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The DAC7 Proposal and Reporting Obligation for Online Platforms

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On 15 July 2020, the EU Commission published a proposal for a directive amending, for the sixth time, Directive 2011/16/EU on administrative cooperation in the field of taxation. The DAC7 Proposal extends EU tax transparency rules to digital platforms. It is proposed that EU Member States will automatically exchange information on income generated by sellers on digital platforms. The authors discuss the content of the DAC7 proposal and try to assess whether it is necessary and proportionate. With respect to proportionality, the authors look in particular at the administrative costs and privacy aspects of the proposal but also consider the consequences for a level playing field for companies. Throughout the article, the authors examine whether the proposal is sufficiently clear.

Keywords: DAC7, online, platforms, e-commerce, automatic information exchange, EU legislation, Platform Operators, Reportable Seller, GDPR, level playing field, digitalization

1 INTRODUCTION

On 15 July 2020, the EU Commission published a proposal for a directive (the ‘DAC7 Proposal’) amending, for the sixth time, Directive 2011/16/EU on administrative cooperation (the ‘DAC’) in the field of taxation.¹ Annex V of the DAC7 Proposal (‘Annex V’) includes reporting rules for platform operators which define the terms of the proposal and give further substance to the due diligence procedures. On 1 December 2020, the Economic and Financial Affairs Council of the EU (ECOFIN) reached an agreement about the DAC7 proposal on a technical level.

The DAC7 Proposal is part of the EU Commission’s Tax Package designed to ensure that European tax policy supports Europe’s economic recovery and long-term growth. It contains several amendments to the Directive, including clarification of the current exchange of information rules (the term ‘foreseeable relevance’ in Article 5a), the introduction of the ability to ask for information on a group of taxpayers who cannot be identified individually by name or otherwise but merely described on the basis of a common set of characteristics (Article 5b), adding royalties to the categories of income that must be exchanged (Article 8), an amendment to the rules regarding the exchange of cross-border rulings and advance pricing arrangements and a revision of the rules on joint audits (section IIa). Finally, the DAC7 Proposal aims to extend the scope of automatic exchange of information to digital platforms by placing an obligation on them to report the income earned by sellers of goods and

services who make use of them. These last new rules are the subject of this article.

DAC7 introduces new reporting obligations for platforms acting as ‘digital intermediaries’ similar to those on financial or tax intermediaries in DAC6. By introducing an obligation on platform operators for the automatic exchange of information on sellers and a general due diligence procedure to identify sellers, the EU Commission hopes to close the gap in effective taxation between online and offline sellers. In principle, using third parties to collect and verify information will make the information obtained from taxpayers more reliable because it can be cross-checked with information obtained from those third parties. It may even be possible to put this information directly into a pre-completed tax return and thus probably reinforcing compliance. It will, however, also increase administrative costs for the platforms which have to perform these duties.

European Business-2-Consumer e-commerce turnover was forecast to grow at around 13% in 2019 and hit EUR 621 billion in sales that year.² The current forecast is that Business-2-Consumer sales will grow to EUR 717 billion by the end of 2020.³ They will keep growing over the next few years as more and more companies adopt online marketplaces as the best way to promote sales. The most familiar and popular online platforms are Amazon, eBay, Rakuten and Alibaba – the giants of online retail – but more and more online retailers are on the rise. The extended lockdown due to covid-19 has also boosted internet shopping and online business models.⁴

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¹ COM (2020) 314 final.

² M. ten Ham & C. Verschueren, *European Ecommerce Report 2019* (11 June 2019).

³ <https://ecommercenews.eu/e-commerce-in-europe> (accessed 05 Nov. 2020).

⁴ COM (2020) 456 *Europe’s moment: Repair and Prepare for the Next Generation*, at 9.

