

DAC 6

New obligations in the fight against
aggressive tax planning

2 March 2021

New obligations relating to the EU Directive¹ on the automatic exchange of information in the field of taxation in relation to cross-border reporting arrangements.

► **CONTEXT**

The European Union has issued a new directive, called DAC 6, aiming at **more fiscal transparency and better cooperation between the Member States**.

Various scandals have recently revealed large multinationals' tax optimization schemes (more specifically, the GAFAs). These companies artificially transferred profits to tax havens to pay virtually no tax. Tax planning structures are incredibly complicated and take advantage of the increased mobility of capital and persons. National economies and markets have been merging more and more rapidly in recent years, challenging the international tax system designed more than a century ago.

The erosion of sovereign tax revenues is central to government policy. With budget deficits skyrocketing as a result of the crisis, this theme is more topical than ever.

¹ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU

► STRIVE FOR BETTER FISCAL TRANSPARENCY

The OECD and the G20 have been working towards fair, transparent taxation since 2015. Their report on the fight against tax evasion and profit shifting (Base Erosion and Profits Shifting or 'BEPS') strives to harmonize national rules, tax transparency, and better exchange of information between countries so profits can be taxed locally.

Action 12 of this report aims, among other things, to create **mandatory, multilateral disclosure rules** specifically aimed at identifying international tax structures and remedying shortcomings in the exchange of bank information.

In this context, on May 25, 2018, the European Union Council adopted the sixth Directive for Administrative Cooperation (DAC 6), which imposes an obligation to declare specific potentially aggressive cross-border schemes.

These provisions have been transposed in Luxembourg by the law of 25 March 2020 relating to cross-border arrangements requiring a declaration, published in Mémorial A - No 192 of 26 March 2020 (hereafter "the Law"), the time limits for application of which have been modified by the law of 26 July 2020.

► WHO IS OBLIGED TO REPORT?

To gain access to the information, DAC 6 calls upon the **'intermediaries'** (such as lawyers, accountants, banks, managers) who may hold this information. The obligation to collect and transmit data to the competent tax authorities rests with those intermediaries or, if there is no reporting intermediary, with the taxpayer who benefits from the tax regime.

However, in some cases, intermediaries have been protected by professional secrecy. In such cases, they are not obliged to report the identified scheme. In Belgium, lawyers benefit from this protection; in Luxembourg, lawyers, auditors (especially from BIG 4) and accountants.

Nevertheless, such intermediaries protected by professional secrecy are then still obliged to inform the other intermediaries of the scheme. It concerns those who are not covered by professional secrecy (or if an intermediary is not identified: the taxpayer himself). They must comply with the reporting obligations relating to the scheme.

Thus, as of January 1, 2021, when acting as an intermediary in a scheme covered by DAC 6, Banque Degroef Petercam Luxembourg S.A. (hereafter "the Bank") will be obliged to communicate all information at its disposal to the tax authorities. If the bank does not do so, it will be subject to sanctions. In Luxembourg, for example, in the event of failure to notify, the fine can amount to up to 250,000 euros.

► WHAT NEEDS REPORTING?

Intermediaries should report only potentially aggressive cross-border arrangements. To assist them in collecting information, DAC 6 provides a list of **key features** to determine whether a scheme is potentially aggressive.

These key features can be used in many situations, ranging from transfer pricing issues and bypassing information exchange under the CRS to the use of schemes whose main benefit is a more favorable tax rate.

Some of the key features trigger an obligation to report if a more favorable tax regime is the most important benefit, or one of the most important benefits, that a person can reasonably expect to receive due to the arrangement.

However, suppose the totality of the facts and circumstances show that the main benefit, or benefits, of structuring, are other than a more favorable tax regime. In that case, there is no need to report the regime.

Value added tax ("VAT"), customs duties, excise duties and social security contributions are not covered by this Directive.

► HOW FAST?

Since 1 January 2021, the Bank has been required to transmit to the Luxembourg direct tax authorities any information of which it has knowledge, which it possesses or which it controls concerning cross-border arrangements within a **period of thirty days**, starting:

- a) the day after the cross-border scheme to be declared has been made available for the purposes of implementation. Availability shall be deemed to have occurred when the Bank has delivered the contractual documents to the taxpayer concerned or otherwise made them available to him; or
- b) the day after the day on which the cross-border arrangement to be declared is ready for implementation; or
- c) when the first stage of the implementation of the transboundary arrangement to be declared has been completed, whichever is the earlier.

The Bank shall also be required to transmit the information within 30 days from the day following the day on which it has provided, directly or through other persons, aid, assistance or advice.

For schemes whose first stage was implemented between 25 June 2018 and 30 June 2020, the Bank must transmit the information no later than 28 February 2021.

For schemes whose first stage was implemented between 1 July 2020 and 31 December 2020, the Bank must transmit the information no later than 31 January 2021.

The information transmitted should enable Member States to carry out targeted tax audits, or even to initiate legislative reforms aimed at filling the gaps identified through DAC 6.

Disclaimer

The information contained in this document is provided for information purposes only and can in no way be considered as advice. This e-mail is the property of Banque Degroof Petercam Luxembourg S.A. ("the Bank") and may not under any circumstances be copied, disseminated or published, even partially, without the prior and express permission of the Bank. The Bank has prepared this document with the utmost care and acts in the interests of its customers without aspiring to any result or profit. This information is based on sources deemed reliable by the Bank, which does not, however, constitute a guarantee of its accuracy or completeness.