

DAC 6 IN LIGHT OF EU LAW

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Introduction:

With the aim of strengthening **tax transparency**, and in line with BEPS Action 12, Directive (EU) 2018/822 (DAC 6 or the Intermediaries Directive) was adopted. This Directive introduces a Mandatory Disclosure Regime at the EU level .

Method:

- Doctrinal Legal Research
- Comparative Legal Research

Structure & issues of potential concern:

Legal Basis

- Art. 113 and art. 115 TFEU
- Is aggressive tax planning a legitimate aim to adopt DAC 6?
- Does it effectively contribute to improve the internal market?

Objective element

- Hallmarks are drafted too broadly and that might undermine the principle of legal certainty. As a result:
- I. Lack of efficiency: different implementations among Member States so the arrangements to be reported also differ (e.g. C.1)
- II. Potential violation of fundamental rights: cases where a tax avoidance arrangement has to be reported (e.g. B.1)

Subjective element

- Are fundamental rights threatened in case II?
- Professional secrecy in case of tax intermediaries
- Right not to incriminate oneself and confidentiality of taxpayers

Time element

- Does the transitional period undermine the principle of non-retroactivity?
- Retroactivity vs. retrospectivity
- Are legitimate expectations respected in the case of DAC 6?

Penalty regime

- LEVEL 1: sanctions under DAC 6 confronted with the principle of proportionality
- LEVEL 2: in case of the reported arrangement. Application of a GAAR? Application of administrative or criminal sanctions?

Preliminary conclusions:

A first analysis of the elements of DAC 6 shows that many of them do not comply with the basic requirements of general principles of EU law (e.g. legal certainty as regards the very objective of the Directive) or specific fundamental rights (e.g. professional secrecy). This has led to **differing implementations** among the different Member States resulting in a potential restriction of the internal market. For these reasons, the **effectiveness** and even the **proportionality** of DAC 6 might be threatened. As a global conclusion the idea that the DAC 6 improves the functioning of the internal market might be questioned.