The characteristics of the digital platform economy make it very difficult for tax authorities to trace and detect taxable events⁵ because many digital platforms exist exclusively online and do not offer any physical marketplace.⁶ Sellers can register relatively easily on a digital platform and start selling without the digital platform knowing exactly who they are. In this way, sellers are fairly anonymous and sometimes untraceable if they do not fulfil their obligations to the online platform or buyers. In such cases, if even the digital platform does not know who the seller is, the competent authorities cannot know either and so it becomes very hard to determine where the income of an online seller must be taxed. The problem is intensified in particular when such transactions are made via digital platform operators established in another jurisdiction.

The Commission justifies the proposal with three arguments. Firstly, the lack of reporting income earned by sellers from providing services or selling goods through the digital platforms leads to a shortfall in Member States' tax revenues. Secondly, this provides sellers with a competitive advantage compared to those who are not active on digital platforms. According to the Commission, the objective of fair taxation cannot be ensured if this regulatory gap is not addressed.⁷ Thirdly, the proposal should reduce the administrative costs of digital platforms because individual Member States are currently introducing their own reporting rules and this may lead to a situation where digital platforms must comply with different rules in multiple jurisdictions.

In our opinion, these arguments – and in particular the administrative argument – are sufficiently convincing to justify EU legislation.

1.1 The Rules Apply to Internal and Cross-Border Transactions

Addressing tax challenges due to digitalization is currently the top priority for the OECD/G20 Inclusive Framework. The Organisation for Economic Co-operation and Development (OECD) recently issued reports with Blueprints for Pillar One⁸ and Pillar Two.⁹ These reports should form the basis for a consensus on the solution to mitigate the tax challenges arising from digitalization. However, these blueprints have a different focus from the DAC7 proposal. In particular, Pillar One addresses the issue that digital companies are difficult to tax in the current tax system that allocates taxing rights according to a company's physical presence and nexus within a jurisdiction. Furthermore, intangible assets are the main profit drivers for these companies and income from those assets is mobile and difficult to determine.

⁵ COM (2020) 314 final, at 2.

⁶ COM (2016) 288 final, at 2.

⁷ COM (2020) 314 final, at 2.

⁸ OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS (2020)*.

⁹ OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS (2020)*.

Whereas the Pillar One proposal aims to tax the income of digital companies, the current proposal aims to strengthen the position of Member States to tax income which is generated by sellers on digital platforms.¹⁰ The point here is that potential taxpayers who currently generate income via these platforms do not report it in their tax returns and so the issue is not tax avoidance or aggressive tax planning but tax evasion and tax fraud.

In this regard the DAC7 proposal also extends the automatic information exchange to the field of Value Added Taxes ("VAT") and other indirect taxes.¹¹ In the explanatory memorandum it is stated that the VAT is significant for the functioning of the internal market. Therefore Article 16 of the current Directive will be amended so that the information exchanged under DAC7 may also be used for the assessment, administration and enforcement of VAT in the Member States.¹² In our view this approach is consistent with other proposals of the European Commission to close the VAT gap.¹³ In this regard the information collected under the DAC7 proposal offers Member States a new possibility to verify if the revenue made on a digital platform is declared in the VAT return of a seller. Especially if a seller only sells via a digital platform it should be relatively easy to monitor if the exchanged information reconciles with the filed VAT return(s).

The proposal does not introduce substantive rules to tax the income over which information is exchanged. This remains the responsibility of the individual Member States. A national tax system must set rules to tax income which is generated via these digital platforms. There could also be shortcomings in the law at this level meaning that income generated via digital platforms is not taxed. For example, if a private dwelling is rented out via Airbnb, the income is only taxed if national rules regard it as taxable. Some activities though could lead to new questions, for example on whether renting your neighbour's personal equipment or car should lead to taxable income.¹⁴

¹⁰ Pillar One includes Automated Digital Services and Consumer Facing Businesses, but the members of the Inclusive Framework have not yet reached political agreement on the scope of the proposal. It is difficult to compare the companies that fall under DAC7 with those which fall under Pillar One. The scope of Pillar One seems to be wider but also more strict. More strict because only Automated services are included in Pillar One and these services must be provided via electronic way. The digital platforms under DAC 7 provide more a connection point and market place. The actual service is provided in a different way. However, the addition of Consumer Facing Business seem to make the scope of Pillar One more wide, because also the direct sale of goods and services by the company (the Platform) falls within the scope of Pillar One, while these companies do not fall under DAC7.

