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Luxembourg Tax Alert

DAC 6 law voted by the Luxembourg parliament

24 March 2020

On Saturday 21 March, the Chamber of Deputies organized an exceptional session where, among others, the draft law transposing EU Directive 2018/822, commonly referred to as DAC 6 (or the "tax intermediaries directive") was voted into Luxembourg law.

Some modifications were made to the initially proposed text of this law during the legislative process.

DAC 6 broadly reflects the elements of BEPS Action 12 on mandatory disclosure rules and is the fifth amendment to the 2011/16/EU Directive on administrative cooperation in the field of taxation (DAC).

DAC 6 introduces an obligation for certain intermediaries and relevant tax payers to disclose to the tax authorities information on cross-border arrangements that meet certain criteria. It also regulates the regular, subsequent exchange of information by and among the tax administrations of EU Member States.

Information received and exchanged under DAC 6 among the tax authorities of EU Member States should allow them to react more rapidly to potentially aggressive tax arrangements and to address potential loopholes by conducting appropriate risk assessments and tax audits, or enacting legislative measures to close such loopholes.

The State Council should grant the exemption of the second vote (expected this afternoon). The text should then be published in the Official Gazette.

The text should become effective as from 1 July 2020 with the first information reported by the end of July 2020. Reportable arrangements should also be disclosed where the first step of implementation takes place between 25 June 2018 and 30 June 2020. The reports should be exchanged by the tax authorities by 31 October 2020.

The following summarizes some key elements of the voted text, including scope, persons with a reporting obligation, reporting deadlines, information to be reported, and potential penalties for noncompliance.

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Scope: Reporting under a hallmarks-based approach

The obligation to disclose information should apply to cross-border arrangements that meet certain criteria called “hallmarks”, which are broad categories with explicit features considered potentially indicative of aggressive tax planning.

A cross-border arrangement:

- Involves either more than one EU Member State, or an EU Member State and a third country
- Meets one or more hallmarks, which are elements that indicate potential tax avoidance or abuse
- Concerns taxes included in the scope of DAC.

The five categories of hallmarks are transposed directly from DAC 6 without any modifications to their wording, although some interpretative comments have been mentioned during the legislative process.

The hallmarks are broadly categorized as generic and specific. Generic hallmarks target arrangements that may be easily replicated and sold to multiple taxpayers. Based on the commentary to the draft law, arrangements where documentation and/or structures are mostly standardized refer to “prefabricated” tax products that potentially could be used as presented or only slightly modified. A client would not need significant support from professional counsel to implement such an arrangement.

Specific hallmarks are used to target tax system vulnerabilities. They cover, among others:

- Cross-border transactions (e.g. deductible cross-border payments made to an associated enterprise under certain circumstances, etc.)
- Automatic exchange of information and beneficial ownership rules
- Transfer pricing (e.g. transfers of hard-to-value intangibles where no reliable comparables exist, etc.).

A “main benefit test” applies to all generic hallmarks and to some of the specific hallmarks to determine whether a reporting obligation is triggered.

The main benefit test will be met if it can be established that the main benefit, or one of the main benefits, that a person may reasonably expect to derive from an arrangement is obtaining a tax advantage, based on all relevant facts and circumstances.

The commentary to the draft law quotes the OECD’s BEPS Action 12 report according to which the main benefit test compares the value of the expected tax advantage to any other benefits likely to be obtained from the transaction and has the advantage of requiring an objective assessment of the tax benefits.

Also, an additional commentary published during the legislative process indicates that, the main benefit test is not met when the main tax advantage obtained through the arrangement is consistent with the object or purpose of the applicable legislation and with the intention of the legislator. To determine whether the concerned arrangement conforms to this intention, all the elements of the arrangement must be taken into consideration. Where the arrangement which, taken as a whole, does not meet this intention, for example by taking advantage of the inconsistencies between two or more tax systems in order to reduce the tax due, the main benefit test is met.
The main benefit test has to be met only with respect to covered taxes. It does not apply where the tax advantage is linked solely to value added tax, customs duties, compulsory social security contributions, or other taxes, as well as taxes excluded from the scope of DAC.

Who will have to report?

The obligation to report cross-border arrangements generally will fall on intermediaries—unless such reporting will breach legal professional privilege—and, in certain cases, on relevant taxpayers.

An intermediary will be defined as a person who designs, markets, organizes, makes available for implementation, or manages the implementation of a reportable cross-border arrangement.

An intermediary will also include any person (e.g. individual, legal person, or association of persons recognized as having the capacity to perform legal acts but lacking the status of a legal person…) who knows or could be reasonably expected to know that they have undertaken to provide, directly or indirectly through other persons, aid, assistance, or advice with respect to the activities mentioned above, based on all relevant facts and circumstances, available information and the relevant expertise and understanding required to provide such services.

