Blockpit

DAC8: Overview & Commentary

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Foreword

This publication contains an overview and commentary on the proposal for the 8th amendment to the Directive of Administrative Cooperation as released by the European Commission on the 8. December 2022. It was primarily drafted on the basis of the relevant documents provided by the European Commission, which were retrieved from: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12632-Tax-fraud-evasion-strengthening-rules-on-administrative-cooperation-and-expanding-the-exchange-of-information_en. In certain parts, however, it also represents the author's own view; this is clearly recognisable from the continuous text or it is referred to accordingly.

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Background

In recent years, the emergence and growing importance of alternative payment and investment systems, such as crypto-assets and e-money, has already led to tax authorities from most countries around the globe demanding corresponding tax information from individuals. However, tax authorities still lack the necessary information to monitor and review proceeds obtained by using crypto-assets, which severely limits their ability to ensure that taxes are effectively paid.[1] This lack of reporting rules at national level, as well as the lack of exchange of information between member states of the European Union ("Member States") means that not only are non-compliant taxpayers difficult to detect, but also that there is no information available about how much realized crypto-related income has actually been taxed by the Member States.

Hence, in July 2020, the European Commission committed to update the Directive on Administrative Cooperation ("DAC"),[2] now in its seventh revision, which frames the mechanism for cooperation and exchange of information within the EU for the purpose of direct taxation. The Commission decided to extend DAC's scope to also cover the exchange of information on crypto-assets as well as tax rulings for high-net-worth individuals.[3] Also, the Commission highlighted that this initiative should be in line with the parallel work in the OECD, which, recently in October 2022, agreed on the Crypto-Asset Reporting Framework ("CARF") as well as the extension of the scope of the Common Reporting Standard ("CRS") to also cover e-money.[4] It stressed the importance of ensuring consistency between the international OECD and EU rules in order to increase the effectiveness of information exchange while reducing administrative burdens, especially because the OECD rules are only non-binding recommendations and would therefore not achieve the same coordinated regime in all participating Member States.[5]

Ultimately, on 8. December 2022, the Commission proposed a set of new rules which shall improve Member States' ability to detect and counter tax fraud, tax evasion and tax avoidance, by requiring all service providers in the field of crypto-assets – irrespective of their size or location – to report the transactions of their clients residing in the EU.[6] This proposal, which takes the form of the 8th amendment to the DAC (thus "DAC8"), is mostly in line with the recommendations set out under CARF and builds on the provisions of the Regulation on Market

[1] European Commission. (2022). Taxation: New transparency rules require service providers to report crypto-asset transactions, Press release 8 December 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7513.
[2] 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 64, 11.3.2011, p. 1–12.
[3] European Commission. (2020). Communication from the Commission to the European Parliament and the Council for an Action Plan for fair and simple taxation supporting the recovery strategy. COM(2020)312 final.
[4] OECD (2022), Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard, OECD, Paris, https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-tothe-common-reporting-standard.htm.
[5] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 9.
[6] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final.

in Crypto-Assets ("MiCA")[7] and the Transfer of Funds Regulation ("TFR"),[8] especially in terms of definitions and relying on the authorisation requirements of the former. However, the Commission rightly stressed, that while the TFR already ensures a certain level of due diligence by obliged entities to combat money laundering and terrorist financing, it does not provide for the reporting and automatic exchange of information in the detail required for direct taxation purposes.[9] Hence, the need for a new directive in the form of DAC8.

Objectives of DAC8

First of all, it should be highlighted that DAC8 is based on a two-step approach: (i) service providers reporting specific crypto-transactions of their users to tax authorities, and (ii) (cross-border) exchange of this reported information between tax authorities of different Member States.[10] Hence, to avoid misunderstandings, DAC8 does not aim at setting out new rules regarding the actual taxation of crypto-asset proceeds based on each Member State's national rules, nor does it cover the taxation of profits made by service providers. Harmonisation is thus limited to informing the competent authorities of the crypto income generated and it is up to the Member States to decide on the tax to be paid under national law.[11] However, there are indications that the introduction of a single EU crypto tax regime is also currently being discussed.[12]

As stated by the Commission, DAC8 primarily aims to address the problem of tax authorities not having the necessary information to monitor and verify the income generated by crypto-assets and their potential tax consequences by creating a clear and harmonized cross-border reporting framework.[13] It shall increase transparency and create a level-playing field, reducing the advantage that some individuals may receive from not reporting income connected with the use of crypto-assets. More specifically, DAC8 shall also improve the ability of Member States to detect and counter tax fraud, evasion and avoidance. It should be emphasised, however, that DAC8 is not a regulation and its rules are therefore not to be applied directly, but - as a directive - are to serve as a basis for national transposition provisions.

