Reporting taxation: Analysing loopholes in the EU's automatic exchange of information and how to close them

CREDITS

AUTHOR: **Andres Knobel**

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Executive Summary

The European Union (EU) has been making improvements to its legal frameworks relating to the collection and exchange of relevant information to help tackle illicit financial flows related to tax evasion and tax avoidance and in order to identify money associated with crime. Given the existence of flaws in the first version of the Directive on Administrative Cooperation (DAC 1), the EU has been working on amendments to the Directive in order to broaden its scope, increase the number of cases that trigger the need for the collection and exchange of information and improve the mechanisms and timeframe for those exchanges. Global initiatives, especially the enactment of the US Foreign Account Tax Compliance Act (FATCA) have also influenced and accelerated the process.

The first revision led to DAC 2 and refers to the adoption of the OECD's Common Reporting Standard (CRS) for the automatic exchange of information relating to financial accounts (e.g. information about foreign bank accounts). Automatic exchanges under the CRS and DAC 2 only started to take place in 2017 (or in 2018 for Austria). As a result, there are no reports about its effectiveness. However, many potential loopholes or shortcomings identified in the CRS are also present in DAC 2 (which is almost a copy of the CRS). First of all, neither framework ensures that all countries, especially financial centres, will take part in the CRS or in DAC 2. For example, there are no sanctions for financial centres or tax havens (e.g. in the US) that fail to exchange all the relevant information with EU countries or for those that exchange information only with selected countries or who sign only bilateral agreements (instead of the multilateral one). Secondly, tax havens may facilitate avoidance mechanisms by offering golden visas and residency via investment schemes so that individuals' banking information is sent to the "wrong" authority (the country issuing the golden visa). These schemes allow individuals to obtain residency or citizenship in exchange for money without needing to actually emigrate to those countries. This is exacerbated when these jurisdictions (e.g. many British overseas territories) choose voluntary secrecy (to send, but not to receive any information from other countries). Thirdly, DAC 2 has not broadened the scope of the CRS. The result of this is that there are still many types of financial institutions and financial accounts or types of non-financial assets that are not covered by either framework. Moreover, in principle information exchanged under DAC 2 cannot be used by authorities for non-tax purposes (e.g. to tackle corruption or money laundering).

In order to address these shortcomings, the EU Commission should revise DAC 2 and oblige all financial centres and tax havens to exchange all relevant information with EU countries and with all countries, especially developing countries or, in the event that they do not do that, impose sanctions. Enhanced due diligence should apply to jurisdictions offering golden visas, residency and citizenship via investment schemes, or who are choosing voluntary secrecy or who are not yet taking part in the CRS (in the case of developing countries, technical assistance should be provided to help them join the CRS as soon as possible). EU countries should establish regulations making it explicit that entities issuing, trading or exchanging crypto-currencies are covered by the CRS/DAC 2. Moreover, the EU should incorporate, as soon as possible, the new OECD mandatory disclosure rules for schemes circumventing the CRS or hiding the beneficial owner of accounts. The EU should also improve the sanctions and incentives proposed by the OECD for cases of non-compliance with these disclosure rules (e.g. by adding whistleblower protection). Lastly and most importantly, in order to track compliance and the effectiveness of DAC 2 and the CRS, EU countries should publish statistics. These statistics would not breach any confidentiality requirements or lead to any extra cost being incurred. They would show how much money is held in each country, classified by the country of residence of the account holders (so that developing

countries unable to join the CRS may find out basic information about their residents' foreign accounts). Statistics would also help identify avoidance schemes. For example, they could show how many accounts (and how much money) are "legally" not being reported ("legally" because they fall outside the scope of the CRS/DAC 2). By checking whether the number and values of these "legally unreported" accounts increased, it would be possible to identify avoidance schemes. Statistics could also reveal the use of golden visas or movements of money that are attempting to avoid reporting (e.g. if Germans start moving their money from France to Serbia or if they start opening bank accounts using golden visas or other residency via investment schemes).

Importantly, "automatic" exchanges of information will not replace exchanges "upon request" within the EU (based on DAC 1) or with non-EU countries (based on international agreements). Instead, both methods of exchange of information complement each other. Authorities receiving information automatically may use that data to make a specific request or a group request to another country to obtain more details.

The second revision of the EU Directive, which led to DAC 3, refers to the automatic exchange of information on crossborder tax rulings and advance price agreements (APAs). This is related to secret tax agreements resulting in tax avoidance by multinationals such as those described in the "LuxLeaks" scandal in Luxembourg. DAC 3 is an improvement by comparison with DAC 1 given that DAC 1 only covered spontaneous exchanges of such rulings based on EU countries' discretion. It is also an improvement compared to the OECD's BEPS Action 5, which covers compulsory spontaneous exchange of information only to countries related to the tax ruling. The improvements that appear in DAC 3 refer to the means of exchanging information. While it refers to "automatic" exchanges, the framework is actually better: each EU country issuing a relevant tax ruling will have to upload it to a central depositary, which will be directly accessible by any other EU country.

DAC 3, however, is not free of loopholes. First of all, it covers only corporate taxpayers but not natural persons (even though high net worth individuals could equally be engaging in secret tax agreements). Secondly, it covers only rulings related to crossborder transactions, but not necessarily rulings benefitting a multinational company as a whole (not related to a specific cross-border transaction). Thirdly and most importantly, information will not be public, even though the information exchanged will not include any trade or commercial secrets. The lack of public access is inconsistent with the fact that many countries - including EU countries - are already publishing summary information on tax rulings for free.

For this reason, the EU should revise DAC 3 and close the loopholes referring to natural person taxpayers and rulings benefitting a multinational (beyond a specific crossborder transaction) and require publication of all exchanged information or at least an anonymised summary of the ruling, but indicating the industry sector of the taxpayer. EU countries should also publish statistics on those rulings that fall outside the scope (e.g. natural persons or excluded old rulings below a given threshold). EU countries should ensure that they have international agreements with all developing countries so that they may spontaneously share information on tax rulings with them pursuant to BEPS Action 5.

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Glossary

APA	Advanced Pricing Agreement: agreement between a tax payer and tax authority determining the transfer pricing methodology that a taxpayer will apply to intra-company transactions.
CRS	Common Reporting Standard: standard for the automatic exchange of financial account information (e.g. banking information) developed by the OECD.
DAC	Directive on Administrative Cooperation: European Union's Directive to address tax evasion and tax avoidance. It involves exchanges of information within Member States related to bank account information, income from employment, real estate, pensions and directors' fees, crossborder tax rulings, advance price agreements and country-by-country reporting.
FATCA	Foreign Account Tax Compliance Act: domestic law of the US that required all banks in the world to report information to the US about American bank accounts or face a 30% withholding tax in case of non-compliance.
IGA	Inter-Governmental Agreement: bilateral agreement signed by the US and many other countries that set the framework for automatic exchange of information based on FATCA regulations.

1. Introduction

This paper will focus on two transparency initiatives implemented at the EU level against the backdrop of the global state of play. The first one refers to the automatic exchange of financial account information pursuant to the first revision of the Directive on Administrative Cooperation (DAC 2[1]), which relates to tax evasion (and could equally be used to tackle money laundering and corruption). The second one refers to the automatic exchange of crossborder rulings and advance price agreements (APAs) pursuant to the second revision of the Directive on Administrative Cooperation (DAC 3[2]), which relates to tax avoidance by multinational entities. The paper will describe both frameworks, their origins and their differences by comparison with other global standards. It will also identify loopholes, shortcomings or risks and propose fixes to solve them.

The current global financial system is characterised not only by little or outdated regulation (e.g. on crypto-currencies), but especially by little or no transparency. For example, individuals may own and control legal vehicles (e.g. companies or trusts) or hold assets (e.g. real estate or bank accounts) without revealing their identities. Moreover, multinationals may agree on secret rulings with some countries' authorities to reduce their tax burden at the expense of smaller local businesses. This also affects the other countries where multinationals actually operate and create value (those not involved in the secret tax agreements) and their citizens, because those governments will lose tax revenue needed to fulfil their country's needs, affecting citizens and small businesses alike, who will face a higher tax burden or suffer from austerity measures.

The lack of transparency has made it fairly easy for wrongdoers (including multinationals engaging in unfair tax agreements) to benefit from corruption, money laundering, tax evasion or avoidance, by hiding and mixing themselves, their assets and their transactions within legitimate uses of the global financial and tax system.

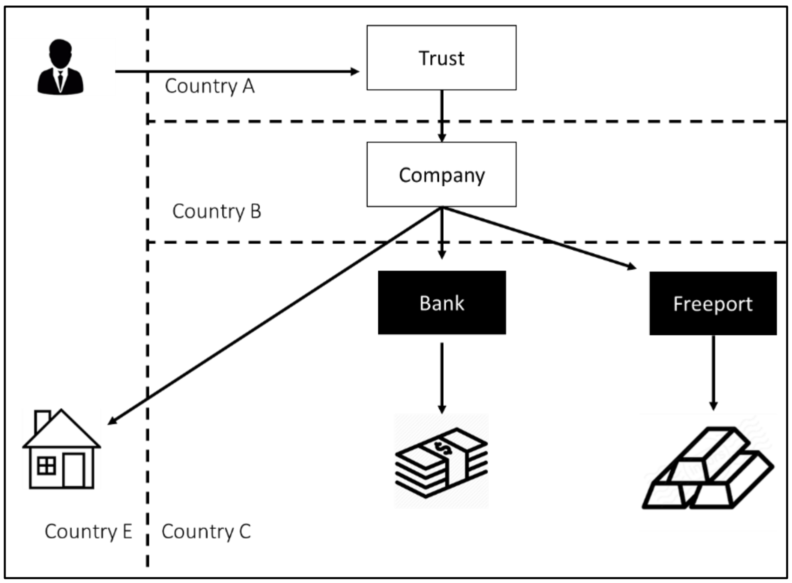
In order to address this problem, national authorities have started to cooperate more with each other at the international and European level to update or establish financial regulations and to increase transparency requirements. However, solving the problem depends on all countries, starting with major players (e.g. major financial centres and tax havens) agreeing to change (rather than blocking) and actually implementing the necessary changes. Without this, improvements and solutions will only get so far.

2. Automatic Exchange of Financial Account Information (DAC 2)

2.1 Why is it important?

Individuals engaged in tax evasion, money laundering or corruption usually adopt three main secrecy strategies in order to exploit loopholes in the law and to keep information away from authorities. First of all, they hold assets related to their criminal activity (e.g. real estate, a yacht, a bank account, gold, etc.) in places where no information about their identity has to be collected or where information is collected only at the *legal owner* level. This means that only the direct holder of the asset (e.g. a company or a nominee) is required to be identified, but not the *beneficial owner* (the individual who ultimately and actually controls and benefits from the asset). In order to add another obstacle preventing authorities from finding out information about the identity of the beneficial owner (i.e. a second level of secrecy), those assets are usually held through a long ownership chain (not just through one company or nominee, but many).

Many layers of legal vehicles such as companies, trusts, partnerships, etc. are usually inserted between the asset and its *real* owner so that, if authorities identify the direct owner of an asset (its legal owner), they will have to overcome many other obstacles (every layer making up the ownership chain) before they may identify the beneficial owner (the individual who is the real owner behind the illegal scheme). Lastly, assets (e.g. bank accounts) and layers of legal vehicles will be located in as many countries as possible to make it even harder for authorities to discover who is behind them. Authorities will have to pierce each layer of ownership by obtaining information from each relevant country, assuming that there is an international treaty that allows for such an exchange of information and that all countries actually collect relevant information. As the figure shows, authorities in country E will first need to find out about the bank account or gold in a free port and then obtain information from country C on the owner of those assets. Then, they will depend on country B to identify the owner of the company and on country A to find our who controls the trust. The more layers and countries there are, the more chances one of the nodes will not collect or exchange information, making it impossible to reveal the truth about the individual involved in the scheme.



Source: elaborated by author

In an ideal world, every country would collect information about the legal and beneficial owners of all relevant financial and non-financial assets (e.g. real estate, bank accounts, etc.) and about all the legal vehicles (e.g. companies, trusts, etc.) created and operating in their territories. Then, there would be no secrecy within a country. If, in addition, countries gave direct access to that information to other countries' authorities, there would be no secrecy at the *global* level and criminals would have nowhere to hide. The current world is a very different place: not all countries collect legal or beneficial ownership information on the financial and non-financial assets located in their territories nor about the legal vehicles created or operating there. On top of this, countries that do collect this information generally do not give direct access to their data to other countries' authorities. In some cases, countries exchange relevant information with each other after receiving a specific request. A better situation is when countries exchange information automatically (once a year, without the need for a specific request) with all relevant countries.

2.2 DAC 2 in a nutshell

In an attempt to get closer to the ideal, automatic exchange of financial account information, DAC 2 involves all countries in the EU automatically exchanging information held in financial institutions[3] (e.g. banks, investment entities and some insurance companies). The information exchanged is about the legal owner of the account and, in some cases, the beneficial owner is also identified. The obvious shortcomings of this are that:

- Data will be exchanged (obtained) as long as a financial asset (e.g. money in a bank account) is held in another EU country. If the bank account is held in a non-EU country, data may still be exchanged, not under DAC 2 but pursuant to the OECD's Common Reporting Standard (CRS), which is essentially the same standard (DAC 2 is the adoption of the CRS among EU countries). However, unlike DAC 2, exchanges under the CRS with non-EU countries are not guaranteed for all EU countries implementing the CRS, but only if the non-EU country has all the relevant international agreements to automatically exchange financial account information with the EU country[4];

- Data will be exchanged as long as it refers to a financial account (e.g. bank account) held by a financial institution (e.g. a bank). Exchanges will not cover: real estate or gold or art or other types of non-financial assets.

- Data will be exchanged at the beneficial ownership level only under some circumstances: when the individual holds the (bank) account directly under their own name or when the individual holds the account through an entity, if such entity is classified as "passive" (because it has mainly passive income such as interests, dividends, etc.). In other cases (when the individual holds the account through an entity classified as "active" because it has income, for example from providing goods or services), only the identity of the entity will be exchanged, allowing the beneficial owner to remain hidden.

2.3 The origins of DAC 2

In 2005, the EU Savings Tax Directive (EUSTD[5]) entered into force, requiring automatic exchange of interest payments made to non-resident individuals (although it allowed some countries to delay full implementation and to withhold taxes instead of exchanging information). The EUSTD was amended in March

2014, although it was repealed[6] in 2015. It had become obsolete after the EU approved DAC 2 in December 2014, which incorporated automatic exchange of financial account information based on the OECD's Common Reporting Standard[7] (CRS) published in July 2014.

