Attn Mr Gerassimos Thomas
Director General
DG TAXUD
European Commission
1049 Bruxelles
Belgium

30 July 2024

Dear Mr Thomas,

Subject: PwC response to the European Commission's request for evaluation of Cooperation on direct taxation (DAC)

PwC International Ltd (PwC), on behalf of the PwC network, welcomes the opportunity to respond to the request for feedback on the Directive on Administrative Cooperation (DACs1-6), by way of this letter.

DACs 1-6 have been important developments in progressing the transparency agenda over recent years and in curbing tax evasion. Subsequent measures (including DAC7 - platform reporting and DAC8 - reporting of crypto asset service providers) have strengthened the DAC programme and demonstrate the commitment to transparency across new and evolving business models and industries. We further await details of a new proposed DAC in respect of exchange of information of the Pillar Two global minimum tax.

However, the reporting requirements have come with an increase in administrative burdens (through reporting or otherwise) and in certain cases (detailed below) there remain uncertainties on how to apply the rules. PwC responds to this request for evaluation and call for evidence in order to support the European Commission in strengthening and streamlining the DAC programme. Where the value of additional reporting is clear, PwC supports increased transparency and reporting in the international taxation area. Although we understand and anecdotally also see the behavioural effects of reporting requirements and exchanging information, there is not much quantitative evidence on the effects on the tax revenues collected by Member States and their ability to tackle tax avoidance and tax

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evasion. We would welcome the publication of statistics in this respect. Our comments are made in the light of the European Commission's stated ambition to reduce the burdens on business associated with reporting and compliance by 25%, and thereby maintain the competitiveness of European business.[1]

Executive Summary of our key comments

The below summarises our key recommendations which we ask the European Commission to consider:

- **DAC2:** Promoting the correct self-certification procedures would be helpful, as would a reduction in the number of, and better alignment of, classifications between FATCA and DAC2. Additionally, some of the governance and controls related to FATCA might be replicated for DAC2. We ask for clarification that derivatives should only constitute a Financial Account when there is a cash value element (given that the uncertainty here generates excessive documentation).

- **DAC3:** There are some duplicative reporting requirements between DAC3 and DAC6 which could be minimised. We suggest that more information about tax rulings should be shared publicly (anonymised) to provide greater clarity. It would be worthwhile to survey Member State's views on any changes in willingness to issue tax rulings in the wake of DAC3 as this would impede tax certainty. Finally, PwC observes that the definition of what is considered 'cross-border' varies among the Member States and is applied differently.

- **DAC4**: Whilst there have been gaps identified with the implementation of DAC4 across the EU, the introduction of public CbCR (as well as the use of CbCR data in the Pillar Two Transitional Safe Harbour regime) is likely to improve both how information is presented and the quality and robustness of the underlying data. Given public interest, MNE Groups will want to ensure that the data is verified and easy to understand, which may be supported through additional guidance and consistent application of the DAC4 requirements. With Pillar Two also being implemented in various EU territories, it might be worthwhile to explore potential options for standardisation of Action 13, DAC4, Pillar Two and public CbCR to create efficiencies and reduce reporting requirements in line with the EU Commission's stated objectives. The EU Commission should look into the merits of such an initiative in relation to these reporting obligations as they ultimately seek to achieve simplification and increase in the efficiency of administration.

- **DAC6:** We believe that the administrative burden of DAC6 can be reduced while continuing to meet the objectives of the Directive of ensuring that tax authorities receive timely information on potentially aggressive cross-border tax-planning arrangements by making a number of modifications;
    - A more aligned approach to the application of how the rules should be adopted across all Member States to the greatest extent possible, such as the main benefit test, would be welcomed. We currently see many variations across Member States in relation to their interpretation of fundamental aspects of the provisions which can result in an

[1] "Reducing burdens and rationalising reporting requirements", 17 October 2023, link available here, and "Long-term competitiveness of the EU: looking beyond 2030", 16 March 2023, link available here.

