as such could not be considered to be proportionate to the objective pursued.[171]

Due to the lack of clarity to its applicability, the rule in the SIAT case was found not to be compatible with the principle of legal certainty. This meant, as a result, that the rule was not deemed to be proportional. The principle of legal certainty requires that rules of law must be clear, precise and predictable regards their effects, especially where they may have unfavourable consequences for undertakings and individuals.[172] In the scope of direct taxation, the SIAT case was the first case in which principle of legal certainty was assessed as part of the proportionality test. One can expect that the CJEU's assessment of legal certainty in the SIAT case to have repercussions for specific conditions that are part of National anti-avoidance rules and that can be found lacking in proportionality for being unclear and imprecise. According to Hilling, the requirement on predictability is now part of the proportionality test. MS's legislator must refrain from replacing anti-avoidance rules where definitive circumstances are specified in the legal text with open ended and more flexible rules intended to combat tax avoidance.[173]

Blum and Langer mean that looking at the DAC 6's object and purpose, three potential justifications comes to mind: (1) the balanced allocation of taxing rights; (2) the need to ensure effective fiscal supervision; and (3) the need to fight tax avoidance and tax evasion.

[168] Case C-318/10 SIAT, para. 53
[169] Case C-318/10 SIAT, para. 50.
[170] Case C-318/10 SIAT, para. 57.
[171] Case C-318/10 SIAT, para. 59.
[172] Case C-318/10 SIAT, para. 58.; and joint Cases C-72/10 and C-77/10 Costa & Cifone, para. 74.
[173] Hilling, M. (2013) Justifications and proportionality: An analysis of the ECJ´s assessment of national rules for the prevention of tax avoidance, Intertax, p. 304.

The persuasiveness of aforementioned justifications, on a stand-alone basis or combined, strongly depends on (1) whether the tax arrangement related to a third state and (2) on the hallmark in question.[174]

The need to ensure balanced allocation of taxing rights may serve as a meaningful justification in cases in which the hallmark target double dips. Double dips are described as deduction of the same item as a loss or depreciation expenditure in two or more countries.[175] Blum and Langer mean that the same is accurate with regard to transfer pricing of hard-to-value intangibles. In respect of Hallmarks of category A, for instance, the fact that the intermediary and his client have signed a confidentiality agreement or that the intermediaries fee depends on the tax savings generated by the arrangement advice is being given on the balanced allocation of taxing right cannot serve as justification ground.[176]

Blum and Langer mean that the need to ensure effective fiscal supervision would in principle be capable of justifying the reporting requirement for cross-border situations where the necessary information cannot effectively be acquired by the requesting state by other means.[177] Pinetz and Binder mean that according to case law by the CJEU, this will routinely be in situations in third-country scenario, if the respective tax treaty do not ensure the effective exchange of information and administrative service.[178] However, Hemels mean that within the EU, the CJEU has been reluctant to accept this justification under the circumstances that the DAC provided the necessary means to obtain the relevant information.[179] Taking this argument as starting point, Blum and Langer mean it can be argued that the DAC 6 rules merely make the existing EU rules on exchange of information more efficient and comprehensive. The MDR, understood as an integral part of the EU regime for exchanging relevant tax information among MS's, hence, would be justified. Blum and Langer argue that this argument may be valid for the hallmarks of category D, which address

[174] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 1, chapter 5.2. IBFD.
[175] Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, para. 47.; and Case C-414/06, *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronnl*, para. 35.
[176] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 1, chapter 5.2. IBFD.
[177] Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*, para. 31.
[178] E. Pinetz & A. Binder, *Ensuring the Effectiveness of Fiscal Supervision in Third Country Situations*, 23 EC Tax Rev. 6, p. 324 et seq. (2014).
[179] S.J.C. Hemels, *References to the Mutual Assistance Directive in the Case Law of the ECJ: A Systematic Approach*, 49 Eur. Taxn. 12, p. 583 et seq. (2009), Journal Articles & Papers IBFD.