The CRS was in fact a "multilateral upgrade" of a domestic law of the US that led to a new international framework for automatic exchange of financial account information. In 2010, the US approved the Foreign Account Tax Compliance Act (FATCA[8]), which required all the financial institutions in the world to send financial account information to the US about American taxpayers. Non-compliant financial institutions would face a penalty of a 30% withholding tax on any payment of income originated in the US[9]. To allow their financial institutions to send information to the US (and avoid such a harsh FATCA penalty), countries all over the world changed their domestic laws and signed bilateral treaties with the US (called Inter-governmental agreements or IGAs) that established a legal framework for the exchange of information with the US based on FATCA regulations. Three different types of agreements were signed between the US and other countries: Model 1 A, Model 1 B and Model 2[10]. While Model 1 B and Model 2 involve information being sent only from the other country to the US, Model 1 A also includes *partial* reciprocity from the US. Importantly, however, under this partial reciprocity the US would not send to other countries any information at the beneficial ownership level, although the US committed to achieving equal levels of reciprocity (without any deadline).

The OECD's CRS framework (for global automatic exchange of information) is mostly based on the IGA Model 1 A (that most countries signed with the US), although it contains no withholding tax for failing to provide information. Instead, the only available "sanction" in the CRS is to stop the exchange of information[11]. The other difference is that the CRS involves full reciprocity among all countries (they all have to exchange the same type of data, e.g. at the beneficial ownership level). However, the CRS also allows a jurisdiction to choose to send, but not to receive information[12]. While the OECD explains that this option may be chosen by jurisdictions without income tax, this "voluntary secrecy" by some tax havens (the deliberate decision not to receive information that they are entitled to) could be part of an avoidance scheme that exploits golden visas or residency and citizenship by investment schemes offered by many tax havens[13], as explained below.

2.4 Automatic exchange of financial account information under DAC 2 (and the CRS)

DAC 2, following the CRS, requires financial institutions such as banks, investment entities[14] (e.g. mutual funds, hedge funds) and some insurance companies[15] (e.g. life insurance companies) located in any EU country to identify those financial accounts that are held by residents of other EU countries. Once all relevant accounts have been identified, their details (e.g. the account number, account balance, gross income from dividends or interests and the account holder's identity) have to be reported to the local tax authority, who will compile the information received from all local financial institutions. All compiled information will be sorted by country of residence of the account holder and then sent to the corresponding foreign authority (i.e. German tax authorities will compile information from all German financial institutions and will then send information about Austrian residents to Austria's tax authorities, about Belgian residents to Belgium's tax authorities, and so on).

EU countries will also exchange the same type of information with (some) non-EU countries pursuant to the CRS and the international treaties that provide its legal framework (e.g. the

Multilateral Convention on Mutual Administrative Assistance in Tax Matters[16] and the Multilateral Competent Authority Agreement[17] or MCAA). With the US, EU countries will exchange information depending on the type of IGA that was signed. Most EU countries signed the IGA 1 A and will receive partial information from the US, while Bulgaria signed a Model 1 B and Austria a Model 2[18]. Neither of these two countries will receive any information from the US about their residents' accounts in American financial institutions.

While all EU members *must* automatically exchange information with each other pursuant to DAC 2, exchanges with non-EU countries implementing the CRS are rather *discretionary*. If an EU country intends to exchange information with a non-EU jurisdiction based on the CRS, they would first need to have in force the legal framework mentioned above (e.g. the Multilateral Tax Convention and the MCAA). Secondly, they would have to choose each other under the MCAA's Annex E (this works in a similar way to a "dating system"). Only then would an "automatic exchange relationship" be established between them. As of 5 July 2018, the EU countries with the highest number of automatic exchange relationships based on the CRS and DAC 2 were: Bulgaria, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Luxembourg, Poland, Slovenia and the UK with 88 relationships[19]. However, many of these countries (e.g. Ireland) will only *send* information to 65 jurisdictions[20]. The difference refers to 23 jurisdictions (with which there is an automatic exchange relationship) that have probably chosen voluntary secrecy under the MCAA's Annex A (to send but not to receive information from any other country) or that have to improve their confidentiality requirements before they may receive information. The OECD publishes neither a jurisdiction's Annex E (with whom they wish to establish an automatic exchange relationship under the "dating system") nor its Annex A (those who chose "voluntary secrecy"). However, by looking into the full list of automatic exchange relationships for all countries published by the OECD, one may identify the ones who probably chose "voluntary secrecy" (or who failed to meet with confidentiality requirements) because they appear as sending information to many countries, but receiving information from none. Six British Overseas Territories are among the 23 jurisdictions sending but not receiving information from Ireland: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Turks and Caicos Islands and Montserrat[21]. Two EU countries (Cyprus and Romania), apparently chose voluntary secrecy (or failed to meet confidentiality requirements) only with respect to non-EU countries: they will both send information to 65 jurisdictions (the same as Ireland), but will only receive information from 33 jurisdictions (all EU countries under DAC 2 and other related countries such as Andorra, San Marino or Switzerland under related EU agreements).

Table 1. Number of activated CRS/DAC 2 relationships for some EU members

Receiving information from… jurisdictions (including EU and non-EU jurisdictions)	EU country
88	Bulgaria, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Luxembourg, Poland, Slovenia, the UK
87	Belgium, Croatia, Germany, Portugal, Spain
86	Denmark, Malta
85	Czech Republic, the Netherlands, Sweden
84	Slovak Republic
83	Hungary
81	Austria
33	Cyprus, Romania

New tax havens in the EU?

It appears that Austria, Bulgaria, Cyprus and Romania could create secrecy risks in the EU, especially in relation to lack of access to banking information. This risk is exacerbated by the residency and citizenship by investment schemes that many of them offer:

- **Austria** has delayed application of DAC 2 until 2018 (unlike all other EU countries). Even worse, it signed a Model 2 IGA agreement with the US. The US will therefore send no information to Austria about Austrians' bank holdings in the US. Austria also agreed with Liechtenstein to exempt some accounts from being reported under the automatic exchange of information procedure. Austria will also be receiving banking information from fewer countries under the CRS, compared to other EU countries. Austria also offers a citizenship by investment scheme.
- **Bulgaria** has signed a Model 1B IGA agreement with the US. As a result, the US will send no information to Bulgaria about Bulgarians' bank holdings in the US. Bulgaria also offers a residency by investment programme.
- **Cyprus** will only receive information from 33 jurisdictions related to the EU (but no information from non-EU countries pursuant to the CRS). Cyprus offers a citizenship by investment scheme.
- **Romania** will only receive information from 33 jurisdictions related to the EU (but no information from non-EU countries pursuant to the CRS).

- **Differences between DAC 2 and the CRS**

DAC 2 is based on the first publication of the CRS of July 2014 and some of the Commentaries[22] about the CRS of October 2014 that provide further details of and interpretations with regard to CRS regulations. The OECD then published a Handbook for CRS implementation[23] (first edition in 2015 and second edition in 2018). Moreover, based on a consultation[24] about schemes that could result in circumventing the CRS, the OECD published, in February 2018, the Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures[25]. In March 2018, the OECD ran another consultation[26] on residency and citizenship by investment schemes (that could also be abused to circumvent the CRS). As of 2 July 2018, the OECD has not published any specific rules on these residency and citizenship by investment schemes.

Apart from these additional rules and handbooks related to the CRS that were published by the OECD (at least for interpretation purposes) but are not yet part of DAC 2, there are specific differences between the CRS and DAC 2. The EU Commission's Expert Group on Automatic Exchange of Financial Account Information[27] summarised the main differences between the CRS and DAC 2 in their Working Document[28] for a meeting held on 30 October 2014. In essence, the main difference is that DAC 2 closed a loophole by eliminating an exemption that had been available in the CRS for insurance companies that are effectively prevented by law from selling covered cash value or annuity contracts to residents of a reportable jurisdiction[29]. As for more technical differences, other than sometimes changing the language to the EU context ("member states" instead of "participating jurisdiction"), according to the Expert Group, DAC 2 has incorporated some elements available in the CRS Commentaries into DAC 2's Annex 2 (e.g. provisions on "change in circumstances"; defining the residence of a financial institution; or when an account is considered to be maintained by a financial institution, etc.). Moreover, some alternatives available in the Commentaries have been incorporated directly into DAC 2, under Annex I, such as provisions to: exempt some group cash value insurance contracts and group annuity contracts; treat new accounts of pre-existing customers as pre-existing accounts; define the concept of related entity; and apply a standardised industry coding system.

2.5 Main findings about DAC 2

Since DAC 2 is based on the CRS, many (if not all) of the loopholes[30] identified in the CRS also apply to DAC 2. These loopholes could be exploited by EU individuals and companies to circumvent automatic exchange of information and remain hidden from EU authorities.

- **The US and other countries that are not exchanging complete information with the EU**

The first and easiest way to avoid automatic exchange of information is to set up bank accounts in countries that are not participating[31] in either the CRS or DAC 2. These countries will have no obligation to exchange information about those bank accounts with EU countries. As of June 2018, at least 43 developing countries have not even committed to implement the CRS, including the Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine. On the one hand, the fact that the EU has close political and economic links with many of these European countries (including accession agreements and negotiations to join the EU) may dissuade EU individuals from using these countries' financial institutions to hold their accounts. On the other hand, Montenegro and Serbia have not even signed the Multilateral Tax Convention and do not have bilateral exchange of information agreements with EU countries that meet the international standard. Serbia is even blacklisted[32] by the Financial Action Task Force, which assesses compliance with anti-money laundering recommendations. Even if a jurisdiction is implementing the CRS, it may not be exchanging information with all EU countries (countries may cherry pick with whom to exchange information among all countries implementing the CRS).

A special case is the United States. While it has signed FATCA-related IGAs with all EU countries, it will only send partial information to most countries or nothing at all (e.g. no information will be sent to Austria and Bulgaria). Since the US will not need to exchange information at the beneficial ownership level, EU individuals will be able to avoid reporting by holding their bank accounts in the US not directly under their own name, but through companies or other entities, especially if those entities are not incorporated in the EU (See Annex A for more details). Unlike the sanctions imposed by the US, there are no sanctions or incentives for countries to join the CRS or to exchange information with EU countries.

- **Golden visas and other residency or citizenship schemes**

Both the CRS and DAC 2 require banks and other financial institutions to determine the residency of the account holder so that information about that account is sent to the corresponding authority, who will be able to check whether that account was properly declared and whether relevant taxes were paid. If Juan – a resident in Spain - has an account in a German bank, the German bank will report that account to the German authorities, who will exchange information with the Spanish authorities. Spain will thus be able to check whether Juan had declared his German account and whether corresponding taxes were paid.

In order to avoid reporting, Juan could acquire a golden visa or any other residency or citizenship via an investment scheme. These schemes allow individuals to obtain residency or citizenship in exchange for money (e.g. USD 100,000), without needing to actually emigrate to those countries. This way Juan could keep enjoying life in Spain while tricking his German bank into believing that he is resident in the country issuing the golden visa or residency or citizenship scheme (by showing his newly acquired residency certificate and, if necessary, a utility bill). For example, Juan could have acquired a residency certificate from St. Kitts. Consequently, the German bank will determine that Juan is resident in St. Kitts and thus information about Juan's German bank account will be sent to St. Kitts, but not to Spain.

The problem of golden visas or residency and citizenship schemes is further exacerbated when the countries offering these schemes also choose "voluntary secrecy" (to send, but not to receive information from other countries under the CRS). If St. Kitts chose voluntary secrecy, then Juan's information will not even be sent to the wrong country (St. Kitts, instead of Spain). No information will be collected and exchanged at all: the German bank will determine that Juan is resident in St. Kitts. Since St. Kitts chose voluntary secrecy, German authorities will not exchange any information with St. Kitts. The German bank will not need to send information about Juan to the German authorities. The German bank will not bother to collect all the CRS-relevant information about Juan either. Juan will be considered a "non-reportable" person (no one, other than his bank, will find out about that account's existence).

According to the Tax Justice Network's Financial Secrecy Index published on 30 January 2018, the following EU countries are offering residency or citizenship by investment schemes.

These golden visas and residency or citizenship schemes could be exploited by EU individuals (and residents of other countries) so that their banking information is sent to the wrong authority (not to the authority of the country where they actually live, work and are subject to tax).

Table: EU countries offering residency or citizenship by investment schemes

EU country	Description of scheme
Austria	Austria has a citizenship-by-investment programme requiring an investment of more than three million EUR; no residency requirement.
Bulgaria	Bulgaria offers permanent resident status to people from non-EU countries through various investment programmes starting at 70,000 USD. There is no residency requirement.
Cyprus	Cyprus has a citizenship-by-investment scheme.
Greece	Greece offers permanent resident status through business or real estate investment starting at 250,000 USD.
Ireland	Investors can get residency permission through investments starting at one million EUR. There is no residency requirement to maintain status, except for a visit once a year.
Italy	Italy offers investor visas for individuals investing around 300,000 EUR in real estate or similar.
Latvia	Latvia provides residency permits through investments starting at approximately 40,000 USD, requiring physical presence of one day per year.
Malta	Malta has a citizenship-by-investment programme.
Netherlands	The Netherland gives residency permits to individuals who invest at least 1,250,000 EUR into a Dutch company or fund.
Portugal	Portugal offers residency permits through investments equal to or greater than 250,000 EUR.
Spain	Residence permits can be obtained in Spain through investments equal to or greater than 500,000 EUR.

Source: Extract from the Table published in "Citizenship and Residency by Investment Schemes: Potential to avoid the Common Reporting Standard for Automatic Exchange of Information", Knobel & Heitmueller, TJN, March 2018

- **Only financial account information will be exchanged and information will only be used for tax purposes**

The CRS and DAC 2 limit exchanges to "financial account information". This means that cash, art, gold or other valuables held at free ports or safe deposit boxes, or ownership of real estate, yachts, horses, etc. will not be exchanged. As for crypto-currencies (e.g. bitcoins), they will be covered only if each country so decides (by considering that they are "financial accounts"). Following the above example, Juan may hold gold, cash, art or bitcoins in a German bank's safe deposit box, and even if he declared his Spanish residency his information will not be exchanged with Spain (because these non-financial assets are not covered by DAC 2).

As for information that Spain will receive about Juan, in principle it can only be used for tax purposes (e.g. to check whether Juan is evading taxes). However, the money held in that account is perhaps not subject to tax, but it may be related to money laundering or corruption. Still, only Spanish tax authorities will be able to use that information instead of sharing it with the Spanish financial intelligence unit or other law enforcement agencies.

