

# ATOZ ALERT

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## New mandatory automatic exchange of information rules for Digital Platforms “DAC7”

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On 15 July 2020, the EU Commission published a directive proposal (the “**DAC7 Proposal**”), amending, for the 6th time, Directive 2011/16/EU on administrative cooperation (the “DAC”) in the field of taxation. The DAC7 Proposal is part of the EU Commission’s Tax Package that aims to ensure that the European tax policy supports Europe’s economic recovery and long-term growth following the COVID-19 crisis.

The DAC7 Proposal aims to extend the scope of automatic exchange of information to digital platforms by placing an obligation on them to report on the income earned by sellers of goods and services who make use of the relevant platforms. It introduces new reporting obligations for platforms acting as “digital intermediaries” like CRS and DAC6 place obligations respectively on financial or tax intermediaries.

The DAC7 Proposal also includes clarifications and improvements of the existing rules on administrative cooperation and introduces notably, for that purpose, a definition of the “foreseeable relevance” required for an information request.

### Platform operators subject to new mandatory automatic exchange of information

The DAC7 Proposal extends the scope of the automatic exchange of information with respect to the information to be reported by digital platform operators and is inspired by the Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy issued by the Organisation for Economic Co-operation and Development (“**OECD**”) on 9 July 2020 (the “**OECD Model Rules**”). The DAC7 Proposal provides for:

- an obligation on the reporting platform operators to collect and verify the information in line with due diligence procedures;
- an obligation on the reporting platform operators to report information on the reportable sellers, which use their platform on which they operate, to sell their goods, provide their services or invest and lend in the context of crowdfunding;
- an obligation on the competent authorities to communicate the reported information to the competent authority of the appropriate Member State.

Pursuant to the DAC7 Proposal, each Member State shall take the necessary measures to require Reporting Platform Operators to carry out new due diligence and reporting obligations by 31 December 2021. They shall apply those provisions as from 1 January 2022.

The DAC7 Proposal does not cover issues related to digital taxation or minimum effective taxation discussed at OECD level. In this regard, it is expected that the Commission will present a dedicated action plan on business taxation by the end of 2020.

## 1. Scope of the DAC7 Proposal

### *a. Who will bear the burden of the new reporting duties?*

With the DAC7 Proposal, the EU Commission targets the digital platform economy, through platform operators, which makes the traceability and detection of taxable events by tax authorities very difficult.

Under the DAC7 Proposal, **'platform'** means any software, including a website or a part thereof and applications, including mobile applications, accessible by users and allowing sellers to be connected to other users for the purpose of carrying out a targeted activity, directly or indirectly, to such users. It also includes any arrangement for the collection and payment of a consideration in respect of the relevant activities.

**'Sellers'** are defined by the DAC7 Proposal as platform users, either an individual or an entity, that is registered at any moment during the reportable period on the platform and that carry out, for consideration, activities which include the rental of immovable property, the provision of personal services, the sale of goods, the rental of any mode of transport, and investment and lending in the context of crowdfunding (the **"Relevant Activities"**). A personal service is a service involving time- or task-based work performed by one or more individuals that act either independently or on behalf of an entity. This service is carried out at the request of a user, either online or physically offline after having been facilitated via a platform.

The term **'platform'** shall not include software that exclusively allows the (i) processing of payments; (ii) listing of users; (iii) advertising; or (iv) redirection or transfer of users to a platform, in relation to the Relevant Activities but without any further intervention in carrying out such Relevant Activities.

A **'platform operator'** is an entity that contracts with sellers to make available all or part of a platform to such sellers.

The reporting obligation will fall on a **"Reporting Platform Operator"** described as any platform operator that is:

- either a tax resident in a Member State or is incorporated under the laws of a Member State or has its place of management (including effective management) or a permanent establishment in a Member State (referred as **"EU Platforms"**);
- neither resident for tax purposes, nor incorporated or managed in a Member State, nor has a permanent establishment in a Member State, but facilitates the carrying out of a Relevant Activity by reportable sellers or the rental of immovable property located in a Member State (referred as **"Foreign Platforms"**).

### *b. Who will be reportable?*

A Reporting Platform Operator will need to collect and report information on any seller other than an excluded seller (i.e. a governmental entity) that, during the reportable period, either carries out a Relevant Activity or is paid or credited consideration in connection with a Relevant Activity, and that is resident in a Member State or that rented out immovable property located in a Member State (**"Reportable Seller"**).

