DAC 6 Law introducing mandatory disclosure rules in Luxembourg passed


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On Saturday 21 March 2020, the Luxembourg Parliament passed a law implementing 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.

The measures are essentially identical to the draft provisions as proposed by the Luxembourg government and include the amendments proposed by the Finance and Budget Commission of the Parliament, which follow the opinion of the State Council. In particular, the intermediaries that will be subject to legal professional privilege (i.e. for which any reporting obligations to the Luxembourg authorities will be waived) broadly include lawyers1 as initially provided, but also chartered accounts2 and auditors3. Intermediaries that are subject to legal professional privilege will be subject to a notification obligation to any intermediary not subject to legal professional privilege or, where there is no such intermediary, to the taxpayer concerned by the relevant reporting obligations pertaining to a reportable cross-border arrangement. However, they will no longer have to make anonymised reports to the Luxembourg tax authorities containing any reportable cross-border arrangements, as had initially been provided for in the draft bill of law.

For more details on the initial bill of law submitted by the Luxembourg government to the Parliament, please refer to our newsflash Disclosure of cross-border arrangements by intermediaries: DAC 6 implementation in Luxembourg.

In line with the draft bill of law, the new provisions should in principle be applicable as from 1July 2020, unless postponement of this application date is obtained from the EU Commission in the context the COVID-19 crisis.

Luxembourg law implementing DAC 6

On Saturday 21 March 2020, the Luxembourg Parliament passed a law (“DAC 6 Law”)

implementing Council Directive (EU) 2018/822 of 25May 2018 amending Directive 2011/16/EU ("DAC 6") as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

Under the new rules, Luxembourg intermediaries and, in certain cases, taxpayers will have to disclose certain information on reportable cross-border arrangements to the Luxembourg tax authorities as from 1 July 2020 within a specified period of time.

Who will be subject to the new reporting obligations?

The reporting obligation first falls to intermediaries. The notion of intermediaries encompasses both what are known as "primary" intermediaries and "secondary" intermediaries.

A "primary" intermediary is any person that designs, markets, organises, makes available for implementation or manages the implementation of a reportable cross-border arrangement, while a "secondary" intermediary is any person that knows, or could be reasonably expected to know, that they have undertaken to provide – directly or by means of other persons – aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross border arrangement. This definition is therefore quite broad and may encompass tax advisers, lawyers, accountants, domiciliation agents, management companies, banks, etc.

In addition, a Luxembourg intermediary is any person that is resident for tax purposes in Luxembourg, or that has a permanent establishment in Luxembourg through which the services pertaining to the arrangement are provided, or that is incorporated in, or governed by, the laws of Luxembourg, or that is registered with a professional association having to do with legal, taxation or consultancy services in Luxembourg.

Under the DAC 6 Law, lawyers, chartered accountants and auditors are subject to legal professional privilege, meaning that the reporting obligations will not apply to them. However, they will have an obligation to notify any intermediary that is not subject to legal professional privilege, or where there is no such intermediary, the taxpayer concerned by the relevant reporting obligations pertaining to a reportable cross-border arrangement.

Where there is no Luxembourg intermediary, or where the Luxembourg intermediary benefits from legal professional privilege, reporting obligations will fall to the taxpayer(s) concerned.

What is a reportable cross-border arrangement?

An arrangement will be reportable if (i) it concerns a covered tax, (ii) it is cross-border (i.e. involving another Member State or a third country), and (iii) it includes a characteristic or feature that presents an indication of potential risk of tax avoidance (“Hallmark”). The Hallmarks are listed in the Appendix to the DAC 6 Law.

The term “arrangement” is not further defined. One may nevertheless refer to the ECRecommendation of 6December 2012 on aggressive tax planning (2012/772/EU), according to which an arrangement means any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event. An arrangement may comprise more than one step or part.

The disclosure regime concerns all direct taxes. VAT, customs duties and compulsory social security contributions are therefore excluded from the scope of the DAC 6 Law.

