ATOZ
TAX ADVISERS
LUXEMBOURG

INSIGHTS

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TAXAND

CONTENTS

EDITORIAL

Greetings,

Getting in the mood of the season's celebrations, the Luxembourg authorities, as is their custom, have put few tax reforms under the Christmas tree.

Indeed, 2017 is nearly behind us, 2018 is in the air, and coming with it is the budget law which brings along some new tax measures. The 2018 budget introduces measures on the investment tax credit, tax classes and non-resident taxpayers and the temporary reduced taxation of capital gains on sale of real estate. In addition, the Luxembourg tax regime of warrant plans has been amended by means of an administrative circular on 29 November 2017. This circular introduces an increase of the taxable basis of warrant plans, clarifies the conditions for employees to be eligible for the tax regime defined in the circular and amends the reporting obligations. We analyse below both the tax provisions of the 2018 budget law and the circular on warrant plans.

The Luxembourg authorities have also recently released a new circular on the conditions applicable to the Luxembourg undertakings for collective investment for obtaining a tax residence certificate. It confirms notably that RAIFs benefiting from the same tax regime as SIFs will be able to get a tax residence certificate and specifies under which conditions.

Luxembourg is also working to comply with its European obligations. As a result, the Luxembourg cost sharing VAT exemption regime (also referred to as “Independent Group of Persons”) has been repealed by a Grand Ducal Decree published on 23 November 2017 and a Circular from the VAT authorities dated 7 December 2017. Consequently, Luxembourg is now compliant with the position of the Court of Justice of the European Union on this topic. The Luxembourg authorities are also working on various bills of law aiming to transpose the 4th anti-money laundering (AML) Directive into national law and amending, among others, the Luxembourg AML law of 2004. Finally, the European Directive on double taxation dispute resolution mechanisms, according to which European Member States will have to efficiently resolve double taxation disputes, has been approved. Luxembourg has until 30 June 2019 to implement the Directive into its laws and regulations.

Noticeably absent under the 2017 “Christmas tax tree” is the new IP regime for which a draft law was released at the beginning of August which has still not become law. However, we expect that the new regime will be adopted beginning of the New Year with effect as from New Year’s Day.

We hope you enjoy these Insights.

The ATOZ Editorial Team wishes you a Merry Christmas and a successful New Year!

2018 BUDGET: MAIN TAX MEASURES

OUR INSIGHTS AT A GLANCE

- Measures in corporate tax include the extension of the scope of the investment tax credit to software acquisition as well as zero-emission vehicles.
- For individual taxation, under certain conditions, non-resident and resident taxpayers will now be able to be taxed in the same manner. Married couples may also now choose to be taxed jointly or separately, and a tax credit for individuals of maximum 2,500 euros is now extended to plug-in hybrid vehicles.
- Other measures include an extension of the scope of the VAT exemption for fund management services to the management of internal collective life insurance funds, as well as an extension of the reduced rate on capital gains realised on the sale of real estate.

On 14 December 2017, the 2018 budget law was passed by the Luxembourg Parliament. The 2018 budget law includes some important tax measures.

Corporate income tax measures

Scope of investment tax credit extended to the acquisition of software

The law extends the scope of the investment tax credit (bonification pour investissement) to the acquisition of software. However, the benefit of the investment tax credit is subject to certain conditions and limitations:

- The investment tax credit only applies if the software is acquired from a third party. Therefore, acquisitions from related parties within the meaning of Article 56 Income Tax Law ("ITL") are excluded.
- It is not possible to benefit both from an intellectual property regime and from the investment tax credit for the same software. Thus, if a taxpayer claims the investment tax credit benefit for the acquisition of specific software, the income generated by this software will not be able to benefit from an IP regime.
- The global investment tax credit amounts to 8% for the first tranche of EUR 150,000 and 2% for the tranche exceeding EUR 150,000. However, the tax credit may not exceed 10% of the tax due for the tax year during which the operating year is ending, during which the acquisition was made.

Scope of investment tax credit extended to eco-friendly vehicles

The scope of the investment tax credit is extended to zero-emission cars under certain conditions.

Individual tax measures

Tax classes & non-resident taxpayers

As announced this summer by the Luxembourg Government, the law extends the scope of situations in which non-resident taxpayers will be able to be taxed in the same way as resident taxpayers (application of Article 157ter ITL).

The law provides that non-resident taxpayers who do not have at least 90% of their worldwide income taxable in Luxembourg will still be able to be taxed in the same way as Luxembourg resident taxpayers if the portion of their foreign income which is not taxable in Luxembourg amounts to less than EUR 13,000.

In addition, when determining whether the 90% requirement is met, the part of the salary income which becomes taxable in the residence State of the taxpayer in application of a double tax treaty (because the maximum amount of days spent by the taxpayer outside of Luxembourg, as provided by the tax treaty, is exceeded) is disregarded. This means that the part of the salary which is taxed in the residence State of the taxpayer is still assimilated to income taxable in Luxembourg in order to determine whether the 90% requirement is met. However, this applies only up to a maximum of 50 days spent outside of Luxembourg.

Finally, the law on the 2017 tax reform has granted married couples as of tax year 2018 the possibility to choose whether they would like to continue being taxed collectively in tax class 2 or whether they would like to be taxed separately. To complement this measure and provide married couples with more flexibility, the law provides that married couples will have until 31 March of the tax year following the tax year concerned (i.e. 31 March 2019 for tax year 2018) to make their choice.

Tax deduction for eco-friendly vehicles extended to plug-in hybrid electric vehicles

The tax deduction introduced last year for eco-friendly vehicles is extended to plug-in hybrid electric vehicles. The maximum tax credit amount applicable to these vehicles will be EUR 2,500.

Other measures of the law

Amendments to the rules on exchange of information upon request postponed

Following the decision of the Court of Justice of the European Union ("CJEU") in the Berlioz case (C-682/15), the Luxembourg rules on exchange of information upon request have to be amended in order to bring them in line with EU law.

In its initial form as released in October, the 2018 budget draft law included some amendments to the law of 25 November 2014 on the procedure of exchange of information upon request in order to take into account the conclusions of the CJEU in the Berlioz case.

However, following the opposition raised by the Luxembourg State Council on some of the amendments proposed, it has finally been decided to remove all provisions amending the law of 25 November 2014 and to deal with these changes in a separate draft law, which has very recently been adopted by the Government but not yet published at the time of the drafting of this article.

