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Problems Raised by DAC 6 concerning Taxpayer's Rights and Fundamental Freedoms. Particular Reference to DAC 6 Implementation in the Spanish Legal Order

1. Introduction

DAC 6 makes reference to the fifth amendment to the *Directive on Administrative Cooperation* (DAC),[2] that is, the one undertaken by the Directive 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. DAC 6 basically establishes the obligation on "tax intermediaries" (in some cases, on taxpayers) to inform (national) tax authorities about certain cross-border arrangements with a potential risk of tax avoidance, followed by the obligation on those tax authorities to automatically exchange that information to be used in the frame of tax risk management processes.

The Directive is rooted in the BEPS' Action 12 which provides recommendations for the design of rules to require taxpayers and advisors to disclose aggressive tax planning arrangements.[3] According to the OECD "Mandatory disclosure regimes should be clear and easy to understand, should balance additional compliance costs to taxpayers with the benefits

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[2] EU, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 347 of 3 December 2011, pp. 1–12.

[3] Action 12 Mandatory Disclosure Rules, Inclusive Framework on BEPS, OECD, *Action 12 Mandatory Disclosure Rules*, n.d., oecd.org/tax/beps/beps-actions/action12/ (accessed: 5.05.2021).

obtained by the tax administration, should be effective in achieving their objectives, should accurately identify the schemes to be disclosed, should be flexible and dynamic enough to allow the tax administration to adjust the system to respond to new risks (or carve-out obsolete risks), and should ensure that information collected is used effectively".[4]

However, the way in which the mandatory disclosure regime is articulated in the Directive leads one to conclude that this regime is far from exhibiting the features that the OECD deems to be desirable. Very much to the contrary, the mandatory disclosure regime laid down in DAC 6 raises serious issues both concerning legal certainty for taxpayers (and, more generally, taxpayer's rights) and efficiency for tax administrations. This work focuses on the first group of issues, pointing out some of them and referring to some aspects of the DAC 6 implementation into the Spanish legal order, which took place through the incorporation[5] of an additional provision (number 23) in the General Tax Law,[6] which endorses the cross-border arrangement reporting obligation. This regulation was completed with the content incorporated through a modification of the Royal Decree 1065/2007[7] by the recently adopted Royal Decree 243/2021 of 6 April. This implementation shows that the Spanish legislature, rather than using the room to manoeuvre that it was given in transposing the Directive to reduce the problems raised by the Directive as regards taxpayer's rights, transposed the Directive in a way that overall enhances those problems. The work ends with some general comments on the problem that the Directive raises for taxpayer's rights from a broader perspective: one related to the Directive's legal bases. This perspective helps to understand why DAC 6 raises also issues concerning fundamental freedoms.

2. Problems raised by DAC 6 concerning taxpayers' rights. Selected issues

Many scholars have been severely criticizing the problems that DAC 6 raises concerning taxpayer's rights.[8] This section focuses on some of those

[4] OECD, *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, OECD Publishing, Paris 2015, p. 9, http://dx.doi.org/10.1787/9789264241442-en (accessed: 5.05.2021).

[5] This incorporation took place through the Law 19/2020, 29 December.

[6] ES, Law 58/2003, of December 17, General Tax Law.

[7] ES, Royal Decree 1065/2007 setting general regulations on tax procedures and detailed implementation regulations on assessment.

[8] See, for instance, N. Cicin-Savin, *New Mandatory Rules for Tax Intermediaries and Taxpayers in the European Union- Another 'Bite' into the Rights of the Taxpayers*, "World Tax

issues related to the vagueness in the definition of both persons obliged to report the arrangements and the arrangements themselves, and on those related with the rules on penalties for non-reporting that this Directive requires Member States to lay down.

2.1. Persons subject to the reporting obligation

Concerning persons subject to the reporting obligation, they will be those (individual or entities) included in the concept of "intermediary", as defined by the Directive, even if in certain cases the obligation is shifted to the "relevant taxpayer".

