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The DAC and primary law: effectiveness of taxpayer's rights to privacy and personal data protection.

by

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Summary

In a time where it is believed that the administrative cooperation between the Members States, in the form of exchange of information and, in particular, thought the mandatory automatic exchange of information without preconditions, is the most effective means of enhancing the correct assessment of taxes in cross-border situations, the bulk of information exchanged increased enormously.

As the European Union took the lead in securing the creation of a legal ecosystem where the rights to privacy and personal data protection are effectively safeguarded, this trend poses significant concerns.

This thesis considers whether the Directive on Administrative Cooperation (DAC) is consistent and proportionate with primary law while affecting taxpayers' rights to privacy and personal data protection.

In order to do so, with the help of relevant CJEU's judgments, both primary and secondary law is taken into consideration. Respectively, the applicable provisions of the Charter of Fundamental Rights of the European Union (the Charter) and the General Data Protection Regulation (the GDPR) are comprehensively analysed.

Abbreviation list

AEOI	Automatic exchange of information.
The Charter	Charter of Fundamental Rights of the European Union, Official Journal C 326, 26.10.2012, p. 391–407.
CJEU	Court of Justice of the European Union.
DAC	Directive on Administrative Cooperation. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, Official Journal L 64, 11.3.2011, p. 1–12. (DAC1).
DAC6	Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, Official Journal L 139, 5.6.2018, p. 1–13
DAC7	Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, Official Journal L 104, 25.3.2021, p. 1–26.
DPD	Data Protection Directive. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Official Journal L 281, 23.11.1995, p. 31–50.
EU	European Union.

GDPR	General Protection Regulation. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC Official Journal L 119, 4.5.2016, p. 1–88.
LED	Law Enforcement Directive. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, Official Journal L 119, 4.5.2016, p. 89–131.
MSs	Member States of the European Union.
OECD	Organisation for Economic Co-operation and Development.
TEU	Consolidated version of the Treaty on European Union, Official Journal C 326, 26.10.2012, p. 13–390.
TFEU	Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26.10.2012 p. 1 – 390.
VAT	Value Added Tax.

1. Introduction

1.1 Background

In the past decades, we have been witnessing what seems to be a steady trend toward increased use of "administrative cooperation" instruments to tackle taxpayers' opaque behaviours in the field of both indirect and direct taxation. The Directive on Administrative Cooperation (DAC)[1] has already been modified six times since its first implementation; each amendment provided for a deepening in the integration between the Member States. At the same time, the broadening of both the objective and subjective scope of the Directive significantly increased the interferences with taxpayers' right to privacy and data protection.[2] The amendments implemented across the years responded to the need to face the increasing phenomenon of taxpayers' cross-border mobility and the surge in the cross-border transactions that made it difficult, with particular regard to direct taxation, for the correct assessment by administration of taxes due without receiving information from the other Member States. In the eyes of the Union's legislator, strengthening the administrative cooperation assumes an *"important role in contributing to the better functioning of the internal market"*.[3] As lastly outlined by the European Commission in its proposal to the Council for the latest amendment of the Directive, *"strengthening the administrative cooperation and exchange of information is crucial in the fight against tax avoidance and tax evasion in the Union"* [4]. At the same time, the recovery from the Covid-19 pandemic exacerbated the need for the Member States to secure "*adequate tax revenues to finance their considerable efforts to contain the negative economic impact* [of Covid-19 pandemic]*"* [5].

On the one hand, according to the Commission, the protection of tax bases' integrity is one of the reasons that justified the introduction of the new reporting obligations for digital platforms. [6] Doing so would preserve Member States' tax revenue by preventing income earned by sellers via digital marketplaces from not being reported or only partially. But on the other hand, a fair taxation rationale also inspired the legislator. In fact, in the opinion of the Union's legislator, digital sellers enjoyed a competitive advantage over traditional ones. Consequently, regulatory gaps had to be closed to establish a level playing field for economic operators. Interestingly,

[1] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, Official Journal L 64, 11.3.2011, p. 1–12.
[2] Manca, Mauro: *EU DAC7 Proposal Further Strengthens EU Tax Administrative Cooperation, Even in Respect of Digital Platforms*, IBFD European Taxation 2021 (Volume 61), No. 4, p. 144.
[3] COM (2020) 314 final, Brussels, 15.7.2020, Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, p. 19.
[4] Ibid., p 1.
[5] Ibid.,
[6] Ibid., p. 2.

the pursuit of this intent is also justified to *"ensure that solidarity and fairness* are *at the heart of the recovery"* from the Covid 19 pandemic. [7]

1.2 Aim

The present research aims to investigate whether the DAC is consistent with primary law with particular reference to the level of protection the DAC provides to taxpayers' rights to privacy and data protection. The choice to jointly investigate the right to privacy and data protection is not casual. In fact, it is explained that those rights are closely linked in the jurisprudence of the Court of Justice. With regard to the rights to privacy and data protection, the benchmarks are the Charter of Human Rights of the European Union (The Charter)[8] and the General Data Protection Regulation (GDPR)[9]. The GDPR does not have the rank of primary law. Still, it constitutes, for some aspects, *lex specialis*, and by giving substance to principles contained in the Charter, it constitutes an indispensable element of the analysis. The purpose of the thesis is, in particular, to analyse if the DAC is proportionate while affecting the mentioned taxpayer's rights.

DAC7, while enlarging the objective scope of the information to be exchanged, more significantly, for the first time, it also extends the reporting obligation outside the arena of financial institutions.[10] The new reporting obligations and the due diligence procedures that have to be established under Annex V of DAC7, in particular, constitute an integral part of the proportionality judgment at the end of the thesis. Specifically, concerning the proportionality of the reporting obligations for digital platforms, the *Airbnb Ireland UC* case[11] concerning the freedom to provide services is analysed. The intent is to show that following a request for information based on the mentioned reporting obligations, some critical elements might emerge if the proportionality of national disposition is analysed. It is, therefore, essential to consider specifically DAC7 for the complete appraisal of the legislation at issue.

Moreover, DAC7, importantly, provides clearness concerning the legal basis according to which taxpayers' personal information shall be treated. The need to investigate this specific area is now more than ever urgent. As mentioned above, the wiliness to increase the effectiveness of administrative cooperation is reflected by the DAC's continuous amendments. This process ultimately determined an enlargement, in particular, of the scope of the provisions concerning the automatic exchange of information. This trend

[7] Ibid., p. 1.
[8] Charter of Fundamental Rights of the European Union, Official Journal C 326, 26.10.2012, p. 391–407.
[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC Official Journal L 119, 4.5.2016, p. 1–88.
[10] Council Directive 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, Official Journal L 104, 25.3.2021, p. 1–26.
[11] Court of Justice of the European Union, 27 April 2022, Case C-674/20, *Airbnb Ireland UC v Région de Bruxelles-Capitale.*

risks causing significant repercussions on taxpayers' rights to privacy and data protection. If it is true that, as acknowledged already in the first version of the DAC, "*the mandatory automatic exchange of information without preconditions is the most effective means of enhancing the correct assessment of taxes in cross-border situations and of fighting fraud,"* [12] then *a fortiori*, taxpayers' rights in those fields deserve to be duly considered.[13]

Therefore, this thesis aims to answer the following question: *Is the DAC consistent and proportionate with primary law while affecting the taxpayer's rights to privacy and data protection?".*

1.3 Method and material

The method used for this research is the dogmatic research method. This research intends to analyse the DAC as it stands. To this scope, it is crucial to outline that, even though the deadline for the transposition into national law of the latest amendment to DAC, i.e., DAC7, has not elapsed yet, it has already entered into force; therefore, it constitutes an integral part of the DAC's corpus.[14] The novelties introduced by DAC7 cannot be consequently left outside the scope of the investigation. In particular, the extension of the reporting obligations to digital platform operators has to be duly considered. To achieve the scope of the research, both primary and secondary law are considered. Respectively, the Charter and the GDPR constitute the main benchmarks against which the adequateness of DAC is tested. The order is not casual: as the GDPR elaborates concepts primarily introduced by the Charter that is hierarchically superior, it is logical to analyse the Charter at first.

It is important to remember that the Member States of the European Union in the field of direct taxation, in particular regarding substantive tax law, still enjoy sovereignty because direct taxes, except for a few cases,[15] have not been harmonised yet. However, that does not mean that the Member States are empowered to act as if they were not part of the European Union just because taxes are not, in most cases, subject to an intervention by the Union's

[12] See *supra* n. 1, preamble n. 10.

[13] Schaper, Marcel: *Data Protection Rights and Tax Information Exchange in the European Union: An Uneasy Combination*, Maastricht Journal of European and Comparative Law 2016, 23(3), p. 514-530; Dourado, Ana Paula: *The European Commission Tax Package: The Condition of Foreseeable Relevance, Group Requests and Data Breaches,* INTERTAX, Volume 48, Issue 11 (2021), p. 950.

