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DAC8: Exchange of HNWI Cross-border Rulings

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“Pandora [Papers, VD] illustrates again the importance of tax transparency. Commission to come in coming months with directives on shell companies, publication of effective tax rates and exchange of tax rulings for wealthy individuals”. This was the first reaction of the European Commission (EC) by Benjamin Angel (Director at the DG Taxation and Customs Union (TAXUD)) following the publication of the Pandora Papers, a massive data leak, which the International Consortium of Investigative Journalists began publishing on 3 October 2021, documenting the beneficial owners of corporate entities established in secrecy jurisdictions. According to the European Parliament, Pandora Papers reveals how high-net-worth individuals, including politicians, criminals, public officials and celebrities, are assisted by intermediaries, such as banks, accountants and law firms, in designing complex corporate structures registered in secrecy jurisdictions or tax havens in close cooperation with offshore professional service providers, in order to shield income and assets from fair taxation and scrutiny.[2] A few months following the publication of the Pandora Papers, on 1 December 2021, the ECOFIN reports to the European Council that the EC will, in 2022, table a legislative proposal on further revision of the Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8), concerning exchange of information on crypto-assets and *tax rulings for wealthy individuals*.[3] On 8 December 2022, the EC’s DAC8 proposal, introducing, amongst others, an exchange of tax rulings for high-net-worth individuals was published.[4][5]

In essence, the automatic exchange is further extended, amongst others, to cover advance cross-border rulings granted to HNWI (HNWI cross-border rulings). The persons concerned are those who *hold* a minimum of EUR 1.000.000 in financial or investable wealth, or in assets under management. These exclude the individual’s main private residence.[6] In addition, a person shall be considered an HNWI when that minimum threshold is met at any time during the calendar year for which the exchange takes place. DAC8 is set to apply as of 1 January 2026.[7] However, EU Member States will also exchange information on HNWI cross-border rulings that were issued, amended or renewed between 1 January 2020 and 31 December 2025, provided these rulings are still valid on 1 January 2026.[8]

It is important to note that DAC8 does not amend the definition of a cross-border ruling. In the case of HNWI and in line with the current text of DAC6 on this point (stemming from DAC3[9]), a cross-border ruling would relate, in essence, to a cross-border transaction (or a series of

transactions) or to the question of whether or not activities carried on by that person in another jurisdiction create a permanent establishment (PE).[10] And cross-border transactions exist where, for instance, none of its parties is resident for tax purposes in the same EU Member State or any of the parties is simultaneously resident for tax purposes in more than one jurisdiction. But also, when one of the parties to the transaction or series of transactions carries on business in another jurisdiction through a PE, and the transaction or series of transactions form part or the whole of the business of the PE.[11]

HNWI definition – a quasi-Union notion

As only HNWI cross-border rulings need to be automatically exchanged under DAC8, the definition of an HNWI becomes decisive. This definition, however, may be new to some EU Member States while for some others the threshold of EUR 1.000.000 may be too high, thereby making the exchange an empty letter. Furthermore, according to the EC, HNWI rulings are not offered by all EU Member States and their numbers are expected to be relatively limited [...].[12]

Zooming in a bit further to the HNWI definition, it seems to me that the EC took inspiration from the (limited, in my view) OECD work in this area. The 2009 OECD report *Engaging with High Net Worth Individuals on Tax Compliance* stated that “wealth reports published by various firms typically define the HNWI population by applying a threshold which is generally USD 1 million or more in financial or investable wealth or assets under control. The threshold takes into account assets held directly by the individual and those held indirectly through controlled entities such as private companies and those held by trustees for beneficiaries, but excludes individual’s private residence“.[13] The question here is whether “assets under management” as per the EC’s definition is the same as “assets under control” as per the OECD report. In addition, the OECD reports states the USD 1 million threshold takes into account assets held indirectly. However, I cannot find this reference in DAC8. Would this mean that the term HNWI is a quasi-Union term? In other words, the definition has been provided at the EU level but then the EU Member States can further define it and perhaps include or exclude indirect holding of assets? The latter, however, is not, in my view, desirable as it will create a fragmented exchange of information regime on HNWIs. Another question regarding the DAC8 definition is whether the term also includes High *Income* Individuals, i.e. individuals at the top of the income tax scale. Although an HNWI may also be a high-income individual, the wording of the DAC8 definition, and more specifically, the verb “holds” points to a direction that only holding wealth of more than EUR 1.000.000 makes the individual an HNWI for DAC8 purposes.

Is the exchange of rulings a measure toward a good direction?

I believe that this is the case. According to the EC, the absence of reporting and exchange of this type of information leaves loopholes that can be exploited for tax evasion and avoidance since rulings for HNWI are often related to corporate taxation.[14] Next to corporate taxation, we have personal income and wealth taxation that has been left for years untouched from a BEPS and tax competition perspective, and the exchange of HNWI – albeit limited – should further contribute to tax transparency.

DAC8: the second EC’s proposal affective HNWI

I observe that DAC8 is not the first EC’s legislative proposal that affects HNWIs. The proposed Unshell Directive contains provisions that may affect HNWI. More specifically, if more than 60%

of the book value of the undertaking's assets that fall within the scope of Article 4, points (e) and (f), was located outside the EU Member State of the undertaking in the preceding two tax years, then the undertaking needs to report its minimum substance (provided that the other two gateway criteria are met). And guess what, Article 4 point (f) refers to income from movable property, other than cash, shares or securities, held for private purposes and with a book value of more than... EUR 1.000.000. Therefore, there may be a reporting obligation and – possibly – tax implications for structures involving an HNWI who sets up an undertaking in an EU Member State that in its turn owns, for instance, artwork located in another EU Member State and is rented to galleries (and for which rental income is earned).

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[2] European Parliament Resolution of 21 October 2021 on the Pandora Papers: implications for the efforts to combat money laundering, tax evasion and tax avoidance (2021/2922(RSP), available [here](#).

[3] ECOFIN report to the European Council on tax issues, available [here](#).

[4] Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation, available [here](#).

[5] Next to the automatic exchange of HNWI, DAC8 contains provisions on reporting and exchange of information on crypto-assets for direct tax purposes.

[6] Article 1, par. 1 (b), point 28 of DAC8

[7] Idem.

[8] Article 1, par. 3 (b)(ii) of DAC8

[9] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

[10] Article 3, point 14, “advance cross-border ruling” of DAC (consolidated).

[11] Article 3, point 16, “advance cross-border transaction” of DAC (consolidated).

[12] European Commission, Questions and Answers: DAC8 available [here](#).

[13] OECD (2009), *Engaging with High Net Worth Individuals on Tax Compliance*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264068872-en>, p.17.

[14] European Commission, Questions and Answers: DAC8 available [here](#).

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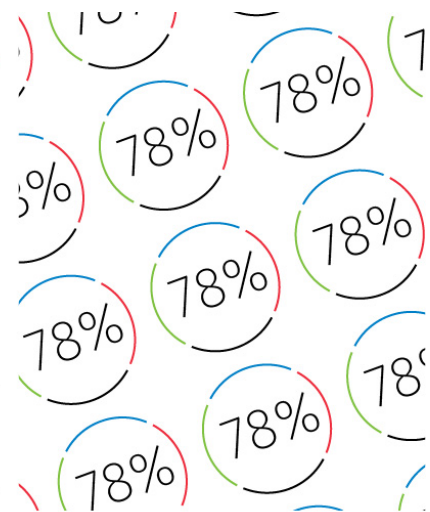
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