Law of 25 March 2020
regarding
Reportable Cross-Border Arrangements

implementing
EU Directive 2018/822/EU ("DAC6")

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Chapter 1 – Definitions

Article 1

For the purposes of this Law:

1. "cross-border arrangement" means an arrangement concerning either more than one Member State or a Member State and a third country if at least one of the following conditions is met:

   (a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;

   (b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;

   (c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;

   (d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment in that jurisdiction;

   (e) such arrangement has a possible impact on the automatic exchange of information or on the identification of beneficial ownership.

   An arrangement also includes a series of arrangements. An arrangement may include more than one step or part.

2. "reportable cross-border arrangement" means any cross-border arrangement linked to one or more of the types of taxes referred to in article 1 of the law of 29 March 2013 on administrative cooperation in the field of taxation (as amended) and which contains at least one of the hallmarks set out in the Annex.

3. "hallmark" means a characteristic or feature of a cross-border arrangement that indicates a potential risk of tax avoidance, as listed in the Annex.

4. "intermediary" means any person that designs, markets or organises a reportable cross-border arrangement, or makes it available for implementation or manages its implementation.

It also means any person that, having regard to the relevant facts and circumstances and based on the available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing or organising a reportable cross-border arrangement, or making available for implementation or managing the implementation of a reportable cross-border arrangement. Any person shall have the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement. For this purpose, that person may refer to all relevant facts and circumstances as well as the available information and their relevant expertise and understanding.

To be an intermediary, a person must meet at least one of the following additional conditions:

a) be resident for tax purposes in a Member State;

b) have a permanent establishment in a Member State through which the services relating to the arrangement are provided;

c) be incorporated in, or governed by the laws of, a Member State;

d) be registered with a professional association in relation to legal, tax or consultancy services in a Member State.

5. "relevant taxpayer" means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement, or has implemented the first step of such an arrangement.

6. "financial account" means a financial account (*compte financier*) within the meaning of the law of 18 December 2015 on the Common Reporting Standard (CRS) (*Norme commune de déclaration (NCD)*) (as amended).

7. "associated enterprise" means a person who is related to another person in at least one of the following ways:

(a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;

(b) a person participates in the control of another person through a holding that exceeds 25% of the voting rights;

(c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25% of the capital;

(d) a person is entitled to 25% or more of the profits of another person.

If more than one person participates, as referred to in points (a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.

If the same persons participate, as referred to in points (a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.

For the purposes of this point, a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

In indirect participations, the fulfilment of the requirements under point (c) shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50% of the voting rights shall be deemed to hold 100%.

An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person.

8. "Member State" means a Member State of the European Union.

9. "marketable arrangement" means a cross-border arrangement that is designed, marketed, ready for implementation, or made available for implementation, without a need to be substantially customised.

10. "person" means a person within the meaning of the law of 29 March 2013 on administrative cooperation in the field of taxation (as amended).

Chapter 2 – Reporting requirements relating to cross-border arrangements

Article 2

(1) Intermediaries are required to file with *l'Administration des contributions directes* (the Direct Tax Authority) such information as is referred to in Article 10 that is within their knowledge, possession or control on reportable cross-border arrangements within thirty days beginning:

(a) on the day after the reportable cross-border arrangement is made available for implementation; or

(b) on the day after the reportable cross-border arrangement is ready for implementation; or

(c) when the first step in the implementation of the reportable cross-border arrangement has been taken;

whichever occurs first.

Notwithstanding the first paragraph, intermediaries as referred to in Article 1(4), paragraph 2, shall also be required to file information within thirty days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

Added by the law of 24 July 2020

(1bis) As a derogation from section (1) paragraph 1, the period of thirty days referred to in that paragraph will begin on 1 January 2021 for reportable cross-border arrangements that were made available for implementation, that were ready for implementation, or where the first step in the implementation has been taken between 1 July 2020 and 31 December 2020.

Added by the law of 24 July 2020

As a derogation from section (1) paragraph 2, the period of thirty days referred to in that paragraph will begin on 1 January 2021 where the aid, assistance or advice referred to in that paragraph was provided between 1 July 2020 and 31 December 2020.

(2) In the case of marketable arrangements, intermediaries are required to file a report every three months providing an update containing any new reportable information as referred to in Article 10 subsections (a), (d), (g) and (h) that has become available since the last report was filed.

Added by the law of 24 July 2020

(2bis) The report referred to in section (2) providing an update containing any new reportable information must be filed for the first time by 30 April 2021 for reportable cross-border

arrangements that were made available for implementation, that were ready for implementation, or where the first step in the implementation has been taken between 1 July 2020 and 31 December 2020.