[14] Pursuant to art. 2 of Directive 2021/514/EU Member States must implement the transposition measures by 31 December 2022. By way of derogation, transposing measures regarding point (1)(d) of art. 1, point (26) of art. 3 of Directive 2011/16/EU and point (12) of art. 1 as regards Section II a of Directive 2011/16/EU must be adopted by 31 December 2023.

[15] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, Official Journal L 310, 25.11.2009, p. 34–46; Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, Official Journal L 345, 29.12.2011, p. 8–16.

legislator. The CJEU has been remarkably coherent with this assumption; it is a settled EU law principle that *"powers retained by the Member States must be exercised consistently with Community law"*[16] and, therefore, that*, "although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law"*.[17] Therefore, in the European Union, the interaction of the Member States' internal law with the European Union law adds another layer of difficulty in analysing the legal source of taxpayers' rights. While it is the responsibility of each Member State, under the principle of procedural autonomy,[18] to create the necessary legal safeguards for the protection of rights conferred by EU law to individuals, the principle of effectiveness bounds MS to act in a way not to empty the substance of the right conferred avoiding, therefore, to jeopardise, in concrete, the legal effect of the EU law. Consequently, it should also be kept in mind that different sources of law (i.e., primary law, secondary law and national law) situated at different hierarchical levels have to be comprehensively considered while assessing the lawfulness of a disposition within the European Union regardless of its status.[19]

The case-law of the CJEU is also examined. Although some of the judgments considered do not directly relate to tax issues, the relevance of these rulings is clearly explained. Finally, the arguments of legal doctrine are part of the analysis by mentioning some relevant doctrinal articles.

1.4 Delimitation

Although the author is conscious of the fact that many other taxpayer's rights are affected by the DAC, of which the right of the taxpayer to participate in the exchange of information and its corollaries, i.e., the right to be informed of the request of exchange; the right to be heard before the transmission; the right to challenge the decision of exchange, constitutes some examples, they nevertheless are not be included in the research. This thesis wants to focus, specifically, on the rights to privacy and data protection in tax matters. In fact, on many occasions, the Commission recognised that the protection of those rights is a priority on its agenda[20]; therefore, their relevance is of critical

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[16] Court of Justice of the European Union, 4 October 1991, Case C-246/89, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, para. 12.

[17] Court of Justice of the European Union, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker*, para. 21.

[18] Please see, Court of Justice of the European Union, 10 April 2003, Case C-276/01, *Joachim Steffensen*, para. 60: *"In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to (...) lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law".*

[19] González, Saturnina Moreno: *Cross-border exchange of tax information upon request and fundamental rights – Can the right balance be struck?: Joined cases C-245/19 and C-246/2019 État luxembourgeois contre B*, Maastricht Journal of European and Comparative Law 2021, Vol. 28(5), p. 716.

[20] European Commission - Press release, European Commission and United States Joint Statement on Trans- Atlantic Data Privacy Framework Brussels, 25 March 2022.

importance in the present day. At the same time, since it would require an inquiry that would cross into reasoning related to the criminal law, the right not to self-incriminate is also not part of the analysis. Finally, the thesis focuses only on direct taxation because the Union's legislator chose to expunge VAT and other indirect taxes from the DAC's scope and instead dedicate a separate instrument.

1.5 Outline

The DAC constitutes the thesis's principal object, including the novelties introduced by Directive DAC7. Therefore, the second chapter focuses on it. At first, a concise introduction of the Directive is provided, also referring to the recommendations by the OECD. The description of the goals DAC pursues follows. An exhaustive understanding of them is essential for the aim of the thesis because, ultimately, their attainment and so the public dimension of the legislation constitutes the counter altar for the taxpayer's individual rights. Later, the way the DAC deals with taxpayers' rights to privacy and data protection is considered.

The third chapter analyses the Charter of Human Rights of the European Union. At first, it is made clear the collocation of the Charter in the hierarchy of the source of the law of the European Union. That is important because the Charter represents the primary benchmark against which to test the adequateness of the legal solutions adopted by the DAC. The provisions that are crucial for the discussion are examined in detail. The leading cases in the jurisprudence of CJEU are brought to the reader's attention.

The fourth chapter focuses on the GDPR. In fact, the GDPR is of critical importance because it contains an exhaustive definition of personal data and data processing which is analysed. After all, it represents the second parameter (the first is the Charter) that has to be considered when investigating if the DAC provides for sufficient protection of the taxpayers' rights at issue in the present analysis. The GDPR, being a piece of secondary legislation, is also crucial because it defines the circumstances when the rights to privacy and data protection can be restricted. Those exceptional circumstances are analysed, bearing in mind the principle of EU law that exceptions must be interpreted narrowly. Also, the relevant case law is considered.

The fifth chapter firstly compares the legal treatment the rights considered receive in the Charter and the GDPR. Secondly, it compares the solutions of the DAC concerning taxpayers' personal data and privacy protection with the appraisal of those rights received within the Charter and the GDPR. The chapter wants to pursue the intent of facilitating, by operating a comparison, the understanding of the adequateness of the DAC on this matter.

The sixth chapter focuses on the proportionality of the reporting obligation for digital platform operators introduced by DAC7. By considering the case-law of the CJEU, the chapter shows that the proportionality of these dispositions of the DAC in this context is questionable.

Finally, in the last chapter, the conclusions illustrate, first, whether the DAC secures a consistent level of protection concerning the taxpayer's rights at issue and, second, whether the DAC is proportionate. Therefore, the main question is answered.

2. The Directive on Administrative Cooperation

This chapter focuses on the DAC. At first, a general introduction is provided that is helpful for the reader to contextualise the analysis. The explication of the objectives the DAC aims to pursue follows. Later, the DAC's dispositions dedicated explicitly to protecting the selected taxpayers' rights are pointed out. Finally, it is described how complying with requests for information might generate a significant economic burden. The chapter aims to explain how the DAC secures the protection of taxpayers' rights to privacy and data protection and shows how it might potentially interfere with the freedom to provide services enshrined by the 56 of the Treaty on the Functioning of the European Union ('TFEU').[21]

2.1 General Report

The DAC lays down a set of rules to enhance cooperation between the Member States with the scope to exchange information relevant to the administration of national legislation concerning tax matters. Article 2 provides for the taxes in relation to which information shall be exchanged.[22] Notably, the broad formulation of the disposition reflects the intent of the Union's legislator to essentially includes "all taxes of any kind" levied by a Member State with the sole exception of VAT, customs duties and excise that are covered by other Union pieces of legislation. Compulsory social security contributions are not covered either. Information concerning taxes covered by the Directive can be exchanged in three fashions: on request, automatically or spontaneously. Chapter II Section I of the Directive delineates the provisions concerning the exchange of information on requests, while Section II concerns the mandatory automatic exchange. Section III Article 9 of the Directive involves the spontaneous exchange of information.

DAC7 constitutes the sixth amendment to directive 2011/16/EU.[23] In the eyes of the Union's legislator, it amounted to the necessary step in strengthening the provisions related to all forms of exchange of information and administrative cooperation.[24] The amendment translates concepts and parameters developed by the OECD within the BEPS Project, whose Action 12 of 2015 recommended that the countries adhering to the project adopt a mandatory international data communication standard to enhance tax transparency, which is considered the primary tool for combating

[21] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26.10.2012 p. 1 – 390.
[22] Consolidated text: Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, Official Journal L 64, 11.3.2011, p. 1.
[23] See *supra* n. 1.
[24] See *supra* n. 10, preamble n. 2.

international tax avoidance practices.[25] At the same time, it contemplates a powerful enlargement and strengthening of the provisions on the exchange of information and administrative cooperation between the EU Member States. An important novelty is the extension of the new rules to digital platforms.[26] DAC7 obliges the digital platforms to communicate information regarding the sellers performing relevant activities on their platforms. Digital platforms (Platform Operator, i.e., *Entity that contracts with Sellers to make available all or part of a Platform to such Sellers*)[27], are affected by the reporting obligation contained in the Directive, therefore, turning into "reporting platform operators" when essentially, they interact with the internal market. In fact, the Directive defines the nexus very broadly, including non-resident, nor incorporated or managed in a Member State platform operator that facilitates the carrying out of a relevant activity by reportable sellers.[28] Platforms are also defined broadly. The term does not include only *"software that without any further intervention in carrying out a Relevant Activity exclusively allows any of the following: (a) processing of payments in relation to Relevant Activity; (b) users to list or advertise a Relevant Activity; (c) redirecting or transferring of users to a Platform"*.[29] Finally, reportable sellers are, essentially, those sellers, either an individual or an entity, resident in a Member State.[30] Communications relating to relevant activities include a wide range and types of earnings deriving from, among other things, the leasing of real estate, the provision of personal services, the sale of goods and the leasing of any means of transport.[31] In contrast, the activities carried out by a seller acting as an employee of the platform operator should not fall within the scope of the disclosure obligations. The set information to be communicated to the relevant Member States' authorities is listed in Article 8ac paragraph 2 of the DAC7.

