

# ATOZ ALERT

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## EU list of non-cooperative tax jurisdictions updated, and DAC8 adopted

18 October 2023

During yesterday's ECOFIN meeting, the EU Council adopted the Council Directive, called "DAC8", amending Directive 2011/16/EU on administrative cooperation in the field of taxation ("DAC"). DAC8 notably introduces new reporting obligations for crypto-asset service providers, automatic exchange of information on advance cross-border rulings for individuals and also extends the list of income subject to mandatory automatic exchange between Member States and amends the Council Directive (EU) 2018/822 of 25 May 2018 in relation to reportable cross-border arrangements, the so-called "DAC6".

The EU Council also updated the EU list of non-cooperative jurisdictions for tax purposes ("Blacklist"). The update of the Blacklist is an important step as it directly impacts the scope of application of three different Luxembourg tax measures: the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions, the requirement to disclose transactions with entities located in non-cooperative jurisdictions and the mandatory disclosure rules applicable to certain cross-border arrangements under DAC6.

We describe below the nature of these measures and their implications.

### Adoption of DAC8

The EU Council adopted a [directive called DAC8 amending for the seventh time EU rules on administrative cooperation in the area of taxation](#) included in DAC. DAC8 mainly amends the DAC to:

#### 1. Add new reporting obligations for crypto-asset service providers

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

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**”).

## 2. Introduce automatic exchange of information on advance cross-border rulings for individuals

In this respect, DAC8 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.

## 3. Extend the list of income subject to mandatory automatic exchange between Member States

DAC8 adds non-custodial dividend income to the list of income subject to mandatory automatic exchange of information under the DAC. Until today, this list contained 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. Before 1 January 2026, Member States shall inform the Commission of at least five categories listed in respect of which the competent authority of each Member State shall, by automatic exchange, communicate to the competent authority of any other Member State information concerning residents of that other Member State. The information shall concern taxable periods starting on or after 1 January 2026.

Under DAC8, ‘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).

## 4. Amend DAC6

In order to align the text of DAC with the ruling of the Court of Justice of the European Union (“**CJEU**”) dated 8 December 2022 on the validity of DAC6 in light of Article 7 of the Charter of Fundamental Rights (“**CFR**”) of the EU, DAC8 amends 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, each Member State will have to 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, as it is already the case in practice, any intermediary who is exempt from the reporting obligation because of the legal professional privilege by which he or she is bound remains required to notify his or her client of their reporting obligations without delay.

The text of DAC8 will now be published in the Official Journal and enter into force on the twentieth day following its publication. Luxembourg will have to implement most of the DAC8 provisions into its internal law by 31 December 2025 at the latest. The described amendments shall apply as from 1 January 2026.

## Update of the EU list of non-cooperative jurisdictions for tax purposes

The Blacklist is updated twice a year (in February and October) by the EU Council based on criteria relating to tax transparency, fair taxation and measures against base erosion and profit shifting ('anti-BEPS measures'). By reference to this list, Member States can put in place defensive measures to help protect their tax revenues and fight against tax fraud, evasion and abuse.

Given the regular updates of the list, the scope of application of all Luxembourg defensive measures which refer to those jurisdictions constantly evolves over time, i.e. the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions, the requirement to disclose transactions with entities located in non-cooperative jurisdictions and the mandatory disclosure rules applicable to certain cross-border arrangements (DAC6).

Yesterday, the EU Finance Ministers decided to add **Antigua and Barbuda, Belize and Seychelles** to the EU list of non-cooperative jurisdictions for tax purposes. All three jurisdictions were found to be lacking the exchange of tax information on request.

At the same time, three jurisdictions were removed from the Blacklist:

- **the British Virgin Islands** because it has amended its framework on exchange of information on request and will be reassessed in accordance with the OECD standard;
- **Costa Rica** because it has amended the harmful aspects of its foreign source income exemption regime; and
- **the Marshall Islands** because it has made significant progress in enforcement of economic substance requirements.

These three latest jurisdictions were added to the Blacklist in February 2023.

As of 17 October 2023, following the listing of Antigua and Barbuda, Belize and Seychelles and the removal of the British Virgin Islands, Costa Rica and the Marshall Islands, the Blacklist now includes the 16 following jurisdictions (the "**Blacklisted Jurisdictions**"): American Samoa; Antigua and Barbuda; Anguilla; Bahamas; Belize; Fiji; Guam; Palau; Panama; Russia; Samoa; Seychelles; Trinidad and Tobago; Turks and Caicos Islands; US Virgin Islands and Vanuatu.

### ***Impact on the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions***

Based on Article 168-5 of the Luxembourg Income Tax Law ("LITL"), since 1 March 2021, under certain conditions, interest and royalties due to entities located in Blacklisted Jurisdictions are not deductible for corporate income tax purposes. As a matter of principle, additions of countries to the Blacklist only have an effect as from the next calendar year whereas the removal of a country from the Blacklist may have an immediate effect under certain circumstances.