the avoidance of the reporting requirement regarding financial accounts, its persuasiveness seems rather questionable regarding the other hallmarks.[180] Blum and Langer mean that the gathering and exchange of information under the MDR is not aimed at ensuring the uniform enforcement of existing rules, it functions as a reconnaissance operation or a "fishing expedition" mandated by the EU to identify politically undesired shortcomings of existing rules. They further mean that the rules under DAC 6, therefore, fulfil a substantially different purpose than for example, exchange of information upon request under the DAC. The need of ensuring effective fiscal supervision might therefore justify those elements of the DAC 6 that are intended to ensure the efficient enforcement of the existing tax rules. DAC 6 ability to justify MDR's obliging taxpayers to report legal but politically undesirable schemes, however, seems doubtful at best.[181] Heber and others mean that in order for such a far-reaching obligation to report regarding de lege lata permissible structures to be justified, the CJEU would have to re interpret the justification of ensuring effective fiscal supervision such that it extends beyond its present applied understanding.[182]

Loss of tax revenue, in and of itself can not serve as justification for treating cross-border situations differently, the need to combat tax avoidance and abuse has repeatedly been accepted by the CJEU in this context.[183] Blum and Langer mean that the arguments raised in the recitals to DAC 6, the legislator of EU seems to believe that the strongest argument of justifying the restrictions under MDR regime is the fight against tax avoidance and tax evasion. They mean that the critical question, is whether the hallmarks of DAC 6 and therefore the scope of reporting requirements remain withing the boundaries developed by the CJEU.[184] According to Blum and Langer, this seems questionable for two reasons. While the goal of DAC 6 is undisputedly to prevent tax avoidance and evasion in the form of aggressive

[180] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 1, chapter 5.2. IBFD.
[181] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 1, chapter 5.2. IBFD.
[182] C. Osterloh-Konrad, C. Heber & T. Beuchert, *Anzeigepflicht für Steuergestaltungsmodelle in Deutschland (Gutachten erstellt im Auftrag des Bundesministeriums für Finanzen)*, p. 74 et seq. (Max-Planck-Gesellschaft 2017).
[183] *See ICI* (C-264/96), para. 28; *Saint-Gobain* (C-307/97), para. 51; *Verkooijen* (C-35/98), paras. 52 and 59; *Metallgesellschaft and Hoechst* (C-397/98) and (C-410/98), para. 59; and *Lankhorst-Hohors*t (C-324/00), para. 36.
[184] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 1, chapter 5.2. IBFD.

tax planning, it by no means is restricted to wholly artificial arrangements.[185] The CJEU noted in Eqiom[186]:

> "in order for national legislation to be regarded as seeking to prevent tax evasion and abuses, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage."[187]

According to Blum and Langer, the MDR rules of DAC 6 are by no means limited to such scenarios, at best, the main benefit test can be interpreted as a tool to comply with the Cadbury Schweppes doctrine on abuse. They further mean that even if DAC 6 could be interpreted according to the abuse and avoidance concept developed by CJEU, its compliance with the fundamental freedoms would still be in question.[188] According to the decisions in Eqiom and Deister[189], rules that operate based on general presumption of fraud and abuse are disproportionate even if the taxpayer hade the change to rebut that presumption.[190] The tax authorities rather have to put forward prima facie evidence that some sort of fraudulent or evasive purpose regarding the chosen arrangement. Regarding the requirements to report, the obligatory disclosure would not admittedly prevent the intermediary from suggesting an arrangement, nor the relevant taxpayer from putting the advice tax arrangement into effect. Blum and Langer mean that it is clear from DAC 6 recitals, that the intention is to deter taxpayers from setting up schemes that would trigger reporting obligation, irrespective of their legality under the existing status. The assumption that the taxpayer would be dissuaded due to the risk of a tax audit and the chance of the chosen scheme being struck down. The obligation to disclosure therefore can be understood as having material effect. Blum and Langer mean that the argument that the MDR's in no way forbid advising on certain structures and as a result, should be seen as a proportionate measure, is not overly persuasive.[191] They believe an

[185] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 1, chapter 5.2. IBFD.
[186] Case C-6/16.
[187] Case C-6/16, *Eqiom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des comptes publics*, ECLI:EU:C:2017:641, para. 26, Case Law IBFD, referring to *Cadbury Schweppes* (C-196/04), para 55.
[188] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 1, chapter 5.2. IBFD.
[189] Case C-504/16
[190] *Eqiom* (C-6/16) and DE: ECJ, 20 Dec. 2017, *Deister and Juhler Holding v. Bundeszentralamt für Steuern*, Joined Cases C-504/16 and C-613/16, ECLI:EU:C:2017:1009, Case Law IBFD.
[191] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 1, chapter 5.2. IBFD.