As noted, in the latest amendment to the DAC, the Union's legislator also introduced a set of due diligence obligations concerning digital platforms' operators concerning their clients. In particular, due diligence procedures are aimed at identifying each seller and by so at enabling the Member States to communicate, by automatic exchange, information under Article 8ac.[32] Annex V Section II of DAC7 lays down a comprehensive "Know Your Customer" process reporting platforms operators must implement. The information referring to an individual seller that must be collected includes: (1) the first and last name; (2) the primary address; (3) the tax identification number; (4) the date of birth.[33] Concerning entities, the platform's operator must collect, among others: the legal name, the primary address, the business

[25] OECD/G20 Base Erosion and Profit Shifting Project Mandatory Disclosure Rules Base Erosion and Profit Shifting ACTION 12: 2015 Final Report. The OECD explains that "BEPS" refers to "tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid."
[26] See *supra* n. 10, art. 1, para. 1, point 8. The newly inserted art. 8ac.
[27] See *supra* n. 10, Annex V Section I, para. 1, letter A, point 4.
[28] Ibid., Annex V Section I, para. 1, letter A, point 4 (b).
[29] See *supra* n. 10, Annex V Section I, para. 1, letter A, point 1.
[30] See *supra* n. 10, Annex V Section I, para. 1, letter B.
[31] See *supra* n. 10, Annex V Section I, para. 1, letter A, point 8.
[32] See *supra* n. 10, Annex V para. 1.
[33] See *supra* n. 10, Annex V Section II para. 1, letter B, point 1.

registration number and the existence of any permanent establishment through which Relevant Activities are carried out in the Union, where available, indicating each respective Member State, where such a permanent establishment is located.[34] Due diligence obligations include establishing a process to verify that the information obtained is reliable and updated across the time. Section III.B.2.c) of Annex V of DAC7 provides for the information to be reported. The scope of the reporting obligation is significantly broad,[35] especially considering the open-end formulation *"as well as any other financial identification information available to the Reporting Platform Operator with respect to that account holder."*[36]

2.2. The goals of DAC

The first preamble of the DAC describes the rationale upon which the Directive relies. It can ultimately be summarised as helping to prevent double non-taxation generated by the interaction of uncoordinated national measures, which, in turn, favours the flourishing of abusive phenomena. It is, in fact, clear that, at least in the eyes of the Union's legislator, the increasing phenomenon of taxpayers' cross-border mobility and the surge in the cross-border transactions made it difficult, with particular regard to direct taxation, for the correct assessment by administration of taxes due without receiving information from the other Member States. The primary scope for implementing a system of administrative cooperation that includes the exchange of information mechanism is to diminish the opportunities for tax avoiders and tax evaders to pursue their intent. [37] In particular, the new reporting obligations for digital platforms are justified by the need to preserve the Member States' tax revenue by preventing income earned by sellers via digital marketplaces from not being reported or only partially. [38]

The Directive also aims at ensuring legal certainty; the Commission noted that some Member States have already introduced similar national rules, potentially obliging economic operators to comply with many different regulations aimed at the same scope. The Directive introduces a common, *de minimis*, legal standard that could interrupt potential arming national legislation. The Directive also, implicitly, prevents discrimination. Potentially, a discriminatory treatment might arise should a Member State decide to introduce a measure directed only at securing the collection of information concerning cross-border situations. In fact, as the CJEU noted in the *Airbnb Ireland UC* case,[39] legislation that makes services providers subject *"to a duty to provide information concerning persons liable to pay a flat-rate tourist tax that were using its services on the written request of the tax authorities"*[40] is not discriminatory because by being, in substance,

[34] Ibid., Annex V, Section II, para. 1, letter B, point 2.
[35] European Union Data Protection Supervisor, EDPS Opinion on the proposal for an amendment of Council Directive 2011/16/EU relating to administrative cooperation in the field of taxation (28 Oct. 2020).
[36] See *supra* n. 10, Annex V, Section III, letter B, point 2(c).
[37] See *supra* n. 3, p. 1.
[38] Ibid., p. 2.
[39] See *supra* n. 11.
[40] Ibid., para 18 and subsequent.

without distinction applicable, *"it merely requires service providers, to retain the particulars for the purposes of the accurate levying of the tax relating to the rental of the property in question from the owners concerned"*. It cannot be excluded that should a similar disposition be directed to cross border provision of services only, it could generate frictions with the freedoms of the treaties. In fact, the Court stated that only measures consisting of tax obligations that entail additional burdens for service providers *"which affect in the same way the provision of services between Member States and the provision of services within one Member State"* [41] do not fall within the scope of Article 56 TFEU.[42]

As explained by the Commission, the new set of rules concerning digital platforms, introduced by DAC7, aims at helping tax administrations to address the challenges posed by digitalisation. [43] Ideally, the new rules ensure that a seller has "*accurately reported its income earned via digital platforms, without the need for ad hoc, time-consuming requests and inquiries"*.[44] However, as suggested by the doctrine, it should be noted that the exchange of information mechanisms is rationally justified only if tax administrations effectively use the information being exchanged.[45] That is because, *"If, on the other hand, the information subject to the exchange is not effectively used, the legality of the measure (…) may be questioned"*.[46] This assessment is remarkably accurate in the automatic exchange of information: the larger the easiness and frequency information is obtainable and exchanged, the largest should be the competent national authorities' concrete usage of these materials.

Interestingly, some authors suggest in the context of DAC6 that one of the goals of the DAC should be understood as, implicitly, pursuing an intent that, ultimately, should be left to "substantive law". In the opinion of this doctrine, DAC would be aimed, in the end, at influencing taxpayers' behaviour. [47] This doctrine suggests that this outcome is the result of the constant difficulties in putting together legislation in the field of direct taxation derived from the strict requirements of Article 115 TFEU.[48] In the view of these authors, the Union legislator had pursued its harmonisation intent surreptitiously. Daniel W. Blum and Andreas Langer argued that: *"Such intensified harmonisation in ensuring the functioning of the internal market (…) should be done in an open and transparent manner, (…) and not secretly through the backdoor of*

[41] Ibid., para. 45 and 46.
[42] See *supra* n. 21.
[43] See *supra* n. 3, p.1.
[44] Ibid., p.7.
[45] Weffe H., Carlos E.: *Highlights and Trends in Global Taxpayers' Rights 2020*, IBFD Bulletin for International Taxation 2021 (Volume 75), No. 7, p. 317.
[46] Ibid., p. 317.
[47] Blum, Daniel W.; Lange, Andreas: *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 2*, IBFD European Taxation, 2019 (Volume 59), No. 7, p. 318.
[48] Art. 115 TFEU empowers the Council of the European Union, under a special legislative procedure, by acting unanimously to issue directives aimed at approximating the laws of the Member States should it is established that such an intervenient is deemed necessary to guarantee the well-functioning of the internal market.

DAC6".[49] If that is the case, *a fortiori*, the level of protection of taxpayers' rights under the DAC needs to be duly considered.

2.3. Taxpayers' rights protection in the DAC

The need for the DAC to secure taxpayer's rights protection is firstly reassured by DAC1 at preamble n. 28, which states that *"This Directive respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union"*. [50] It is essential to consider, for the specific rights analysed by this thesis, that the Union's legislator in DAC7 reinforced the content of this provision by adding that "*In particular, this Directive seeks to ensure full respect for the right to the protection of personal data and the freedom to conduct business."*[51] With specific reference to the protection of personal data, the novelties introduced by DAC7 are relevant for explicitly establishing which legislation has to be applied. In 2016, the Data Protection Directive (DPD)[52] was replaced by the GDPR. In fact, until this moment, although the GDPR provides that any references to the DPD should be read as a reference to the GDPR,[53] some authors suggested, instead, that it only appeared to seem logical to conclude that the GDPR would have applied to the DAC in the same precise manner as the DPD.[54]

The relevance of the GDPR for the DAC is testified by the fact that DAC7 replaced former Article 25 entirely. It now explicitly provides that "*All exchange of information pursuant to this Directive shall be subject to Regulation (EU) 2016/679"*. [55] The redrafted Article 25, therefore, constitutes the legal basis for applying GDPR provisions to the DAC. In particular, Article 25(1) explicitly provides that Articles 13, 14(1) and 15 of the GDPR shall be guaranteed.[56] Nevertheless, the protection secured by the applicability of the GDPR to DAC is not absolute. In fact, the provision at issue allows for the possibility of restricting the rights provided by GDPR that the DAC must guarantee, should it be necessary for the protection of one of the objectives of general interest of the Union or of a MS, namely, "an important economic or financial interest (…), including monetary, budgetary and taxation a matters, public health and social security".

