

Luxembourg State Council issues opinion on draft MDR legislation - Application of legal professional privilege to be revised

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Executive summary

On 14 January 2020, the Luxembourg State Council, a constitutional institution mandatorily called on to issue an opinion on all government and parliament draft laws and regulations, published its views on the draft law (Draft Law)¹ implementing the European Union (EU) Directive on the mandatory disclosure and exchange of information on cross-border tax arrangements (DAC6 or the Directive). Under DAC6, intermediaries (including tax consultants, banks and lawyers that have a defined EU nexus) and in some situations, taxpayers, are required to report certain cross-border arrangements (reportable arrangements) to the relevant EU member state tax authority.

The State Council's opinion contains a number of recommendations and suggestions to clarify certain concepts of the Draft Law as well as interpretations that the legislator is invited to confirm or invalidate. Most importantly, the opinion contains formal oppositions against, inter alia, two measures, being: (i) the exemption from reporting that the Draft Law proposes to grant only to lawyers registered with the Luxembourg Bar; and (ii) the access given to the Luxembourg tax authorities, in the framework of their verification procedures, to certain information.

It is expected that the text of the Draft Law will undergo some amendments in order to consider and address the points raised by the State Council, specifically with respect to the lawyers' reporting exemption. Possible options include

requiring all intermediaries, including lawyers, to report (i.e., including all those professions covered by a legal professional privilege) or the extension of the lawyers' exemption from reporting to further professions that are subject to professional secrecy in tax matters, implying a shift, in many cases, of the reporting obligation to the taxpayer.

Detailed discussion

Reporting exemption based on legal professional privilege

The Draft Law exempts Luxembourg intermediaries that are covered by article 35 of the modified Law on the Legal Profession of 10 August 1991, i.e., lawyers registered with the Luxembourg Bar, from reporting (legal professional privilege or LPP). This exemption does however not apply if the intermediary acts outside the limits to the legal profession prescribed by the aforementioned law. These limits relate, in particular, to certain functions that are not compatible with the law profession (e.g., acting as director of a commercial company or exercising as a certified public accountant). Intermediaries falling under the reporting exemption are still required to inform other intermediaries or relevant taxpayers of their obligations to report within a determined deadline.

The Draft Law also sets forth an obligation for intermediaries who qualify for exemption owing to LPP to file, with the Luxembourg tax authorities, specified information on a reportable cross-border arrangement, such as the identification of the relevant intermediary, detailed information on the relevant hallmark rendering the cross-border arrangement reportable, summary of the content of the reportable cross-border arrangement and detailed information on the legal provisions on which the reportable cross-border arrangement is based.

The State Council first highlights the fact that under Luxembourg law, litigants, be it individuals or corporates, are authorized, in tax matters, to be represented or assisted before the administrative tribunal by a certified accountant (*expert-comptable*) or an independent auditor (*réviseur d'entreprises*). It notes that the parliamentary comments to the Draft Law justify the exemption granted to the lawyers by, in particular, the fact that a lawyer may be called on to represent the interest of his/her clients in a court procedure, as the case may be in the context of a litigation directly or indirectly linked to a reportable cross-border arrangement.

Given that this may also be the case with regard to certified accountants and independent auditors, the option to grant the exemption only to lawyers may lead to unequal treatment in the field of tax advisory services, which goes against the constitutional principle of equality before the law. The State Council formally requests the extension of the exemption from reporting to all intermediaries subject to professional secrecy, at least in tax advisory matters, thus including lawyers, certified accountants and independent auditors.

With respect to the obligation for intermediaries subject to LPP to file certain general information on a reportable cross-border arrangement, the State Council emphasizes that a transmission of information, even anonymized, infringes the LPP, as the LPP covers all information that the professional has obtained in the framework of the exercise of his/her profession. In addition, in the State Council's opinion, the Luxembourg tax authorities may, in certain cases, be able, based on the detailed information on the relevant hallmark(s), to identify a determined operation and the name of the taxpayer concerned. Finally, in the case of a court procedure on the tax aspects of a given operation, the affected taxpayer is likely to be confronted with the information that has been transmitted to the Luxembourg tax authorities by its lawyer. The State Council hence formally requests to remove the reporting obligation for professionals subject to professional secrecy, as it adversely affects the very substance of such professional secrecy.

Access to certain information in the framework of their verification procedures by Luxembourg tax authorities

The Draft Law proposes that Luxembourg tax authorities have access, upon request, to specified information kept by certain professionals under the amended law of 12 November 2004 on the fight against money laundering and terrorist financing. Given that this implies access to personal data, the State Council indicates that this conflicts with the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR), which requires that such personal data be collected for specified, explicit and legitimate purposes only for it to not be further processed in a way incompatible with those purposes.

Implications

Given that the State Council has issued formal objections, it is expected that the identified points will be analyzed and addressed by the legislator in the near future in order to swiftly progress with the legislative process. With respect to the reporting exemption based on LPP, options include completely removing the reporting exemption, which would mean that lawyers would be subject to the same obligations as any other intermediary, or else extending the reporting exemption to other professions subject to professional secrecy obligations, with the consequence that in many cases the reporting obligation will be shifted to the taxpayers.

Determining if and where there is a reportable cross-border arrangement raises complex technical and procedural issues, and taxpayers who have operations in Luxembourg should review their policies and strategies for logging and reporting tax arrangements to make sure they are fully prepared for meeting their obligations.

Endnote

1. For a more detailed discussion, see EY Global Tax Alert, [Luxembourg submits draft law implementing EU Mandatory Disclosure regime to Parliament](#), dated 21 August 2019.

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