VAT changes

Some provisions of the VAT law will be amended, including the extension of the scope of the VAT exemption applicable to fund management services (article 44, § 1, d, of the VAT law) to the management of internal collective life insurance funds (*fonds d'investissement internes collectifs d'assurance-vie*) under certain conditions.

Extension of temporary reduced taxation of capital gains on sale of real estate

The temporary tax measure on the individual tax treatment of long term capital gains realised on the sale of real estate assets is extended until 31 December 2018.

This temporary measure was introduced in 2016 in order to improve the access to housing and provides that long term capital gains (i.e. capital gains realised after more than 2 years following the acquisition) realised between 1 July 2016 and 31 December 2017 are considered as an "extraordinary income" and are taxed at 1/4 of the rate otherwise applicable in accordance with the Luxembourg income tax law.

The 2018 budget law extends the application of this measure until 31 December 2018.

Other announcements - Warrant plans

During the presentation of the 2018 budget, a reform to the tax regime of warrant plans has been announced by Finance Minister Gramegna. Whereas a draft law was initially expected to be released in order to amend the regime, the Government announced later on that the change will be made by means of a circular, which was released on 29 November 2017. We present the changes introduced by the new circular in our dedicated article of these ATOZ Insights (see page 9).

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LUXEMBOURG TAX AUTHORITIES RELEASE NEW CIRCULAR ON TAX RESIDENCE CERTIFICATES FOR LUXEMBOURG UCIS

OUR INSIGHTS AT A GLANCE

- On 8 December 2017, the Luxembourg Tax Authorities published a new version of the 2015 circular on obtaining tax residence certificates for UCIs taking into account new tax treaties and clarifying how the recently introduced RAIF, when taxed in the same way as a SIF, can obtain a tax residence certificate.
- For double tax treaty (DTT) purposes, a tax residence certificate can be obtained under certain conditions for SICAVs/SICAFs as well as for FCPs and other tax transparent entities.
- The new Circular clarifies which DTTs currently in force do or do not apply to SICAVs, SICAFs, FCPs and other transparent entities based on a series of conditions listed in the article. As far as FCPs and other tax transparent entities are concerned, certain recent DTTs include specific provisions. The Luxembourg tax authorities will issue a tax residence certificate upon request for these DTTs. In all other situations, Luxembourg FCPs will not be able to obtain a tax residence certificate.

Luxembourg Undertakings for Collective Investment ("UCIs") may perform different types of investments in many different countries. The return on these various investments may be subject to withholding tax in the country of source. The double tax treaties ("DTTs") concluded by Luxembourg provide, among others, reduced withholding tax rates. The question arises as to whether and if so, under which conditions, Luxembourg UCIs may benefit from these reduced rates. Obtaining a tax residence certificate from the jurisdiction of establishment of the fund is very often one of the requirements.

Back in 2015, the Luxembourg tax authorities released a first circular aiming to confirm under which conditions Luxembourg UCIs (SICAVs, SICAFs and FCPs) may obtain a tax residence certificate and clarifying the position of the Luxembourg tax authorities and the foreign authorities towards DTT benefits for Luxembourg UCIs. The circular initially covered SICAVs, SICAFs & FCPs, both within the meaning of the 2010 law on Undertakings for Collective Investments and within the meaning of the 2007 Law on Specialised Investment Funds ("SIFs").

On 8 December 2017, a new version of this circular (the "new Circular"), which takes into account new tax DTTs and clarifies how the recently introduced Reserved Alternative Investment Fund ("RAIF") can obtain a tax residence certificate, was published. The new Circular only covers RAIFs taxed in the same ways as SIFs, i.e. exempt from tax on their income and subject to subscription tax. Therefore, the new Circular does not cover RAIFs which have opted to be taxed in the same way as SICAR. However, these vehicles can get a tax residence certificate under the standard rules applicable to any Luxembourg company.

Tax residence certificate in a Double Tax Treaty ("DTT") context

A tax residence certificate can be obtained under certain conditions for SICAVs/SICAFs as well as for FCPs and other tax transparent entities.

The new Circular indicates which DTTs currently apply to SICAVs, SICAFs, FCPs and other transparent entities and which DTTs do not apply.

As far as SICAVs/SICAFs are concerned, the DTT may or may not apply, and this may result from:

- a clear provision in the DTT;
- an agreement between the competent authorities of Luxembourg and the other contracting State; or
- the interpretation of the Luxembourg tax authorities or of the tax authorities of the other contracting State.

The new Circular clarifies which DTTs currently in force do or do not apply based on the above. For the DTTs which do apply, the Luxembourg tax authorities will issue a tax residence certificate upon request.

As far as FCPs and other tax transparent entities are concerned, certain recent DTTs include specific provisions. The Luxembourg tax authorities will issue a tax residence certificate upon request for these DTTs. In all other situations, Luxembourg FCPs will not be able to obtain a tax residence certificate, since they have no legal personality and are seen as tax transparent from a Luxembourg tax point of view.

The following formal conditions apply to requests for tax residence certificates in a DTT context:

- The request has to be sent to the Luxembourg tax authorities (Administration des Contributions Directes, Tax Office 6);
- The request has to indicate the tax number of the Company;
- Except for RAIFs, a certificate from the CSSF (Luxembourg Supervisory Authority of the Financial Sector) has to be filed together with the request, which confirms that the applicant is a SICAV/SICAF/FCP which is subject to CSSF supervision;
- For RAIFs, the request has to be made by either the Company or by its depositary. It has to indicate the tax number, the date of incorporation as well as the legal seat of the Company. The tax residence certificate will be sent automatically to the legal seat of the Company. The tax office may require additional information or supporting documents considered as essential for the issue of the tax residence certificate (such as an income statement).