arrangement needing to be assessed under the rules of several jurisdictions to determine if a filing obligation arises;
- An aligned approach might be facilitated under the FISCALIS program where tax administrators exchange views on how the rules should be applied;
- In harmonising the approach, we have made some suggestions on how the scope of certain hallmarks could be refined in a manner that continues to meet the objectives of the Directive;
- We would suggest that consideration be given to extending the timeframes for reporting, in general from 30 days to 90 days;
- Currently, an intermediary is exempt from the obligation to file where it has proof, in accordance with national law, that the same information has already been filed by another intermediary. No exemption is available for an intermediary in circumstances where a relevant taxpayer has made the filing. In order to avoid multiple reporting obligations, we suggest also to exempt an intermediary where it has proof that the specified information has been filed by a relevant taxpayer.
- In some Member States, the Directive creates an unlevel playing field with respect to reporting between the legal profession and other intermediaries providing similar tax advice. In general there should be a level playing field between intermediaries and law firms providing tax advice.

Finally, we refer to the Appendix for specific considerations.

We would ask you to take our observations in this letter and the Appendix into consideration. We stand ready to discuss the issues raised in this letter in more detail, if that would be helpful at any point - please do not hesitate to contact me or any of the individuals set out below.

Yours sincerely,

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PwC IL is registered under number 60402754518-05 in the EU Transparency Register

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Appendix - Analysis of the specific (technical) considerations

DAC2

Promotion of correct self-certification procedures

Since the whole system hinges on self-certifications, Financial Institutions (FIs) have an incentive to try to ensure these are filled out correctly.

However, FIs have a lot of exchanges back and forth with their clients on the reasonableness of self certifications. It often becomes a trial-and-error iterative process as FIs are not allowed to advise on the status that a client/ counterparty should fill out. More guidance and the promotion of greater awareness of the process would make this easier.

It would also assist with the determination of whether an FI is in scope. Smaller FIs, like personal investment companies, are often not aware of their DAC2 obligations. Moreover, after the Shell Bank report one could wonder if any FIs should be taken out of scope by the list of non-reportable entities. Governments may be reluctant to have all FIs in scope. Nil-reporting doesn't entirely solve that, nor does the IRS approach with its GIIN list. If all FIs have to report other FIs, then governments may be willing to have all FIs in scope.

Reduction and alignment of classifications

Less classifications and streamlining of FATCA/DAC2 classifications would be helpful in providing greater simplicity and efficiency. There are 62 FATCA classifications for entities. 24 are noted on the W8 form. DAC2 has similar classifications, with a slightly different naming convention. FIs have to do a reasonableness test on self certifications they receive. We often see FIs struggle with the reasonableness test with clients that have filled out different, but all valid classifications, for the same entity over the course of time (for example a pension fund could indicate that it is an exempt beneficial owner for FATCA and a non-reporting FI for DAC2).

More clarity in categorisation of derivatives as Financial Accounts

More clarity should be given, for example in an FAQ or in an example in the CRS Commentary, about derivatives being a Financial Account, and we would encourage EU Member States to put this on the agenda of OECD Working Party 10. The market took a conservative approach, primarily to mitigate the risks related to 30% FATCA withholding tax, and in the ISDA agreements FATCA clauses have been incorporated. As a result, numerous W8 forms are being exchanged by derivative counterparties on an annual basis. Most of these derivative trades are between FIs.

The clarity sought is that derivatives should only constitute a Financial Account when there is a cash value element, like a significant upfront payment. Many derivatives are cash-flow basis only, e.g., foreign exchange derivatives where one currency is exchanged for another against a predetermined price on a predetermined amount, or interest rate derivatives where floating interest is exchanged with fixed interest payments. As long as the premium is market conformed, and does not contain a significant upfront payment (e.g. for a payment of 100 that is due at the end of the derivative term, an upfront payment of 70 is made as a premium), then the derivative should not constitute a Financial Account. As such, there should not be a documentation requirement under DAC2 (and FATCA).

Governance framework requirements

DAC2 could incorporate governance framework requirements that there has to be a Responsible Officer, similar to FATCA.

There could also be more extensive requirements for written policies and procedures. A control framework should be in place.

These changes would not solve all governance discussions within FIs but further matters could be discussed within the industry.

DAC3

Reduce duplicative reporting

PwC observes that the obligation to exchange information on tax rulings and advance pricing arrangements under DAC3 primarily sits with tax authorities. At the same time, we note that there can be duplication between DAC reporting obligations which results in unnecessary administrative burden and cost for taxpayers and tax authorities.