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[49] See *supra* n. 45, p. 319.
[50] See *supra* n. 1.
[51] See *supra* n. 10, preamble n. 37.
[52] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Official Journal L 281, 23.11.1995, p. 31–50
[53] Wattel, Peter; Marres, Otto; Vermeulen, Hein (ed), update by Sigrid Hemels: *Administrative Cooperation1 in the Assessment and Recovery of Direct Tax Claims*, European Tax Law, Kluwer Law International 2019, p. 41.

[54] Ferreira Liotti, Belisa: *Taxpayers' Data Protection: Do International, Regional, and Domestic Instruments Guarantee Adequate Rights in Tax (A)EoI?*, INTERTAX, Volume 50, Issue 2 (2022), p. 145.
[55] See *supra* n. 10, art. 1(1) point 18, the first paragraph of the redrafted art. 25.
[56] Respectively, art. 13 "Information to be provided where personal data are collected from the data subject"; art. 14 "Information to be provided where personal data have not been obtained from the data subject"; art. 15 "Right of access by the data subject".

Despite that, Article 25, as pointed out by the doctrine, is relevant in safeguarding taxpayers' rights.[57] In fact, regardless of the possibility of restricting the rights provided by the first paragraph, it mandates that the Member States must make sure that each reporting subject "(*a) informs each individual concerned that information relating to that individual will be collected and transferred in accordance with this Directive*" and "*(b) provides to each individual concerned all information that the individual is entitled to from the data controller in sufficient time for that individual to exercise his/her data protection rights (...)"*.[58]

In any case, concerning the possibility of restricting the rights under Article 25(1) of the DAC, it is crucial to consider that any limitation must respect the essence of fundamental rights and freedoms and must be a necessary and proportionate measure in a democratic society to achieve the goal of the legislative measure it aims to achieve. Moreover, paragraph five states that *"Information processed in accordance with this Directive shall be retained for no longer than is necessary to achieve the purposes of this Directive"*. [59]

Finally, the redrafted Article 25 now includes provisions dealing with data breaches and the subsequent remedial action that has to be taken in paragraphs six and seven. The Directive promotes tight cooperation between MSs and the Commissions. That is important for safeguarding taxpayer data collected and exchanged pursuant to the Directive.

2.4 Request for information's potential interferences with Article 56 TFEU

Requests for information by tax administrations are *ex se* capable of causing relevant costs for the economic operators they are directed to. This is an issue that directly concerns the DAC under both the provisions concerning the procedures for the exchange of information on request and the automatic exchange of information.[60] In fact, depending on the level of organisation of the economic operator complying with the authority's orders might be costly. It should be remembered that Preamble 37 of Directive 2021/514/EU provides for the full respect of the "freedom to conduct business", a concept that presupposes that any interference should be limited and proportionate regarding its objective.

In this regard, the Court of Justice, in the *Airbnb Ireland UC v. Région de Bruxelles-Capitale* case,[61] had the opportunity to rule with reference to the possible interference generated by the legislation of a Member State that mandated an obligation to communicate information for tax purposes with Article 56 TFEU relating to the free provision of services. Even though the Court's scrutiny concerned a national disposition in the case considered, the analysis of the judgment is relevant for this research. In fact, for example,

[57] See *supra* n. 54, p. 147.
[58] See *supra* n. 10, art. 1(1) point 18, the fourth paragraph of the redrafted art. 25.
[59] See *supra* n. 10, art. 1(1) point 18, the fifth paragraph of the redrafted art. 25.
[60] See *supra* n. 22 respectively, Chapter II, Sections I and II.
[61] See *supra* n. 11.

Article 6(3) of the DAC, concerning the request for information by the authority of another MS, provides that *"the requested authority shall follow the same procedures as it would when acting on its own initiative"*.[62] This suggests that likely, national dispositions such as that scrutinised by the Court in the *Airbnb Ireland UC* case are comparable to those that would have been applied should a request under the DAC reach the national authority.

In the case under analysis, Airbnb Ireland UC was ordered by the tax authority of Brussels to provide "*information concerning persons liable to pay the flat-rate tourist tax that were using its services"*.[63] At issue was Belgian disposition,[64] which imposed *"an obligation on providers of property intermediation services, irrespective of their place of establishment and the manner in which they mediate, in respect of tourist accommodation establishments that are located in a region of the Member State concerned and for which they act as intermediary or carry on a promotion strategy, to provide the regional tax authorities, on the latter's written request, with the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year"*. [65] The Court was called, in particular, to assess whether such a disposition was in line with the free provision of services principle enshrined by Article 56 TFEU. The recurrent, in fact, argued that the national disposition at issue contravened the prohibition of restrictions to the free provision of services within the European Union and, in particular, it affected its activity, specifically the mediation of services. The assumption was that by introducing additional obligations, although indistinctly applicable, that ultimately resulted in a cost, economic operators would have been discouraged from operating in the internal market.

The Court, while acknowledging that *"by their very nature, tax obligations entail additional burdens for service providers"*, [66] affirmed that *"measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and the provision of services within one Member State, do not fall within the scope of Article 56 TFEU"*.[67]

Therefore, the *Airbnb Ireland UC* case seems not to leave space for the possibility of challenging requests for information based on Article 56, alleging that the dispositions pursuant to which national tax authorities issue the submissions are in contrast with the principle of free provision of services. Notably, the national disposition must not be discriminatory. If that is the case, the *Airbnb Ireland UC* ruling leaves the possibility to challenge the restricting disposition intact.

However, in particular, regarding the provisions of DAC7, dealing with the reporting obligations for digital platforms, the findings of the Court in the

[62] See *supra* n. 22, art. 6(3).
[63] See *supra* n. 11, para. 18.
[64] Namely, art. 12 of the order of the Brussels Capital Region of 23 December 2016 on the regional tax on tourist accommodation establishments.
[65] See *supra* n. 11, para. 39.
[66] Ibid., para. 45.
[67] Ibid., para. 46.

Airbnb Ireland UC judgment do not seem satisfactory, especially concerning the criterion of proportionality.
In fact, preamble 37 of DAC7 provides that: *"this Directive seeks to ensure full respect for the right to the protection of personal data and the freedom to conduct business"*. It appeared, therefore, legitimate to investigate whether taxpayers can rely on the freedoms provided by the TFEU, namely the freedom to provide service under Article 56, to question tax administrations' requests for information in these specific circumstances. While the Court of Justice recognised that compliance with these requests might determine high costs for economic operators, it sustained that this was the unavoidable consequence of the fact that tax obligations, although procedural, are implicitly costly.

Nevertheless, the *Airbnb Ireland UC* left some space for manoeuvre with reference to the proportionality analysis. Those arguments are assessed in the subsequent section. These aspects are considered later.

2.5 Conclusion

By analysing first, the content of the DAC and then its goals, this chapter revealed that the redrafted Article 25 now clearly constitutes the legal basis for applying the GDPR to the DAC. It also showed that, although the potential interference with the freedom to provide services, the CJEU is unlikely to deem measures mandating the transmission of tax information to fall within the scope of Article 56 TFEU. However, some space for manoeuvre remains concerning the proportionality of reporting obligations for digital platforms under DAC7.

3. The Charter of Human Rights of the European Union

This chapter focuses on the Charter of Human Rights of the European Union. First, a concise introduction to the Charter is provided. The relation between the concept of privacy and data protection follows. Finally, it is analysed how the Charter protects those rights. This chapter aims to provide an analysis of the content of the Charter concerning privacy and data protection because the Charter represents the first benchmark against which the adequateness of the DAC is tested.

3.1 General Report

The Charter of Human Rights of the European Union, which derived its content from the European Convention on Human Rights[68], acquired a legally binding status with the entry into force of the Treaty of Lisbon in December 2009; based on Article 6 of the Treaty on the European Union ('TEU') [69] the Charter has "the same legal status of the Treaties"; therefore, it shall be considered as a primary source of EU law. According to Article 51, the Charter binds the *"institutions, bodies, offices and agencies of the Union (...) the Member States only when they are implementing Union law"*; it comes that secondary EU legislation should be in line with the provision of the Charter and, notably, national measures implementing EU law (i.e., Directives for the scope of this thesis) should also be consistent with the provisions of the Charter. [70] According to the Court of Justice's ruling in the Åkerberg Fransson case, *"Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter"*.[71] Consequently, the CJEU enshrined the principle that both the secondary EU legislation and the national measure implementing EU law must be consistent with the Charter. This reasoning, therefore, directly applies *mutatis mutandis* to the DAC.

3.2 The relation between privacy and data protection

The doctrine sustains that there is a tendency to consider the right to data protection as a corollary of the right to privacy. Even though there are

[68] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.
[69] Consolidated version of the Treaty on European Union, Official Journal C 326, 26.10.2012, p. 13–390.
[70] For the precise meaning of "measures implementing EU law" or the purpose of art. 51 please refer to: Court of Justice of the European Union, 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, para. 18 and subsequent.
[71] Ibid., para. 21.

considerable overlaps between the two rights, it must be underlined that the Charter provides for a distinction between the mentioned rights that, according to the doctrine, is not *"purely symbolic"*.[72]

As it is also considered more in detail in the following section, Article 7 of the Charter protects everyone's private life and family; it might be deemed that, supposedly, the right to protection of personal data can be included in the concept of private life. According to this reasoning, the protection of personal data would be already secured by Article 7 of the Charter.