[7] The final version of MiCA is yet still to be published. For the proposal, see: European Commission. (2020). Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final.
[8] The final version of TFR is also yet still to be published. For the proposal, see: European Commission. (2021). Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on information accompanying transfers of funds and certain crypto-assets, COM/2021/422 final.
[9] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 4.
[10] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 8.
[11] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 9.
[12] As recently reported by Politico, see: https://www.politico.eu/article/eu-commission-brussels-bitcoin-currency-eyes-eu-crypto-tax/.
[13] European Commission. (2022). EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 402 final. Page 1.

Who is affected?

Crypto-Asset Service Provider

In the EU, the fundamental legal framework for any service provider in the fields of crypto to take a closer look at is MiCA, which was agreed upon at the end of June 2022.[14] One of the key aspects of MiCA is that it defines the term "Crypto Asset Service Provider" ("CASP") very broadly. To be more specific, CASP means any legal person or other undertaking whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis. Such "Crypto-Asset Services" are:

- the custody and administration of crypto-assets on behalf of third parties;
- the operation of a trading platform for crypto-assets;
- the exchange of crypto-assets for funds (i.e. banknotes and coins, scriptural money or electronic money);
- the exchange of crypto-assets for other crypto-assets;
- the execution of orders for crypto-assets on behalf of third parties;
- placing of crypto-assets;
- providing transfer services for crypto-assets on behalf of third parties;
- the reception and transmission of orders for crypto-assets on behalf of third parties;
- providing advice on crypto-assets; or
- providing portfolio management on crypto-assets.

This technology-neutral definition of CASPs was most recently not only adopted by the TFR, but is now also found in the DAC8-proposal (including an explicit reference to staking and lending).[15] It covers, among others, exchanges, brokers and traders, decentralized trading platforms and crypto-ATMs. However, under the DAC8-proposal, not all Crypto-Asset Services are considered to be relevant. The reason being that services such as "providing advice" and the "issuance" of crypto-assets do not have any relevance for establishing holdings or capital gains that would be relevant for tax purposes.[16]

Crypto-Asset Operator

Apart from CASPs, the proposal also covers so-called "Crypto-Asset Operators" ("CAO").[17] While this term is somewhat cryptically phrased, it shall cover all those providers of Crypto-

[14] Council of the European Union, Press release 30 June 2022, retrieved from: https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/digital-finance-agreement-reached-on-european-crypto-assets-regulation-mica/.
[15] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, B. 4.
[16] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 23.
[17] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, B. 2.

Asset Services to EU-based customers that do not fall under the CASP definition of MiCA and therefore do not qualify for authorization under this regulation. This includes, among others, service providers with non-solicited EU customers, or service providers that trade non-fungible tokens ("NFT", i.e. unique and non-interchangeable unit of data stored on a blockchain).[18]

While CASPs receive authorization under MiCA in the Member State of their legal entity and thus have to report in this Member State, CAOs will be required for a single registration with a Member State of their choice (where also reporting takes place). In this regard, CAOs, before the start of each fiscal year, shall communicate to this Member State their (i) name; (ii) postal address; (iii) electronic addresses, including websites; (iv) any TIN issued to them; and (v) Member States in which their reportable users are residents.

As CAOs may be resident outside the EU, DAC8 also foresees the relieving of the above single registration and reporting obligation for those CAOs that need to comply with requirements for which equivalent reporting and exchange mechanisms have already been established in relation to non-union-jurisdictions (so-called "Qualified Non-Union Reporting Crypto-Asset Service Provider").[19] Simply put, if CAOs are already reporting under a DAC8 compliant framework, they should not be required to report the same information again. This is similar to what is foreseen in DAC7[20] and has the same purpose of ensuring a level playing field and avoiding that service providers engage in forum shopping.[21]

The inclusion of this new category of reportable service providers may raise some concerns about the scope of DAC8, especially as CARF does not provide for such a provision. However, as crypto-assets are highly mobile and digitized and can therefore be exchanged anywhere in the world, the Commission considered it necessary to include non-EU-based service providers in order to prevent them from being favoured over their European competitors.[22] This may be reasonable with respect to foreign service providers, in particular to prevent EU resident taxpayers from choosing them to disguise their taxable income, but the extension to service providers that are resident in the EU but not covered by MiCA may prove to be rather questionable. This could be particularly relevant considering that small service providers and projects (such as NFT gaming platforms) may also be affected, which as such do not have the resources required for reporting under DAC8.

