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Interplay Between Anti-Money Laundering Provisions and Exchange of Information for Tax Transparency Purposes at EU Level

Irene Schiefer

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Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Irene Schiefer earned her LLM in European and International Business Law, with distinction, at the University of Vienna, Austria, and is a lawyer in the field of corporate criminal law and compliance in Italy. She completed her law studies in Italy at the University of Bologna and Trento, attending one academic year at the University of Montpellier – UM1 in France. After her Masters Degree in Law, she achieved the postgraduate specialization for legal professions at the University of Turin, Italy, and started her professional career in various sectors of law (civil law, litigation, human rights, criminal law) as a trainee lawyer and as an intern at the Criminal Court of Turin. Since her admission to the Italian Bar Association in 2016, she has been working as a lawyer mainly in the area of criminal law and corporate law, with specialization in corporate liability, compliance, data protection and privacy.

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Abstract

This thesis provides an overview on the legislative frameworks adopted at EU-level to combat money laundering and terrorist financing (AML/CFT provisions) and to establish an efficient system of exchange of information for tax transparency purposes (DAC provisions) with the aim to analyze them and, subsequently, to point out the interdependency and interconnection between the two legal frameworks.

The main part of the first chapter is focused on the legislative measures adopted at EU-level in order to fight money laundering and terrorist financing and their development, accordingly discussing the First, Second, Third, Fourth and Fifth AML-Directive.

The aim of the second chapter is to analyze the initiatives undertaken at EU-level in order to combat tax avoidance and tax evasion, accordingly discussing the Directive on Administrative Cooperation in the field of taxation and its subsequent amendments (DAC 1, DAC 2, DAC 3, DAC 4, DAC 5, DAC 6 and DAC 7).

In both chapters, before discussing the legislative EU framework, a short overview regarding the main instruments adopted at international level by the most influent stakeholders involved is provided (UN Conventions and FATF Recommendations in the field of AML/CFT; FATCA and CRS, issued, respectively, by the US and the OECD in the field of automatic exchange of information and tax transparency), also in order to show the influence of these initiatives on the following EU measures.

The purpose of the third chapter is to summarize and highlight the link between the AML and DAC provisions. The last part of the thesis provides also a short summary concerning the challenges and loopholes that still have to be faced in order to guarantee a proper functioning of the interconnection between AML and DAC provisions and, therefore, the efficiency of DAC as well as a brief insight into the further measures planned by the European Commission in order to tackle the main challenges identified in this work. 74

The thesis concludes that the existing synergy and interplay between the AML and DAC enhances the functioning of DAC, showing up that the concept of beneficial owner and the need to identify the beneficial owner as well as accurate up-to-date information on the beneficial owner, are key factors for both, AML and DAC provisions. Thus, a clear and uniform definition of beneficial owner remains one of the main challenges in order to guarantee a proper functioning of the interaction of these provisions and, therefore, the efficiency of DAC.

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List of Abbreviations

AEOI	Automatic Exchange of Information
AML	Anti-Money Laundering
AML – Regulation	Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, COM (2021) 420 final, July 2021
BO	Beneficial Owner
CAA	Competent Authority Agreement
CbC	Country-by-Country
CDD	Costumer Due Diligence
CFT/CTF	Countering the Financing of Terrorism/ Counter Terrorist Financing
CJEU	Court of Justice of the European Union
CRS	Common Reporting Standard
DAC	Council Directive (EU) 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1 and its subsequent amendments
DAC 1	Council Directive (EU) 2011/16 of 15 February 2011 on administrative

	cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1
DAC 2	Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2014] OJ L 359/1
DAC 3	Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2015] OJ L 332/1
DAC 4	Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory exchange of information in the field of taxation [2016] OJ L 146/8
DAC 5	Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money laundering information by tax authorities [2016] OJ L 342/1
DAC 6	Council Directive (EU) 2018/822 of

	25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements [2018] OJ L 139/1
DAC 7	Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation [2021] OJ L 104/1
EC	European Commission
EDD	Enhanced Due Diligence
EOI	Exchange of Information
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
FFI/FFIs	Foreign Financial Institution(s)
FI/FIs	Financial Institution(s)
First AML-Directive/ 1st AML-D	Council Directive (EEC)91/308 of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L166/77
Fifth AML-Directive/ 5th AML-D	Parliament and Council Directive (EU) 2018/843 of 30 May 2018 amending

	Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43
FIU/FIUs	Financial Intelligence Unit(s)
Fourth AML- Directive/ 4th AML-D	Parliament and Council Directive (EU) 2015/859 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73
FSRBs	FATF-Style Regional Bodies
HIRE Act	Hiring Incentives to Restore Employment Act
IGA/IGAs	Intergovernmental Agreement(s)
I.R.S.	Internal Revenue Service (is the revenue service of the United States federal government; it is part of the Department of

	the Treasury)
KYC	Know-Your-Costumer/Knowing-Your-Costumer
ML	Money Laundering
MNE	Multinational Enterprises
Mutual Assistance Directive	Council Directive (EEC) 77/799 of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation [1977] OJ L 336/15
NFE	Non-Financial Entities
OECD	Organisation for Economic Co-operation and Development
Palermo Convention	United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, A/RES/55/25
PEPs	Politically Exposed Persons
Regulation AML-Authority	Proposal for a Regulation of the European Parliament and the of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU)

	1095/2010; COM (2021) 421 final, July 2021
RBA	Risk-Based-Approach
Savings Directive	Council Directive (EC) 2003/48 of 3 June 2003 on taxation of savings income in the form of interest payments [2003] OJ L 157/38
Second AML-Directive/ 2nd AML-D	Parliament and Council Directive (EC) 2001/97/EC of 4 December 2001 amending Directive 91/308EEC on the prevention of the use of the financial system for the purpose of money laundering [2001] OJ L344/76
SDD	Simplified Due Diligence
Sixth AML-Directive	Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849, COM (2021) 423 final, July 2021
SMEs	Small and Medium-sized Enterprises
TAs	Tax Authorities

TF	Terrorist Financing
Third AML- Directive/ **3rd AML-D**	Parliament and Council Directive (EC) 2005/60 of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L 309/15
TIEA	Tax Information Exchange Agreement
UN	United Nations
UNCAC	United Nations Convention against Corruption, New York, 31 October 2003, Doc. A/58/422
US/U.S.	United States of America
Vienna Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988, E/CONF.82/14

I. CHAPTER: Anti-money laundering provisions at international and EU-level

1.1. Definiton of money laundering

Money laundering (hereinafter also "ML"), "generally defined as a process of concealing the illicit origin of money or assets acquired through crime activities"[1], "is harmful as it provides an opportunity for criminals to launder (or legitimise) criminal proceeds and reinvest laundered funds into their activities".[2]

The significant developments in financial information, technology and communication provide benefits and opportunities for the global community and the economic environment.[3] However, criminals and money launderers can take advantage of these kind of development as well as of the liberalization of markets ("of the freedom of capital movements and the freedom to supply financial services which the Union's integrated financial area entails"[4]) to make their illegal money appear legitimate and this process is generally referred to as "money laundering".[5]

Money laundering, frequently carried out in an international context, became an increasing concern during the last decades for the global financial community,

[1] Thai Van Ha, "The Development of European Union Legislative Framework against Money Laundering and Terrorist Financing in the Light of International Standards" (2021) 18 Technium Soc Sci J 185, 185.
[2] Matthew Manning/Gabriel T W Wong/ Nada Jevtovic, "Investigating the relationships between FATF recommendation compliance, regulatory affiliations and the Basel Anti-Money Laundering Index" (2021) 34 (3) Security Journal 566, 566.
[3] Van Ha (n 1), 185.
[4] Parliament and Council Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43 ("Fifth AML-Directive"), recital (2).
[5] Van Ha (n 1), 185.

because "ML creates economic distortions, erosion of financial sectors, reduced government revenue and other socioeconomic effects".[6]

It became clear that national legislation was not sufficient to tackle these new challenges and that international coordination and cooperation became essential.

The EU have actively taken part in the development of international, regional and national anti-money laundering (hereinafter also "AML") instruments, because flows of illicit money "can damage the integrity, stability and reputation of the financial sector, and threaten the internal market of the Union as well as international development".[7]

The anti-money laundering measures in the EU have been developed parallel to the international standards in the field, taking particular account of the Financial Action Task Force (FATF) Recommendations.

According to FATF, "money laundering is the processing of criminal proceeds to disguise their illegal origin"[8] - basically bringing the "cleaned" proceeds obtained from criminal activity (such as illegal arms sales, smuggling, the activities of organised crime, including for example drug trafficking and prostitution rings, as well as embezzlement, insider trading, bribery[9]) back to legal economy and

[6] Manning /Wong /Jevtovic (n 2), 566.
[7] Parliament and Council Directive (EU) 2015/859 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73 ("Fourth AML-Directive"), recital (1).
[8] FATF, "What is Money Laundering?" <www.fatf-gafi.org/faq/moneylaundering/> accessed 6 November 2021.
[9] FATF, "What is Money Laundering?" <www.fatf-gafi.org/faq/moneylaundering/> accessed 6 November 2021.

making these proceeds appear originating from a legitimate manner.[10] The purpose of money laundering is to make "dirty money" become "clean money".[11]

The money laundering process typically consists of three stages: I) placement: "the proceeds of crime are put into the financial system in order to remove the direct link between money and the illegal activities through it has acquired";[12] II) layering: consists in concealing "the criminal origin of the proceeds";[13] "money is transferred between accounts to conceal the true origin from which it is generated. Some methods used in layering include the purchase of high value assets with cash and then converting or reselling them. The identity of the parties to the transaction may be obscured and the assets may become difficult to trace back and confiscate";[14] III) integration: "laundered money is eventually introduced into the legitimate economy",[15] "creating an apparent legal origin for criminal proceeds and allows the criminal to use the criminal proceeds for its personal benefit".[16]

The increasing awareness of the importance to combat financial crimes has led at international level to the development of the global anti-money laundering framework, which is the combination of "hard law" and "soft law" instruments. The first are mainly agreements under the UN treaties and the latter are standards set with the FATF Recommendations.[17]

[10] Van Ha (n 1), 186.
[11] ibid.
[12] ibid.
[13] Laurel S. Terry and Jos Carlos Llerena Robles, "The relevance of FATFS Recommendations and fourth round of mutual evaluations to the legal profession" (2018) 42 Fordham Int'l LJ 627, 634.
[14] Van Ha (n 1), 186.
[15] ibid.
[16] Terry and Llerena Robles (n 13), 634.
[17] Van Ha (n 1), 187-188.

1.2. Anti–money laundering provisions at international level

1.2.1. The UN Conventions

The United Nations played a leading role in setting up the anti-money laundering framework.

The starting point of such efforts was the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (or the Vienna Convention)[18] adopted in 1988 (entry in force on 11 November 1990), establishing international cooperation in mutual legal assistance.[19] The purpose of the Convention was "to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension".[20]

This Convention aimed to "to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing"[21] or to weaken the power of "financial crimes by curtailing their economic capabilities".[22] To achieve this, it was considered important "to tackle the opportunities that enable such perpetrators to launder the proceeds of their crimes".[23]

The Vienna Convention was a first milestone in building up the following framework in combating money laundering.

[18] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances , Vienna, 20 December 1988, E/CONF.82/14 ("Vienna Convention").
[19] Van Ha (n 1), 187.
[20] UN Vienna Convention, art. 2 (1) sent.1.
[21] UN Vienna Convention, preamble, par. 6.
[22] Van Ha (n 1), 187.
[23] ibid.

In November 2000 the Palermo Convention (The United Nations Convention against Transnational Organized Crime and the Protocols Thereto)[24] was adopted, which came into force in 2003. The Convention requires States parties to build regulatory framework to detect and deter all forms of money laundering, including customer identification, suspicious transactions report, and record keeping.[25] States parties are obligated to adopt legislative and other measures to criminalize the laundering of the proceeds of crime and not only drug-related offences as contained in the Vienna Convention but also other serious offences, such as corruption[26] and also to strengthen mutual legal assistance.[27]

In October 2003 the United Nations Convention against Corruption (UNCAC)[28] has been adopted (came in effect in 2005). The Convention provides measures to prevent and combat corruption, and measures to prevent money laundering.[29] According to this Convention State parties must criminalize bribery, embezzlement of public funds, obstruction of justice and the concealment, conversion or transfer of criminal proceeds.[3031]

1.2.2. The Financial Action Task Force (FATF) and FATF Recommendations

A significant achievement in the fight against money laundering has been reached with the establishment of the Financial Action Task Force (FATF), an

[24] United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, A/RES/55/25 ("Palermo Convention").
[25] Palermo Convention, art. 7.
[26] Palermo Convention, art. 8.
[27] Van Ha (n 1), 188.
[28] United Nations Convention against Corruption, New York, 31 October 2003, Doc. A/58/422 ("UNCAC").
[29] UNCAC, Chapter II.
[30] UNCAC, Chapter III.
[31] Van Ha (n 1), 188.

independent inter-governmental body established in 1989 by the Ministers of its Member jurisdictions, that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.[32]

The mandate of the FATF was/is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering and terrorist financing.[33]

Less than one year after its establishment, the forty FATF Recommendations have been issued, which set an international standard, that countries should implement through measures adapted to their particular circumstances in order to combat money laundering and terrorist financing. These forty Recommendations are recognized as the global anti-money laundering (AML) and counter-terrorist financing (CTF) standard. [34]

The FATF Recommendations set out the essential measures that countries should have in place to:

i) "identify the risks, and develop policies and domestic coordination;

ii) pursue money laundering, terrorist financing and the financing of proliferation;

iii) apply preventive measures for the financial sector and other designated sectors;

[32] FATF (2012-2021), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France, 7 ("FATF Recommendations"). <www.fatf-gafi.org/recommendations.html> accessed 8 November 2021.
[33] FATF Recommendations, 7.
[34] FATF Recommendations, 7.

iv) establish powers and responsibilities for the competent authorities (e.g., investigative, law enforcement and supervisory authorities) and other institutional measures;

v) enhance the transparency and availability of beneficial ownership information of legal persons and arrangements; and

vi) facilitate international cooperation." [35]

In 1990 the original FATF Forty Recommendations were drawn up as an initiative to combat the misuse of financial systems by persons laundering drug money. In 1996, the Recommendations were revised to broaden their scope well beyond drug-money laundering in order to reflect evolving money laundering trends and techniques. In October 2001 the FATF expanded its mandate to deal with the issue of the funding of terrorist acts and terrorist organisations, creating the Eight (later expanded to Nine) Special Recommendations on Terrorist Financing. [36]

Further, FATF Recommendations have been reviewed in the following years, in close co-operation with the FATF-Style Regional Bodies (FSRBs) and the observer organisations, including the International Monetary Fund, the World Bank and the United Nations, in order to address new and emerging threats, to strengthen the requirements for higher risk situations, and to allow countries to take a more focused approach in areas where high risks remain or implementation could be enhanced.[37]

The process of revision, started in 2009, has been concluded in 2012 and the recommendations resulted updated with the supplement of the following issues:

[35] FATF Recommendations, 7.
[36] FATF Recommendations, 7.
[37] FATF Recommendations, 8.

