MAPLES GROUP

UPDATE

Ireland and Luxembourg: the Updated EU Annex I List

On 6 October 2020, the EU Finance Ministers comprising the Economic and Financial Affairs Council ("ECOFIN") announced that the Cayman Islands has been removed from the EU Annex I list of non-cooperative jurisdictions for tax purposes.

This update considers the impact of this development on certain tax reporting and other tax measures in Ireland and Luxembourg.

Impact of the Changes to the EU Annex I List on DAC6 Reporting

DAC6 is the new EU Mandatory Disclosure Regime requiring disclosure of certain cross border transactions which are considered to involve potentially aggressive tax planning arrangements by intermediaries assisting in those transactions.

As reported in our July 2020 update[1], the initial reporting dates in both Ireland and Luxembourg were delayed by six months as provided for by the EU Commission due to COVID-19. First reports are due from early 2021, but many intermediaries and transaction participants are currently working through their historic transaction list to determine whether arrangements entered into between 25 June 2018 and 1 July 2020 are reportable.

In that context, it is important for intermediaries reviewing transactions with the Cayman Islands, a significant location for international investment into Europe, to note that ECOFIN announced that the Cayman Islands has been removed from the Annex I list.

This development is relevant because one limb of Hallmark C1 of DAC6 ("Hallmarks" are the triggers for reporting) applies to an arrangement that involves tax deductible cross-border payments made between two or more associated enterprises where the recipient is resident for tax purposes in a jurisdiction that is on the EU Annex I list. This would, therefore, have impacted payments between EU based companies and investment entities associated with a Cayman recipient.

It is important to note that this particular Hallmark C1 does not require that the "main benefit" test (or business purpose test) also be met. Effectively, this means that any arrangements falling within the terms of this limb of Hallmark C1 are automatically reportable, regardless of whether obtaining a tax advantage could have been one of the main benefits for the participants in entering into the arrangement.

There are still technical aspects to the analysis in relation to this point. In particular, EU jurisdictions may take different views as to when to apply the test i.e. whether it is sufficient that a jurisdiction is not present on the Annex I list at the time of reporting or whether presence

[1] https://maples.com/Knowledge-Centre/Industry-Updates/2020/07/Luxembourg-Extension-of-Reporting-Deadlines-for-DAC-6-and-FATCA-and-CRS

on the Annex I list at the time of the arrangement is sufficient to require future reporting of that arrangement. Ireland and Luxembourg should not require reporting on this basis where the jurisdiction in question is not on the Annex I list at the time of reporting.

Impact on Irish Corporation Tax Filings

Irish corporate taxpayers filing their corporation tax returns in Ireland this year will have noticed a new information seeking section included in the Irish Revenue CT1 form online. The new section asks whether, during the accounting period in question, the taxpayer entered into any transactions involving the payment of royalties, interest or dividends to a person in any jurisdiction which is currently (i.e. at the time of the return filing) considered as a non-cooperative jurisdiction for tax purposes.

Companies with a 31 December 2019 year end, filing their returns by 23 September 2020, will have been required to consider the jurisdictions on the Annex I list at that time, but this will no longer be applicable to the Cayman Islands going forward.

Luxembourg tax authorities currently require disclosure on the corporate tax returns to the extent there are any transactions with related parties in Annex I jurisdictions.

The Luxembourg tax authorities have also expressly committed to "reinforced control" of such related party transactions, which could include, *inter alia,* increased scrutiny and risk of audit for any transactions involving Annex I jurisdictions.

Impact on the EU "Defensive Measures" for Annex I Countries

At the end of 2019, the European Council issued guidelines encouraging all EU Member States to implement legislative defensive measures with respect to jurisdictions on the Annex I list. Luxembourg has published certain draft measures which may restrict the deductibility of certain interest and royalties payments to related entities that are established in a jurisdiction on that list from 1 January 2021.

This draft tax law on the "defensive tax measures" which the EU has suggested should be in force by 1 January 2021 for Annex I jurisdictions. This generally aims at denying interest and royalty expenses to a related corporate entity established in an Annex I jurisdiction. More information on this draft law can be found in our March 2020[2] update.

To date, Ireland already contains many of these defensive measures in its existing legislation in respect of, broadly, countries with which it does not have a double tax treaty.

How the Maples Group Can Help You

We are currently working with many clients with regard to the impact of DAC6 on their cross border structures, particularly in respect of investment fund, securitisation and multinational structures. In particular, we are advising on international structures involving the EU and the US and the Cayman Islands. We are also advising on questions of legal privilege as it may apply to clients and also representing clients as a "neutral adviser" on DAC6 where a client may already be advised on a potentially reportable transaction by other advisers.

Further Information

For further information as to how the Maples Group can assist with your DAC6 and other

[2] https://maples.com/en/Knowledge-Centre/Industry-Updates/2020/03/Denial-of-Tax-Deduction-on-Interest-and-Royalties-to-EU-Non-Cooperative-Tax

obligations, please see our previous Ireland[3] and Luxembourg[4] client updates on DAC6.

For assistance on any of the above matters, please liaise with your usual Maples Group contact or any of the contacts below.

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[3] https://maples.com/Knowledge-Centre/Industry-Updates/2020/02/Enactment-of-the-EU-Mandatory-Disclosure-of-Cross-Border-Arrangements-Directive-DAC6
[4] https://maples.com/en/Knowledge-Centre/Industry-Updates/2019/08/Luxembourg-Publishes-Draft-Law-on-DAC-