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The DAC8 Proposal and the Future of Crypto-Asset Reporting: Some Preliminary Thoughts

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The [DAC8 proposal published on 8 December 2022](#) represents the most recent effort of the European Commission to enhance administrative cooperation in the tax field. It aims to include crypto-assets under the existing EU framework for the exchange of information. This way, the Commission's work is intended to address the challenges associated with the increasing use of crypto-assets for investments and preserve the overall fairness of Member States' tax systems.

Based on the proposed rules, the first reporting period involving crypto-assets is expected to be 2026 considering that the proposal, once approved by the Council, will enter into force on 1 January 2026. According to the Commission, the expansion of the exchange of information involves an additional EUR 2.4 billion in tax revenue for Member States. As long as information on crypto-assets are exchanged between different tax authorities, Member States should finally be enabled to tax crypto-asset transactions and effectively contrast the phenomenon of tax evasion and tax avoidance in the context of the digital economy.

The contents of the proposal are largely based on the [OECD's Crypto-Assets Reporting Framework \(CARF\)](#), as well as on the last amendments of its [Common Reporting Standard \(CRS\)](#). Also, the proposal refers to several definitions of the (to be adopted) [Regulation on Markets in Crypto-Assets \(MiCA\)](#). The CARF, which has been approved on 10 October 2022, provides for the reporting of tax information on transactions in crypto-assets in a standardised manner based on a set of due diligence procedures and a common definition of in-scope crypto-assets and service providers. The amended CRS, which has also been approved on 10 October 2022, aims to bring central bank digital currencies and certain electronic money products within the scope of the exchange of information.

Building on the existing OECD framework, the European Commission's initiative is the outcome of previous consultations with stakeholders and impact assessments. As it is currently unclear what the OECD's timeline is for implementation and which countries will implement the CARF, the European Commission has decided not to wait for this. It follows the recommendations of the European Council and the European Parliament to enhance fair taxation by including more categories of income and assets in the automatic exchange of information framework. However, further consultations are still in progress as [the interested stakeholders have been invited by the European Commission to provide feedback on the proposed text until 4 March 2023](#) (at the time of

writing). It should be noted that the original eight-week feedback period is extended every day until this adopted proposal is available in all EU languages.

Key aspects of the proposal

The core of the DAC8 proposal focuses on making reporting mandatory for crypto-asset service providers covered by the scope of the MiCA as well as for all the other crypto-asset operators providing services to EU resident users. To this purpose, non-EU operators must register in a Member State to comply with DAC8 rules and ensure that information is reported. This way, Members States' tax authorities should have the proper instruments to monitor crypto-asset income earned by EU users and assume the proper measures to enforce tax compliance.

The reporting process consists of three steps. Firstly, reporting crypto-asset service providers^[2] collect relevant information about reportable transactions conducted by their users. Secondly, these providers report the collected information to the competent tax authority of the Member State where they are based (for EU providers) or the competent authority of the Member State of registration (for non-EU providers). Thirdly, the competent tax authority transmits the reported information, including the tax identification numbers (TIN) of the reported users, to the competent authorities where the users are residents.

The proposal also focuses on the reporting requirements for reportable users and reportable crypto-assets. Reportable users must provide their full name, address, Member State of residence, date, and place of birth, as well as their TIN. Reportable crypto assets must be identified by their full name and the aggregate gross amount paid or the aggregate fair market value.

The due diligence procedures outlined in Section III of Annex VI of the DAC8 proposal are also worth noting. Reporting crypto-asset service providers are required to obtain a self-certification from the user that includes information to determine the user's tax residence, such as the full name, date of birth, residence address, and TIN. However, the proposal allows for a wide margin of appreciation regarding the reliability of this self-certification, and providers may verify the information based on other sources including their own customer due diligence procedures if there are doubts. If a user accesses the platform through a Member State's digital identity system, the provider is exempt from collecting this information, but must still obtain the user's full name, the identification service used, and the Member State of issuance.

