

ECOFIN reaches agreement on DAC 7

The amendments to Directive 2011/16/EU on Administrative Cooperation in the field of Taxation ("DAC") are following each other up in quick succession. Recently, an agreement has been reached on the "DAC 7" proposal, which will introduce, amongst other, reporting obligations for digital platform operators and the automatic exchange of the reported information between Member States. This newsflash provides an update on this matter.



On 15 July 2020, the European Commission ('EC') adopted a new tax package on fair and simple taxation. This package included a proposal to amend the DAC for the 6th time (hence: DAC 7). A modified version of this DAC7 proposal was published by the Council on 25 November and on 1 December 2020, a revised proposal was approved by the ECOFIN. Several procedural formalities will take place in the upcoming weeks, before the EU Council will formally adopt the proposal.

The key objectives of the DAC 7 proposal are twofold:

- » Extending the scope of the automatic exchange of information to certain data held by digital platform operators, and;
- » Making certain technical amendments to the existing provisions of the DAC (e.g. defining the notion of foreseeable relevance, introducing a

procedure regulating requests for information to groups of taxpayers, enhancing administrative cooperation, etc.).

We discuss these new rules here below.

New reporting obligations for digital platforms

According to the explanatory memorandum to the DAC 7, the use of digital platforms has led to a lack of reporting of income earned by taxpayers selling (or renting out) goods or offering services through those platforms.

Inspired by the OECD's "Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy", the DAC 7 imposes certain reporting obligations on "Digital Platform Operators".

A "Platform Operator" is an entity that contracts with certain taxpayers ("Sellers"), and makes available software ("a Platform"), including websites or apps, allowing these taxpayers to be connected to users for the purpose of carrying out "Relevant Activities". Activities deemed "Relevant" for DAC 7 are: (i) the renting out of immovable property, (ii) time-or task-based online or offline personal services, (iii) the sale of goods and (iv) the renting out of any means of transport. However, platforms that exclusively allow the processing of payments in relation to the Relevant Activities, exclusively allow users to

advertise these Activities, or exclusively allow the redirecting or transferring of users to a platform, are excluded from the scope.

A Platform Operator will be subject to the DAC7 obligations if: (a) it is a tax resident in a Member State; (b) it is incorporated under the laws of a Member State; (c) has its place of management in a Member State; or (d) has a permanent establishment in a Member State ("Reporting Platform Operators"). Non-EU operators not meeting these requirements are also in-scope if they facilitate the carrying out of a Relevant Activity by a qualifying taxpayer and/or the rental of immovable property located in a Member State. However, if the non-EU jurisdiction has concluded an AEOI-Agreement (Automatic Exchange of Information) requiring the exchange of similar information, the non-EU platform operator will no longer be subject to the DAC 7 reporting duties in the EU.

In essence, DAC 7 will require the "Reporting Platform Operators" to:

- » **Install a due diligence procedure** to collect information on qualifying individual or entity taxpayers ("Active Sellers") who, during a Reportable Period (i.e. a calendar year), are registered at any moment on the Platform and carry out a Relevant Activity or are paid or credited consideration in connection with a Relevant Activity. Only those Active Sellers that are resident in a Member State or that rented out immovable property located in a Member State are considered "Reportable Sellers" (unless they are specifically excluded, e.g. governmental bodies, listed companies, *de minimis* exemption, hotel chain/tour operator exemption).

This due diligence procedure must in principle be completed by 31 December of each Reportable Period at the latest (31

December 2023 for the first time), with some exceptions.

- » **Report certain information on these taxpayers to the competent authorities** of the Member State where the Platform Operator is resident (or where it is incorporated, has its place of management or has a PE), or, for non-EU operators, in the Member State where it elected to register itself. If an EU Platform Operator qualifies as a Platform Operator in more than one Member State, it may elect a single Member State in which to carry out its reporting obligations. The information to be reported includes, in addition to the identity of the Seller, amongst others, the consideration paid to the taxpayers through the platform and the fees charged by the Platform. The reported information will then be automatically exchanged with the Member State where the taxpayer is a resident (or e.g. where the immovable is located).

The collected information has to be transmitted by the Platform Operator to the competent authority of the relevant Member State no later than 31 January of the year following the Reportable Period in which the taxpayer is identified as a "Reportable Seller". The competent authorities of each EU member state will exchange the reported information within two months after the end of a reporting period.

- » **Provide a copy of the information to the Reportable Sellers** by 31 January of the year following the year in which the taxpayer is identified as a Reportable Seller.

The current proposal requires Member States to implement the new DAC 7 reporting duties

for digital platforms by 31 December 2022 and apply the provisions as from 1 January 2023. The first due diligence procedures will have to be completed by 31 December 2023, and the first reporting will need to be done on 31 January 2024 at the latest.

Technical amendments to the DAC

In addition to the introduction of the new reporting rules for digital platforms, DAC 7 also contains, amongst others, the following technical amendments to the existing provisions:

- » *New definition of foreseeable relevance:* if one Member State requests certain information from the tax authorities of another, the requested information has to be foreseeably relevant. The DAC 7 proposal introduces a definition of the notion of "foreseeable relevance" in order to provide more legal certainty.
- » *Group requests:* the proposal contains a clause regulating requests sent to a group of taxpayers who cannot be identified individually.
- » *Royalties added to the AEoI:* the proposal also expands the scope of the DAC by adding royalties to the categories of income subject to an automatic exchange of information between Member States, in addition to the already existing obligation to exchange information on employment income, directors fees, income from immovable property, life insurance products and ownership of income from immovable property.
- » *Enhancing administrative cooperation:* The proposal also contains new rules with regard to the presence of officials of a Member State during an inquiry in another Member State, simultaneous controls and joint audits. The joint audit clause has to be applied by Member States as from 1

January 2024 (implementation on 31 December 2023 at the latest).

- » *Miscellaneous:* several other technical changes to the DAC are provided by DAC 7 (concerning amongst others clauses on the exchange of rulings, communications of data and statistics to the EC, the use of exchanged data, standard forms, the link with GDPR...)

Takeaways

When DAC 7 becomes final and enters into force, digital platform operators will be confronted with new - and quite burdensome - compliance rules. This will most likely require important investments in the IT system of the operators. The first due diligence process will have to be finalized on 31 December 2023 and the first reporting will have to be done on 31 January 2024. We therefore recommend to anticipate early to the upcoming obligations.

For taxpayers offering goods and services through these platforms, DAC 7 will result in information on their identity and their dealings being disclosed to the tax authorities of their resident state (or e.g. the state where the immovable property is located). In turn, this could lead to tax audits. We therefore advise these taxpayers to review their tax position, and, if required (and possible under the legislation of the Member State concerned), rectify the situation. Please do not hesitate to get in touch with our WTS Global tax experts to assure your compliance with local tax laws.

Finally, DAC 7 does not mark the end of the ever more complicated modifications to the EU exchange of information rules. The EC intends to amend the DAC again in 2021 ("DAC 8") in order to include within its scope certain reporting obligations for alternative means of payment and investment (e.g. crypto-assets, e-money).

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