A first indication that the Charter, specifically, adopted a different approach is firstly demonstrated by the structure of the Charter itself.
Article 8 specifically addresses the protection of personal data. Therefore, the circumstance that the Charter chose to dedicate a distinct provision concerning the protection of personal data can be interpreted as the will to distinguish data protection from privacy.[73] The fact that Article 8 in paragraphs two and three details how personal data must be treated is another element that the doctrine argues is explanatory of the fact that these two rights are not entirely synonyms.

Despite the structure of the Charter, the Court of Justice interprets the concept of privacy as being at the centre of the protection of personal data, therefore suggesting a strict link between the two. This is clearly affirmed in the *Volker und Markus Schecke GbR* Case. The CJEU stated that: *"it must be considered that the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual"*.[74]

In the case at issue, in particular, the Court inferred the interference to private life on the basis of the publication of information pursuant to the EU legislation concerning agricultural aids. It was held that *"the publication on the internet of data by name relating to the beneficiaries concerned and the precise amounts received by them"*[75] allowed third parties to *"draw conclusions as to their income (...) the aid represents between 30% and 70% of the total income of the beneficiaries concerned".*[76] The Court, therefore, acknowledged that the publication of information that made it possible for the public to determine, presumably, a considerable part of the income of the aid's beneficiaries amounted to interference in their private life.

The right to privacy and data protection, at least in the jurisprudence of the Court of Justice, are closely linked, although they are not entirely convergent under the Charter.

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[72] Kokott, Juliane; Sobotta, Christoph: *The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR*, International Data Privacy Law, 2013, Vol. 3, No. 4, p. 222.
[73] Ibid., p. 223.
[74] Court of Justice of the European Union, 9 November 2010, Joined Cases C-92/09 and C-93/09, V*olker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, para. 52.
[75] Ibid., para. 64.
[76] Ibid., para. 73.

3.3 The right to privacy and data protection in the Charter

Article 7 of the Charter provides that *"Everyone has the right to respect for his or her private and family life, home and communications".* Despite the word "privacy" is not mentioned explicitly, it is a common understanding that the expressions "the right to respect" for "private and family life" and for "home and communications" shall be considered as being composed of the broader concept of "right to privacy".[77] A principle that, with different degrees of intensity, has been acknowledged as worthful of protection by other international legal instruments.[78]

The protection of information and personal data is considered to be an essential element of privacy. Article 8 of the Charter precisely addresses this aspect by providing that *"Everyone has the right to the protection of personal data concerning him or her"* this provision, as noted by the doctrine, constitutes *lex specialis* with respect to Article 7 of the Charter.[79] Article 8(2) provides that *"Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified".* The Charter also requires that an independent authority must supervise compliance with the rules concerning the protection of personal data.[80]

The Charter, therefore, enshrines that the protection of personal is a fundamental right.[81]

It should be noted that, similarly, Article 16 TFEU provides that the European Parliament and the Council *"shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by* the *Union (...)".*[82]

3.3.1 Personal scope

Importantly, it must be noted that the Charter, both under Articles 7 and 8, refers to "everyone". This has led to the conclusion that both the right to privacy and data protection should be guaranteed to natural persons and legal persons.[83] As it is shown later, this is not the case for the GDPR.

3.3.2 Restrictions

The protection of personal data is not absolute. Article 52 of the Charter allows for introducing limitations should they be established by law, necessary for the protection of *"objectives of general interest recognised by*

[77] Drywa, Anna: *Taxpayer's Right to Privacy?,* INTERTAX, Volume 50, Issue 1 (2022), p. 40-55.
[78] Please see the Universal Declaration of Human Rights, Art. 12 and the European Convention on Human Rights, Art. 8.
[79] See *supra* n. 77, p. 44.
[80] See *supra* n. 8, art. 8(3).
[81] See *supra* n. 8, preamble 1.
[82] See *supra* n. 21.
[83] See *supra* n. 72, p. 225.

the Union" and proportionate. To this scope, the need to enforce tax obligations, prevent tax fraud and tax evasion, and safeguard MS' taxable bases are recognised in the CJEU's jurisprudence as general interests to be protected.

3.4 Conclusion

This chapter illustrated that the rights to privacy and data protection in the Charter, although strictly related, are two distinct concepts. Importantly, concerning the personal scope of Articles 7 and 8, it is established that these provisions are directed to "everyone". Finally, it is concluded that the Charter allows for these rights to be restricted for the attainment of general interests recognised by the Union.

4. The General Data Protection Regulation

This chapter focuses on the General Data Protection Regulation. First, importantly, the definitions of personal data and data processing are provided. An exhaustive analysis of the restriction and, in particular, of their scope follows. To this scope, relevant judgements of the Court of Justice of the European Union are presented. Finally, the protection of personal data is examined in concrete by referring to the concept of data retention, automatic data processing and data transfer. The chapter aims to investigate how the GDPR secures data protection as it constitutes the second benchmark against which the adequateness of the DAC is tested.

4.1 The definition of personal data

The notion of personal data is comprehensively provided by Article 4(1) of the GDPR, which states *personal data " means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person"*.
The definition is broad and essentially includes all the information relating to an identified or identifiable natural person. In turn, an identifiable person means a person that can be identified by means of an identifier such as, among others, a name, an identification number, or through a specific factor. To determine whether a person is identifiable, *"account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly"*.[84] The notion of personal data provided by the GDPR can embrace, as noted by the doctrine, the fiscal information that must be exchanged under the DAC because it can lead to the identification of the relevant taxpayers.[85] This assessment is also reinforced by the fact that DAC acknowledges that: *"All exchange of information referred to in this Directive is subject to the provisions implementing (...) on the protection of individuals with regard to the processing of personal data and on the free movement of such data and (...) on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data".*[86] The Union's legislator reaffirmed this concept in DAC7.[87] The fact that information helpful in fiscal proceedings

[84] See *supra* n. 9, preamble 26.
[85] Čičin-Šain, Nevia: *New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?*, IBFD European Taxation 2019 (Volume 11), No. 1, p. 112.
[86] See *supra* n.1, preamble 27.
[87] See *supra* n. 10, preamble 36.

constitutes personal data is affirmed by the Court of Justice. The CJEU, in the case *SIA 'SS' v Valsts ieņēmumu dienests*,[88] clearly stated that information requested by the Tax Authority of Latvia pursuant to the Latvian law on taxes and duties, allegedly to assess the tax liability of taxpayers, indisputably constitutes personal data under Article 4, point 1, of Regulation 2016/679/EU. At issue in the *SIA 'SS'* case was the request by the tax authority for communication of information relating to vehicle sales announcements published on the website of the SS, an online advertising services provider established in Latvia. In particular, the tax authority requested the electronic transmission in a format that allowed the authority to filter and select the data of information concerning the brand, the model, the chassis number and the price of the vehicles being advertised on the SS' online website, as well as the seller's telephone number.

4.2 The concept of personal data processing and its requirements

Article 4(2) defines data processing. It states that *processing "means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".*[89] On the specific concept of "data processing" the CJEU, affirmed in the *SIA 'SS'* case that the Union's legislator intended to provide a broad definition.[90] The Court affirms that this outcome is corroborated by the use of the word "such as" and so by the formulation of an open-end list of processing's means. The Court then concluded that *"A request, in which the tax administration of a Member State requests an economic operator to communicate and make available personal data which the latter is obliged to provide and to make available to it under the national law of that State member, initiates a process of "collection" of such data, pursuant to Article 4, point 2, of Regulation 2016/679".* [91]

Therefore, requests for information by tax authorities with the scope to assess tax liabilities constitute a procession of personal information and must be treated accordingly.

A critical passage for the protection of personal data in the GDPR is represented by Article 5. It mandates, in particular, that personal data shall be (a) "processed lawfully, fairly and in a transparent manner in relation to the data subject"; (b) *"collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes"*. Interestingly, a so-called "purpose limitation" is introduced here; should personal data be further processed in the public interest, such processing shall not be considered as being incompatible with the initial

[88] Court of Justice of the European Union, 24 February 2022, Case C-175/20, *SIA 'SS' v Valsts ieņēmumu dienests,* para. 34.
[89] See *supra* n. 9, art. 4(2).
[90] See *supra* n. 88, para. 35.
[91] Ibid., para. 37.

purpose that justified the collection of personal data at issue. Moreover, personal data shall be (c) *"adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed"*, and that shall be *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed"*. Article 5 also provides that personal data must be accurate and processed in a way that ensures appropriate security.[92]

4.3 Restricting the guarantees provided by the GDPR

As it was for the Charter, the GDPR also includes dispositions that allow, under certain conditions, for the rights it provides to be restricted. Article 23 of the GDPR grants the possibility of introducing restrictions by way of a legislative measure. In particular, *"the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34 may be restricted when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security".* As mentioned, Article 25(1) of DAC7 directly provides for the application of Article 23(1)(e).