2.6 The list of loopholes in DAC 2 and proposed fixes

a) Major CRS/DAC 2 risks

I. The US is not participating in the CRS

The US is a major financial centre that is deliberately not participating in the CRS. EU countries that signed an IGA 1 A (all except for Austria and Bulgaria) will receive some information from the US, but not at the beneficial ownership level. This means that if any EU individual taxpayer holds an account in an American financial institution through an entity (not under its own name), no EU country will be able to find out about that individual's financial accounts in the US.

For example, if a German holds a bank account in the US through an Austrian or Bulgarian company, no information will be reported from the US. If the German holds the account through a non-EU company, e.g. a company from Panama, then Panama (but not Germany) would find out about the account. Even if Germany found out about the Panamanian company, it would not be able to identify the German individual hiding behind it because non-EU companies are not covered by the beneficial ownership registries of AMLD IV or V.

Proposed fix

- Ensure that all EU countries sign Model 1 A agreements with the US for them to receive information from the US. Demand that the US complies with its commitment on full reciprocity contained in IGA Model 1 A, for example by means of establishing a 30% withholding tax on payments of EU-sourced income, against US financial institutions until full reciprocity is obtained[33].

- Alternatively, demand that the US joins the CRS. Include the US on the EU list of non-cooperating third country jurisdictions for tax purposes if they are not compliant with CRS.

II. Jurisdictions offering golden visas, residency or citizenship by investment schemes

The Achilles heel of the CRS lies in determining the residency of the account holder (so that their information will be sent to the corresponding country's authorities, if applicable). Individuals may thus circumvent the CRS by tricking the financial institution where they hold an account into believing that they are actually resident in a different jurisdiction (e.g. as shown by the passport or residency they acquired in exchange for an investment, in addition to a utility bill from a house there, if necessary). This way, an individual may keep living and working in their real country of residence, while their account information will be sent to the "wrong" jurisdiction (wherever the account holder declared to be resident using the acquired passport or residency, and utility bill if necessary). This risk is considerably increased if the country where an individual is "falsely" claiming to be resident is not participating in the CRS (see below) or if it has chosen voluntary secrecy (to send, but not to receive information from other countries). In either case, the account holder will become a non-reportable person. In other words, it is not that their information will be sent to the "wrong" country (where they do not really reside), but rather that their information will not even be reported at all.

As of 15 May 2018, 17 jurisdictions (including six British Overseas Territories) appear to have chosen voluntary secrecy.

In addition, the following EU countries offer residency and/or citizenship by investment schemes[34]: Cyprus (which, apparently, will receive information from EU countries, but chose voluntary secrecy in relation to other countries[35]), Ireland, Malta, Bulgaria, Greece, Italy, Netherlands, Portugal, Austria, Latvia and Spain. Other jurisdictions related to the EU also offer these schemes: Cayman Islands, Jersey, Guernsey, Curacao, Gibraltar and Switzerland.

On top of everything, financial institutions are only required to re-determine the residence of an account holder if they are aware of a change of circumstances. However, finding out about a telephone number in a new jurisdiction is not considered to invalidate the original self-certification submitted by the account holder about their residence[36].

The second edition of the CRS Handbook for implementation suggests that, although adding language in the self-certification form requiring the Account Holder to update the bank if there is a change in the information (e.g. their residence) is not a requirement under the Standard, a Reporting Financial Institution may want or may be required to, under a particular jurisdiction's domestic law, include such language. This may reduce the onus on the Reporting Financial Institution in applying the "reasonableness test"[37].

Proposed Fix

- Apply enhanced due diligence to account holders claiming that they are resident in jurisdictions offering citizenship and residency by investment schemes, especially if those jurisdictions have chosen voluntary secrecy or are not participating in the CRS.

- The same enhanced due diligence should apply if the residency or citizenship certificate submitted by the account holder was issued in or after 2014 (when the CRS was published)[38]. However, the enhanced due diligence may be relaxed if the account holder can prove, e.g. with passport stamps (not merely declare), that they have been present for over 183 days in the jurisdiction where they claim to be resident[39].

- Publish (and demand publication by all other countries) the number of accounts held by residents of jurisdictions offering citizenship/residency by investment schemes, noting also if these jurisdictions have chosen voluntary secrecy. Check if the number of accounts held by individuals resident in these countries have increased since 2013 (before the CRS was published, a time when there was no need to acquire a residency/citizenship to circumvent the CRS).

- Demand that jurisdictions offering the schemes publish or at least exchange information about all the individuals who acquired their residency or citizenship via investment schemes.

- Require financial institutions to request annual updates from their account holders on their residence status[40] and to treat any change (e.g. a new address or telephone number) as a change of circumstances that requires their residence to be re-certified. Relationship managers should be actively required to monitor, on an annual basis, account holders who have residency in a high-risk country (one offering citizenship or residency via investment, one choosing voluntary secrecy or any residency or citizenship issued in or after 2014)[41].

- Require account holders to declare all past and present residencies and any citizenship/nationality that they held and hold. Financial institutions should determine that the account holder is resident in all the previous jurisdictions of residency or citizenship (especially those that do not offer golden visas) and information should be exchanged with all those countries unless the account holder can prove (e.g. with a certificate from the tax authority of the former country of residence) that they are no longer tax resident there[42].

III. Countries not implementing the CRS

Countries that do not implement the CRS create two types of risks. Firstly, any account held in their financial institutions will remain unreported (because the country itself is not part of the CRS). Secondly, in a similar way as with the case above about acquiring residency or citizenship in exchange for an investment, passports from non-participating countries could be "stolen" (used without the consent of its owner) or "rented" (with the consent of its owner) for an individual resident in a CRS or DAC 2 jurisdiction to open an account pretending to be someone else[43]. Suppose a German individual opens a bank account in France using a passport from a Bosnian. The German individual could then manage the account in practice through online banking or by having a power of attorney over the account. The German individual would face no risks from German authorities because France would not report such an account to any jurisdiction (because on paper the account belongs to a Bosnian resident and Bosnia is not implementing the CRS). At the same time, the Bosnian person would pose no risk to the German individual, because he/she would have no way to find out that a bank account has been opened under his/her name.

Proposed Fix

- Apply enhanced due diligence whenever the account holder claims to be resident in a jurisdiction not participating in the CRS, especially if such an account also has a power of attorney in favour of another person.

- Publish (and demand publication by all other countries) the number of accounts held by residents of non-participating countries and check whether accounts held by these residents in non-participating countries have increased since 2013 (before the CRS was published, a time when there was no need to steal or rent a passport from a non-participating country).

- Push all countries to implement the CRS.

IV. Crypto-currencies (e.g. bitcoins)

While bitcoins and other crypto-currencies have increased their relevance and wider use, it is not clear if all entities trading, issuing or exchanging crypto-currencies are covered by the CRS/DAC 2 or not.

Proposed Fix

- Establish explicit requirements that entities issuing, trading or exchanging crypto-currencies should be considered as reporting financial institutions, who should be required to identify holders of crypto-currencies and report their holdings to their corresponding country of residence.

V. Hard assets not covered by CRS/DAC 2

The CRS (and hence DAC 2) covers only financial account information held by financial institutions. This means that there will be no reporting about cash held in safe deposit boxes, gold deposited in vaults or free ports, real estate, yachts and other hard assets that may be related to illicit financial flows.

Importantly, *"*real estate" is not considered to be a financial asset. This means that an investment entity, e.g. a trust, which only holds direct investments in real estate, will not be considered to be a financial institution that has to identify and report its account holders (called "equity holders", such as the settlor, beneficiaries, etc.).

While DAC 1 involves exchange of information in the EU about real estate ownership, that will only take place if information is available. The EU Commission Staff Working Paper published in December 2017 a report on DAC 1[44]. While the report describes that about 1,000 messages have been sent between EU countries from 2015 to 2017 relating to ownership of and income from immovable property, it is not clear whether all EU countries actually collect this information and whether it covers all residents of other EU countries, especially at the beneficial ownership level.

The exclusion of real estate from the scope of CRS/DAC 2 could lead individuals to direct their investments to real estate, contributing to inflating real estate prices even more.

Proposed Fix

- The EU should require all member countries to collect and report information on real estate ownership.

- The EU should include safe deposit boxes and storage at free ports within the scope of DAC 2 and exchange either the values held there or at least the ownership of those safe deposit boxes and storage units held in banks and free ports.

- The EU should require all relevant registries of assets (e.g. real estate, cars, yachts, planes, race horses, etc.) to collect legal and beneficial ownership information, making it public, or at least exchanging ownership information within the DAC.

- Real estate should be considered to be a financial asset under the CRS and DAC 2.

VI. Use of information limited to tax purposes

The CRS, indirectly under MCAA's recitals and directly under the Multilateral Tax Convention Art. 22.2[45], as well as the consolidated DAC (under Art. 16.1[46]), requires information received to be used for tax purposes only. However, information received such as an account balance could also be relevant for authorities tackling corruption and money laundering (e.g. if an individual cannot justify the legal origin of the money deposited abroad, regardless of whether or not such money or income is subject to tax).

The CRS (indirectly through the MCAA's recitals and directly under the Multilateral Tax Convention Art. 22.4) as well as the consolidated DAC (under Art. 16.2[47]), however, allow countries sending information to authorise recipient countries to use information for other non-tax purposes.

There is no public list of countries that have required or allowed other countries to use the information for non-tax purposes, such as to tackle money laundering or corruption.

Proposed Fix

- The EU should establish that information received pursuant to DAC 2 may be used by law enforcement and financial intelligence units to tackle corruption and money laundering.

VII. No prescribed sanction for non-compliance or reporting false or inaccurate information

The CRS and DAC 2 under Section IX require jurisdictions to have rules and administrative provisions to ensure effective implementation, including "effective enforcement provisions to address non-compliance". However, both legal frameworks leave it up to each country to establish sanctions.

If countries choose to impose only monetary sanctions, this may not incentivise compliance: given that a financial institution or a service provider may be assisting a client to evade millions in taxes, any fixed fine may be considered a worthwhile "cost".

Proposed Fix

- EU countries should implement on-site audits, and establish monetary and non-monetary sanctions (e.g. a criminal prosecution, loss of licence to carry out financial activities) for non-compliance or recurrent cases of reporting false or inaccurate information under the CRS/DAC 2.

VIII. Undocumented accounts are not sanctioned

The CRS and DAC 2 establish that, for pre-existing individual accounts, whenever a financial institution cannot determine the residence of its account holders (and very probably whenever the beneficial owners of pre-existing accounts cannot be identified either), financial institutions may simply report the account as "undocumented". The CRS Implementation Handbook[48] merely states that countries should monitor the amount of undocumented accounts and the financial institutions reporting them.

Proposed Fix

- Any account where the residency of the account holder or the identity of the beneficial owner cannot be identified should be reported as "undocumented" but also frozen (prohibiting any transfer or withdrawal) until the account holder provides the missing information. Account holders of frozen accounts should lose all rights over the account at the latest one year after the account was frozen. Values should be given to the government and applied for CRS/DAC 2 enforcement (e.g. auditing).

- Countries should publish statistics about the number and value of undocumented accounts, by type of reporting financial institution.

IX. Closed accounts do not report previous value

Whenever an account is closed, only the closure of such an account is reported (Section 1.A.4 of the CRS or DAC 2 Annex I), but not the account or income. It is the same as if the CRS/DAC 2 required only for the existence of an account to be reported, but not its account balance or income.

Account closures, especially if they took place after 2014 and before 2017 or 2018 (when information started to be exchanged) may be related to avoidance strategies.

Proposed Fix

- Information about closed accounts should also include the last balance value or the annual average balance (whichever is higher).

- Countries should publish statistics about the number of accounts closed and the residence of their account holders (and check if numbers increased since 2013).

b) Technical loopholes/ambiguities

X. There are many types of non-reporting financial institutions (excluded from reporting)

Section VIII. B of the CRS and DAC 2 excludes certain financial institutions from the obligation to report information, such as some pension funds[49], qualified credit card issuers, exempt collective investment vehicles (e.g. investment entities regulated as a collective investment vehicle provided that all of the interests in the collective investment vehicle are held by or through individuals or entities that are not reportable persons), etc. In addition, both legal frameworks offer a *carte blanche* to countries to exclude any financial institution considered as presenting a low risk for tax evasion from reporting.

In addition, there can be an exclusion to avoid duplication of reporting. For example, a trust (that would otherwise be required to report information) need not report anything if its trustee is already reporting relevant information.

Moreover, the definition of "reporting financial institution" of Section VIII.A excludes certain types of financial institutions from reporting, such as investment entities managed by an individual (instead of being by another investment entity).

Lastly, financial institutions that have no reportable persons do not need to report anything.

All of these exemptions could be exploited by individuals and entities trying to avoid reporting to remain hidden. Individuals and entities would simply open accounts in non-reporting or excluded financial institutions rather than in those that have to report their information.

Proposed Fix

- Ideally, there should be no exemptions (and all financial institutions should be required to report information about all accounts, including if they are managed by an individual).

- Countries should require all financial institutions exempted from reporting (either because they are excluded by the standard or to avoid duplication of reporting or because they could not identify any reportable person among their account holders) to file nil returns where they explain why they do not file any relevant information or which financial institution is doing the reporting on their behalf (to avoid duplication).

- Countries should publish statistics showing the total value held by each type of non-reporting financial institution (including reporting financial institutions that claim not to have any reportable accounts). Values should be checked since 2013, in case they have increased, to identify potential avoidance schemes.

XI. There are many types of excluded accounts (exempted from reporting)

Just as some financial institutions are exempted from reporting (see above), some types of accounts are also exempted from reporting under the CRS/DAC 2's Section VIII.C.17: escrow accounts, some estate accounts, accounts related to some pension or retirement funds and there is also *carte blanche* for countries to include other types of accounts where there is a low risk of tax evasion.

The same also applies to accounts that do not fall within the definition of a "financial account", e.g. accounts involved in direct investment in real estate or a cash value contract that is irrevocable[50]. Individuals or entities could choose to open these types of excluded accounts merely to avoid being reported.

Proposed Fix

- Ideally, there should be no exclusions or exemptions for types of accounts.

- Countries should publish statistics showing the total value held by each type of excluded account (also specifying in which financial institution they are held). Since 2013, the values of excluded accounts should have been checked in case they have increased to identify potential avoidance schemes.

XII. Pre-existing accounts holding less than USD 250,000 may be excluded from reporting

While DAC 2 states under Recital 10: "thresholds should not be generally included in this Directive as they could be easily circumvented by splitting accounts into different Financial Institutions", both the CRS and DAC 2 allow countries (to choose) to exclude from reporting any pre-existing account with an account balance of below USD 250,000 that is held by an entity (not by an individual).

This has allowed individuals and entities to avoid reporting provided that they hold the account through an entity and that they opened the account before a set date. For example, for Austria, the set date is 1 January 2017.