A Reportable Seller is considered resident in a Member State if, during the reportable period, it had its primary address in a Member State, it had a TIN or VAT identification number issued in a Member State or, for a seller that is an entity, it had a permanent establishment in a Member State. Notwithstanding these criteria, a Reporting Platform Operator shall consider a seller resident in each Member State confirmed by an electronic identification service made available by a Member State or the EU to ascertain the identity and tax residence of the seller.

## 2. New duties for Reporting Platform Operators

### *a. Due diligences procedure*

A Reporting Platform Operators will have to carry out due diligence procedures to identify Reportable Sellers. For that purpose, the Reporting Platform Operator will have to collect information for each seller (that is an individual or an entity) and will have to then determine whether the information collected is reliable, using all information and documents available to the Reporting Platform Operator in its records, as well as any electronic interface made available by a Member State or the EU free of charge to ascertain, for example, the validity of the TIN and/or VAT identification number.

Where the Reporting Platform Operator has reason to know that any of the information may be inaccurate, it will have to request the seller to correct information items that were found to be incorrect and to provide supporting documents, data or information, which is reliable and of independent source, such as a valid government-issued identification document or a recent tax residency certificate.

Where a seller is engaged in a Relevant Activity involving the rental of immovable property, the Reporting Platform Operator will have to collect the address of each property listing and, where issued, respective land registration number.

If a Reportable Seller does not provide the information required to the Reporting Operating Platform after two reminders, the latter will have to close the account of such seller and prevent the seller from re-registering on the platform for a six-month period or withhold the payment of the consideration to the seller.

A Reporting Platform Operator will have to collect the required information, verify its' accuracy and have it available by 31 December of the calendar year in respect of which reporting is being completed (the "**Reportable Period**"). If the DAC7 provisions apply, as expected, as from 1 January 2022, the first Reportable Period will be the 2022 calendar year and the first due diligence duties will have to be completed by 31 December 2022. In that case, for sellers that were already registered on the platform as of 1 January 2022 or as of the date on which an entity becomes a Reporting Platform Operator, the due diligence procedures are required to be completed by 31 December of the second Reportable Period for the Reporting Platform Operator (i.e., 31 December 2023 in this case).

A Reporting Platform Operator will be allowed to rely on the due diligence procedures conducted in previous Reportable Periods, provided that the required information has been collected or verified within the last 36 months, and it does not have reason to know that the information collected has become unreliable or incorrect.

A Reporting Platform Operator will be allowed to designate another platform operator or a third party to assume the obligations with respect to due diligence procedures, but such obligations shall remain the responsibility of the Reporting Platform Operator. A Reporting Platform Operator will also be allowed to only complete the due diligence procedures for active sellers upon election. The procedure for such election will be determined by each Member State when implementing the DAC7 Proposal.

### *b. Reporting duties*

The information, as collected and verified, will have to be reported within one month following the end of the Reportable Period in which the seller is identified as a Reportable Seller (i.e., no later than 31 January 2023 if the seller is identified as a Reportable Seller in 2022). Reporting will only be made in one Member State (i.e., single reporting).

A Reporting Platform Operator will report to the competent authority of the Member State where it is tax resident, or where it does not have a residence for tax purposes in a Member State, in the Member State where it is incorporated or has its place of management (including effective management), or where it has a permanent establishment. In the event the platform is linked to more than one Member State based on the above criteria, the Reporting Platform Operator will have to elect one Member State in which to report. A Reporting Platform Operator that is a Foreign Platform shall report in the Member State in which it is registered.

The information to be reported, as listed in the DAC7 Proposal, will provide Member States' tax administrations with sufficient information to correctly assess and control gross income earned in their country from commercial activities performed with the intermediation of digital platforms. This information includes income earned by sellers of goods and services who make use of the platforms. Information about the consideration paid and other amounts will have to be reported based on quarterly figures of each Reportable Period in which the consideration was paid or credited. The definition of the '**consideration**' under the DAC7 Proposal excludes any fees, commissions or taxes withheld or charged by the Reporting Operating Platform.

The Reporting Platform Operators will have to inform each individual concerned that information will be collected and reported to the competent authorities and provide all information the data controllers are required to provide under the General Data Protection Regulation ("**GDPR**") before the information are reported.