The Directive uses a very broad concept of intermediary as this concept includes those scholars call "promoters" of the arrangement (or "principal intermediaries"), and the so-called "service providers" (or "auxiliary intermediaries").[9] The first group of intermediaries includes "any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement".[10] The second group includes "any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement".[11] Scholars refer to the intermediaries included in this second group as those meeting the "knowledge test".[12] In connection with this the Directive states that "[a]ny person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement", and that "[f]or this purpose, that person may refer to all relevant facts and circumstances as well as available information and

Journal" 2019, Vol. 11, No. 1; D. Blum, A. Langer, *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 2*, "European Taxation" 2019, Vol. 59, No. 7.

[9] See, for instance, J. Malherbe, S. Braun, *The European Union Directive (DAC6) Compelling Advisors to Report Transnational Tax Schemes*, "Tax Management International Journal" 2020, No. 3, p. 6.

[10] DAC 6, Art. 1(1)(b).21, Para. 1.

[11] DAC 6, Art. 1(1)(b).21, Para. 2.

[12] S. Moreno González, *La Directiva sobre revelación de mecanismos transfronterizos de planificación fiscal agresiva y su transposición en España: Transparencia, certeza jurídica y derechos fundamentales*, "Nueva Fiscalidad" 2019, No. 2, p. 47.

their relevant expertise and understanding".[13] Therefore, it is incumbent upon the auxiliary intermediary to prove unawareness of the arrangement. According to Rodríguez Márquez, the words used by the Directive at this point may lead to conclude that it does not impose auxiliary intermediaries an enhanced due diligence,[14] even if, as stressed by Moreno González, the vagueness in the words prevents from clearly identifying the requirements for triggering the reporting obligation. The Spanish legislator, when implementing the Directive into the domestic legal order, did not contribute to reduce this uncertainty, and when establishing the persons subject to the reporting obligations simply reproduces the definition and kinds of "intermediary" included in the Directive without providing any further clarification on the conditions triggering the reporting obligation for auxiliary intermediaries.[15]

As noted, the reporting obligation is, in certain cases, shifted to the "relevant taxpayer". This takes place in the case where there is no intermediary because the taxpayer designs and implements a scheme in-house and, in the case, when the intermediary is exempt from this obligation due to a legal professional privilege. DAC 6 establishes a far-reaching concept of "relevant taxpayer", including "any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement".[16] The Spanish legislature transposed this concept in a very similar way, being the only peculiarity to be taken into account the fact that, as very recently explained by the Spanish legislature,[17] the Directive uses a concept of "taxpayer" (*contribuyente* in the Spanish version) which goes beyond the concept of *contribuyente* enshrined in our domestic tax system. That is why the domestic legislator opted to use the term *obligado tributario interesado* to refer to the term *contribuyente interesado* adopted by the Directive.

The author agrees with Moreno González that the far-reaching approach in the definition of the concepts of "intermediary" and "relevant taxpayer" may render it difficult to determine the person subject to the reporting obligation with the risk of duplicate reporting by more than one intermediary (or relevant taxpayer), increasing the compliance cost for taxable persons. As emphasized by that author, it should be noted that, at

[13] DAC 6, Art. 1(1)(b).21, Para. 2.

[14] J. Rodríguez Márquez, *Revelación de esquemas de planificación fiscal agresiva: directiva de intermediarios fiscales*, Lefebvre-El Derecho, Madrid 2018, pp. 48–49.

[15] S. Moreno González, *La Directiva*…, p. 48.

[16] DAC 6, Article 1(1)(b).22.

[17] ES, Royal Decree 243/2021, 6 April, Preamble, II, Para. 6.

least, the domestic provision of the Regulation[18] implementing the DAC 6 clarifies that, in cases of multiple reporting obligations, the filling of the declaration by one of them exempts the rest from such an obligation?[19]

As stated, it is possible that intermediaries are exempt from their reporting obligation due to a legal professional privilege, since the Directive establishes that "[e]ach Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State".[20] Since the task of defining the scope of legal professional privilege is a matter for domestic legislators, many authors have stressed the risk that domestic regulations on the matter may become pool factors for aggressive tax planning arrangements, leading to a scenario where Member States would be in competition with each other when seeking to attract those arrangements to their jurisdictions. That is why Rodríguez Márquez understands that it would have been better if the Directive had followed the approach undertaken by the Anti-Money Laundering Directive,[21] which itself establishes the reporting obligations on lawyers.[22] The radically different approach adopted by DAC 6 renders the regulation of the professional privilege by each Member State crucial.

