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The voice of European Lawyers

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CCBE response to the public consultation regarding DAC recast

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I. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 46 countries and, through them, more than one million European lawyers. The CCBE would like to provide some comments in the context of the public consultation on the directive on administrative cooperation in the field of taxation (DAC).

The CCBE wishes to focus on DAC6 and therefore, it has opted for contributing to the consultation in the form of a paper, instead of answering to the questionnaire.

The CCBE also wishes to thank the European Commission for having invited it to the targeted consultation as it allowed to tailor this contribution.

The CCBE welcomes the Commission's initiative to assess the functioning of DAC6 and to gather stakeholders' views on possible options for improvement, as several elements of DAC6 have been seen as problematic for practitioners. The following considerations aim to contribute to this reflection by highlighting some of the difficulties encountered in practice by lawyers, in particular with regard to the Main Benefit Test (MBT) and the hallmarks associated with it.

The experience of intermediaries and taxpayers shows that the MBT, as currently formulated, presents problems of clarity and uniform application across Member States. Moreover, some hallmarks also raise doubts.[1] This entails a significant administrative burden and can lead to reports being made for prudential purposes, without the added value of the information collected always being clear.

The CCBE's comments therefore **focus on how to improve the clarity and effectiveness of the existing rules, reducing legal uncertainty and promoting a more consistent application of DAC6, and reduce the administrative burden on legal practitioners**, in accordance with the principles of proportionality and fundamental rights, in particular the legal professional privilege (LPP)/professional secrecy.

[1] In this regard the CCBE has raised concerns as early as in 2018, after the adoption of DAC6, see the CCBE position:
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TAX/TAX_Position_papers/EN_TAX_20181019_CCBE-Guidance-on-certain-aspects-of-the-Tax-Intermediaries-Directive.pdf

II. Considerations regarding Main Benefit Test and hallmarks A

The Directive establishes a MBT with a set of related hallmarks to identify the types of schemes to be reported to the tax authorities. The MBT is linked to distinctive criteria that are categorised in the directive as generic hallmarks (A) and specific hallmarks (B and a part of C).

Regarding two options presented by the Commission regarding MBT (i.e. targeted legislative clarifications to the MBT or its removal), the CCBE notes that none of them meets the CCBE's unanimous support as the situation in Member States differs and the answer depends on how each option would be specified and implemented. The considerations below may inform the approach to be adopted.

The CCBE would wish to see an approach that clarifies and reforms hallmarks to make them objective which would be applied as a first step and then, as second steps, contains the principles of MBT to exclude reporting in cases where the transaction has a commercial purpose. MBT elements as such should be clear on the basis of the information that the intermediary has at its disposal, without the need for searching for extensive additional information, and in particular not in the countries other than the country of practice of the lawyer.

Since the adoption of the Directive, technical difficulties have been encountered in applying the MBT test. In particular, it has been pointed out that it is not based on objective criteria, but on highly subjective criteria, leading to uneven application of the Directive among Member States. The administrative burdens created have not necessarily translated into concrete benefits for tax administrations in all national experiences.

The CCBE has already highlighted these problems in the past.[2] Among its main observations, the CCBE pointed out that the description of the hallmarks requires only that the tax advantage be "one of the main benefits." This criterion is highly subjective, resulting in a non-objective and disproportionate requirement, as it seems contradictory that, when adopting measures to combat tax avoidance, the tax advantage should not be the "main advantage."

Furthermore, the provisions do not clarify the concept of "one of the main benefits," leading to a lack of clarity and therefore certainty of the provisions, a basic principle of legal certainty. The notion that it is sufficient for the tax advantage to be "one of the main benefits" of the transaction appears disproportionate and legally uncertain. It is contradictory to the stated objective of identifying potentially aggressive schemes. In some jurisdictions, it results in intermediaries reporting transactions in which the tax advantage is merely ancillary or incidental to legitimate economic or commercial purposes to be included in the reporting scope.