Also, preamble 112 of the GDPR recognises explicitly that the transfer of data between, among others, tax administration constitutes *"necessary for important reasons of public interest"*.[93] Despite that, as is explained below, it would be wrong to conclude that transfer of data under these circumstances can escape the safeguards provided by the GDPR aimed at protecting taxpayers' personal information.

4.3.1 The processing of personal information according to a public authority's request

On the possibility of excluding from the scope of application of the GDPR under its Article 2(2)(d) the request of a Member State's tax administration according to which it seeks to collect the personal data of certain taxpayers from an economic operator, the CJEU provided for some clarifications. Article 2(2)(d) provides that, *"This Regulation does not apply to the processing of personal data: (d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security."*[94] In the SIA 'SS' case, the national judge of the first instance was of the opinion that the GDPR did not apply to the tax administration in the circumstances at issue. The Court of Justice rejected this assessment. The CJEU firstly argued that from preamble

[92] See *supra* n. 9, respectively, art. 5(1)(d) and (f).
[93] See *supra* n. 9, preamble 112.
[94] See *supra* n. 9, art. 2(2)(d).

19 of the GDPR, it emerges that the exception at issue is based on the assumption that treatment of personal data under the circumstance described by Article 2(2) is governed by a dedicated legislative instrument, i.e., the Law Enforcement Directive (LED),[95] which contain a definition of "competent authority" that by analogy, in the opinion of the Court, shall be applied in the context of the GDPR as well. Secondly, the Court noted that the LED provides[96] that the GDPR applies to the processing of personal data that is carried out by a "competent authority", pursuant to Article 3, point 7, of that Directive, but for purposes other than those provided for by the latter. Because of that, the CJEU affirmed that when the tax administration of a Member State requires an economic operator to communicate personal data relating to certain taxpayers to collect taxes and fight tax evasion, it does not appear that such administration can be considered a "competent authority" according to Article 3, point 7, of the LED. The Court, therefore, concluded that such requests for information do not fall within the exception provided for by Article 2(2)(d) of the GDPR.[97] The fact that it cannot be excluded that personal data such as those at issue in the main proceedings may be used in the context of criminal prosecutions in the future, in the event of a tax violation, against some of the persons concerned, is not relevant. In fact, for the Court, it did not appear that such data were collected for the specific purpose of carrying out such criminal prosecution or in the context of activities of the State in the field of criminal law.[98] This reasoning leads to the conclusion that the collection by the tax administration of a Member State from an economic operator of information concerning a significant amount of personal data is subject to the GDPR.[99] Therefore, the principle provided by article 5(1) of the GDPR must be observed.

4.3.2 Limiting the scope of Article 5

The CJEU in the *SIA 'SS'* case also dealt with the feasibility for the tax administration of a Member State to derogate from the obligations which Article 5 of the GDPR mandates. In fact, in the case at issue, the Latvian tax administration was prevented from relying on a provision of national law, which allowed the possibility to derogate from the obligations deriving from Article 5. As already noted, Article 23 of the GDPR provides for the possibility, by means of a legislative act, to restrict article 5 should a reason of general public interest be pursued. The ruling in *SIA 'SS'* is important. It clarified the concrete magnitude of this possibility by upholding its past jurisprudence on the issue. More importantly, it extended the findings developed in the past in cases not dealing with fiscal matters to the tax arena.

[95] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, Official Journal L 119, 4.5.2016, p. 89–131.
[96] Ibid., preamble 11.
[97] See supra n. 88, para. 44.
[98] Ibid., para. 45.
[99] Ibid., para. 46.

The Court, in fact, confirmed[100] that the legislation aimed at restricting the rights granted under the GDPR and the Charter *"must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose personal data are affected have sufficient guarantees that data will be effectively protected against the risk of abuse. That legislation must be legally binding under domestic law and must indicate in what circumstances and under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary"*.[101] The Court, therefore concluded that, *"any measure adopted pursuant to Article 23 of Regulation 2016/679 must, (...) be clear and precise, and its application foreseeable for the persons subjected to it"*.[102] The CJEU, in particular, *added that the individuals concerned by restrictive measure "must be able to identify the circumstances and conditions under which the scope of the rights conferred on them by that regulation might be limited"*.[103] Therefore, any limitation of the rights at issue must, necessarily, be provided by an act with the characteristics just mentioned. Thus, tax administrations are prevented from restricting taxpayers' rights in the absence of such an act.

In the *SIA 'SS'* case, the Court of Justice also clearly affirmed that tax administrations are bound by Article 5(1)(b) of the GDPR when they require economic operators to provide information in their possession. In particular, in the case at issue, it was disputed whether the tax administration of a Member State might require information relating to taxpayers concerning *"an indefinite period of time and without specifying the purpose of this communication request"*. [104] The Court answered negatively. It underlined the fact that personal information must be collected for specific, explicit and legitimate purposes only. On those occasions, whether the objectives are not clarified in advance, they must, in any case, be identified, at the latest, at the time of the collection of personal data. [105] This implies that the tax administration must clearly indicate in the request of information the specific purpose for which personal information is requested. With respect to the requirement that mandates that the aim must be legitimate, the Court recognises that because Articles 6(1)(e) and 6(3) read in conjunction, requests for information that are the result of the execution of a task of public interest or are related to the exercise of public authority which is vested in the tax administration are legitimate. Still, importantly, the Court established on one hand that the recipient of the request must be able to verify the lawfulness of the transmission of the personal data in question and, on the other, that national courts shall be in the position to check the legitimacy of the treatment. To those scopes, "*in the event that the communication of the personal data in question is not based directly on the legal provision that*

[100] Ibid., para. 55.
[101] Court of Justice of the European Union, 2 March 2021, Case C-746/18, *Criminal proceedings against H.* K. Para. 48. On this issue, also see, among others: Court of Justice of the European Union, 6 October 2020, C-511/18, *La Quadrature du Net and Others v Premier ministre and Others,* para. 132.
[102] See *supra* n. 88 para. 56.
[103] Ibid.,
[104] See *supra* n. 88, para. 59.
[105] See *supra* n. 88, para. 64.

constitutes its basis, but results from a request from the competent public authority, it is necessary that this request specify the specific purposes of said collection of data in relation to the task of public interest or the exercise of public authority". [106]

The outcome of this reasoning is that requests that do not specify clearly and transparently their purposes cannot be considered legitimate.

Concerning the fact that the request by the Latvian tax authority was not limited in time, the Court underlined that the data controller is required to restrict the collection period of personal data to what is strictly necessary, in light of the purpose of the treatment aims to achieve. Therefore, the temporal extension of the data collection cannot exceed the duration strictly necessary to achieve the general interest objective pursued.[107] Finally, the Court established that the burden of proof in this regard lies with the Latvian tax administration.[108]

In the *SIA 'SS'* case, while recognising that tax administrations are legitimated in requiring economic operators to provide personal information with the scope to combat tax evasion and tax avoidance, the Court clearly affirmed that requirements provided by the GDPR must be duly respected.

4.4 The protection of personal data in concrete

Concerning the protection of personal data, three key phases should be considered: the retention, the processing, and the transfer of data. The DAC affects personal data with respect to all of the three phases. This is clearly the case according to the material scope of the GDPR. Article 2(1) states that: *"This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system"*.[109] At the same time, as explained above, Article 2(2) does not expunge the treatment of personal data in fiscal matters from the application scope of the GDPR.

4.4.1 Data retention

With respect to data retention, the fundamental principle is that the retention period of personal data shall not extend beyond what is strictly necessary. Although not concerning tax matters, the case *Digital Rights Ireland Ltd*. shall nevertheless be considered.[110] In the ruling at issue, the CJEU assessed the validity of Directive 2006/24/EC, particularly Articles 7 and 8 of the Charter. Notably, the Court judged the Directive to be invalid because it

[106] See *supra* n. 88, para. 71.
[107] See *supra* n. 88, para. 79 and 80.
[108] See *supra* n. 88, para. 81.
[109] See *supra* n. 9, art 2(1).
[110] Court of Justice of the European Union, 8 April 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*.

essentially provided for a *"wide-ranging and severe interference with those fundamental rights"* without *"such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary"*[111]. The CJEU established that in those circumstances where legislation mandates an intense interference with the rights provided by the Charter, legislation must lay down "*clear and precise rules governing the extent of the interference with the fundamental rights"*.[112] It seems important to determine what, in the case at issue, caused such an intense interference: to this scope, it must be underlined that the CJEU agreed with the finding of the Advocate General.[113] The Advocate General acknowledged that, while it is true that the Directive provides that MSs *"must ensure that minimum principles concerning the protection and security of the data retained"*,[114] no provision of the Directive mandated the storage of those data *"to be retained in the territory of a Member State, under the jurisdiction of a Member State"*. Thus, in the eyes of the Advocate General, it *"considerably increasing the risk that such data may be accessible or disclosed in infringement of that legislation"*.[115] The fact that personal data are placed beyond the control of the authorities of a Member State significantly increases the risk that such data may be accessible or disclosed unlawfully.[116] The CJEU also seemed to suggest in the *Digital Rights Ireland Ltd* Case that there must be a clear connection between the data retained and the objectives the legislation according to which they are collected aims to attain.[117]

This outcome has been recently upheld in Case *Commissioner of the Garda Síochána e.a*.*[118]* The Court stated that *"legislation requiring the retention of personal data must always meet objective criteria that establish a connection between the data to be retained and the objective pursued"*.[119] In other words, personal data collected must be capable of contributing to the achievement of the paved objectives.

