

New Bill implementing DAC6

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On 8 August 2019, the Luxembourg Government tabled a new Bill of Law N° 7465 (the “ **Bill**”) before the Luxembourg Parliament (*Chambre des députés*) implementing the so-called “DAC6” (EU Directive 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements) into Luxembourg domestic law.

DAC6 requires EU “intermediaries” (or taxpayers) to report cross-border arrangements that strongly present a risk of tax avoidance or abuse.

Please find below a summary of the main provisions of the Bill which generally adopts the wording of DAC6.

1. • **WHAT must be reported?**
2. The following arrangement are considered as Reportable Arrangements:
3. (i) “Cross-Border Arrangements” (i.e. arrangements involving either more than one EU member state or an EU member state and a third country);
4. (ii) Arrangements that meet at least one of the “hallmarks” listed in the Bill. Hallmarks reflect characteristics of an arrangement identified as potentially indicative of aggressive tax planning. Some of them are subject to a gateway criterion, known as the “Main Benefit Test”.
5. The Bill reproduces the hallmarks listed in DAC6 without any add-ons or amendments. However, at the time DAC6 was released, those hallmarks already raised many concerns as they are wide in scope and thus leave plenty of room for debate.
6. • **WHO has to report?**
7. (i) Intermediaries (e.g. tax consultants or service providers such as banks, auditors, PSF, accountants) who design or provide, directly or indirectly, assistance with respect to Reportable Arrangements (“**Intermediaries**”) or;

8. (ii) the taxpayer(s) if there are no Intermediaries who are obliged to report (e.g. in the case the Intermediary asserts professional secrecy or in the case the taxpayer designs and implements a scheme in-house).
9. The definition is wide for, not only does it cover Intermediaries who provide tax advice but it also covers Intermediaries that know, or who are reasonably expected to know that, they are providing assistance with respect to a Reportable Arrangement.
10. (iii) Some Intermediaries are however exempted from the reporting obligations:
 11. - The Bill exempts lawyers that are subject to professional secrecy, as set out in Article 35 of the Law of 10 August 1991 on the profession of lawyer ¹ (the “**Lawyers**”), from reporting obligations when such reporting would be in breach of the attorney-client privilege. However, when they are acting outside the boundaries of their profession, the regular reporting obligations remain applicable.
 12. Under DAC6, an EU member state may give an Intermediary the right to waive its reporting obligations where they would breach the legal professional privilege under the national law of that Member State. Unsurprisingly, the Bill took the option offered by DAC6 to exempt Lawyers from the reporting obligations.
 13. Despite this exception, the Lawyers will still be subject to an obligation to report general information in relation to reportable cross-border arrangements (while keeping the identities of the taxpayers concerned unidentifiable) in order to best reconcile the requirements of the legal professional privilege with the need to obtain timely information on the reportable cross-border arrangements. In addition, the Lawyers must notify without delay any other Intermediary (or, if there is no such Intermediary, the relevant taxpayer) of its reporting obligations.
 14. According to the Bill, and in line with the objectives of DAC6, in situations where the exemption noted above is applicable, and where there is no other intermediary subject to the reporting obligations, those shall be the responsibility of the taxpayer concerned by the reportable cross-border arrangement.
 15. - Intermediaries proving that a Reportable Arrangement was already disclosed by another Intermediary.
 16. • **WHEN does a Reportable Arrangement have to be reported?**
 17. As from 1 July 2020, Reportable Arrangements must be reported to the tax authorities within 30 days beginning on the day after which (i) the reportable cross-border arrangement is "made available" for implementation; or (ii) the reportable cross-border arrangement is "ready" for implementation, or (iii) the "first step" in the implementation of the reportable cross-border arrangement has been made.

18. Reportable Arrangements, which were/will be initiated between 25 June 2018 and 30 June 2020 must be reported before 31 August 2020.
19. • **WHAT taxes are covered?**
20. Income tax, corporate tax, capital gains tax, registration duties, local taxes, real estate taxes, and wealth or inheritance taxes are all within the scope of the Bill. However, indirect taxes such as VAT, customs and excise duties are not.
21. • **WHAT are the penalties in case of infringements?**
22. In line with the fines applicable under FATCA² and CRS³ laws, the Bill introduces penalties of up to EUR 250,000 for Intermediaries and taxpayers concerned who do not comply with their obligations to report or notify the Luxembourg tax authorities. The concerned intermediary or taxpayer may appeal against a fine.
23. • **WHEN does the Bill enter into force?**
24. The Bill will enter into force once it has been approved by the Luxembourg Parliament. This will be achieved before the end of the year. Meanwhile, it will go through the Luxembourg legislative process, i.e., be subject to different opinions of concerned agencies (professional bodies), but especially to the opinion of the Council of State. It may thus be amended before Parliament's final vote.

The scope of DAC6 is very wide, giving rise to many grey areas and practical issues. Although the Bill provides some clarifications, there are still many outstanding questions regarding the scope and the detailed application of the mandatory reporting obligations. It is hoped that further details will be introduced during the legislative process.

- 1 According to the law of 10 August 1991 on the profession of lawyer, the lawyer is responsible for keeping secret information that is acquired by him or her, except in cases where he or she is called before a judge to testify and in cases where the law obliges them to disclose the information.
- 2 Law of 18 December 2015, as amended.
- 3 Law of 23 December 2016, as amended.

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