The Directive 2011/16/EU on administrative cooperation in the field of taxation of crypto-assets: The DAC 8.

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Abstract.

Tax fraud, tax evasion and tax avoidance represent a major challenge for the Union and at global level. It is estimated that Member States lose up to EUR 170 billion per year a as a result of tax fraud, tax evasion and tax avoidance, which significantly undermines the capacity to provide quality public services. Exchange of information is a pivotal part in the development of a well-functioning and effective Union framework to fight against such harmful practices. DAC 8 sets requirements for cryptoasset service providers on taxation reporting[1]. Member states need to put into place a system that obliges the cryptoasset service providers to report on transactions on an annual basis, furthermore, the exchange of national best practices among tax

[1] **Staking and Lending** are no longer classified as ***crypto-asset services.*** The use of crypto-assets as an investment asset to generate passive income has become steadily more popular since the implementation of smart contracts on blockchains becoming popular with Ethereum in 2017. It reached an interim all-time high with the massive price fluctuations of crypto-assets in 2021. Many of these ways of generating returns on crypto-assets are an integral part of Decentralized Finance (DeFi) applications.

authorities should also be encouraged. The reporting must be relatively detailed. Investors, taxpayers, and platforms will have to confirm that everyone is aware of obligations and rights and what this entails. Companies offering crypto services will need to report their clients' transactions to national authorities[2], for both domestic and cross-border transactions, beginning in 2026.

1. Introduction.

The crypto-asset market has gained in importance and increased its capitalisation substantially and rapidly over the last 10 years. "*Crypto-assets are a digital representation of a value or of a right, which is able to be transferred and stored electronically, using distributed ledger technology* ("**DLT**") *or similar technology* (such as ***blockchain***)".

The EU Market in Crypto-Assets ("**MiCA**") regulation is a ***game changer*** for the EU cryptoassets sector: Germany, Austria, and France, among others, have already established cryptoasset licensing regimes. Ireland has created a simple anti-money-laundering registration requirement. Others have no cryptoasset regulatory framework at all. With the entry into force of MiCA[3], **unregulated offshore companies will no longer be able to target EU consumers**. MiCA-regulated cryptoasset firms will gain significant EU market share over their unregulated offshore competitors. Cryptoasset regulatory clarity in the midst of global uncertainty could attract capital, talent, and companies wanting to launch the

[2] By 2026 a European Tax Identification Number (TIN) could be implemented.

[3] A.Lanotte, "**MiCA Leads the EU Digital Market's Growing Presence**" (TNI US, june 2023) available at the folowing link: <https://www.taxnotes.com/tax-notes-international/cryptocurrency/mica-leads-eu-digital-markets-growing-presence/2023/06/19/7gvh3> . **The Directive applies to crypto-assets service providers regulated by and authorised under Regulation (EU) 2023/1114 and to crypto-asset operators that are not**. Both are referred to as reporting crypto-asset service providers as they are required to report under this Directive. The general understanding of what constitutes crypto-assets is very broad and includes those crypto-assets that have been issued in a decentralised manner, as well as stablecoins, including e-money tokens, as defined in Regulation (EU) 2023/1114, and certain non-fungible tokens (NFTs). Crypto-assets that are used for paymentor investment purposes are reportable under this Directive.

tokenization process. This emerging industry could become an opportunity for the economic and technological revival of the EU.

For the taxation of cryptoassets at international level, it is useful to revisit the October 10, 2022, cryptoasset reporting framework (**CARF**) published by the OECD[4].

The OECD document takes advantage of existing regulatory and tax frameworks, such as the OECD common reporting standard[5] and the Financial Action Tax Force rules[6] (General Recommendations of 2012, Recommendations on Virtual Currencies of 2019, Updates of 2021)[7], which set the global standard for ***know-your-customer*** procedures.