This problem has been exacerbated by additional rules established in the CRS Commentaries incorporated into DAC 2's Annex I that also allow new accounts of pre-existing customers (held in a financial institution or in a related entity of such a financial institution) to be considered "pre-existing" under some circumstances:. both accounts are considered as one with regard to the determination of the account balance when applying due diligence thresholds, there is no new or amended information required to be submitted to open the new account and existing information satisfies the anti-money laundering procedures which, by law, have to be performed (DAC 2, Section VIII.C.9).

Proposed Fix

- Countries should not establish any threshold to exclude accounts.
- Countries choosing to keep this threshold should publish statistics about the number of these accounts that are exempted from reporting, identifying the financial institutions that hold them (and publish the country of residence of any of their account holders).

XIII. Too much reliance on Anti-Money Laundering (AML) procedures for due diligence procedures

The CRS and DAC 2 allow financial institutions to rely on information collected for AML purposes to identify the residence of account holders for automatic exchange of information purposes. Instead, the CRS/DAC 2 should require financial institutions to request from the account holder all relevant information unless the country and financial institution are fully compliant with AML obligations.

The problem with relying on information collected pursuant to AML provisions is that compliance with AML provisions seems rather low.

While AML requirements are older than the CRS/DAC 2, none of the nine EU countries evaluated by the FATF in the last round[51] (between 2016 and 2018) was found to be compliant with its enforcement under Immediate Outcome 4, which assesses whether "financial institutions and DNFBPs[52] adequately apply AML/CFT preventive measures commensurate with their risks, and report suspicious transactions". In fact, Austria, Belgium, Hungary, Italy, Portugal, Slovenia, Spain, Sweden and Switzerland were found to be "partially compliant" (called "moderate level of effectiveness") while Denmark was found to be non-compliant ("low level of effectiveness"). As for the legal framework's compliance with FATF Recommendation 10 (regarding customer due diligence requirements by financial institutions), only Austria was found to be compliant. The remaining seven countries were considered only "largely compliant", while Denmark and

Switzerland were found to be partially compliant.

On top of everything, in cases of pre-existing accounts held by individuals with an account balance of below 1 million USD, the CRS Handbook (page 76) and CRS Commentaries (page 113) allow financial institutions to simply use whatever address is in their records as long as they have a "sufficient [level of] comfort" about its accuracy even if no AML requirements were in place and no documentary evidence (such as a passport or certificate of residency) was obtained[53].

Similarly, the CRS Handbook 2018[54] explains that, for the same type of account (pre-existing, held by an individual, below USD 1 million), a financial institution may simply not report the beneficial owner if the financial institution only has their name but not their address.

Proposed Fix

- Countries should improve their laws, audits and enforcement to ensure compliance with AML requirements (established by FATF recommendations).

- Countries that are not compliant with FATF recommendation 10 and Immediate Outcome 4 should not be allowed to rely on information collected under AML procedures but should be required to obtain information specifically for CRS/DAC 2 purposes.

- Accounts where the residence (or identity) of the account holder or controlling person cannot be determined because updated AML requirements were not applied should be subject to the same proposal for undocumented accounts: accounts should be frozen until the relevant information is collected.

- Countries should publish statistics about the financial institutions that were found not to be compliant with AML requirements and that have any account whose account holder or beneficial owner was not identified because they were not required to apply updated AML requirements.

XIV. Computerised system and relationship manager should be expanded

Enhanced due diligence procedures (and some exclusions) depend on the account balance (e.g. an individual's account below USD 1 million or a pre-existing entity account below USD 250,000). However, the CRS and DAC 2 Section VII.C rules on aggregation of accounts held in a financial institution (to determine whether an individual or entity has an overall balance account above the threshold, considering all of their accounts) depend on whether the financial institution has a computerised system that allows for all accounts belonging to the same person to be linked. A relationship manager should also aggregate accounts that he/she knows belong to the same account holder, but only in relation to account holders who are individuals, not entities.

Proposed Fix

- Countries should apply the relationship manager rules also to account holders who are entities.

- Countries should require their financial institutions to have computerised systems that allow accounts to be linked.

- Countries should publish statistics about the number of financial institutions that do not have such computerised systems.

XV. Reporting oneself

A high net worth individual may set up their own bank (e.g. similar to Odebrecht[55]) to avoid reporting or, in an operation which is much less complicated, the high net worth individual may deliberately set up an investment entity that will be considered as a financial institution (for example because it is managed by another financial institution). This way, the investment entity will have to report its own owner (the high net worth individual). On top of this, any account held by such an investment entity in a bank will not be reportable because "investment entities that are considered financial institutions" are not reportable persons (because they are supposed to do their own reporting). This could be abused by the high net worth individual either to avoid reporting altogether or at least to relax the due diligence, for example on where it is resident[56].

Proposed Fix

- The CRS/DAC 2 should establish that a financial institution, especially an investment entity that holds only one individual or family as clients/investors, cannot directly perform due diligence and report information on its controlling investor/owner/equity holder. In such a case, the investment entity would have to request a certified third party to review the residency and other details of the account/equity holders.

- Likewise, if such an investment entity holds an account in a different financial institution (e.g. a bank), then that account should be reported and the investment entity should be considered a passive entity so that its controlling persons are identified and reported as well.

XVI. There is no reporting of beneficial owners of "active" entities that hold accounts

When an entity holds an account in a financial institution, it can be classified as "passive" if most of its income or assets are passive (e.g. dividends, interest, etc.). Otherwise, the entity will be classified as "active" (e.g. an entity whose income is mostly from selling goods or services, in addition to default types of entities like "startups"). Only "passive entities" (called "Passive Non-Financial Entity under the CRS/DAC 2) will be "looked through" to identify their beneficial owners (called "controlling persons"). For passive entities, information will be reported to the country of residence of the entity and to every country of residence of the entity's beneficial owners.

As is explained in Annex A, AMLD IV or V do not solve this issue unless the "active" entity is considered resident in an EU country and is also subject to beneficial ownership registration under articles 30 or 31 of the AMLD IV or V (e.g. a company incorporated in an EU country).

Even if all countries in the world had public beneficial ownership registries, active entities would still pose a problem because their information is reported only to the country of residence of the entity, but not to the countries of the entity's beneficial owners. Consequently, while authorities could know who the beneficial owners of any company are, they would not know that such a company has a financial account. Imagine that a Polish resident holds an account in a Swiss bank through an active Panamanian company. Even if Panama had beneficial ownership registries, the Polish authorities would never find out about the Swiss account because Switzerland would only tell Panama about such an account, but not Poland (because there is no reporting at the beneficial ownership level for active entities).

The US is also relevant here. The CRS and DAC 2 contain an anti-avoidance provision, treating as a passive entity (thus requiring the identification of its beneficial owners) any investment entity located in a jurisdiction that is not implementing the CRS (if that investment entity were in a participating jurisdiction, it would be likely to be considered a financial institution and would thus not be required to be reported because it would have to do its own reporting). Originally, Switzerland and Luxembourg[57] treated the US as a participating jurisdiction (thus not applying the anti-avoidance provision that considered an investment entity resident in the US as a passive entity and thus required its beneficial owners to be identified).

Proposed Fix

- Ideally, all entities, passive or active should identify their beneficial owners and reporting should take place at both the entity and the beneficial ownership levels.

- Countries should not consider the US as a participating jurisdiction until it fully reciprocates. Thus, investment entities located in the US should be treated as passive entities.

- Since the AMLD V establishes interconnected beneficial ownership registries, EU countries should also exchange information about account holders that are "active" entities with the country of residence of those active entities' beneficial owners. Let us suppose that a Pole has an account in a Swiss bank through a French active entity. Switzerland will only report that account to France. But since France will know, based on the interconnected beneficial ownership registries, that the beneficial owner of the French active entity is Polish, France should also report information about such an account to Poland.

XVII. The threshold to identify an individual as a "beneficial owner" is too high

Not surprisingly, the CRS and DAC 2 (and also the EU 4th and 5th Directive on Anti-Money Laundering) use the threshold of "more than 25%" before an individual may be considered a beneficial owner of a (passive) entity. This threshold is too high because an entity with simply four equal owners (e.g. two parents and two children) would not have to identify any of them as the beneficial owner unless any of them held control through other means. Such an entity would simply be able to identify a senior manager (e.g. a nominee director) as the beneficial owner. While the "more than 25%" is supposedly based on the FATF recommendations, the FATF actually mentions this as an example within another example[58]. In fact, many countries[59] use lower thresholds, such as Argentina's 20%, Uruguay's 15% or Curacao[60], which considers any shareholder as a beneficial owner.

Proposed Fix

- The EU should lower the threshold for the definition of beneficial owners to at least 5 or 10% (or ideally anyone holding at least one share). In addition, if no individual passes the threshold or controls the entity by other means, then the top 5, 10 or 20 (or all) shareholders should be considered the beneficial owners, instead of a senior manager.

XVIII. Accounts held by lawyers should identify clients on whose behalf the account is held[61].

The CRS / DAC 2 are explicit that the account holder cannot be an agent, custodian, nominee, signatory, etc., holding the account on someone else's behalf, but that other person (Section

VIII.E.1). This means that lawyers holding accounts on behalf of their clients should not be regarded as the account holders, but their clients should be reported as account holders.

For this reason, Switzerland[62] has excluded accounts held by lawyers and notaries on behalf of clients (under certain conditions) from reporting under its IGA with the US.

Proposed Fix

- EU countries should undertake audits and guidance to ensure that accounts held by lawyers and notaries on behalf of clients are reporting the clients as the account holders.

XIX. Account balance should not be netted against loans

The CRS Commentaries state that "the balance or value of the account is not to be reduced by any liabilities or obligations incurred by an account holder with respect to the account or any of the assets held in the account" (page 98). Nevertheless, financial institutions may decide to net or offset balance accounts against loans given to an account holder to make it appear that the account balance is lower.

Proposed Fix

- EU countries should make it explicit that an account holder's balance of account or income cannot be netted or offset against loans and other liabilities of such an account holder.

2.7 Statistics

In addition to EU individuals and entities exploiting the loopholes mentioned above, automatic exchanges under the CRS/DAC 2 may be ineffective because of deliberate or negligent (e.g. mistakes) cases of non-compliance with regulations. The only way to assess enforcement of CRS and DAC 2 is to have data, not only on cases or indicia of non-compliance, but also on the information that is actually being exchanged.

The publication of statistics should pose no problems: it is already envisaged under DAC, it breaches no confidentiality, it creates no extra costs for authorities or financial institutions and it allows foreign authorities from developing countries as well as the general public (civil society organisations, journalists, legislators, etc.) to know how much information is being exchanged and to hold authorities to account with regard to the use of the received information.

First of all, the legal sources. DAC already requires countries to publish statistics on automatic exchange of information (Art. 8.b of the consolidated DAC[63]). The EU Commission even published, in December 2017, a first report[64] with statistical information on the implementation of DAC 1. However, this information is too general to assess compliance or the usefulness of automatic exchanges (e.g. only the total number of messages with information on real estate ownership or income were published, but this does not reveal which countries collect and exchange information, whether it covers legal or beneficial ownership, whether the scope covers all real estate or not, residents of which countries own real estate in other EU countries, etc.). Moreover, based on Article 23.4 of the consolidated DAC, the EU Commission "shall, in accordance with the procedure referred to in Article 26(2), determine a list of statistical data which shall be provided by the Member States for the purposes of evaluation of this Directive".

Secondly, statistics do not breach any confidentiality provision because no specific account holder or account is being identified. Only totals by country of residence are being provided (for example, the US[65] and Switzerland[66] already publish total liabilities held by their banks, specifying the country of origin).

Thirdly, statistics can be provided at no extra cost because authorities already have all the information that could be published as statistics: both the CRS and DAC 2 require financial institutions in any country to send all information to their local authorities, who will have to compile all the information and sort it by country of residence, in order to send all relevant information (at the account holder level) to the corresponding country. Therefore, after sorting information by country of residence, authorities could publish the total number of accounts and total values held by residents of each country and publish those totals (without identifying any account holder).

Annex B describes in detail all the fields that statistics should include. Here are some examples of how statistics could be useful:

- Identification of avoidance schemes involving closure of accounts: statistics could show, for example, that most German taxpayers have closed their accounts in Switzerland and opened them in Austria. This could lead German authorities to investigate why German residents are choosing the new destination to hold their money.

- Avoidance schemes using golden visas: statistics could show that the number of accounts held in Belgian banks by residents of a country offering golden visas (e.g. St. Kitts) have increased tenfold while the accounts held by Danish residents have declined by the same proportion. This could indicate that Danes are acquiring St. Kitts residencies in order to avoid reporting their information to Denmark.

- Avoidance schemes exploiting CRS and DAC 2 exemptions: statistics could show, in Cyprus, an increase in the number and value of accounts held by financial institutions that are exempted from reporting information (e.g. financial institutions considered to pose a low risk of tax evasion). This could indicate that this type of financial institution is being abused to avoid reporting of information, forcing the Cypriot authorities to take measures.

- Low volume of reporting: statistics could show that Malta's financial institutions are reporting only 10% as many accounts as other EU countries even though all those EU countries have financial centres of similar sizes, with a similar number of banks and managed assets. This could indicate that some of Malta's financial institutions are failing to comply with the CRS and DAC 2.

- Authorities and civil society organisations from developing countries in Africa, Asia and Latin America that are unable to join the CRS (and will thus not receive any information automatically) would still be able to know how much money and income their residents have in total in each EU country (e.g. Bolivian authorities could find out that Bolivian residents have X million euro in Austria's financial institutions, X million euro in Belgium's financial institutions, etc.).

