

Mandatory Disclosure Rules

Luxembourg DAC6 transposition finalized – further guidance pending

This article provides a summary of the transposition of DAC6 mandatory disclosure rules into Luxembourg domestic law.

Status

On March 21, 2020, the Luxembourg Parliament passed a bill to transpose Directive (EU) 2018/822 on mandatory disclosure rules (hereinafter “DAC6” or “the Directive”) into domestic law.

Please note that the summary is based on information available as at June 11, 2020.

Scope

The scope of the legislation is closely aligned with the Directive, with no extension of scope proposed for VAT, customs duties or excise duties. Luxembourgish mandatory disclosure rules (MDRs) will also only apply to “cross-border arrangements” (i.e. domestic transactions will not be in scope).

Definitions

The main definitions included in the regulations align with the text of the Directive. In particular, the definitions of “associated enterprise”, “intermediary”, “relevant taxpayer”, “cross-border” and “marketable arrangement” mirror the text of the DAC6.

Hallmarks & Main Benefit Test

The list of hallmarks is aligned with Annex IV of the Directive. The main benefit test should apply to the category A and B hallmarks and paragraph 1(b)(i), (c) and (d) of the category C hallmarks). No additional clarification on the interpretation of the hallmarks has been provided so far.

Commentaries to the DAC6 implementation bill clarify that, for the purposes of applying the main benefit test (MBT), tax advantages obtained outside of the EU are also relevant. It is further clarified that the test is not met when the main tax advantage obtained from the arrangement is in accordance with the object or purpose of the applicable legislation, and the legislator’s intention.

To determine whether the MBT is met, all the elements of an arrangement should be taken into consideration. An example is provided where an arrangement takes advantage of subtle nuances in the tax system or discrepancies between different tax systems to reduce the tax burden, in which case the MBT will be met.

Reporting - Intermediary

The intermediary is only obliged to report if they have a presence in Luxembourg (local residency, permanent establishment, incorporation or professional registration).

Where an intermediary has a reporting obligation in multiple Member States, the information shall be filed only in the Member State that features first in the list below:

- 1) Member State where the intermediary is resident for tax purposes;
- 2) Member State where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;
- 3) Member State which the intermediary is incorporated in or governed by the laws of;
- 4) Member State where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

The reporting timelines mirror the requirements of the Directive, i.e. 30 days as of the relevant reporting trigger for reportable bespoke arrangements.

The information to be disclosed largely mirrors the requirements of the Directive.

Reporting – Intermediary (cont.)

The Luxembourg Finance and Budget Commission (COFIBU) has clarified that an intermediary should not be considered a participant to an arrangement when assessing whether an arrangement is cross-border. This is because – for the purposes of Luxembourg MDRs, a participant is deemed to have an active role in the arrangement, whereas an intermediary designs, markets, organizes, makes available for implementation or manages the implementation of a cross-border arrangement, or provides aid, assistance or advice with respect to any of the above.

For example, under Luxembourgish law, an arrangement in relation to which an EU intermediary provides assistance does not qualify as cross border where there are no EU participants involved. The same principle applies where participants to the arrangement reside in the same foreign country, but where the intermediary has a link to Luxembourg. However, this principle does not apply when the cross-border arrangement may impact the automatic exchange of information or the identification of beneficial owners, as the concept of participants is not relevant in these situations.

Legal Professional Privilege

Intermediaries may be granted a waiver from reporting information based on legal professional privilege. The legislation clarifies that the exemption for professional secrecy includes lawyers, chartered accountants and auditors.

Where legal professional privilege applies, the exempt intermediary is required to notify other intermediaries or relevant taxpayers (if no other intermediaries having a reporting obligation are involved) that legal professional privilege is being claimed. A timeline of 10 days is included for making this notification.

In addition, the exempt intermediary is required to provide the information necessary to complete the reporting to the relevant taxpayer.

It is not possible for a taxpayer to discharge intermediaries from their confidentiality obligation, but taxpayers may appoint the intermediary to perform the reporting on their behalf.

Reporting – Relevant Taxpayer

A relevant taxpayer will be required to report arrangements in Luxembourg if they:

- 1) Are liable to tax in Luxembourg by virtue of tax residency, PE, registered office or place of business;
- 2) Operates in Luxembourg through a PE, which benefits from the arrangement;
- 3) Receive income or profits in Luxembourg; or
- 4) Pursues an activity in Luxembourg.

Where multiple taxpayers are involved, the relevant taxpayer that is to file information will be the one that features first in the following list:

- 1) The taxpayer that agreed the arrangement with the intermediary; or
- 2) The taxpayer that is managing the implementation of the arrangement.

Reporting timelines for relevant taxpayers and the information that is required to be disclosed mirror the requirements of DAC6.

Relevant taxpayers will also be required to include a reference to reportable arrangements in their corporate tax returns. A box will have to be ticked in the returns indicating that reportable arrangements are applicable to the company filing the return.

Penalties

A penalty of up to EUR 250,000 may apply where an intermediary (or relevant taxpayer) fails to report in a timely manner, reports incomplete information or fails to report entirely.

This penalty is consistent with penalties applied in Luxembourg for failures under FATCA and Common Reporting Standard (CRS) provisions.

The penalty of EUR 250,000 may also apply where an intermediary fails to notify intermediaries or taxpayers in cases where legal professional privilege applies within the relevant 10 day notification time period.

However, the commentary to the legislation states that the level of the penalty imposed will ultimately depend on the facts and circumstances of the case (i.e. the gravity of the infraction).

For more information, please refer to KPMG's [EU Mandatory Disclosure Rules page](#) or contact the following:

Antoine Badot

Partner
KPMG in Luxembourg
antoine.badot@kpmg.lu

Raluca Enache

Director
KPMG's EU Tax Centre
Enache.Raluca@kpmg.com

kpmg.com/socialmedia



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2020 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved. The KPMG name and logo are registered trademarks or trademarks of KPMG International.