D.A.C.6 IMPLEMENTATION IN LUXEMBOURG – RISK OF MULTIPLE REPORTING OBLIGATIONS EXISTS

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INTRODUCTION[1]

D.A.C.6 is the latest European Union Directive on Administrative Cooperation. It requires Intermediaries, and in some cases taxpayers, to report a wide range of "potentially aggressive tax planning arrangements" to tax authorities. The Directive became effective on July 1, 2020. It imposes obligations to report transactions entered into from June 25, 2018. It introduced the concept of "Hallmarks" into European tax law, albeit with a sense somewhat different to its more everyday usage.[2]

LEGISLATIVE BACKGROUND

European Council Directive (E.U.) 2018/822 of 25 May 2018 regarding the mandatory exchange of information in the field of taxation in relation to reportable cross-border arrangements, known as D.A.C.6, introduces mandatory reporting obligations on intermediaries who play a role in reportable cross-border arrangements ("C.B.A.'s") entered into by taxpayers. D.A.C.6 formed the basis of the Luxembourg draft Bill (*Projet de Loi*) No 7465 dated the August 8, 2019. On March 21, 2020, the Luxembourg Parliament approved the law of 25 March 2020 ("L.L.2020") and stated that the provisions would be applicable from July 1, 2020. D.A.C.6, however, foresees a retroactive effect with respect to any C.B.A. where "the first step in implementing" occurred between June 25, 2018 and July 1, 2020.

The main purpose of D.A.C.6 is to enhance transparency through the imposition of mandatory reporting obligations on "gate keepers" (*i.e.*, intermediaries) of arrangements that contain Hallmarks of potentially aggressive tax planning. This information is shared with other tax authorities in the E.U. It was inspired by the Final Report on Action 12 of the O.E.C.D. B.E.P.S. Project. However, the Mandatory Disclosure Rules ("M.D.R.") of D.A.C.6 are broader in that they impose an obligation to disclose potentially aggressive tax planning arrangements.

Due to the COVID-19 pandemic, the implementation of these rules was delayed. Any reportable C.B.A.'s where the first step was implemented between June 25, 2018 and July 1, 2020 should have been reported by February 28, 2021. Additionally, any reportable C.B.A.'s which took place between July 1, 2020 and the present must be reported within 30 days from January 1, 2021. The first exchange of information between the Member States under D.A.C.6 is scheduled to occur by April 30, 2021.

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[1] The authors acknowledge the insights obtained from Thierry Pouliquen, Andrew Knight, Simon Gorbutt, and Graham J. Wilson during the preparation of this article.

[2] While the term "hallmark" is generally a positively affected word, being a symbol of certifying the standard of purity attributed to an object/ article, the hallmarks referred to within D.A.C.6 are the contrary and have negative features.

This article will consider the position in Luxembourg in relation to the transposition of D.A.C.6 and examine guidelines such as the Circular of the Luxembourg Tax Authority ("L.T.A.") (formally the *Administration des Contributions Directes* or "A.C.D.") as well as the commentaries on the draft law and the State Council opinion. References will be made to relevant existing law that may lead to duplicate reporting of the same facts.

TRANSPOSITION OF D.A.C.6 IN LUXEMBOURG

Almost Identical Transposition of D.A.C.6

There are three means of legislating within the European Union: by Directive, by Regulation, and by Decision. As stipulated by Article 288 of the Treaty on the Functioning of the European Union, Directives are implemented in the following way.

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

In comparison to Regulations and Decisions, Directives must be transposed into national law by each Member State. As a Directive, D.A.C.6 provides for a general legal framework that can be considered as the minimum standard for achieving its stated purposes. While transposing D.A.C.6 into national law, the E.U. Member States were required to specify certain provisions but were also free to broaden its scope. However, the reality with respect to Directives has been to move away from the "framework" style of Directive as embodied in Article 288 and towards the issuance of more detailed provisions. This shift leaves the Member States less wriggle room when transposing the Directive into national law. As such, Member States seem to be reluctant to depart from the wording of the Directives and the wording of domestic legislation frequently follows the exact wording of the Directives.

