

Disclosure of cross-border arrangements by intermediaries: DAC 6 implementation in Luxembourg



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On 8 August 2019, the Luxembourg government filed Bill of law No 7465 ("DAC 6 Bill") implementing the provisions of the Council Directive (EU) 2018/822 (the "Directive"), commonly called DAC 6, which requires certain intermediaries to report to their tax authorities cross-border arrangements that contain at least one of the hallmarks laid down in the DAC 6.

The DAC 6 Bill is in line with the Directive provisions and does not go further than the obligations prescribed by the latter. In line with the option left by the Directive, lawyers (as intermediaries) remain protected by their legal professional privilege and will have to notify within 10 days any other intermediary or the relevant taxpayers of their reporting obligations. They should nevertheless remain subject to a limited reporting by disclosing to the tax authorities certain general information on cross-border arrangements falling within the scope of DAC 6.

First reporting should be made by 31 August 2020 regarding reportable cross-border arrangements for which the first step was implemented between 25 June 2018 and 30 June 2020.

This newsflash summarises the reporting obligations introduced by the DAC 6 Bill, which will be applicable to Luxembourg intermediaries.

Identification of the persons subject to the reporting obligations

Under the Directive, intermediaries with an EU nexus (e.g., which are resident for tax purposes in an EU Member State) have the primary obligation to report any reportable cross-border arrangements to the local tax authorities.

The definition of the intermediary is very broad. An intermediary is defined as any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement (promoters).

The Directive further extends the circle of intermediaries to persons that know, 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, organizing, making available for implementation or managing the implementation of a reportable cross border arrangement (service providers).

The Directive permits Member States to grant intermediaries an exemption from the requirement to report on cross-border arrangements where such obligation would constitute a breach of their legal professional privilege. If this is the case, the intermediary should notify any other intermediary, or, if there is no such intermediary, the relevant taxpayer that the reporting obligation would then rest with them.

All intermediaries involved in a transaction have an obligation to file information on the reportable arrangement. Any exemption from such an obligation should only be granted to intermediaries to the extent they can prove that the same arrangement has already been filed by another intermediary.

When there is no intermediary involved because, for instance, the taxpayer designs and implements a scheme in-house, or the intermediary benefits from a legal professional privilege, the reporting obligation shifts to the taxpayer.

The DAC 6 Bill follows the Directive's broad definition of the term intermediary, distinguishing between promoters and service providers. Consequently, this term may include lawyers, tax advisers, accountants, banks and any other professionals that advise taxpayers on cross-border transactions or are involved in the implementation of such transactions. 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 with respect 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 related to legal, taxation or consultancy services in Luxembourg.

The Luxembourg legislator has chosen the option left by DAC 6 ensuring that the legal privilege applicable to lawyers is also respected in the context of DAC 6. In this case, the reporting obligation shall be shifted to other intermediaries in the sense of the DAC 6 Bill or the taxpayer if there is no such intermediary. However, lawyers should remain subject to a limited anonymous reporting obligation with respect to general information on cross-border reportable arrangements.

Identification of a cross-border reportable arrangement

Pursuant to the Directive, an arrangement concerning a covered tax is reportable if the following two conditions are met:

â–ª The arrangement meets the definition of a cross-border arrangement, namely involving either more than one Member State or an EU Member State and a third country and presents certain criteria.

â–ª The arrangement comes within the scope of at least one of the so-called "hallmarks" defined in Annex IV of the Directive, namely having a characteristic or feature that presents an indication of potential risk of tax avoidance.

In addition, certain of the hallmarks only trigger a reporting obligation when an arrangement fulfills the main benefit test ("MBT"), namely when it can be established that the main benefit or one of the main benefits which a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.

Furthermore, the disclosure regime concerns all taxes except value added tax (VAT), customs duties, excise duties and compulsory social security contributions.

The DAC 6 Bill defines a reportable cross-border arrangement in a similar manner than the Directive.

Furthermore, both the Luxembourg hallmarks and the MBT rules are basically set out in accordance with the text of the Directive.

Information to be reported

The information that shall be reported by the intermediaries or the taxpayer is the following:

â–ª identification of the intermediaries and the taxpayers involved (including TIN, tax residence, associated enterprises etc.);

â–ª details of the relevant hallmarks that generated the reporting obligation;

â–ª a summary of the content of the reportable arrangement; (iv) the date of first step of implementation;

â–ª details of the domestic provisions forming the basis of the reportable arrangement;

â–ª value of the reportable arrangement;

â–ª identification of the relevant taxpayer's Member State and any other Member States which

are likely to be concerned by the reportable arrangement;

â^a identification of any other person in a Member State likely to be affected by the reportable arrangement.

Reporting process

According to the Directive, the information must be filed with the local tax authority within thirty (30) days from the first to occur of: (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.

In addition, an intermediary qualifying as a service provider will be required to file information within 30 days on the day after they provided, directly or by means of other persons aid, assistance or advice.

In principle, reportable arrangements will be subject to a single reporting except in the context of marketable arrangements.

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

The DAC 6 Bill mirrors the events triggering the deadline and the timeline used in the Directive. In addition, as foreseen by the Directive, taxpayers have to declare in their annual tax returns the use of a reportable cross-arrangement.

The reporting regime for arrangements where the first step is implemented during the interim period between 25 June 2018 and 30 June 2020 is identical to the Directive i.e. requires submission by 31 August 2020.

Penalties

Pursuant to DAC 6 Bill, penalties apply to both intermediaries and taxpayers for any infringement of the relevant provisions. Non-compliance with the obligation to notify or report all available data in connection with the arrangement in due time constitutes an administrative offense and is subject to a fine of up to € 250,000 per breach.

Concluding remarks

The DAC 6 Bill constitutes a fair implementation of the Directive provisions into domestic tax law. Luxembourg intermediaries and taxpayers should already anticipate the reporting requirements and carefully monitor any developments that may nevertheless occur during the legislative

process. The final vote of the law is expected to occur before the end of December 2019.

As a result, intermediaries should pre-classify their files in order to assess whether any arrangement that has been put in place since 25 June 2018 could fall within the scope of DAC 6. Further to the issuance of the DAC 6 Bill, a second assessment should also now be performed to classify remaining back log files.

Intermediaries should also analyse any new file on a daily basis in order to determine their reporting obligations under DAC 6.