¹¹ COM (2020) 314 final, at 4, Art. 113 of the TFEU is the legal basis for this.

¹² COM (2020) 314 final, at 20.

¹³ The VAT gap is the difference between the expected VAT revenue and the VAT actually collected. In this regard European countries lost an estimated EUR 140 billion in VAT revenues in 2018 (Study and Reports on the VAT Gap in the EU-twenty eight Member States, final report 2020).

¹⁴ In the Netherlands, these issues are addressed in a report by the Dutch Ministry of Finance of 1 May 2020 entitled 'Het belasten van

Despite the fact that, in our opinion, the proposal focuses on the tax position of sellers via a digital platform, the reporting obligation will also shed light on the income generated by these platforms in particular jurisdictions because commission and fees charged to sellers must be reported separately. This is an important indicator of the level of activities and revenue in a jurisdiction and could be used to allocate profits of a digital company to a jurisdiction.¹⁵ We discuss the content of the DAC7 proposal below and try to assess whether it is proportionate. With respect to proportionality, we look in particular at the administrative costs and privacy aspects of the proposal but also consider the consequences for a level playing field for companies. Finally, we examine whether the proposal is sufficiently clear.

2 THE DAC7 PROPOSAL

DAC7 introduces an obligation on 'Reporting Platform Operators' (1) to verify the identity of 'Reportable Sellers' which conduct 'Relevant Activities' via their platform and (2) to report the consideration paid to these Reportable Sellers and any fees, commissions or taxes withheld or charged by the Reporting Platform. The Reporting Platform Operator will register for this reporting obligation in one Member State and that Member State will exchange the reported information with the other Member States.¹⁶

2.1 Reporting Platform Operators

The obligation for automatic exchange of information lies with the Reporting Platform Operators.

2.1.1 The Term 'Platform'

Under DAC7 a Platform is the following: any software, including a website or a part thereof and applications, including mobile applications, accessible by users and allowing Sellers to be connected to other users for the purpose of carrying out a Relevant Activity, directly or indirectly, to such users. It also includes any arrangement for the collection and payment of a Consideration in respect of a Relevant Activity.¹⁷ It is not clear to us why the sentence '*It also includes any arrangement for the collection and payment of a Consideration in respect of a Relevant Activity*' has been included because these activities are excluded from the definition when they are the only activities. It may be that the Commission is

inkomsten behaald uit de deel- en kluseconomie, Bouwstenen voor een beter belastingstelsel'.

¹⁵ We do not necessarily agree with the notion that a market jurisdiction is entitled to levy corporate income tax on sales that take place within its jurisdiction, but this is not relevant for this article.

¹⁶ Annex V, s. IV, F.

¹⁷ Annex V, s. I, A.1.

concerned that consideration paid by platforms will otherwise be hidden as remuneration for the payment service.

A platform does not include software that without any further intervention in carrying out a Relevant Activity exclusively allows (1) for processing of payments in relation to the Relevant Activity, (2) users to list or advertise a Relevant Activity and (3) redirecting or transferring of users to a platform. It is therefore clear that a platform must offer the ability to sell goods and services via the platform and that these sales must also take place via the platform.

Due to the very broad definition of the term Platform, platforms will in practice easily fall within the scope of DAC7. If a Platform has mixed activities it will not always be clear whether it should be treated as a Reporting Platform Operator or to what extent in that situation non-reportable activities, such as advertising a Relevant Activity, will be drawn into the reporting obligation of the platform.

A Platform Operator¹⁸ qualifies as a Reporting Platform Operator if it meets two conditions:

1. it must conduct a Relevant Activity; and
2. it must have a presence in the EU or offer services in the EU market.