For example, taxpayers may request an advance tax ruling or advance pricing arrangement for a transaction that at the same time could fall under one of the hallmarks of DAC6. Typically transfer pricing operations could fall under, e.g., Hallmark E2 (arrangements involving transfers of hard-to-value intangibles are considered to be potentially harmful) or under Hallmark E3 (arrangements involving a business restructuring to be reported under certain circumstances).

PwC suggests that as information on relevant tax rulings will be shared between tax authorities under DAC3, there should be no further obligation to share the same information, either by the taxpayer, or by a tax intermediary, under DAC6.

Transparency of ruling practices

Further, as regards the transparency of ruling practices in different countries, PwC observes that there is currently no binding obligation on EU Member States to make rulings public (on an anonymous basis). A best practice or minimum standard (via an FAQ document, as was done for the minimum tax Directive and the Foreign Subsidies Regulation) could be introduced for tax authorities to publish rulings anonymously, or to at least publicly reveal the number of rulings per category so as to offer important statistics and guidance to taxpayers. Although a taxpayer cannot derive rights from such publication, certain directions in the line of reasoning of the tax authorities become apparent and can be used as a basis for further compliance. This would increase transparency on ruling practices in EU Member States in keeping with the policy purpose of DAC3. Furthermore, it would be prudent to assess whether the impact of DAC3 has decreased the willingness of tax authorities to provide tax certainty to taxpayers through the issuance of rulings, and therefore, transparency of rulings practices across the EU would be a useful standard to pursue.

Finally, PwC observes that the definition of what is considered 'cross-border' varies among the EU Member States and is applied differently. Clarification on the meaning thereof, and how the definition is utilised in practice across EU Member States would therefore be welcomed.

DAC4

Relevance of scope and purpose

The main objective of DAC4 was to address "...*challenges that Member States are facing in terms of correct assessment of taxes in cross-border situations and fighting tax avoidance and evasion.*" DAC4 has enhanced the AOEI to assist tax administrations assess transfer pricing risk on intercompany transactions.

The requirement for the obligation remains as it did on implementation. All Member States are signatories of the MCAA and have signed up to the minimum commitment per the OECD requirements and as such are required to have CbCR legislation in line with the OECD model legislation as well as information sharing provisions to share with relevant jurisdictions based on the CbCRs that they receive from MNE Groups.

The introduction and sharing across the EU (and more widely) of CbCR has provided greater transparency in the tax affairs of MNEs, allowing Member States' tax authorities to better assess risks in their respective jurisdictions and to carry out more effective audits.

The imminent introduction of EU public CbCR (effective in most Member States for accounting periods starting on or after 22 June 2024) is aimed at increasing transparency further (beyond that envisaged by DAC4) and is a move in the direction of exercising and allowing additional scrutiny of individual MNE Group income tax positions and strategies. The EU public CbCR regime will require all impacted MNEs to disclose specific tax information on a country-by-country basis to the general public (meaning access to CbCR is no longer limited to submission to, and exchange between, tax administrations as is the case with the DAC4 requirements).

Further to the above, there is additional focus on CbCR as a result of the global minimum tax (i.e. Pillar Two), given that there is a temporary simplification measure available which relies on MNE Group's CbCR data and output. Transparency also receives additional attention within the sustainability initiative like the introduction of the EU's Corporate Social Responsibility Directive ("CSRD").

Summing this up, the relevance of CbCR/DAC4 and its purpose has remained just as important as at the time of its introduction if not increased. Nevertheless, some minor problems can be identified including:

- **Analysis capabilities** - Member States with less developed tax authorities from a digital or human capacity perspective experienced limitations in their capabilities of interpretation and review of data. Considering efficient ways to provide support in this respect may contribute to additional benefits for overall application of DAC4.
- **Format / Data upload** - There is no prescribed format (at an EU level[2]) for filing of CbCRs which can lead to lower quality. Furthermore, shortcomings in relation to certain software systems used by tax administrations to accept CbCRs has led to frustrations for taxpayers as there can be multiple attempts at uploading compliant XML files. Ensuring consistency of the data to upload and stability of the receiving systems may be considered to contribute to overall better experience and more efficient administration.