In the case of Spain, Additional Provision 23 of the General Tax Law exempts from the obligation to report cross-border tax arrangements due to the duty of *professional secrecy* (which is how is known in our country "the legal privilege protection offered in relation to lawyer-client communications")[23] those who are intermediaries (according to the

[18] ES, Art. 42(4).2º of the Royal Decree 1065/2007 setting general regulations on tax procedures and detailed implementation regulations on assessment.

[19] S. Moreno González, *La Directiva*..., pp. 49–50.

[20] DAC 6, Art. 8ab.5.

[21] EU, Council Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance), OJ EUT L 141 of 5 June 2015, pp. 73–117.

[22] J. Rodríguez Márquez, *El secreto profesional y la transposición de la DAC 6*, "ELDERECHO.COM", Lefevbre, 2 June 2020, section 1, https://elderecho.com/secreto-profesional-la-trasposicion-la-dac-6 (accessed: 5.05.2021).

[23] A. Benalal, M. Fuentes, *Legal privilege, confidentiality and professional secrecy Q&A: Spain*, 2021, https://www.twobirds.com/~/media/disputes-plus/files/pdfs/various-qas---april-2020/legal-privilege-confidentiality-and-professional-secrecy-qanda-spain.pdf (accessed: 5.05.2021). As the authors note, "professional secrecy is conceptualised as a right and duty of lawyers, by which they are exempt from disclosure to third parties (mainly the public administration and judges) of communications maintained with their clients,

Directive), regardless of the activity performed, and have provided advice with respect to designing, marketing, organizing, making available for implementation or managing of the implementation of a reportable cross-border arrangement, *with the sole aim of evaluating the arrangement's compliance with applicable legislation* and *without seeking or facilitating its implementation*. According to this provision, the duty of professional secrecy in Spain, as regards this obligation, only concerns persons who undertake the so-called "neutral advice", that is, the one *with the sole aim of evaluating the arrangement's compliance with applicable legislation* and *without seeking or facilitating its implementation*. This means that the only task covered by the duty of professional secrecy is, as stressed by Rodríguez Márquez, the one consisting of establishing the taxpayer's legal position by analysing whether the arrangement under the reporting obligation is compliant with the law.[24] Intermediaries who undertake an active position concerning the arrangement, by performing tasks consisting of designing, marketing, organizing, making available for implementation or managing of the implementation of the reportable cross-border arrangement may never invoke professional secrecy.[25] This has been severely criticized by Spanish scholars and, specially, by the Spanish Association of Tax Advisors, which further emphasizes that intermediaries who evaluate the arrangement's compliance with applicable legislation will not be covered by professional secrecy if "they seek or facilitate its implementation". As a conclusion, this association states that the Spanish legal treatment of professional secret concerning the reporting obligation is more restrictive than the one granted by the Directive and warned about the difficulties of reconciling the domestic provision implementing the DAC 6 regarding professional secrecy, with its regulation by both the Spanish Constitution and the domestic legal framework.[26]

In relation with this, one needs to bear in mind that the abovementioned domestic provision acknowledges professional secrecy of those with the status of intermediary "regardless of the activity performed". Therefore, as explained by Rodríguez Márquez, the legal privilege does not only cover lawyers, but also any person having the status of intermediary (such

counterparties or other lawyers involved by reason of their profession". They emphasize that "this concept differs from the common law concept of 'legal privilege', which is a right of the client. Professional secrecy is rather a duty (and right) of the lawyer".

[24] J. Rodríguez Márquez, *El secreto profesional*…, section 4.

[25] *Ibidem*.