An arrangement will only be reportable if it encompasses a cross-border element. However, the mere cross-border nature of an arrangement does not in itself imply an obligation to declare the arrangement. A case-by-case analysis is necessary in order to determine whether the cross-border arrangement is actually reportable. Under the comments to the DAC 6 Law, where the cross-border element is only due to the tax residence of the primary intermediary (all other parties being located in another Member State), the arrangement should not be reportable, unless (i) the arrangement may have consequences on the reporting obligations on automatic exchange of financial account information, or (ii) the intermediary is also active in the implementation of an arrangement it has designed itself (in this case, the intermediary should be treated as a participant in the arrangement).

There are five categories of Hallmarks, which are summarised below.

Some of the Hallmarks will only trigger a reporting obligation if the arrangement in question meets the main benefit test (“MBT”). The MBT will be met when it can be established that the main benefit, or one of the main benefits, which a person may reasonably expect to derive from the arrangement is the obtaining of a tax advantage in the EU or in a third State. According to the comments to the DAC 6 Law, and in line with the OECD-BEPS action 12 report, the test compares the amount of the expected tax benefit with all other benefits that may result from the arrangement and is based on an objective assessment of the tax benefits. In addition, the MBT is not met when the main tax advantage obtained by means of the arrangement is in accordance with the object or purpose of the applicable law and in line with the legislator’s intention. In order to determine whether the arrangement is in accordance with that intention, all the constituting elements of the arrangement must be taken into consideration. Thus, an arrangement will meet the MBT if, taken as a whole, it does not comply with that intention, for example by taking advantage of the intricacies of a tax system or of inconsistencies between two or more tax systems in order to reduce the tax payable.

The first category of Hallmarks (referred to as HallmarksA), which includes general Hallmarks linked to the MBT, concerns arrangements:

- where the taxpayer undertakes to comply with a condition of confidentiality
- where the intermediary is entitled to receive a contingent fee, or
- involving standardised documentation and/or structures available to more than one taxpayer that do not need to be substantially customised for implementation.

The second category (referred to as Hallmarks B), which includes specific Hallmarks linked to the MBT, concerns arrangements:

- involving the acquisition of a loss-making company
- having the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax, or
- containing circular transactions.

The third category (referred to as Hallmarks C) includes Hallmarks involving certain cross- border transactions. Some Hallmarks are to be met cumulatively with the MBT and concern arrangements involving deductible cross-border payments made between associated enterprises (broadly representing a participation of more than 25% in the voting rights / capital / profits, or the exercise of a significant influence), where the recipient is resident in a no or almost no-corporate-tax jurisdiction, or where the payment is subject to a full tax exemption or a preferential tax regime.

Some Hallmarks C are not linked to the MBT and concern arrangements involving:

- deductible cross-border payments made between associated enterprises where the recipient is not tax resident in any jurisdiction or is resident in a black-listed country (for instance, the EU list of non-cooperative jurisdictions for tax purposes – please refer to our newsflash on the EU list of non-cooperative jurisdictions for tax purposes for more details), or - the deduction of the same depreciation on asset in multiple jurisdictions, a double tax relief claimed in multiple jurisdictions, or the transfer of assets with significant differences in the valuation of the payable amount in the involved jurisdictions.

The fourth category (referred to as Hallmarks D), which concerns the automatic exchange of information and beneficial owners, is not linked to the MBT. It broadly includes arrangements having the effect of circumventing the reporting obligations on automatic exchange of financial account information, or involving any legal structure lacking substantive economic activity where the beneficial owners are not identifiable.

The fifth category (referred to as Hallmarks E) which concerns transfer pricing, is also not linked to the MBT. It broadly includes arrangements providing the use of unilateral safe harbour rules,

the transfer of hard-to-value intangibles, or the cross border transfer of functions / risks / assets resulting in at least a 50% decrease in the transferor's EBIT over the next 3 years.

What information will have to be reported to the Luxembourg tax authorities?