The Luxembourg legislative procedure, which is unicameral, nevertheless requires formal consultation by the Government with several nongovernmental organizations, the most important of which is the State Council (*Conseil d'Etat*). While N.G.O.s are consulted according to the subject matter of a proposed law, the State Council is consulted on all proposed laws and has the power to delay, although not amend, legislation. Commentaries by the State Council are often illuminating, as are the commentaries that accompany practically every proposed law in Luxembourg, whatever the subject matter.

The wording of L.L.2020 aligns closely with the text of D.A.C.6. The main definition of the terms such as "C.B.A.'s," "intermediary," "relevant taxpayer," "associated enterprise," "Hallmarks," and "marketable arrangement" – are identical to the definitions within the D.A.C.6, Thus, L.L.2020 adopted the five categories of Hallmarks in D.A.C.6:

- General Hallmarks linked to the main benefit test ("M.B.T.")
- Specific Hallmarks linked to the M.B.T.
- Specific Hallmarks related to cross-border transactions, with only some being subject to the M.B.T.

- Specific Hallmarks concerning automatic exchange of information and beneficial ownership
- Specific Hallmarks concerning transfer pricing

Luxembourg decided to transpose D.A.C.6 as an autonomous law and not merely as an amendment to the law of 29 March 2013 (itself as amended) on administrative cooperation in the field of tax, which transposed Directive 2011/16/UE. Therefore, L.L.2020 needed to define the notion of "financial accounts" and "persons" and to specify that the L.L.2020 applies to all taxes except V.A.T., customs duties, excise duties, and compulsory social security contributions.

The main scope of the reporting obligation was not extended beyond the scope expressly set down in D.A.C.6. For example, no additional Hallmarks were included and no reporting in relation to purely domestic arrangements is required.

Some Specifics of L.L.2020

D.A.C.6 authorizes the Member States to provide waivers from intermediary reporting. Thus, Member States may

> * * * take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable C.B.A. where the reporting obligation would breach the legal professional privilege under the national law of that Member State.

Initially limited to lawyers in the draft Bill 7465, L.L.2020 provides an exemption from reporting obligations for lawyers, chartered accountants (*experts-compatibles*) and auditors (*réviseurs d'entreprises*) reflecting the important role of accountants in providing tax advice to businesses and also reflecting the growing number of accounting firms that are associated with legal practices to a greater or lesser degree.

D.A.C.6 further requires E.U. Member States to introduce effective, proportionate, and dissuasive penalties for failure to comply with the provisions of the national laws that implement the Directive.

To this end L.L.2020 provides that intermediaries and relevant taxpayers may incur a fine that will be fixed by the Luxembourg Tax Administration up to an amount of EUR 250,000 in cases involving (i) failure to report information, (ii) late transmission of information, (iii) transmission of incomplete information, and (iv) transmission of inaccurate data.

Additionally, in cases where an intermediary is within the scope of legal professional privilege, a fine may be levied where an intermediary fails to notify other intermediaries or relevant taxpayers within the relevant ten-day notification period. The commentaries to the draft law indicate that the level of the penalty imposed will consider the circumstances of the case as well as the intentional character of the breach. Those commentaries also refer to the effective, proportionate, and dissuasive criteria of the penalties decided. The practice of enforcing tax reporting rules by means of having the tax administration impose fines occurs regularly in Luxembourg.[3]

[3] See for example the European Court of Justice case of Berlioz: C-682/15.

INTERPRETATION OF THE RULES AND AVAILABLE GUIDANCE

Official Guidance?

The fact that D.A.C.6 itself is very broad in terms of its definitions and the Hallmarks may lead to different interpretations within the E.U. Member States. The wording of the L.L.2020 aligns closely with the text of D.A.C.6 and consequently does not provide much information on the definitions and Hallmarks. Most unfortunately the same is true of the commentaries to the draft law.

"The fact that D.A.C.6 itself is very broad in terms of its definitions and the Hallmarks may lead to different interpretations within the E.U. Member States."

The State Council noted, in its opinion dated January 14, 2020, that the Luxembourg Government commentaries do not provide sufficient clarification allowing for a better understanding and, therefore, a possibly better assessment of whether a C.B.A. must be reported. In the same opinion, the State Council suggested some clarifications that have not been followed by the Luxembourg Government. Nevertheless, the L.T.A. followed some of the suggestions made by the State Council when the L.T.A. published its circular.

