European Commission publishes crypto and other revised reporting proposals for tax (DAC8)

14 December 2022

In brief

The European Parliament's recommendations to the EU Commission on a fair and simple taxation strategy included further categories of income and assets, such as crypto assets, to include in the scope of automatic exchange of information. The seventh potential update published by the European Commision to the EU's Directive on Administrative Cooperation on Tax (DAC), which would make this DAC8, is to address certain deficiencies that have been identified in the scope of the automatic exchange of information, including to set minimum levels of financial penalties with respect to serious non-compliance.

- Amendments would address the lack of information at the level of EU tax administrations about e-money, digital currencies, cross-border tax rulings for high net worth individuals, and certain crypto assets.
- The crypto asset and e-money element largely follows the model rules of the OECD's Crypto-Asset Reporting Framework (CARF) which was published in October, along with amendments to the Common Reporting Standard (CRS), as set out in our Alert of 11 October 2022.
- The Commission believes this information will level the playing field and raise additional tax revenues of €2.4B by the EU Member States; implementation costs are estimated at €300M with annual recurring costs of €25M.
- With a few exceptions these changes would apply from 1 January 2026.

In detail

Background

The EU Commission has proposed further amendments to Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8). The previous update, DAC7, related to reporting by digital platform operators as well as joint audits and exchange of information on certain royalties. DAC2 related to requirements broadly equivalent to the OECD's CRS.

In parallel, the European Parliament soon will vote on adopting a regulation on markets in crypto-assets (MiCA), referred to in these proposals as Regulation XXX. The regulation identifies and covers three types of crypto-assets, namely:

- asset-referenced tokens (ART),
- electronic money tokens (EMT), and
- other crypto-assets not covered by existing EU law.

The legislation would regulate the issuance and trading of crypto-assets as well as the management of the underlying assets, where applicable, with additional regulatory rules aimed at 'significant' ART and EMT. The proposals aim at securing liquidity and redemption, and envisage the inclusion of the environmental impact of crypto-assets in communications to investors. The European Securities and Markets Authority maintains a register with authorised crypto-asset service providers and also maintains a blacklist of operators exercising crypto-asset services that require an authorisation under Regulation XXX.

DAC8 does not substitute any wider obligations arising from Regulation XXX. Rather, DAC8 is aligned with the definitions laid out in MiCA and relies on the authorisation requirement introduced by MiCA, thereby avoiding additional administrative burdens for crypto-asset service providers.

Crypto-assets and e-money

The OECD's extension of CRS's scope to cover electronic money products and central bank digital currencies, in addition to improvements in the due diligence procedures and reporting requirements, is intended to increase the utility of CRS information for tax administrations. In particular, the preamble to DAC8 provides that the volume of e-money products is rapidly increasing and these new rules are intended to harmonise reporting obligations across Member States. Moreover, income from dividends not paid into a custodial account, is included in the category of income and capital subject to automatic exchange (see further below).

Crypto-asset reporting is largely in alignment with the OECD CARF framework with three principal obligations on:

- the reporting crypto-asset service providers to collect and verify the requisite information in line with due diligence procedures,
- the reporting crypto-asset service providers to report to the relevant competent authority information on the crypto-asset users, and
- the competent authority of the Member State that receives the information to share it with the competent authority of the relevant Member State where the reportable crypto-asset user is resident.

In relation to the provisions involving the reporting of crypto-assets, there are also some notable variations from the CARF:

- Proposed Regulation XXX includes an authorisation requirement for crypto-asset service providers (CASP). In general, a reporting crypto-asset service provider is expected to report in the Member State in which it is authorised under Regulation XXX. However, DAC8 also applies to other crypto-asset operators outside the EU if they have reportable users in the European Union. The Commission will establish a central register which would be available to the competent authorities of all Member States (similar to DAC7). This is a different approach to the CARF, which determines filing obligations based on a hierarchy of tax nexus rules.

- There would be a rule of equivalence for crypto-asset operators that are situated in non-EU jurisdictions and provide services to EU crypto-asset users. This rule would ensure that anyone reporting information under a similar regime to a country outside the European Union would not also need to provide the same information if that country has committed to share the information with EU Member States (e.g. via CRS agreements).