(i) Anti-money laundering and counter terrorist financing policies and coordination; (ii) money laundering and confiscation; (iii) terrorist financing and proliferation; (iv) preventive measures, such as such as Costumer Due Diligence (CDD) and record keeping; (v) measures to ensure transparency on the ownership of legal persons and arrangements; (vi) the establishment of competent authorities with appropriate functions; and (vii) improving powers, mechanisms, and arrangements to cooperate with other countries. [38]

The new standards include a significant number of "interpretive notes" to clarify concepts and obligations, and give more precise guidance in the application of the Recommendations.[39]

The new Recommendation on the risk-based approach (RBA)[40] sets out the principles and the underlying requirements.[41] In this context, "countries should first identify, assess and understand the risks of money laundering and terrorist finance that they face, and then adopt appropriate measures to mitigate the risk. This risk-based approach allows countries, within the framework of the FATF requirements, to apply preventive measures that are commensurate to the nature of risks, in order to focus their efforts in the most effective way".[42] The risk-based approach applies across all relevant FATF Recommendations.[43] Adopting this approach, countries as well as financial institutions (FI) and other entities (real estate agents, lawyers) are required to identify, assess and understand their ML/TF

[38] Van Ha (n 1), 189.
[39] Bjørn Skogstad Aamo, "Combating Money Laundering and Terrorist Financing: Monitoring the Implementation of FATF Recommendations" (2017) 28 (1) European business law review 89, 92.
[40] See Recommendation 1 and its interpretative notes.
[41] Aamo (n 39), 93.
[42] FATF Recommendations, 8.
[43] Aamo (n 39), 93.

risks.[44] The objective is to understand which risks are more important and which are of less significance.[45]

In addition, the new Recommendations 24 and 25 require several measures to identify the beneficial ownership of legal persons or arrangements.[46] A beneficial owner is the natural person(s) who directly or indirectly owns or exercises ultimate effective control over a legal person or arrangement.[47] Competent authorities should have adequate, accurate and timely access to beneficial ownership information.[48] All companies should be registered and should obtain and record basic information. Company registries should record some of the basic information[49] and this information held by the company registry should be made

[44] ibid.
[45] Ibid.
[46]See FATF, FATF Guidance Transparency and Beneficial Ownership (2014) ("FATF Guidance") <www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> accessed 13 November 2021. Recommendation 24 - Transparency and beneficial ownership of legal persons: "Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22."; Recommendation 25 - Transparency and beneficial ownership of legal arrangements: "Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22."
[47] Definition of Beneficial owner from the Glossary to the FATF Recommendations: "Beneficial owner refers to the natural person(s) who ultimately[50] owns or controls a customer[51] and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement". [50] Reference to "ultimately owns or controls" and "ultimate effective control" refer to "situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control. [51] This definition should also apply to beneficial owner or a beneficiary under a life or other investment linked insurance policy". (Footnote reference numbers taken from the Glossary to the FATF Recommendations).
[48] See Interpretative Note to Recommendation 24, par. 17.
[49]This basic information include the following: the company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers (for example,

publicly available[50] as well as beneficial ownership information, which should be proactively held in company registries or by companies[51]; and/or countries may use a variety of existing information to determine who the beneficial owner is, when necessary.[52]

Moreover, tax crimes should be included as predicate offence for money laundering in national legislation. In this way it would be easier to report transactions as suspicious to the Financial Intelligence Unit (FIU) (in case a transaction is found out of proportion with the known income and assets of a client by a bank), which will inform the tax authorities (TAs) as relevant.[53]

The FATF Forty Recommendations, together with the Nine Special Recommendations, are universally recognized as the international standards for anti-money laundering and countering the financing of terrorism (AML/CFT).

1.2.2.1. FATF Guidance: Beneficial Owner (BO)

According to the FATF Guidance on Transparency and Beneficial Ownership, the FATF definition of beneficial owner[54] in the context of legal persons must be distinguished from the concepts of legal ownership and control. "On the one hand, legal ownership means the natural or legal persons who, according to the respective jurisdiction's legal provisions, own the legal person. On the other hand, control refers to the ability of taking relevant decisions within the legal person and

memorandum and articles of association), and a list of directors (See Interpretative Note to Recommendation 24, par. 5).
[50] See Interpretative Note to Recommendation 24, par. 13.
[51] See Interpretative Note to Recommendation 24, par. 2.
[52] Aamo (n 39), 93.
[53] ibid.
[54] See n 47.

impose those resolutions, which can be acquired by several means (for example, by owning or controlling a block of shares)".[55]

In any case, as specified by the FATF Guidance, "an essential element of the FATF definition of beneficial owner is that it extends beyond legal ownership and control to consider the notion of ultimate (actual) ownership and control. In other words, the FATF definition focuses on the natural (not legal) persons who actually own and take advantage of capital or assets of the legal person; as well as on those who really exert effective control over it (whether or not they occupy formal positions within that legal person), rather than just the (natural or legal) persons who are legally (on paper) entitled to do so. For example, if a company is legally owned by a second company (according to its corporate registration information), the beneficial owners are actually the natural persons who are behind that second company or ultimate holding company in the chain of ownership and who are controlling it. Likewise, persons listed in the corporate registration information as holding controlling positions within the company, but who are actually acting on behalf of someone else, cannot be considered beneficial owners because they are ultimately being used by someone else to exercise effective control over the company".[56]

Furthermore, regarding legal persons, "another essential element to the FATF definition of beneficial owner is that it includes natural persons on whose behalf a transaction is being conducted, even where that person does not have actual or legal ownership or control over the customer. This reflects the distinction in

[55] FATF Guidance, 8, Section III, par. 15.
[56] FATF Guidance, 8, Section III, par. 15.

customer due diligence (CDD) in Recommendation 10[57] which focuses on customer relationships and the occasional customer. This element of the FATF definition of beneficial owner focuses on individuals that are central to a transaction being conducted even where the transaction has been deliberately structured to avoid control or ownership of the customer but to retain the benefit of the transaction".[58]

As specified in the FATF Guidance, the definition of beneficial owner "also applies in the context of legal arrangements, meaning the natural person(s), at the end of the chain, who ultimately owns or controls the legal arrangement, including those persons who exercise ultimate effective control over the legal arrangement,

[57] According to FATF Recommendation 10 "Financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names. Financial institutions should be required to undertake customer due diligence (CDD) measures when: (I) establishing business relations; (II) carrying out occasional transactions: (i) above the applicable designated threshold (USD/EUR 15,000); or (iii) that are wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16; (III) there is a suspicion of money laundering or terrorist financing; or (IV) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.
(…) The CDD measures to be taken are as follows: (a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information. (b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer. (c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship. (d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds. (…)
Financial institutions should be required to verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal conduct of business.
Where the financial institution is unable to comply with the applicable requirements under paragraphs (a) to (d) above (subject to appropriate modification of the extent of the measures on a risk-based approach), it should be required not to open the account, commence business relations or perform the transaction; or should be required to terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.
These requirements should apply to all new customers, although financial institutions should also apply this Recommendation to existing customers on the basis of materiality and risk, and should conduct due diligence on such existing relationships at appropriate times."
[58] FATF Guidance, 8, Section III, par. 15.

and/or the natural person(s) on whose behalf a transaction is being conducted. However, in this context, the specific characteristics of legal arrangements make it more complicated to identify the beneficial owner(s) in practice. For example, in a trust, the legal title and control of an asset are separated from the equitable interests in the asset. This means that different persons might own, benefit from, and control the trust, depending on the applicable trust law and the provisions of the document establishing the trust (for example, the trust deed). In some countries, trust law allows for the settlor and beneficiary (and sometimes even the trustee) to be the same person. Trust deeds also vary and may contain provisions that impact where ultimate control over the trust assets lies, including clauses under which the settlor reserves certain powers (such as the power to revoke the trust and have the trust assets returned). This may assist in determining the beneficial ownership of a trust and its related parties".[59]

FATF Recommendation 24 allows a threshold approach for the determination of the controlling shareholders in the legal person, providing the example of a 25% as minimum percentage of ownership interest, without specifying what threshold may be appropriate. According to the FATF Recommendation "a percentage shareholding or ownership interest should be considered as a key evidential factor among others to be taken into account" and "this approach includes the notion of indirect control which may extend beyond formal ownership or could be through a chain of corporate vehicles".[60]

[59] FATF Guidance, 9 Section III par. 18.
[60] FATF Guidance, 15 par. 33 (a); See Interpretative Note to Recommendation 24, par. 6 (1).

1.3. Anti-money laundering provisions at EU-Level

1.3.1. The First Anti-Money Laundering Directive (1st AML-D)

The EU played an active role in developing instruments for the fight against money laundering and terrorist financing. In 1991, the first Directive has been adopted (the Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering),[61] based on the need to protect the internal market and to avoid that criminals could take advantage of the freedom of capital movement and freedom to supply financial services within the internal market.[62]

In this Directive the term "money laundering" was based on the Vienna Convention 1988,[63] concentrating to combat the laundering of proceeds deriving from drug related crimes through the financial sector. The directive required Member States to prohibit money laundering and to oblige financial and credit institutions to identify their customers, keep appropriate records, establish internal procedures to train staff and guard against money laundering and to report any indications of money laundering to the competent authorities.[64] However, the

[61] Council Directive (EEC) 91/308 of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] OJ L166/77 ("First AML-Directive").
[62] First AML- Directive, Preamble: "Whereas lack of Community action against money laundering could lead Member States, for the purpose of protecting their financial systems, to adopt measures which could be inconsistent with completion of the single market; whereas, in order to facilitate their criminal activities, launderers could try to take advantage of the freedom of capital movement and freedom to supply financial services which the integrated financial area involves, if certain coordinating measures are not adopted at Community level".
[63] See First AML-Directive, art. 1: "criminal activity" means a crime specified in Article 3 1) (a) of the Vienna Convention and any other criminal activity designated as such for the purposes of this Directive by each Member State.
[64] Parliament and Council Directive (EC) 2005/60/ of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L 309/15 ("Third AML-Directive"), recital (4).

directive failed to give any clarification regarding the nature, functions and powers of the responsible authorities.[65]

1.3.2. The Second Anti-Money Laundering Directive (2nd AML-D)

The Second Directive (Directive 2001/97/EC)[66] amending the First Directive: i) broadened the definition of credit and financial institutions; ii) expanded the obligations laid down in the AML-Directive (reporting duties), besides credit and financial instructions, to legal or natural persons acting in the exercise of their professional activities, such as auditors, external accountants and tax advisors, real estate agents, notaries and other independent legal professionals; casinos[67] iii) expanded the list of predicate offenses;[68] iv) clarified and broadened the client identification and due diligence procedure.[69]

1.3.3. The Third Anti-Money Laundering Directive (3rd AML-D)

The Third Directive (2005/60/EC)[70] adopted in October 2005 refers to the updated FATF Recommendations in 2003, introducing broader and more detailed provisions, especially regarding: i) BO: providing details regarding "beneficial owner";[71] ii) expanding the definition of "criminal activity" including terrorist activity and defining what is meant by "serious crime";[72] iii) introducing a "risk-

[65] Van Ha (n 1), 190.
[66] Parliament and Council Directive (EC) 2001/97/EC of 4 December 2001 amending Directive 91/308EEC on the prevention of the use of the financial system for the purpose of money laundering [2001] OJ L344/76 ("Second AML- Directive").
[67] Second AML-Directive, inserted art. 2a.
[68] Second AML-Directive, replaced art. 1(E).
[69] Second AML-Directive, replaced art. 3.
[70] Parliament and Council Directive (EC) 2005/60/ of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L 309/15 („Third AML- Directive").
[71] Third AML-Directive, art. 3 (6).
[72] Third AML-Directive, art. 3 (5).

based approach";[73] iv) changing the procedure for costumer identification and documentation, also known as costumer due diligence (CDD);[74] v) broadening and defining reporting obligations.[75]

1.3.4. The Fourth anti-money laundering Directive (4th AML-D)

The fourth Directive (UE) 2015/849[76] implements the 40 Recommendations issued by the FATF revised in 2012, repealing the Third Directive.

