ATOZ
TAX ADVISERS LUXEMBOURG

ATOZ ALERT

ECOFIN Council reaches an agreement on DAC8

17 May 2023

At yesterday's ECOFIN meeting, the EU Council agreed on a general approach regarding foreseen amendments to the directive on administrative cooperation in the area of taxation. This general approach transpires in the Presidency compromise text of the draft Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation ("**DAC**") dated 5 May 2023 ("Compromise Text") which aims, amongst other things, to extend the scope of the reporting and automatic exchange of information on revenues from transactions in crypto-assets and on advance tax rulings granted to individuals when they relate to high value transactions or to individuals' residence for tax purposes, the so-called "**DAC8**". The Compromise Text slightly amends the DAC8 directive proposal adopted by the EU Commission on 8 December 2022 (the "DAC8 Proposal") and described in our ATOZ Alert of December 2022.

Below we present the Compromise Text as well as its future implications.

New reporting obligations for crypto-asset service providers

Like the DAC8 Proposal, the Compromise Text aims at extending the scope of automatic exchange of information to information that will have to be reported by crypto-asset service providers on transactions (transfer or exchange) of crypto-assets and e-money. It lays down the scope and conditions for the mandatory automatic exchange of information that will be reported by reporting crypto-asset service providers to the competent authorities. The definition of what constitutes a "crypto-asset" is very broad and refers to any digital representation of a value or a right which may be transferred and stored electronically, using distributed ledger technology or similar technology. It includes crypto-assets that have been issued in a decentralised manner, as well as stablecoins, including e-money tokens and certain non-fungible tokens ("**NFTs**").

Under DAC8, reporting crypto-asset service providers will have to carry out due diligence procedures according to which they will have to collect and verify information about crypto-asset users that are reportable users or that have controlling persons that are reportable persons. The reporting crypto-asset service providers would then

have to report to the relevant competent authority information on the crypto-asset users, i.e. those who use the service provider to trade and exchange their crypto-assets.

For more information, please read our last Insights published in April, where we outlined the changes brought by the DAC8 Proposal which mainly expand the scope of application of the automatic exchange of information under the DAC to new types of reportable persons and reportable transactions.

Automatic exchange of information on advance cross-border rulings for individuals

Like the DAC8 Proposal, the Compromise Text widens the scope of automatic exchange of advance cross-border rulings and advance pricing agreements when the ruling exclusively concerns and involves the tax affairs of one or more natural persons. However, rulings in the scope of the automatic exchange under the Compromise Text slightly differ. It targets advance cross-border rulings issued, amended or renewed after 1 January 2026 and where:

- the amount of the transaction or series of transactions of the advance cross-border ruling exceeds EUR 1 500 000 (or the equivalent amount in any other currency), if such amount is referred to in the advance cross-border ruling; or
- the advance cross-border ruling determines whether a person is or is not resident for tax purposes in the Member State issuing the ruling.

The scope of the automatic exchange of information is thus extended to advance cross-border rulings granted to individuals where the amount of the transaction or series of transactions of the ruling exceeds EUR 1 500 000 (or the equivalent amount in any other currency) or to advance cross-border rulings which determine whether the individual is resident for tax purposes in the Member State issuing the ruling. In the DAC8 Proposal, reference was made to rulings granted to high-net-worth individuals holding a minimum of EUR 1 000 000 in financial or investable wealth or assets under management, excluding that individual's main private residence.

In addition, under the Compromise Text, only advance cross-border rulings issued, amended or renewed after 1 January 2026 are in the scope of the automatic exchange. The DAC8 Proposal targeted advance cross-border rulings for high-net-worth individuals issued, amended or renewed between 1 January 2020 and 31 December 2025 with other Member States, under the condition that the rulings were still valid on 1 January 2026. In this respect, the Compromise Text removes the element of retroactivity introduced by the initial DAC8 Proposal also.

Automatic exchange of information: extension of the list of income subject to mandatory automatic exchange between Member States

In order to close loopholes that allow tax evasion, tax avoidance and tax fraud, Member States should be required to exchange information related to income derived from non-custodial dividends. Income from non-custodial dividends should therefore be included in the categories of income subject to automatic exchange of information. As a result, like the DAC8 Proposal, the Compromise Text includes non-custodial dividend income in the list of income subject to mandatory automatic exchange of information under the DAC. Currently, this list contains income from employment, director's fees, life insurance products not covered by other EU legal instruments on exchange of information and other similar measures, pensions and ownership of and income from immovable property and royalties.

Under the Compromise Text, 'non-custodial dividend income' means dividends or other income treated as dividends in the payer's Member State, which are paid or credited to an account other than a custodial account (i.e. an account - other than an insurance contract or annuity contract - which holds one or more financial assets for the benefit of another person).

