

Luxembourg Tax Authorities issue MDR guidance

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Executive summary

On 13 May 2020, the Luxembourg Tax Authorities issued guidance addressing the implementation of the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive). Under DAC6, taxpayers and intermediaries are required to file information on reportable cross-border arrangements from 1 July 2020. However, reports will retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.¹

The newly issued guidance (the Guidance) provides more clarity on the interpretation of the Luxembourg Mandatory Disclosure Rules (MDR) legislation and how the Luxembourg Government anticipates the reporting process to operate.

The Guidance confirms that the Luxembourg MDR legislation is broadly aligned to the requirements of the Directive.

The key highlights of the Luxembourg newly issued Guidance are summarized below.

Detailed discussion

Clarifications around certain definitions and concepts

Intermediary vs. participants

According to the guidance, an intermediary who, in relation to a cross-border arrangement, exclusively carries out activities such as the designing, marketing, organizing or making available such an arrangement for the purposes of its implementation, is not to be considered as a participant in the arrangement unless this intermediary is also active in the arrangement that it itself designed, proposed, implemented, made available for the implementation or managed the implementation for the benefit of the taxpayer concerned.

Service providers (secondary intermediaries) with reasons to know

A service provider has the right to provide evidence that it did not know and could not reasonably have been expected to know that it undertook to provide, directly or through others, aid, assistance or advice concerning the design, marketing or organization of a reportable cross-border arrangement or concerning its making available for the purposes of implementation or the management of its implementation. The Luxembourg tax authorities will review such situations on a case-by-case basis. Proof can be provided by any means and must be provided upon request by the Luxembourg tax authorities who will assess each case separately based on the facts and circumstances.

No audit obligation

According to the Guidance, intermediaries do not have a specific obligation to actively seek information that they do not have at their disposal and that goes beyond existing professional obligations.

Existence of a cross-border arrangement

According to the Guidance, an arrangement is not considered as a cross-border arrangement when all the participants in the arrangement are tax resident in the same Member State, the intermediary is not a participant in the arrangement and only the intermediary has a link with Luxembourg. This will not apply in case of an arrangement that has a possible impact on the automatic exchange of information or the identification of beneficial ownership (art. 1 (1) e of the Luxembourg MDR Law).

Making available for implementation

The Guidance indicates that an arrangement is made available for implementation where the intermediary has transferred to the relevant taxpayer the contractual documents or has made them available by other means. An actual implementation is not required.

Main benefit test

The Guidance states that certain hallmarks only result in a reporting obligation if the relevant arrangement meets the “main benefit test” (MBT). In accordance with DAC6, the MBT will be satisfied if it can be established that “the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, (is) the obtaining of a tax advantage.”

In accordance with parliamentary comments to the Law, the MBT criterion will not be met if the tax advantage obtained is in line with the object and purpose of the applicable legislation and the intention of the legislator. To determine if a given arrangement is consistent with such intention, the entirety of the elements constituting the arrangement must be considered. For example, an arrangement, viewed as a whole, will not be consistent with the intention of the legislator if it makes use of the subtleties of a tax system or of inconsistencies between two or more tax systems in order to reduce the tax to be paid, and will therefore be regarded as meeting the MBT criterion.

Furthermore, the Guidance confirms that the MBT must be fulfilled in relation to the types of taxes referred to in Article 2 of Directive 2011/16 / EU, i.e., direct taxes and certain indirect taxes, such as inheritance tax, while value-added tax, customs duties, excise duties and compulsory social security contributions are excluded. The Guidance also confirms that the tax benefit does not necessarily have to be obtained in a Member State but can also arise in a third State. The Guidance is in line with parliamentary comments in this regard.

Reporting obligations

Reporting process and proof of reporting

The Guidance states, that reports can be submitted manually through the same platform through which tax returns are to be filed (MyGuichet) or by importing an xml file. A user manual and the structure of the xml file will be made

available on the Luxembourg tax authorities' website. The interface will be available in English, French and German, but the information to report shall be provided in English.

According to the Guidance, when filing a report, a transmission slip as well as a pdf-document containing the details of the information communicated to the Luxembourg tax authorities will be generated automatically. At that moment, two reference numbers will be attributed, an "arrangement ID" and a "disclosure ID."

The arrangement ID will be assigned at the time when the report is submitted for the first time by the initial reporter. This ID will be assigned by the Luxembourg tax authorities if the first report is filed in Luxembourg. Where the first report is submitted in another EU Member State, the arrangement ID will be attributed by that State. The arrangement ID is attached to the declared arrangement and is to be used by every person that makes a declaration in relation to such arrangement. To this end, the initial reporter has to communicate the arrangement ID to every person known to it that is covered by the obligations of the Luxembourg MDR law as well as any other person known to it that is potentially covered by similar obligations in another Member State, whether that be another intermediary, a relevant taxpayer and whether resident in Luxembourg or in another Member State. Any other person filing reports in relation to the same arrangement must mention the arrangement ID such that all reports in relation to the same arrangement can be linked to the same arrangement in the central depository.

The Disclosure ID is unique and attributed to each new report filed. It constitutes personal information that must not be disclosed and allows the person who submitted the report to modify or review the report that has already been transmitted.

After the automatic exchange of the information transmitted, a certificate of disclosure drawn up by the Luxembourg tax authorities will be made available to the depositor on the MyGuichet platform. The Luxembourg tax authorities cannot guarantee that this document as well as the transmission slip and relating pdf-document will be accepted as evidence by the competent authorities of other Member States.

Clarifications on elements forming part of the report

The Guidance provides clarifications on certain items of information that need to be included in the report to be filed:

"Value of the reportable cross-border arrangement" refers to the valuation of the amount at stake in the cross-border arrangement and it is to be assessed on a case-by-case basis. In particular this can refer to the amount of the transaction giving rise to the cross-border arrangement, which could for example be a sale, an acquisition, a loan or a capital investment. The value does not refer to the expected tax benefit. Amounts are to be declared at their nominal value.

"Details of the national provisions that form the basis of the reportable cross-border arrangement": It will be sufficient to indicate the relevant article of the law and the exact title of the law as well as the relevant country. It will not be necessary to reproduce the legal provisions.

Proof of reporting in another jurisdiction/by another person

Proof that the same information has been transmitted in another Member State and/or by another intermediary or relevant taxpayer must be provided by any means at the request of the Luxembourg tax authorities, who will make a case-by-case assessment based on the facts and circumstances. A written document emanating from the competent authority of the Member State concerned is considered a means of proof (among other means). The indication of the arrangement ID will in principle not be considered sufficient.

Marketable arrangements - requirement for updated reports

According to Article 1(4) of the Luxembourg MDR Law, a period report must be filed by intermediaries every three months providing an update on new reportable information in relation to marketable arrangements. Nonetheless, the Guidance states that a quarterly update is only required in the case where adjustments have to be made to the report (e.g., addition of names of taxpayers concerned). This update can be done at any time. A zero report is not required.

Next Steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Taxpayers and intermediaries who have operations in Luxembourg should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting these obligations.

Endnote

1. On 8 May 2020, in a Proposal for a Council Directive amending Directive 2011/16/EU, the Commission proposed amendments to certain time limits for filing and exchanging information under Directive 2011/16 concerning reportable arrangements as provided by DAC6. See EY Global Tax Alert, [European Commission proposes deferral for certain filing deadlines under the Mandatory Disclosure Rules](#), dated 8 May 2020.

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