2.8 Main Recommendations

The EU Commission should revise DAC 2 to incorporate the following recommendations:

i. <u>Adopt sanctions against financial centres that fail to exchange complete information with the EU and developing countries</u>

The EU should use its negotiation powers, including the threat of FATCA-based withholding taxes against non-compliant countries or financial institutions[67], to push all financial centres (including the US) to implement the CRS (or at least to exchange all information required to be exchanged pursuant to the CRS) and to exchange information with all other countries at once. Expanding automatic exchange of information will not only benefit other countries but also benefit the EU because fewer countries will be available as secrecy jurisdictions where EU residents choose to hide their money. For this reason, the EU should also push countries not to choose voluntary secrecy (the option to send, but not to receive information) so as to reduce the risk of golden visas, citizenship and residency by investment schemes offered by these jurisdictions, which could also be used by EU residents to avoid reporting. Lastly, the EU should assist developing countries that are still unable to join the CRS, either with technical or financial assistance, or by engaging in pilot projects sponsored by the Global Forum, and especially by publishing statistics as described in Annex B.

ii. Require all countries issuing golden visas or residency and citizenship via investment schemes to identify all individuals who acquired them

Jurisdictions offering golden visas, residency and citizenship via investment schemes should publish statistical information and spontaneously exchange information with the country of past citizenship/residency of those individuals who acquired residency/citizenship in exchange for an investment. For example, if 20 German residents acquired a residency certificate in Cyprus in exchange for an investment, Cyprus should publish that 20 Germans acquired their residency-for-investment and also report to Germany the identity of the 20 (former) German residents.

iii. Adopt as soon as possible all additional rules against CRS/DAC 2 avoidance schemes

The OECD has been publishing additional material that complements the CRS. Most importantly, after a public consultation, the OECD published, in March 2018, model [mandatory disclosure rules]() for trust and corporate service providers and other intermediaries offering schemes that could result in either avoiding reporting under the CRS or hiding the beneficial owner behind opaque legal structures. These are likely to become applicable in the EU pursuant to DAC 6[68]. In addition, the OECD is likely to publish new rules on citizenship and residency via investment schemes following a public consultation that took place in March 2018. The EU should incorporate these materials as binding rules applicable since 2018 and improve sanctions and incentives for compliance by adding non-monetary penalties (e.g. criminal sanctions, loss of licence) to intermediaries that fail to disclose avoidance schemes, require the publication of those schemes and add whistleblower protection and rewards to incentivise the disclosure of avoidance schemes.

Importantly, and based on the responses[69] to the OECD consultation, the EU should ensure that any advice or request to transfer money to the US should be considered as an avoidance scheme until the US decides to fully reciprocate by sharing with EU countries as much information as would be required under the CRS. In addition, the EU should ensure that client-attorney privilege/confidentiality will be consistent with FATF requirements and limited to the right to a fair trial, instead of an absurd unlimited “right” that anything “touched” by a lawyer (including advice on how to avoid the CRS, engage in tax evasion or money laundering) will be considered confidential. In order to address concerns by the private sector, who appear to be too worried about the wellbeing of government authorities and their ability to cope with too many CRS-avoidance reports, intermediaries could be required to add a level of risk to every report that they disclose to authorities. In this way, authorities could start focusing on disclosures deemed to be high-risk in nature.

iv. <u>Expand the scope of information to be exchanged, especially cryptocurrencies</u>

The EU should expand the scope of information being exchanged, especially with regard to automatic exchange of non-financial information. For example, DAC 1 requires that EU countries automatically exchange information on ownership and income from immovable property[70]. The problem with DAC 1, however, is that it depends on information being available. If an EU country does not collect or hold this information, it need not exchange it.

The EU should amend DAC 1 to require that all EU countries collect and automatically exchange both income as well as legal and beneficial ownership information related to immovable property but also about other registrable assets such as cars (or at least luxury cars above a certain value), yachts and other ships, private planes, race horses, etc. In addition, the EU could include collection and exchange of income and ownership of gold and other metals. Lastly, the EU should also cover the values held in, or at least the mere (legal and beneficial) ownership of safe deposit boxes (e.g. in banks) and storage spaces in free ports and similar venues (e.g. open warehouses).

Lastly, the EU should incorporate guidelines to DAC 2 to establish that reporting financial institutions include any entity issuing, trading or exchanging crypto-currencies, such as bitcoins, so that they are also covered.

v. <u>Publish statistics on information that is being exchanged and exempted from reporting under CRS/DAC 2 to track enforcement and identify avoidance schemes</u>

EU countries should publish statistics (and push all financial centres to do the same), describing the information that is being exchanged and all the data that is exempted from reporting under the CRS/DAC 2, as described by Annex B. These statistics will help track enforcement of the CRS and identify avoidance schemes and should include the number of audits performed in each EU country on their financial institutions and sanctions imposed for non-compliance with CRS/DAC 2 (e.g. if banks in an EU country reported a high number of undocumented accounts, if there is an absence of reporting or if they are reporting fewer tax identification numbers (TINs) compared to other financial institutions [Handbook, pages 35-36]).

3. Automatic Exchange of Crossborder Rulings and APAs (DAC 3)

3.1 Why is it important?

Multinational entities may engage in a wide variety of tax planning strategies, which, as the OECD[71] describes, involve exploiting "gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity". These strategies are problematic, adds the OECD, because they undermine the fairness and integrity of tax systems when multinationals gain an unfair advantage over firms operating only domestically, which also affects competition. It also affects regular taxpayers and citizens who are unable to engage in similar tax minimisation strategies (either because they do not have transnational operations or because they cannot afford lawyers, accountants and other practitioners that provide these tax avoidance services). Regular taxpayers may thus face a higher tax pressure or suffer from austerity measures or both.

While most - if not all - countries may suffer the consequences of tax avoidance by multinationals, some countries are very much responsible for it too. As the EU Commission Staff Working Document described, "many Member States have designed themselves complex and opaque corporate tax systems, which at times, have been designed to incentivise businesses to shift profits to their jurisdictions. In that way Member States have actually contributed to and encouraged aggressive tax planning" [72].

One example of this was the LuxLeaks scandal, where the International Consortium of Investigative Journalists (ICIJ) leaked confidential agreements "also known as 'advance tax agreements' or 'comfort letters' — from Luxembourg officials that assure companies they will get favorable treatment for their tax-saving maneuvers"[73]. Luxembourg secret tax agreements involved "companies [that] have channeled hundreds of billions of dollars through Luxembourg and saved billions of dollars in taxes. Some firms have enjoyed effective tax rates of less than 1 percent on the profits they've shuffled into Luxembourg. Many of the tax deals exploited international tax mismatches that allowed companies to avoid taxes both in Luxembourg and elsewhere through the use of so-called hybrid loans"[74]. A recent news item from the Netherlands refers to an enquiry about a tax agreement signed between the Dutch government and the company Shell which, the newspaper states, cost the Dutch treasury seven billion euro.

3.2 DAC 3 in a nutshell

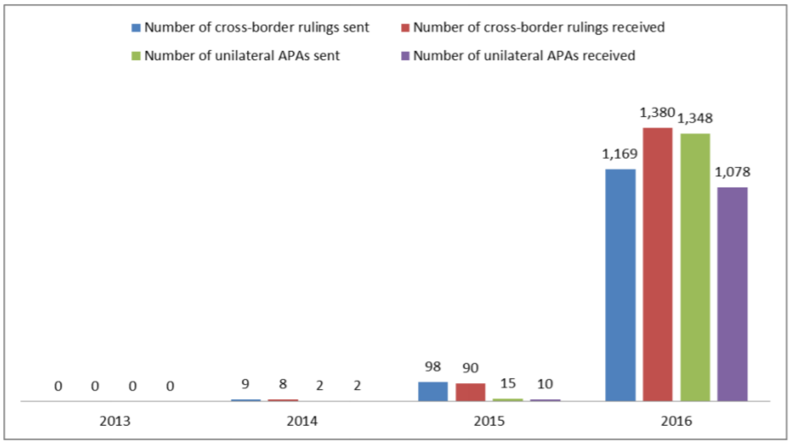
Within the wide range of tax avoidance strategies available to multinationals, DAC 3 is mostly related to LuxLeaks because it involves the automatic exchange of information about crossborder tax rulings and advance pricing arrangements (APAs) issued by EU countries in favour of specific corporate taxpayers.

As the EU Commission put it, "an advance crossborder tax ruling is a confirmation or assurance that tax authorities give to taxpayers on how their tax will be calculated in a crossborder situation before the transaction takes place. Similarly, an advance pricing arrangement determines in advance of crossborder transactions an appropriate set of criteria between associated enterprises (i.e. group companies) for the determination of transfer prices or determines the attribution of profit to a permanent establishment".[75]

As for the relevance of tax rulings and APAs, in 2016 alone there were 1,539 APAs in force with other EU countries[76].

3.3 The origins of DAC 3

DAC 1[77] (approved in 2011) established the exchange of information that is of "foreseeable relevance" to the administration and the enforcement of Member States' tax laws. Crossborder tax rulings and advance pricing arrangements (APAs) were implicitly covered by Article 9 of DAC 1, which required spontaneous exchanges of information under different circumstances, e.g. a supposition that there may be a loss of tax in the other Member State or by Article 5 on exchanges upon request.



Source: EU Commission Staff Working Document on the application of Council Directive (EU) no 2011/16/EU on administrative cooperation in the field of direct taxation, Brussels, 18.12.2017

However, the EU Commission Staff Working Document 2017 describes that "it was evident that the objective of ensuring that all Member States receive sufficient information on tax rulings and APAs could not be achieved through non-coordinated action implemented by each Member State individually on the basis of spontaneous exchanges of information"[78]. As the document and next figures describe, exchanges in 2013 and 2014 were minimal and it was only in 2015 and especially in 2016 (after DAC 3 was approved, but before it entered into force) that spontaneous exchanges of crossborder tax rulings and APAs increased.

Parallel to the EU Directives, the G20 and OECD adopted, in 2013, the OECD's 15 Action Points to address Base Erosion and Profit Shifting (BEPS). Similar to DAC 3, BEPS Action 5 requires exchanges of crossborder rulings and APAs. Specifically, it "requires spontaneous exchange of information on five categories of taxpayer-specific rulings: (i) rulings relating to certain preferential regimes, (ii) unilateral advance pricing arrangements (APAs) or other crossborder unilateral rulings in respect of transfer pricing, (iii) rulings providing for a downward adjustment of taxable profits, (iv) permanent establishment (PE) rulings; and (v) related party conduit rulings"[79]. Spontaneous exchange of information should be among all 'relevant' jurisdictions, including jurisdictions of residence of: the related parties with which the taxpayer enters into a transaction covered by the ruling; the immediate parent of the taxpayer; the ultimate parent of the taxpayer; the head office (for PE rulings); the ultimate beneficial owner of the payment (for conduit rulings)[80].

In 2017, the OECD published the "Peer Review Reports on the Exchange of Information on Tax Rulings"[81], which described statistics on spontaneous exchanges pursuant to BEPS Action 5 and noted concerns or other factors affecting the exchanges. The following 19 EU countries were found to have areas where they could improve, which mostly referred to delays in the exchanges, being unable to gather all relevant information or not having exchanged all relevant information with all relevant jurisdictio

Table: Summary of areas that require improvement in EU countries, as identified by the OECD regarding exchange of information on tax rulings pursuant to BEPS Action 5

Jurisdiction	Details
Several areas for improvement	
Poland	The process for identifying all potential exchange jurisdictions for past and future rulings (other than APAs) is still ongoing. For future rulings (both APAs and other rulings), it does not ensure that information on all potential exchange jurisdictions is always collected. It did not have a process to provide the required information on rulings to the Competent Authority without undue delay. It did not have a process to exchange information on rulings within the timelines required by the transparency framework and did not complete any exchanges in 2016.
Hungary	It is not certain that the process for identifying all potential exchange jurisdictions, particularly the ultimate parent company, for future rulings will always be obtained. It did not yet have a process for the timely submission of the information to the Competent Authority. It experienced significant delays in exchanging information on both past and future rulings. It has not exchanged information on new entrants to the IP (Intellectual Property) regime.
Italy	It experienced some delays in identifying future rulings. For future rulings (other than APAs), information on all potential exchange jurisdictions is not yet always obtained, especially for *ad hoc* Patent Box agreements. Italy has not identified all relevant information on new entrants to the IP regime that obtained benefits with respect to trademarks.
Estonia	It does not currently collect information on the ultimate parent company for all future rulings. It experienced some delays in exchanging information on past rulings and no exchanges of information on future rulings occurred for the year in review.
Spain	It did not appear to apply the best efforts in its approach to obtain information on potential exchange jurisdictions for past rulings which were rulings related to preferential regime or permanent establishment (PE) rulings. It does not yet collect information on all potential exchange jurisdictions for future rulings which come under preferential regimes or are PE rulings.
Austria	It is not certain that information on all potential exchange jurisdictions is always identified for future rulings. No exchanges of information on past or future rulings occurred for the year in review.
The Netherlands	The information-gathering process is still underway in the Netherlands with respect to past rulings. It experienced significant delays in exchanging information on past rulings. The exchange of information on all new entrants from 6 February 2015 to 31 March 2016 has not yet been completed.
Luxembourg	The information-gathering process is still underway in Luxembourg with respect to past rulings and the classification of these rulings under each category. Luxembourg experienced significant delays in exchanging information on past rulings.
Lack of legal framework for the comprehensive collection of information	
Latvia	It does not yet have the necessary legal framework in place for exchanging information on rulings.

France	It did not identify or exchange information on new entrants to the IP regime or taxpayers benefiting from the third category of IP asset.
United Kingdom	It has not exchanged information on new assets of existing taxpayers benefiting from the grandfathered IP regime as this information was not able to be collected other than in the case of a formal investigation.
No identification of all relevant jurisdictions for the exchange of information	
Slovenia	For future rulings for the year in review, it is not certain that information on all potential exchange jurisdictions was always obtained.
Sweden	For future rulings, it did not obtain information on all potential exchange jurisdictions in all cases.
Delays and timeliness of exchanges	
Finland	It did not exchange any information on rulings for the year in review because Finland chose to wait for the creation of the EU central directory platform.
Czech Republic	It has not applied the timelines for exchanges of information on rulings as set out in the transparency framework to the extent that such exchanges are with other EU Member States.
Denmark	It experienced some delays in exchanging information on past rulings.
Germany	It experienced some delays in exchanging information on past rulings.
Greece	It has not applied the timelines for exchanges of information on rulings.
Portugal	It encountered some delays in the exchange of information on rulings within the scope of the transparency framework.
No factors for improvement identified	
Belgium	-
Ireland	-
Slovak Republic	-
Not reviewed	
Bulgaria	
Croatia	
Cyprus	
Lithuania	
Malta	
Romania	

Order of jurisdictions and classification of factors prepared by the author

3.4 Automatic exchange of unilateral crossborder rulings and APAs under DAC 3

As the EU Commission describes[82], EU countries will have to automatically exchange information on advance crossborder tax rulings and APAs with all other EU countries by registering the rulings and APAs in a central directory database that will be accessible by all Member States (but not by the public).

Covered rulings and APAs include (i) past ones (issued between 2012 and 2013 as long as they were still in force by 2014; or any issued between 2014 and 2016) that have to be exchanged by 1 January 2018; and (ii) new ones (issued in or after 2017) that have to be exchanged in September (if issued between January and June) or March (if issued between July and December).