The L.T.A. Circular

The L.T.A. published a circular, most recently amended on February 12, 2021 (the "Circular"), providing further details in relation to the implementation of L.L.2020. It is our understanding that several Member States produced guidelines are more fundamental and categorical than those from Luxembourg and did so much sooner than Luxembourg.

The Circular contains only a few further details and clarifications in relation to the definitions or interpretation of the Hallmarks, specifically with regard to the M.B.T., which appear to stem from the opinion of the State Council. Apart from this, it contains mainly guidelines about the practical aspects of the reporting obligations, including (i) forms and communication methods to report information, (ii) languages that should be used, and (iii) scope of information to be provided to the L.T.A. However, some very important practical issues have not been dealt with and these items are discussed below.

Some of the details provided by the Circular are as follows.

Cross-Border Arrangement

In terms of the definition of a C.B.A., the Circular specifies there is no C.B.A. within the meaning of Article 1 (1) a-d if (i) all participants concerned with the arrangement are tax resident in the same Member State (which is not Luxembourg), and (ii) the intermediary is not to be considered as a participant of an arrangement, and (iii) the intermediary is the only one to present a link with Luxembourg. At the same time, it clarifies that this reasoning does not apply when the arrangement may have consequences on the automatic exchange of information or on the identification of the beneficial owner.

Clarifications on Intermediary Definition

Regarding the term of "made available for implementation" in relation to the definition of an intermediary, the Circular clarifies the time when the reporting clock begins to run. The activity

> * * * is made available when the intermediary has provided the relevant taxpayer with the contractual documents or made them accessible to him otherwise, while specifying that an effective implementation, however, is not required.

The Circular further specifies that an intermediary who exercises, in relation to a C.B.A., exclusively activities such as the design, marketing, organization of a C.B.A., or the provision of such an arrangement for implementation, is not to be qualified as a participant in the arrangement unless this intermediary is also active in the arrangement that he himself has imagined, proposed, set up, made available for implementation or has managed the implementation for the benefit of the relevant taxpayer.

Participant of an Arrangement

Participants include not only the relevant taxpayer but also their commercial and contractual partners regarding the arrangement in question, such as buyer and seller of a property or lenders and borrowers.

Marketable Arrangement

Interesting to see is that the Circular expressly states that Hallmark A3, involving, an arrangement that has substantially standardized documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customized for implementation, is not automatically considered as a marketable arrangement.

Professional Secrecy- Notification Obligation

Where the exemption for professional secrecy applies, the Circular clarifies that the exempt intermediaries are required to notify other intermediaries involved, including non-Luxembourg intermediaries, meaning that those intermediaries will, if they consider the transaction as reportable, make the reporting to the tax authorities of their respective Member States of residence. It also specifies that any intermediary or relevant taxpayer may, after receiving notification of a reporting obligation by an intermediary subject to professional secrecy, revise the initial assessment made by the notifying intermediary and may conclude that the arrangement is not reportable, based on the facts and circumstances. In the event the notified intermediaries and the taxpayer erroneously determine that no report is required, the exempt intermediary likely will not face a penalty for noncompliance on its part.

The Main Benefit Test

L.L.2020 subjects certain Hallmarks to the M.B.T. This means that even if the facts indicate that terms of the Hallmark have been met by the arrangement, reporting is required only if the following M.B.T. conclusion is reached:

> [I]t 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.

Commentaries on draft law note that under paragraph 81 of Action 12 of the O.E.C.D. B.E.P.S. Project, the analysis calls for a comparison of the value of the expected tax benefit with the value of other benefits that may arise from the transaction based on an objective assessment of the tax benefits.

The Circular clarifies that the M.B.T. is not met when the tax advantage concerned is obtained from an arrangement that is in accordance with the purpose or the aim of the applicable legislation and the legislator's intention. In that case, that arrangement or transaction need not be reported. It further clarifies that to determine whether the arrangement is in accordance with the legislator's intention, all elements of the arrangement must be taken into consideration. An example of where the M.B.T. is met involves an arrangement that takes advantages of the subtleties or nuances of a tax system, or inconsistencies between two or several tax systems, to reduce the tax due. In these circumstances, the arrangement or transaction would be reported.