The information reportable by intermediaries or the taxpayer is the following:

1. identification of the intermediaries and the taxpayers involved as well as their associated enterprises (including name, date and place of birth for individuals, tax residence and TIN)
2. details of the relevant Hallmarks that generated the reporting obligation
3. a summary of the content of the reportable arrangement
4. the date of first step of implementation
5. details of the domestic provisions forming the basis of the reportable arrangement
6. the value of the reportable arrangement
7. identification of the relevant taxpayer's Member State and any other Member States which are likely to be concerned by the reportable arrangement
8. identification of any other person in a Member State likely to be affected by the reportable arrangement.

What is the reporting process?

The reporting process will start as at 1 July 2020.
As from that date, concerned intermediaries (not subject to legal professional privilege) or taxpayers, as the case may be, will have to file the reportable information with the Luxembourg tax authorities within thirty (30) days from the first to occur of the following: (i) the day after the reportable arrangement is made available for implementation; (ii) the day after the reportable arrangement is ready for implementation; or (iii) the day when the first step in the implementation of the reportable arrangement has been made.

Intermediaries qualifying as a secondary intermediaries (or service providers) will be required to file information within 30 days from the day after they provided, directly or by means of other persons aid, assistance or advice.

Furthermore, between 1 July 2020 and 31 August 2020, concerned intermediaries or taxpayers, as the case may be, will be required to report information on reportable cross- border arrangements whose first step was implemented between 25 June 2018 and 30 June 2020.

With respect to intermediaries, only information that is within their knowledge, possession or control will have to be reported. There are therefore no active investigation obligations. Intermediaries may provide evidence that they did not know and could not reasonably be expected to have known that they were participating in a reportable cross-border arrangement. This may, for example, be the case where the person does not have expertise in the matter or does not have sufficient relevant information on the arrangement.

Where several intermediaries are concerned by the same cross-border arrangement, each must either report the information on this cross-border arrangement or prove that this information has already been reported by another intermediary in Luxembourg or another Member State.

Where the obligation to report falls to the relevant taxpayer and multiple taxpayers are involved, the taxpayer that has agreed the reportable cross-border arrangement with the intermediary, or that manages the implementation of the arrangement shall make the report, unless it can prove that that the same information has already been reported by another taxpayer in Luxembourg or in another Member State.

In addition, each impacted taxpayer shall indicate on its annual income tax returns whether it uses the arrangement in question.

The Luxembourg tax authorities will exchange the reported information automatically with other Member States through a centralised database. The Commission will have access only to the data necessary to monitor the implementation of the rules.

What penalties apply?

Late, incomplete or inaccurate reporting, non-reporting or non-compliance with the notification obligations shall be subject to a maximum fine of 250,000 euros.

Concluding remarks

The DAC 6 Law constitutes a fair implementation of the DAC 6 provisions into domestic tax law.

The start date of the reporting obligations is therefore 1 July 2020. However, the timing of this application appears highly problematic for numerous market players given the current economic climate. Thus, it can be expected that strongly impacted EU countries will contact the EU Commission to obtain the postponement of the DAC 6 implementation date. Absent any concrete action in this respect, however, Luxembourg intermediaries and taxpayers will be advised to be ready to start the process of reporting or notification as from 1 July 2020.

By this time, therefore, each Luxembourg intermediary and all taxpayers concerned should be able to assess whether an arrangement falls within the scope of the DAC 6 Law and should have all internal reporting and notification processes in place.

A Grand-ducal decree should be issued shortly. It should detail the form and conditions applicable to the reporting of information to the tax authorities. Theoretically, this should be by secure electronic means.

However, no further guidance, in particular with respect to the definitions and Hallmarks contained in the DAC 6 Law, is expected to be issued by the Luxembourg authorities in the short term. Luxembourg intermediaries and taxpayers are therefore advised to ensure that a consistent approach to interpretation is coordinated between all players, especially where some intermediaries are located in other EU Member States.

1 Lawyers subject to Article 35 of the amended law of 10 August 1991.

2 Chartered accounts subject to Article 6, paragraph 1, of the amended law of 10 June 1999.

3 Auditors subject to Article 28, paragraph 1, of the amended Act of 23 July 2016.