2. The Directive.

The main aim of the directive is to ensure consistency between OECD and EU rules to increase the effectiveness of information exchange while reducing administrative burdens. DAC 8 adheres to the CARF and the OECD reporting standards. It will require cryptoasset service providers to collect information on transfers and comply with the new reporting rules, including the more stringent requirements for reporting "**tax identification numbers (TINs)"**. Cryptoasset service providers (CASP)

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[4] In April 2021 the G-20 asked the OECD to develop a framework for the automatic exchange of tax-relevant information on cryptoassets. In August 2022 the OECD approved the CARF, which provides for the standardized reporting of tax information on transactions in cryptoassets, with a view to the automatic exchange of information. The CARF defines the in-scope cryptoassets, intermediaries, and other service providers. *See* OECD, "Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard" (Oct. 10, 2022).

[5] In August 2022 the OECD also approved amendments to the common reporting standard to bring some electronic money products and central bank digital currencies in-scope. In light of the CARF, amendments were made to it to ensure that it covers indirect cryptoasset investments through derivatives and investment vehicles. Also, changes were made to strengthen due diligence and reporting requirements (including a requirement to disclose the role of each "controlling person") and to provide an exclusion for genuine nonprofit organizations.

[6] The Financial Action Tax Force recommendations are the internationally approved global standards against money laundering and terrorist financing. They increase transparency and enable countries to block the misuse of their financial system. *See* Financial Action Task Force, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations" (last updated Feb. 2023).

[7] FATF, "Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers" (Oct. 2021). The virtual asset sector is fast-moving and technologically dynamic, which means continued monitoring and engagement between the public and private sectors is necessary. In October 2021, the FATF updated its 2019 Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (VASPs). 2019 Guidance for a Risk-Based Approach for Virtual Assets and Virtual Asset Service Providers (VASPs). This updated Guidance forms part of the FATF's ongoing monitoring of the virtual assets and VASP sector.

and cryptoasset operators (CAO) are both included in the directive, a distinction from other European regulations such as the MiCA regulation and the anti-money-laundering package.

Crypto-asset service providers ("**CASP**") covered by MiCA (Regulation(EU) 2023/1114) may exercise their activity in the Union through passporting ("**licensing**") once they have received their authorisation in a Member State[8]. In order to foster administrative cooperation in this field with non-Union jurisdictions, crypto-asset operators ("**CAO**") that are situated in non-Union jurisdictions and provide services to EU crypto-asset users, such as **NFT service-providers oroperators** providing services on a reverse-solicitation basis, should be allowed to solely report information on crypto-asset users resident in the Union to the tax authorities of a non-Union jurisdiction insofar as the reported information is correspondent to the information set out in this Directive and insofar as there is an effective exchange of information between the non-Union jurisdiction and a Member State. Crypto-asset service providers authorised under Regulation (EU) 2023/1114 (MiCA Eu Regulaation) could be exempt from reporting such information in the Member States where it is holding the authorisation if the correspondent reporting takes place in a non-Union Jurisdiction and insofar as there is an effective qualifying competent authority agreement in place[9].

[8] For these purposes, ESMA holds aregister with authorised crypto-asset service providers. Additionally, ESMA also maintains a blacklist of operators exercising crypto-asset services that require an authorisation under that Regulation.

[9] The qualified non-Union jurisdiction would in turn communicate such information to the tax administrations of those Member States where crypto-asset users are resident. Where appropriate, that mechanism should be enabled to prevent correspondent information from being reported and transmitted more than once.

The TIN[10] ("**Tax Identification Number**") is essential for member states to match the information received with the data in their national databases, facilitating identification of the taxable persons concerned and assessing the correct taxes. Therefore, it is important that Member States require that TIN (Tax Identification Number) is indicated in the context of exchanges related to financial accounts, advance cross-border ruling sand advance pricing agreements, country-by-country reports, reportable cross-border arrangements, and information on sellers on digital platforms and crypto-assets. However, when the TIN is not available, such an obligation may not be fulfilled by the competent authorities of Member States[11].

The Commission is entitled to produce reports and documents, using the information exchanged in an **anonymised manner**, so as to take into account the taxpayers' rights to confidentiality and in compliance with Regulation (EC)1049/2001 regarding public access to European Parliament, Council and Commission documents. The publication of **anonymised and aggregated country-by-country report statistics**, including on effective tax rates, on an annual basis for all Member States contributes to improve the quality of public debates on taxation affairs[12].