The most important changes introduced by the Fourth Directive concern the extension of the scope of the Directive and relate to the domain of risk based approach, ongoing monitoring, beneficial ownership, customer due diligence (CDD), politically exposed persons ("PEPs"), and third party equivalence.[77]

The fourth Directive broadens the scope of the Directive to all providers of gambling services (the Third Directive only concerned casinos) (art.2 (3) (f), providing a possible exemption for this category in case of the proven low risk posed by the nature and the scale of operations of such services. Further, natural or legal persons acting in the exercise of their professional activities are considered "obliged entities" when trading in goods to the extent that payments are made or received in cash in an amount of 10.000,00 Euro or more, whether the transaction is carried out in a single operation or in several operations which

[73] Third AML-Directive, Chapter II, Section 3.
[74] Third AML-Directive, Chapter II.
[75] Third AML-Directive, Chapter III.
[76] Parliament and Council Directive (EU) 2015/859 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73 ("Fourth AML-Directive").
[77] Melanie Müller-Dragovits/Maryte Somare, „Interplay between automatic exchange of information and AML requirements", in Lang/Haunold, Transparenz – Eine neue Ära im Steuerrecht (Linde 2016), 84.

appear to be linked,[78] as the use of large cash payments is considered highly vulnerable to money laundering and terrorist financing.[79]

Already Directive 91/308/EEC brought notaries and other independent legal professionals within the scope of the Community anti-money laundering regime. This coverage has remained unchanged in the following Directives, therefore these legal professionals, as defined by the Member States, are subject to the provisions of the AML- Directive when participating in financial or corporate transactions, including providing tax advice, where it is considered to exist "the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity or for the purpose of terrorist financing".[80] However, it has been noted that where independent members of professions providing legal advice which are legally recognized and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, "it would not be appropriate under this Directive to put those legal professionals in respect of these activities under an obligation to report suspicions of money laundering or terrorist financing".[81] Therefore the Directive is providing exemption from any obligation to report information obtained before, during or after judicial proceedings, or in the course of ascertaining the legal position of a client.[82] Thus, "legal advice should remain subject to the obligation of professional secrecy, except where the legal professional is taking part in money laundering or terrorist financing, the legal advice is provided for the purposes of money laundering or terrorist financing, or

[78] Fourth AML-Directive, art. 2 (3) (e).
[79] Fourth AML-Directive, recital (6).
[80] Fourth AML-Directive, recital (9) and Third AML-Directive, recital (19).
[81] Third AML- Directive, recital (20).
[82] Third AML-Directive, recital (20) and Fourth AML-Directive, recital (19).

the legal professional knows that the client is seeking legal advice for the purposes of money laundering or terrorist financing".[83]

The Fourth Directive updates the list of predicate offenses, clarifying that under "criminal activity" is meant all serious crimes, which include "all offences, including tax crimes relating to direct taxes and indirect taxes and as defined in the national law of the Member States, which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months"[84]. Thus, the Directive is now generally referring also to tax crimes, but without specific definition, using as reference the threshold of deprivation of liberty.[85]

The main change introduced by the Fourth Directive, concerns the risk-based-approach (RBA), involving the use of evidence-based decision-making in order to target the risks of money laundering and terrorist financing within the UE[86] and requiring the obliged entities, especially financial institutions to adopt appropriate measure to identify and assess AML/CFT risk by taking into account risk factors

[83] Third AML-Directive, recital (20) and Fourth AML-Directive, recital (19).
[84] Fourth AML-Directive, art. 3(4) (f).
[85]Fourth AML-Directive, recital (11): „It is important expressly to highlight that 'tax crimes' relating to direct and indirect taxes are included in the broad definition of 'criminal activity' in this Directive, in line with the revised FATF Recommendations. Given that different tax offences may be designated in each Member State as constituting 'criminal activity' punishable by means of the sanctions as referred to in point (4)(f) of Article 3 of this Directive, national law definitions of tax crimes may diverge. While no harmonisation of the definitions of tax crimes in Member States' national law is sought, Member States should allow, to the greatest extent possible under their national law, the exchange of information or the provision of assistance between EU Financial Intelligence Units (FIUs)."
[86] Fourth AML-Directive, recital (22): "The risk of money laundering and terrorist financing is not the same in every case. Accordingly, a holistic, risk-based approach should be used. The risk-based approach is not an unduly permissive option for Member States and obliged entities. It involves the use of evidence-based decision-making in order to target the risks of money laundering and terrorist financing facing the Union and those operating within it more effectively".

related to their customers, countries or geographical areas, products, services, transactions, or delivery channels. Those steps shall be proportionate to the nature and size of the obliged entities.[87]

The risk assessment has to be documented, kept up-to date, and made available to the relevant competent authorities and self-regulatory bodies concerned.[88]

The obliged entities must have established policies, procedures and controls, proportioned to their size and nature, in order to effectively mitigate and manage the AML/CFT risk (identified at the level of the EU, Member State and the obliged entity).[89]

These mentioned policies, procedure and controls should include models of risk management practices, costumer due diligence, reporting, record-keeping, an internal control system and a compliance management.[90] Where appropriate, regarding the size and nature of the business, an independent audit function to test the established internal policies, controls and procedures should be put in place.[91]

The senior manager of the obliged entity has to approve the policies, procedures and controls as well as to monitor and enhance measures taken.[92]

The focus on the risk-based approach, has effects also on the Costumer Due Diligence procedure as well as the beneficial ownership.

[87] Fourth AML- Directive, art. 8 (1).
[88] Fourth AML-Directive, art.8 (2).
[89] Fourth AML- Directive, art. 8 (3.)
[90] Fourth AML-Directive, art. 8 (4) (a).
[91] Fourth AML-Directive, art. 8 (4) (b).
[92] Fourth AML-Directive, art. 8 (5).

1.3.4.1. Costumer Due Diligence (CDD) procedure

The CDD obligations defined within the Fourth Directive have to be red in combination with the most important principle of "knowing your costumer" (KYC-principle), which is a prerequisite for performing a comprehensive risk assessment and for complying with additional costumer due diligence requirements.[93]

The general provisions on CDD in this Directive want to prevent obliged entities from keeping anonymous account or anonymous passbooks and from the misuse of bearer shares and share warrants.[94]

CDD measures have to be applied in the following circumstances:

- when establishing a business relationship, when carrying out an occasional transaction that amounts or exceeds 15.000,00 Euro;
- in the case of persons trading in goods amounting to or exceeding 10.000,00 Euro;
- for providers of gambling services when executing transactions amounting to or exceeding 2.000,00 Euro;
- when there is a suspicion of money laundering or terrorist financing;
- when there are doubts concerning the veracity or adequacy of obtained costumer identification data.[95]

[93] Müller-Dragovits/Somare (n 77), 90.
[94] Fourth AML-Directive, art. 10.
[95] Fourth AML-Directive, art. 11; Müller-Dragovits/Somare (n 77), 86.

CDD measures shall be applicable also to existing costumers on a risk-sensitive basis considering times when the relevant circumstances of a costumer might change.[96]

The major CDD obligations include:

a. identifying the costumer on the basis of documents, data or information obtained from a reliable and independent source;

b. identifying the beneficial owner and taking reasonable measures to verify that person's identity so that the obliged entity is satisfied that it knows who the beneficial owner is regarding legal persons, trusts, companies, foundations or similar legal arrangements and taking reasonable measures to understand the ownership and control structure of the costumer;

c. assessing and obtaining information about the purpose and intended nature of the business relationship;

d. conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship. In this way, ensuring that the transactions are consistent with the obliged entity's knowledge of the costumer and the business and risk profile including the source of funds as well as ensuring that the documents, data and information are up-to-date.[97]

In case an obliged entity is not able to comply with the requirements mentioned in the first three aforementioned points, the financial institutions shall not carry out a transaction through a bank account, establish a business relationship or carry out

[96] Fourth AML-Directive, art. 14 (5).
[97] Fourth AML-Directive, art. 13 (1); Müller-Dragovits/Somare (n 77), 86-87.

the transaction, shall terminate the business relationship and consider making a suspicious transaction report to the Financial Intelligence Unit (FIU).[98]

By applying a risk sensitive approach obliged entities shall determine whether the relevant relationship or transaction might initiate the application of simplified or enhanced CDD measures ("SDD" or "EDD").[99]

For determining the lower risk and the application of SDD, criteria set out in Annex II should be considered, which provides a list of non-exhaustive potentially low risk situations, referred to: costumer risk factors; geographical risk factor, product, service, transaction, and delivery channel risk factor.[100]

Enhanced Due Diligence measures ("EDD") must be applied when dealing with natural persons or legal entities established in third countries, which are identified by the Commission, Member States or the obliged entities themselves as high-risk third countries.[101] Further, EDD must be applied in case of cross-border relationships with a third – country respondent institutions,[102] transactions or business relationships with PEPs[103], life insurance or other investment related insurance policies when the beneficiaries and/or the beneficial owners of the beneficiaries are PEPs.[104] Additionally, obliged entities are required to examine, as far as reasonably possible, the background and purpose of all complex and unusually large transactions, and all unusual patterns of transactions, which have

[98] Fourth AML-Directive, art. 14 (5).
[99] Müller-Dragovits/Somare (n 77), 87.
[100] Fourth AML-Directive, art. 16.
[101] Fourth AML-Directive, art. 18 (1).
[102] Fourth AML-Directive, art. 19.
[103] Fourth AML-Directive, art. 20.
[104] Fourth AML-Directive, art. 21.

no apparent economic or lawful purpose.[105] For the assessment of AML/CFT risks the factors of potentially high risk situations set out in Annex III shall be taken into account.

To be compliant with CDD measures and the KYC-principle, obliged entities must demonstrate to have built up effective systems, procedure and strategies to ensure that they have compiled sufficient information about their costumer's identity.

Besides the costumer *per se*, the obliged entities must identify beneficial owners and beneficiaries of the trust.

1.3.4.2. Beneficial Owner (BO)

The Directive emphasises the need to identify any natural person who exercises ownership or control over a legal entity,[106] defining the need for accurate and up-to date information on the beneficial owner as a key factor in tracing criminal who might otherwise hide their identity behind a corporate structure.[107]

The Fourth AML-Directive defines the beneficial owner as any natural person (s) who ultimately owns or controls the costumer and/or the natural persons (s) on whose behalf a transaction is being conducted.[108]

In case of corporate entities, this includes at least: "the natural person (s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares, voting rights or ownership interest in that

[105] Fourth AML-Directive, art. 18 (2).
[106] Fourth AML-Directive, recital (12).
[107] Fourth AML-Directive, recital (14).
[108] Fourth AML-Directive, art. 3 (6).

entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information".[109]

The Fourth Directive introduces a threshold of 25% to identify the beneficial owner, but as an indicator to identify direct or indirect ownership:

- an indication of direct ownership is a shareholding of 25% plus one share or an ownership interest of more than 25% for the costumer specified as a natural person;
- an indication of indirect ownership is a shareholding of 25% plus one share or an ownership interest of more than 25% for the costumer indicated as a corporate entity which is under the control of a natural person (s);[110]

In case no beneficial owner can be identified applying all possible means or there is a doubt about the identified beneficial owner, the natural person who holds the position of senior managing official(s) shall be considered as the beneficial owner.[111] Indeed, control can be exercised through other means than by holding shares or voting rights, especially through any form of influence on the management of the legal person resulting in management decisions being made in the interest of the party exerting influence.[112]

The Directive clarifies that "senior management" means an officer or employee (with no need to be a member of the board of directors) with sufficient knowledge

[109] Fourth AML-Directive, art. 3 (6) (a) (i), par. 1.
[110] Fourth AML-Directive, art. 3 (6) (a) (i), par. 2.
[111] Fourth AML-Directive, art. 3 (6) (ii).
[112] Müller-Dragovits/Somare (n 77), 92.

of the institution's money laundering and terrorist financing risk exposure and sufficient seniority to take decisions affecting its risk exposure.[113]

With a view to enhancing transparency in order to combat the misuse of legal entities and in order to be able to identify beneficial owner, corporate and other legal entities incorporated within the territory of a Member State are required to hold accurate up-to-date information on their beneficial ownership (in addition to basic information such as the company name and address and proof of incorporation and legal ownership) and such information must be held in a central register (for example a commercial register, companies register or a public register) and accessible to competent authorities, FIUs, entities required to conduct due diligence checks and other parties with a legitimate interest.[114]

The identification and verification of the identity of the costumer and the beneficial owner must generally take place before the establishment of a business relationship or the currying out of the transaction. In cases where it is necessary not to interrupt the normal conduct of business and where there is little risk of money laundering or terrorist financing the verification procedure of the identity of the costumer and the beneficial owner can be completed during the establishment of a business relationship and shall be completed as soon as practicable after initial contact.[115]

In case an obliged entity is not able to complete the identification procedure, the transaction cannot take place and the business relationship cannot be established and any existing business relationship has to be terminated and, eventually, in

[113] Fourth AML-Directive, art. 3 (12).
[114] Fourth AML-Directive, art. 13 and recital (14).
[115] Fourth AML-Directive, art. 14 (1) and (2).

case the KYC process leads to reasonable evidence for suspicion that a business relationship or a transaction is designed to serve the purpose of AML/CFT, a suspicious transaction report must be forwarded to the FIU.[116]

1.3.5. The Fifth anti-money laundering Directive (5th AML-D)

The fifth anti-money laundering directive (Directive (EU) 2018/843),[117] modified the fourth AML-Directive and has been adopted on 19 June 2018. The Directive has been adopted as reaction to recent terrorist attacks, which have brought in light emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations, acknowledging that "certain modern technology services are becoming increasingly popular as alternative financial systems, whereas they remain outside the scope of Union law or benefit from exemptions from legal requirements" and that "further measures should be taken to ensure the increased transparency of financial transactions, of corporate and other legal entities, as well as of trusts and legal arrangements having a structure or functions similar to trusts ('similar legal arrangements')".[118]

The main focus of this directive is to increase the overall transparency of the economic and financial environment of the Union, enhancing transparency as deterrent for money laundering.

The upgraded rules, can be reassumed as following:

[116] Müller-Dragovits/Somare (n 77), 95.
[117] Parliament and Council Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43 ("Fifth AML-Directive").
[118] Fifth AML-Directive, recital (2).