2.1.2 Condition 1: Relevant Activity

Only platforms that offer a particular Relevant Activity fall within the scope of the automatic exchange of information. A Relevant Activity¹⁹ may pertain to (1) rental of immovable property, (2) personal services,²⁰ (3) sale of goods, (4) rental of any mode of transport and (5) investing and lending in the context of crowdfunding²¹ as defined in Union financial markets legislation. Surprisingly, not all services are included in the definition of a relevant activity. For example, renting equipment which is not immovable property from your neighbours (peerby.com) does not fall within the scope.

The activity must be carried out for a Consideration.²² Other activities carried out by a seller

¹⁸ A Platform Operator is an Entity that contracts with Sellers to make available all or part of a Platform to such Sellers (Annex V, s. I, A.2).

¹⁹ Annex V, s. I, A.4.

²⁰ A Personal Service is a service involving time- or task-based work performed by one or more individuals, acting either independently or on behalf of an Entity, and which is carried out at the request of a user, either online or physically offline after having been facilitated via a platform (Annex V, s. I, A.6). For example Uber, Zoofy, werkspot.nl etc.

²¹ Crowdfunding is a financial technology solution that provides small and medium-sized enterprises (SMEs) and, in particular, start-ups and scale-ups, with alternative access to finance in order to promote innovative entrepreneurship in the Union, thereby strengthening the Capital Markets Union (Directive 2014/65/EU on markets in financial instruments).

²² Consideration is compensation in any form, net of any fees, commissions or taxes withheld or charged by the Reporting Platform Operator, i.e. paid or credited to a Seller in connection with the Relevant Activity, the amount of which is known or reasonably knowable by the Platform Operator (Annex V, s. I, A.5).

acting as an employee of the Platform Operator or a related Entity are not Relevant Activities.

2.1.3 Condition 2: Presence within the EU

In order for a platform to qualify as a Reporting Platform Operator, it must have a certain presence in the EU. This is the case if the Platform Operator is a tax resident in a Member State, incorporated under the laws of a Member State or has its place of management or a permanent establishment in a Member State.²³

Notably, the DAC7 proposal and DAC in general do not include a definition of a permanent establishment. In our opinion reference should, therefore, be made to the definition of a permanent establishment as developed by the OECD.²⁴

The scope of the rules also includes Platform Operators that do not have an EU presence but facilitate (1) Relevant Activities of EU Sellers/providers or (2) rental of real estate located in the EU. These non-EU Platform Operators must register in a Member State.²⁵ From the perspective of the level playing field it is fair that the reporting obligation extends to non-EU Platform Operators. However, enforcement of this rule may be difficult because non-EU companies can operate in the EU market without a presence in the EU. What ability does the EU have to deny access to the EU market if these companies do not comply?

2.2 Reportable Sellers

Reporting Platform Operators must automatically exchange information about a Seller²⁶ on their platform. A Seller is an individual or an entity that is a Platform user. The Seller must be registered on the Platform and carry out a Relevant Activity during the reportable period. Only information about a Reportable Seller has to be reported. Reportable Seller²⁷ means an active seller that is resident in a Member State or that has rented out immovable property located in a Member State.

2.2.1 Active Seller

An Active Seller is a Seller that performs a Relevant Activity during the Reportable Period or is paid or credited a Consideration in connection with a Relevant Activity during the Reportable Period,²⁸ which is one calendar year.²⁹

²³ Annex V, s. I, A.3 and COM (2020) 314 final, at 10.

²⁴ A permanent establishment is defined in para. 1 of Art. 5 of the OECD Model Tax Convention as 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'.

²⁵ Annex V, s. III, A.3.

²⁶ A Seller means a Platform user, either an individual or an Entity, i. e. registered at any moment during the Reportable Period on the Platform and carries out the Relevant Activity (Annex V, s. I, B.1).

²⁷ Annex V, s. I, B.3.

²⁸ Annex V, s. I, B.2.

²⁹ Annex V, s. I, C.6.