The Circular further confirms the view of the legislator within the draft bill that the M.B.T. must be met with respect to direct and certain indirect taxes, such as inheritance tax. It would not apply where the tax advantage is linked to V.A.T., customs duties, excise duties and compulsory social security contributions. Whether the tax advantage was obtained in an E.U. or a non-E.U. country does not affect the application of this exception.

The concept of the M.B.T. is not a new phenomenon. It has already been seen within the General Anti-Abuse Rule ("G.A.A.R.") provided under the Anti-Tax Avoidance Directive 2016/1164, however under different criteria. Directive 2016/1164 has been transposed by Luxembourg in the law of 21 December 2018. Under the G.A.A.R., nongenuine arrangements or a series of arrangements that are put in place for the main purpose, or one of the main purposes, of obtaining a tax advantage that defeats the object or purpose of the applicable tax law should be ignored for the purposes of determining the tax liability. An arrangement under the G.A.A.R. is regarded as nongenuine to the extent that it is not put into place for valid commercial reasons which reflect economic reality. Because the M.B.T. under D.A.C.6 does not have the same objective requirements, the scope of its application under D.A.C.6 is much broader.

Point 14 of the preamble of D.A.C.6 states the following:

> [I]t is appropriate to recall that aggressive cross-border tax-planning arrangements, the main purpose or one of the main purposes of which is to obtain a tax advantage that defeats the object or purpose of the applicable tax law, are subject to the general- anti-abuse rule as set out in Article 6 of Council Directive (E.U.) 2016/1164.

Examples of Hallmarks

For each Hallmark, an intermediary must analyze arrangements on a case-by-case basis and consider all Hallmarks under D.A.C.6 and existing laws to ensure compliance. The discussion that follows addresses several Hallmarks, but not all.

B2: Conversion of Income in Context of Classes of Shares

Classes of shares with different economic rights such as preferred shares or tracking shares, are commonly used by Luxembourg companies and held both by investment funds and others.

The redemption of a class of shares by a Luxembourg company might be viewed as an arrangement falling within Hallmark B2, which relates to the conversion of income into capital or low or zero taxed income. In particular, this is because the shareholder in such case may be considered to be receiving a return in the form of a capital gain that is free of withholding tax rather than receiving a dividend that might be subject to withholding tax.

The conversion of the income should be assessed, in principle, at the level of the shareholder. Moreover, Hallmark B2 is subject to the M.B.T. This being said, the reporting of any repurchase of the classes of shares must be analyzed on a case-by-case basis.

For instance, in the case of a Luxembourg company held by a Luxembourg investment fund in the form of a tax-exempt opaque company, the redemption of an entire class of shares should not be considered as falling under the Hallmark B2 since any income received by such an investment fund is tax-exempt. Nevertheless, the repurchase of the entire class of shares would have to be analyzed in light of the M.B.T. to complete and support the absence of reporting of the C.B.A..

A3: Standardized Documentation and B2: Income Conversion in the Context of Life Insurance

As a preliminary remark, in many European countries, life insurance is seen as a good thing, whether it contains a greater or lesser element of savings or investment. This may also be linked to pension considerations. This means that in many countries one or more of the three principal components of life/pension insurance are the following:

- The payment of the premium by the policy holder
- The investment by the insurer/pension fund
- The eventual payment to the beneficiary

Each provides tax benefits, which may or may not be limited by ceilings or other standards. These advantages may include (i) the tax deductibility of premiums by the policy holder, (ii) the exemption or low taxation of investment income and gains in the hands of the insurer/pension fund, and (iii) the exemption or lower taxation of payments to a beneficiary or withdrawals by a beneficiary. This is a huge business and is heavily based upon standardized contracts. In 2017 life insurance premiums in the E.U. totaled €710 billion.

Hallmark A3 (Standardized documentation) and Hallmark B2 (Income conversion) might have an impact on Luxembourg life insurance contracts. Both Hallmarks are subject to the M.B.T. A life insurance contract is not automatically reportable under those Hallmarks and therefore needs to be analyzed on a case-by-case basis.

Regarding Hallmark A3, the commentaries of the draft law specify, by referring to paragraph 104 of Action 12, the following:

> [This Hallmark] covers “prefabricated” tax products that can be used as they are, or after limited modifications. In order to set up such an arrangement, the customer does not need significant support in the form of professional advisory services.