[26] Europapress, *Aedaf avisa de "importantes problemas" de seguridad jurídica por la transposición de la directiva 'DAC 6'*, 25 May 2020, https://www.europapress.es/economia/fiscal-00347/noticia-aedaf-avisa-importantes-problemas-seguridad-juridica-transposicion-directiva-dac-20200525191030.html (accessed: 5.05.2021).

as advisors) according to the Directive. By contrast, in Spain professional secrecy, conceived as a right-duty, was so far limited to lawyers. Indeed, as remarked by that author, this right-duty of professional secret, in the field which is relevant for the purpose of this work, is linked to the fundamental right of defence, enshrined in Art. 24.2 of the Spanish Constitution, which states that "[…] all persons have the right […] to the defence and assistance of a *lawyer*". Next, this provision establishes that "the law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences". Given that the right of defence is a fundamental right, its legal development (including its delineation in relation to other legal interests that are constitutionally recognized) must be undertaken through an Organic Law. This Law is the Organic Law 6/1985 of the Judicial Power, of 1 July, whose Art. 542(3) establishes that "*Lawyers* shall keep secret all facts or information that have been confided to them through any of the facets of their professional activity and may not be obliged to give evidence thereon". Being clear that professional secrecy in Spain is only recognized by Organic Law of the Judicial Power to lawyers, its extension to other persons covered by the term "intermediary", within the meaning of DAC 6, should have been carried out by a legal instrument with status of organic law. This is the opinion of Rodríguez Márquez, who criticises that the extension of the subjective scope of professional secrecy to other persons who are not lawyers has been carried out through an ordinary law.[27] The Spanish General Tax Law, which is an ordinary law, basically reproduces the content of the Directive regarding this issue.

2.2. Content of the reporting obligation

The content of the reporting obligation includes the cross-border arrangements potentially aggressive which fulfilled the conditions established by the Directive.[28] Given that "Aggressive tax-planning arrangements have evolved over the years to become increasingly more complex and are always subject to constant modifications and adjustments as a reaction to defensive countermeasures by the tax authorities",[29] the European legislature understands that " it would be more effective to endeavour to capture potentially aggressive tax-planning arrangements

[27] J. Rodríguez Márquez, *El secreto profesional*…, section 4.

[28] It should be noted that the reporting obligation only arises regarding potentially aggressive arrangements covered by the objective scope of the Directive 2011/16/EU.

[29] DAC 6, Preamble, IX.

through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning".[30] The Directive refers to these indicators as "hallmarks"[31] (included in Annex IV of the Directive) being a hallmark defined as "a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in Annex IV".[32] Consequently a "reportable cross-border arrangement" means any cross-border arrangement that contains at least one of the hallmarks set out in Annex IV".[33]

It is important to note that those hallmarks just indicate a potential risk of tax avoidance. The presence of one or several hallmarks in an arrangement does not render it abusive.[34] Certain hallmarks, such as the one relating to transfer pricing transactions, even refer to genuine transactions not linked with potentially abusive transactions. This remark leads Calderón Carrero to conclude that the scope of application of those hallmarks goes beyond what is necessary to attaint their objectives, especially if one takes into account that those transactions are already subject to specific documentation and reporting obligations.[35]

Also, it is important to note that certain hallmarks may only be taken into account where they fulfil the "main benefit test". "That test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage".[36] This test is broader than the one included in the GAAR of the Anti-Tax Avoidance Directive[37] (ATAD) and is articulated in a more objective way since it uses the term "benefit" instead of the term "purpose". As explained by Moreno González, the Spanish transposing provision adopted a very similar definition of the test, even if with some variations which,[38] in that author's

[30] *Ibidem*.

[31] *Ibidem*.

[32] DAC 6, Art. 1(1)(b).20.

[33] DAC 6, Art. 1(1)(b).19.

[34] J.M. Calderón, *El nuevo marco de transparencia sobre esquemas transfronterizos sujetos a declaración por intermediarios fiscales y contribuyentes: las "EU tax disclosure rules" y sus implicaciones*, "Quincena Fiscal" 2018, No. 10, p. 13.

[35] *Ibidem*, p. 18.