Reporting Crypto Asset Service Provider

Finally, given the above definitions, the question arises as to who is reportable under DAC8. For this purpose, the proposal contains the definition of a "Reporting Crypto Asset Service Provider" ("RCASP"). In essence, this includes any CASP and any CAO, that conducts one or

[18] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 11.
[19] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, F. 7.
[20] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 104, 25.3.2021, p. 1–26.
[21] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 11.
[22] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 30.

more Crypto-Asset Services permitting Reportable Users (as defined below) to complete an Exchange Transaction.[23] In line with OECD's CARF, such "Exchange Transaction" includes exchanges between reportable crypto-assets and fiat (i.e. Buy/Sell) as well as exchanges between one or more reportable crypto-assets (i.e. Trading).[24] Hence, as already mentioned above, CASPs/CAOs providing solely advice, issuance or mere portfolio management are not subject to the DAC8 reporting requirements.

Reportable Users and Exemptions

Under DAC8 only transactions of so-called "Reportable Users" are relevant. This includes individuals or entities that are resident in a Member State and are customers of a RCASP for the purpose of carrying out Reportable Transactions (as defined below). Exempt are:

(i) entities the stock of which is regularly traded on a securities market as well as entities that control or are controlled by such an entity by more than 50% (vote and value);
(ii) governmental entities;
(iii) international organisations;
(iv) central banks; and
(v) certain financial institutions other than crypto investment entities.[25]

With regard to cases involving an intermediary, the Explanatory Memorandum of the DAC8-proposal specifically addresses two scenarios: firstly, where an individual or entity, other than a financial institution or a RCASP, acts for the benefit or account of another individual or entity as agent, custodian, nominee, signatory, investment adviser, or intermediary; and secondly, where a RCASP facilitates payments in crypto-assets for or on behalf of a merchant in consideration of goods or services for a value exceeding EUR 50.000 (so-called "Reportable Retail Payment Transactions").[26]

In both cases, only the transactions of the third party, i.e. (i) the person/entity on whose behalf action is taken or (ii) the merchant's counterparty, are reportable if this third party is to be considered as Reportable User. In the latter case of retail payments, a further – practically reasonable – restriction applies: such transactions are only reportable if the RCASP is also obliged to verify the identity of the involved customer on the basis of the transaction in accordance with national anti-money laundering regulations.[27]

[23] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, B. 3.
[24] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, C. 2.
[25] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, E. 1.
[26] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 12.
[27] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, D. 2.

Crypto-Assets in Scope

The group of crypto-assets covered by the proposal is to a great extent similar to that of MiCA. The general definition used ("*a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology*")[28] is the same and includes:

(i) payment token (e.g. Bitcoin, Ethereum, etc.),
(ii) asset-referenced token (e.g. USDC, Tether, BUSD, etc.),
(iii) equity/debt token (i.e. equity share in a company/organization or debt instrument such as mortgages/bonds), and
(iv) certain NFTs (i.e. the issuance of NFTs as part of a large series or collection should be considered as an indicator of their fungibility).

All of these assets can be held and transferred in a decentralised manner without the intervention of traditional financial intermediaries. However, since those two key elements do not apply to central bank digital currencies (CDBC, i.e. assets representing a claim on an issuing central bank) and e-money tokens (i.e. assets with stable value based on only one fiat currency), they are exempt from DAC8 and, like traditional financial instruments, instead fall under DAC2.[29][30]

More specifically, under DAC8 a so-called "Reportable Crypto-Asset" is any crypto-asset other than a CDBC, e-money,[31] e-money token, or any crypto-asset for which a RCASP has adequately determined that it cannot be used for payment or investment purposes.[32] In this regard, Recital 14 of the proposal calls RCASPs to consider on a case-by-case basis whether crypto-assets can be used for payment or investment purposes, taking into account the exemptions provided for in MiCA, in particular in relation to limited networks and certain utility tokens. Hence, it is not yet possible to determine with certainty which crypto-assets fall within the scope of DAC8. According to the Commission's Impact Assessment Report, it can only be assumed that "utility token" which are only accepted by the issuer of such tokens and are issued with non-financial purposes to digitally provide access to applications, services or resources available on blockchains (so-called "closed-loop systems", e.g. certain vouchers, airline miles, etc.), and "non-marketable crypto-assets" which are not traded in a publicly available market or do not require intervention by a CASP (e.g. trading card games) are excluded.[33]

[28] European Commission. (2020). Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final. Article 3.1(2).
[29] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 359, 16.12.2014, p. 1–29.
[30] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 22.
[31] As defined in Art. 2(2.) Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267, 10.10.2009, p. 7–17.
[32] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, A. 4.
[33] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 23.