The new list above including 16 countries will be the list to refer to **for interest and royalties due as from 1 January 2024** (i.e. there will be no retroactive nor immediate effect but an impact as from next year). This means that the deduction of interest and royalties due to the three newly added jurisdictions (Antigua and Barbuda, Belize and Seychelles) and Russia (added to the list in February 2023) may only be denied based on Article 168-5 of the LITL as from 1 January 2024.

**For interest and royalties due and paid as from 1 January 2023**, the latest list available as at 1 January 2023 (i.e. the list released in [October 2022](#)) is the only list to refer to.

With regards to the British Virgin Islands, Costa Rica and the Marshall Islands, which were added to the Blacklist in the February 2023 update but have since been removed, interest and royalties due to these

countries will not be taken into account for the application of the measure during 2023 (because they were not in the latest list available as of 1 January 2023 - i.e. the list released in October 2022) and also during 2024 because the latest list available as of 1 January 2024 (i.e. the list released in October 2023) is the only list to refer to. Therefore, the listing in February will have no effect in this respect.

For a detailed explanation of the scope of the measure provided by Article 168-5 of the LITL, its conditions and its timing aspects, please read our article 'New guidelines on Luxembourg defensive measures against non-cooperative jurisdictions for tax purposes' in our [July 2022 ATOZ Insights](#).

### ***Impact on disclosure requirements based on Circular L.I.R. n° 168/2 of 31 May 2022***

Based on Section 4 of Circular L.I.R. n° 168/2 of 31 May 2022, the Luxembourg tax authorities systematically review transactions entered into by Luxembourg corporate taxpayers with related parties (within the meaning of Article 56 of the LITL) located in non-cooperative jurisdictions (as listed by the EU) in order to assess whether the terms and conditions of the transactions reflect the arm's length principle. Detailed information on these transactions has to be reported by Luxembourg corporate taxpayers in their corporate tax returns.

The Circular states that the blacklisting as of the end of the accounting year concerned is key for determining whether reporting is required or not. Therefore, since most companies have an accounting year corresponding to the calendar year, reference generally has to be made to the list reflecting the October update of the year concerned. When determining whether a specific transaction of a company with an accounting year corresponding to the calendar year has to be reported in the 2023 corporate income tax return under Circular L.I.R. n° 168/2 of 31 May 2022, reference will have to be made to the newly released October 2023 list.

However, one should keep in mind that for companies with an accounting year which differs from the calendar year (e.g. for companies with an accounting year starting on 1 March), reference may have to be made to the list reflecting the February update. Thus, for these companies, the new list in force as of February 2023 might be relevant. In such case, transactions with entities located in the BVI, Costa Rica, the Marshall Islands and Russia would have to be disclosed in the 2023 corporate tax returns.

### ***Impact on disclosure requirements under DAC6***

The listing of a jurisdiction as non-cooperative may also have an impact on the reporting obligations applicable according to the Luxembourg Law of 25 March 2020 implementing DAC6. Indeed, Hallmark C.1.b) ii) of the Annex to the Law of 25 March 2020 implementing DAC6 covers deductible cross-border payments made between two or more associated enterprises where the recipient is resident for tax purposes in a jurisdiction which has been assessed as being non-cooperative. This hallmark is not subject to the main benefit test.

Therefore, reference should be made to the list in force at the time the arrangement was implemented and the listing or delisting of a jurisdiction after the arrangement has been implemented should not have any retroactive effect. In other words, reporting should only be required if the arrangement with the entity located in the jurisdiction was implemented at the time when this jurisdiction was on the Blacklist. Arrangements implemented with the British Virgin Islands, Costa Rica and the Marshall Islands on or after the publication of the new Blacklist are no longer reportable under this Hallmark.

On the contrary, arrangements implemented with Antigua and Barbuda, Belize and Seychelles on or after the publication of the new Blacklist (but only as long as these jurisdictions remain on the Blacklist) in the Official Journal of the European Union (publication to take place in the coming days) may have to be reported under Hallmark C.1.b) ii). However, one should keep in mind that as soon as Article 168-5 of the LITL applies (provided all its conditions are met), payments to these Blacklisted Jurisdictions are not tax deductible in Luxembourg so they no longer fall within the scope of Hallmark C.1.b) ii).

## Implications

Luxembourg taxpayers with investments into and from non-cooperative jurisdictions should seek advice from their tax advisers in order to analyse the potential tax impact of the update of the Blacklist on their investments and the potential reporting requirements. The evolution of the legislation of jurisdictions under the radar of the EU Council should also be closely monitored in order to anticipate an addition to or a removal from the Blacklist in the future and thus a change in the scope of application of the Luxembourg measures.

## Do you have further questions?



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