On December 12, 2020, the Luxembourg Insurance and Reinsurance Association (*Association des Compagnies d'Assurance et Réassurance* or "A.C.A.") published on its website a post called "Frequently Asked Questions" on D.A.C.6 (F.A.Q.) constituting a nonbinding common interpretation of A.C.A. members presented and discussed with the Ministry of Finance and the L.T.A.

According to these F.A.Q., the A.C.A. suggests that Hallmark A3 should not apply to life insurance contracts, to the extent that those contracts are in compliance with the Luxembourg law, regulations, other binding measures or best practices, are in principle personalized to the client (*e.g.*, determination of the beneficiary, choice between different types of investments and vehicles), and a certain degree of advice is provided.

Moreover, through life insurance contracts, the policyholder has the possibility to

> [* * * invest] in a wide variety of instruments in order to constitute, using the income derived by these investments, a capital sum that can be repaid or bequeathed to one or more beneficiaries, generally with some preferential tax treatment, if certain specific conditions are met.

In this respect, life insurance contracts might be viewed as an arrangement falling within Hallmark B2 ,which relates to the conversion of income into capital or low or zero taxed income.

Based upon a particularly narrow view of the nature of an insurance contract, in the F.A.Q., the A.C.A. considers that, to the extent that the insurance company is the legal and beneficial owner of the invested assets, the policyholder does not benefit from any conversion of its income throughout the duration of the life insurance contract, and therefore Hallmark B2 is not automatically satisfied. In addition, if Hallmark B2 were to be considered as satisfied, the application of the M.B.T. to the policy would need to be analyzed.

E3 - E.U. Cross-Border Merger

Hallmark E3 refers to the following fact pattern:

> [A]n arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (E.B.I.T.) during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual E.B.I.T. of such transferor or transferors if the transfer had not been made.

This Hallmark is not subject to the M.B.T. As a result, many transactions commonly used in Europe to effect corporate reorganizations can be caught by Hallmark E3. This despite the fact that there is specific European legislation which is intended to facilitate such transactions, including mergers, demergers, migrations, and liquidations, where tax deferral and/or reduction is a natural consequence alongside the other usual advantages sought in such reorganizations.

Whether Hallmark E3 is applicable to all sorts of mergers will likely depend on the activities, functions, risks, and assets carried on and held by the companies involved, keeping in mind that the Hallmark E3 is part of specific Hallmarks concerning transfer pricing.

Where an absorbed target company carries out shareholding and financing activities, transfer pricing issues generally should not be relevant. Therefore, profit that might be generated by those activities should not correspond to the E.B.I.T. notion referred to under Hallmark E3, rendering the cross-border merger potentially not reportable.

Conversely, if the absorbed target company carries on a commercial activity generating profitable operating revenues, besides its shareholding and financing activity, such profit should correspond to the E.B.I.T. notion referred to under Hallmark E3. As, a merger will inevitably reduce the E.B.I.T. of the absorbed company to nil, the cross-border merger could potentially qualify as a reportable C.B.A.

DOUBLE COUNTING OR THE INTERACTION OF REPORTING MECHANISMS

"Where an absorbed target company carries out shareholding and financing activities, transfer pricing issues generally should not be relevant."

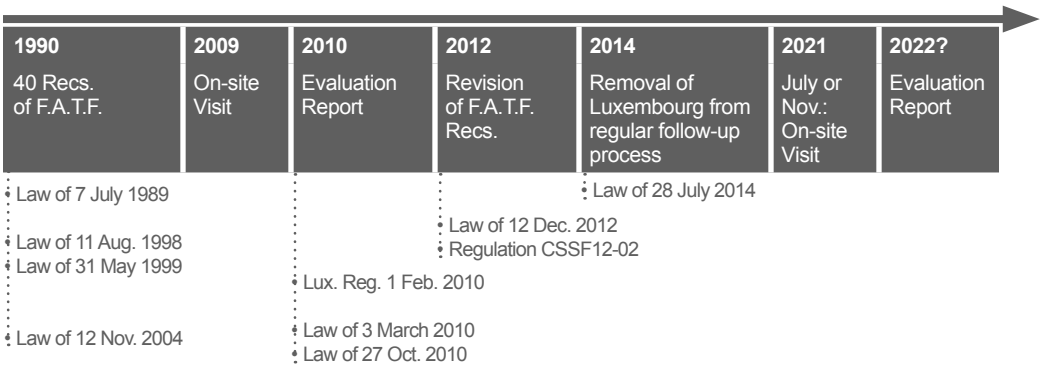
Law of 12 November 2004 on the fight Against Money Laundering and Against the Financing of Terrorism, as Amended (A.M.L. Law) and All Hallmarks of D.A.C.6