However, since the proposal should also be seen in the context of the parallel work in the OECD,[34] it seems rather reasonable to refer to the commentary section of CARF for further interpretative recommendations. It states that in assessing whether a crypto-asset cannot be used for payment or investment purposes, the following aspects may be taken into account:

(i) crypto-assets that are subject to financial regulation can be used for payment or investment purposes and are therefore to be considered reportable crypto-assets;

(ii) regardless of whether a NFT is marketed or labelled as a collectible (and is therefore not reportable), it is important to assess the commonly accepted usage of such NFT and if it is traded on a marketplace for payment or investment purposes;

(iii) crypto-assets that are characterised by operating in a limited fixed network/environment beyond which they cannot be transferred or exchanged in a secondary market, and cannot be sold or exchanged at a market rate inside or outside of such closed-loop, would generally not be able to be used for payment or investment purposes.[35]

From a practical point of view, the rule that RCASPs have to consider on a case-by-case basis whether crypto-assets can be used for payment or investment purposes seems rather inappropriate, even with the help of the above recommendations. In fact, this might lead RCASPs to classify each and every asset as reportable in order to exclude their liability. Not only would this unnecessarily inflate the information received, but it could also result in an incoherent collection of information that could compromise not only the efficiency but also the effectiveness of the DAC8 reporting regime. Therefore, clear guidelines should be given that allow for a coherent and uniform interpretation and do not make the decision solely dependent on the RCASP.

Reporting Requirements

Identifying Reportable Users

First of all, each RCASP is obliged to identify, whether a customer (individual or entity) is actually a Reportable User under DAC8. In order to do so the RCASP has to carry out certain due diligence procedures when entering into a business relationship with a new customer or in the case of existing customers, no later than 12 months after the entry into force of DAC8. The principal mechanism for this is self-certification, which shall allow the RCASP to identify, for example, the tax residence(s) of its customers.

For validity purposes, the self-certification is required to be signed or otherwise positively affirmed by the customer and dated at the latest at the date of receipt. Moreover, it shall contain the following:

[34] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 2.
[35] OECD (2022), Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard, OECD, Paris Page 48, https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-tothe-common-reporting-standard.htm.

- First and Last Name/Legal Name;
- (residence) address;
- Member State(s) of residence for tax purposes;
- with respect to each Reportable Person, the tax identification number ("TIN") in relation to each Member State;
- date of birth (for individuals); and
- for entities, the above information on controlling person and their roles by virtue.[36]

If a user does not provide the required information after two reminders following the initial request by the RCASP, but not before the expiration of 60 days, the RCASP has to prevent such user from performing exchanges between reportable crypto-assets and fiat (i.e. Buy/Sell) or exchanges between one or more reportable crypto-assets (i.e. Trading).[37]

Since both CASPs and CAOs professionally involved in facilitating exchanges of crypto-assets usually fall within the scope of obligated entities for the purposes of the Financial Action Task Force (i.e. "Virtual Asset Service Providers"),[38] many of them are already required to collect and review documentation of their customers, including on the basis of AML/KYC documentation. The Commission therefore argues that the new reporting and exchange framework will impose reporting obligations only on those providers that already largely have the necessary information,[39] so it can be assumed that a large part of the relevant information is already available. However, whether this is actually the case or whether the implementation of DAC8 will pose significant challenges to RCASPs remains to be seen in practice.

Nevertheless, it should not go unmentioned that the proposal also contains certain facilitations for RCASPs in this regard. Specifically, where RCASPs rely on self-certification through an identification service made available free of charge by a Member State or the Union to determine the identity and tax residence of their customers, they are only required to ascertain the (legal) name of their customers and, in relation to the identification service used, its name, identification service identifier, and the Member State through which it was issued. Also, in line with the latest amendments to CARF prior to its publication,[40] DAC8 allows RCASPs to rely on a third party to fulfil their due diligence obligations. However, since these obligations remain the responsibility of the RCASP,[41] it is even more important to have an established and trustworthy partner, such as Blockpit.[42]

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[36] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section III, C(1) and (2).
[37] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section V, A(2).
[38] Definition of "VASP" retrieved from: https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.
[39] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 24.
[40] OECD. (2022). Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard. Page 18, https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-tothe-common-reporting-standard.htm.
[41] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section III, D(2).
[42] Blockpit is Europe's leading B2B-Cryptotax Reporting Solution Provider. For more information, visit: https://blockpit.io/en/dac8/.