In principle, information to be exchanged about rulings and APAs includes the identity of the taxpayer(s), a summary of the ruling/APA with the amounts of the transaction, the date of issuance or renewal and its duration, the criteria and method for transfer pricing (for APAs) and the list of EU countries and taxpayers in other EU countries that may be affected by the ruling/APA. However, for multilateral APAs that prohibit the disclosure of such APAs, information to be exchanged includes only the above points that were mentioned, not in the APA but in the request that led to the issuance of the APA.

3.5 Differences between DAC 3 and BEPS Action 5

EU countries will have to comply with both DAC 3 and BEPS Action 5. Both frameworks refer to exchanges of tax rulings and APAs, although both characterisations could be considered misleading. Exchanges under BEPS Action 5 are supposed to be "compulsory spontaneous exchanges of information" taking place on specific dates and within agreed formats. That makes them "automatic" rather "spontaneous" exchanges. As for DAC 3, it is supposed to involve "automatic" exchanges while EU countries will not actually exchange information with each other (as happens under DAC 2 or under BEPS Action 5), but rather upload the rulings to a central depository that will be accessible to all EU countries. The main difference, however, is that BEPS Action 5 still limits exchanges only to relevant jurisdictions (those that may be affected) as used to happen under DAC 1, while DAC 3 gives access to information to all EU countries (regardless of whether they are affected by each ruling or APA).

Other more specific differences refer to the scope. While BEPS Action 5 limits exchange to six categories of rulings, DAC 3 includes any type of advance crossborder tax ruling. However, DAC 3 seems to have exclusions which are not available under BEPS Action 5, such as taxpayers who are natural persons or old rulings where the corporate taxpayers are below a threshold or some information on multilateral APAs where information cannot be disclosed to third parties.

3.6 Main findings about DAC 3

Similar to the situation in DAC 2, there are loopholes that may prevent the effectiveness of DAC 3.

- **Negative incentives for authorities**

The first concern has to do with the negative incentives of the agents involved in the information that has to be exchanged. In the case of DAC 2, financial institutions are the main agents in charge of collecting and reporting information (about their own accounts), while authorities merely distribute this information to their foreign counterparts. In the case of DAC 3, however, authorities are not only involved in distributing or exchanging information, but the information itself is about the tax rulings or APAs that the authorities themselves have issued, renewed or amended. In other words, authorities are in charge of sharing information that could compromise or affect them. This could create an incentive not to share all tax rulings (especially compromising ones). While the "automatic" feature should improve past experiences (when authorities had discretion to spontaneously exchange information), there is still a potential for discretion. After all, authorities have to decide if tax rulings involve "crossborder transactions". Given that exchanges under DAC 3 will actually involve uploading and giving direct access to a central database, EU countries could decide to use that central database also for any taxpayer that requests a tax ruling. Having taxpayers submit requests through the central database would not change the access to those requests (access would still be available only to the relevant jurisdiction, who would eventually upload those tax rulings that are covered by DAC 3). However, having a central database would still make it easier to find out about the total number of rulings requested, issued, amended or renewed by each jurisdiction. In this way, compliance with DAC 3 would be easier to enforce.

- **Limited scope and timing**

DAC 3 covers only multinational groups but not individuals (even though high net worth individuals may have as much bargaining power as a multinational). In addition, rulings issued, renewed or amended before 2012 (e.g. the Shell agreement with the Netherlands of 2005 that is facing criticism[83]) will not be covered even if they are still valid. Lastly, tax rulings are covered only if they are considered "advanced", but not if they are issued after filing the tax return but during a tax audit for instance. DAC 3 should be amended to remove all these limitations.

- **Not public**

There will be no public access to information, not even to a list of rulings and their summary, even though the summary description available to EU countries already excludes "the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy" (Art, 8a.6.b of the consolidated DAC).

3.7 The list of loopholes in DAC 3 and proposed fixes

I. Tax rulings with taxpayers who are natural persons are excluded

DAC 3 covers only corporate taxpayers (irrespective of its business form: company, partnership, trust, etc.), but not natural persons, even if natural persons are involved in the tax ruling. In such cases, only corporate taxpayers are identified. Natural persons will be covered by DAC 2, but that refers to completely different information (e.g. bank accounts) which cannot help reveal the existence of tax avoidance through secret agreements.

While it is not possible to ascertain the materiality of this loophole, given the economic power of some high net worth individuals (e.g. billionaires) and the risks posed by golden visas or residency and citizenship by investment schemes, it cannot be ruled out that tax authorities may be engaging in secret agreements with high net worth individuals on how to tax their income and wealth, including for inheritance purposes (e.g. if they are using trusts). The EU Commission Staff Working Document even considered other risks, such as "with respect to natural persons one has to keep in mind that it is not the average private consumer or taxpayer who would request a tax ruling concerning crossborder transactions. (…) this would rather concern for instance large private shareholders, or a private person who requests a tax ruling concerning a trust he/she is involved in. It could well be argued that tax rulings for these types of natural persons should well fall under the information exchange. Furthermore, including all taxpayers (…) would limit the possibility for future circumvention of the information exchange by adapting the respective setup of the tax structure"[84].

Proposed Fix

- Natural persons should also be covered by DAC 3. At the very least, countries should publish statistics on how many tax rulings they have issued in favour of natural persons, also indicating the residency of those natural persons.

II. Only crossborder transactions related to tax rulings or APAs are covered, but not necessarily agreements involving a multinational as a whole (not with regard to a specific transaction)

The new Article 3.16 of the consolidated DAC (as amended by DAC 3) limits the scope to rulings related to crossborder transactions. However, the secret agreement could be related to a multinational as a whole (not to a specific transaction), e.g. to reduce its income tax rate or other applicable taxes in exchange for establishing its headquarters or factory in that jurisdiction. It is not clear if such an agreement regarding a multinational as a whole (instead of a specific transaction) would be covered by DAC 3 even though such an agreement could affect other countries, but also other (smaller) domestic taxpayers in the jurisdiction, e.g. small and medium enterprises.

Proposed Fix

- Any tax ruling (as defined by DAC 3) involving a multinational (a business with operations in more than one country) should be covered by DAC 3, regardless of whether it refers to a crossborder transaction or not. At the very least, EU countries should publish statistics about domestic tax rulings issued in favour of multinationals, identifying those multinationals (even if no other information is disclosed)).

III. Information will not be public

There will be no public access to information, not even to a list of rulings and their summary, even though the summary description available to EU countries already excludes "the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy" (Art, 8a.6.b of the consolidated DAC).

In addition, as the Tax Justice Network's Financial Secrecy Index 2018 describes, many EU countries are already publishing, for free, at least summary information (that may be anonymised) on all or some APAs and unilateral crossborder rulings. Regarding APAs, the list includes Belgium, Denmark, Finland, Luxembourg, the Netherlands and Sweden. As for unilateral crossborder rulings, the list includes Australia, Belgium, Brazil, Denmark, Finland, France, Israel, Kenya, Luxembourg, Mauritius, Netherlands, South Africa and Sweden.

The EU Commission Staff Working Document also described the benefits of public access: "The effectiveness of this option would be very high as for instance businesses would be able to verify whether they are treated equally to their competitors, creating peer pressure on enterprises active in aggressive tax planning, thus reducing the chance of unfair competition. (…) Arguably, the summary information as outlined in the preferred option on the scope of information to be exchanged would not conflict with fundamental rights to conduct a business as it does not lead to disclosure of commercial, industrial or professional secrets"[85].

Giving public access to summary information on rulings and APAs could also create a deterrent effect against illegitimate agreements. Otherwise, some countries' authorities and multinationals may keep engaging in illegitimate agreements knowing that there will be little in the way of consequences in practice, based on the previous lack of compliance with DAC 1's spontaneous exchanges of tax rulings and the delays and other non-compliant factors identified by the OECD Peer Reviews on Action 5 in 2017. On top of everything, the EU Commission reported on the low capacity and staff of many EU countries' authorities dealing with DAC[86].

Proposed Fix

- DAC 3 should give public access at least to basic information on tax rulings, e.g. number of tax rulings, their summary and the identification of the taxpayer (or at least industry sector).

IV. Only "advance" crossborder tax rulings and APAs are covered and if they were issued, amended or renewed since 2012

The new Art. 3.14 states that an "advance" crossborder tax ruling has to be made in "advance" of (i) transactions, (ii) activities that create a permanent establishment or (iii) the filing of tax returns. However, this excludes agreements entered into after the filing of tax returns but during a tax audit.

In addition, the new Art. 8.a.2 establishes that only some tax rulings issued, amended or renewed since 2012 will be covered. However, tax rulings could have been issued, renewed or amended before 2012 but still be valid.

Proposed Fix

- DAC 3 should also cover tax rulings issued during a tax audit even if it happened after the filing of tax returns. DAC 3 should cover - additionally – any tax ruling issued, renewed or amended before 2012 provided that it is still valid.

V. Optional exclusion of tax rulings issued before April 2016 in favour of corporate taxpayers (not involved in mainly investment or financial activities) with a group annual net turnover of below EUR 40 million

While it is not possible to ascertain the materiality of this loophole, there seems to be no good reason to choose it. In addition, this loophole could have been exploited because the exclusion does not refer only to past rulings, but to new or amended ones too: this loophole became known at the latest in 2015 when DAC 3 was approved. Rulings could therefore have been issued or amended by March 2016 and still be excluded from DAC 3.

Proposed Fix

- Countries should not choose this exclusion. Countries that chose the exclusion should publish a list of all the excluded rulings and APAs that they have issued or amended or renewed, identifying the taxpayer and providing a summary of the agreement.

VI. Limited information on APAs with third countries that do not allow disclosure to third countries

Article 8a.3 of DAC 3 establishes that “bilateral or multilateral advance pricing arrangements with third countries shall be excluded from the scope of automatic exchange of information under this Article where the international tax agreement under which the advance pricing arrangement was negotiated does not permit its disclosure to third parties”. If the partner country’s authorities do not give permission for its disclosure, then – Art. 8a.3 continues – information to be exchanged will be relevant data included in the request that led to issuance of such a bilateral or multilateral APA (but not data from the actual APA).

Proposed Fix

- EU countries should attempt to obtain authorisation from other countries to exchange information on those excluded APAs.

- EU countries should publish a list of excluded APAs and the list of taxpayers (or at least the industry sector) that are benefitting from this exclusion and should also publish the identity of all the partner countries that have not given authorisation to share the APAs with other EU countries.

VII. Not all developing countries may have access to tax rulings and APAs

While DAC 3 covers only EU countries, information on tax rulings and APAs could be equally important for third countries, especially developing countries.

As the EU Commission Staff Working Document described, “according to the International Monetary Fund (IMF), there is evidence that tax base spill-overs are particularly marked, when it comes to developing countries. Developing countries derive a greater proportion of their revenue from corporate tax than OECD countries (in extreme cases, up to 90%). Consequently, the sums these countries lose due to corporate tax avoidance are proportionately larger relative to their overall revenues than in developed countries. According to the IMF, base erosion due to multinational profit shifting is 2-3 times larger for developing countries than for OECD countries"[87].

EU countries have to exchange information on tax rulings and APAs with non-EU countries under BEPS Action 5's "compulsory spontaneous exchanges of information". Interestingly, unlike what happens under the CRS, exchanges under BEPS Action 5 require no reciprocity[88]. As a result, all developing countries with which there is an international agreement allowing for spontaneous exchanges of information should be able to receive information from EU countries.

Proposed Fix

EU countries should ensure that they have international agreements with all relevant developing countries so that they may spontaneously send information to developing countries about relevant crossborder tax rulings and APAs.

3.8 Main recommendations

The EU Commission should revise DAC 3 to incorporate the following recommendations:

i. <u>Set up a central database to request tax rulings</u>

Instead of only uploading covered tax rulings to a central depository, all requests for a tax ruling or APA should be done through the same central depository. While countries would only give access (to other authorities) to tax rulings and APAs covered by DAC 3, having a unique platform to request tax rulings would facilitate enforcement of DAC 3. Otherwise, negative incentives (e.g. authorities issuing illegitimate tax rulings may not be willing to exchange them) may prevent its effectiveness.

ii. <u>Expand the scope of DAC 3</u>

The scope of DAC 3 should be expanded to cover taxpayers who are natural persons, rulings involving multinationals as a whole (not only those involving specific crossborder transactions), rulings issued before 2012 that are still valid and rulings issued during tax audits. Until DAC 3's scope is expanded, countries should publish statistics about the rulings that are exempted from exchanges (e.g. those covering individual taxpayers, those covering multinationals but not a specific crossborder transaction, etc.).

iii. <u>Public access</u>

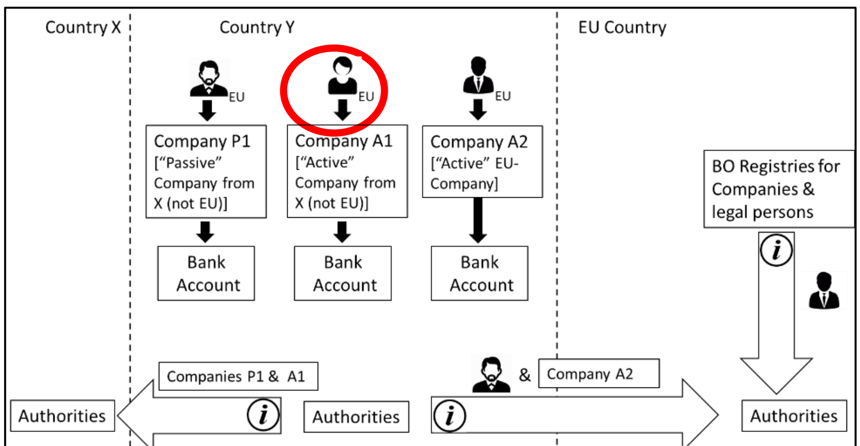
EU countries should publish online free information about all tax rulings and APAs that they have issued, amended or renewed, at least indicating summary information and identifying the taxpayer or at least the industry sector they belong to. They should also publish information about APAs that were not allowed to be disclosed, indicating the jurisdictions that did not allow for such disclosure and the taxpayers that were involved (or at least their industry sector).

iv. <u>Share information with developing countries</u>

EU countries should ensure they have international agreements with all relevant developing countries and that they spontaneously exchange information with them.

Annex A: DAC 2 loopholes and AMLD IV and V

One may wonder whether the 4th or 5th EU Anti-Money Laundering Directives (AMLD IV or V) would not solve the issue of "active" entities under the CRS/DAC 2 (who do not need to identify and report their beneficial owners) or the lack of exchange of information on the beneficial owner in FATCA IGAs. After all, EU countries will have to register the beneficial owners of legal persons (such as companies) and of some legal arrangements (such as trusts). Therefore, people may believe that the lack of exchange of information at the beneficial ownership level for active entities (or under FATCA IGA 1A) may be offset or neutralised by the beneficial ownership registries available in the EU pursuant to AMLD IV or V.