- limit the anonymity related to virtual currencies, wallet providers and prepaid cards;[119]
- establish the interconnection of central registries or retrieval systems between all member states in order to grant timely access to information regarding beneficial owner;
- enhance the powers of EU Financial Intelligence Units (FIUs), providing them with access to widen range information for the carrying out of their tasks;
- broaden the criteria for the assessment of high-risk third countries and enhance the safety for financial transactions to and from such countries;
- improve the cooperation information exchange between related parties.[120]

Sub I): due to the increased use of certain modern technology services, such as virtual currencies, for money laundering and terrorist financing, the Fifth AML-Directive aims to regulate this matter.[121]

Providers engaged in exchange services between virtual currencies and fiat currencies (that is to say coins and banknotes that are designated as legal tender and electronic money, of a country, accepted as a medium of exchange in the issuing country) as well as custodian wallet providers are not obliged entities under the Fourth AML-Directive,[122] therefore they do not need to identify their

[119] Regarding "prepaid cards" see Fifth AML-Directive, recital (14) and (15) and added art.12 (3).
[120] Van Ha (n 1), 191.
[121] See Fifth AML-Directive, recital (2), (8) and (9).
[122] Fifth AML-Directive, recital (8).

customers via KYC checks ("Know-Your-Customer") nor are they obliged to report any suspicious transactions.[123]

For this reason, new obliged entities are introduced: "Providers engaged in exchange services between virtual currencies and fiat currencies" as well as "custodian wallet".[124]

This new provision cannot completely solve the problem of anonymity related to virtual currency transactions, which can lead to a potential misuse for criminal purposes, because anyway part of the virtual currency environment will remain anonymous considering that users can transact without such providers.[125] To combat the risks related to the anonymity, national Financial Intelligence Units shall be able to obtain information allowing them to associate virtual currency addresses to the identity of the owner of virtual currency. [126]

However, user identities and their wallets for virtual currencies will not be registered and not be made available to the public.[127] Rather, it is for the European Commission to first assess the necessity of such register by January 2022.[128]

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[123] Lars Haffke/Mathias Fromberger/Patrick Zimmermann, "Cryptocurrencies and anti‑money laundering: the shortcomings of the fifth AML Directive (EU) and how to address them" (2020) 21, Journal of Banking Regulation 125, 130.

[124] Fifth AML-Directive, art. 1(1) (c), adding at art. 2 (1), point (3), lit. g) and h), also the following obliged entities have been introduce, adding lit. i) and j): (i) persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to euro 10.000,00 or more; (j) persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by free ports, where the value of the transaction or a series of linked transactions amounts o euro 10.000,00 or more.

[125] Fifth AML-Directive, recital (9).

[126] Fifth AML-Directive, recital (9).

[127] Haffke /Fromberger/Zimmermann (n 123), 131.

[128] Fifth AML-Directive, replaced art. 65 (1), last par.: "The first report, to be published by 11 January 2022, shall be accompanied, if necessary, by appropriate legislative proposals, including, where appropriate, with respect to virtual currencies, empowerments to set-up and maintain a central database registering users' identities and wallet addresses accessible to FIUs, as well as self-declaration forms for the use of virtual currency users, and to improve cooperation between

Nevertheless, the 5th AML- Directive aims to enable FIUs to gather all information necessary to combat money laundering risks with regard to virtual currencies.[129]

Sub II): the Member States agreed on the need to interconnect the Member States' central registers holding beneficial ownership information through the European Central Platform established by Directive (EU) 2017/1132,[130] which necessitates the coordination of national systems having varying technical characteristics.[131] Therefore it was considered "essential to establish centralised automated mechanisms, such as a register or data retrieval system, in all Member States as an efficient means to get timely access to information on the identity of holders of bank and payment accounts and safe-deposit boxes, their proxy holders, and their beneficial owners",[132] subsequently modifying the par. 10 of Article 30 Fourth AML-Directive, in the sense that Member States shall ensure that the central registers held in each Member State are interconnected via the European Central Platform established by Article 22(1) of Directive 2017/1132 and that information referred to beneficial ownership are available through the national registers and through the system of interconnection of registers for at least five years and no more than 10 years after the corporate or other legal entity has been struck off from the register; the Fifth AML-Directive does not refer to a legitimate interest test for the access to the register, granting a broader access to the public ("any

Asset Recovery Offices of the Member States and a risk-based application of the measures referred to in point (b) of Article 20".

[129] Haffke /Fromberger/Zimmermann (n 123), 131.

[130] Parliament and Council Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law (codification) (Text with EEA relevance) [2017] OJ L 169/46.

[131] Fifth AML-Directive, recital (37).

[132] Fifth AML-Directive, recital (20).

member of the general public"),[133] introducing the possibility of restricting access to the information contained in the register in the event of exposure to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence, or intimidation.[134]

Regarding the scope *sub* III): to enhance the effectiveness and efficiency of FIUs, by clarifying the powers of and cooperation between FIUs the Fifth AML-Directive establishes that "FIUs should have access to information and be able to exchange it without impediments, including through appropriate cooperation with law enforcement authorities".[135]

Sub IV): further, the amending fifth AML- Directive, specifies, that obliged entities shall "apply the customer due diligence measures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis, or when the relevant circumstances of a customer change, or when the obliged entity has any legal duty in the course of the relevant calendar year to contact the customer for the purpose of reviewing any relevant information relating to the beneficial owner(s), or if the obliged entity has had this duty under Council Directive 2011/16" [136]("DAC").[137]

Sub V): improve the information exchange. To this regard, the Fifth AML-Directive has introduced in section 3 of Chapter VI the Subsection IIa, named

[133] Fifth AML-Directive, replaced art. 30 (5).
[134] Fifth AML-Directive, replaced art. 30 (9); Arnaud Tailfer and Stephanie Aufèril, "Register of trusts and privacy: French case law in perspective with the fifth Anti-Money Laundering Directive register" (2018) 24 (10), Trusts & Trustees 968, 972.
[135] See Fifth AML-Directive, recital (16) – (20).
[136] Fifth AML-Directive, replaced art. 14 (5).
[137] Council Directive (EU) 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1 and its subsequent amendments („DAC").

"Cooperation between competent authorities of the Member States", adding Article 50a, which states that Member States shall not prohibit or place unreasonable or unduly restrictive conditions on the exchange of information or assistance between competent authorities for the purposes of AML/CFT. In particular "Member States shall ensure that competent authorities do not refuse a request for assistance on the grounds that:

(a) the request is also considered to involve tax matters;

(b) national requires obliged entities to maintain secrecy or confidentiality, except in those cases where the relevant information that is sought is protected by legal privilege or where legal professional secrecy applies, as described in Article 34(2);

(c) there is an inquiry, investigation or proceeding underway in the requested Member State, unless the assistance would impede that inquiry, investigation or proceeding;

(d) the nature or status of the requesting counterpart competent authority is different from that of requested competent authority."[138]

Furthermore, FIUs shall "exchange, spontaneously or upon request, any information that may be relevant for the processing or analysis of information by the FIU related to money laundering or terrorist financing and the natural or legal person involved, regardless of the type of associated predicate offences and even if the type of associated predicate offences is not identified at the time of the exchange".[139]

[138] Fifth AML-Directive, inserted art. 50a.
[139] Fifth AML-Directive, amended art. 53 (1) first subparagraph (adding "regardless of the type of associated predicate offences").

II. CHAPTER: Exchange of information for tax purposes at international and EU-level

2.1. Exchange of Information for tax purposes at international level

Automatic exchange of information (hereinafter also "AEOI") between tax authorities has become a new global standard, due to the development of specific national and international models, aimed at enhancing intergovernmental cooperation to prevent the phenomenon of offshore tax evasion.[140]

The new era of "tax transparency" is characterized "by the unprecedented levels of taxpayer information shared between governments around the globe". [141]

Exchange of information is interwoven with the worldwide taxation principle: to avoid tax evasion realized by resident taxpayer by not reporting or underreporting their income produced abroad, residence-countries need the cooperation of source-countries to obtain information about the income produced by their residents in those countries (exchange of information and administrative cooperation).[142]

The strengthening of the framework for information exchange was recognized as a political priority by the OECD in 1998, within the debate on the negative effects of "harmful tax practices" and tax havens. [143]

[140]Stjepan Gadžo and Irena Klemenčić, "Effective international information exchange as a key element of modern tax systems: promises and pitfalls of the OECD's common reporting standard" (2017) 41 (2) Public Sector Economics 207, 208.
[141] ibid 209.
[142] Carlo Garbarino, "FATCA legislation and its application on international and EU level" (2018) Study for the PETI committee, 99.
[143] Gadžo and Klemenčić (n 140), 209. For a short historical overview on information exchange in tax matters see Gadžo and Klemenčić (n 140), 210-212.

The foundational rules of exchange of information are found in Article 26 of the OECD Model Convention, which is reflected in double tax treaties which are aimed at the prevention of tax evasion and tax avoidance. [144]

Art. 26 of the OECD Model Convention provided a legal basis for three forms of information exchange: 1) exchange upon request; 2) spontaneous information exchange; and 3) automatic exchange of information (AEOI). [145]

The practical issues involved in these types of exchange of information have been addressed by the OECD Global Forum Working Group on Effective Exchange of Information, which started to work on a project of a Tax Information Exchange Agreement ("TIEA"), with a view on promoting actual methods of international cooperation in tax matters through exchange of information. From 2001 onwards the Global Forum on Taxation was established and the OECD project of a Tax Information Exchange Agreement began to focus on improving transparency and increasing effective access to exchange of information. In April 2002 the OECD released a Model of Tax Information Exchange Agreement ("Model TIEA"), which is a non-binding instrument that serves as a model for assisting contracting States in their bilateral or multilateral negotiations aimed at finalizing actual TIEA's.[146]

The financial crisis in 2008, when several tax evasion scandals broke out, boosted the need of governments to raise revenues by curtailing tax evasion and transparency of national tax systems became the focus of the G20 summits in

[144] Garbarino (n 142), 9.
[145] Gadžo and Klemenčić (n 140), 209.
[146] Garbarino (n 142), 9.

following years.[147] The G20 declared that an automatic exchange of information should be implemented on a global level and gave the OECD a mandate to develop a global standard for the automatic exchange of information.[148] In 2014 the OECD released a global framework for the exchange of financial information based denominated as "Common Reporting Standard" (hereinafter also "CRS"), which is based on the idea that banks and other financial institutions should play a crucial role in providing information on taxpayer's income and assets to tax authorities around the globe. [149] Under the technological framework of the CRS tax information is not only exchanged multilaterally, but also automatically (without need of a specific request), phenomena which is called "automatic exchange of information" (AEOI).[150]

2.1.1. The Foreign Account Compliance ACT (FATCA)

The revision in the international tax policy towards a global system of automatic exchange of information (AEOI) was induced by a unilateral U.S. initiative - the adoption of Foreign Account Tax Compliance Act (FATCA) in the US in 2010. Its basic features were adopted and, *mutatis mutandis*, incorporated in the OECD's Global Standard for AEOI, released in 2014.[151]

In 2010, the US Congress issued the Foreign Account Tax Compliance Act (FATCA) as part of a wider measure known as the "Hiring Incentives to Restore Employment Act" (the "HIRE Act"). The major aim of the FATCA approach is to induce foreign (i.e. non-US) financial institutions (FFIs) to participate in a global

[147] ibid 10.
[148] Müller-Dragovits/Somare (n 77), 101.
[149] Gadžo and Klemenčić (n 140) 207, 209.
[150] Garbarino (n 142), 11.
[151] Gadžo and Klemenčić (n 140), 222.

regime of automatic information reporting of the income of US residents to the US government.[152] In order to induce FFIs to participate, FATCA established a basic principle: a nonparticipating FFI is subject to a 30% withholding tax on US-source payments.[153]

So FATCA imposes significant compliance burdens for FFIs (of determining whether the beneficial owner of each account is a US tax resident and of automatic information reporting to the US). [154] "FATCA is a unilateral system in which automatic information reporting is used to enforce US tax law with respect to US residents' foreign accounts; foreign governments do not receive information on their residents' US (or other offshore) accounts".[155]

FATCA introduced unilaterally a complex mechanism of AEOI based on four components: I) the identification of participating financial foreign intermediaries; II) the requirement of reporting such intermediaries on certain U.S. and non- U.S. account-holders; III) the threat of withholding tax on U.S. sourced payment in case of non compliance and IV) the duty by U.S. persons to specifically report to the I.R.S. their foreign financial assets.[156]

FATCA has been criticised for being unconstitutional, in the light of infringement of freedom and right to privacy of overseas Americans[157] and for its

[152] Dhammika Dharmapala, "Cross-border tax evasion under a unilateral FATCA regime" (2016) 141 Journal of Public Economics 29, 29.
[153] Garbarino (n 142), 10.
[154] Dharmapala (n 152), 29.
[155] ibid.
[156] Garbarino (n 142), 13.
[157] See Angelo Venardos, ""CRS- Will it really be 'Son of FATCA'" (2016) 22 (5), Trusts& Trustees 545, 545-547.

extraterritorial reach as well as with regard to the conflicts with domestic laws on data protection.