Section V of Annex VI includes provisions for the effective implementation of the new measures, including the enforcement of compliance by non-EU crypto-asset operators with EU resident users. If a non-EU operator fails to comply with the reporting obligations due to a lack of registration in a Member State, the DAC8 proposal allows Member States to take "*effective, proportionate, and dissuasive measures*"^[3] to enforce compliance, potentially including preventing the operator from operating within the EU as a last resort. However, the specific measures to be taken are mainly left to the discretion of the Member States.

Zooming into the objective scope

Although the currently available text of DAC8 is still a proposal subject to further changes, it is already possible to share some preliminary thoughts on its main contents and objectives.

For instance, the DAC8 proposal seems to include more provisions on its subjective scope than on its objective scope of application. In this sense, while several new rules within the DAC8 proposal

explicitly deal with the definition of crypto-asset service providers, crypto-asset operators, and crypto-asset users, the objective scope does not receive the same attention from the European Commission. Only one provision of the proposal addresses the objective scope of DAC8 specifying that “*reportable transactions are exchange transactions and transfers of reportable crypto-assets*”[4].

To clarify the meaning of such a provision, it is then necessary to focus on the concept of “reportable crypto-assets”. In this regard, the Annex VI of the proposal is helpful; according to its Section IV “*reportable crypto-asset means any crypto-asset other than a central bank digital currency, electronic money, electronic money token, or any crypto-asset for which the reporting crypto-asset service provider has adequately determined that it cannot be used for payment or investment purposes*”[5]. Therefore, based on this wording, it is possible to assume that the definition of reportable crypto-asset – which is relevant for the objective scope of DAC8 – can be considered a residual definition, meaning that it only applies when dealing with crypto-assets other than the following two qualitative categories: (i) central bank digital currency, electronic money, or electronic money token; (ii) any crypto-asset that cannot be used for payment or investment purposes (based on an assessment performed by the reporting crypto-asset service provider).

This analysis gives evidence of the way to follow to trace the perimeter of the objective scope of DAC8. Once it is excluded the possibility to qualify a crypto-asset under one of the above qualitative categories, it is still necessary to see what a crypto-asset is under EU legislation. This may e.g. be relevant with respect to non-fungible tokens (NFT’s) of which many different shapes and forms exist[6].

To this purpose, there is a need to examine a broader framework of EU legislation including the latest initiatives of the European Commission to face the challenges of the digital economy, such as the [MiCA](#) and the [DLT Pilot Regime Regulation](#). This is because the DAC8 proposal itself, under Section IV of Annex VI, defines a crypto-asset referring to the definition provided under Article 3 of the MiCA. According to the latter provision crypto-asset means “*a digital representation of a value or a right which may be transferred and stored electronically, using distributed ledger technology or similar technology*”. Based on this definition, it results that the EU law concept of crypto-asset covers both the so-called “asset-referenced tokens” and “utility tokens” respectively associated with a stable value or right and to the access to a good or a service supplied by the issuer of the token[7].

As for the concept of distributed ledger technology (DLT), which is explicitly mentioned in the latter provision, the MiCA refers to the DLT Pilot Regime Regulation where DLT means “*a technology that enables the operation and use of distributed ledger*” intended as “*an information repository that keeps a record of transactions and that is shared across, and synchronized between a set of DLT network nodes using a consensus mechanism*”[8].

The definition of DLT established by the DLT Pilot Regime Regulation offers the possibility to cover different blockchain scenarios: not only public (permissionless) blockchains where all the users have access to the data stored on the ledger and participate in the consensus mechanism but also private (permissioned) blockchains where only a few nodes have access to the network and oversee the consensus protocol[9].

Furthermore, the same definition of DLT is sufficiently broad to include various types of consensus mechanisms; according to the DLT Pilot Regime Regulation consensus mechanism

means “*the rules and the procedures by which an agreement is reached among DLT network nodes that a transaction is validated*”[10]. Therefore, there is the possibility to include under the new DAC8 reporting framework also the crypto-assets that are based on consensus mechanisms other than the proof-of-work such as the proof-of-stake or the proof-of-authority or the proof-of-elapsed-time.