Figure 1 shows that the journey of the A.M.L. Law goes back to 1990 when the 40 recommendations published by the Financial Action Task Force ("F.A.T.F.") were implemented in Luxembourg in the law of 7 July 1989. A few years later, the recommendation were transposed into the Luxembourg criminal code and finally into the law of 12 November 2004.

In 2009/10, F.A.T.F. undertook an on-site visit to Luxembourg as part of its general plan to verify the implementation of the F.A.T.F. recommendations by the E.U. Member States. A mutual evaluation report was issued in 2010 indicating recommendations as to how strengthen certain aspects of the Luxembourg system in relation to its actions to counter money laundering and terrorist financing ("A.M.L./T.F."). Luxembourg consequently enacted several additional laws strengthening its A.M.L./T.F. system. Finally, in February 2014, the F.A.T.F. recognized that Luxembourg made significant progress in addressing deficiencies identified in the February 2010 mutual evaluation report so that it should be removed from the regular follow-up process.

The next ten-year evaluation process was scheduled for the spring of 2020. Due to COVID-19, it was first delayed until the autumn of 2020 and is now due to take place in July or November 2021, with the report to potentially follow in 2022. Luxembourg is extremely concerned about ensuring that it will receives a favorable evaluation report from the F.A.T.F. To be fair, this is, entirely justified given the rigorous procedures that have been put in place and which are well policed.

Figure 1: F.A.T.F. and Luxembourg



The first and only anti-money laundering Directive ("A.M.L.D.") on the fight against money laundering that existed in 1991 was transposed into Luxembourg Law in 1993. In 2001, a second directive was transposed into the current A.M.L. Law. In 2005 the 3rd A.M.L. was adopted and covered not only anti money laundering but also terrorist financing. Over the years additional A.M.L. Directives have been issued. To date, the A.M.L. Law has been amended as a result of the growing problem of tax fraud and money laundering six times, the last one being by the law of February 25, 2021.

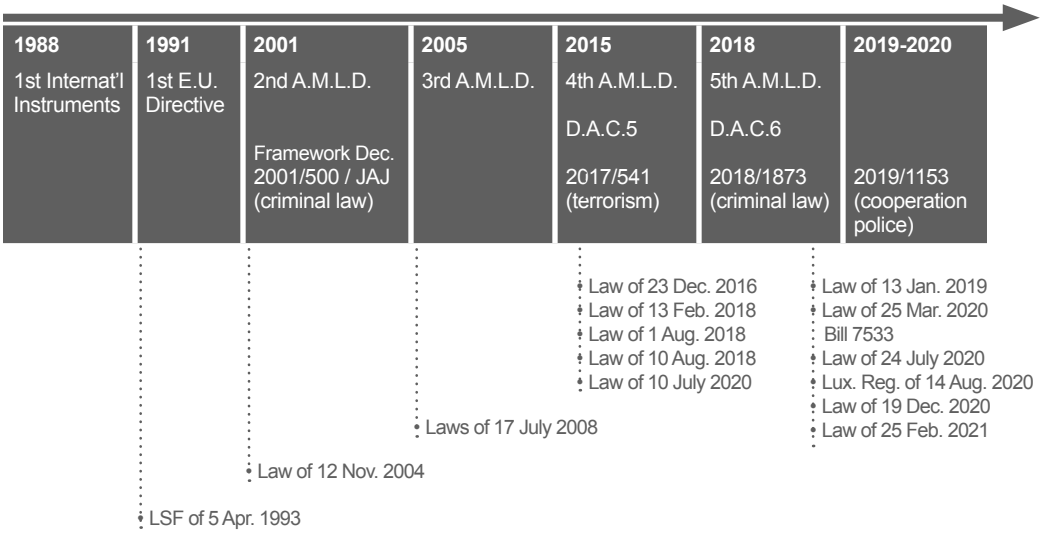
The evolution of the Directives on Administrative Cooperation (D.A.C.) in the field of taxation in the European Union is enormous. So far, the original Directive 2011/16/E.U. ("D.A.C.1") has been amended five times by the following Directives with the object and purpose of strengthening the administrative cooperation between the E.U. Member States. As can be seen by the dates, the main, or one of the main, motivations was the fall-out from the 2008/9/10 financial crisis and the perceived need to raise tax revenues without raising taxes.