In February 2012 the I.R.S. issued the "Proposed Regulations to implement FATCA", but it was apparent that FFIs would have met problems in directly implementing the required due diligence procedures, considering the obstacles posed by domestic legislation[158] (such as data protection law in non-US jurisdictions that would be violated by FFIs reporting information to the US) [159] as well as the problem of the extraterritorial reach of FATCA from a public international law perspective, representing FATCA an exertion of US law into the jurisdictional realm of foreign countries, without their consent.[160]

To overcome these legal obstacles to the implementation of FATCA, since 2012 the US has significantly changed the structure of the FATCA, finding the legal basis for the implementation of FATCA in special intergovernmental agreements (IGAs).[161] "Simply, the solution was found in the 'routing mechanism', which entails that FFIs do not report relevant information directly to the IRS, but rather to their local tax authorities, who will further engage in the exchange of information with their US counterparts."[162]

Two types (Model 1 and Model 2) of IGAs have been prepared by the US Treasury and have been used in negotiations with other countries.[163] Each of the models has a sub-version, targeted at countries which have concluded neither a

[158] Garbarino (n 142), 17.
[159] Dharmapala (n 152), 30.
[160] Gadžo and Klemenčić (n 140), 213.
[161] Dharmapala (n 152), 30.
[162] Gadžo and Klemenčić (n 140), 214.
[163] about 2 Models IGA see Garbarino (n 142), 17-19; about legal status of IGA's see Garbarino (n 142), 19-21.

double tax treaty nor a special Tax Information Exchange Agreement (TIEA) with the US. [164]

Model 1 IGA incorporates the concept of reciprocal information exchange[165] and has been signed by all 27 EU Member States but Austria with the US.[166] Therefore, it has been selected as a template for the creation of the OECD's Global Standard.[167] Under Model 2, which has been signed by Austria, the US does not automatically send information on financial accounts held in the US by taxpayers.[168]

The FATCA regime has undergone various modifications since its enactment and its implementation has been repeatedly delayed and it began operating in 2015.[169]

2.1.2. OECD: Common Reporting Standard (CRS)

In 2013 the G20 countries committed to the OECD's proposal for a model of AEOI to be implemented on a global basis (the OECD's Global Standard). The intention of the OECD was to set a minimum standard for AEOI, without restricting the existing models. In 2014 the OECD released the document titled "The Standard for Automatic Exchange of Financial Account Information".[170]

The OECD's Global Standard consists of two main components: 1) the Model Competent Authority Agreement (Model CAA), which is a template for a legal

[164] Gadžo and Klemenčić (n 140), 214.
[165] ibid.
[166] Eckhard Binder, "Implementation of the EU requirements for tax information exchange" (2021) EPRS- European Parliamentary Research Service 1, 109; <www.europarl.europa.eu/RegData/etudes/STUD/2021/662603/EPRS_STU(2021)662603_EN.pdf > accessed 22 November 2021.
[167] Gadžo and Klemenčić (n 140), 214.
[168] Binder (n 166), 109.
[169] Dharmapala (n 152), 29.
[170] Gadžo and Klemenčić (n 140), 214.

instrument enabling AEOI between participating countries; and 2) the Common Reporting Standard (CRS), which lays down reporting and due diligence requirements in respect of specific categories of financial accounts.[171] CRS is based on the FATCA Model IGA I to accommodate a global exchange of information so that FIs can use the implemented processes and systems of FATCA.[172]

So, the Model CAA is primarily addressed to participating tax authorities who want to regulate their mutual AEOI relationships, whereas the CRS is primarily aimed at banks and other financial institutions upon which the reporting and due diligence obligations are imposed.[173]

It should also be noted that the CRS, a key element of the OECD's Global Standard, have to be implemented into the domestic law of participating States to be legally binding upon "reporting financial institutions".[174] In this way, each State can decide the level of detail that will be contained in its domestic rules on reporting, due diligence and other CRS requirements. [175]

The CRS, sets out reporting and due diligence requirements with regard to specific types of accounts ("reportable accounts"). These obligations fall upon "reporting financial institutions".[176]

CRS is a multilateral instrument and draws heavily on the intergovernmental dynamics used in the implementation of FATCA[177]. Its introduction did not

[171] ibid.
[172] Venardos (n 157), 547.
[173] Gadžo and Klemenčić (n 140), 215.
[174] ibid.
[175] ibid 216.
[176] ibid.

replace or amend other exchange of information, but is intended to function as "minimum required standard for the exchange of information" [178] on international level.[179]

2.2. Exchange of information for tax purposes at EU-Level

The EU played an important role in developing anti-tax-evasion instruments.

The first Directive on Mutual Assistance in the Assessment of Taxes in the field of direct taxation entered into force in 1977 (Council Directive 77/799/EEC of 19 December 1977),[180] drafted with a view to provide for an efficient exchange of information between the Member States in order to counter new forms of tax evasion and avoidance. This Directive provided a framework for exchange of information on request and has been revised several times.[181]

In 2003 the "Savings Directive" (Directive 2003/48/EC)[182] on taxation of savings income in the form of interest payments has been adopted, which was aimed at effective taxation of cross-border interest payments in the State of residence of individuals, introduced obligatory and automatic exchange of information at regular intervals. The focus on more pro-active automatic exchange of information instead of request-based exchange started in 2009 and got a strong

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[177] Binder (n 166), 109.
[178] ibid.
[179] ibid.
[180] Council Directive (EEC) 77/799 of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation [1977] OJ L 336/15 ("Mutual Assistance Directive").
[181] Michael Schilcher/Karoline Spies/Sabine Zirngast, „Mutual Assistance in Direct Tax Matters", in Lang et al (Eds), Introduction to European Tax Law on Direct Taxation" (6th edn Linde 2020), para 710.
[182] Council Directive (EC) 2003/48 of 3 June 2003 on taxation of savings income in the form of interest payments [2003] OJ L 157/38 ("Savings Directive").

boost in 2014 and 2015, driven by the above mentioned international developments.[183]

In 2011, with the Directive on Administrative Cooperation in the field of taxation (hereinafter "DAC") the mandatory automatic exchange of information has been introduced in areas other than interest payments. [184]

The Directive 2011/16/EU ("DAC 1") [185] and its subsequent amendments aim to combat tax fraud and tax evasion by facilitating the exchange of information between the tax authorities (TAs) of EU Member States. [186]

The progress made in the last 10 years in the field of tax information exchange between EU Member States has been driven by the need "for more transparency and fairness of the taxation systems within the single market".[187] Beginning with the exchange of available information and information exchange on request, the scope of the directive has developed in the sense to include a growing number of categories of mandatory automatic exchange.[188]

2.2.1. Directive on Administrative Cooperation in the field of taxation: DAC-DAC 1

The Directive on Administrative Cooperation in the field of taxation ("DAC") lays down rules and procedure under which the Member States shall cooperate with a view to exchanging any information that is "foreseeable relevant" to the

[183] Schilcher/Spies/Zirngast (n 181), para 711.
[184] Schilcher/Spies/Zirngast (n 181), para 712.
[185] Council Directive (EU) 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1 („DAC 1").
[186] Binder (n 166), 41.
[187] ibid 4.
[188] ibid.

administration and enforcement of the domestic laws of the Member States concerning taxes.[189]

"The standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer".[190]

The wording "foreseeable relevant" has been copied from art. 26 OECD Model Convention,[191] the commentary on this article plays a vital role in interpreting these provisions, as confirmed in Berlioz by the CJEU.[192]

This wording is relevant for the exchange on request, spontaneous exchange and participation in administrative enquiries, but not with regard to automatic exchange.

DAC 1 applies to all taxes of any kind levied by, or on behalf of, a Member State or its territorial or administrative subdivisions and local authorities.[193] However, the Directive explicitly excludes its applicability with regard to an exhaustive list of taxes, such as valued added tax, customs and excise duties covered by other Union legislation, compulsory social security contributions, fees for certificates and other public documents and dues of contractual nature.[194] According to this

[189] DAC 1, art. 1 (1).
[190] DAC 1, recital (9).
[191] Schilcher/Spies/Zirngast (n 181), para 720.
[192] Schilcher//Spies/Zirngast (n 181), para 720; Case C-682/15, *Berlioz* [2017] ECLI:EU:C:2017:373 [63] (Schilcher/Spies/Zirngast (n 181), para 720 fn. 30).
[193] DAC 1, art. 2 (1).
[194] DAC 1, art. 2 (2) and (3).

negative list approach, the Directive, thus, in particular cover taxes on income and capital, including inheritance and wealth taxes, real estate transfer taxes, car taxes, environmental taxes, wage taxes, taxes on insurance premiums, and taxes on capital appreciation.[195]

In general, the nationality or residence of the taxpayers involved is not relevant. Therefore exchange of information can also involve persons who are neither nationals nor residents of any Member State.[196] The residence becomes relevant only for the automatic exchange of information and of financial account information.[197] The term "person" is intended in a very wide sense by the Directive – individuals, corporations or hybrid entities - including associations of persons and any other legal arrangements owning or managing assets that are subject to taxes covered.[198]

The Directive distinguishes between three types of exchange of information: exchange on request,[199] mandatory automatic exchange[200] and spontaneous exchange[201] and each kind pursues a different purpose.[202]

Exchange on request depends on the initiative of another Member State: any designated authority of a Member State[203] may request from a designated

[195] Schilcher/Spies/Zirngast (n 181), para 722.
[196] ibid para 723.
[197] See DAC 1, art. 8 (1), art. 3(9) (b) and Annex I, Section VIII.D.2.
[198] DAC 1, art. 3 (11); Schilcher/Spies/Zirngast (n 181), para 723.
[199] DAC, art. 5 et seq.
[200] See: DAC 1, art. 8; DAC 3, art. 8a, DAC 4, art. 8aa, DAC 6, art. 8ab; DAC 7, art. 8ac.
[201] DAC, art. 9.
[202] Schilcher/Spies/Zirngast (n 181), para 731.
[203] See DAC 1, art. 4; the latter "distinguishes between four types of entities engaged in the cooperation proceeding: the competent authority, the single central liasion office („CLO"), liasion departments and competent officials. Each Member State has to designate a single competent authority for the purposes of the Directive, which will be made public by the Commission. The Member State's competent authority must then designate a single central liaison office, which has

authority of another Member State any information according to article 1 (1). It is necessary for a request to relate to a specific case,[204] thus "fishing expeditions" should not be permitted.[205] In order to demonstrate the foreseeable relevance of the information requested, the request has to include at least the identity of the person under investigation and the tax purpose for which the information is sought.[206] In addition, "the requesting authority may, to the extent known and in line with international developments, provide the name and address of any person believed to be in possession of the requested information as well as any element that may facilitate the collection of information by the requested authority"[207].[208]

If these information are provided, the requested State is, in principle, obliged to answer such a request as quickly as possible – at the very latest within six months from the date of receipt of the request or within two month, if the requested authority is already in possession of the relevant information.[209] In case the requested authority is not in possession of the requested information and unable to respond or refuses to do so on the grounds provided for in the Directive[210] it shall

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the principal responsibility for contact with other Member States. In addition, the competent authority is permitted, but not obliged, to set up liaison departments and appoint any number of competent officials. The DAC, thus, provides, (…), a legal basis for direct communication between two internal revenue services of different Member States, on the basis that these authorities are appointed as liaison departments or competent officials by the Member States' competent authorities" (Schilcher/Spies/Zirngast (n 181), para 728-729). As regards automatic exchange of information, specific detailed rules on the organization are set out in the Annex to the DAC and the Council Implementing Regulation (EU) 2015/2378 (Schilcher/Spies/Zirngast (n 181), para 730).

[204] DAC 1, art. 3 (8).

[205] DAC 1, recital (9).

[206] DAC 1, art. 20 (2); Schilcher/Spies/Zirngast (n 181), para 732.

[207] DAC 1, art. 20 (2) last par.

[208] Schilcher/Spies/Zirngast (n 181), para 732.

[209] DAC 1, art. 7 (1).

[210] See DAC 1, art. 17, which lists five specific grounds that give Member States the right to refuse cooperation; these limits are mainly relevant to exchange on request and mandatory spontaneous exchange of information, meanwhile with regard to automatic exchange for specific categories art. 17 (2) and (3) do not seem to be applicable and only commercial secrets under art. 17 (4) might be valid ground for refusal in respect of automatic exchange of tax rulings and cross-border arrangements (Schilcher/Spies/Zirngast, para 783).

communicate the reasons thereof within one month at latest.[211] However, the Directive mentions explicitly two invalid grounds for refusal of cooperation: i) on the ground that Member States may have no domestic interest in the information asked for;[212] ii) national bank secrecy[213].[214]

Spontaneous exchange of information is carried out by a State on its own decision whether the information obtained may be relevant to another State.[215] This is meant to be "a non-systematic communication between authorities at any time without prior request"[216] and is partly mandatory - mentioning the circumstances in which a member State "shall" inform the other State without prior request, and partly voluntary[217]- communicating the information "of which they are aware and which may be useful to the competent authorities of the other Member States".[218]

Automatic exchange of information is provided on the basis of a pre-defined interval[219] without the need for investigations as to whether the information may be useful to the receiving State. Due its automatic nature, it is considered the most effective type.[220]

DAC 1 requires Member States to automatically communicate to the competent authority of another Member State information that is "available" concerning residents of that other member State on the following categories of income and

[211] DAC 1, art. 7 (6).
[212] DAC 1, art. 18 (1).
[213] DAC 1, art. 18 (2).
[214] DAC 1, recital (20).
[215] Schilcher/Spies/Zirngast (n 181), para 731.
[216] ibid para 773.
[217] DAC 1, art. 9 (1); Schilcher/Spies/Zirngast (n 181), para 773.
[218] DAC 1, art. 9 (2).
[219] DAC 1, art. 8 (6), according to which information must be communicated at least once a year, within six months following the end of the tax year of the Member State during which the information became available.
[220] Schilcher/Spies/Zirngast (n 181), para 731.

capital: income from employment, director's fees, life insurance products not covered by other Union legal instruments on exchange of information and similar measures, pensions and the ownership and income from immovable properties. [221]

Information "available", means that only information retrievable in the tax files in accordance with national procedures for gathering the processing information in the Member State communicating the information[222] need to be exchanged under DAC 1. This pre-condition might lead to asymmetries of exchange content among the Member States.[223]

2.2.2. DAC 2 - Directive (EU) 2014/107

The first Directive on administrative cooperation has been amended for the first time in 2014 (Council Directive 2014/107/EU)[224] which entered into application in January 2016 and extended the scope of the mandatory exchange of information to information on financial accounts. Member States are already making this information available to the United States according to their bilateral agreements signed under FATCA. Thus, this requirement of mandatory exchange of information was included to avoid the need for Member States to invoke the most favored nation clause established in DAC 1[225] and to avoid distortions that would be detrimental to the smooth functioning of the internal market.[226]

[221] DAC 1, art. 8 (1).
[222] DAC 1, art. 3 (9); Schilcher/Spies/Zirngast (n 181), para 740.
[223] Schilcher/Spies/Zirngast (n 181), para 740.
[224] Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2014] OJ L 359/1 ("DAC 2").
[225] Binder (n 166), 5; according to DAC 1 art. 19 in case a Member State provides a wider cooperation to a third country than that provided under DAC, that Member State has to provide such wider cooperation to any other Member State that requests it.
[226] DAC 2, recital (8).

