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Publication of the draft bill of law implementing DAC 6 into Luxembourg domestic law

The draft bill n°7465 implementing Directive 2018/822/EU of 25 May 2018 (the "**DAC 6 Directive**")[1] into domestic law (the "**Draft Law**") was submitted to the Luxembourg parliament on 8 August 2019. By way of background, the DAC 6 Directive goes yet another step further in the administrative cooperation in tax matters in that, starting with the exchange of information upon request, then the automatic exchange of information in tax matters, followed by the exchange of tax rulings, it is now foreseen (i) to exchange information on potentially aggressive tax planning arrangements more generally and (ii) to rely on intermediaries involved in the structuring or the implementation of the latter to get access to such information. Whilst the Draft Law may still be subject to change as it goes through the legislative process, we would like to share with you our insights on certain selected aspects thereof.

❖ *Scope of the reporting*

In line with the preamble of the DAC 6 Directive, potentially aggressive cross-border tax planning arrangements will have to be reported to the tax authorities to ensure that "Member States' tax authorities obtain comprehensive and relevant information [in this respect] at an early stage". An arrangement is considered as "cross-border" if it concerns more than one Member State or a Member State and a third country.

A cross-border arrangement is reportable only if it contains at least one of the 15 hallmarks listed in an annex to the Draft Law (which is identical to the relevant annex of the DAC 6 Directive). Examples of such hallmarks notably include (without being limited to): arrangements where a participant takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability; or arrangements that involve deductible cross-border payments made between two or more associated enterprises where the recipient is resident for tax purposes in a low or no tax jurisdiction or in a jurisdiction assessed by the EU or the OECD as being non-cooperative; or arrangements where the relevant taxpayer undertakes not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities (condition of confidentiality); or arrangements that have standardised documentation and/or structure and are available to more than one relevant taxpayer without a need to be substantially customised for implementation; or arrangements involving an intragroup cross-border transfer of functions, risks and/or assets, if certain conditions relating to the transferor's EBIT are met. The above are only some examples of the hallmarks listed in the

[1] amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements

Draft Law. The Luxembourg Draft Law has essentially copied the hallmarks of the DAC 6 Directive without providing further guidance as to their interpretation.

Certain hallmarks only apply if the main benefit test is satisfied, that is to say if "it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage". It remains to be seen how this test is implemented in practice, i.e., whether it will be sufficient for a structure to rely on sound (i.e., economic and commercial) reasons notwithstanding the existence of a tax benefit.

According to its commentary, the Draft Law shall only apply to direct taxes, i.e., excluding VAT, customs duties, excise duties or compulsory social security contributions.

- *Who needs to disclose*

The obligation to disclose in principle lies on the relevant EU intermediary. Under the Draft Law, EU intermediaries mean "any 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, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement", including the tax advisers, finance consultants, banks, accountants and lawyers that design and/or promote tax planning schemes.

Lawyers subject to the Luxembourg law of 10 August 1991 are protected by the client-attorney privilege and therefore benefit from a reduced reporting obligation, under the Draft Law. They must notify any other intermediary and, if none, the taxpayer (within 10 days) and, in any event, disclose some general information about relevant reportable cross-border arrangements to the Luxembourg tax authorities, without however allowing the identification of the relevant taxpayers. The obligation to disclose the reportable cross-border arrangement as a whole will then fall back on another intermediary or, if none, on the taxpayer itself. Of course, clients can decide to mandate their lawyers to perform the reporting duties on their behalf.

The commentary further reminds that the intermediaries or taxpayers do not have any obligation to actively look for information that is not already in their possession.

Finally, in the event there is an obligation to disclose information about an arrangement within different Member States, the relevant intermediary or taxpayer may be exempted from the disclosure in Luxembourg provided he or she brings a written evidence from the relevant authority of the Member State, stating that the same information has been already delivered pursuant to the domestic legislation of this other Member State.

- *Content and timing of the disclosure*

The detailed information to be provided in the context of a DAC 6 disclosure is laid down in article 10 of the Draft Law. It includes the name of the intermediaries and relevant taxpayers, the hallmarks that make the cross-border arrangement reportable, the content and value of the arrangement, the date of its first step of implementation as well as the Members States and persons likely to be concerned by the arrangement.

According to the commentary of the Draft Law, the information so provided may be used by the tax authorities not only to identify (and react to) aggressive tax planning arrangements, but also, for example, to assess or collect taxes.

The disclosure has to be made within 30 days beginning the day after the reportable cross-border arrangement is made available for implementation or ready for implementation, or the day of the 1st step in the implementation, whichever occurs first. In any event, the relevant intermediary also needs to disclose reportable cross-border arrangements the day after the assistance or advice is provided.

Even though the effective date of the Draft Law (in line with the DAC 6 Directive) is set at 1 July 2020, the reporting will include any structure the first step of which was implemented between 25 June 2018 and 30 June 2020. You or your adviser should therefore already start reviewing any newly implemented structures from a DAC 6 perspective and keep a trace of such analysis ready for 1 July 2020, so as to be in a position to report in a timely manner, i.e., within 30 days for structures implemented or made available for implementation from 1 July 2020, and on 31 August 2020 for structures the first step of which was implemented between 25 June 2018 and 30 June 2020.

- *Penalties*

Pursuant to the Draft Law, an intermediary or taxpayer failing to comply with its obligation to disclose a reportable arrangement may be fined up to EUR 250,000. The intentional character will be taken into account in order to set the amount of the fine.

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