- **Directive 2014/107/E.U.**: This Directive introduced an automatic exchange of information on financial accounts and the related account holders ("D.A.C.2"), implemented in Luxembourg by the law of 18 December 2015 on the common reporting standard (C.R.S.).
- **Directive 2015/2376/E.U.**: This Directive addressed the automatic exchange of tax rulings and advance pricing agreements ("D.A.C.3"), implemented into Luxembourg law by the law of 23 July 2016.
- **Directive 2016/881/E.U.**: This Directive introduced the automatic exchange of country-by-country reports ("D.A.C.4"), implemented in Luxembourg by law of 23 December 2016.
- **Directive 2016/2258/E.U.**: This Directive ensures that tax authorities have access to beneficial ownership information collected pursuant to 4th E.U. A.M.L. Directive ("D.A.C.5"), implemented into Luxembourg legislation by the law of 1 August 2018.
- **Directive 2018/822/E.U.**: This Directive addressed automatic exchange of reportable C.B.A.'s ("D.A.C.6").

D.A.C.7 was issued earlier this month (March 2021) and addresses tax transparency on digital platforms. D.A.C.8 has been proposed on reporting of crypto assets.

Figure 2: Development of the Legislative and Regulatory Framework Over the Past Three Decades on A.M.L.

Historical Overview of Anti-Money Laundering Law (E.U.)



Luxembourg Law of 18 December 2015 Transposing E.U. Directive 2014/107, Known as "D.A.C.2," Relating to the Mandatory Automatic Exchange of Information in Tax Matters (C.R.S. Law) and Hallmark D1 (Automatic Exchange of Information)

The C.R.S. Law requires financial institutions to report financial accounts held by account holders that are tax residents in a C.R.S. jurisdiction. At the same time, separate reporting obligations under L.L.2020 may be triggered if the specific Hallmarks concerning automatic exchange of information (Hallmark D1) are considered to be satisfied. This Hallmark is not subject to the M.B.T.

In comparison to the C.R.S. Law, the reporting obligation under Hallmark D1 is not addressed only to financial institutions but extends to include intermediaries or if there is no intermediary to the "relevant taxpayer." The scope of Hallmark D1 is extremely broad and reporting under Hallmark D1 covers arrangements that may have the effect of undermining the reporting obligations under the C.R.S.

As a result, an intermediary is left with considering two sets of rules when an arrangement falls within the scope of Hallmark D1. The preamble to D.A.C.6 however points to the M.D.R. developed by the O.E.C.D. and related commentary as a source of illustration and interpretation which might be useful in analyzing whether the reporting arrangement is consistent with the C.R.S. law. Nevertheless, in the circumstances where Hallmark D1 applies, the intermediary or the taxpayer should consider whether C.R.S. Law have been complied with, too.

Luxembourg Law of 13 January 2019 Creating a Register of Beneficial Owners Transposing the 4th E.U. A.M.L. Directive, as Amended by the 5th E.U. A.M.L. Directive (R.B.E. Law) and Hallmark D2 (Concealment of Beneficial Owner)

Hallmark D2 is not linked the M.B.T. and looks at arrangements where the intermediary or taxpayer intends to conceal the beneficial owner by using offshore entities

and structures with no real substance. O.E.C.D. examples look to fact patters in which undisclosed nominee shareholders are used or where control is exercised indirectly rather than by means of formal ownership. Beneficial ownership may also be obscured where arrangements are based in jurisdictions where there is no requirement to maintain information on beneficial ownership. This Hallmark should not be triggered in the first place if A.M.L. obligations and R.B.E. Law have been complied with during the identification process and the beneficial owner is recorded on the Luxembourg beneficial owner register.