DAC 2 introduced the EU framework for the OECD Common Reporting Standard,[227] transcribing various elements of the OECD CRS into EU law[228] requiring Financial Institutions to implement reporting and due diligence rules which are fully consistent with those set out in the CRS developed by the OECD.[229] In this way, bringing the expanded scope of automatic exchange within the Union in line with international developments, costs and administrative burdens both for tax administration and for economic operators might be minimized.[230]

DAC 2 requires the Reporting Financial Institutions ("reporting FIs") of Member States to automatically exchange information on financial accounts and related income, namely: interest, dividends or other income generated by financial accounts; gross proceeds from sale or redemption of assets held in the financial accounts; financial account balances.[231] This AEOI has to be carried out on an annual basis[232] while the pre-condition of "availability" does not apply under DAC2.[233]

Under DAC 2 reporting FIs are required to report predefined information concerning relevant accounts ("reportable accounts") to the competent authority of another Member State, without prior request, at pre-established intervals.[234] A "reportable account" is a financial account (of a depositary, custodial or similar character) that is maintained by a Member State reporting financial institution

[227] Binder (n 166), 5.
[228] ibid 57.
[229] DAC 2, recital (9).
[230] DAC 2, recital (9).
[231] DAC 2, inserted art 8 (3a).
[232] DAC 2, replaced art. 8 (6).
[233] Binder (n 166), 65.
[234] DAC 2, art. 8 (3a) in conjunction with art. 3(9) (b); Schilcher/Spies/Zirngast, (n 181), para 743. Binder (n 166), 65.

(such as custodial institutions, depositary institutions, investment entities or specified insurance companies)[235] and is held by one or more "reportable persons"[236] or by a non-financial entities (NFE) with one or more controlling persons that is a reportable person.[237]

"Reportable persons" are individuals and entities that are resident in another Member State, other than: a corporation the stock of which is regularly traded on one or more established securities markets, governmental entities, international organizations, central banks or financial institutions.[238]

The term "controlling persons" means a natural person who exercise control over an entity; the term must be interpreted in a manner consistent with the Financial Action Task Force Recommendations.[239]

Each Member State is obliged to require reporting FIs to follow the reporting and due diligence rules set out in Annex I and II of DAC 2 in order to be able to comply with the reporting requirement established, in particular ascertaining the tax residence of the account holder(s) to establish whether they are a reportable person and establishing who the controlling persons of an entity are.[240]

[235] The definitions of „reporting financial institution" and „non reporting financial institution" is contained in Annex I, Section VIII A and B, respectively, of DAC 2.
[236] Schilcher/Spies/Zirngast (n 181), para 743.
[237] Definition „Reportable account" is contained in Annex I, Section VIII D (1) of DAC 2.
[238] Schilcher/Spies/Zirngast (n 181), para 743; See definition „reportable person" in Annex I, Section VIII, D (2) and (3) of DAC 2.
[239] See Definition „Controlling person" contained in Annex I, Section VIII D (5) of DAC 2: "The term "Controlling Persons" means the natural persons who exercise control over an Entity. In case of a trust, the term means the settlor(s), the trustee(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other than a trust, such term means persons in equivalent or similar positions. The term "Controlling Persons" must be interpreted in a manner consistent with the Financial Action Task Force Recommendations."
[240] Binder (n 166), 65; Schilcher/Spies/Zirngast (n 181), para 746; Reporting and due diligence rules are detailed in Annexes I and II of DAC 2.

Under DAC 2, beneficial ownership is determined for both individual accounts, where the individual holds directly their interest in the account, and for passive non financial entity (NFE), where the individual holds the account through an entity.[241] In case highly complex structures are used for the purpose of tax avoidance and evasion it is necessary to look through the structure in order to identify the real ownership of the underlying assets or income and the correct taxable person, not relying only on the legal ownership.[242] Thus, it is important to have access to BO information.

Under DAC 2, where the account holder is a passive NFE (non-financial entity),[243] reporting FIs must, according to the due diligence requirements, look through to assess and identify who the "controlling persons" are. For this purpose FIs rely on BO information obtained under the Fourth AML -Directive.[244]

Specific due diligence requirements with the aim of identifying reportable accounts depend on the nature of the account. DAC 2 distinguishes between pre-existing and new individual accounts and between individual and entity accounts.[245]

In particular, reporting FIs shall rely on information collected and maintained pursuant to AML/KYC procedure: I) regarding pre-existing entity accounts, for the purposes of i) determining whether the entity is a reportable person; [246] ii)

[241] Binder (n 166), 73.
[242] Binder (n 166), 73.
[243] NFE means entity that is not a Financial Institution (see definition in Annex I, Section VIII D (6) DAC 2); a NFE is passive if more than 50% of their gross income is passive income or more than 50% of the assets produce passive income (See definition of passive and active NFE in Annex I, Section VIII D (6)-(8) of DAC 2).
[244] Binder (n 166), 28, 113.
[245] See Schilcher/Spies/Zirngast (n 181), para 747.
[246] See DAC 2, Annex I Section V, D (1).

determining the controlling persons of an account holder;[247] iii) determining whether a controlling person of a passive NFE is a reportable person;[248] and II) regarding new entity accounts, for the purpose of i) determining whether the entity is a reportable person;[249] ii) determining the controlling person of an account holder;[250]as well as III) regarding new individual accounts for the purpose of identifying reportable accounts.[251]

With regard to new individual accounts and entity accounts, the FIs must obtain self-certification that allows to determine the account holder's residence for tax purposes and to determine if it is reportable person.[252] The self-certification provided by the entities for each controlling person who are reportable persons must be verified based on the information obtained including any documentation collected pursuant to the AML/KYC procedure (applying the "reasonableness test").[253] Thus, it is important that the collected AML/KYC documentation can be considered accurate.[254] Whereas, for pre-existing lower value individual accounts the due diligence requirements are satisfied by verifying if the self-certification provided by the account holder seems reasonable and no enhanced due diligence procedures are required.[255]

Also, accounts held by a (resident) passive entity are subject to the exchange of information procedure if its controlling natural persons are resident in another

[247] See DAC 2, Annex I Section V, D (2) (b).
[248] See DAC 2, Annex I Section V, D (2) (c).
[249] See DAC 2, Annex I Section VI (1).
[250] DAC 2, Annex I Section VI (2) (b).
[251] See Annex I, Section IV.
[252] See DAC 2, Annex I, Section IV, V, VI.
[253] Müller-Dragovits/Somare (n 77), 119.
[254] See Binder (n 166), 74.
[255] Binder (n 166), 74; See DAC 2, Annex I, Section III (B).

Member State.[256] Thus, in order to enable tax authorities to identify the controlling persons of such intermediary structure, the amendments introduced by DAC 5 ensures that the TAs have access to beneficial ownership information collected pursuant to AML legislation.[257]

2.2.3. DAC 3 - Directive (EU) 2015/2376

The second amendment of the DAC (DAC 3- Council Directive 2015/2376/EU)[258] introduced automatic exchange of tax rulings on advance cross-border rulings and advance price arrangements.[259] The driven force behind this amendment was the increasing concern within the Union and at global level regarding cross-border tax avoidance, aggressive tax planning, harmful competition[260] and, in particular, the "Luxembourg leaks" case (public exposure of preferential rulings granted to multinationals by Luxembourg tax authorities).[261]

DAC 1[262] already obliged Member States to spontaneously exchange information in cases where there may be a loss of tax in another Member State, this information, in practice, has rarely been shared.[263] To face the problem that "rulings concerning tax-driven structures have, in certain cases, led to a low level of taxation of artificially high amount of income in the country issuing, amending or renewing the advance ruling and left artificially amounts of income to be taxed

[256] Schilcher/Spies/Zirngast (n 181), para 743.
[257] ibid.
[258] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2015] OJ L 332/1 ("DAC 3").
[259] See DAC 3, recital (5) and inserted art. 8a. The definition of "advance cross-border ruling" and "advance pricing agreements" are contained in art. 3 point (14) and (15) added by DAC 3, see also DAC 3 recital (6).
[260] DAC 3, recital (1).
[261] Schilcher/Spies/Zirngast (n 181), para 714.
[262] Art. 9 (1) (a) DAC 1.
[263] Schilcher/Spies/Zirngast (n 181), para 749.

in any other countries involved" an increase in transparency was considered essential, introducing the further amendment with DAC 3, applied from January 2017.[264]

2.2.4. DAC 4 - Directive (EU) 2016/881

The further amendment of DAC arrived with the Council Directive (EU) 2016/881 of 25 May 2016 (DAC 4),[265] requiring Member States to collect country-by-country (CbC) information from their multinational enterprises (MNE) groups and automatically change such information with other Member States,[266] applied from June 2017.

The reasons for this further widening of the scope we can find in the following considerations contained in the Directive. As multinational enterprise groups (MNE Groups) "are active in different countries, they have the possibility of engaging in aggressive tax-planning practices that are not available for domestic companies. When MNE Groups do so, purely domestic companies, normally small and medium-sized enterprises (SMEs), may be particularly affected, as their tax burden is higher than that of MNE Groups. On the other hands, all Member States may suffer revenue losses and there is the risk of competition to attract MNE Groups by offering them further tax benefits".[267] The information contained in CbC-reports, regarding the structure of MNE Groups, their transfer-pricing policy and internal transactions in and outside the Union, are aimed to "enable the tax authorities to react to harmful tax practices by making changes in legislation

[264] DAC 3, recital (1).
[265] Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory exchange of information in the field of taxation [2016] OJ L 146/8 ("DAC 4").
[266] See DAC 4, inserted art. 8aa; DAC 4, recital (20).
[267] DAC 4, recital (2).

or by undertaking adequate risk assessment and tax audits, and to identify whether companies have engaged in practices that have the effect of artificially shifting substantial amounts of income into tax-advantaged environments".[268] "Increased transparency towards tax authorities could have the effect of giving MNE Groups an incentive to abandon certain practices and pay their fair share of tax in the country where profits are made. Enhancing transparency for MNE Groups is therefore considered an essential tool for tackling base erosion and profit shifting."[269]

Thus, with this amendment Country-by-Country (CbC) reports became part of the categories of information subject to mandatory automatic exchange of information.

In the CbC report, MNE Groups have to provide annually and for each tax jurisdiction in which they do business the amount of revenue, profit/loss before income and income tax paid and accrued as well as the number of employees, stated capital, accumulated earnings and tangible assets in each tax jurisdiction.[270]

[268] DAC 4, recital (3).
[269] DAC 4, recital (4).
[270] DAC 4, recital (6) and inserted art. 8aa (3). For further details regarding CbC reports and amendments introduced by DAC 4 see Schilcher/Spies/Zirngast (n 181), para 757-763.

2.2.5. DAC 5 – Directive (EU) 2016/2258

With the Council Directive (EU) 2016/2258 of December 2016 (DAC 5)[271] DAC 1 has been further amended as regards access to anti-money laundering information by tax authorities.

As considered in this new Directive, with the amendments introduced by DAC 2 global standard for automatic exchange on account holders of financial account information in tax matters within the Union have been implemented thereby ensuring that information on account holders of financial accounts is reported to the Member State where the account holder is resident.[272] Thus, where the account holder is an intermediary structure, financial institutions have to look through that structure in order to identify and report on its beneficial owner, relying for the application of this element, therefore, on AML information obtained pursuant to Directive (EU) 2015/849 for the identification of the beneficial owners.[273]

Moreover, it has been held that to ensure effective monitoring of the application by FIs of the due diligence procedures set out in DAC, "the tax authorities need access to AML information. In the absence of such access, those authorities would not be able to monitor, confirm and audit" that the FIs are applying the provisions of DAC 2 "properly by correctly identifying and reporting on the beneficial owners of intermediary structures".[274]

[271] Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money laundering information by tax authorities [2016] OJ L 342/1 („DAC 5").
[272] DAC 5, recital (1).
[273] DAC 5, recital (2).
[274] DAC 5, recital (3).