In this regard we wonder whether a passive seller could also exist in practice. In our view this could be a seller which is registered with the platform but does not regularly offer services, for example because the account has not yet been activated for the public or the seller does not regularly (once a year) make sales.

In this regard only Governmental Entities are classified as Excluded Sellers.³⁰ A Reporting Platform Operator may rely on publicly available information or a confirmation from the Entity Seller to determine this.³¹

2.2.2 Resident in the EU

The Seller must be a resident in a Member State, which is the case if it has its Primary Address³² in a Member State, has a Tax Identification Number (TIN) or VAT identification number issued in a Member State or, if the Seller is an entity, has a permanent establishment in a Member State.³³

2.3 Obligations of a Reporting Platform Operator

A Reporting Platform Operator has two obligations. Firstly it must collect and verify Active Seller information and secondly it must report this information to the competent authority³⁴ of the Member State where it has to report the information.

2.3.1 Collection and Verification of Seller Information (Due Diligence Procedure)

The Reporting Platform Operator must collect information for each Active Seller, which can be an individual³⁵

³⁰ A Governmental Entity does not qualify as an Active Seller (Annex V, s. I, B.4). This means the government of a Member State, or other jurisdiction, any political subdivision of a Member State or jurisdiction (which includes a state, province, country or municipality), or any wholly owned agency or instrumentality of a Member State or other jurisdiction or of any one or more of the foregoing (each, a Governmental Entity) (Annex V, s. I, C.2). It is not clear whether a state-owned enterprise falls under this definition. This might be the case if a state-owned enterprises is seen as an agency, but normally an agency is an independent part of the government and not a separate entity such as a state-owned enterprise.

³¹ Annex V, s. II, A.

³² The Primary Address is the address i.e. the primary residence of a Seller who is an individual, or the address of the registered office of a Seller i.e. an Entity (COM (2020) 314 final, at 11. and Annex V, s. I, C.5).

³³ COM (2020) 314 final, at 11. and Annex V, s. I, B.3.

³⁴ A Competent Authority of a Member State is an authority which has been designated as such by that Member State (Art. 3 DAC) and this will often be the tax authorities.

³⁵ The Reporting Platform Operator shall collect the following information for each Seller that is an individual: the first and last name, Primary Address, any TIN issued to the Seller, including each Member State of issuance, the VAT identification number of the Seller, where available, and date of birth (Annex V, s. II, B.1).

or an entity,³⁶ and collect the address of each property listing.^{37 38}

Thereafter the Reporting Platform Operator must verify the information collected using all information and documents available in its records as well as any electronic interface made available free of charge by a Member State or the Union to ascertain the validity of the TIN or VAT identification number.^{39 40} Alternatively, the Reporting Platform Operator can confirm the identity and residence of a Seller directly through an electronic identification service made available by a Member State or the Union.^{41 42}

The Reportable Platform Operator may use information and documents available in its electronically searchable records to determine whether the information collected is reliable. If it has reason to know that the information may be inaccurate, it must request the seller to correct the information and provide supporting documents, data or information which is reliable and from an independent source.⁴³

A Reporting Platform Operator will consider a Seller to be resident in⁴⁴:

1. the Member State of the Seller's Primary Address;
2. the Member State of issuance of TIN or VAT identification number if this is a different Member State than that in which the Seller has its Primary Address;
3. the Member State where it has a permanent establishment;
4. each Member State confirmed by an electronic identification service made available by a Member State.⁴⁵

The required information must be verified and available by 31 December of each Reportable Period⁴⁶ and once

verified may be relied on for the next thirty-six months provided the Reporting Platform Operator has no reason to doubt the collected information.⁴⁷ The Platform must verify the information again after that period.