The table below provides an overview of the position of Luxembourg FCPs, other tax transparent entities and SICAVs/SICAFs towards tax residence under a DTT:

Double Tax Treaty (DTT) Benefits For Luxembourg UCIs

		Covered by the new Circular					
		SICAVs/SICAFs				FCPs & other transparent entities	
		Express Agreement	Provision in DTT	Interpretation	No clear position	Provision in DTT	No Provision in DTT
1	Armenia						
2	Andora						
3	Austria						
4	Azerbaijan						
5	Bahrein						
6	Barbados						
7	Belgium						
8	Brazil						
9	Brunei						
10	Bulgaria				!		
11	Canada						
12	China						
13	Croatia						
14	Czech Republic						
15	Denmark						
16	Estonia						
17	Finland						
18	France						
19	Georgia						
20	Germany						
21	Greece						
22	Guernsey						
23	Hong Kong						
24	Hungary		*As from 2018**			*As from 2018**	
25	Iceland						
26	India						
27	Indonesia						
28	Ireland						
29	Isle of Man						
30	Israel						
31	Italy						
32	Japan						
33	Jersey						
34	Kazakhstan						
35	Korea						
36	Laos						
37	Latvia						
38	Liechtenstein						
39	Lithuania						
40	Macedonia						
41	Malaysia						
42	Malta						
43	Mauritius						
44	Mexico						
45	Moldavia						
46	Monaco						
47	Morocco						
48	Netherlands						
49	Norway						
50	Panama						
51	Poland						
52	Portugal						
53	Qatar						
54	Romania						
55	Russia						
56	San Marino						

57 Saudi Arabia						
58 Serbia						
59 Seychelles						
60 Singapore						
61 Slovak Republic						
62 Slovenia						
63 South Africa						
64 Spain	*UCITS only*					
65 Sri Lanka						
66 Sweden						
67 Switzerland						
68 Taiwan						
69 Tajikistan						
70 Thailand						
71 Trinidad & Tobago						
72 Tunisia						
73 Turkey						
74 Ukraine						
75 United Arab Emirates						
76 United Kingdom						
77 United States						
78 Uruguay						
79 Uzbekistan						
80 Vietnam						

(*) Only based on the new DTT effective as from 1 January 2018 - Not taken into account in the new Circular

DTT applicable
DTT not applicable
No clear position

Tax residence certificate based on Luxembourg internal law

For SICAVs and SICAFs, a tax residence certificate can be established for Luxembourg internal law purposes each time the legal seat or the central administration of the SICAV/SICAF is located in Luxembourg.

Such certificates can be established in any situation (whether there is an applicable DTT, a non-applicable DDT, or no DTT at all). As far as this type of tax residence certificate is concerned, the formal requirements are much more burdensome:

- The request has to be sent to the Luxembourg tax authorities (Administration des Contributions Directes, Tax Office 6);
- The request has to indicate the tax number of the Company;
- Except for RAIFs, a CSSF certificate has to be filed together with the request, confirming that the applicant is a SICAV/SICAF subject to CSSF supervision;
- As far as RAIFs are concerned, the request has to be made by either the Company or by its depositary. It has to indicate the tax number, the date of incorporation as well as the legal seat of the Company. The tax residence certificate will be sent automatically to the legal seat of the Company. The tax office may require additional information or supporting documents considered as essential for the issue of the tax residence certificate (such as an income statement);
- Any request for a tax residence certificate based on internal law has to be "motivated", meaning that it will be necessary to explain why the certificate is needed, including an explicit reference to the applicable DTT or foreign local law provision to be applied;
- It is necessary to provide a detailed statement of the income for which the tax residence certificate is needed. In case the said income has not yet been received, the request has to indicate the investment strategy of the UCI. In addition, the UCI has to commit to provide a detailed income statement at the latest on 30 June of the year following the accounting year during which the income has been received.

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LUXEMBOURG WARRANT PLAN REGIME: CONTINUITY AMID CHANGE

OUR INSIGHTS AT A GLANCE

- On 29 November 2017, the Luxembourg tax authorities released the highly anticipated circular on stock-option/warrant plans, clarifying some of the rules already applied by practitioners and increasing the amount of the taxable value of so called "warrant plans".
- The specific fixed rate valuation method which is presented in the circular only applies to freely transferable options. In practice, in most cases, these options take the form of "warrants", which are granted over stock exchange indexes and/or stocks of third party corporations.
- As from 1 January 2018, the value of the warrants will be deemed to be equal to 30% of the value of the underlying assets. The valuation at 17.5% of the value of the underlying assets (as applicable since 2013) will remain applicable until 31 December 2017.
- The circular now clarifies that the fixed rate valuation at 17.5 or 30% is only possible in the case of warrant plans if three cumulative conditions, as defined in this article, are met. Should one of these three conditions not be met, the circular states that the value of the benefit in kind subject to tax will be equal to the full allotment price of the warrant.

On 29 November 2017, the Luxembourg tax authorities released the highly anticipated circular on stock option/warrant plans (the "Circular"). The publication of the Circular follows the announcement made by Finance Minister Gramegna during his presentation of the 2018 budget, according to which the regime of stock-option/warrant plans would be amended soon. The Circular replaces the former circulars 104/2 (20 December 2012) and 104/2bis (28 December 2015) as well as internal administrative guidelines from the tax authorities.

Far from the announced "aggiornamento" of the taxation regime of stock-options, the new Circular only clarifies some of the rules already applied by practitioners and increases the amount of the taxable value of so called "warrant plans". Conversely, this new Circular does not change the taxation of more classic stock-options, contrary to what was expected by practitioners and businesses.

Scope of the circular

As in the previous circulars, the key feature of this Circular relates to the valuation rules applicable for tax purposes when determining the value of benefits-in-kind granted by employers to their employees (senior executives) in the form of options or warrant plans. These rules were already in force prior to the issuance of the new Circular.

The specific fixed rate valuation method which is presented in the Circular only applies to freely transferable options. In practice, in most cases, these options take the form of "warrants", which are granted over stock exchange indexes and/or stocks of third party corporations.

What are described as stock-options in practice are generally options granted to employees on the stock of their employers' company. Since these types of option are, in most cases, not freely transferable, mostly, they will not fall within the scope of the fixed rate valuation rules described in the Circular.

In the following comments, we refer to "warrants" as these are in practice the most commonly used instruments, being warrants over stock market indices. However, it should be noted for completeness that the fixed rate valuation method provided by the Circular can be applied to any option which is freely transferable.

Valuation of warrants - Increase from 17.5 to 30% as from 2018

The Circular amends the rules applicable to the computation of the value of warrants. In the absence of a more precise valuation and subject to certain conditions, a fixed rate valuation is allowed as follows:

- as from 1 January 2018, the value of the warrants will be deemed to be equal to 30% of the value of the underlying assets;
- the valuation at 17.5% of the value of the underlying assets (as applicable since 2013) will remain applicable until 31 December 2017.

A new provision has been added, which specifies that the valuation at 17.5% or 30% cannot be applied when warrants are granted in lieu of a legal or contractual severance payment following the termination of an employment contract.