[36] DAC 6, Annex IV, Part I.

[37] EU, Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193 of 19 July 2016, pp. 1–14.

[38] The Spanish provision instead of using the term "main benefit", adopts the term "main effect", and instead of the term "main benefit", it uses the term "tax saving". S. Moreno González, *La Directiva*..., pp. 35–36.

view, aim to articulate the test in even more objective terms and to clarify its material scope. However, as expressed by Moreno González, the Spanish provision does not succeed in eradicating subjectivity and uncertainty, since, among other things, makes it necessary to determine whether the tax benefit is the main effect or one of the main effects of the arrangement.

2.3. When must the information must be transmitted?

One of the most controversial issues regarding the reporting obligation is the moment when the relevant information must be provided.

According to Art. 8ab.1 of the Directive "Each Member State shall take the necessary measures to require intermediaries to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the competent authorities within 30 days beginning:

1) on the day after the reportable cross-border arrangement is made available for implementation; or

2) on the day after the reportable cross-border arrangement is ready for implementation; or

3) when the first step in the implementation of the reportable cross-border arrangement has been made,

whichever occurs first".

This regulation shows that the Directive applies, as put forward by Malherbe and Braun, to "prior intellectual activity", and that is why these authors conclude that the Directive "would probably find its place better in Aldous Huxley's 'Brave New World' than in legislation".[39]

2.4. Consequences of failure to comply with the reporting obligation

According to Art. 25a of the Directive, "Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Arts. 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive."

The way in which DAC 6 addresses the matter of penalties raises, at least, two issues. First, the fact that designing those penalties lies within the competence of domestic legislators, without any minimal

[39] J. Malherbe, S. Braun, *The European Union Directive*…, p. 10.

harmonizing framework established by the Directive, may lead to similar competition issues as those raised by the approach undertaken by the Directive regarding the legal privilege. Second, the fact that penalties will be imposed as a consequence of failure to comply with an obligation which is designed on the basis of very broad and unclear concepts raises obvious problems concerning the essential general principles of criminal law, such as the principles of legality, characterization, and legal certainty. Once again, the transposition of the Directive into the Spanish legislation, did not help to reduce the problems of legal uncertainty, and raises issues regarding the proportionality principle claimed by the Directive. The rules on infringement and penalties laid down by the Spanish legislature had been severely criticized by the Spanish Association of Tax Advisors who stressed that the domestic provision remains silent on the impossibility of sanctioning behaviours performed before its entry into force and held that the amount of penalties runs against the proportionality principle.[40]

3. Final comments: The controversial legal bases of DAC 6 as the root of the problems regarding taxpayer's rights and fundamental freedoms

It is clear that DAC 6 raises issues regarding taxpayers' rights, and that the Spanish legislation transposing the Directive does not succeed in solving those issues. The Directive shows two interests at stake: Member States' interest in fighting aggressive tax planning and (constitutional fundamental) taxpayers' rights. If the Directive tried to find a balance between them, it clearly chose to enhance the first interest to the detriment of taxpayers' rights. Moreover, the mandatory disclosure regime laid down in the Directive shows problems of incompatibility with the EU legal order. Echoing this concern, Blum and Langer stress that the justification for the restriction of fundamental freedoms[41] that mandatory disclosure rules involve is difficult to find regarding certain hallmarks. Those authors point out that while the necessity of ensuring effective fiscal supervision might justify certain elements of the DAC 6 that aim to ensure the efficient enforcement of existing tax rules – as happens also through the rules of the DAC on the exchange of information upon request – it seems at best

[40] Europapress, *Aedaf avisa de "importantes problemas"...*

[41] The reporting obligation – with its correlated administrative costs – arises in cross-border situations.

doubtful that such justification can be applicable regarding "mandatory disclosure rules obliging taxpayers to report legal, but politically undesirable, structures".[42]