2.3.2 Reporting the Information

The information that the Reportable Platform Operator has to report includes the following: the name, registered office address and TIN and business names of the platforms on which the Reporting Platform Operator is reporting.⁴⁸

The following information on a Reportable Seller that carries out a Relevant Activity must be reported: details to identify the Seller, the Financial Account Identifier,⁴⁹ the name of the holder of the financial account, the total consideration⁵⁰ paid or credited, any fees, commissions or taxes withheld or charged by the Reporting Platform Operator and the property listing.⁵¹

The due diligence information must be reported in one Member State no later than 31 January of each calendar year (i.e. single reporting).⁵² A Reporting Platform Operator with a presence in more than one Member State may choose the Member State where it reports the information.⁵³ A non-EU Platform must report in the Member State in which it has registered.⁵⁴ Financial information must be reported in respect of the quarter of the reportable period.⁵⁵

A Reporting Platform Operator must also provide the information on the Reportable Seller before 31 January of the year following the calendar year in which the consideration is paid or credited to a Reportable Seller for a Relevant Activity.⁵⁶ The records of the due diligence information must be kept for a minimum period of five years but no longer than seven years.⁵⁷

The Competent Authority must exchange all information within two months after the end of the calendar year (the Reportable Period) with the competent authorities where the Reportable Seller is resident or the immovable property is located.⁵⁸

³⁶ The Reporting Platform Operator shall collect the following information for each Seller that is an Entity: the legal name, Primary Address, any TIN issued to the Seller, including each Member State of issuance, the VAT identification number of the Seller where available, the business registration number and the existence of a permanent establishment in the Union, where available, indicating each respective Member State, where such a permanent establishment is located (Annex V, s. II, B.2).

³⁷ The Property Listing is all immovable property units located at the same street address and offered for rent on a Platform by the same Seller (Annex V, s. I, C.7).

³⁸ COM (2020) 314 final, at 11 and Annex V, s. II, E.

³⁹ COM (2020) 314 final, at 11 and Annex V, s. II, C.1.

⁴⁰ The TIN or business registration number of the Seller does not have to be collected if the Member State of registration does not issue a TIN or business registration or does not require the collection of the TIN (Annex V, s. II, B.4).

⁴¹ In our opinion this could, e.g. be the VAT Information Exchange System (VIES), which enables companies to rapidly confirm the VAT numbers of their trading partners and enables VAT administrations to monitor and control the flow of intra-Community trade to detect all kinds of irregularities.

⁴² https://ec.europa.eu/taxation_customs/vies (accessed 05 Nov. 2020).

⁴³ Such as valid government-issued identification document and recent tax residency certificate (Annex V, s. II, C.3).

⁴⁴ Annex V, s. II, D.1.

⁴⁵ Annex V, s. II, D.2.

⁴⁶ Annex V, s. II, F.1.

⁴⁷ Annex V, s. II, F.3.

⁴⁸ Annex V, s. III, B.1.

⁴⁹ The Financial Account Identifier is the unique identifying number or reference available to the Platform Operator of the bank account or other similar payment services account to which the Consideration is paid or credited (Annex V, s. I, C.8).

⁵⁰ The Consideration and all other amounts must be reported in respect of the Reportable Period in which the Consideration was paid or credited. In principle, these amounts are reported in the currency in which they were paid or credited provided it is a fiat currency. Otherwise it must be reported in a local currency, converted or valued in a consistent manner by the Reporting Platform Operator (Annex V, s. III A 5–6).

⁵¹ Annex V, s. III, B.2.

⁵² COM (2020) 314 final, at 12 and Annex V, s. III, A.1.

⁵³ Annex V, s. III, A.2 and s. IV, E and F.

⁵⁴ Annex V, s. III, A.3.

⁵⁵ Annex V, s. III, A.6.

⁵⁶ Annex V, s. III, A.4.

⁵⁷ Annex V, s. IV, B.1.

⁵⁸ Article 8ac, ss 2 and 3.