According to the Compromise Text, before 1 January 2026, Member States shall inform the Commission of at least five categories[1] listed in respect of which the competent authority of each Member State shall, by automatic exchange, communicate information concerning residents of the other Member State to the competent authority of any other Member State. The information shall concern taxable periods starting on or after 1 January 2026. Under the DAC8 Proposal, Member States had to communicate, by automatic exchange, information on all categories of income and capital referred to in the list concerning residents of the other Member State to the competent authority of any other Member State.

DAC6

On 8 December 2022, the Court of Justice of the European Union ("**CJEU**") ruled on the validity of a provision of DAC, as amended by Council Directive (EU) 2018/822 of 25 May 2018 in relation to reportable cross-border arrangements, the so-called "**DAC6**", in light of Article 7 of the Charter of Fundamental Rights ("**CFR**") of the European Union.

DAC6 provides that Member States shall give intermediaries the right to waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach their legal professional privilege under the national law of the Member State. This might, for example, apply in the case of professionals that are lawyers or tax advisers. However, in these circumstances, intermediaries must notify, without delay, any other intermediary (or, in the absence of such an intermediary, the relevant taxpayer) of their reporting obligations.

Nevertheless, according to the CJEU, the obligation under DAC6 for a lawyer, bound by a legal professional privilege, acting as an intermediary to notify other intermediaries of their reporting obligations entails an interference with the right to respect for communications between lawyers and their clients which is guaranteed in Article 7 of the CFR.

In order to align the text of DAC with the ruling of the CJEU, the intention of the Council is to amend the DAC6 *"in such a manner that its provisions do not have the effect of requiring a lawyer acting as an intermediary, where he or she is exempt from the reporting obligation, on account of the legal professional privilege by which he or she is bound, to notify any other intermediary who is not his or her client of that intermediary's reporting obligations"*. As a result, the Compromise Text provides that each Member State may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. In such circumstances, each Member State shall take the necessary measures to require any intermediary that has been granted a waiver to notify, without delay, his or her client of their reporting obligations under DAC6, if such client is an intermediary or, if there is no such intermediary, if such client is the relevant taxpayer. This means that any intermediary who, because of the legal professional privilege by which he or she is bound, is exempt from the reporting obligation, remains required to notify without delay his or her client of his or her reporting obligations.

For that purpose, 'client' means any intermediary or relevant taxpayer who receives services, including assistance, advice, counsel or guidance, from an intermediary subject to the legal professional privilege in relation to a reportable cross-border arrangement.

In addition, the information to be communicated by the competent authority of a Member State under DAC6 will be amended so as to exclude information on intermediaries exempt from the reporting obligation on account of the legal professional privilege.

[1] So one more than under DAC7

Penalties

The first DAC8 Proposal aimed at guaranteeing an adequate level of effectiveness in all Member States, and for that purpose, established minimum levels of penalties in relation to two conducts that were considered grievous: namely failure to report after two administrative reminders and when the provided information contains incomplete, incorrect or false data, which substantially affects the integrity and reliability of the reported information.

The Compromise Text gives up on this approach and sticks to the initial version of the DAC provision on penalties according to which the choice of penalties remains within the discretion of Member States, but that penalties provided for should be effective, proportionate and dissuasive.

Other amendments

Finally, the Compromise Text provides for the following additional changes to the DAC:

- Reporting of the tax identification numbers of taxpayers (TIN);
- Use of information exchanges for other purposes: like the DAC8 Proposal, the Compromise Text amends the DAC to ensure that information reported and exchanged under the DAC can be used for purposes other than direct taxation, provided that the sending Member State has stated the purpose allowed for the use of such information in a list. In addition, the Proposal clarifies that information communicated between Member States may also be used for the assessment, administration and enforcement of VAT, as well as other indirect taxes, customs duties and anti-money laundering and countering the financing of terrorism;
- Review of the provisions of Directive 2014/107/EU: since Council Directive 2014/107/EU ("**DAC2**") implemented the OECD Common Reporting Standard ("**CRS**") within the EU, like the DAC8 Proposal, the Compromise Text introduces some changes to reflect the latest developments at global level regarding the CRS to cover electronic money products and central bank digital currencies.

Next steps and conclusion

The European Parliament will still have to present its opinion, which is mandatory but non-binding for the Council. The outcome of this legislative process will be decided by Member States in the Council, by unanimity. At this stage, we do not expect delays for the adoption of such Compromise Text by the Council.

Should the Compromise Text be adopted and should it remain unchanged on its timing aspects, Luxembourg will have to implement most of the amendments into its internal law by 31 December 2025 at the latest so that they would become applicable as from 1 January 2026. Some exceptions apply regarding the implementation timing and dates of application of the provisions on the identification service and on the verification on the tax identification number.

Do you have further questions?

OLIVER R. HOOR
Partner,
International & Corporate Tax
oliver.hoor@atoz.lu
T + 352 26 940 646

MARIE BENTLEY
Knowledge Director
marie.bentley@atoz.lu
T +352 26 940 903