22 April 2020
Newsletter

MANDATORY DISCLOSURE RULES - DAC 6 DIRECTIVE IMPLEMENTED INTO LUXEMBOURG LAW

On 21 March 2020, the Luxembourg Parliament adopted the bill n°7465 related to reportable cross-borders arrangement (hereafter the "Law").

The Law aims at transposing the provisions of the EU Directive 2018/822 of 25 May 2008 (also commonly known as "**DAC 6**") modifying the Directive 2011/16/UE as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements into Luxembourg law.

In that view, the Law introduces:

- an obligation to report certain cross-border arrangements;
- a mandatory automatic exchange of information related to reportable cross-border arrangements with the tax authorities of the other Member States.

The provisions implemented by the Law should be effective as from 1st July 2020.

I. Purpose

The purpose of DAC6 is to provide tax authorities of the EU Member States with detailed information on potentially aggressive tax practices so that they can react more quickly to close potential loopholes either through adequate risk assessments and tax audits, or by reforming tax legislation.

II. Reportable arrangements

The Law defines as reportable arrangements cross-border arrangement that:

- target taxes covered by the law of 29 March 2013 implementing the Council Directive 2011/16/UE of 15 February 2011 on administrative cooperation in the field of taxation, and
- contain at least one of the hallmarks listed in the Appendix of the Law.

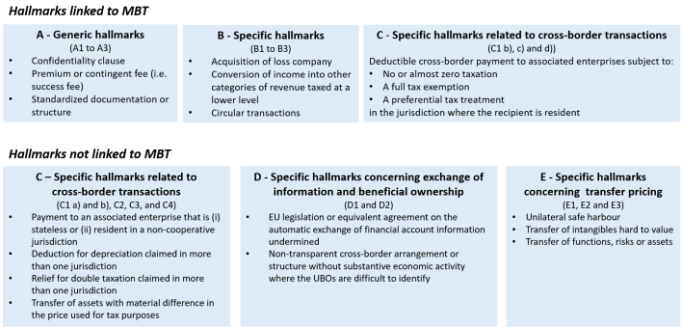
A cross-border arrangement is defined as being an arrangement that concerns several Member States or a Member State and a third country and which meets at least one of the conditions of the Law, such as, that not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction.

Taxes covered by the law of 29 March 2013 are all taxes levied by, or on behalf of a Member State or the Member State's territorial or administrative subdivisions, including local authorities, except VAT, custom duties, excise duties, and compulsory social security contributions.

The Law defines as a hallmark any characteristic or specificity of a cross-border arrangement that indicates

a potential risk of tax evasion as set out in the Annex of the Law in line with DAC 6. For a summary of the hallmarks, please see picture 1. Certain hallmarks are only to be considered if they meet also the main benefit test.

Picture 1



Even though the Law is effective only as of 1st July 2020, reportable arrangements also include cross-border arrangements for which the 1st step has been implemented between 25 July 2018 and 30 June 2020.

III. Persons subject to the reporting obligation in Luxembourg

The reporting obligation introduced by the Law primarily applies to intermediaries, which are tax resident in Luxembourg or that have certain other ties with Luxembourg, and that:

- design, market, organize reportable cross-border transactions, make them available for implementation, or manage their implementation;
- know or could be reasonably expected to know that they have undertaken to provide, either directly or through 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.

In certain cases, the taxpayer participating in a cross-border arrangement will have to report the cross-border arrangement to the Luxembourg tax authorities. That will for instance be the case if a Luxembourg resident taxpayer has implemented a cross-border arrangement without the help of an intermediary, with the help of an intermediary that has no ties with an EU member state or with the help of an intermediary that is exempt from reporting cross-border arrangements in Luxembourg. The reporting may be carried out, either by the taxpayer or by any other person on his/her or its behalf.

Intermediaries that are exempt from reporting in Luxembourg are lawyers, auditors (*réviseurs d'entreprises*) and public accountants (*expert-comptables*) that are subject to the professional secrecy provided for by the Luxembourg laws applicable to their profession. The exemption is only available to the extent the intermediaries act within the boundaries of their profession.

Lawyers, auditors and public accountants that are exempt from the mandatory reporting must, however, give notice within 10 days to any other intermediary about his or her reporting obligations. In the absence of other intermediaries required to report to the Luxembourg tax authorities, the notification must be made to the taxpayer. If the lawyer, auditor or public accountant is held to notify the taxpayer, he or she must in addition provide the taxpayer with all information required to comply with the reporting obligation.