2.4 Penalties and Fines

If a Reportable Seller does not provide the required information after two reminders, the Reporting Platform Operator must close the account of that Seller and prevent the Seller from re-registering on the Platform for a period of six months or withhold the payment of the Consideration to the Seller.⁵⁹

2.5 Implementation

Member States must adopt and publish, by 31 December 2021 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive.⁶⁰ Member States must implement the rules of the DAC7 proposal in national legislation from 1 January 2022.⁶¹ This means that the first year to which the reporting obligations relate is the calendar year 2022. The information must then be provided by a Platform Operator to the relevant tax authorities by 31 January 2023 at the latest.

3 EVALUATION

3.1 Privacy Aspects

The General Data Protection Regulation (GDPR)⁶² must be taken into consideration when introducing new provisions on automatic exchanges of information by Platform Operators. This is because personal data⁶³ will become available due to the automatic exchanges of information and must be covered by specific provisions and safeguards on data protection. The first proposals for this Directive were criticized for their lack of compliance with the GDPR.⁶⁴ According to recital 27 of the Proposal, the European Data Protection Supervisor was consulted but no reference is made to specific comments or concerns of this agency.

We merely note the general assertion that the proposed amendments will continue to follow and respect these safeguards. Any possible adverse impact on personal data will be minimized by IT and procedural

measures. Data will be exchanged through a secure electronic system that encrypts and decrypts the data and only authorized officials in any tax administration should have access this information. As joint data controllers, they will have to ensure secure and specific data storage.⁶⁵

As the automatic exchange of information rules in the DAC continue to be broadened and so the amount of personal data which is exchanged grows, it will become ever more important to ensure safeguards for such personal data. Under Article 25(1) of Directive 2011/16/EU, all exchanges of information are already subject to the GDPR. Under DAC7, it is now proposed to add a new section to Article 25 of Directive 2011/16/EU which enables Member States to mitigate the risks of data breaches in the context of the exchange of information.⁶⁶ In the event of a personal data breach, competent authorities of Member States may, as joint data controllers, decide to ask the Commission to suspend exchanges of information with the Member State(s) where the breach occurred.⁶⁷

By extending Article 25 on data protection, the EU is in our view acknowledging the importance of this subject but questions remain as to whether this extension will ultimately be sufficient to safeguard personal data. However in the end a data breach could occur even if all the correct procedures have been followed. More important is whether the chance of a breach in personal data outweighs the level playing field between online and offline sellers by automatically exchanging information about online taxpayers.

In this regard it is, and we quote, 'essential to establish a level playing field between the public interest pursued with the exchange of information and the guarantees of confidentiality, adequate use and protection of taxpayer data'.⁶⁸ Consequently, a judgment has to be made between on the one hand the necessity and proportionality of the collection and processing of personal data, which implies limiting the scope of the application of the collection and transmission of data to that strictly necessary to serving the finality of the fight against fraud and tax evasion, and on the other hand avoiding the processing of irrelevant or excessive data and establishing exclusions in favour of low-risk accounts and the DAC7 proposal.⁶⁹

In our opinion the DAC7 proposal is proportionate in respect of the automatic exchange of personal data since, if the DAC7 rules are not implemented, sellers on online sale platforms would remain anonymous and no level

⁵⁹ Annex V, s. IV, A.2.

⁶⁰ COM (2020) 314 final, at 31, Art. 2.

⁶¹ COM (2020) 314 final, at 24.

⁶² Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 Oct. 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data.

⁶³ Personal Data is any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person (Regulation (EU) 2018/1725, Art. 4(1)).

⁶⁴ See Saturnina Moreno González, *The Automatic Exchange of Tax Information and the Protection of Personal Data in the European Union: Reflections on the Latest Jurisprudential and Normative Advances*, EC Tax Rev. 3 (2016).

⁶⁵ COM (2020) 314 final, at 3.

⁶⁶ COM (2020) 314 final, at 15, Art. 25(5).

⁶⁷ The Commission must restore the process for exchanges of information after the competent authorities ask it to re-enable exchanges of information under this Directive with the Member State where the breach occurred.

⁶⁸ See *ibid.*, at 64.