In order to enable tax authorities to identify the controlling persons of such intermediary structure, Art. 22 (1a) introduced by DAC 5 ensures that the TAs have access to beneficial ownership information collected pursuant to AML legislation.[275]

2.2.6. DAC 6 - Directive (EU) 2018/822

The Directive on administrative cooperation has been further amended by Council Directive (EU) 2018/822 of 25 May 2018 (DAC 6)[276] as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.[277]

The objective of this Directive is "to improve the functioning of the internal market by discouraging the use of aggressive cross-border tax-planning arrangements",[278] calling "for tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance and evasion"[279] considering that "certain financial intermediaries and other providers of tax advice seem to have actively assisted their clients in concealing money offshore".[280]

Thus, DAC 6 introduced mandatory disclosure rules for reportable cross-border arrangements.[281] These disclosure rules are imposed on any intermediary as defined by the Directive, which means "any person that designs, markets,

[275] Schilcher/Spies/Zirngast (n 181), para 743; DAC 5, recital (5).
[276] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements [2018] OJ L 139/1 ("DAC 6").
[277] See DAC 6, inserted art. 8ab.
[278] DAC 6, recital (19).
[279] DAC 6, recital (4).
[280] DAC 6, recital (5).
[281] See DAC 6, inserted art. 8ab; "cross-border arrangements" are defined by point.18, art. 3, introduced by DAC 6; "reportable cross-border arrangements" are defined by point 19, art. 3, introduced by DAC 6, which refers to Annex IV of DAC 6.

organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement".[282]

An intermediary can be either an individual or a company (i.e. accountants, lawyers, advisers, banks, etc). An intermediary is also "any person that, having regard to the relevant facts and circumstances required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or be means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement".[283]

In case the reporting obligation would not be enforceable upon an intermediary due to a legal professional privilege or where there is no intermediary, the reporting obligation is shifted to the relevant taxpayer who benefits from the arrangement in such cases.[284]

"Relevant taxpayer" means[285] any person: i) to whom a reportable cross-border arrangement is made available for implementation (this doesn't mean that the person concerned has to be involved in the arrangement, for example the parent company engages a tax advisor to do an arrangement, which only affects the subsidiary company); ii) who is ready to implement a reportable cross-border arrangement (which concerns all persons, without whose actions an arrangement

[282] See DAC 6, added point (21) of art. 3.
[283] DAC 6, added point (21) par. 2 of art.3; See Binder (n 166), 59 and Schilcher/Spies/Zirngast (n 181), para 766.
[284] DAC 6, recital (8); See DAC 6, inserted art. 8ab (5) and (6).
[285] See definition in DAC 6, added point (22) of art. 3.

cannot be implemented); iii) has implemented the first step of such an arrangement.[286]

The intermediaries (or relevant taxpayers) have to file information that is within their knowledge, possession or control on a reportable cross-border arrangement with the competent tax authorities. The information has to be filed within 30 days, beginning on the day after the reportable cross-border arrangement is made available for implementation by the intermediary, after it is ready for implementation, or when the first step in its implementation has been taken, whichever occurs first.[287] In addition, with regard to marketable arrangements (i.e. those that do not need to be substantially customized),[288] periodic report has to be made every three months, covering specific new reportable information that has become available since the last report was filed.[289]

Therefore, each cross-border arrangement (i.e. an arrangement in either more than one Member State or a Member State and third country, that meets at least one of the conditions set out in DAC 6),[290] has to be analysed in order to decide if it's reportable or not.[291] The hallmarks of reportable cross-border arrangements are set out in Annex IV introduced by DAC 6 and cover a "main benefit test", as well as a number of generic and specific hallmarks.[292]

[286] Stefan Bendlinger, „Das EU-Meldepflichtgesetz Offenbarungseid für Steuerberate und Mandanten," (2019) 04, WT Fachjournal Internationales Steuerrecht 277, 279.
[287] DAC 6, inserted art. 8ab (1) and (7); Schilcher/Spies/Zirngast (n 181), para 765.
[288] See DAC 6, added point (24) of art. 3 for the definition of "marketable arrangements".
[289] DAC 6, inserted art. 8ab (2); Schilcher/Spies/Zirngast (n 181), para 765.
[290] See DAC 6, added point (18) of art.3.
[291] Schilcher/Spies/Zirngast (n 181), para 768.
[292] ibid.

The "main benefit test" will be satisfied if (one of) the main benefit(s) which a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.[293] Generic hallmark cover three exhaustively listed situations, which, among others, concern arrangements where the intermediary is entitled to receive a fee that is fixed by reference to the amount of the tax advantage derived from the arrangement, and arrangements where the taxpayer undertakes to comply with a condition of confidentiality as regards the tax planning scheme.[294] Specific hallmarks are established in four further categories: B - linked to the "main benefit test" (i.e. for example circular transactions); C - related to cross-border arrangements (i.e. for example low-tax jurisdictions, situations of double deduction or double relief); D -concerning automatic exchange of information and beneficial ownership (i.e. for example avoiding the reporting of income); E - concerning transfer pricing (i.e. for example use of unilateral safe harbor rules).[295]

Applying these rules, an arrangement should be subject to reporting obligation in case it cumulatively fulfils the main benefit test and one (or more) general hallmark(s) or one (or more) of the specific hallmark(s) in category B or in category C. Also, irrespective of whether or not the main benefit test is satisfied, an arrangement would be subject to reporting if it, on a standalone basis, meets one (or more) of the residual specific hallmark(s) listed in category C or category D or E.[296]

Therefore, among others, according to category D in Annex IV, exists the reporting obligation with regard to an arrangement involving a non-transparent

[293] DAC 6, Annex IV, Part I par. 2; Schilcher/Spies/Zirngast (n 181), para 768.
[294] DAC 6, Annex IV, Part II, cat. A; Schilcher/Spies/Zirngast (n 181), para 768.
[295] See DAC 6, Annex IV, Part II, cat. B, C, D, E; See Schilcher/Spies/Zirngast (n 181), para 768.
[296] Schilcher/Spies/Zirngast (n 181), para 769.

legal or beneficial ownership chain with the use of persons, legal arrangements or structures: that do not carry on a substantive economic activity supported by adequate staff, equipment, assets and premises; and that are incorporated, managed, resident, controlled or established in any jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive (EU) 2015/849, are made unidentifiable[297] (e.g. between assets and the beneficial owner a letterbox company, trust or foundation in a Caribbean tax haven is set up, whereby the beneficial owner of the assets is not anymore identifiable. This arrangement has to be necessarily reported).[298] Furthermore, it's specified in category D, that the reporting obligation exists with regard to arrangements which may have the effect of undermining the reporting obligation under the Fourth AML-Directive or any equivalent agreements on the automatic exchange of Financial Account information[299] (such as the agreements under the CRS)[300].[301]

The competent authority of a Member State where the information on a reportable cross-border arrangement was filed, is obliged to automatically communicate the specified information in DAC 6[302] to the competent authorities of all other Member States via a secure central directory to be developed by the European

[297] DAC 6, Annex IV, D. (2).
[298] Stefan Bendlinger, „Meldepflicht grenzüberschreitender Steuergestaltung – Offenbarungsbescheid für Steuerberate und deren Mandanten" in GedS Kofler, Herausforderungen im Unternehmenssteuerrecht und in der Rechnungslegung (Linde 2020), 233.
[299] See DAC 6, Annex IV, D. (1).
[300] DAC 6, recital (13).
[301] For details regarding reporting obligation under DAC 6 see Stefan Bendlinger (n 298), 213-262.
[302] See DAC 6, inserted art. 8ab (14).

Commission.[303][304] According to the Directive, the information to be exchanged contains the following elements:

- the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual, residence for tax purposes, TIN (tax identification number) and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;
- detail of the hallmarks set out in Annex IV that make the cross-border arrangement reportable;
- a summary of the content of the reportable cross-border arrangement and an abstract description of the relevant business activities, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;
- the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;
- details of the national provisions that form the basis of the reportable cross-border arrangement;
- the value of the reportable cross-border arrangement;
- the identification of the Member State of the relevant taxpayer(s) and any other Member State which are likely to be concerned by the reportable cross-border arrangement;

[303] See DAC 6, replaced art. 21 (5).
[304] Schilcher/Spies/Zirngast (n 181), para 770.

- the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.[305]

The automatic exchange of information shall take place within one month of the end of the quarter in which the information was filed.[306]

This Directive widened the scope, imposing reporting obligations on intermediaries, professionals related to legal, taxation or consultancy services in a Member State, especially lawyers, notaries and tax advisors.[307] Intermediaries therefore are obliged to file information that is within their knowledge, possession or control on reportable cross-border arrangements[308] and to verify if such an obligation exists according to DAC 6.

2.2.7. DAC 7 and DAC 8

With DAC 7 - Directive (EU) 2021/514[309]- further amendments have been introduced, which bring royalties within the scope of categories of income subject to mandatory automatic exchange between Member States,[310] specifying the meaning of "foreseeable relevance",[311] facilitating joint audits[312] and imposing new reporting rules for digital platform operators (located inside and outside the

[305] DAC 6, inserted art. 8ab (14).
[306] DAC 6, inserted art. 8ab (18).
[307] See DAC 6, added point (21) of art. 3 for conditions in order to be a intermediary.
[308] See DAC 6, inserted art. 8ab.
[309] Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation [2021] OJ L 104/1 ("DAC 7").
[310] DAC 7, amended art. 8, adding in par. 1, lit f) royalties.
[311] DAC 7, inserted art. 5a.
[312] DAC 7, inserted art. 12a.

EU) on their sellers whose information (revenues generated) are subject to an automatic exchange of information obligation.[313]

Further amendments are programmed (with "DAC 8"), imposing reporting obligations and allowing the exchange of information concerning new alternative means of payment and investment such as crypt-assets or e-money.

III. CHAPTER: Interplay between AML and DAC provisions

3.1. Beneficial Ownership (BO)

AML and exchange of information provisions have a various amount of interactions and interdependencies, due to the type of information required to tackle money laundering and tax avoidance and/or evasion. The main link between the two frameworks is beneficial ownership, which is a key aspect for both.[314]

The definition of BO in both frameworks (AML and DAC provisions) is based on the definition provided by the FATF Recommendations and/or has to be interpreted in line with them.

The purpose of the FATF standards on transparency and beneficial ownership "is to prevent the misuse of corporate vehicles for money laundering or terrorist financing. However, these FATF standards support the efforts to prevent and detect other designated categories of offences such as tax crimes and corruption"[315] and are also relevant for tax purposes.[316]

[313] DAC 7, inserted art. 8ac.
[314] Binder (n 166), 113.
[315] FATF Guidance, 4 par. 5.

The FATF Guidance focuses on the concept of control, and defined the beneficial owner as being the natural persons(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.[317]

Under DAC 2 the term "controlling persons" means the natural persons who exercises control over an entity and must be interpreted in a manner consistent with the Financial Action Task Force Recommendations.[318]

It has to be considered that the percentage of ownership interest has been set up at 25% by the 4th AML-Directive, adopting this minimum threshold in line with the FATF Recommendations and also "controlling person" under DAC 2 has to be interpreted in line with FATF Recommendations. Thus, a person holding 25% or less of ownership interest might not be identified as controlling person or beneficial owner.[319]

Therefore, it can be noted that regarding passive NFEs under DAC 2, "as long as no party has over 25% beneficial ownership of an entity, there will be no reportable persons in relation to that entity" and "financial accounts owned by several owners through a trust or similar financial structure will not be reportable if none of the owners of the trust owns more than 25% and therefore none will have to be declared by the trust to the reporting FI as ultimate beneficial

[316] FATF Guidance, 4 par. 4.
[317] Binder (n 166), 115; See Chapter I, par. 1.2.2.1.
[318] DAC 2, Annex I, Section VIII, D. par. 5.
[319] Binder (n 166), 73.

owner".[320] Thus, "accounts in relation to that entity may be considered undocumented accounts" and, in addition, "where the entity is active the beneficial owners will remain hidden irrespective of the 25% threshold"[321] (regarding active entities, only the residence of the entity has to be reported and not that of the controlling persons).[322]

The "controlling person" does not always coincide with a beneficial owner under AML rules. In particular, in the case of a trust, the term "controlling persons" under DAC 2 means "the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising ultimate effective control over the trust".[323] Thus, all settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries are treated as controlling persons regardless the effective exertion of control over the trust.[324]

The key factor in the process identifying the real beneficial owner is the ability to distinguish between the legal and real beneficial owner. In this regard, for example, settlers are considered to be beneficial owners in relation to trusts, but this does not consider the use of "dummy settlers", where the settler of the trust (identified as "controlling person") must be distinguished from the person who provided the economic value of the settlement of the trust.[325]

[320] ibid.
[321] ibid.
[322] ibid.
[323] DAC 2, Annex I, Section VIII, D. par. 5.
[324] Müller-Dragovits/Somare (n 77), 118.
[325] Binder (n 166), 73-74.

Also with regard to corporation entities or structures it has to be noted that most ownership and control is obtained by shareholding, which can indicate legal ownership, but not necessarily the real ownership (e.g. in case a complex structure is used with the main purpose to hide the real ownership for tax fraud purposes, bearer shares are used and shadow directors, whilst having control over the corporate' actions and BO, will not be declared as legal owner).[326]

Thus, information based on documentation might suggest the identity of the legal owner, but the economic benefit may be accrued by a different individual, the real beneficial owner.

Therefore, for an appropriate functioning of the provisions in order to identify the real beneficial ownership a proper functioning of the due diligence procedures is essential,[327] ensuring that the information is accurate.[328]

Based on FATF Recommendations 24 and 25 the Fourth AML – Directive requires companies and trusts to retain "adequate and accurate" information on their beneficial ownership. Furthermore, the Member States are required to held the information of the beneficial owner (s) of an entity in national registers (BO register) in order to centralize the storage of this information and make it available to supervisory authorities and obliged entities.[329]

According to DAC 2, in order to identify the controlling persons, FIs may rely on the records collected for AML purposes, which information should contain not only on beneficial owners but also on persons having influence over the entity

[326] ibid 115.
[327] ibid 74.
[328] ibid 115.
[329] Müller-Dragovits/Somare (n 77), 119; See Chapter I, par. 1.2.2. and 1.3.4.2.

and, therefore, on controlling persons in the context of DAC 2.[330] Thus, for the identification of the controlling person/beneficial owner DAC relies on AML information obtained by FI under the Fourth AML-Directive. [331]

To guarantee the effectiveness of DAC, tax authorities must ensure that financial institutions are complying with the due diligence procedures.[332] Therefore, access to AML information is an essential key part.[333] The Fourth AML-Directive provides that Member States should allow access to AML information to competent authorities, FIUs, entities required to conduct due diligence checks and other parties with a legitimate interest [334]

The fifth AML Directive widened the scope for interaction between AML and DAC provisions establishing the interconnection of EU Member States' central register holding beneficial ownership information.[335] Due to these amendments national tax administrations are able to use the BO information provided by BO registers.[336] The fifth AML, in particular:

- "sets up publicly available registers for companies, trusts and legal arrangements;
- provides access to data on the beneficial ownership of trusts without restrictions to competent authorities (including tax administrations) and other relevant parties;
- interconnects beneficial ownership registers at EU level, facilitating cooperation and exchange of beneficial ownership information across Member States;

[330] Müller-Dragovits/Somare (n 77), 119; See Chapter I, par. 1.3.4.
[331] Binder (n 166), 74, 76, 113.
[332] See DAC 5, recital (3).
[333] Binder (n 166), 113-114.
[334] See Fourth AML-Directive, recital (14) and art. 13.
[335] Binder (n 166), 29.
[336] ibid.