Reportable Transactions

In addition to the information collected through the above due diligence procedures (name, address, tax residence, TINs, date of birth/controlling persons, etc.), RCASPs also have to report specified tax relevant transaction data. In line with OECD's CARF,[43] there are four types of (domestic and cross-border) transactions by Reportable Users which are relevant under DAC8:

(i) exchanges between reportable crypto-assets and fiat (i.e. Buy/Sell);
(ii) exchanges between one or more reportable crypto-assets (i.e. Trading);
(iii) transfers of reportable crypto-assets (i.e. Transactions leaving a platform, e.g. to a cold wallet);[44] and
(iv) high-value retail payment transactions (i.e. transfers for goods or services over EUR 50.000).[45]

Together, these transactions four types are defined as "Reportable Transactions".[46] Hence, whilst mere peer-to-peer transactions are not considered Reportable Transactions, the transfer of reportable crypto-assets to wallets managed by a different CASP/CAO or by the user itself are reportable under DAC8. The reason for this is to help tax authorities not only to reconcile the information reported by multiple CASPs/CAOs if a taxpayer uses multiple providers to acquire and/or sell crypto-assets, but also to record transfers to self-hosted addresses.[47] Here, too, the Commission has followed considerations of the OECD and the rules already provided for under CARF.[48]

While a number of different reporting possibilities were considered in the course of the DAC8 negotiations (i.e. user balance-based reporting, transaction-by-transaction, aggregated or hybrid reporting),[49] the Commission, essentially in line with CARF, finally agreed on a form of hybrid reporting, where RCASPs report annually on an aggregate basis by type of crypto-asset and distinguishing outward and inward transactions. In order to improve the usability of this reported data for competent authorities, a distinction is further made between crypto-to-crypto and crypto-to-fiat transactions. From a practical point of view, this seems very reasonable, especially considering that in some Member States crypto-to-crypto transactions are a taxable event while in others they are not.

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[43] For an overview, see: Bernt/Wimmer. (2022). Why Tax Regulations Are as Important for Crypto Companies as AML Requirements, retrieved from https://sumsub.com/blog/tax-regulations-for-crypto-companies/.
[44] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, C. 1.
[45] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, C. 4.
[46] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section IV, C.
[47] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Page 25.
[48] OECD. (2022). Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard. Page 12, para 23, https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-tothe-common-reporting-standard.htm.
[49] In Detail, see European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Pages 25–29.

More specifically, for crypto-to-fiat transactions it is proposed that the total fiat amount paid or received shall be reported as the acquisition amount or gross proceeds based on the market value at the time of acquisition or disposal (if amounts were paid or received in multiple fiat currencies, the amounts are to be reported in a single currency). For crypto-to-crypto transactions, the value of the crypto-asset (at acquisition) and the gross proceeds (upon disposal) shall be reported in fiat currency according to its fair market value (which is to be determined in a single fiat currency by the RCASP in a consistent manner). For both type of transactions, the aggregated number of transferred units and Reportable Transactions shall also be reported. Moreover, RCASPs shall categorize transfers by transfer type (e.g., airdrops, income derived from staking or lending), at least in instances where they have such knowledge.

Finally, regarding retail payment transactions for goods or services over EUR 50.000 and transfers to distributed ledger addresses not known to be associated with a virtual asset service provider or financial institution (e.g. transfers to cold-wallets), RCASPs have to report their number, aggregate fair market value as well as the aggregated number of transferred units.[50]

Notwithstanding the foregoing, the proposal provides for some alleviation: For RCASPs it is not necessary to report the information in relation to their users if they have obtained adequate assurances that another RCASP already fulfils all reporting requirements of DAC8.[51] This appears to be a viable solution, which is intended to counteract the problem of double reporting highlighted by the Commission.[52]

Reporting Deadlines and Retention Periods

Reporting is to take place only in one Member State: (i) CASPs have to report to the competent authority of the Member State in which they obtained MiCA passporting authorization, and (ii) CAOs have to report to the place of their single registration (unless the CAO is already reporting under a DAC8 compliant framework). All information, as collected and verified, is to be reported no later than 31 January of the year following the relevant calendar year or other appropriate reporting period (e.g. if the tax year of a Member State deviates from the calendar year). The first information shall be reported for the relevant calendar year or other appropriate reporting period as from 1 January 2026.[53] Records of the steps undertaken and any information relied upon by the RCASP for the performance of the reporting requirements and due diligence procedures shall remain available for a period of five to ten years following the end of the reporting period to which they relate.[54]

[50] In detail, see European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section II, B(3).
[51] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 28, Art. 8ad, para 6.
[52] European Commission. (2022). IMPACT ASSESSMENT REPORT: Initiative to strengthen existing rules and expand the exchange of information framework in the field of taxation so as to include crypto-assets, SWD(2022) 401 final. Pages 57.
[53] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section II, C.
[54] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section V, B(1).

