



ABBL response to the 2024 European Commission public consultation on the Directive on Administrative Cooperation (DAC)¹

Luxembourg, 30 July 2024

The Luxembourg Bankers' Association (ABBL) is the largest association of the financial sector in Luxembourg with more than 270 members, representing the majority of financial institutions as well as market infrastructures, e-money and payment institutions and other regulated financial services providers operating in Luxembourg. Its primary mission is to promote the sustainable development of regulated, innovative and responsible banking services in Luxembourg.

The ABBL is fully committed to tax transparency and is providing its members assistance in a compliant and consistent implementation of the underlying exchange of information standards in Luxembourg.

We welcome the opportunity to contribute to the public consultation launched by the European Commission on the Directive on Administrative Cooperation (hereafter "DAC").

Comments provided reflect the views of our members and thus focus on the role of banks as "financial intermediaries" in the context of DAC 2 and DAC 6.

Generally speaking, we believe that the European Union (hereafter the "EU") has set-up a very comprehensive framework to increase tax transparency, international cooperation and fight against tax evasion. In addition, we believe that the current exchange of information is complete and exhaustive, insofar as financial institutions now exchange most of the data they hold on their customers.

Financial institutions have invested massively in the implementation of the automatic exchange of information, which is now well established in banking processes and can be qualified as "business as usual". Therefore, disruptions should be avoided. In this respect, we note that based on a report published by the Commission in 2018², the total costs incurred by Member States for implementing DAC 2 remain relatively modest at EUR 45 million. By contrast, costs incurred by financial institutions are much higher. One-off estimates for financial institutions in 5 European countries (FR, UK, DE, AT, LU) total around EUR 340 million while yearly costs are estimated at EUR 120 million. If we add up the figures, implementation costs in these five countries alone would be close to EUR 1 billion today.

We submit that the obligations regarding the exchange of information should remain proportionate, coherent and harmonised. Based on feedback received from our members, we believe that (1) a critical assessment of DAC 6 is necessary and (2) better interaction and consistency between the DAC and other European and international regulations needs to be ensured. Finally, (3) 10-years after the introduction of DAC 2, it would be desirable for the use of the data collected to be subject to an in-depth evaluation, prior to the introduction of any new proposal.

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13678-Cooperation-on-direct-taxation-evaluation_en

² Report from the Commission to the European Parliament and the Council on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation, 17 December 2018.

1. Critical assessment of DAC 6 is necessary

The arrangements within the scope of the DAC 6 are for the most part put in place by intermediaries who are, on the basis of the current provisions, exempt from reporting obligations. Financial institutions, for their part, have had to put in place extensive due diligence processes even though they are rarely promoters of tax arrangements. As financial institutions are not tax advisors in the first instance, they are not in the best position to adequately assess such arrangements. As a result, only a limited number of arrangements in scope of DAC 6 can be reported by financial institutions under DAC 6.

Furthermore, DAC 6 is implemented in a very fragmented way within the EU. The lack of harmonization of the rules by the EU Member States leads to certain discrepancies in the implementation of key concepts.

The main factor is the absence of uniform guidance at EU level, a situation contrasting with DAC 2, which is implemented on the basis of an extensive commentary produced by the OECD in relation to the CRS. This results in increased compliance costs for intermediaries and raises concerns in terms of level-playing field between Member States. Besides, data exchanged by Member States are not necessarily comparable and this may compromise the objectives of DAC 6.

The interpretation of key concepts varies between Member States. There are also discrepancies related to interpretation of “hallmarks” and applicable penalty regimes. Similarly, the categories of the intermediaries which are exempted from reporting based on a legal professional privilege differ between Member States. Some of these discrepancies are described in a report from the European Parliament³.

In addition, due to the fact that territoriality rules under DAC 6 are interpreted differently by Member States, arrangements performed at the level of a branch of a financial institution may simultaneously be subject to reporting obligations under DAC 6 in the Member State where such branch is located and in the Member State where its head office is established. This exacerbates uncertainty where jurisdictions have an inconsistent implementation of DAC 6. Conversely, and for the same reasons, a given arrangement may not be subject to any reporting obligation at all.

In the light of the above considerations, **we note an imbalance between the cost of compliance with DAC 6 at the level of financial institutions and the effectiveness of the data reporting.** We believe that the cost of implementing and maintaining a DAC 6 reporting framework is disproportionate in relation to the reportable data that the framework generates in a banking context. To our view, any reassessment of DAC 6 should ensure in the first instance an adequate proportionality as regards reporting obligations vesting to intermediaries acting as service providers.

2. Better coordination between DAC and other European and international regulations would be desirable

To some extent, **the DAC overlaps with other European and international regulations. The way in which links are established between these different regulations from a textual point of view is sometimes inconsistent or even a source of contradiction.**

³ European Parliament, March 2022, Assessment of recent anti-avoidance and evasion measures (ATAD & DAC 6)

For example, from a European perspective, there are interactions between the DAC and the Anti-Money Laundering (hereafter “AML”) framework. While the AML Directive⁴ introduces an obligation to not disclose information to the customer concerned in the event of suspicions concerning them in relation to AML (including tax fraud) (“prohibition of tipping-off”), DAC 6 requires the financial institution to exchange information concerning arrangements set up to circumvent the automatic exchange of information on financial accounts (hallmark D.1) and the General Data Protection Regulation (hereafter “GDPR”)⁵ requires to inform the customer concerned in advance.

Finally, **potential data protection implications of the DAC should be assessed to strike a balance between data disclosure for tax purposes and privacy rights under GDPR that is sustainable in the longer term, bearing in mind the need for proportionality assessment under the GDPR.** In this context, we would like to underline that, under DAC 2 financial institutions are required to report most of the information they have at their disposal on their customers. Indeed, financial institutions are required under DAC 2 to report to their tax authorities information concerning the identity, account, account balance and related financial income of each person resident for tax purposes in a reportable jurisdiction.

3. Limited use of data collected by the various Member States and data misuse

The usefulness of information exchange depends, among other things, on the use made of the data collected.

Given the investment made by financial institutions to implement this automatic exchange of information and the future exchanges coming, Member States should ensure that the data exchanged is used appropriately.

In this respect, we note a report of the European Court of Auditors dated of 2021⁶ stating that “Member States receive huge volumes of information, with information generally underused. (...) Only two of the five Member States carried out a structured risk analysis of incoming data.”

In addition, we understand that, in some cases, the data collected is not used appropriately. For example, while DAC 2 requires the reporting of account balances as of December 31st and gross sales proceeds of the previous calendar year, we have evidence that some tax authorities erroneously consider that the amounts reported constitute a taxable basis.

⁴ Article 39 of the 4th AML Directive (Directive EU 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation EU No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC), which is upheld in AMLR (Regulation EU 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) under article 73

⁵ 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 on the free movement of such data (a.k.a General Data Protection Regulation) (Articles 12 to 15)

⁶ European Court of Auditors, special report 2021, “Exchanging tax information in the EU: solid foundation, cracks in the implementation”.