(3) For the purposes of section (1), the intermediary is required to file information on reportable cross-border arrangements with *l'Administration des contributions directes* (the Direct Tax Authority) when the Grand Duchy of Luxembourg is the Member State that features first in the list below:

(a) the Member State where the intermediary is resident for tax purposes;

(b) the Member State where the intermediary has a permanent establishment through which the services relating to the arrangement are provided;

(c) the Member State in which the intermediary is incorporated or by whose laws the intermediary is governed;

(d) the Member State where the intermediary is registered with a professional association related to legal, tax or consultancy services.

(4) Where, pursuant to section (3), there are multiple reporting obligations, the intermediary shall be exempt from filing the information if it has proof that the same information has been filed in another Member State.

Article 3

(1) By way of dispensation from Articles 2 and 5, an intermediary who is subject to article 35 of the law of 10 August 1991 on the profession of lawyer (as amended), to article 6 paragraph 1 of the law of 10 June 1999 on the organisation of the profession of chartered accountant (as amended), or to article 28 section 1 of the law of 23 July 2016 on the audit profession (as amended), is not required to file such information as is referred to in Article 10 that is within their knowledge, possession or control on reportable cross-border arrangements.

As an exception to paragraph 1, the requirements of Articles 2 and 5 shall however remain applicable to intermediaries as referred to in paragraph 1 when they are acting outside the limits applicable to the practice of their professions.

(2) Where section (1) paragraph 1 is applicable, the intermediary shall notify, not later than ten days from the date referred to in Article 2 section (1) subsection (a), (b) or (c), whichever occurs

first, to all other intermediaries, and in the absence of such an intermediary to which section (1) paragraph 1 does not apply, to the relevant taxpayer, the reporting obligations applicable to them pursuant to this Law.

In the event that the intermediary is required under paragraph 1 to notify to the relevant taxpayer the reporting obligations applicable to them pursuant to this Law, the intermediary shall make available to the relevant taxpayer, if required, the necessary information with regard to the reporting obligation referred to in Article 4.

Added by the law of 24 July 2020

(3) As a derogation from section (2), the period of ten days referred to in that section will begin on 1 January 2021 for reportable cross-border arrangements that were made available for implementation, that were ready for implementation, or where the first step in the implementation has been taken between 1 July 2020 and 31 December 2020.

Article 4

(1) Where there is no intermediary, or where the dispensation pursuant to Article 3 section 1 paragraph1 applies and there is no other intermediary responsible for the reporting obligations referred to in Articles 2 and 5, the obligation to file information on a reportable cross-border arrangement falls on the relevant taxpayer.

(2) The relevant taxpayer upon whom the reporting obligation falls shall file the information referred to in Article 10 within thirty days, beginning on the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or is ready for implementation by the relevant taxpayer, or when the first step in its implementation has been taken in relation to the relevant taxpayer, whichever occurs first.

Added by the law of 24 July 2020

(2bis) As a derogation from section (2), the period of thirty days referred to in that section will begin on 1 January 2021 for reportable cross-border arrangements that were made available for implementation, that were ready for implementation, or where the first step in the implementation has been taken between 1 July 2020 and 31 December 2020.

(3) For the purposes of section (1), the relevant taxpayer is required to file information on the reportable cross-border arrangement with *l'Administration des contributions directes* (the Direct Tax Authority) when the Grand Duchy of Luxembourg is the Member State that features first in the list below:

(a) the Member State where the relevant taxpayer is resident for tax purposes;

(b) the Member State where the relevant taxpayer has a permanent establishment benefiting from the arrangement;

(c) the Member State where the relevant taxpayer receives income or generates profits, even though the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State;

(d) the Member State where the relevant taxpayer carries on an activity, even though the relevant taxpayer is not resident for tax purposes and has no permanent establishment in any Member State.

(4) Where, pursuant to section (3), there are multiple reporting obligations, the relevant taxpayer shall be exempt from filing the information if it has proof that the same information has been filed in another Member State.

Article 5

Where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement falls on all the intermediaries involved in the same reportable cross-border arrangement.

An intermediary shall be exempt from the obligation to file information only to the extent that it has proof that the same information as referred to in Article 10 has already been filed by another intermediary.

Article 6

Where the reporting obligation falls on the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that is to file the information in accordance with Article 4 section (1) is the one that features first in the list below:

(a) the relevant taxpayer that has agreed the reportable cross-border arrangement with the intermediary;

(b) the relevant taxpayer that is managing the implementation of the arrangement.