⁶⁹ See *ibid.*, at 64.

playing field would exist between the taxation of online and offline sellers. Rights of the sellers are protected because they are also notified of the information that is collected and exchanged. Fixed time limits are also set for the storage of the information. These time limits seem to be reasonable enough to allow tax authorities to issue additional assessments based on the information exchanged. A concern from the perspective of necessity and proportionality is that data are also collected and exchanged with Member States without knowing in advance whether this information is useful for tax purposes. It may very well be that income generated via digital platforms is not taxed in a Member State under local tax legislation. Compared to other forms of exchange of information it is also appropriate to ensure that no information is exchanged with third countries. The risk that information is not processed in a correct way is lower because all Member States are bound by the GDPR.

Finally, it is not clear to what extent Member States are authorized to use the information for non-tax purposes and to that end allowed to exchange the information with other agencies (for example to regulate activities e.g. setting a maximum on the weeks that an immovable property may be rented out). This might cause issues from the viewpoint of the limitation of finality.

3.2 Administrative Burden

One would think that the legislative proposals on DAC7 would lead to an administrative burden for digital Platform Operators but tax administrations already frequently request information from them, causing significant administrative and compliance costs. At the same time, some Member States have imposed a unilateral reporting obligation which creates an additional administrative burden for Platform Operators as they have to comply with a multitude of national reporting standards. It is therefore essential that a standardized reporting obligation applies across the internal market.

It is now argued that introducing the DAC7 proposal will reduce the administrative burden placed on digital platforms since they no longer have to deal with several different national reporting requirements.⁷⁰ Nonetheless, digital platforms must comply with the extensive reporting rules based on DAC7. This could create an obstacle to market access, particularly because the rules do not contain provisions for small market players, as is the case for example in the CbCR obligation. This may be logical since the purpose of the reporting obligation is to reinforce compliance of the sellers but new digital platforms will be required to comply with these rules immediately

and this could be costly, making it more difficult for them to access the market. Large platforms will have relatively low compliance costs per seller.

This will increase the winner takes it all effect for the digital platforms already existing online. It could also further enhance the existing positive network effects⁷¹ for these digital platforms because no new digital platforms will become active but the number of buyers and e-commerce sales volumes will keep increasing. In the end the giants of online retail will then keep expanding.

On the administrative burden faced by Platform Operators due to DAC7, consideration therefore has to be given to whether the proposal is proportionate to its goals. In our view, although it could become harder for new digital platforms to access the market, all would benefit from EU legislation as every digital platform will have to comply with the same rules which create a level playing field.

4 CONCLUSION

This article discusses and evaluates the framework of the DAC7 proposal. Based on our evaluation we conclude the following about the proportionality of the proposal and whether in our view it is sufficiently clear.

In our opinion, the DAC7 proposal is proportionate in that the objections to the exchange of personal data and the administrative burden do not outweigh the arguments used to justify the proposal. By introducing the DAC7 rules on automatic exchange of information, in our view it is most important that sellers on digital platforms will no longer be anonymous so that the competent authorities can tax them in accordance with national rules.

Due to the very broad definition of the term Platform, platforms will in practice easily fall within the scope of DAC7. If a platform has mixed activities it will not always be clear whether it should be treated as a Reporting Platform Operator or to what extent in that situation non-reportable activities will be drawn into the reporting obligation.

It is also unclear how the DAC7 rules are going to be enforced on non-EU digital platforms. For instance, although non-EU companies are obliged to register in a Member State to comply with the DAC7 rules, enforcement of this rule may be difficult if they do not have a presence in the EU. If in this case no single Member State is responsible for enforcing the rules on non-EU companies there will still not be a level playing field and the income earned by sellers on the sales platforms of these non-EU companies will not be visible.

⁷⁰ https://ec.europa.eu/taxation_customs/general-information-taxation/eu-tax-policy-strategy/package-fair-and-simple-taxation_en (accessed 05 Nov. 2020).

⁷¹ A network effect is the effect that one user of a good or service has on the value of that product to other people (COM (2016) 288 final, at 4).