Source: elaborated by author

In essence, AMLD IV or V solve this issue *only* when the (EU) individual holds the bank account through an EU legal person (see "Company A2" in the figure above), or in some cases, through an EU trust. In this case, while the EU country would only receive information from a foreign country about the identity of the "active" EU company holding the foreign bank account ("Company A2"), it would be able to identify the beneficial owners of such an "active" EU company in the corresponding beneficial ownership registries established in EU countries pursuant to AMLD IV or V.

However, if the (EU) individual holds a foreign account through a non-EU "active" company ("Company A1" in the figure above), then: the EU country would not even find out about that account's existence, and, even if it did, such a non-EU company would not be covered by the beneficial ownership registries of AMLD IV or V. It would not therefore be able to identify their beneficial owners either (the EU woman in the red circle in the figure above would remain unidentified by EU authorities).

In the case of an EU individual holding a foreign account through an "active" trust, the issue is even more complex: first of all, the "active" trust would have to be classified as tax resident in the EU for an EU country to receive information about such an account. Secondly, the trust would have to be covered by beneficial ownership registration established by AMLD V, which is not as straightforward as in the case of legal persons (e.g. companies).

The results (lack of exchange of relevant information) would be similar in the event that an EU individual holds an account in the US through an entity (because the US will not report the beneficial owners). If the entity is an EU company, then the EU country where the company is resident would receive information from the US (unless it is an Austrian or Bulgarian company, because neither country will be receiving information from the US). However, the individual may be from a different EU country. If a German holds an account in the US through a French company, only France would receive information about that account (but not Germany).

Annex B: DAC 2 Statistics

Civil society organisations have been calling for and proposing templates for CRS/DAC 2 statistics since 2014[89]. Below are rules and descriptions of what these statistics should encompass.

1. Rules and sanctions that complement or improve statistics

a) The "widest" approach

Financial institutions are required to collect and report information on account holders who are resident in a jurisdiction participating in the CRS (so that their information will eventually be sent to their country of residence). However, the CRS allows countries to require their financial institutions to apply the "wider" approach and collect information on all account holders (regardless of whether they are resident in a jurisdiction participating in the CRS or not) or at least on residents of countries that committed to implement the CRS or that signed the MCAA (because there would be an expectation that those countries will soon become a "participating" jurisdiction with regard to the country where the financial institution is located). The wider approach, covering all account holders, was also favored by financial institutions and by the First Report[90] of the EU Commission's Expert Group on Automatic Exchange of Financial Account Information because it reduces costs for financial institutions, who would otherwise need to run their due diligence process on all account holders again, every time a new jurisdiction becomes a jurisdiction "participating" in the CRS.

The Handbook also considers adopting the "widest" approach (Handbook, page 25), also called the "wider-wider" approach, where financial institutions not only collect but also report relevant information on all account holders to local authorities. While authorities would only exchange information about residents in a participating jurisdiction, they would already hold ready information about residents in non-participating countries until those countries join the CRS and are able to receive such information. In the meantime, however, authorities could publish statistics on both residents in participating and in non-participating countries. This would favour developing countries, most of which are still non-participating countries, to obtain at least basic information on the values held by all of their residents in each foreign country (that publishes statistics).

According to the OECD portal[91] on automatic exchange of information, these are the EU countries implementing at least the wider approach (there is no detail on the type of "wider" approach, whether it covers all account holders and whether information is also reported to authorities or only collected by financial institutions): Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Slovenia, Spain, Sweden and the UK.

b) Identification and reporting by all financial institutions (covered and not covered)

In order to track compliance, countries need to identify all financial institutions that need to report information and those that do not. For this reason, EU countries should require all of a country's financial institutions (not only those covered by the CRS, as suggested by the Handbook) to register with authorities so as to be able to track compliance both of reporting and non-reporting financial institutions. The list of financial institutions that self-register as covered and not covered by the CRS should be crosschecked against other sources available to authorities, such as full lists of financial institutions held by other regulators (e.g. the Central Bank) or from information provided in tax returns identifying the type of business.

In addition, countries should require nil returns to help to crosscheck compliance (Handbook, pages 33-35). These nil returns are declarations by financial institutions that have no information to report either because they are not covered by the CRS or because they do not have any account that should be reported under the CRS or because another financial institution is supposed to be reporting the information. Nil returns should include the reason why the financial institution is not reporting any information, including the identification of the financial institution that is reporting the information instead of them, e.g. in case a trustee does the reporting instead of the trust.

2. Statistics template

Statistics should include the following information:

i. To check consistency and use

-Publish the total number of financial accounts and their values (both of financial institutions that have reported information to authorities and of those financial institutions that filed nil returns) and compare them to the total number of financial accounts held in the country according to the Central Bank.

-Publish the total number of financial accounts, whose information was received from other countries pursuant to the CRS/DAC 2, that were effectively matched to accounts from resident taxpayers (this would show the benefits and uses of the CRS/DAC 2). In addition, countries should publish the total number of financial accounts that belong to account holders identified as resident in the jurisdiction but who are not registered as taxpayers (this could indicate that someone acquired a residency or citizenship via investment scheme only to trick the financial institution and avoid reporting to their real jurisdiction of residence).

ii. To provide basic information to developing countries' authorities, NGOs, journalists and the public

-Publish, classified by country of residence of the account holders, the total number and value of accounts and income, in each type of financial institution (e.g. deposit banks, custodial banks, investment entities, insurance companies, etc.): (i) aggregated (e.g. *all account holders who are Argentine residents hold a total of 1,000 accounts with a total balance account of USDX million and total income of USDX million in Germany's depositary banks*); (ii) disaggregating that information depending on whether those accounts are held by individuals or by entities. Information on accounts held by entities should also be subclassified between "passive" entities and "active" entities; and (iii) in the case of passive entities, providing information at the beneficial ownership level: e.g. *all beneficial owners resident in Argentina (of accounts held by passive entities) hold in total 500 accounts with a total balance account of USDX million and total income of USDX million in Germany's depositary banks*). (iv) Countries could also publish, when aggregating information about accounts held by passive entities, the list of residencies of any beneficial owner of all those passive entities (e.g. *all account holders who are passive entities resident in the Cayman Islands hold in total 10,000 accounts with a total balance account of USDX billion and total income of USDX billion in Germany's depositary banks. The beneficial owners of all of those Cayman-resident passive entities include residents from: Argentina, Brazil, Cyprus, India and Australia*). (v) The same could apply (to crosscheck the last field) when countries aggregate information at the beneficial ownership level: e.g. *all beneficial owners resident in Argentina (of accounts held by passive entities) hold in total 500 accounts with a total balance account of USDX million and total income of USDX million in Germany's depositary banks. Argentine-resident beneficial owners (of accounts held by passive entities in Germany's depositary banks) use passive entities (to hold those accounts) from the following jurisdictions: Cayman Islands, Panama and Uruguay.*

Information provided by points (iv) and (v) could help understand which jurisdictions are being chosen by individuals of every country to incorporate entities (e.g. companies, trusts, etc.) to hold their foreign financial accounts. Similar information could be estimated if all countries had public beneficial ownership registries for all legal vehicles (this way, for example, it would be possible to know the residency of all beneficial owners of German legal vehicles). Information from beneficial ownership registries, however, would not reveal whether these legal vehicles hold any assets (e.g. a bank account) and where those assets are.

iii. To identify potential non-compliance and avoidance schemes

-Publish (based on information from nil returns) the total number and value of accounts and income, held in (i) financial institutions that (a) are not covered by the CRS/DAC 2 (e.g. Central Bank, government financial institutions, etc.), (b) do not have reportable persons, and (c) are not reporting information because another financial institution is reporting it; and (ii) excluded accounts (classified by type of excluded account, e.g. escrow accounts, pre-existing entity accounts with an account balance below $250,000, etc.). An example of this would be: *German depositary banks have in total 100 accounts, with a total account balance of USDX million and total income of USDY million that are "excluded accounts" because they are pre-existing entity accounts with an account balance below USD 250,000*). Ideally, publish this information classified by country of residence of the account holders (e.g. how many of those excluded accounts in Germany belong to Argentines, Austrians, Belgians, etc.).

-Publish (i) accounts that are undocumented accounts (accounts where either the residence or the identity of the account holder couldn't be determined) classified by type of financial institution where they are held (e.g. *German depositary banks have in total 10 accounts, with a total account balance of USDX million and total income of USDY million that are "undocumented accounts");* (ii) account closures, considering the total value held in the account before its closure (e.g. *German depositary banks had in total 20 accounts, with a total account balance of USDX million and total income of USDY million that were closed in 2017);* and (iii) accounts where the account holder is determined not to have any residence for tax purposes.

-Publish statistics on accounts where a power of attorney to manage the account was given to another person (identifying the residency of the account holders and that of the person with a power of attorney), to identify cases of stolen or rented passports from non-participating countries such as Serbia or Bosnia.

Statistics should also identify the number of accounts, account balance and income for account holders (either individuals or beneficial owners of passive entities) that are resident in jurisdictions (i) offering golden visas, citizenship or residency via investment schemes, (ii) that chose voluntary secrecy (to send, but not to receive information), and (iii) that are not participating in the CRS.

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0107&from=EN; 17.5.2018.

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2376&from=en; 17.5.2018.

[3] The term "Financial Institution" means a Custodial Institution, a Depository Institution, an Investment Entity or a Specified Insurance Company (Section VIII.A.3 of Annex I of DAC 2)

[4] In order to exchange information under the CRS, an EU country and a non-EU country would first need to have an international agreement that allows for automatic exchange of information (e.g. both being party to the Multilateral Tax Convention on Administrative Assistance in Tax Matters). Second, they would need a competent authority agreement (e.g. both being signatories to the Multilateral Competent Authority Agreement or MCAA). In such a case, both countries would have to choose each other under the MCAA's "dating system" of Annex E.

[5] https://ec.europa.eu/taxation_customs/individuals/personal-taxation/taxation-savings-income/2003-directive_en; 17.5.2018.

[6] https://ec.europa.eu/taxation_customs/individuals/personal-taxation/taxation-savings-income/repeal-savings-directive-line-with-international-eu-developments_en; 17.5.2018.

[7] http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm; 17.5.2018.

[8] https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca; 17.5.2018.

[9] Summary of Key FATCA Provisions: "(3) withhold and pay over to the IRS 30 per cent of any payments of U.S. source income, as well as gross proceeds from the sale of securities that generate U.S. source income, made to (a) non-participating FFIs, (b) individual account holders failing to provide sufficient information to determine whether or not they are a US person, or (c) foreign entity account holders failing to provide sufficient information about the identity of its substantial US owners." (https://www.irs.gov/businesses/corporations/summary-of-key-fatca-provisions; 15.8.2018).

[10] See more details, page 10 of Knobel, A., "The role of the US as a tax haven. Implications for Europe", Greens/EFA, May 2016, available in: https://www.greens-efa.eu/legacy/fileadmin/dam/Documents/Studies/Taxation/The_US_as_a_tax_haven_Implications_for_Europe_11_May_FINAL.pdf; 17.5.2018.

[11] See section 7.3 of the MCAA: http://www.oecd.org/ctp/exchange-of-tax-information/multilateral-competent-authority-agreement.pdf; 17.5.2018.

[12] See Section 2.1.2 of the MCAA, idem note above.

[13] See more details here: http://taxjustice.wpengine.com/wp-content/uploads/2018/03/20180305_Citizenship-and-Residency-by-Investment-FINAL.pdf; 17.5.2018.

[14] "The term "Investment Entity" means any Entity: (a) which primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer: (i) trading in money market instruments (cheques,

bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading; (ii) individual and collective portfolio management; or (iii) otherwise investing, administering, or managing Financial Assets or money on behalf of other persons; or (b) the gross income of which is primarily attributable to investing, reinvesting, or trading in Financial Assets, if the Entity is managed by another Entity that is a Depository Institution, a Custodial Institution, a Specified Insurance Company, or an Investment Entity described in subparagraph A(6)(a)." (Section VIII.A.6 of Annex I of DAC 2)

[15] "The term "Specified Insurance Company" means any Entity that is an insurance company (or the holding company of an insurance company) which issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract." (Section VIII.A.8 of Annex I of DAC 2)

[16] http://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm; 17.5.2018.

[17] http://www.oecd.org/ctp/exchange-of-tax-information/multilateral-competent-authority-agreement.pdf; 17.5.2018.

[18] Idem Note 10.

[19] http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/; 17.5.2018.

[20] http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/; 17.5.2018.

[21] This number is obtained by comparing the jurisdictions that will send information to Ireland and those that will receive information from Ireland.

[22] http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/common-reporting-standard-and-related-commentaries/#d.en.345314; 17.5.2018.

[23] http://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf; 17.5.2018.

[24] http://www.oecd.org/tax/exchange-of-tax-information/oecd-seeks-input-on-new-tax-rules-requiring-disclosure-of-crs-avoidance-arrangements-and-offshore-structures.htm; 17.5.2018.

[25] http://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf; 14.5.2018.

[26] http://www.oecd.org/tax/exchange-of-tax-information/oecd-releases-consultation-document-on-misuse-of-residence-by-investment-schemes-to-circumvent-the-common-reporting-standard.htm; 17.5.2018.

[27] http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3187&NewSearch=1&NewSearch=1; 17.5.2018.

[28] http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=17739&no=3; 17.5.2018.

[29] CRS Section III.A on "Accounts Not Required to be Reviewed, Identified, or Reported" under Due Diligence for Pre-existing individual accounts

[30] See for example: https://taxjustice.net/wp-content/uploads/2013/04/TJN-141124-CRS-AIE-End-of-Banking-Secrecy.pdf; https://www.taxjustice.net/wp-content/uploads/2013/04/OECD-CRS-Implementation-Handbook-FINAL.pdf; and https://www.taxjustice.net/wp-content/uploads/2013/04/TJN_AIE_ToR_Mar-1-2017.pdf; 17.5.2018.

[31] As of June 2018, these are the jurisdictions that have not set a date to start exchanging information pursuant to the CRS: "Armenia, Benin, Botswana, Burkina Faso, Cambodia, Cameroon, Chad, Côte d'Ivoire, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Former Yugoslav Republic of Macedonia, Gabon, Georgia, Guatemala, Guyana, Haiti, Jamaica, Kazakhstan, Kenya, Lesotho, Liberia, Madagascar, Mauritania, Moldova, Mongolia, Montenegro, Morocco, Niger, Papua New Guinea, Paraguay, Philippines, Rwanda, Senegal, Serbia, Tanzania, Thailand, Togo, Tunisia, Uganda, Ukraine" (https://www.oecd.org/tax/transparency/AEOI-commitments.pdf)

[32] http://www.fatf-gafi.org/countries/d-i/iraq/documents/fatf-compliance-june-2018.html; 15.8.2018.