Any relevant taxpayer shall be exempt from filing the information only to the extent that it has proof that the same information as referred to in Article 10 has already been filed by another relevant taxpayer.

Article 7

Each relevant taxpayer shall declare, as part of its annual income tax declaration, the use made of the arrangement for each of the years for which it uses the arrangement.

Article 8

Intermediaries and relevant taxpayers are required to file information on reportable cross-border arrangements the first step of which was implemented between 25 June 2018 and 30 June 2020. The information to be filed is as referred to in Article 10. Intermediaries and relevant taxpayers, as appropriate, shall file this information on or before 28 February 2021 [date amended by the law of 24 July 2020].

Article 9

L'Administration des contributions directes (the Direct Tax Authority), with whom the information has been filed pursuant to Articles 2 and 4 to 8, shall communicate, by means of an automatic exchange, the information referred to in Article 10 to the appropriate authorities of all other Member States, in accordance with the practical arrangements adopted in accordance with Article 13.

Article 10

(1) The information to be communicated to *l'Administration des contributions directes* (the Direct Tax Authority) for the purposes of the Authority's onward communication shall include the following, as applicable:

(a) the identification of the intermediaries and relevant taxpayers, including their name, their date and place of birth (in the case of an individual), their residence for tax purposes and their taxpayer identification number;

Where an associated enterprise of the relevant taxpayer participates in the reportable cross-border arrangement, the identification shall also include the name, the date and

place of birth (in the case of an individual), the residence for tax purposes and the taxpayer identification number of the associated enterprise.

(b) details of the hallmarks set out in the Annex that make the cross-border arrangement reportable;

(c) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;

(d) the date on which the first step in implementing the reportable cross-border arrangement has been taken or will be taken;

(e) details of the legal provisions of the Member States concerned that form the basis of the reportable cross-border arrangement;

(f) the value of the reportable cross-border arrangement;

(g) the identification of the Member States of the relevant taxpayers and any other Member States that are likely to be affected by the reportable cross-border arrangement;

(h) the identification of any other person likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.

(2) The format and method of transmission of the information referred to in section (1) will be set out in a Grand-Ducal Regulation.

Article 11

The fact that *l'Administration des contributions directes* (the Direct Tax Authority) does not react to a reportable cross-border arrangement shall not imply any acceptance of the validity of the tax treatment of that arrangement.

Article 12

The automatic exchange of information shall take place within one month of the end of the quarter in which the information was filed. The first information shall be communicated on or before 30 April 2021 [date amended by the law of 24 July 2020].

Article 13

(1) The automatic exchange of information will be carried out using standard forms adopted in accordance with the procedure referred to in article 26 (2) of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

(2) The information to be communicated pursuant to Articles 9 and 10 shall be stored in a secure central directory developed and supplied in accordance with article 21 (5) of the abovementioned Directive 2011/16/EU in order to meet the requirements of the automatic exchange provided for in those Articles.

(3) Until that secure central directory is operational, the automatic exchange of information will be carried out electronically through the Common Communication Network (CCN), in accordance with the applicable practical arrangements.

Chapter 3 – Confidentiality and protection of personal data

Article 14

(1) The processing of information relating to cross-border arrangements to be communicated to other Member States or received from another Member State is carried out with a guarantee of secure, limited and monitored access.

This information may only be used for the purposes provided for by this Law and by the law of 29 March 2013 on administrative cooperation in the field of taxation (as amended) or for the application of the law of 18 December 2015 on the Common Reporting Standard (CRS) (*Norme commune de déclaration (NCD)*) (as amended).

(2) *L'Administration des contributions directes* (the Direct Tax Authority) is considered to be the data controller within the meaning of EU Regulation 2016/679 of the European Parliament and Council of 27 April 2016 on the protection of individuals with regard to the processing of

personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), for the processing that it carries out.

(3) The information processed in accordance with this Law shall be kept for no longer than necessary for the purposes of this Law and, in any event, in accordance with the legal provisions applicable to the controller of the data relating to limitation periods.

Chapter 4 – Penalties

Article 15

(1) In the event of a failure to file information, late filing or filing of incomplete or inaccurate data within the meaning of article 2 section (1) or article 4 section (2), or in the event of non-compliance by intermediaries as referred to in article 3 section (1) paragraph 1 with the obligations referred to in article 3 section (2), the intermediary or the relevant taxpayer with an obligation to file or notify in the Grand Duchy of Luxembourg under the provisions of this Law may be liable to a fine not exceeding EUR 250 000.