Effectiveness in providing the desired outcomes and impact

The desired outcome of DAC4 was the transposition of CbCR aspects of Action 13 from the BEPS project. Notwithstanding the focus of DAC4 being the EU, it should be noted that other non-EU jurisdictions played a role in adopting similar proposals. Apart from EU cooperation, DAC4 has also encouraged bilateral exchanges in the CbCR area to recognise trade activity undertaken between, for example, US and EU MNEs.

While DAC4 has efficiently implemented the OECD's CbCR Action 13 requirements, during this review it may also be helpful to consider other developments since the implementation of the Directive. As mentioned above, CbCR is also relevant for Pillar Two, public CbCR and CSRD, which is just around the corner. Therefore, considering the interactions of these various measures and ensuring that the requirements posed by them can be fulfilled in an efficient manner (e.g. no duplication in tasks, aligning reporting requirements from a data perspective, considering timing requirements, etc.) could be a timely exercise.

Efficiency of the AOEI and other tools

EU companies who are within these rules would likely have had to introduce the rules irrespective of the DAC4 Directive and its specific obligations because of BEPS Action 13 and the fact that all Member States signed up to the MCAA. As such, it would not be accurate to assert that DAC4 introduced an additional burden on EU MNEs. DAC4 was therefore useful in standardising the adoption of coordinated rules on transparency obligations of MNE Groups.

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[2] We note here that the OECD has released XML schema guidance, see link, but it is not mandated by either the OECD or the EU that this should be followed.

One of the recurring comments has been the lower than optimal level of quality of the data provided by MNE Groups. However, subsequent [OECD implementation guidance] has contributed to significant improvements in this area and the OECD should be commended as it has taken measures to improve the quality of the guidance and the [recommendations on risk assessments] for Member States. The advent of the EU's public CbCR regime and the use of CbCR data as part of the Transitional Safe Harbour under Pillar Two provide additional incentives for MNE Groups to proactively improve the quality of their CbCR submissions. Nevertheless, taking into account the interactions between CbCR, its application for Pillar Two purposes and public CbCR, further guidance in the EU or contributing to the work in the OECD to ensure a more consistent approach to preparing CbCRs may be considered.

DAC6

Overview

It is our view that ensuring compliance with DAC6 imposes a significant administrative burden on both intermediaries and taxpayers. The broad scope of several of the provisions and the absence of specific guidance on their application to practical scenarios has resulted in many uncertainties and divergences across Member States.

Although we understand the potential behavioural effects of reporting and exchanging information, there is not much statistical information on the effects on the tax revenues collected by Member States and their ability to tackle tax avoidance and tax evasion[3]. We would welcome the publication of (more) statistics in this respect.

The 2022 study on the ATAD and DAC6, entitled *"Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC6)"* which was provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the Economic and Monetary Affairs Subcommittee on Tax Matters (FISC) contains a number of key observations in relation to DAC6 which align with our views and experience. Some of the broad themes which emerged in the report were as follows:

- DAC6 has a much broader scope than the ATAD,
- the fact that many terms in DAC6 are undefined or have been defined very broadly has led to many uncertainties regarding its scope of application,
- the degree of flexibility allowed to the Member States in the implementation process has resulted in non-uniform implementation of DAC6 in the EU. These divergences extend across the breadth of the Directive both in terms of what should be reported and who must report.

[3] Also see this report of the european court of auditors: Exchanging tax information in the EU: solid foundation, cracks in the implementation ([Special Report ECA)], 2021

Harmonisation of Application across Member States

DAC6 is drafted broadly and contains many undefined terms. This has resulted in many uncertainties regarding its scope and other technical matters. A considerable level of discretion was left to Member States in their domestic implementation of the Directive. In practice there are many differences in how the rules are applied across Member States and many uncertainties in the absence of specific guidance on technical points resulting in intermediaries and relevant taxpayers needing to take their own views on the assessment.

In circumstances where an arrangement concerns more than one Member State, there is frequently a need to assess whether it is a reportable cross-border arrangement under the domestic provisions and guidance in place in each relevant Member State.