- A crypto asset user is obligated to provide their taxpayer identification number (TIN), and if they do not, transactions are to be blocked. In order to validate the TIN, the Commission is developing an electronic tool to ensure that the provided TINs are correct. Member States are expected to introduce electronic identification services to simplify and standardise the due diligence process.

- A reporting crypto-asset service provider has to inform each individual concerned that their information will be collected and reported to the tax authorities and has to supply an individual with all the relevant information before the individual has to file that information.

- A crypto-asset service provider is not obligated to report the information in relation to a Crypto-Asset User where the Reporting Crypto-Asset Service Provider has obtained adequate assurances that another Reporting Crypto-Asset Service Provider fulfils all reporting requirements.

- Reporting is to be made no later than 31 January of the year following the relevant calendar year or other appropriate reporting period of the reportable transaction.

- The minimum retention period of information records should be no longer than necessary but, in any event, not shorter than five years. This provides some insight into a potential statute of limitations.

The automatic exchange of information is to take place electronically via the EU common communication network (CCN), which is already used for the automatic exchange of information on advance cross-border tax rulings and cross-border arrangements. The information exchanged is explicitly allowed for the assessment, administration, and enforcement of local tax laws including VAT, other indirect taxes, customs duties, and anti-money laundering and countering the financing of terrorism.

Disparity in sanctions

Member States are already required to impose penalties related to ‘offences’ under DAC that are effective, proportionate and dissuasive. The proposals would be more specific to “guarantee an adequate level of effectiveness in all Member States” for failure to meet information reporting requirements imposed in each State as a result of DAC. It is proposed to set minimum levels of financial penalties with respect to serious non-compliance.

Those would be applied when a person:

- fails to report data after two administrative reminders, or

- provides data that is incomplete, incorrect or false and it amounts to more than 25% of the information that should have been reported.

The same minimum penalty would generally apply for reportable cross-border arrangements (DAC6), reportable digital platform operators (DAC7), and crypto-asset service providers (DAC8) - that is a fine of at least EUR 50,000, increasing to EUR 150,000 for a taxpayer with a turnover of EUR 6 million or more (but a fine of EUR 20,000 or more if the payer is a natural person). There is no natural person equivalent for the CRS (DAC2), but otherwise the figures are the same. For CbCR (DAC4) the penalty would have to be at least EUR 500,000.

The Commission would evaluate the size of the penalties every five years.

These minimum penalty amounts would not prevent Member States from applying more stringent sanctions for these two types of infringements, as the imposition of penalties for non-compliance will remain under the sovereign control of the individual EU Member States.

Other proposals

- The provision that determines the 'ordinary' categories of income subject to mandatory automatic exchange of information between the Member States (income from employment, director's fees, life insurance products, pensions, ownership of and income from immovable property, and royalties, etc) would be extended to include non-custodial dividend income. An amendment would also oblige Member States to exchange with other Member States all information that is available on all these categories of income and capital with respect to taxable periods starting on or after January 2026.
- Cross-border rulings for high-net-worth individuals (who hold a minimum of €1M in financial or investable wealth or assets under management, excluding that individual's main private residence) issued, amended or renewed (between 1 January 2020 - 31 December 2025), and still valid on 1 January 2026 would also be exchanged.
- Tax identification numbers would generally need to be provided for all types of automatic exchange.
- Member States would have to put in place an effective mechanism to ensure the use of information exchanged including for certain purposes other than direct or indirect taxation. They would also regularly have to report on use of the shared information.

The takeaway

EU entities are increasingly becoming subject to additional reporting obligations for tax purposes, whether they are headquartered in the European Union or elsewhere. Where a group makes use of the ability to report EU-wide information under any of the DAC regimes in one Member State rather than specific information in a number of Member States, it may wish to review any change in the penalties it faces for getting that information wrong or failing to provide it on time.

Groups may also want to analyse any entities in their group that may have additional EU reporting requirements related to crypto-assets or e-money were DAC8 to be agreed unanimously by Member States in the Council of the European Union. Member States could otherwise adopt legislation that follows the OECD model rules, so groups may wish to consider anyway the potential need for user and investor onboarding processes that enable know-your-customer (KYC) information to be gathered and an appropriate governance and due diligence framework to be put in place. Systems improvements may be needed to gather, report, and maintain the necessary information.

Let's talk

For a deeper discussion of how the crypto and other revised reporting proposals for tax (DAC8) might affect your business, please contact:

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