Data Protection

The existing provisions of the DAC-regime interact with the General Data Protection Regulation (GDPR)[55] in several instances where personal data becomes relevant. The proposed amendment to Article 25(3) is intended to recognise this also under DAC8. According to this amendment, RCASPs have to inform each individual concerned that information relating to this individual will be collected and reported to the competent authorities. In this regard, the RCASP has to provide all information that data controllers are required to provide under the GDPR, and to supply each individual with all information, at the latest before its information is reported; this is without prejudice to the data subject's rights provided under the GDPR.[56]

The Commission further highlights that the set of data elements to be transmitted to tax administrations is defined in a way to capture only the minimum data necessary to detect non-compliant underreporting or non-reporting, in line with the GDPR obligations, in particular the data minimisation principle. In addition, the exchange of data between Member States may only take place via a secured electronic system that encrypts and decrypts the data and which can only be accessed by authorised national officials in each tax administration. As joint data controllers, Member States must also ensure that data is stored in accordance with the security measures and time limits required by the GDPR.[57]

Automatic Exchange of Information

As from 1. January 2027, the competent authority of the Member State where the reporting takes place shall, by means of automatic exchange within 2 months following the end of the calendar year, transmit the information reported by a RCASP to the competent tax authorities of the Member States where this RCASP is resident for tax purposes or has received its authorisation, or where it is registered. This automatic exchange of information will take place electronically via the EU common communication network (CCN) by using an XML schema developed by the Commission. This is the common communication network already used for the automatic exchange of information under the DAC regime.[58]

In relation to the exchanged information, the proposal contains some amendments to Article 16 which, inter alia, aim to ensure that such information can be used for purposes other than direct taxation, such as for the assessment, administration, and enforcement of VAT, other indirect taxes, customs duties, anti-money laundering and countering the financing of terrorism. Although this can already be done under the existing DAC-regime, it is only possible to the extent that the transmitting Member State has specified the permissible purpose for the use of such information. However, the procedure for such use is cumbersome as the supplying

[55] 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, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.
[56] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 13.
[57] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 4 and 9.
[58] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 13.

Member State must be consulted before the receiving Member State can use the information for other purposes. The amendments therefore provide for the abolition of the requirement for such consultation, if the intended use of the information is set out in a list previously drawn up by the supplying Member State. This should reduce the administrative burden and allow tax authorities to act quickly when necessary.[59]

Finally, the amendments to Article 16 also provide for the opportunity for the reported information to be used to implement sanctions in an international context, provided that there is an agreement at EU level on the use of such information (e.g. decisions pursuant to Article 215 of the Treaty on the Functioning of the European Union regarding restrictive measures).[60] Hence, DAC8 will also introduce the possibility to use reported information to detect violations or to circumvent restrictive measures, in particular sanction regimes.

Penalties for Non-Compliance

To increase compliance of RCASPs with their new reporting requirements, the proposal contains a compliance framework, including penalties and monitoring, the implementation and enforcement of which is under the sovereign control of Member States. Hence, in order to ensure an adequate level of effectiveness in all Member States, Article 25a on penalties is amended to require Member States to set minimum levels of penalties for two types of conduct considered to be serious: (i) in cases of non-reporting after two valid administrative reminders and (ii) when the provided information contains incomplete, incorrect or false data, amounting to more than 25 % of the information that should have been reported. In these two cases, the following minimum fine shall be imposed on the relevant RCASP:

(i) EUR 20.000 (if such RCASP is a natural person);
(ii) EUR 50.000 (if the annual turnover is below 6 million);
(iii) EUR 150.000 (if the annual turnover is EUR 6 million or above); or
(iv) EUR 500.000 (if such RCASP qualifies as "Multinational Enterprise Group" in accordance with Article 8aa).[61]

In addition, while Member States shall indicate whether the penalties provided for in national law are applied by reference to individual cases of infringement or on a cumulative basis, they shall in any event ensure that the minimum penalties are applied cumulatively. Moreover, the minimum amounts of penalties should neither prevent Member States from applying more stringent fines for these two types of violations, nor to apply effective, dissuasive and proportional penalties for other types of infringements as well.[62] National tax authorities will

[59] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 21, para. 34.
[60] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 30, 7(a) and 7(b).
[61] Such "MNE Groups" were introduced to the DAC-regime through DAC4 and are described therein as enterprises which, because they "*are active in different countries, they have the possibility of engaging in aggressive tax-planning practices that are not available for domestic companies.*" In detail, see: Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 146, 3.6.2016, p. 8–21.
[62] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 22, para. 40.

be in charge of enforcing these penalties and more generally of ensuring overall compliance with DAC8, by performing regular audits to detect and deter non-compliance.