This can result in uncertainties around matters such as identifying who has the filing obligation. For example, the intermediary who designed the arrangement and the relevant taxpayer to whom the arrangement is provided may be located in a Member State which does not regard the arrangement to be reportable. Another relevant taxpayer may be located in another Member State which does regard the arrangement to be reportable. While it may be expected that the EU-based intermediary would have the filing obligation, in this case the filing obligation is likely to rest with the relevant taxpayer located in the other EU Member State.

While we acknowledge that the Member States may expand mandatory reporting obligations beyond the scope of the Directive (as for instance done by Poland), a more uniform approach across Member States is highly desirable to ensure a clear, consistent and rigorous implementation of the Directive. This would help to decrease the degree of complexity experienced in applying the provisions in practice and help reduce any unnecessary compliance burden on intermediaries and taxpayers.

The Commission may wish to consider sharing with Member States additional practical guidelines on interpreting the provisions and the intended scope of the Directive (e.g., whether it is the Commission's intention that tax advantages in third countries are relevant for the main benefit test). This could be done by way of the release of a Baseline Commentary on DAC6 or an FAQ document. While it would not be binding, it would give Member States a clear base to follow, with the facility for a Member State to lodge reservations or objections if it does not consent to a proposed interpretation.

Consideration could also be given to providing a whitelist of arrangements which are not within the scope of DAC6. This could include arrangements where the tax effects or benefits are governed by other EU Directives, for example the Mergers Directive.

In addition, the Commission may wish to consider options for the anonymised publication of reported arrangements under each hallmark category including a position from the Commission and the Member States whether such arrangement is expected to be reported or not going forward. Such a publication could significantly decrease the uncertainties that intermediaries and relevant taxpayers are facing when trying to comply with the reporting obligation including determining whether certain arrangements actually need to be reported. Secondly, an ineffective overreporting could be mitigated in situations where Member States have already concluded on the basis of reports filed in the past that certain cross-border arrangements do not require policy measures to tackle aggressive tax planning[4] and, as such, there may be no benefit of receiving additional reports on such arrangements.

We have outlined in the next section a number of specific areas where the hallmarks could be further refined and additional practical guidance would be welcome.

Guidance on the Application of the Provisions

The broad scope of several of the hallmarks and the absence of an associated main benefit test for some has resulted in the need for intermediaries and taxpayers to analyse and potentially report on many ordinary cross-border transactions where there is no tax benefit obtained or no tax-planning aspect involved.

This varies depending on how Member States have chosen to implement the provisions and what guidance they have provided. We would suggest that the scope of some hallmarks could be also refined to more specifically target potentially aggressive tax-planning arrangements.

In addition, the fact that there is no de minimis limit on the value of arrangements to be reported means that all transactions need to be assessed, regardless of their size or value. The Commission may wish to consider introducing a valuation threshold to eliminate immaterial transactions, particularly in the context of applying Hallmarks E2 and E3 which give rise to a significant number of reports.

Main benefit test

Varied approaches have been adopted in applying the main benefit test contained in Part 1 to Annex IV of the Directive. The most significant variations relate to the interpretation of ‘tax advantage’ for the purpose of applying the test:

- A number of Member States have restricted the scope of ‘tax advantage’ to taxes levied by or on behalf of a Member State. Others, including Germany and Austria, have chosen to adopt a very wide interpretation of ‘tax advantage’ where tax benefits in a third state alone would be sufficient to meet the main benefit test.
- Some Member States, including Luxembourg, have clarified that what is in scope is a tax advantage that defeats the object or purpose of the applicable tax law. Excluded are circumstances where the expected tax advantage is consistent with the policy intent of the relevant tax provision. Other Member States have made no such exclusions.

In order to adopt a more consistent approach to this assessment, the Commission may wish to consider providing more specific guidelines on the intended scope of ‘tax advantage’.

[4] For instance, based on an Answer of the Federal Government of Germany to the minority enquiry by the CDU/CSU parliamentary group dated 8 May 2023 (BT DrS 20/6734) the German tax authorities have identified - as of 31 March 2023 - more than 200 individual arrangements as part of their legal policy analysis of about 27,000 filing. Of these 200 individual arrangements only a total of 24 were provided to the Federal Ministry of Finance for further policy considerations.