In my view, the very problem surrounding these issues, and in particular, the difficulties in finding a justification for the restriction to the fundamental freedoms that certain hallmarks clearly involve, lays on the legal bases (Arts. 113 and 115 TFEU) on which the DAC 6 was adopted. Problems arising from the adoption of Art. 115 TFEU (legal basis for the harmonization of direct taxes) are even more obvious than those arising from Art. 113 TFEU (legal basis for the harmonization of indirect taxes).[43] Article 115 TFEU empowers the Council to unanimously adopt "directives for the approximation of the laws […] of the Member States as directly affect the establishment or functioning of the internal market". Article 115 TFEU therefore allows the adoption of directives which harmonize Member States' legislations when *those legislations* directly affect the functioning of the internal market. As I have stressed in other work,[44] it is essential to note that Art. 115 does not address *taxpayers' practices or behaviours*, but rather *national domestic laws*. The problem with the DAC 6 is that it does not address national domestic laws but taxpayers' practices or behaviours, that is, aggressive tax planning. I have expressed analogous considerations regarding the ATAD. With the aim to protect Member States' tax bases from erosion caused by increasing sophisticated tax-planning structures, DAC 6 articulates a reporting obligation that enable Member States to close loopholes by, *inter alia* enacting legislation which discourages taxpayers to use them. However, in my view, "if the existing domestic laws are inappropriate at the global level and allow taxpayers to exploit disparities for their benefit, and to the detriment of Member States' tax collection interests", leading to, for instance, a situation of double non-taxation, these States should take action and adopt consistent harmonizing directives that eliminate both situations of double non-taxation as well as double taxation situations to which those disparities might lead as well.[45] "Avoidance", the idea inspiring the ATAD, and also the DAC 6, "is a concept focused on

[42] D. Blum, A. Langer, *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1*, "European Taxation" 2019, Vol. 59, No. 6, p. 289.

[43] For a complete analysis of both provisions (Arts. 113 and 115 TFEU) as the legal bases of DAC 6 see: D. Blum, A. Langer, *At a Crossroads Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1*, pp. 284–290.

[44] M.C. Barreiro Carril, *La controvertida base jurídica de la Directiva antielusión fiscal. Un análisis a la luz de reglas de vinculación*, "Revista de Derecho Comunitario Europeo" 2019, Vol. 62, p. 171. See also: *idem, The controversial legal basis of the anti-tax avoidance directive. An analysis in the light of its linking rules*, "Tijdschrift voor Fiscaal Recht" 2021, Vol. 19, No. 611, pp. 971–972.

[45] *Ibidem*.

the behaviour of the taxpayer and not on the inadequacy of existing rules", as pointed out by Dourado.[46] As I stated in another work, "The fact that the existing rules are inadequate should not lead to responses by EU law which adversely affect taxpayers that undertake legal mismatch arrangements by taking advantage of such inadequacy".[47] In this regard, in my opinion, it is shocking that the Council states that "tax-planning structures often take advantage of the increased mobility of both capital and persons within the internal market",[48] while no real concern seems to emerge from the Council regarding tax obstacles created by disparities in Member States' legislations. For instance, the Common Consolidated Corporate Tax Base, which would provide for consistent harmonization by removing obstacles jeopardizing the exercise of fundamental freedoms, has been set aside for a later time. Further still, I agree with Weber that the utilization by taxpayers of the most advantageous legal systems is in line with the objective of the internal market.[49] Therefore, if Member States want to prevent taxpayers from making use of disparities or loopholes, they should truly harmonize domestic legislations, for example, through a consistent directive from the perspective of the internal market, in the terms outlined.

Regarding its legal basis, DAC 6 raises the same essential problems as the ATAD. The DAC 6 is arguably even more problematic than the ATAD, since, as expressed by Malherbe and Braun, while the second one applies to transactions which have been already performed, DAC 6 "addresses prior intellectual activity.[50]

As a final conclusion, it should be stressed that both the ATAD and the DAC 6 focus on aggressive tax planning behaviours rather than (domestic) legislations. However, in order for the Council to enforce Directives in the field of direct taxation, what is needed is domestic legislations, not taxpayers' behaviours, to affect the internal market. Member States are of

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[46] A.P. Dourado, *The meaning of aggressive tax planning and avoidance in the European Union and the OECD: An example of legal pluralism in International Tax Law*, [in:] J. Englisch (ed.), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism*, IBFD, Amsterdam 2016, p. 264.