The terminology used in the directive with reference to these aspects is characterised by generality, which makes it difficult to demonstrate certain analyses that the directive itself provides for (for example, the expressions "can reasonably expect to obtain" are used in relation to "can reasonably expect to obtain a tax advantage from an arrangement"; the use of the adverb "reasonably" is difficult to reconcile with a certain

[2] The CCBE has previously highlighted these issues in its document, in particular concerns related to the lack of objective criteria:
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TAX/TAX_Position_papers/EN_TAX_20181019_CCBE-Guidance-on-certain-aspects-of-the-Tax-Intermediaries-Directive.pdf
For further information about the CCBE position on hallmarks, see also:
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TAX/EN_TAX_20240729_CCBE-response-to-the-public-consultation-regarding-directive-on-DAC-evaluation.pdf

prediction of the application of the provisions of the directive and therefore of the proper functioning of the MBT).

These considerations apply primarily to the generic hallmarks in category A,[3] which are always subject to the MBT and are formulated in broad and vague terms.

Since its entry into force, the practice has confirmed the CCBE's initial concerns.

On the basis of these premises, the CCBE considers that, overall, the MBT has not functioned as an effective filter, but rather as a source of structural legal uncertainty, leading intermediaries and taxpayers in some Member States to report "out of an excess of caution" and resulting in greater analysis burdens for both taxpayers and tax administrations in those jurisdictions. In particular, in some countries, for tax lawyers subject to professional secrecy and that do not report themselves, the MBT may entail risks of penalties in case their assessment that MBT was not met, is found as "wrong advice" by the authorities. The uncertainty associated with the MBT and, therefore, the difficulties in assessing reporting obligations *ex ante* has also led to defensive behaviour ("just in case reporting") in some jurisdictions to avoid penalties. Moreover, where the MBT operates as a subjective filter, there may also be a risk of self-incrimination, as intermediaries or taxpayers may be required to document assessments of tax motives that could subsequently be used against them.

In light of the experience gained in some Member States, the possibility of removing the MBT in its current form from Annex IV deserves serious consideration.

However, the CCBE admits that a mere removal of the MBT does create a risk of higher reporting volumes. Reporting volumes could remain unaltered or increase in the event of removal of the MBT due to the application of a strictly factual test to purely genuine economic and commercial transactions.

A distinction must be made between the different categories of hallmarks. In fact, as already explained, given their low efficiency and lack of relevance in practice, the removal of generic category A hallmarks from the directive, together with the abolition of the MBT, would in some Member States contribute significantly to reducing reports that have no real informational value for the tax authorities.

Regarding hallmark A2, the CCBE understands that the Commission considers that alternatively it could stand alone provided changes are brought to this hallmark. The CCBE thinks that this proposal is less efficient although it could be acceptable, provided that the new wording is unambiguous and clear. There should be a clear, concise and precise definition regarding the definition of the "tax advantage". Any fee received by any intermediary in the realm of the provision of legal services and in respect to the amount of the "tax advantage" does not necessarily presuppose the existence of a potentially aggressive tax

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[3] Council Directive (EU) 2018/822, Annex IV, Part II, Category A (Generic hallmarks linked to the main benefit test): "*Part II. Categories of hallmarks*
A. Generic hallmarks linked to the main benefit test
1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.
2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:
(a) the amount of the tax advantage derived from the arrangement; or
(b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.
3.An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation."

arrangement which is the purpose of the DAC6 directive and repeatedly noted within the Preamble of the DAC6 Directive.

Moreover, in certain Member States (e.g. the Czech Republic), such fee structures are explicitly prohibited for some regulated professions, such as tax advisers, while in the legal profession they do not occur in practice. In Germany, fee arrangements which depend on the success of a case, are prohibited for lawyers and for tax advisors. Retaining hallmark A2 would therefore not contribute to the identification of aggressive tax planning and would only increase legal uncertainty and administrative burdens without providing added value for tax administrations.

Regarding the potential impact the elimination of the MBT would have on reporting volumes, the CCBE believes that the impact will depend on the overall design of the reform. Experience in certain Member States suggests that the MBT currently serves as a legal basis for excluding arrangements from reporting. Its removal, if not accompanied by the repeal or substantial narrowing of the relevant hallmarks, could lead to an increase in reporting volumes. Conversely, where the elimination of the MBT is combined with the removal of generic hallmarks with limited informational value, and its elements are maintained to limit reporting, reporting volumes in some Member States are likely to decrease and the quality of information reported to improve. It would significantly reduce the administrative burden on taxpayers and lawyers in those Member States and thus also contribute to legal clarity and cost savings. Because the use of several vague legal terms in the MBT to date means that the review process is extremely time-consuming and costly.