The conditions for being able to apply a valuation at either 17.5% (until 31 December 2017) or 30% (as from 2018) to warrant plans, the so-called "reasonable conditions/circumstances", are now expressly mentioned in the Circular.

These conditions were already detailed in unpublished internal guidelines of the tax authorities, some content of which had been made public in a response to a parliamentary question four years ago.

The Circular now clarifies that the fixed rate valuation at 17.5 or 30% is only possible in the case of warrant plans if the three following cumulative conditions are met:

- The value of the warrant should not exceed 50% of the gross annual remuneration (warrant included). This percentage has to be computed individually, i.e. for each of the participants in the warrant plan;
- The warrant plan can only apply to senior executives within the meaning of Article L 211-27 5 of the Labour Law (i.e. "cadres supérieurs");
- The characteristics of the warrant plan have to be such that the price of the warrant cannot exceed 60% of the value of the underlying assets/index.

Should one of these three conditions not be met, the Circular states that the value of the benefit in kind subject to tax will be equal to the full allotment price of the warrant, i.e. it will be equal to the "real" value of the warrants.

Despite the definition provided by the Labour Law, the notion of "cadres supérieurs" remains vague and open to interpretations. Autonomy, level of remuneration and decision-making power are some of the main criteria defining this status.

Notification to the tax authorities

Arguably, the biggest change brought by the Circular relates to the reporting obligations. The former circular 104/2bis Income Tax law of 28 December 2015 introduced an obligation for employers to inform the Luxembourg tax authorities (RTS office) about the option or warrant plans that they put in place for their employees. The new Circular defines in more detail the rules related to this obligation and more importantly, introduces new sanctions which will apply in case of non-compliance. The rules vary depending on the tax year concerned:

- Up to 2015 included, the information will have to be provided to the extent that it is requested by the Luxembourg tax authorities when reviewing the tax situation of the employer.

- In respect to 2016, to the extent that no information has already been provided to the Luxembourg tax authorities, any benefit within the meaning of the Circular granted by an employer to its employee(s) has to be notified by 31 January 2018 at the latest.

- As far as 2017 is concerned, to the extent that no information has already been provided to the Luxembourg tax authorities, any benefit within the meaning of the Circular granted by an employer to its employee(s) has to be notified by 31 March 2018 at the latest. In addition, since the new Circular replaces, as from its release, all former notification requirements (including the requirement, according to which the notification has to be made at least 2 months prior to implementation of the plan), employers may still consider implementing a warrant plan before the end of 2017 under the valuation rules applicable until year end (i.e. fixed rate valuation at 17.5%).

- As from 2018, any employer who intends to grant to its employee(s) benefits falling within the scope of the Circular is required to inform the tax authorities as soon as the benefit is granted.

The Circular provides that notifications have to be made electronically.

Should this information not be provided at the time the benefits are granted, taxation will apply on the total attribution price, which would therefore represent the full market value of the warrants granted.

What now?

Compared to what was the initial intent of the tax authorities, and given the announcement made by Finance Minister Gramegna, the new Circular could be seen as a bit of a “damp squib”.

However, one positive aspect of the Circular is that the warrant regime is maintained. As a consequence, Luxembourg maintains this advantageous remuneration tool which allows employers to attract “high level executives”.

On the less positive side, by only marginally modifying the current rules for stock option plans, the Luxembourg authorities have chosen not to amend the rules applicable to “classic” stock-option plans. These plans are common and popular in the “new economy” and in the SME market, with plans that are typically designed to encourage long-term alignment of employees with the growth of the employer’s company, something that is generally seen to be a positive aim for society as a whole. Creating an equivalent to the attractive warrant taxation for the tax regime of stock options would have been an opportunity for Luxembourg to attract players of the new economy. For this purpose, the new Circular is clearly a missed opportunity.

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INDEPENDENT GROUPS OF PERSONS: AN EVOLVING AREA

OUR INSIGHTS AT A GLANCE

- On 21 September 2017, the Court of Justice of the European Union released its judgments in three cases relating to the scope of application of the cost sharing VAT exemption.
- For the VAT exemption to apply, services rendered by Independent Groups of Persons or "IGP" to their members must be directly necessary to sustain each member's VAT exempt or non-business activities.
- Noting that the VAT exemption provision is included in the chapter 'Exemptions for certain activities in the public interest of the EU VAT Directive', the CJEU ruled that the VAT exemption only applies to IGPs active in the public interest sector.
- Therefore, the scope of application of the VAT exemption has been drastically reduced and the VAT exemption will no longer be applicable to IGPs set up in the financial and insurance sectors.
- By a Grand Ducal Decree published on 23 November 2017, the Luxembourg IGP regime has been brought in line with the position of the CJEU.

On 21 September 2017, the Court of Justice of the European Union ("CJEU") released its judgments in three cases[1] relating to the scope of application of the cost sharing VAT exemption (also referred to as "Independent Group of Persons" or "IGP").

Interest of the IGP on the Luxembourg market

As a general rule, services rendered by a VAT taxable person are subject to VAT. Nevertheless and pursuant to article 132, § 1, f) of the EU VAT Directive, the supply of services by IGPs to their members who are either VAT exempt taxable persons, or non-taxable persons, are exempt from VAT. For the VAT exemption to apply, these services must be directly necessary to sustain each member's VAT exempt or non-business activities.

The aim of the IGP regime is notably to avoid a VAT cost on support services pooled at the level of the IGP (staff, payroll services, etc.). Without this specific VAT exemption, services rendered by the IGP to its members would be subject to VAT, thus representing a final cost for them since they carry out activities with no VAT deduction right.

Aviva and DNB Banka cases

In these two cases, the CJEU ruled that the VAT exemption does not apply to IGPs supplying services to their members who carry out activities in the financial and insurance sectors.

Noting that the VAT exemption provision is included in the chapter 'Exemptions for certain activities in the public interest of the EU VAT Directive', the CJEU ruled that the VAT exemption only applies to IGPs active in the public interest sector (medical care, welfare, education, etc.). Accordingly, the scope of application of the VAT exemption has been drastically reduced and the VAT exemption will no longer be applicable to IGPs set up in the financial and insurance sectors.