"Hallmark D2 is not linked the M.B.T. and looks at arrangements where the intermediary or taxpayer intends to conceal the beneficial owner by using offshore entities and structures with no real substance."

Law of 10 February 2021 introducing Defensive Measures Towards Blacklisted Countries and Hallmark C1 b (ii) (Blacklisted Countries)

This law denies, under certain circumstances, the deduction of interest and royalties owed by Luxembourg corporate taxpayers to associated enterprises and individuals established or based in noncooperative tax jurisdictions (E.U. "blacklisted countries"). As of February 22, 2021, those jurisdictions include American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the U.S. Virgin Islands, and Vanuatu. Hallmark C1.b(ii) is not subject to the M.B.T. and target situations where arrangements involve tax-deductible payments to a resident in blacklisted countries. The fact that those arrangements are now reportable to the tax authorities under the Hallmark C1.b(ii) may permit the L.T.A. to apply the law of 10 February 2021 and sanction those arrangements.

Law of 23 July 2016 Transposing Directive 2015/2376/E.U. on Automatic Exchange of Tax Rulings, known as "D.A.C.3" and Hallmarks, Particularly Hallmark E (Concerning Transfer Pricing)

As of January 1, 2017, all cross-border advance tax rulings and advance pricing agreements issued, modified, or renewed by the L.T.A. are subject to automatic exchange of information with all other E.U. Member States. In this respect, if an arrangement falls within one of the Hallmarks or in particular Hallmark E, it must be reported. Moreover, if the arrangement is considered to be exchanged under the law of 23 July 2016, this will lead to unnecessary double exchange between the E.U. tax authorities and ultimately to an increase of workload for the tax authorities.

CONCLUSION

As we have seen from the above, it has taken eight years to move from D.A.C.1 to D.A.C.6 and the process is ongoing with D.A.C.7. Perhaps the E.U. will soon get it right.

- D.A.C.6 itself is very broad in terms of its definitions and Hallmarks. This may lead to different interpretations across the different E.U. Member States. Luxembourg followed the wording of D.A.C.6 rather closely. Thus, there is a serious need for further guidance in Luxembourg concerning L.L.2020, in particular the definitions and the interpretation of the Hallmarks.
- The limited clarification within the commentaries to the draft law and the State Council opinion, which as indicated, have not been followed by the Luxembourg Government, as well as the rather practical guidance from the L.T.A., are not sufficient.

- L.L.2020 concerns C.B.A.'s, which indicates that more than one intermediary will almost certainly be involved in a particular arrangement. Thus, different intermediaries may have different views as to whether a particular arrangement is considered as reportable or not.
- Depending on the decision taken by the intermediaries involved, this may result in unnecessary multiple and even overlapping filings in relation to the same arrangement, increasing the workload of not only of the intermediaries but also the tax authorities (all of course paid for by the taxpayer directly or indirectly).
- According to L.L.2020, an intermediary for which the exemption applies under the professional legal privilege must notify "any other intermediary" involved, and in the absence of an intermediary not subject to the legal professional privilege, the relevant taxpayer.
- The State Council notes, in its opinion dated March 10, 2020 on the draft law, that given the definition of the term intermediary, "any other intermediary" means the other intermediary regardless of whether it benefits from an exemption from the reporting obligation for a C.B.A.. This leads to an unnecessary and inconsistent multiplication of notifications to the various intermediaries.
- The Circular states that "the intermediary subject to professional secrecy is required to notify the reporting obligations to the persons to whom they fall and of which he is aware, whether he is an intermediary or a relevant taxpayer." But it is still not clear whether "to whom they fall" excludes intermediaries benefiting from an exemption from the reporting obligation, which does not put an end to the concerns.
- The fact that the intermediaries and tax authorities must also consider above mentioned existing laws while analyzing a C.B.A. leads to an increase of work and expenses. Thus, specific guidelines from the Luxembourg Government are long overdue to avoid such unnecessary reporting and increase of workload.

This being said, and to the extent that Member States tend to replicate the text of Directives as mentioned above, it may be time for the E.U. Commission to go beyond providing more and more precise Directives by providing detailed rules as to how expedient and efficient implementation, including simple reporting, should be made.

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