exchange of information on request or a voluntary exchange of information may be considered to result in a less intense restriction of the fundamental rights and thereby be more proportional.[192]

4.3 Summarized analysis

In situations where a national law is justified by several justification grounds combined, the requirement that the law only target artificial arrangements do not apply. However, if the national rule is designed to prevent tax avoidance by itself, without other justification grounds, the national rule must be designed to only target artificial arrangements.[193] In the case Cadbury Schweppes, the CJEU identified the circumstances which are required in order for a transfer of profits to be qualified as wholly artificial arrangement. The main benefit test of DAC 6 can be interpreted as a tool to comply with the Cadbury Schweppes doctrine on abuse. In cases where the national rule is considered to be justified by the CJEU, the rule must pass the proportionality test, in other words, the tax rule must be proportional to the end which the law aims to attain. In the SIAT case, the principle of legal certainty became a part of the proportionality test. The CJEU noted in the case that it was impossible to determine the scope of the rule with sufficient precision and its applicability did remain as a matter of uncertainty. The lack of clarity to its applicability, the national rule in the SIAT case was found not to be compatible with the legal certainty principle. The legal certainty principle demands that the rule of national law must be clear, precise, and predictable regards their effects, especially where they may have unfavourable consequences for undertakings and individuals.[194]

The arguments raised in the recitals to the DAC 6, the legislator seems to believe that the strongest argument of justifying the restrictions under MDR is the fight against tax avoidance and tax evasion. If scope of the reporting obligation in forms of hallmarks remain within the boundaries developed by the CJEU is uncertain.[195] DAC 6 reporting requirements are not

[192] Blum and Langer (2019) European Union – At a crossroads: Mandatory Disclosure under DAC-6 and EU Primary law Part 2, chapter 4.2.2. IBFD.
[193] See chapter 4.2.
[194] See chapter 4.2.
[195] See Chapter 4.2.

limited to abusive situations which make it doubtful if the need to prevent tax avoidance and evasion can serve as valid justification ground.

Given that the reporting obligation under DAC 6 is justified, according to the decisions in Eqiom and Deister, rules that operate based on general presumption of fraud and abuse are disproportionate. The decisive question is the proportionality of the measures, if the MDR and automatic exchange of gathered information is necessary to achieve the intended aim. The author believes that since the legal certainty became part of the proportionality principle and thus the requirement for the national law to be clear, precise, and predictable, the Swedish implementations compatibility with the principle may be jeopardised. As previously mentioned, the Swedish implementation has been criticised for its vague formulations which could lead to uncertainty of its application. The critical question in order to determine if the Swedish MDR is proportionate to achieve its goal, is whether equal capable measures which are less restrictive exist in order to accomplish the justifying object.

5 Conclusions

It is the authors opinion that MDR will not only target arrangements that are considered to constitute aggressive tax planning. The vague formulations and broad definitions of central words will create uncertainty of the application which will lead to arrangements that is completely legal and non-controversial will be reported.

A legal arrangement which may considered to be aggressive, and the legislator wants to stop, why not change current law, or implement new. It is obvious that the legislator, in question of the MDR, acknowledge several arrangements which contain some of the hallmarks to be undesirable. However, that does not equal abuse. It is the authors opinion that it would make more sense to change the law instead of imposing additional administrative burden on intermediaries and relevant taxpayers. The fear for penalties will clearly lead to over reporting which will lead to increase of costs which the Swedish government have not considered in their calculation of the costs of MDR. However, the author believe that these costs will decrease by the time the legislation is implemented. Another measure which the author considers to be less restrictive and more likely to be proportional, would be to implement exchange of information on request.

It is important counter tax evasion and tax fraud. However, it is the authors opinion that MDR will not target neither tax evasion nor tax fraud. Sweden furthermore already have national GAAR in order to target arrangements that are legit but go against the legislator's purpose. Arrangements that is in accordance with the law, and do not fall under the national GAAR, are completely legit. By levying heavy administrative burden on intermediaries and in some cases the relevant taxpayer for legitimate but undesirable arrangements, the author does not find it likely to be proportionate.

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