[1] European Commission v. Federal Republic of Germany (C-616/15), Minister Finansów v. Aviva Towarzystwo Ubezpieczeń na Życie S.A. w Warszawie (C-605/15) and DNB BANKA' AS v. Valsts ienemumu dienests (C-326/15)

Stressing the principle of legal certainty, the CJEU also ruled that these judgments cannot have a retroactive effect. By a Grand Ducal Decree published on 23 November 2017 and Circular n°783 of the VAT authorities dated 7 December 2017, the Luxembourg IGP regime has been brought in line with the position of the CJEU. The VAT authorities explicitly confirmed that current Luxembourg IGPs have to comply with the outcome of the CJEU by 1 January 2018 at the latest.

Implications

These judgments, in conjunction with the case Commission against Luxembourg (see ATOZ Insights of June 2017), impact Luxembourg IGPs which are commonly used in the Luxembourg financial and insurance sectors. Groups of companies having implemented an IGP will now have to bear additional VAT costs and should consider the resulting budgetary impacts.
The introduction of a VAT grouping regime into the Luxembourg VAT Law as well as the recourse to Global Employment Contracts may be considered in order to develop alternatives to these judgments which have eliminated the use of the IGP in the "non-public interest" industry.

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NEW DIRECTIVE ON DOUBLE TAXATION DISPUTE RESOLUTION MECHANISMS IN THE EU

OUR INSIGHTS AT A GLANCE

- On 10 October 2017, the Council of the EU approved the EU directive on double taxation dispute resolution mechanisms, according to which EU Member States will have to efficiently resolve double taxations.
- The Directive puts in place a 3-step double taxation dispute resolution mechanism, which forces Member States to resolve all disputes affecting the tax position of businesses and citizens which originate from tax treaties.
- The notable features of the mechanism include a recourse for taxpayers to national courts to move procedure forward, an obligation to notify taxpayers and publish abstracts of the arbitration decisions, an enforceable timeline.
- The Directive will apply to any complaint submitted from 1 July 2019 onwards with respect to questions related to the tax year starting on or after 1 January 2018. However, the competent authorities of the Member States concerned may agree to apply this Directive with regard to any complaint that was submitted prior to 1 January 2018.

On 10 October 2017, the Council of the EU approved the EU directive on double taxation dispute resolution mechanisms (the "Directive"), according to which EU Member States will have to efficiently resolve situations of double taxation. The Directive is almost identical to the Directive proposal on which the EU Economic and Financial Council reached an agreement on 23 May 2017. However, and this is to be regretted, the Directive puts in place a process which is too long to really be efficient and some of its provisions remain unclear.

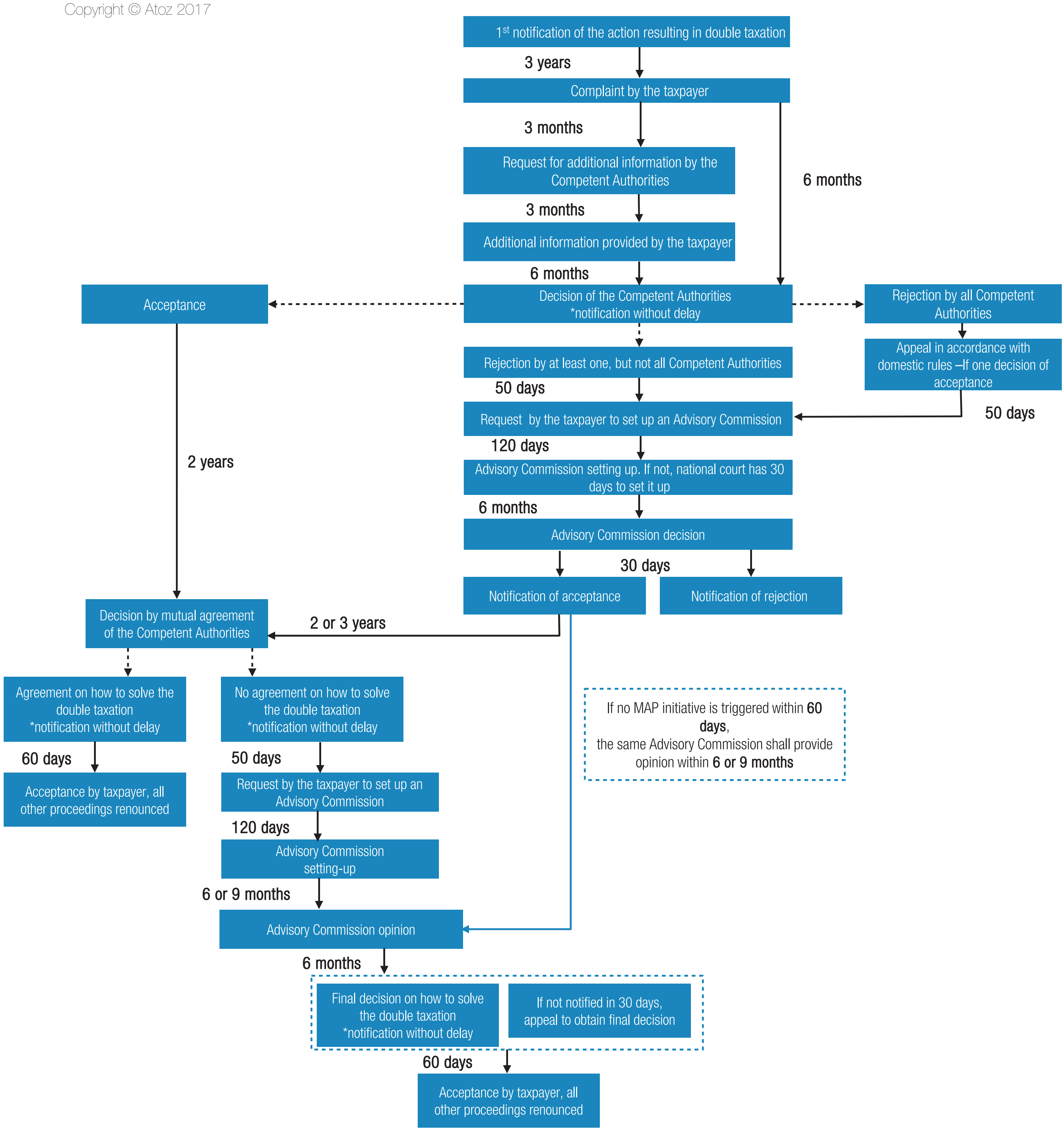
Objective of the Directive

The Directive lays down rules on a mechanism to resolve disputes when they arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital (the "Double Taxation Dispute"). Double taxation disputes are related to impositions by two (or more) Member States of taxes in respect to the same taxable income or capital when it gives rise to either an additional tax charge, increase in tax liabilities or cancellation or reduction of losses, all of which could be used to offset taxable profits.