If an intermediary is subject to reporting obligations in several EU Member States, no reporting needs to be done to the Luxembourg tax authorities if the intermediary can proof that the information to be provided to the Luxembourg tax authorities has already been reported in another EU Member State.

In case multiple intermediaries are involved in a reportable cross-border arrangement, each intermediary has the obligation to report the arrangement. An exception exists if the intermediary can proof that the information to be reported has already been provided by another intermediary in Luxembourg or in another EU Member State.

If a cross-border arrangement is to be reported by a taxpayer and the arrangement involves several taxpayers, the reporting is due by the taxpayer that has agreed the arrangement with an intermediary or that has managed its implementation. No reporting is required if the taxpayer can prove that the information to be provided to the Luxembourg tax authorities has already been provided by another taxpayer.

Finally, it is worth mentioning that taxpayers must also declare for each year during which they used reportable arrangement, the use they made of the reportable arrangement in their annual income tax returns.

IV. Information to be reported

For each reportable arrangement, the following information has to be reported to the *Administration des Contributions Directes*, either by the intermediary or the taxpayer:

a) the identification of the intermediaries and the taxpayers concerned by the arrangement, as well as any enterprise associated to the concerned taxpayer;
b) details of the hallmarks that make the cross-border arrangement reportable;
c) a summary of the content of the cross-border arrangement, including, if needed, a reference to the designation by which the arrangement is commonly known and a description of the commercial activities or arrangements;
d) the date when the first implementation step has been executed or will be executed;
e) details on the national provisions of the Member States concerned that form the basis of the reportable cross-border arrangement;
f) the value of the cross-border arrangement;
g) the identification of the Member State of the concerned taxpayer(s), as well as any other Member State that is likely to be concerned by the cross-border arrangement;
h) the identification of any other person likely to be affected by the cross-border arrangement including the indication of the Member State to which the person is linked.

In case of a marketable cross-border arrangement (i.e. an arrangement designed, marketed, ready to be implemented, or available for implementation, without any important updates required), the intermediaries have to prepare every three months a report providing updated information and including any new information related to above listed points a), d), g) and h).

V. Reporting deadline

The reporting must be provided to the *Administration des Contributions Directes* within 30 days as from the first day of the earliest of the following the below events:

- the cross-border arrangement is made available for implementation;
- the cross-border arrangement is ready for implementation;
- the first step in the implementation process has been achieved.

For intermediaries that only provided help, assistance or advice in relation to the reportable cross-border arrangement, the reporting deadline starts as from the day after they provided directly or through other persons aid, assistance or advice.

Reportable cross-border arrangements, for which the first step has been implemented between 25 June 2018 and 30 June 2020, must be reported until 31 August 2020.

VI. Verification procedure

The *Administration des Contributions Directes* may verify the compliance with the reporting obligations and may notably check that the intermediaries and the concerned taxpayers do not adopt practices that aim at avoiding the communication of information.

For the purpose of the verification, the *Administration des Contributions Directes* will have the same investigative powers as for the taxation procedures aiming at assessing or auditing taxes.

VII. Penalties

The Law provides for fines up to EUR 250.000 for:

- failure to transmit the required information;
- late transmission of the required information;
- inexact or incomplete transmission of information; or
- failure by intermediaries bound to the professional secrecy to notify other intermediaries or the tax payer or in the case of late notification.

VIII. Next steps

As the Law provides for potential reporting obligations in relation to arrangement implemented between 25 June 2018 and 30 June 2020, it is important to analyze all arrangements for which the first step has been implemented as from 25 June 2018 in order to assess if the arrangement must be reported.

Given that the *Administration des Contributions Directes* may verify the compliance with the reporting obligations, it will also be important for intermediaries and taxpayers to adopt specific procedures in order to

assess the arrangements in the view of potential reporting under the Law and to keep track of the assessments carried out.

Our Tax Advisory team is at your disposal to assist you in assessing your arrangements implemented since 25 June 2018, as well as reviewing or implementing the necessary processes in order to comply with the Law.

Key Contacts

Paul Leyder
Tax Partner
+352 45 123 734
paul.leyder@bdo.lu

Astrid Barnsteiner
Tax Director
+352 45 123 575
astrid.barnsteiner@bdo.lu

Bertrand Droulez
Tax Director
+352 45 123 591
bertrand.droulez@bdo.lu