Last but not least, to guarantee an adequate level of effectiveness in all Member States while implementing Council Directive2014/107/EU and Council Directive

[10] Member states will have to introduce electronic identification services to simplify and standardize the due diligence process and provide for cases of exemption if TINs cannot be recovered.

[11] Reporting cryptoasset service providers report annually on an aggregated basis by type of cryptoasset. They distinguish between outgoing and incoming transactions while distinguishing between crypto-to-crypto and crypto-to-fiat transactions. However, from a technical point of view, there is a lack of guidance on how the collected data should be appropriately summarized and then transmitted in a readable and secure way. Guidance will be crucial to ensure a harmonized reporting standard across the EU, especially because DAC8 is only a directive. The provisions in this Directive should not double or materially overlap with the provisions in the Union's anti-money-laundering framework.

[12] Directive 2011/16/EU provides for the possibility to use the information exchanged for other purposes than for direct and indirect tax purposes to the extent that the sending Member State has stated the purpose allowed for the use of such information in a list. However, the procedure for such use is **cumbersome** as the sending Member State need to be consulted before the receiving Member State can use the information for other purposes. Removing the requirement for such consultation should alleviate the administrative burden and allow swift action from tax authorities when needed. It should therefore not be required to consult the sending Member State where the intended use of information is covered in a list drafted beforehand bythe sending Member State. Such list can include the use of information of non-tax related data by local authorities in the framework of thresholds and limitations attached to the delivery of certain services such as services provided via an online platform in particular.

(EU)2016/881 most particularly, minimum levels of penalties should be established in relation to two conducts that are considered grievous: 1. namely failure to report after two administrative reminders and 2. when the provided information contains incomplete, incorrect or false data, which substantially affects the integrity and reliability of the reported information[13]. Therefore a set of minimum penalties for non compliance that are considered to be high, especially for smaller reporting cryptoasset service providers.[14]

3. Conclusive Remarks.

In conclusion, DAC8 is needed for several reasons. Cryptoassets are relatively new technology, making it important for member states to have the tools necessary to get information needed to ensure that these new assets are treated more or less the same as traditional assets, and to establish a level playing field with fair taxation. There was no cryptoasset exchange of information before DAC 8. For these reasons Member States shall adopt and publish, **by 31 December 2026 at the latest**, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof. They shall forthwith communicate to the Commission the text of those provisions. For taxable periods starting on or after 1 January 2027, Member States shall ensure that the TIN (Tax Identification Number) of reported individuals or entities issued by the Member

[13] Incomplete, incorrect or false data substantially affect the integrity and reliability of the reported information when they amount to more than 25 % of th etotal data that the taxpayer or reporting entity should have correctly reported in accordance with the required information set forth in the Annexes. These minimum amounts of penalties should not prevent Member States from applying more stringent penalties for these two types of infringements. Member States still have to apply effective, dissuasive and proportional penalties for other types of infringements.

[14] Penalties and compliance measures provided for shall be effective, proportionate and dissuasive. Member States shall ensure that penalties are enforced against the parties actually at fault. Where a Member State provides for penalties exceeding EUR 150 000, it shall establish a temporary penalty reduction regimefor 3 years for SMEs. .

State of residence, **where available**, is included in the communication of the information[15]. Information is important for cryptoassets because trading them on a platform usually will not transpire in the trader's country of residence. The trader's tax authorities will be unaware from a lack of information. Some taxpayers may not even know that they must declare this trading. DAC8 is therefore an important system for putting in place the means to get this information to tax authorities. Furthermore for the purpose of complying with the reporting requirements, each Member State shall lay down the adequate rules to require a Crypto-Asset Operator (CAO) to register within the Union. The competent authority of the Member State of registration shall allocate an individual identification number to such Crypto-Asset Operator.

[15] By January 2026, the Commission shall assess whether it is desirable to introduce a European TIN. The Commission may submit, where appropriate, a legislative proposal to theEuropean Parliament and the Council.