III. Considerations regarding specific hallmarks B and C

Specific hallmarks, B and C, could be reformulated in a more objective and limited way, as expressed by the CCBE in its prior statements.[4]

Some of the issues expressed above were also noted for the specific hallmarks in category B, which often describe cases already covered by national or international anti-abuse rules, but which continue to require a subjective analysis linked to the MBT. Finally, some category C hallmarks have also encountered critical issues in their application, mainly due to the fact that these hallmarks require an assessment of the tax benefit that overlaps with complex checks (e.g., in the area of transfer pricing), often outside the information actually available to intermediaries.

Indeed, the CCBE highlights a general need to provide more details and clearer definitions in relation to the directive and the hallmarks mentioned above. Another necessary revision of these hallmarks should consist of reducing the scope of application to only those cases that present clear and verifiable indicators of tax risk, which in turn requires clear regulatory delimitation in order to prevent the elimination of the MBT from leading to an indiscriminate expansion of disclosure obligations.

We note the proposal to amend hallmark C.1.b(i) so that it applies where the recipient does not satisfy minimum substance requirements. We would urge caution in the design of any minimum substance requirements noting that it will not be feasible to identify a minimum level that can reasonably apply to all business models. Any such proposal should also take into account typical group structures where different functions are housed in separate legal entities. Not all legal entities will have premises or personnel. Indeed, it would not be unusual for one group entity in a jurisdiction to engage all employees and for another to hold premises. Changing the target of hallmark C.1.b(i) away from tax avoidance purposes and towards

[4] The CCBE's view that hallmarks should be clarified was expressed in its response to the public consultation on the evaluation of DAC: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TAX/EN_TAX_20240729_CCBE-response-to-the-public-consultation-regarding-directive-on-DAC-evaluation.pdf

minimum substance requirements likely will result in normal commercial transactions falling within reporting requirements.

The proposal to amend hallmark C.1.c should also be designed to not require reporting of transactions with tax exempt entities that have an established policy purpose. For example, investment funds are typically exempt from tax on the basis that they facilitate pooling of investor funds which results in more efficient use of capital. Tax deductible payments to investment funds (e.g. payments of interest to debt funds) should not become reportable under the recast DAC. We welcome the proposal to limit the hallmark to regimes that have been identified as harmful.

To sum up, the CCBE agrees that the elimination of the MBT in its current form should entail the establishment of more precise and detailed and objective hallmarks that can avoid any kind of subjective interpretation by tax administrations. A welcome approach would be clarification of hallmarks to be applied as a first step and, as second steps, using principles of MBT to exclude reporting in cases where the transaction has a commercial purpose. For the second step, it should be limited to the information that the intermediary has at its disposal, without the need for searching for extensive additional information, and in particular not in the countries other than the country of practice of the lawyer.

With regard to the possible introduction of alternative filters, such as quantitative or monetary thresholds, at present, there is insufficient evidence to determine whether the introduction of such alternative filters would actually improve the current system, both for taxpayers and intermediaries and for tax administrations.

The CCBE believes that the ruling of the CJEU in Case C-623/22 and the opinion of the Advocate General shall be considered in this regard.

IV. Hallmarks D and E

There are hallmarks with which intermediaries struggle because it is difficult for them to form a view about such matters without undertaking what may be a considerable analysis of an arrangement of which they may only know part. This is the case with hallmarks D.2. and E.3.[5]

Regarding hallmarks D, it should be taken into account that anti-money laundering (AML) legislation has also regulated this field. In the experience of tax lawyers, this hallmark does not generate a lot of reporting and therefore should be removed. Since consolidation of DAC1 to DAC9 is intended, it should be avoided that regulations on the same topic are found in different places, which may be worded differently and thus lead to contradictions. The CCBE is of the view that hallmarks D could be removed without undermining tax transparency, as the relevant risks are already addressed under EU and national AML legislation, including rules on beneficial ownership. Their removal would reduce duplication of reporting obligations and administrative burdens, while not depriving tax authorities of relevant information.