Double taxation dispute resolution mechanisms

The Directive puts in place a 3-step double taxation dispute resolution mechanism, which forces Member States to resolve all disputes affecting the tax position of businesses and citizens which originate from tax treaties. For that purpose it introduces notably:

- A recourse for taxpayers to national courts to move the procedure forward;
- An obligation to notify taxpayers and publish abstracts of the arbitration decisions;
- An enforceable timeline. In this respect, a shorter timeframe would have been welcome in order to improve the effectiveness of the mechanisms put in place by the Directive. An average period of 5 to 7 years to obtain a final decision by the competent authorities to solve double taxation is indeed a little bit long.



Implementation by EU Member States

The Directive will apply to any complaint submitted from 1 July 2019 onwards with respect to those questions related to the tax year starting on or after 1 January 2018. However, the competent authorities of the Member States concerned may agree to apply this Directive with regard to any complaint that was submitted prior to 1 January 2018. Member States have until 30 June 2019 to implement the Directive into their internal laws and regulations.

For a detailed overview of the provisions introduced by the Directive and the 3-step process it introduces, please click here (https://www.atoz.lu/sites/default/files/atoz_flipbook/atoz-insights-june-2017/mobile/index.html#p=18) and read the dedicated article in our June 2017 ATOZ Insights.

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LUXEMBOURG AML-TF FRAMEWORK: RECENT DEVELOPMENTS

OUR INSIGHTS AT A GLANCE

- Even though the implementation date remains uncertain, professionals subject to the revised AML Law of 2004 should consider taking the necessary measures to become compliant as soon as possible.
- Bill 7128, the first of many which seek to implement the 4th AML directive into Luxembourg Law, expands the list of professionals (individuals or entities) falling within its scope and places an additional burden on these professionals to assess the risks of money laundering and terrorism financing to which they are exposed through their customer relationships.
- Based on this business-wide risk assessment exercise, professionals must also assess the object and nature of the individual business relationship with a specific customer (including its beneficial owner) or of an occasional transaction. Bill 7128 expands the types of beneficial owners to be identified from now on as well.
- A professional violating the obligations imposed by the AML-TF Law can be severely sanctioned.

In current times, Luxembourg professionals are experiencing important changes to the anti-money laundering and terrorist financing ("AML-TF") legal framework. Luxembourg is no exception, even if the process is slow-going. At the time of writing, Luxembourg has not yet fully transposed the 4th AML Directive into national law, exceeding the original mid-2017 deadline, while jurisdictions such as the UK, France and Germany have already taken these steps. In this article we examine the main changes to the AML-TF practices proposed by a number of bills implementing the 4th AML Directive (Section I). Nonetheless, some of the Directive's provisions relating to criminal offences have already been transposed into Luxembourg law (Section II). In order to strengthen their defences in the fight against money-laundering, tax authorities are about to receive enhanced access to beneficial owner information (Section III). With these changes on the horizon, professionals subject to AML-TF obligations should already be taking steps to ensure compliance with this new legal framework (Section IV).

I. Bills implementing the 4th AML Directive into Luxembourg law

Current implementation status

Luxembourg should have implemented the 4th AML Directive[2] into its national law by 26 June 2017. The first bill[3] lodged in April amending, among others, the AML Law of 2004[4] has not yet been approved and was reviewed only by a handful of organisations concerned by it ("Bill 7128"). At the time of the drafting of this article, professional bodies representing financial services professionals, notaries and insurers had yet to send in their comments.
Two other bills, regulating specifically the beneficial ownership register and the trust register, were lodged only recently with the

[2] DIRECTIVE (EU) 2015/849 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (the "Fourth Money Laundering Directive").
[3] Bill n° 7128 lodged on 26 April 2017 implements the Fourth Money Laundering Directive as well as the Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006.
[4] The amended law of 12 November 2004 relating to the fight against money-laundering and against the financing of terrorism (the « AML Law 2004 »).

House of Representatives. We will monitor their adoption and publication closely and a separate, forthcoming article will be dedicated to an in-depth analysis of the bill's provisions.

Even though the implementation date is uncertain, professionals subject to the revised AML Law of 2004 should consider taking the necessary measures to become compliant as soon as possible.

New categories of professionals subject to the AML law of 2004

Bill 7128 expands the list of professionals (individuals or entities) falling within its scope to:

- all persons exercising the activity of Family Office;
- bailiffs, when they proceed over auctions of movable assets and crops;
- asset dealers, when payments made or received in cash exceed 10,000 Euros (the amount threshold has decreased);
- trust and company service providers, also when they (i) act as director of a partnership, or (ii) provide business premises;
- other financial institutions exercising their activity in Luxembourg, including Luxembourg branches of financial institutions headquartered within or outside the European Union.

The professionals listed above, together with credit institutions, financial institutions, insurers, brokers, pension funds, notaries, lawyers, accountants, real estate agents, investment funds and their management companies and managers and investment professionals, are all subject to the revised AML Law of 2004 (the "Professionals" or "obliged entities") in their relationship with their clients and/or investors (the "Customers").

Bill 7128 brings an overhaul of professional obligations

The new AML-TF regulatory framework is built on a **risk-based approach**. Thus, it is now incumbent entirely on the Professionals to assess the risks of money laundering and terrorism financing ("ML-TF") to which they are exposed and to adapt customer due diligence ("CDD") level and measures they apply to their Customer relationship as necessary.

Business-wide risk assessment

Professionals must be continuously aware in which areas of their business they are exposed to the risks of ML-TF and where to take appropriate protection measures.

Moreover, Professionals must perform and document ex-ante ML-TF risk-assessments before they launch new products or introduce new business practices. This could include opening up new distribution channels or using new technologies.

Firms should identify and assess risk by taking into account multiple risk factors, such as:

- risks associated with their Customers and their beneficial owners[5] (are they politically exposed persons; or persons linked to sectors that are commonly associated with corruption risks - like construction, pharmaceuticals, public procurement; or is their reputation affected by allegations of corruption or criminal conduct?);
- risks relating to geographical location (does the Customer operate in countries known for their endemic corruption, weak AML-TF supervision and enforcement or non-compliance with international tax transparency standards?); or
- risks inherent to the business offering (do the products carry a potential for anonymity; are the services unnecessary and highly complex; are intermediaries involved in the transactions and are they regulated and supervised; is the business conducted on a non-face-to-face basis?).