(2) This fine is set by the tax office for withholding tax on interest (*bureau de la retenue d'impôt sur les intérêts*).

(3) The intermediary or relevant taxpayer may appeal (*un recours en réformation*) against this decision to the administrative court (*le tribunal administratif*).

Chapter 5 – Verification procedures

Article 16

(1) *L'Administration des contributions directes* (the Direct Tax Authority) will monitor compliance with the reporting obligations by the intermediaries and relevant taxpayers to which this Law applies. The Direct Tax Authority will verify if the intermediaries and relevant taxpayers attempt to adopt practices to circumvent the filing of information.

(2) *L'Administration des contributions directes* (the Direct Tax Authority) has the same powers of investigation as in the taxation procedures for setting or checking taxes and duties, with the same guarantees attached.

Article 17

Unless specified to the contrary in this Law, the provisions of the law of 16 October 1934 on tax adjustments (as amended) and the general tax law of 22 May 1931 (as amended) shall apply to the automatic exchange of information.

Chapter 6 – Entry into force

Article 18

This Law shall enter into force on 1 July 2020.

Annex – Hallmarks

Part I. Main benefit test

Generic hallmarks under category A and specific hallmarks under category B and under category C paragraph 1 points (b)(i) (c) and (d) may only be taken into account where they fulfil the "main benefit test".

This test will be satisfied if it 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 within the territory of the European Union or outside the territory of the European Union.

In the context of a hallmark under Category C paragraph 1, the presence of conditions set out in category C paragraph 1 points (b)(i) (c) and (d) cannot alone be a reason for concluding that an arrangement satisfies the main benefit test.

Part II. Categories of hallmarks

A. Generic hallmarks linked to the main benefit test

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality that may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.

2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to:

   (a) the amount of the tax advantage derived from the arrangement; or

   (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.

3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

B. Specific hallmarks linked to the main benefit test

1. An arrangement whereby a participant in the arrangement takes contrived steps that consist of acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.

2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue that are taxed at a lower level or exempt from tax.

3. An arrangement that includes circular transactions resulting in a “carousel” of funds, that is, through interposed entities without other primary commercial functions or transactions that offset or cancel out each other or that have other similar features.

C. Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions is met:

   (a) the recipient is not resident for tax purposes in any tax jurisdiction;

   (b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:

      (i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or

      (ii) is included in a list of third-country jurisdictions that have been assessed by Member States collectively or as part of the operations of the OECD as being non-cooperative;

   (c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes;

   (d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.

2. Deductions for the same depreciation on an asset are claimed in more than one jurisdiction.

3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.

4. There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for those assets in the jurisdictions involved.

D. Specific hallmarks concerning automatic exchange of information and beneficial ownership

1. An arrangement that may have the effect of undermining the reporting obligation under the laws implementing European Union legislation or any equivalent agreements on the automatic exchange of financial account information, including agreements with third countries, or that takes advantage of the absence of such legislation or agreements. Such arrangements include, but are not limited to:

   (a) the use of an account, product or investment that is not, or purports not to be, a financial account, but which has features that are substantially similar to those of a financial account;

   (b) the transfer of financial accounts or assets to, or the use of, jurisdictions that are not bound by the automatic exchange of financial account information with the Member State of residence of the relevant taxpayer;

   (c) the reclassification of income and capital into products or payments that are not subject to the automatic exchange of financial account information;

   (d) the transfer or conversion of a financial institution or a financial account or the assets therein into a financial institution or a financial account or assets that are not subject to reporting under the automatic exchange of financial account information;

   (e) the use of legal entities, arrangements or structures that eliminate or purport to eliminate the reporting of one or more account holders or controlling persons under the automatic exchange of financial account information;

   (f) arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by financial institutions to comply with their obligations to report financial account information, including the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

2. An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures:

   (a) that do not carry on a substantive economic activity supported by adequate staff, equipment, resources and premises; and

   (b) that are incorporated, managed, controlled, established or resident in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, legal arrangements or structures; and

   (c) where the beneficial owners of such persons, legal arrangements or structures, as defined in the law of 12 November 2004 on anti-money laundering and the financing of terrorism (as amended) are made unidentifiable.

E. Specific hallmarks concerning transfer pricing

1. An arrangement that involves the use of unilateral safe-harbour rules.

2. An arrangement involving the transfer of hard-to-value intangibles. The term “hard-to-value intangibles” covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises:

   (a) no reliable comparables exist; and

   (b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible, are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.

3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.