[33] This was also proposed here (see page 18, idem Note 10).

[34] See details here (pages 12-15): http://taxjustice.wpengine.com/wp-content/uploads/2018/03/20180305_Citizenship-and-Residency-by-Investment-FINAL.pdf; 17.5.2018.

[35] See inconsistencies in the jurisdictions receiving information from and sending information to Cyprus: http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/; 17.5.2018.

[36] See pages 151-152 of the CRS Commentaries here: http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/common-reporting-standard-and-related-commentaries/; 16.8.2018.

[37] Page 152: https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf; 16.8.2018.

[38] Based on the proposal by Henly & Partners: http://www.oecd.org/tax/exchange-of-tax-information/public-input-received-misuse-of-residence-by-investment-schemes-to-circumvent-the-common-reporting-standard.pdf; 16.8.2018.

[39] See Mark Morris proposal, page 76 here: http://www.oecd.org/tax/exchange-of-tax-information/public-input-received-misuse-of-residence-by-investment-schemes-to-circumvent-the-common-reporting-standard.pdf; 16.8.2018.

[40] Based on the proposal by EFAMA, see page 38 here: http://www.oecd.org/tax/exchange-of-tax-information/public-input-received-misuse-of-residence-by-investment-schemes-to-circumvent-the-common-reporting-standard.pdf; 16.8.2018.

[41] Idem previous note.

[42] Based on the proposal by KPMG, see page 70 here: http://www.oecd.org/tax/exchange-of-tax-information/public-input-received-misuse-of-residence-by-investment-schemes-to-circumvent-the-common-reporting-standard.pdf

[43] See more details here (Idem Note 34, page 11).

[44] See page 6: https://ec.europa.eu/taxation_customs/sites/taxation/files/2017_swd_admincooperation_taxation_en.pdf; 17.52018.

[45] "Article 22 – Secrecy. 1 Any information obtained by a Party under this Convention shall be treated as secret (…). 2. Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes": https://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf; 17.5.2018.

[46] "Article 16: Disclosure of information and documents. 1. Information communicated between Member States in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it. Such information may be used for the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2. Such information may also be used for the assessment and enforcement of other taxes and duties covered by Article 2 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (3), or for the assessment and enforcement of compulsory social security contributions. In addition, it may be used in connection with judicial and administrative proceedings that may involve penalties, initiated as a result of infringements of tax law, without prejudice to the general rules and provisions governing the rights of defendants and witnesses in such proceedings": http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02011L0016-20180101; 17.5.2018.

[47] "Art. 16.2: 2. With the permission of the competent authority of the Member State communicating information pursuant to this Directive, and only in so far as this is allowed under the legislation of the Member State of the competent authority receiving the information, information and documents received pursuant to this Directive may be used for other purposes than those referred to in paragraph 1. Such permission shall be granted if the information can be used for similar purposes in the Member State of the competent authority communicating the information." (idem note above).

[48] Idem Note 37, Page 38.

[49] In essence, these funds should belong to a government or central bank, or otherwise be subject to regulation and report to the tax authorities. DAC 2 describes: "The term "Broad Participation Retirement Fund" means a fund established to provide retirement, disability, or death benefits, or any combination thereof, to beneficiaries who are current or former employees (or persons designated by such employees) of one or more employers in

consideration for services rendered, provided that the fund: (a) does not have a single beneficiary with a right to more than 5 % of the fund's assets; (b) is subject to government regulation and provides information reporting to the tax authorities; and (c) satisfies at least one of the following requirements: (i) the fund is generally exempt from tax on investment income, or taxation of such income is deferred or taxed at a reduced rate, due to its status as a retirement or pension plan; (ii) the fund receives at least 50 % of its total contributions (other than transfers of assets from other plans described in subparagraphs B(5) through (7) or from retirement and pension accounts described in subparagraph C(17)(a)) from the sponsoring employers; (iii) distributions or withdrawals from the fund are allowed only upon the occurrence of specified events related to retirement, disability, or death (except rollover distributions to other retirement funds described in subparagraphs B(5) through (7) or retirement and pension accounts described in subparagraph C(17)(a)), or penalties apply to distributions or withdrawals made before such specified events; or (iv) contributions (other than certain permitted make-up contributions) by employees to the fund are limited by reference to earned income of the employee or may not exceed, annually, an amount denominated in the domestic currency of each Member State that corresponds to USD 50,000, applying the rules set forth in paragraph C of Section VII for account aggregation and currency translation.
6. The term "Narrow Participation Retirement Fund" means a fund established to provide retirement, disability, or death benefits to beneficiaries who are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, provided that: (a) the fund has fewer than 50 participants; (b) the fund is sponsored by one or more employers that are not Investment Entities or Passive NFEs; (c) the employee and employer contributions to the fund (other than transfers of assets from retirement and pension accounts described in subparagraph C(17)(a)) are limited by reference to earned income and compensation of the employee, respectively; (d) participants that are not residents of the Member State in which the fund is established are not entitled to more than 20% of the fund's assets; and (e) the fund is subject to government regulation and provides information reporting to the tax authorities.
7. The term "Pension Fund of a Governmental Entity, International Organisation or Central Bank" means a fund established by a Governmental Entity, International Organisation or Central Bank to provide retirement, disability, or death benefits to beneficiaries or participants who are current or former employees (or persons designated by such employees), or who are not current or former employees, if the benefits provided to such beneficiaries or participants are in consideration of personal services performed for the Governmental Entity, International Organisation or Central Bank". (DAC 2, Annex I, Section VIII.B.5 and 6)

[50] https://www.economist.com/finance-and-economics/2015/02/26/leaks-on-tap; 17.5.2018.

[51] http://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf; 17.5.2018.

[52] DNFBP are Designated non-financial businesses and professions such as lawyers, corporate service providers, real estate agents, etc. that are subject to AML requirements.

[53] "While likely to be rare in practice, where accounts were opened prior to AML/KYC requirements being in place and Documentary Evidence has not been obtained at the time of or since the opening of the account, provided the Financial Institution's policies and procedures provide sufficient comfort that the address on file is current, as set out in the Standard, then the Documentary Evidence condition can still be satisfied" (page 76, CRS Implementation Handbook 2018, idem Note 19).

[54] See CRS Implementation Handbook 2018 (Idem Note 19), page 149: https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf; 17.5.2018.

[55] https://www.ft.com/content/91c23442-c7ee-11e6-8f29-9445cac8966f; 16.8.2018

[56] See note 69, on Henley & Partners

[57] http://www.taxjustice.net/2016/07/12/luxembourg-backs-supporting-tax-haven-usa/; http://www.taxjustice.net/2016/06/09/luxembourg-starts-rush-to-bolster-tax-haven-usa/; 30.1.2017.

[58] https://www.taxjustice.net/2017/05/11/achilles-heel-effective-beneficial-ownership-registration-everyone-fixed-25/; 16.8.2018.

[59] See pages 33-35 here: https://publications.iadb.org/bitstream/handle/11319/8646/Regulation-of-Beneficial-Ownership-in-Latin-America-and-the-Caribbean.PDF?sequence=5&isAllowed=y; 16.8.2018.

[60] See page 14, footnote 31 here: https://www.taxjustice.net/wp-content/uploads/2018/06/TJN2018-BeneficialOwnershipRegistration-StateOfPlay-FSI.pdf; 16.8.2018.

[61] See more details here: https://www.taxjustice.net/2017/06/12/double-layer-secrecy-add-lawyer-confidentiality-banking-secrecy/; 17.5.2018.

[62] https://www.newsd.admin.ch/newsd/message/attachments/43165.pdf; 17.5.2018.
[63] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02011L0016-20180101; 17.5.2018.
[64] https://ec.europa.eu/taxation_customs/sites/taxation/files/2017_report_administrative_cooperation_direct_taxation_en.pdf; 17.5.2018.
[65] https://www.federalreserve.gov/data/statbanksus/liabfor20180630.htm; 6.7.2018.
[66] https://data.snb.ch/en/warehouse/BSTA#!/cube/BSTA@SNB.JAHR_UL.BIL.PAS.TOT?fromDate=2013&toDate=2017&dimSel=KONSOLIDIERUNGSSTUFE(U),INLANDAUSLAND(A,ABW,AFG,AGO,ALB,AND,ARE,ARG,ARM,AUS,AUT,AZE,BDI,BEL,BEN,BES,BFA,BGD,BGR,BHR,BHS,BIH,BLR,BLZ,BMU,BOL,BRA,BRB,BRN,BTN,BWA,CAF,CAN,CHL,CHN,CIV,CMR,COD,COG,COL,COM,CPV,CRI,CUB,CUW,CYM,CYP,CZE,DEU,DJI,DMA,DNK,DOM,DZA,ECU,EGY,ERI,ESP,EST,ETH,FIN,FJI,FLK,FRO,FSM,GAB,GBR,GEO,GGY,GHA,GIB,GIN,GMB,GNB,GNQ,GRC,GRD,GRL,GTM,GUY,HKG,HND,HRV,HTI,HUN,IDN,IMN,IND,IRL,IRN,IRQ,ISL,ISR,ITA,JAM,JEY,JOR,JPN,KAZ,KEN,KGZ,KHM,KIR,KOR,KWT,LAO,LBN,LBR,LBY,LCA,LKA,LSO,LTU,LUX,LVA,MAC,MAR,MDA,MDG,MDV,MEX,MHL,MKD,MLI,MLT,MMR,MNE,MNG,MOZ,MRT,MUS,MWI,MYS,NAM,NCL,NER,NGA,NIC,NLD,NOR,NPL,NRU,NZL,OMN,PAK,PAN,PER,PHL,PLW,PNG,POL,PRK,PRT,PRY,PSE,PYF,QAT,ROU,RUS,RWA,SAU,SDN,SEN,SGP,SHN,SLB,SLE,SLV,SMR,SOM,SRB,SSD,STP,SUR,SVK,SVN,SWE,SWZ,SXM,SYC,SYR,TAA,TCA,TCD,TGO,THA,TJK,TKM,TLS,TON,TTO,TUN,TUR,TUV,TWN,TZA,UGA,UKR,URY,USA,UZB,VAT,VCT,VEN,VNM,VUT,WLF,WSM,XVU,YEM,ZAF,ZMB,ZWE,BIZ_4T,BIZ_4W,BIZ_2W,BIZ_4Y,BIZ_3C,BIZ_4U,BIZ_5R,BIZ_5K,BIZ_FR,BIZ_1N,BIZ_PU,BIZ_1Z),WAEHRUNG(U),BANKENGRUPPE(A30); 6.7.2018.
[67] Idem Note 10, Page 4.
[68] See Annex IV, Hallmark.D regarding "Specific hallmarks concerning automatic exchange of information agreements in the Union" here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0335; 6.7.2018.
[69] http://www.oecd.org/tax/beps/public-comments-mandatory-disclosure-rules-for-CRS-avoidance-arrangements-offshore-structures.pdf; 17.8.2018.
[70] Art. 8.1.e of DAC 1: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32011L0016; 15.8.2018.
[71] http://www.oecd.org/tax/beps/beps-about.htm; 21.5.2018.
[72] https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transparency/swd_2015_60.pdf; 21.5.2018.
[73] https://www.icij.org/investigations/luxembourg-leaks/new-leak-reveals-luxembourg-tax-deals-disney-koch-brothers-empire/; 21.5.2018.
[74] https://www.icij.org/investigations/luxembourg-leaks/; 21.5.2018.
[75] https://ec.europa.eu/taxation_customs/sites/taxation/files/council_directive_eu_2015_2376_en.pdf; 21.5.2018.
[76] https://ec.europa.eu/taxation_customs/sites/taxation/files/2016_jptf_apa_statistics_en.pdf; 21.5.2018.
[77] http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32011L0016; 21.5.2018.
[78] https://ec.europa.eu/taxation_customs/sites/taxation/files/2017_swd_admincooperation_taxation_en.pdf; 21.5.2018.
[79] http://www.dbriefsap.com/bytes/Dec2017_1.OECD%E2%80%99sfirstpeerreviewreportonthespontaneousexchangeoftaxru...pdf; 21.5.2018.
[80] https://www.oecd.org/tax/beps/beps-action-5-harmful-tax-practices-peer-review-transparency-framework.pdf; 21.5.2018.
[81] Idem Note 79.
[82] https://ec.europa.eu/taxation_customs/sites/taxation/files/council_directive_eu_2015_2376_en.pdf; 21.5.2018.
[83] https://nltimes.nl/2018/06/18/dutch-govt-fire-tax-deal-shell; 6.7.2018.
[84] Idem Note 72, Page 50.
[85] Idem Note 72, Page 55.
[86] The EU Commission Staff Working Document of 2017 wrote: "Member States have reported that relatively few staff is dedicated to administrative cooperation. Most tax administrations report having between 1 to 5 staff in the CLOs" (https://ec.europa.eu/taxation_customs/sites/taxation/files/2017_swd_admincooperation_taxation_en.pdf; 21.5.2018).

[87] Idem Note 72, Page 18.

[88] "There are a number of benefits associated with a reciprocal approach to exchange of information. However, the benefits of reciprocity do not appear to have any relevance where the legal system or administrative practice of only one country provides for a specific procedure. Accordingly, a country that has granted a ruling that is subject to the obligation to spontaneously exchange information cannot invoke the lack of reciprocity as an argument for not spontaneously exchanging information with an affected country, where the affected country does not grant, and therefore cannot exchange, rulings which are subject to the obligation to spontaneously exchange information" (OECD "Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – Action 5: 2015 Final Report", page 55: https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/BEPS%20Action%205%20-%20Counter%20Harmful%20Tax%20Practices%20More%20Effectively%2C%20Taking%20into%20Account%20Transparency%20and%20Substance%20(October%202015).pdf; 21.5.2018).

[89] See for example here (pages 10-11): http://taxjustice.wpengine.com/wp-content/uploads/2018/03/20180305_Citizenship-and-Residency-by-Investment-FINAL.pdf; here (pages 37-52): https://www.taxjustice.net/wp-content/uploads/2013/04/TJN_AIE_ToR_Mar-1-2017.pdf; here (pages 20-21): https://www.taxjustice.net/wp-content/uploads/2013/04/OECD-CRS-Implementation-Handbook-FINAL.pdf; here (page 41): https://taxjustice.net/wp-content/uploads/2013/04/TJN-141124-CRS-AIE-End-of-Banking-Secrecy.pdf; 17.5.2018.

[90] http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=18068&no=1; 21.5.2018.

[91] http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/#d.en.345489; 17.5.2018.