The proposal also provides for a rather harsh sanction which, however, only affects CAOs: Where a CAO does not comply with its obligation to report the required information after two reminders by the Member State of single registration, this Member State shall, without prejudice to the above monetary fines, take the necessary measures to revoke its. The registration shall be revoked not later than after the expiration of 90 days but not prior to the expiration of 30 days after the second reminder.[63] In this context, Member States shall take the necessary measures to require that a CAO whose registration has been revoked may only be reinstated for registration if it provides sufficient proof of compliance with the penalties imposed and gives an appropriate assurance regarding its obligation to comply with EU reporting requirements, including any outstanding reporting requirements.[64]

Mandates for the European Commission

In order to ensure uniform conditions for the implementation of DAC8, the proposal provides for the delegation of certain implementing powers to the Commission which powers are to be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council.[65] Firstly, this concerns the authority to make the practical arrangements necessary for the implementation of the mandatory automatic exchange of information reported by RCASPs, including (i) the introduction of a standard form for the exchange of information;[66] (ii) the establishment of a central directory, to which Member States would upload and store reported information; and (iii) the development and provision of a tool allowing Member States an electronic and automated verification of the correctness of the tax identification number that has been provided to them by the taxpayer or the reporting person.[67] In essence, this shall build on the existing framework and systems for the automatic exchange of information using a central directory for advance cross-border rulings ("DAC3")[68] and reportable cross-border tax arrangements ("DAC6"),[69] which were developed pursuant to Article 21 of Directive 2011/16/EU in the context of these previous amendments to the DAC-regime.[70]

[63] European Commission. (2022). ANNEXES to the Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. ANNEX III, Section V, F. 6.
[64] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 28.
[65] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13.
[66] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 18, para. 16.
[67] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 22, para. 36 and 37
[68] Council Directive (EU) 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, OJ L 139, 5.6.2018, p. 1–13.
[69] Council Directive (EU) 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, OJ L 139, 5.6.2018, p. 1–13
[70] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 40.

Secondly, the Commission shall, by means of implementing acts, following a reasoned request by any Member State or on its own initiative, determine whether information required to be exchanged pursuant to an agreement between the competent authorities of a Member State and a non-union jurisdiction is correspondent to that specified in DAC8.[71] This is particularly important with regard to the qualification of a CAO or CASP as a so-called "Qualified Non-Union Reporting Crypto-Asset Service Provider", as they may then be able to refrain from additional reporting in a Member State. The main question here is, how this presents itself in the context of CARF. In fact, the proposal is quite clear in this respect: As CARF is a minimum standard or equivalent (which has not been decided yet by OECD), setting out a minimum scope and content for implementation by jurisdictions, the determination of consistency between DAC8 and CARF by the Commission is not deemed to be necessary, provided that there is an effective agreement between the non-union jurisdictions and all Member States that requires the automatic exchange of information corresponding to that specified in DAC8.[72]

Lastly, the Commission shall, by means of implementing acts and before 31. December 2026, lay down the practical and technical arrangements necessary for the registration and identification of CAOs.[73] Hence, a central register for CAOs shall be established. Moreover, an amendment to Article 27 (2) is replaced by a provision obliging Member States to monitor and assess, for their own jurisdiction, the effectiveness of administrative cooperation in combating tax fraud, tax evasion and tax avoidance. For the purpose of the overall evaluation of DAC8, Member States, in accordance with the amendment to Article 23 (3), shall then communicate the results of these assessment to the Commission on a yearly basis.

High Net Worth Individuals

Overall, the DAC8-proposal does not only concern the automatic reporting of transactions involving crypto-assets, but also rules on the exchange of rulings on high-net-worth individuals. The reason being, that, in the view of the Commission, the lack of such rules means that tax administrations may not be aware of these rulings and that loopholes are therefore created which can create opportunities for tax fraud, tax evasion and tax avoidance.[74] Hence, the amendment to Article 8a foresees rules for the automatic exchange of advance cross-border rulings and advanced pricing agreements for persons other than natural persons. This provision is extended to high-net-worth individuals who hold a minimum of EUR 1 000 000 in financial or investable wealth or assets under management, excluding this individual’s main private residence. This amendment will oblige Member States to exchange with other Member States information on advance cross-border rulings for high-net-worth individuals issued, amended

[71] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Article 8ad (11).
[72] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 19, para. 21.
[73] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Article 8ad (9) and (10).
[74] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 21, para. 30.

or renewed between 1 January 2020 and 31 December 2025, such communication shall take place under the condition that they were still valid on 1 January 2026.[75]

Practical Impact on Service Providers and Individuals

DAC8, in combination with MiCA, TFR and publicly available blockchain data, should in many cases be able to reveal quite accurately the taxable income/gains of each taxable person and entity in the EU. With this amount of data available, not only the general, still rather sluggish attitude towards crypto tax returns will (have to) change, but also the first step towards (at least partially) shifting the rather complicated tax return obligations from individuals to service providers is made, similar to what is already known from the more traditional financial sector. In fact, some countries like Austria have already enacted specific laws requiring crypto exchanges to withhold taxes, as has been the practice for banks and stock trading for decades.

From a practical point of view, however, increasing anti-money laundering and now also tax reporting obligations pose a major challenge for many crypto service providers. In view of the comprehensive regulations that will soon come into force in the European Union, there are already considerations by service providers to establish themselves outside the EU in order to circumvent these obligations. But leaving the EU brings with it a multitude of restrictions.