Concluding remarks

Based on the above analysis, it is possible to conclude that the new EU reporting framework can count on a definition of crypto-asset which is sufficiently broad and flexible to include a variety of crypto-asset transactions without distinctions based on the specific features of the underlying DLT technology.

Nonetheless, some doubts arise about the choice of the European Commission to build the DAC8’s objective scope on a definition of “reportable crypto-asset” which is narrower than that of “crypto-asset”. In particular, potential loopholes might emerge because of the possibility for reporting crypto-asset service providers to exclude certain crypto-assets from the reporting obligation any time they conclude that such crypto-assets cannot be used for payment or investment purposes. The qualitative nature of such an assessment could lead to grey areas, considering that the concept of “investment use” usually presents a certain margin of discretionary appreciation. For example, Member States, when implementing DAC8, could potentially approach the concept of “investment purposes” with different sensibilities and consequently jeopardize the effectiveness of the DAC8 rules. Also, based on the literal wording of the proposed Directive, it is not entirely clear whether the scope also covers the reporting of users that are based in the same country as the reportable provider or only cross-border transactions of EU-users.

Given these still open issues, the focus is now on the next round of public consultation with the interested stakeholders. The expectation is that new comments could improve the DAC8 proposal and make it finally well-equipped to address the tax challenges of the crypto-asset market.

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[2] The concept of “reporting crypto-asset service providers” includes both the crypto-asset service providers covered by the scope of the MiCA and all the other crypto-asset operators providing services to EU resident users. This is because according to the DAC8 proposal a reporting crypto-asset service provider is “*any crypto-asset service provider and any crypto-asset operator that conducts one or more crypto-asset services permitting reportable users to complete an exchange transaction*” (see COM(2022) 707 final, 8 Dec. 2022, p. 11).

[3] *Ibid.* p. 14 with particular reference to the proposed amendment to Article 25(a) of Directive 2011/16/EU.

[4] *Ibid.*, p. 12.

[5] *Ibid.*, Annex VI, Section IV.

[6] For a comprehensive token classification *see* C. Lo Yuen & F. Medda, *Assets on the blockchain: An empirical study of Tokenomics*, 53 *Information Economics and Policy*, p. 4 (2020), available at <https://www.sciencedirect.com/science/article/pii/S0167624520301256> (accessed 2 Jan. 2023). For the tax qualification of tokens *see e.g.* V. Ooi, *A Framework for Understanding the Taxation of Digital Token*, 50 *Australian Tax Review* 4, pp. 260-269 (2021).

[7] L. Oliveira, L. Zavolokina, I. Ingrid & G. Schwabe, *To Token or not to Token: Tools for Understanding Blockchain Tokens*, in *International Conference of Information Systems San Francisco, USA, 12 December 2018 – 16 December 2018* (2018), available at <https://www.zora.uzh.ch/id/eprint/157908/> (accessed 2 Jan. 2023).

[8] *See* Article 2 of Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU.

[9] M. Liu, K. Wu & J.J. Xu, *How will blockchain technology impact auditing and accounting: Permissionless versus permissioned blockchain*, in 13 *Current Issues in Auditing* 2 (2019).

[10] *See* Article 2 of Regulation (EU) 2022/858.

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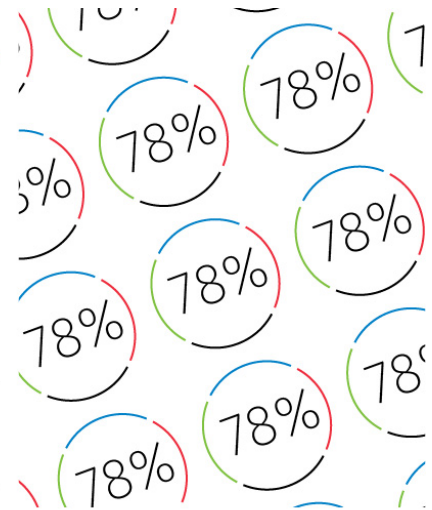
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