### 3. Automatic exchange of information reported by the Reporting Platform Operators

The information reported by Reporting Platform Operators will have to be exchanged by the competent authorities of the Member States where the reporting has been made with the Member States where the Reportable Seller is a resident and/or the immovable property is located within 2 months following the end of the Reportable Period (i.e., by the end of February).

### 4. Penalties for non-compliance at national level

Reporting Platform Operators will be subject to penalties applied by Member States in case the obligations laid down in the DAC7 Proposal are not respected. The penalties shall be effective, proportionate, and dissuasive. Currently, in Luxembourg the penalties for non-compliance with the CRS and DAC6 regulations amount to a maximum of 250,000 euros.

## Other clarifying measures included in the DAC7 Proposal

The DAC7 Proposal also proposes to amend existing provisions on exchange of information and administrative cooperation, notably in order to clarify some requirements.

### 1. Exchange of information upon request: conditions of the request

#### a. Foreseeable relevance and exhaustiveness

The ‘**foreseeable relevance**’ of the information requested by one Member State to another conditions whether the requested Member State shall be required to comply with the request for information, and thus constitutes one of the legal bases of the information order addressed by that Member State to a relevant person and of the penalty imposed on that person for failure to comply with the information order.

The purpose of the DAC7 Proposal is to clearly delineate the standard of foreseeable relevance, to ensure effectiveness of the exchanges of information and prevent unjustified refusals of requests, as well as to provide legal clarity and certainty for both tax administrations and taxpayers.

The DAC7 Proposal provides for a definition of the standard of foreseeable relevance under which *“the requested information shall be deemed to be foreseeably relevant where at the time the request is made the requesting authority considers that, in accordance with its national law, there is a reasonable possibility that the requested information be relevant to the tax affairs of one or several taxpayers, whether identified by name or otherwise, and be justified for the purposes of the investigation”*. The request for information can relate to one or more taxpayers, as long as they are individually identified.

In this context, the DAC7 Proposal clarifies that the standard of foreseeable relevance should not apply to requests for additional information following an exchange of information concerning an advance cross-border ruling or an advance pricing arrangement.

The DAC 7 Proposal also lays down procedural requirements that the requesting authority must observe. Thus, *“with the aim to demonstrate the foreseeable relevance of the requested information, the requesting competent authority shall provide the requested authority with supporting information, in particular on the tax purpose for which the information is requested and the grounds that point to the requested information as being held by the requested authority or as being in the possession or control of a person within the jurisdiction of the requested authority”*.

Finally, the DAC7 Proposal clarifies that before requesting information, the requesting authority must exhaust all of the usual sources of information that it could have used in the circumstances for obtaining the information requested and pursued all available means. However, if by doing so the requesting authority faces disproportionate difficulties and runs the risk of jeopardising the achievement of its objectives, the obligation does not apply.

In case the requesting authority did not respect this obligation, the requested authority may refuse to provide the information.

#### b. Group requests

Considering there is sometimes a need for issuing requests for information that concern groups of taxpayers which cannot be identified individually but that are instead described by a common set of characteristics, the DAC7 Proposal addresses the issue of group requests in the context of a request for information.

In that respect, the DAC7 Proposal provides for the possibility for tax administrations to make group requests for information. In such a case, the requesting authority has to provide the requested authority a set of information

including a comprehensive description of the characteristics of the group and an explanation of the applicable law and of the facts and circumstances that led to the request.

Due to the nature of the request, the standard of foreseeable relevance does not apply to a group request.

*c. Standard form*

As a result of the above, the DAC7 Proposal states that the standard form for the request for information will have to include at least the following information to be provided by the requesting authority:

- the identity of the person under examination or investigation and, in the case of group requests, a comprehensive description of the common characteristics of the group; and
- the tax purpose for which the information is sought.

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

According to the EU Commission, information related to income derived from intellectual property should be exchanged between Member States as this is predisposed to profit shifting arrangements due to its highly movable underlying assets. As a result, the DAC7 Proposal proposes to include royalties 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.

Before 1 January 2023, Member States shall inform the EU Commission of at least four categories of income 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 in that other Member State. The information shall concern taxable periods starting on or after 1 January 2024.

This amendment will oblige the Member States to exchange all information that is available on at least four categories of income with other Member States with respect to taxable periods as from 2024.

**Do you have further questions?**



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