

## **Mandatory Disclosure Regime: Be prepared for 1 July 2020.**

On 21 March 2020, the Luxembourg Parliament approved the draft law implementing EU Council Directive 2018/822 (the Directive) on the *Mandatory Disclosure Regime (MDR)*.

The purpose of the Directive is to flag cross-border situations (i.e. arrangements taking place between more than one Member State or between a Member State and a third country) deemed as potentially aggressive / abusive tax planning schemes and to enforce their disclosure to the local tax authority prior to (or shortly after) implementation. Such schemes shall be reportable if they meet at least one of the hallmarks set forth in the Directive, some of them being subject to the main benefit test (MBT) as an additional condition to trigger reporting obligations. Whereas the Principal Purpose Test introduced through BEPS Action 6 is a subjective test on the intention of the taxpayer to put in place a certain structure, the MBT is purely objective as it solely considers whether the main benefit ensuing from the cross-border arrangement was to secure a tax advantage not being in accordance with the object or aim of the applicable legislation. Interestingly enough, this approach seems to differ from the usual intention of the legislators to fight against the use of the subtleties of a tax system, or inconsistencies between two or more tax systems, in order to reduce tax payable.

Reporting obligations will rest, in principle, with the tax advisor (or tax *intermediary*) unless this party is protected by a legal professional privilege (LPP). However, whereas the initial draft law transposing the Directive into Luxembourg law provided a waiver from reporting solely for the benefit of lawyers (as part of their LPP); now, following the recommendations of the State Council, the final law extends this waiver to *experts-comptables* and *réviseurs d'entreprises*. Accordingly, many Luxembourg tax advisors (law firms, Big 4) are therefore only required to inform, within 10 days, the other intermediary(ies) or, in the absence of intermediaries, the taxpayer of their waiver and/or, in the absence of a reporting intermediary, to provide the taxpayer with the relevant information required to submit the reportable cross-border arrangement to the Luxembourg Tax Authorities.

The reporting obligation will also fall on the taxpayer in the absence of EU tax intermediaries or where there is no tax intermediary because the taxpayer is implementing an arrangement designed internally (which could be the case of an Alternative Investment Fund Manager (AIFM) in a Private Equity (PE) context, as AIFMs can no longer rely on their reporting obligation to be picked-up by their tax advisers).

This being said, penalties (up to a maximum of EUR 250,000) will also apply to intermediaries that are exempt from reporting if they do not notify other intermediaries or relevant taxpayers or do not provide the relevant information to taxpayers so that they can report themselves.

### **Impacts for PE?**

Through the years, Luxembourg's fiscal framework and its business-friendly environment have helped it to become a world-renowned platform for PE investments. Recent developments in the field of MDR, in particular those related to the extension of the reporting waiver, will be of extreme concern for the PE sector. Indeed, regardless of the structure chosen to host PE investments, it is reasonable to assume that the cross-border element of any arrangement could make related implementation advice or assistance reportable under MDR.

Time is of the essence as the deadline of 1 July is almost upon us. It is therefore crucial that all Luxembourg PE houses amass a good understanding of their obligations and set into motion a compliance strategy, if they don't want to expose themselves to the potential financial penalties foreseen by the draft law. To this end, performing an MDR impact assessment would be the best way to start, as the objective of this exercise is to understand and map the activities of the taxpayer from 25 June 2018 onwards to identify reportable cross-border arrangements.

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