[47] M.C. Barreiro Carril, *The controversial legal basis of the anti-tax avoidance directive…*, p. 972.

[48] DAC 6, Preamble, II. As expressed in a great way by Blum and Langer that statement "essentially claims that the internal market and the associated free flow of goods and services was "too" successful, since it has become too easy to receive sophisticated and comprehensive tax advice within the European Union. In other words, the internal market has to be protected from being a victim of its own success" (D. Blum, A. Langer, *At a Crossroads: Mandatory Disclosure under DAC-6 and EU Primary Law – Part 1*, p. 286).

[49] D. Weber, *Tax avoidance and the EC Treaty freedoms*, Kluwer Law International, Alpheen aan den Rijn 2016, p. 33.

[50] J. Malherbe, S. Braun, *The European Union Directive…*, p. 10.

course entitled to fight those behaviours and protect their tax bases as long as tax avoidance domestic legislations fulfil the conditions arising from fundamental freedoms, as set up by the CJEU.[51] This is all the more justified if one bears in mind that aggressive tax planning behaviours, are, among other things, incompatible with the principle of equity. They can do so unilaterally or inspired by the BEPS Project, but cannot use a directive based on Art. 115 TFEU (at least with the content of the ATAD or the DAC 6) for the sole purpose of fighting against legal tax-planning arrangements, even if all of them agree to do so, by fulfilling the requirement of unanimity, which so far was very difficult to attain in the field of direct taxation. As I expressed regarding the ATAD, an objective (i.e.: such as fighting tax avoidance) does not acquire (priority) European status only because it appears as such in a directive: the fight against tax evasion is not, in my opinion, an objective to be achieved through a directive, at least in the way the ATAD has attempted to achieve it.[52] If Member States decide to use a Directive to fight aggressive tax planning in the field of direct taxes, they can only do so through one which eliminates disparities in domestic legislations, pursuing not only the objective of eradicating aggressive tax planning practices, but also the removal of tax obstacles to the internal market.

Article 115 TFEU is, in my view, conceived, from a taxation perspective, to contribute to improving the conditions in which taxpayers exercise their fundamental freedoms within the EU. True harmonization may serve that purpose. Both the ATAD and DAC 6 are not real harmonising directives. This work shows how the inappropriate use of a legal (harmonizing) basis – Art. 115 TFEU – for goals other than building a real internal market, may be the true cause of problems for taxpayers, both from the perspective of fundamental rights and fundamental freedoms.

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[51] CJEU, judgment, 12 September 2006, *Cadbury Schweppes*, C-196/04.

[52] M.C. Barreiro Carril, *Commentary on Chapter 16: Does the Anti-Tax Avoidance Directive Involve a Positive Step Towards the Completion of the Internal Market? Some Reflections in the Light of Linking Rules Addressing Hybrid Mismatches*, [in:] P. Pistone (ed.), *European Tax Integration: Law, Policy and Politics*, IBFD, Amsterdam 2018, pp. 640–641.

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Abstract

This work aims to identify some of the problems that the Directive 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 (DAC 6) and its implementation into the Spanish legal order, raise as regards taxpayers' rights and fundamental freedoms. By describing the basic content of this reporting obligation, the author emphasizes the vagueness in which that content is defined both in the Directive and in the domestic legislation implementing the Directive, which raises issues as regards the principles of legality, characterization, and legal certainty. Furthermore, the author stressed that the mandatory disclosure regime laid down in the Directive, and in the domestic legislation, shows problems of incompatibility with the EU legal order. The work ends with some general comments on the problem that the Directive raises for taxpayers' rights from a broader perspective: the one related to the Directive's legal bases. This perspective helps to understand why, in the author's opinion, DAC 6 raises also issues concerning fundamental freedoms.

Keywords: reporting obligation of cross-border arrangements, aggressive tax planning, DAC 6, legal basis for the adoption of harmonizing directives, taxpayers' rights