The risk assessment should be a proportionate exercise, adapted to the nature and size of the Professional and the complexity of their business. For instance, firms could assign scores to the risks identified, weight them all together and then categorise the ML-TF risk related to the business relationships and occasional transactions.

Finally, Bill 7128 requires firms to document the risk assessment exercise that they perform and to constantly keep it up to date. Firms need to make their process available to the relevant supervisory authorities and also must be able to justify their conclusions.

Customer due diligence

Based on the business-wide risk assessment exercise, Professionals must also assess the object and nature of the individual business relationship with a specific Customer (including its beneficial owner) or of an occasional transaction. They can then calibrate the CDD measures to be taken depending on the risks identified.

The annexes to Bill 7128 provide non-exhaustive examples of (i) risk variables inherent to Customers, (ii) high risk factors, or (iii) factors indicating a low risk of ML-TF, which are meant to guide Professionals on their evaluation of risks. However, they can no longer rely on a predefined list of transactions and situations that would enable them to automatically apply a simplified analysis of their Customers. Nor can they rely solely on the central registers of beneficial owners that will be put in place across the European Union.

[5] According to the Bill, beneficial owner refers to "any individual who ultimately owns or controls the Customer or any individual on whose behalf a transaction is being carried out", e.g. in the case of a company, the owner of a sufficient percentage of the shares or voting rights, as illustrated by the 4th AML Directive.

Furthermore, Bill 7128 expands the types of beneficial owners to be identified from now on. Professionals must therefore make sure that their KYC-AML files are updated going forward. Apart from individuals controlling the corporations, firms must also identify different categories of beneficial owners of trusts, foundations or legal constructions similar to trusts, and of life-insurance or insurance-based contracts. Firms should not have recourse to an automatic application of the CDD rules for opaque structures. Additionally, Firms will also need to go beyond the 25% ownership threshold to find the person exercising effective control on the structure.

In certain circumstances, Professionals are allowed to apply a simplified CDD. However, as soon as there is a suspicion of money-laundering or financing of terrorism, or a doubt as to the veracity of the information collected, Professionals must apply reinforced CDD measures. Firms must also scrutinise unusual transactions, unusual transactions being defined as transactions "without any apparent economic purpose or licit scope carried out by customers". Similarly, when Professionals enter into a business relationship with a person established in a country that does not apply (sufficient) measures to fight against ML-TF, a reinforced CDD is required. Reinforced CDD is also required in relation to politically exposed persons ("PEP"), whether domestic or international. Firms should update their files considering that the PEP category will include members of legislative bodies similar to parliaments, of governing bodies of political parties, of management boards of central banks, as well as board members of international organisations, together with family members, including brothers and sisters.

Finally, Professionals who on-board Customers without verifying their identity first must have risk management procedures in place to limit the type, number or amount of transactions that can be carried on and secondly, are required to supervise significant, complex or atypical transactions.

Internal organisation

Besides identifying business-wide and client related risks, Professionals must effectively mitigate and manage ML-TF risks on a continuous basis. In order to be able to do so, they should be properly organised internally, with policies, controls and procedures in place.

Firms should have dedicated and specific policies and procedures with respect to ML-TF risk management, CDD, cooperation with the authorities, KYC data processing and storage, etc. They should appoint a person in charge of supervising the AML-TF practices, be it among their employees or, if necessary, an independent internal auditor. Firms should train staff and raise awareness with respect to AML-TF obligations and criminal practices. Given the considerable amount of personal data collected for KYC-AML purposes, firms should take measures and train staff in order to ensure that this data is protected. When they receive requests for information from the Luxembourg authorities, Professionals must be able to respond in a quick and comprehensive manner. Finally, Bill 7128 requires Professionals to protect whistle-blowers by offering them a specific, independent and anonymous way to report violations of obligations relating to the AML-TF fight.

Group-wide organisation

Luxembourg parent companies of concerned entities must put in place policies and procedures at group[6] level (in both EU and non-EU subsidiaries and branches), in particular with respect to data protection and information sharing within the group for the purpose of combatting ML-TF. Bill 7128 requires Professionals to ensure that their group entities are subject to the strictest AML-TF obligations, or else they risk losing the right to conduct business in non-compliant jurisdictions.

Conversely, when the Luxembourg based Professional is a subsidiary or branch of a parent company based in an EU Member State that has already implemented the 4th AML Directive, the Luxembourg based Professional should make sure that its AML-TF policies and procedures are appropriate and up-to-date, given that it is required to adhere to the strictest standards. As such, a business-wide risk assessment may need to be performed or beneficial owner registers may need to be implemented, even if the Luxembourg law currently in force does not require these actions.

Data storage and personal data protection

As part of their AML-TF obligations, Professionals are required to collect, process and store a considerable amount of highly sensitive (private placement memorandums, shareholders' or voting agreements, detailed information relating to transactions) and personal data (copies of passports, documents evidencing the domicile address of an individual, his/her wealth). Firms must store the KYC-AML data securely for a number of years after the end of the business relationship. However, they must also make sure this sensitive data is destroyed after that lapse of time. Personal data should be processed within the larger framework of the general data protection regulation[7] that will enter into force next year.

[6] The "group" is defined by reference to the Accounting Directive (Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC), as a group of undertakings which consists of a parent undertaking, its subsidiaries, and the entities in which the parent undertaking or its subsidiaries hold a participation, as well as undertakings linked to each other by a relationship within the meaning of Article 22 of the Accounting Directive.

[7] The Bill 7184 will implement the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data) and will repeal and replace the Luxembourg Law of 2002.

Register of beneficial owners of legal persons and trust register[8]

Trust register

Bill n°7216 establishes the beneficial ownership register on trusts/fiducies. Luxembourg based trustees (fiduciaries) must obtain and keep at their registered office information on the beneficial owners (settlor, trustee, beneficiary, any person exercising control) of the trust/fiducie for which they exercise a fiduciary function. They must provide this information to national authorities and to Professionals when the latter fulfil their CDD obligations. In addition, the bill institutes a trust register to be managed by the Administration of Registration and Domains for any trust that generates tax consequences. A future Grand-ducal regulation will provide further details about the access and consultation of the trust register.