The question therefore arises as to how service providers can deal with these increasingly comprehensive reporting obligations. In essence, there are three major options: (i) either they try to solve their reporting obligations independently and create the corresponding internal resources; or (ii) seek external advice and then start building in-house solutions (usually accompanied by ongoing external monitoring); or (iii) decide to outsource these tasks to third-party providers. Each of these options comes with certain advantages and disadvantages and, in most cases, the decision will crucially depend on how much budget is available. Moreover, as far as outsourcing to third-party providers is concerned, there are already some providers of corresponding services in the area of AML, but barely any in the area of crypto taxation. This is mainly because there are certain legal requirements that hardly any tax solution provider can meet: On the one hand, this concerns data protection, which is particularly strict in the EU,[76] and on the other hand, the fact that different tax laws apply in each Member State and therefore different tax-relevant information might be required.

After all, not only are service providers themselves increasingly subject to comprehensive tax reporting obligations, but also their customers have to determine and provide accurate information on their tax-relevant transactions in order to be legally compliant. In fact, one key objective of CARF and DAC8 is to provide tax authorities with a much larger data set that can be used for individual tax assessments/audits. However, providing customers with proper and accurate crypto tax management comes with many obstacles, especially if service providers are

[75] European Commission. (2022). Proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, COM(2022) 707 final. Page 10.
[76] For a detailed summary, see: Scientific Foresight Unit (STOA) EPRS | European Parliamentary Research Service. (2019). Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European data protection law?, https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU(2019)634445_EN.pdf.

serving cross-border markets. Usually, tax regimes differ quite significantly from country to country, treating various transaction types (e.g. trades, staking rewards, fees, airdrops) and asset classes (e.g. stablecoins, asset-referenced token, NFTs, derivatives) differently for tax purposes. Multiply all these variables by the need to calculate gains and losses for each transaction, and you find yourself with a Gordian knot to untie.

Hence, what might sound clear and simple in theory quickly becomes complex in practice. If customers conduct more than a handful of trades, they will soon reach the limit of what can be managed with simple tools like an Excel-sheet; and then there is also the issue of country-specific tax calculation rules and reporting forms. However, there are already certain solutions and different levels of support that service providers can offer their clients in fulfilling their tax obligations, which are listed in order of usefulness:

(i) country-specific tax reports with calculated taxable gains and pre-filled report forms based on up-to-date regulation;
(ii) summary of gains and losses by category (e.g., value appreciation, staking rewards, margin profit);
(iii) API for data extraction (to connect to a third-party tax software); or
(iv) CSV export of their transaction history (to import in third party tax software).

At the latest with the CARF and DAC8 reporting obligations, it seems only reasonable for any service provider to provide its users with one of the first two options, especially as these reporting obligations will require such level of information anyway. Blockpit is the first EU-based infrastructure-provider that offers corresponding tax solutions which are directly integrated with the platform of the service provider.[77] This can be done via a plug-and-play API that is integrated into the platform of the respective server provider, depending on its individual technical requirements. The fundamental building blocks required for such services are Blockpit's unique server structure, which does not rely on third-party cloud services and is continuously audited for compliance with GDPR and other relevant data protection laws, as well as its extensive asset database, which contains crucial country-specific tax classification and pricing data not only on "traditional" crypto assets, but also on derivatives, asset-backed tokens, NFTs and the like.

In this way, even service providers who do not have the necessary internal resources or simply do not want to deal with this highly complex matter themselves can offer their users a comprehensive and legally compliant solution. Automated tax management systems, such as those offered by Blockpit, can therefore not only help CASPs to comply with upcoming tax reporting obligations, but also significantly improve the experience of their users.

[77] For more information, visit: https://blockpit.io/en/dac8/.

Conclusion and Outlook

Ultimately, DAC8 is in essence no other than a form of CARF adapted to the European Union and its regulations, in particular the existing DAC-regime. Hence, with regard to reporting requirements, the proposal does not contain any surprising provisions, but, in certain areas, more clarity would have been desirable for more legal certainty. This concerns in particular the obligation of RCASPs to determine on a case-by-case basis whether a transferred crypto-asset is reportable or not. In this respect, there is a risk that there are potentially significant differences in interpretation and that this lack of coherence may reduce the effectiveness and efficiency of the DAC-regime. Moreover, it also remains to be seen to what extent the Commission will classify other arrangements as consistent with DAC8 so that duplicative reporting requirements for RCASPs can be avoided. Finally, the inclusion of CAOs located in the EU but not covered by MiCA may also prove questionable. Especially considering that these are often smaller service providers that find it difficult to comply with comprehensive reporting requirements.

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