The CCBE is also in favour of removing hallmark E.3. Based on the experience of practitioners, in a number of countries, most reports are filed due to hallmark E.3. and with no real benefit being derived by the tax authorities. In our opinion, hallmark E.3. has no utility from a fiscal perspective and should be deleted. This hallmark is causing a lot of unnecessary reporting for totally harmless and tax neutral transactions which do not raise tax evasion concerns, usually in relation to cross-border transfers, mergers and re-

[5] See the CCBE past position in this regard: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TAX/TAX_Position_papers/EN_TAX_20181019_CCBE-Guidance-on-certain-aspects-of-the-Tax-Intermediaries-Directive.pdf

organisations (including intra group transfers of assets prior to group entities being liquidated) which are easy to trace and not motivated by tax reasons.

V. Other questions regarding DAC6 from the public consultation

Question: "Would you support a longer deadline to report an arrangement? In that respect, reasonable extended deadlines, also based on other existing deadlines in DAC, could be 60 days or 90 days."

CCBE answer: Yes, at least 90 days would be preferred. It would allow intermediaries and taxpayers to properly assess complex arrangements and would improve the quality and accuracy of reporting.

Question: "According to the findings from the DAC evaluation, reporting under DAC6 generates significant costs for the intermediaries and taxpayers. Can you please provide estimations of the costs incurred. Please provide a quantification of cost estimations. Quantification can be made in monetary terms or in FTE. If quantifications are not available, please provide a range. For intermediaries & taxpayers."

CCBE answer: The costs differ from case to case and from Member State to Member State. For instance, in Ireland, the costs estimated are: implementation = 3 FTEs; on-going reporting as it requires constant engagement = 5 FTE. The CCBE confirms that reporting under DAC6 generates significant administrative and compliance costs for both intermediaries and taxpayers. These costs include one-off investments in training, internal processes and IT systems, as well as ongoing personnel and administrative expenses. In several Member States, available information suggests that these costs have not been matched by measurable improvements in tax collection or enforcement. Precise quantification is difficult due to the lack of reliable data, but the overall burden is considered substantial. For example, in the Czech Republic, according to the Czech Supreme Audit Office, none of the 927 DAC6 reports examined resulted in the identification of tax risks with an impact on tax revenues, despite the strengthened exchange of information under DAC6 (Control Action No. 23/23, 2024).

Furthermore, since other intermediaries involved who are not bound by a mandate of the lawyer as intermediary must also be named, the consent of these intermediaries must first be obtained. This is often not possible within 30 days. Furthermore, this results in increased time expenditure and thus increased costs. It would be compliant with ECJ case law if lawyers, as intermediaries, no longer had to make such reports regarding other intermediaries involved.

Question: "Article 8ab, paragraph 9 requires that in situations where there are multiple intermediaries involved in the same reportable cross-border arrangement, all of them are liable to report information. While this provides for complete information on the arrangement, it can also lead to duplicative reporting. Furthermore, if intermediaries do not report (e.g. in situations of legal professional privilege), the reporting obligation falls to the taxpayer. Please indicate below which option to streamline reporting would you be in favour of:

CCBE answer: **The CCBE favours the following solution regarding lawyers:**

Taxpayer as a principal reporting subject, intermediaries secondary

Single report by intermediaries who are jointly liable

X *Taxpayer as a sole reporting subject*

Other

No change to the current situation

No opinion

This option is also supported by the ECJ.

If a lawyer is considered being an intermediary, the taxpayer is obliged to report. However, exceptionally, only when the national legal framework regarding LPP/PS allows it, the taxpayer may agree with the lawyer that while this reporting obligation remains with the client, the lawyer can represent the client for the reporting.

VI. Professional secrecy/LPP

The CCBE encourages the Commission to take the opportunity that recasting DAC presents and amend the provision regarding reporting by intermediaries (Article 8ab par.5). It should be reviewed in order to include **an obligation** for Member States to foresee a waiver from filling information for persons subject to professional secrecy/legal professional privilege.