Register of beneficial owners (REBECO)

Bill n° 7217 contemplates the establishment of a register of beneficial owners of Luxembourg legal persons (“REBECO”), to be managed by the company register (RCS). Legal persons will be required to obtain, keep and register the information on their own beneficial owner(s) in the REBECO. The register will be made available to national authorities, to control/self-regulating authorities, to Professionals who are fulfilling their CDD obligations and, provided a strict procedure is followed, to any other person having a legitimate interest. A future Grand-ducal regulation will set out the conditions relating to REBCO access, as well as the accreditation and withdrawal procedure necessary for the authorisation of REBCO access for Professionals.

As a deterrent for the misapplication of the new provisions, both bills sanction violations with hefty fines and other administrative measures. Trustees and legal persons will have six months to implement the trust register and the REBECO, following the entry into force of the laws.

Supervision by authorities

Compliance of Professionals and Luxembourg-based establishments of EU professionals with obligations deriving from the revised AML Law of 2004 will be supervised by control authorities and self-regulating authorities. In addition, control authorities have extended supervisory, investigatory and sanctioning powers.

Sanctions

Any violations to the CDD obligations, to the obligation of having an appropriate internal organisation, or to the obligation of cooperating with the authorities, will constitute administrative or criminal offences. The administrative penalties of Bill 7128 enable the control authorities to suspend or withdraw the authorisation of the person in breach of the law, to apply a temporary ban on the exercise of the profession or to impose administrative fines, which can be as high as 1mio Euro (or 5mio Euro in the case of credit institutions or of financial institutions). The amount of the criminal fines has also increased and now ranges between 12,500 Euro and 5mio Euro. Moreover, the control authorities can name and shame offenders, by publishing any decision that has acquired the authority of a final decision online.

II. Extended scope of the money-laundering offence

Since 1 January 2017[9], the scope of the money-laundering offence has been extended. It now includes, as predicate offences, the criminal offences of aggravated tax evasion and of tax fraud, whether they are committed in relation to direct, indirect, registration or inheritance taxes. In practical terms, this translates into an obligation of the part of Professionals (and ability) to identify money laundering through the prism of these tax crimes, but also to report any suspicious activity, should they believe that their Customers or beneficial owner(s) are laundering money by committing tax evasion or tax fraud or by using the proceeds deriving from or connected to these tax crimes.

III. Tax authorities’ enhanced access to the beneficial ownership information

Professionals should be aware of a new bill[10] which, in its form at the time of writing, provides that the Luxembourg tax authorities (“LTAs”) can, in the context of their controls, access beneficial ownership information held by Professionals. The controls in question concern the application of the exchange of information and are performed within the framework of European and international administrative cooperation.

The LTAs’ (i.e. the Administration of the direct contributions, Administration of the Registration and the Domains, Administration of Customs and Excise) control, and thus access to anti money-laundering information, may be exercised under any of the following:

- a bilateral convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital;
- a Bilateral Agreement on Exchange of Information in Tax Matters;
- the Law of 21 July 2012 on mutual assistance for the recovery of claims relating to taxes, duties and other measures in the European Union;

[8] The new bills n° 7216 relating to the trust register and n° 7217 relating to the beneficial owners register have been lodged with the House of Representatives on 6 December 2017. We will monitor closely their adoption and publication.
[9] The Law of 23 December 2016 implementing the tax reform 2017 has amended the Criminal Code in order to include the above mentioned predicate tax offences in the scope of the money-laundering offence.
[10] Bill n° 7208 introduced in November 2017 relating to the tax authorities’ access to the information relating to the fight against money-laundering and implementing the Council Directive (EU) 2016/2258 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities.

- the amended law of 29 March 2013 on administrative cooperation in the field of taxation;
- the law of 26 May 2014 approving the Convention on mutual administrative assistance in tax matters and its amending protocol, signed in Paris on 29 May 2013 and amending the general tax law;
- the law of 24 July 2015 relating to FATCA;
- the law of 18 December 2015 on the Common Reporting Standard (CRS); or
- the law of 23 December 2016 relating to Country-by-Country reporting (CbCR).

The LTAs shall have access to AML mechanisms, procedures, documents and information that are to be put in place by the future version of the AML Law of 2004. As such, from 1 January 2018 the LTAs will have access to:

- general CDD measures taken by professionals subject to the AML Act of 2004 (i.e., identification of customers; identification of UBOs - including trusts, foundations; assessment of the nature of and object of the business relationship with the Customer; constant CDD measures) - and therefore to the documents that Professionals are obliged to produce and to the information they must collect and store to prove that they have taken such measures;
- the measures, information, documents relating to beneficiaries of payments made under a life insurance policy;
- the measures, information, documents relating to beneficiaries of payments made by fiducies, trusts and similar legal constructions; and
- the documents, data and information that the AML Act of 2004 requires professionals to keep (concerning customers, beneficiaries and transactions) for 5 years or more.

The Council Directive (EU) 2016/2258 provides that the tax authorities should also be granted access to the central register of beneficial owners and the central register of trusts/fiducies. The recent Government bills might include provisions in this respect.

IV. The next steps

Despite the uncertainty surrounding the implementation date and the final version, Luxembourg professionals should:

- closely monitor the implementation of 4th AML Directive and of the GDPR into Luxembourg law;
- identify and assess the risks specific to their own activities and Customers and document that risk assessment exercise;
- update the internal organisation and implement group-wide measures if required;
- review the beneficial ownership checks performed by group entities or third parties in order to ensure they can be relied upon;
- review Customers' files in order to correctly identify all beneficial owners, considering the definitions and categories newly introduced by the Bill;
- prepare the relevant beneficiary ownership information in order to be able to register it in the trust register/REBECO on time;
- inform the Customers about data processing and their rights with respect to personal data;
- train staff on AML-TF and GDPR matters;
- monitor the developments on the 5th AML Directive (aiming to decrease the threshold for the identification of beneficial owners to 10% and to open the access to central registers to the public);
- be mindful of the Brexit effect: even if the UK has already implemented the 4th AML Directive and is a member of the FATF, it will become a non-EU country in 2019. As a consequence, it will be necessary to reconsider group-wide policies and procedures with regards to protection and sharing of data with UK entities, the reliance on the CDD performed by UK entities, while maintaining the application of the most stringent standards in the fight against ML-TF.

We can help you prepare to comply with your professional obligations by delivering tailored guidance on implementation, preparing appropriate documentation, conducting suitable staff training and assisting you in the application of compliance measures.

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