Specifically, on this point, the automatic exchange of information, despite the fact, as explained, that it is internationally considered to be the new standard in preventing abusive behaviours, has proven to be, in practice, not particularly effective. In fact, it has been demonstrated that MSs make only limited use of information retrieved through the automatic exchange of information mechanism. As the European Court of Auditors suggested, the information received is incomplete in many cases.[120]

As noted above, the *Digital Rights Ireland* case but also the *Commissioner of the Garda Síochána e.a* Case do not concern taxation; nevertheless, as

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[111] Ibid., para. 65.
[112] Ibid.,
[113] Ibid., para. 37.
[114] Opinion of Advocate General Cruz Villalón in Case C-293/12, 12 December 2013, para. 77.
[115] Ibid., para. 78.
[116] Ibid., para. 79.
[117] Ibid., para. 59.
[118] Court of Justice of the European Union, 5 April 2022, Case C-140/20, *G.D. v The Commissioner of the Garda Síochána and Others*.
[119] Ibid., para. 55.
[120] European Court of Auditors, Exchanging tax information in the EU: solid foundation, cracks in the implementation, Special Report No. 3, p. 24.

pointed out by the doctrine,[121] it seems fair to sustain that the same issues would emerge should a similar question be referred with reference to the DAC. As described at the beginning of this Chapter, DAC concerns a significant amount of information.

4.4.2 Automatic data processing

Concerning the processing of data, it is essential to underline that should personal data be automatically processed, i.e. without any human intervention, for profiling purposes, that amounts to *"any form of automated processing of personal data evaluating the personal aspects relating to a natural person"*[122], particular attention shall be paid. Recital 71 of the GDPR allows with respect to *"fraud and tax-evasion*" the performance of profiling activities. Still, it requires that *"such processing should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision".*[123] In other words, in the case legislation expressly authorises the performance of such activities, they should be operated in such a way to allow, in any case, the intervention of a human and the possibility to challenge that decision.

4.4.3 Data transfer

The transfer of data should be taken into consideration. In particular, concerning this aspect, it is essential to underline that should personal data be transferred outside the European Union, it is required that the country of destination offers an adequate level of protection.[124] It is up to the European Commission to evaluate the equivalence in the third protection countries grant to personal data. Recital 112 of the GDPR stipulates that derogations contained in Article 23 should, in particular, apply *"in cases of international data exchange between (...), tax or customs administrations"*. Despite that, it would be wrong to conclude that because of recital 112 and Article 23, read in conjunction, international automatic exchange of information could, in general, escape the requirements provided by Articles 44 and 45 of the GDPR. It is an established principle of EU law that exceptions shall be interpreted narrowly. In particular, *"obligations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary"*.[125] Also, the restricting measure should be proportionate in pursuing its object.

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[121] See *supra* n. 54.

[122] See *supra* n. 9, preamble 71.

[123] Ibid.,

[124] See *supra* n. 9, art. 44 and 45.

[125] Court of Justice of the European Union, 6 October 2020, C-511/18, *La Quadrature du Net and Others v Premier ministre and Others*, para. 210.

Concerning the transfer of data or the risk of data being transferred to third countries, it is crucial to consider the *Schrems* judgments. [126] To the scope of this thesis, it is relevant to point out that, according to the CJEU, an "adequate level of protection" means a level that is *"essentially equivalent to that ensured within the Union by that regulation, read in the light of the Charter."*.[127] The Court also pointed out that any EU legislation must lay down *"clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned to have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data"*[128]. Automatic processing of personal data requires a high degree of protection.[129] Although the *Schrems* judgments do not refer to taxation, their findings are extendable to tax issues since, as already mentioned, the DAC deals with personal information.

4.5 Conclusion

Through a detailed analysis of the content of the GDPR, this chapter concluded, importantly, at first, that tax information fails within the scope of the definition of personal data provided by the GDPR. Secondly, it concluded that requests for information constitute "data processing", and the GDPR binds tax administrations which implies that the safeguards of the GDPR, therefore, apply in their entirety. Thirdly it drew some conclusions about the protection of personal data in concrete. Concerning data retention, it was pointed out how personal data collected must be capable of contributing concretely to the objectives the legislation pursues. Regarding automatic data processing, it was concluded that the intervention of a human must be ensured. Finally, concerning data transfer outside the EU, the same level of protection must be guaranteed.

[126] Court of Justice of the European Union, 6 October 2015, Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*; Court of Justice of the European Union, 16 July 2020, Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems*.
[127] Court of Justice of the European Union, of 16 July 2020, Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems*, para. 105.
[128] Court of Justice of the European Union, 6 October 2015, Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*, para. 91; Court of Justice of the European Union, of 16 July 2020, Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems*, para. 176.
[129] Court of Justice of the European Union, 6 October 2015, Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*, para. 91

5. Comparison

This chapter provides a comparison firstly concerning the personal scope of privacy and data protection in the Charter and the GDPR and secondly regarding the adequateness of the content of the DAC with the two benchmarks selected. The chapter aims to facilitate the conclusions.

5.1 Personal scope of the right to privacy and data protection in the Charter and the GDPR

While Articles 7 and 8 of the Charter refer to anyone, the GDPR provides for the protection of personal data only with respect to natural persons. The GDPR, under this point of view, does confirm the content of its predecessor, the EU Data Protection Directive.[130] Article 1 of the DPD, titled "Object of the Directive", in fact, provides that *"The Member States, shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data".* [131] Article 2 of the DPD, just as the correspondent article of the GDPR, provides that *"'personal data' shall mean any information relating to an identified or identifiable natural person"*.[132] Based on these provisions and recital 2 of the Directive, the Court of Justice elaborated its jurisprudence. In the already mentioned *Volker und Markus Schecke GbR* case, the Court, regarding the procession data protection, stressed that *"legal persons can claim the protection of Articles 7 and 8 of the Charter in relation to such identification only in so far as the official title of the legal person identifies one or more natural persons"*.[133] As the doctrine suggested, precluding legal persons' protection of personal data by referring to Articles 7 and 8 of the Charter does not appear to be reasonable since these dispositions are clearly directed to *"everyone"*.[134]

Referring to legal persons, the CJEU appears to be more indulgent with the right to privacy. As noted by the doctrine, private legal entities would be entitled to enjoy the protection secured by Article 7 of the Charter.[135] In this regard, a significant step is represented by the Roquette Frères Case.[136]

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[130] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] Official Journal L281/31.
[131] Ibid., art. 1(1).
[132] Ibid., art. 2(1)(a).
[133] See *supra* n. 74, para. 53.
[134] See *supra*. n. 72, p. 225.
[135] See *supra* n. 72 p. 225. Please also see Julicher, Manon; Henriques, Marina; Blai, Aina Amat; Policastro, Pasquale: *Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared*, Utrecht Law Review Volume 15, Issue 1, 2019, p. 6.
[136] Court of Justice of the European Union, 22 October 2002, Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, para. 29.

5.2 The DAC's adequateness in the protection of taxpayer's rights compared to the Charter and the GDPR

As noted, concerning the protection of taxpayers' right to privacy and data protection, the DAC refers both to the Charter and the GDPR. On the base of that, it seems fair to state that the protection of the two categories of individuals is secured. However, apparently, with a significantly different degree of intensity.

The redrafted Article 25 by DAC7 that replaced the correspondent Article of the DAC in its previous version deserves to be further considered. By emending Article 25, the Union's legislator wanted to make it clear that the principle of the GDPR must be guaranteed while processing personal data according to the purposes of the DAC. It is argued that the level of protection secured by the GDPR is significantly higher than that of the repealed the DPD. In fact, the legal instrument of the regulation guarantees a direct and uniform application of the GDPR across the Union by preventing discrepancies in the level of protection that different national implementing dispositions would generate. Therefore, the DAC, by rendering the GDPR directly applicable according to Article 25, appears to guarantee a level of protection to natural individual taxpayers' personal information that is comparable to the content of the GDPR. The direct referral to the GDPR also made explicit the applicability of the CJEU's jurisprudence elaborated in this respect to the DAC.