Taking account of the variations set out, this could outline that the test is focused on benefits obtained with respect to EU taxes (within the scope of Article 2 of Council Directive 2011/16/EU) and which are inconsistent with the policy intent of the relevant provision.

Applying a de minimis threshold to the meaning of 'tax advantage' could also be considered to exclude arrangements that are not material from the scope of the filing requirements.

Adding a main benefit test to all of the hallmarks, with the exception of the hallmarks in Category D (which do not necessarily target tax benefits) could be considered.

Hallmarks E2 and E3

Overall, we understand that these hallmarks have resulted in the greatest proportion of reports filed.

Hallmark E2 applies to arrangements "involving the transfer of hard-to-value intangibles". The hallmark does not stipulate that the transfer needs to be cross-border in order to be within the scope of the hallmark. As a result it is possible that a transfer for hard-to-value intangibles taking place between two companies that are resident in the same Member State, for example, will be within the scope of this hallmark if the transfer forms part of a wider cross-border arrangement. Confirmation would be welcome that this hallmark is intended to apply where there is a cross-border transfer of such intangibles and not to wholly domestic transfers.

Hallmark E3 contains a number of terms that are not defined which has given rise to some uncertainties regarding application. Different interpretations have been applied to the following aspects in particular:

- the term 'intragroup' is not defined in the Directive. Some Member States have interpreted it as referring to the concept of 'associated enterprise'. This is consistent with the view taken by the EU Commission Services as contained in the summary record of the Working Party IV Meeting held on 24 September 2018. However, other Member States have interpreted it more widely so as to include transfers that take place with a single entity including transfers between a head office and a permanent establishment or between different permanent establishments;
- the meaning of 'cross-border transfer'. Uncertainties arise as to whether a transfer taking place within a single jurisdiction between entities that are resident in different jurisdictions is a cross-border transfer. An example includes a company resident in Member State A transferring assets from its head office to a permanent establishment located in Member State A of a company resident in Member State B. Income and profits deriving from those assets remain wholly within the tax base of Member State A. Absent specific guidance in many Member States, mixed approaches have been adopted in relation to whether this constitutes a cross-border transfer within the scope of Hallmark E3;
- the application of the 'EBIT' test. This is an accounting concept and interpretation differences have arisen in relation to certain matters such as whether dividend income and other non-operating income form part of EBIT. Similarly, mixed approaches have

therefore been adopted in relation to whether transfers of shares, for example, are within the scope of the hallmark;

- relevance of arm's length considerations: Hallmarks of the category E concern transfer pricing. While this is evident for hallmark E1 (where applied transfer prices may not be in line with the arm's length principle due to unilateral safe harbour rules) and hallmark E2 (where the determination of adequate transfer prices might be particularly difficult), it is not evident in hallmark E3 to what extent an arm's length remuneration for the underlying cross-border transfer can be taken into account when applying the EBIT test, particularly if the transfer is remunerated with a one-time payment upon transfer.

Furthermore, the fact that the main benefit test does not apply to these hallmarks means that the tax analysis of the transfer is wholly irrelevant to the assessment of whether the hallmark is met. Transfers from a low tax jurisdiction to a high tax jurisdiction are in scope, as are transfers from third countries into the EU as well as transfers from EU Member States to third countries.

In order to reduce the compliance burden associated with reporting on such transfers and to more specifically target potentially aggressive tax-planning arrangements, the Commission may wish to consider the following potential options:

- providing guidance on the matters where differing interpretations have been applied across Member States;
- introducing a valuation threshold to eliminate immaterial transactions from the scope of both Hallmarks E2 and E3;
- clarifying for purposes of hallmark E3 that any remuneration obtained by the transferee would need to be taken into account for the EBIT test;
- introducing a tax-related test in some form to focus on circumstances where transfers impact the tax base in Member States and/ or where EU taxes will reduce as a result of the transfer. This could include extending the main benefit test to these hallmarks (as noted above); and
- removing from the scope of these hallmarks (and other hallmarks such as C4) transfers which fall within the scope of another EU Directive such as the Merger Directive.

Hallmark A3

Similar to the point in relation to Hallmark E3 above, the Directive provides Member States with a degree of optionality in terms of applying Hallmark A3 to arrangements that have *"substantially standardised documentation and/or structure"*. Member States could choose to adopt a broad approach of applying the hallmark to any arrangement with substantially standardised documentation or substantially standardised structure, or could alternatively choose to apply the hallmark to arrangements with substantially standardised documentation and structure.