- requires member States to have mechanisms in place to verify the information collected by the registers;
- enhances the powers of Financial Intelligence Units to cooperate more easily between themselves and other competent authorities (including tax administrations)".[337]

The Fourth AML- Directive required information to be made available to competent authorities, but only at a national level, in this way, limiting the possibility for cooperation between Member States.[338]

With DAC 5 the interaction between the provisions has been further enhanced, allowing tax authorities access to BO information collected under AML procedures,[339] also in order to allow tax authorities an effective monitoring regarding the proper application by FIs of due diligence procedures set out in DAC 2 aimed at identifying the beneficial owners of intermediary structures.[340] DAC 5 also provides for dynamic references to the AML provisions and that Member States will have access to BO information across Member States through interconnected BO registers at EU level.[341]

It should be emphasised that tax advisors, notaries and other independent legal professionals, are considered obliged entities under AML provisions when participating in financial or corporate transactions (besides the exemption for legal professionals when ascertaining the legal position of a client or for professionals

[337] ibid 114.
[338] ibid.
[339] ibid.
[340] See DAC 5, recital (3); See Chapter II, par. 2.2.5.
[341] Binder (n 166), 114.

representing a client in a legal proceeding)[342] and with DAC 6 these professionals, when acting as "intermediary", that is when designing, marketing, organizing or making available for implementation or managing the implementation of a reportable cross-border arrangement or providing aid, assistance for the mentioned purpose directly or by means of other persons (except the reporting obligation is not enforceable upon an intermediary due to a legal professional privilege),[343] became subject also to reporting obligations regarding reportable cross-border arrangements.

3.2. Loopholes and challenges

The purpose of AML provisions is to fight anti money laundering and that "any proceeds derived from criminal activity are identified for this purpose".[344] The Fourth AML-Directive, when defining "criminal activity", also includes tax crimes, but without offering a clear definition, remaining, therefore, this definition within the Member States competence. Thus, there is a lack of a common/uniform definition of tax crime across EU Member States. The preamble of the Fourth AML-Directive calls for to "allow, to the greatest extent possible under their national law, the exchange of information or the provision of assistance between EU Financial Intelligence Units (FIUs)"[345] in order to enhance the effectiveness of the AML provisions.[346]

Thus, obliged entities may not be required to keep beneficial ownership if transactions do not fall under the national definition of tax crime where they are

[342] See Chapter I, par. 1.3.4.
[343] See Chapter II, par. 2.2.6.
[344] Binder (n 166), 115.
[345] Fourth AML-Directive, recital (11).
[346] Binder (n 166), 115.

subject to the AML provisions and, therefore, TAs will lack on this information[347] for tax purposes.

One of the main challenges is the identification of real beneficial ownership, which is linked to the need that the information is accurate. The lack of a common/uniform definition of BO nor by DAC and AML provisions nor across the Member States themselves is, therefore, one of the main loopholes.[348] DAC specifies that the definition should be in line with the FATF Recommendations and the AML provisions also are based on the FATF guidance,[349] but the exact definition remains within the discretion of the Member States.

These inconsistencies can limit the effectiveness of the interaction between DAC and AML provisions and, therefore, the exchange of information for tax purposes.[350]

As mentioned, the correct information regarding BO is crucial to the effectiveness of the AML provisions and a key aspect for the effectiveness of DAC is the access and exchange of that information. The effectiveness and interaction of the provisions rely on the implementation of the Directives by the Member States.[351]

In addition, when DAC relies on AML information acquired through exchange of information on request, this request has to refer to a specific case in order to avoid "fishing expeditions". Thus, in order to make the request Member States must

[347] ibid.
[348] ibid.
[349] ibid.
[350] ibid.
[351] ibid 115-116.

know what and who they need information on.[352] Moreover, the required standard of "reasonable relevance" means that the information must be need for tax purposes (limitation of purpose). Thus, it might be possible that the effectiveness of DAC may be limited to the case of prior suspicion in order to make the request of information and this information may only be used for the declared purpose.[353]

As emphasised, for a proper functioning of the DAC and AML mechanism the BO information must be accurate. Under AML provisions, obliged entities must held accurate and up-to-date information. However, neither the 4th nor the 5th AML- Directive set a minimum standard or a common approach for the supervision of AML activities.[354] This has led to divergences between Member States regarding the supervision and its effectiveness. In this way, effectiveness of BO identification under AML provisions is affected and, as a consequence, indirectly those under DAC provisions, creating also imbalances in the system of exchange of information, where information from some Member States may be more accurate than those from others where supervision is limited. [355]

3.3. Further developments to face challenges

In order to face this challenge, posed by differing AML supervisions across Member States, the European Commission (EC), in May 2020 adopted an Action Plan with – among the others - the purpose to create an AML supervisor on EU level.

[352] ibid 116.
[353] ibid.
[354] ibid.
[355] ibid 116-117.

In that Action Plan, the Commission committed to take measures in order to strengthen the EU's rules on combating money laundering and terrorist financing and their implementation and defined six priorities or pillars:

1. Ensuring effective implementation of the existing EU AML/CFT framework,
2. Establishing an EU single rulebook on AML/CFT,
3. Bringing about EU-level AML/CFT supervision,
4. Establishing a support and cooperation mechanism for Financial Intelligence Units (FIUs),
5. Enforcing EU-level criminal law provisions and information exchange,
6. Strengthening the international dimension of the EU AML/CFT framework[356]

Then, on 20 July 2021, the European Commission presented an ambitious package of legislative proposals to strengthen the EU's anti-money laundering and countering the financing of terrorism (AML/CFT) rules. The package includes a proposal for the creation of a new EU authority that will transform AML/CFT supervision in the EU and enhance cooperation among financial intelligence units (FIUs). It should be the central authority coordinating national authorities to ensure that the private sector correctly and consistently applies EU rules. [357]

As emphasised in the Preamble of this Proposal, the new European authority is essential to address the current shortcomings in AML/CFT supervision in the Union: AML/CFT supervision within the EU is currently Member State-based. Its

[356] Explanatory Memorandum, par. 2, of the legislative proposals, part of the package of legislative proposals to strengthen the EU's anti-money laundering and countering the financing of terrorism (AML/CFT) rules adopted on 20th July by EC.

[357] Proposal for a Regulation of the European Parliament and the of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010; COM (2021) 421 final, July 2021 ("Regulation AML-Authority").

quality and effectiveness are uneven, due to significant variations in resources and practices across Member States.[358]

The new authority "should be enabled to support national authorities and to promote supervisory convergence, also in the non-financial sector. To fulfill its task of direct supervision, the authority should establish joint supervisory teams, undertake general inspections and impose supervisory measures and administrative sanctions, while respecting the specificities of national systems and enforcement set-ups. The new supervisor should have an independent and autonomous governance structure and cooperate with other relevant EU and national authorities. For the establishment of a FIU coordination and support mechanism, the Council suggests giving the new authority a central role in strengthening and facilitating joint analysis between FIUs, supporting the FIUs' analyses and promoting exchanges and capacity building among FIUs and also with other competent authorities." [359]

The new Authority should also play a vital role in improving the exchange of information and cooperation between FIUs. [360]

Furthermore, the package contains the proposal for a new regulation on AML/CFT,[361]which will contain directly applicable rules, including in the areas of customer due diligence and beneficial ownership.

[358] Regulation AML-Authority, preamble under point 1, par. 7.
[359] Regulation AML-Authority, preamble under point 1, par. 6.
[360] Regulation AML-Authority, preamble under point 1, par. 10.
[361] Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, COM(2021) 420 final, July 2021 ("AML Regulation").

With the proposal for a new regulation on AML/CFT, the European Commission intends to face the need for harmonised rules across the internal market, considering that the lack of direct applicability of the requirements of the 5th AML- Directive and their granularity led to a fragmentation in their application along national lines and divergent interpretations. The EC recognized that this situation does not allow dealing effectively with cross-border situations and are therefore ill-suited to adequately protect the internal market. It also generates additional costs and burdens for operators providing cross-border services and causes regulatory arbitrage. [362]

With this proposal also a number of changes of substance are made in order to bring about a greater level of harmonisation and convergence in the application of AML/CFT rules across the EU, which, among others, include the areas of customer due diligence and beneficial ownership to ensure an adequate level of transparency across the Union and to mitigate risks that criminals hide behind intermediate levels.[363]

In addition, the new legislative package includes a proposal for a 6th Directive on AML/CFT,[364] which should replace the existing Directive 2015/849/EU containing provisions that will be transposed into national law, such as rules on national supervisors and financial intelligence units in Member States.

[362] AML Regulation, preamble, under point 1, par. 6.
[363] AML Regulation, preamble, under point 1, par. 8.
[364] Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849, COM(2021) 423 final, July 2021 ("Sixth AML-Directive").

As acknowledged in the explanatory of this proposal, the need for the combination of harmonised rules via an AML/CFT Regulation and stronger rules on the national AML/CFT systems through an AML/CFT Directive has been corroborated by the evidence provided in the 2019 reports issued by the Commission. "These reports identified a lack of consistent approaches to supervision of obliged entities, with divergent outcomes for operators providing services across the internal market. They also highlight that uneven access to information by FIUs which limits their capacity to cooperate with one another and that FIUs lacked common tools. All these elements limited the detection of cross-border ML/TF cases. Finally, due to a lack of a legal basis it has not been possible so far to interconnect bank account registers and data retrieval systems, key tools for FIUs and competent authorities". [365]

To address these issues and avoid regulatory divergences, all rules that apply to the private sector have been transferred to a proposal for an AML/CFT Regulation, whereas the organisation of the institutional AML/CFT system at national level is left to a Directive, in recognition of the need for flexibility for Member States in this area. [366]

The proposal for the new Directive also includes a number of changes of substance in order to bring about a greater level of convergence in the practices of supervisors and FIUs and in relation to cooperation among competent authorities.[367]

[365] Sixth AML-Directive, preamble under point 1, par. 6.
[366] AML Regulation, preamble, under point 1, par. 7; Sixth AML-Directive, preamble under point 1, par. 7.
[367] Sixth AML-Directive, preamble under point 1, par. 8.

CONCLUSIONS

The conducted analysis of the DAC and AML provisions in this work shows us that between the two frameworks exists evident synergy and that this interplay enhances the functioning of DAC.

Nevertheless the effective and efficient interaction of the provisions isn't perfect yet and several challenges have still to be faced in order to guarantee a proper functioning of their interplay and, in consequence, the DAC provisions and the exchange of information for tax purposes.

The main issues that still have to be faced can be summarized mainly as definitional issues as well as appropriate access and accuracy of the information exchanged.[368]

With regard to the first category, clear and uniform definitions of tax crime and beneficial owner are needed in order to guarantee a proper functioning of the interaction of the provisions.

Especially, the lack of an agreed and common definition of "tax crime" across Member States impacts whether the information is held in first place for AML purposes[369] and, therefore, whether the information is made available also for tax purposes.

When it comes to beneficial ownership, there are differences between the DAC and AML provisions as well as between Member States. This inconsistency can

[368] Binder (n 166), 121.
[369] ibid.

particularly impact the effectiveness of the interplay between the provisions and the exchange of information, remaining therefore one of the main challenges.[370]

With regard to the second category, the access to and successful exchange of information depends on the transposition of the 4th and 5th AML into national law by Member States.[371] In addition, Member States can adopt a different standard for the accuracy of information. This difference between the Member States can impact the effectiveness of identification of BO under AML provisions and, therefore, affect the interaction between AML and DAC provisions and the effectiveness of exchange of information for tax purposes. Thus, the lack of minimum standards for ensuring the accuracy of information under AML provisions or a common approach to supervise AML activities across Member States needs to be tackled.[372]

Aware of these challenges and loopholes, the European Commission on 20 July 2021, presented an ambitious package of legislative proposals to strengthen the EU's AML/CFT rules.

As emphasised by the EC, "[a]t the heart of this legislative package is the creation of a new EU authority that will transform AML/CFT supervision in the EU and enhance cooperation among financial intelligence units (FIUs). It will be the central authority coordinating national authorities to ensure the private sector correctly and consistently applies EU rules".[373] The AML authority at EU level

[370] ibid 29, 121 -122.
[371] See ibid 116.
[372] ibid 29, 122.
[373] EC, webpage <https://ec.europa.eu/info/publications/210720-anti-money-laundering-countering-financing-terrorism_en> accessed 3 December 2021.

should be operational in 2024 and should start the work of direct supervision slightly later, once the new rules start to apply.[374]

Furthermore, the new legislative package contains the proposal for a new regulation on AML/CFT, which will contain directly applicable rules, including in the areas of customer due diligence and beneficial ownership and a proposal for a 6th Directive on AML/CFT, which should replace the existing Directive 2015/849/EU containing provisions that will be transposed into national law, such as rules on national supervisors and financial intelligence units in Member States,[375] trying in this way to tackle the need of harmonised rules via an AML/CFT Regulation and stronger rules on the national AML/CFT systems through an AML/CFT Directive.

[374] EC, webpage <https://ec.europa.eu/info/publications/210720-anti-money-laundering-countering-financing-terrorism_en> accessed 3 December 2021.

[375] EC, webpage <https://ec.europa.eu/info/publications/210720-anti-money-laundering-countering-financing-terrorism_en> accessed 3 December 2021.

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