

Newsalert

Tax Department, Newsalert of 24 March 2021
DAC 7 amending Directive 2011/16/EU

I. Background

On 22 March 2021 the EU Council has adopted a new Council Directive amending Directive 2011/16/EU on administrative cooperation in the field on taxation (“DAC 7”).

The adoption follows the EU Commission proposal of 15 July 2020, as reviewed and amended by the the Economic and Financial Affairs Council (ECOFIN) on 1 December 2020.

DAC 7 will enter into force starting from 1 January 2023.

In a nutshell, DAC 7 aims at: (i) introducing new reporting obligations upon digital platform operators; and (ii) amending certain existing provisions of Directive 2011/16/EU on foreseeable relevance and group requests.

II. Who must report under DAC 7

DAC 7 provides for specific disclosure and reporting obligations upon digital platforms, meaning any software, including a website or a part thereof and related applications, accessible by users and enabling sellers to connect with other users in order to carry out a relevant activity, directly or indirectly, to such users (the “Platforms”).

However, an exclusion is provided for Platforms that exclusively enable: (i) the processing of payments in relation to a relevant activity (as specified in paragraph 3 below); (ii) users to list or advertise a relevant activity; and (ii) redirecting or transferring of users to a Platform.

Reporting obligations introduced by DAC 7 shall be fulfilled by the Platform operator (“Platform Operator”), *i.e.* the entity that contracts with sellers to make available all or part of a platform

to such sellers, provided that: (i) it is resident for tax purposes in an EU Member State; (ii) it is incorporated under the laws of an EU Member State; or (iii) it has its place of management or a permanent establishment in an EU Member State.

The reporting obligations will also affect extra-EU Platform Operators that facilitate the carrying out of a relevant activity by reportable sellers or the rental of immovable property located in a Member State.

III. What and when to report under DAC 7

Following a due diligence activity, Platform Operators will be obliged to report, to the competent tax authorities, information on sellers either having their primary address, a tax identification number (TIN) or a permanent establishment in an EU Member State (the “Reportable Sellers”).

Activities that fall into the scope of DAC 7 are: (i) rental of immovable properties; (ii) provision of personal services; (iii) sale of goods; and (iv) rental of any means of transport.

Furthermore, tax information on Reportable Sellers who rent out immovable property located in an EU Member State must be reported, regardless of whether these sellers are EU resident.

Reportable information concerns, among others, name, address, VAT identification number, consideration, fees, commissions, taxes, address of listed real estate, etc..

The Platform Operator will have to report the information to an EU Member State no later than 31 January of the year following the reportable period (e.g., if the reportable period ends on 31 December of year X, reportable information must be reported on 31 January of year X+1).

IV. The standard of foreseeable relevance and group requests

In order to strengthen the effectiveness of exchange of information on request and prevent unjustified refusal of requests, DAC 7 clarifies the scope of the standard of “foreseeable relevance” of the information requested and the boundaries of a “group request”.

In particular, according to DAC 7, the standard of foreseeable relevance will occur when there is a reasonable possibility that the requested information will 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 requesting authority is required to prove the foreseeable relevance of the requested information by providing adequate supporting information. In this regard, the requesting authority shall provide at least the tax purpose of the request and a specification of the information required for the administration or enforcement of its domestic law.

Moreover, the DAC 7 introduces a specific provision dealing with group requests, providing that if a request relates to a group of taxpayers who cannot be identified individually, the requesting authority shall at least provide certain information, such as a detailed description of

the group and the reason to believe that the taxpayers in the group have not complied with the applicable law.

It is worth noting that, although group requests are not expressly mentioned in the currently in-force version of Directive No. 2011/16 (*i.e.*, the version prior to the DAC 7), group requests have been generally considered admissible (see, to this end, EUCOM, *Evaluation of Administrative Cooperation in Direct Taxation – Final Report*, 24 April 2019, Ch. 8.2; EUCOM, Working Group on Administrative Cooperation in the Field of Direct Taxation, *TAXUD.D.2 (2018) 5721450*, 4 October 2018, par. 3.(3).(d)).

Lastly, among the amendments brought to Directive 2011/16/EU, DAC 7 adds royalties to the categories of income subject to mandatory automatic exchange of information and provides for a framework for the competent Authorities of two or more Member States to conduct joint audits.

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