Some Member States have also stipulated that the hallmark is met only where there is a clear link between the documentation / structure in question and the tax advantage obtained or expected to be obtained from the arrangement. Some have also provided a whitelist of arrangements that are excluded from the scope of Hallmark A3, for example because the tax benefit of the arrangement is consistent with policy intent and / or is subject to some degree of oversight, certification or approval from the local tax authorities.

Hallmarks B2 and B3

Some uncertainties have arisen in relation to how to interpret these hallmarks in the context of what constitutes 'converting income' in Hallmark B2 and what constitutes the 'round-tripping of funds' in Hallmark B3. Again, some practical examples on the application of these terms would be very welcome.

Knowledge Concerns

Uncertainties also arise in terms of what level of due diligence is expected to be taken by an intermediary or relevant taxpayer in order to ascertain whether a particular hallmark is met where they are not privy to all necessary information. One example is where the arrangement involves the transfer of assets between third parties. In assessing whether Hallmark C4 applies, knowledge of the amount treated as payable in consideration for the assets in all jurisdictions is required. Confirmation would be welcome that the intermediary or relevant taxpayer would not be expected to undertake additional due diligence or to seek additional information not otherwise required or available in order to ascertain whether a hallmark is met.

Reporting Timelines

The narrow timeframes for intermediaries and relevant taxpayers to file information on reportable arrangements means that in many cases, information on arrangements must be filed before the arrangement is implemented or is fully implemented. In particular, the information filing timelines for intermediaries referred to in the second paragraph of Article 3, para 21 is linked to the time when they provide their aid, assistance or advice. This can be considerably earlier than the date on which the arrangement is ready for implementation or that implementation has commenced.

Some disadvantages associated with this are that, in some cases, the arrangement may not ultimately proceed at all or steps in the arrangement may be amended prior to implementation. The narrow filing timeframe and potentially early stage of reporting can also present challenges in terms of gathering all relevant information required to be filed including valuations.

It is acknowledged that the Directive highlights the benefit of tax authorities receiving information on potentially aggressive cross-border tax-planning arrangements at an early stage and before such arrangements are actually implemented in achieving its envisaged effect of deterring aggressive tax-planning practices. However, in practice, we are not aware of tax authorities in Member States taking immediate action on receipt of filings with any degree of frequency.

We would suggest that consideration be given to extending the filing timelines for all intermediaries and relevant taxpayers from 30 days to 90 days after the earliest of the relevant dates. It is our view that this approach should not reduce the deterrent effect of DAC6 and would continue to provide tax authorities with timely information on reportable arrangements.

Multiple Reporting Obligations - Exemption from Filing

The Directive is designed in such a manner that an intermediary is exempt from the obligation to file only in circumstances where it has proof, in accordance with national law, that the same information has already been filed by another intermediary. No exemption is available for an intermediary in circumstances where a relevant taxpayer has made the filing. We would suggest that consideration be given to confirming that an intermediary can be exempt in the following circumstances;

- In circumstances where a Member State has opted to give intermediaries the right to a waiver from filing on the basis that the reporting obligation would breach legal professional privilege, the Directive (Article 8ab, para 5) provides that the intermediary should notify any other intermediary in priority to notifying the relevant taxpayer. However, in practice the domestic legislation in some Member States (including Ireland) requires the intermediary to notify the relevant taxpayer only. The amendment to this Article in DAC8, which is made on foot of the judgement in Case C-694/20, *Orde van Vlaamse Balies and Others v Vlaamse Regering,* will require all intermediaries that have been granted a waiver to notify their 'client' as defined. This amendment will apply to all Member States from 1 January 2026.
- Where the intermediary notifies the relevant taxpayer that legal professional privilege applies, and the relevant taxpayer files the requisite information with its local tax authorities, under the current rules any other intermediary involved in the arrangement continues to have a filing obligation. We would suggest that the intermediary can be exempt where it obtains the required evidence that the relevant taxpayer has filed the same information either locally or with the competent authorities in another Member State. We would not envisage any disadvantages to facilitating this exemption.