At the same time, as said, the protection of legal persons' rights is less intense. Although preamble n. 28 of DAC1 remembers that fundamental rights enshrined by the Charter are observed, this does not seem to be specific enough to secure a comparable level of protection. Still, lacking adequate secondary legislation, legal persons should necessarily relate to the jurisprudence of the Court should they allege their rights, as taxpayers, not to be respected. Despite those particular cases where the legal entity's official denomination contains referent to a natural person, legal persons' data protection is significantly dependent on that mentioned jurisprudence by the Court of Justice that stipulates that the concept of protection of personal data is closely linked to that of privacy.

5.3 Conclusion

This chapter concluded as the personal scope of the Charter and the GDPR while protecting taxpayers' rights to privacy and data protection is different. The chapter concluded that the level of protection for natural persons and legal persons is different, being lower for the latter.

6. The relevance of the Airbnb Ireland UC case to the proportionality analysis

This chapter focuses on the proportionality of the DAC7's dispositions concerning the reporting obligations for online platform operators. The chapter, at first, provides a brief explanation of the concept.

6.1 The concept of proportionality in EU law

The analysis of proportionality represents a fundamental step in the reasoning of the CJEU while assessing the compatibility of a source of law with respect to another hierarchically predominant source. In fact, should the former limit the latter's scope, such limitation must be proportionate. Complying with the principle of proportionality presupposes the cumulative fulfilment of three requirements. The measure must be suitable, necessary and proportionate in the strict sense. A measure is suitable if it is effetely capable of supporting its alleged purpose; it is necessary if it represents the option causing the least possible prejudice concerning the interests at issue. Finally, the measure is proportionate in the strict sense if, having in mind the aim perused by the legislative measure, by way of comparison between the values at issue, it is established that the level of interference caused by the measure is reasonable.

6.2. Focusing on the reporting obligations for Online Platform Operators

The recently judged *Airbnb Ireland UC* case reparents a valuable element for the assessment concerning the proportionality of the provisions extending the reportable obligations to online platforms' operators introduced by Directive 2021/514/EU. The case mentioned has already been briefly mentioned in chapter two; it deserves now to be considered in its entirety.

As already mentioned, the Court did not find the Belgian disposition to be discriminatory, and therefore it was not deemed to constitute a restriction within the meaning of Article 56. Still, the CJEU provided some clearness regarding the relationship between the imposition of a legal obligation, consisting of the collection and transmission to the tax authority of a set of information, ultimately amounting to an economic burden and freedom to do business also recognised by the Charter.

At first, attention should be focused on paragraph 44 of the judgment in this context. The Court states: *"It is true that the development of technological means and the current configuration of the market for the provision of property intermediation services lead to the finding that intermediaries providing their services by means of an online platform are likely, under legislation such as that at issue in the main proceedings, to be faced with an obligation to transmit data to the tax authorities which is more frequent and*

greater than that imposed on other intermediaries. However, that greater obligation is merely a reflection of a larger number of transactions by those intermediaries and their respective market shares. Consequently, there is no resulting discrimination."

This reasoning is based on the assumption that it is always the case that online platforms operate a more significant number of transactions and has a market share considerably larger with respect to comparable traditional (off online) operators. Arguably, this equation is not always satisfied. Therefore, arguing *a contrario,* should it be proven that, in turn, in a specific circumstance, the reality is the other way around, it has to be concluded that legislation such as that at issue in the main proceeding is actually discriminatory.

Secondly, the Court seemed to suggest that the interference represented by the prescriptions of the Belgian legislation with the liberty to do business is tolerable only if the economic burden. The CJEU states in this regard: *"even if the obligation imposed on all intermediaries to provide information to the tax authorities, at their request, concerning the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year, may create additional costs, in particular in connection with the search for and storage of the data concerned, it should be noted, particularly in the case of intermediation services provided by digital means, that the data at issue are stored by intermediaries such as Airbnb Ireland, with the result that, in any event, the additional cost to those intermediaries that is created by that obligation appears to be limited".*[137] In the *Airbnb Ireland UC* case the Court concluded that *"that legislation such as that at issue in the main proceedings, (...) which imposes an obligation on providers of property intermediation services provide the regional tax authorities, on the latter's written request, with the particulars (...) details do not contravene the prohibition laid down in Article 56 TFEU".*[138]

As before, the assumption on which the Court's reasoning articulates appears to be pretty weak. If it is proved that the tax legislation imposes costs that proportionally represent a significant burden in terms of economic costs, it derives that Article 56 TFEU is contravened.

Arguably, this reasoning can be applied, *mutatis mutandis*, to the DAC directly with a significant difference. As explained before, Directive 2021/514/EU under Annex V introduces several due diligence obligations with respect to an online digital platform, the aim and the content of which have already been specified. It is fair to say that such obligations are significant for the way they are determined, primarily because DAC7 does not distinguish between small and big economic operators.[139] Indeed, the outcome is that reporting platform operator, with every probability, would have to set up a substantial due diligence process.[140] This is entirely different

[137] Ibid., para. 47
[138] Ibid., para. 49
[139] Stevens, S.A.; van Wamelen, J.T.: *The DAC7 Proposal and Reporting Obligation for Online Platforms*, EC TAX REVIEW 2021/1, p. 30.

[140] Beretta, Giorgio: *The New Rules for Reporting by Sharing and Gig Economy Platforms Under the OECD and EU Initiatives*, EC TAX REVIEW 2021/1, p. 35.

from the data and information mentioned above, which are most likely already available and *"are stored by intermediaries*".[141]

6.3 Conclusion

By showing how the reasoning of the CJEU in the Airbnb Ireland UC case can be applied, *mutatis mutandis*, to the DAC, this chapter concluded that the proportionality of DAC7's dispositions concerning the reporting obligations for online platform operators is questionable.

[141] See supra n. 11, para. 47

7. Conclusion and final remarks

This final chapter presents the conclusions. At first, with reference to the consistency of the DAC in protecting taxpayers' right to privacy and data protection. And secondly, the proportionality of the DAC is addressed, also by referring to the proportionality of the reporting obligations for digital platforms. The research question is therefore answered.

6.1 The consistency of DAC in protecting taxpayers' right to privacy and data protection

The DAC, primarily because of the novelties introduced by the redrafted Article 25 in DAC7, appears to provide a level of protection, including for the automatic data processing, that is adequate compared to the treatment privacy and data protection received in the Charter and the GDPR. This assumption is particularly true for natural persons. Concerning legal persons, as noted, the DAC does not seem to provide for an equivalent level of protection compared to natural persons, except in the case where the *"official title of the legal person identifies one or more natural persons"*. Arguably, this lower level of protection results from the fact that adequate secondary legislation dedicated explicitly to the protection of legal persons is missing. Nevertheless, they could count on the CJEU and the fact that the DAC secures the protection of the fundamental rights enshrined by the Charter for all the subjects concerned. In this case, the level of protection is also dependent on the national measures of transposition, and attention should be paid to them.

Regarding the automatic exchange of information with third countries under Article 24 of the DAC, some concerns are expressed. Significantly, the fact that no mention is made of the necessity for the country of destination to offer an adequate level of protection might not provide satisfactory protection for taxpayers' personal data, mainly because of the more significant risks they might suffer in these circumstances.

6.2 Proportionality

It is sustained that, having in mind the significance of the MSs' interests to the assessment of tax obligations, the DAC appears to be proportionate while affecting the rights taken into consideration in this thesis. In particular, the presence of a solid reference to the GDPR under Article 25 coupled with the most recent cases by the CJEU mentioned provides for the necessary safeguards to be applied concerning the data processing under the DAC.

Nevertheless, having regard to data retention, some doubts remain concerning the effective capability of the automatic exchange of information instruments to pursue their intents. It has been explained that information obtained is not used much because of its poor quality in most cases. This seems not to align with the relevant CJEU's jurisprudence outcome.

Regarding the reporting obligations for the digital platform, some concerns about proportionality have been pointed out. Significantly, because DAC7 treats all the online operators the same way, without providing a distinction depending on their business' dimension, should the Court of Justice decide to apply the same criteria of the Airbnb Ireland UC, it could be that these dispositions might not be deemed to be proportionate. In fact, as it is shown, because of Article 6(3) of the DAC, national dispositions comparable to those scrutinised by the Court in the Airbnb Ireland UC case are likely to be applied should a request for information be received. This directly affects the proportionality of the corresponding provisions of the DAC since it is a Directive.

Finally, the open-end formulation under Annex V Section III Letter B point 2 (c) of DAC7 might be too far-reaching and deemed not proportionate should it come under scrutiny.

Therefore, the question presented by the thesis shall be answered as follows:

Yes, the DAC appears to be consistent with the benchmarks analysed. Although, in some parts, it seems not to be sufficiently proportionate.

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