The definition of intermediaries also provides that everyone has the right to provide evidence that they did not know and could not reasonably have been expected to know that they were involved in a reportable cross-border arrangement which is concerned by the reporting. This may, for example, be the case when the person does not have the expertise in the matter or does not have at all or not enough relevant facts or information concerning a cross-border arrangement.

The legislative commentary indicates that DAC 6 does not in itself impose any specific duty on intermediaries that will go beyond their existing professional obligations by requiring them to actively seek information that they will not otherwise hold.

Some clarifications have been made during the legislative process relating to the difference between intermediary and participants. Indeed an intermediary who exercises, in relation with a cross-border arrangement, exclusive activities as provided for in the definition of the term "intermediary", should not be qualified as a participant in the arrangement. Unless this intermediary is also active in the arrangement that he himself imagined, proposed, set up, made available for implementation or managed the implementation for the benefit of the relevant taxpayer. There is no cross-border arrangement if all participants in the arrangement—excluding the intermediary itself—

are resident for tax purposes in the same State, which is not Luxembourg, and that only the intermediary has a link with Luxembourg.

In principle, where more than one intermediary is involved in the same reportable cross-border arrangement, all intermediaries will have simultaneous reporting obligations.
An intermediary is exempt from the reporting obligation only insofar as they can prove that the same information has already been transmitted by another intermediary.
The voted draft law also addresses the procedure to be followed where there is more than one relevant taxpayer.

In the final version of the text, lawyers, auditors and accountants, operating within the limits applicable to their respective professions, benefit from a waiver of reporting information but should notify any other intermediary. The legislative commentary explains that the notification must be made to any other intermediary and in cases where all intermediaries benefit from an exemption from the reporting obligation, the notification must be made to the relevant taxpayer.

In addition to these reporting obligations, two additional obligations will apply:

- Intermediaries will have to provide quarterly updates of arrangements qualifying as “marketable” (i.e. cross-border arrangements that are designed, marketed, ready for implementation, or made available for implementation without the need to be customized substantially)
- Relevant taxpayers will have to report the use of cross-border arrangements annually. Each relevant taxpayer will be required to include information regarding the use of a previously reported arrangement (either by an intermediary or by itself) on its annual Luxembourg income tax return. This obligation will apply for each of the years in which the taxpayer used the arrangement.

Information to be reported and timing

Mandatory reporting to the tax authorities will start as from 1 July 2020.
Intermediaries and relevant taxpayers will also be required to disclose information on reportable cross-border transactions if the first step in the plan was implemented between 25 June 2018 and 1 July 2020. This information should be reported by 31 August 2020.

As from 1 July 2020, intermediaries will have to report cross-border arrangements within 30 days following the day when:

- The arrangement (i) was made available for implementation, or (ii) was ready for implementation; or
- The first step of the reportable cross-border arrangement was implemented, whichever occurred first.

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Intermediaries "who know or could reasonably be expected to know…" will also be required to file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance, or advice.

The reportable information will have to cover:

- The identity of intermediaries and relevant taxpayers, including their names, place of tax residence, and TIN number
  Where an associated enterprise with the relevant taxpayer participates in the cross-border arrangement, the identification also includes the name, date, and place of birth (for natural persons), tax residence, and TIN number of this associated enterprise
- Details of hallmark(s) that make the cross-border arrangement reportable
- A summary of the arrangement, including the name by which it is known and an adequate description of the relevant business activities
- The date on which the first stage of the reportable cross-border arrangement was implemented or will be implemented
- Details of the national provisions of the concerned countries that form the basis of the arrangement
- The value of the reportable cross-border arrangement
- The EU Member State of the relevant taxpayer(s) and any other EU Member State(s) likely to be concerned by the arrangement
- Identification of any other person likely to be affected by the cross-border arrangement to be declared, indicating to which Member States this person is linked.

Penalties

The penalty, in line with those already applicable to other exchange of information provisions, will be up to EUR 250,000. A penalty will apply for failure to report, late reporting, and incomplete or inaccurate reporting. A penalty will also apply to intermediaries, benefiting from a waiver of reporting information, who breach their duty to timely notify other intermediaries or relevant taxpayers.

As indicated in the commentary to the draft law, the intentional nature of an infraction will be taken into account in determining the penalty amount.

Comments

Even though interpretative comments have been provided during different steps of the legislative process, more clarity on the key concepts, as well as some practical implementation guidelines, are still awaiting.

In light of the COVID-19 outbreak, one could expect an extension of the report filing deadline.

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