

Tax transparency and fight against aggressive tax planning

At the European Council in June 2000, the member states reach agreement that the European Union should work towards full implementation of the exchange of information between tax authorities. The 2008 economic and financial crisis hastens the move towards tax transparency and the fight against aggressive tax planning.

This topic presents Luxembourg's efforts in order to bring its entire body of tax agreements in line with the international standard, as well as its measures taken in the context of the fight against aggressive tax planning.

2000-2010

Progress in fiscal transparency at EU level can be traced back to the Santa Maria da Feira European Council (under the Portuguese Presidency), which took place on 19 and 20 June 2000. At this European Council, the member states reached agreement that the European Union should work towards full implementation of the exchange of information between tax authorities, and that this exchange of information should be automatic.

On the basis of this agreement, Council Directive 2003/48/EC of 3 June 2003, known as the 'Savings Directive', was adopted. It introduces an automatic exchange of income generated by interests on savings. Twelve of the then fifteen member states implemented this system for the automatic exchange of savings information, while Luxembourg, Austria and Belgium applied a transitional system involving a withholding tax.

The 2008 economic and financial crisis hastened the move towards tax transparency, and efforts were stepped up to combat tax evasion by giving it an international dimension. In March 2009, Luxembourg announced that it would align itself with the standard for the exchange of information on request as laid down in the OECD model agreement. The government then embarked on negotiations with around ten partner countries with the aim of concluding and amending agreements to avoid double taxation, which were approved by the Law of 31 March 2010. Since then, Luxembourg has brought its entire body of tax agreements in line with the international standard.

2011-2013

At the European level, provisions for administrative cooperation on tax matters were laid down in a new directive, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, which provided for the exchange of information on request, automatic exchange and spontaneous exchange between member states' tax authorities from 1 January 2013.

Moreover, in May 2013, Luxembourg signed the Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters and its Protocol (ratified by the Law of 26 May 2014) to facilitate international administrative cooperation in the area of taxation.

That same year, Luxembourg became involved in the work on the OECD Action Plan, commissioned by the G20, for the development of measures to curb base erosion and profit shifting (BEPS). The plan was adopted by the G20 leaders in September 2013.

2014

In late March 2014, Luxembourg and the United States signed the intergovernmental agreement known as 'FATCA' (Foreign Account Tax Compliance Act), which provides for the automatic exchange of information between the Luxembourg and US tax authorities. The agreement was transposed into national legislation by the Law of 24 July 2015. This transition to the automatic exchange of information between tax administrations provided crucial impetus at international level and paved the way for a worldwide initiative.

With the support of the G20, the OECD developed a single global standard known as the CRS (Common Reporting Standard), which provides for the automatic exchange of financial account information and is largely inspired by. The CRS was approved by the OECD Council on 15 July 2014 and endorsed by the Finance Ministers at the G20 Summit on 20 and 21 September 2014 in Cairns.

On 28 and 29 October 2014, Luxembourg signed a multilateral agreement in Berlin between competent authorities on the implementation of the new global standard and agreed to apply automatic information exchange from 2017 onward.

At the same time, the European Union adopted Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, which introduced the automatic exchange of financial account information between Member States.

The Luxembourg Government, together with the other member states, is therefore firmly committed to the adoption of the OECD's rules on the automatic exchange of information as a new global standard; it transposed Directive 2014/107/EU into national legislation with the Law of 18 December 2015 (see under 2015). Via these initiatives, Luxembourg, along with around fifty other OECD countries applying the exchange of information as laid down in the CRS, is an 'early adopter'.

With regard to the exchange of information on request, the Global Forum recognised all the measures introduced by the Luxembourg Government, especially the adoption in July 2014 of the Law on the immobilisation of bearer shares and units and the Law of 25 November 2014 laying down the procedure applicable to the exchange of information on request in tax matters, and raised the country's rating on transparency and exchange of information for tax purposes to 'largely compliant'.»).

Among the reforms adopted in 2014, two measures to combat aggressive tax planning should also be mentioned in particular. On the one hand, the amended General Tax Law of 22 May 1931 ('Abgabenordnung') has been supplemented by paragraph 29a in order to **provide a better framework for advance tax rulings**, with the aim of making the procedure more readable and transparent. The reform aims to reflect and formalise existing practice, while at the same time improving the dialogue between the administration and the taxpayer and ensuring legal certainty in international economic affairs.

On the other hand, the amended law of 4 December 1967 on income tax has been amended to introduce a new Article 56 devoted entirely to the **arm's length principle**, in order to enhance legal certainty and clarity of Luxembourg legislation in the field of transfer pricing.

2015

With the objective of introducing into Luxembourg domestic law the **new global standard for automatic exchange of information** developed by the OECD and approved by the G20, the **amended Law of 18 December 2015 on the Common Reporting Standard (CRS)** aims to transpose Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards the automatic and compulsory exchange of information in the field of taxation (commonly referred to as '**DAC2**'). Directive 2014/107/EU aligns EU legislation on the automatic exchange of information in the tax area with the standard developed by the OECD, namely the 'Common Reporting Standard' ('NCD').

The Luxembourg Presidency of the Council of the European Union in 2015 made fighting fraud and tax evasion one of the priorities of its work programme. Transparency and the establishment of a level playing field on a global scale are vital if these efforts are to prove effective.

During the Luxembourg Presidency of the Council of the European Union, a unanimous agreement was reached by the member states on 6 October 2015 to strengthen cooperation between them with respect to taxation and to discourage the abusive use of advance tax rulings. This led to the adoption of Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, which was transposed into national legislation by the Law of 23 July 2016 (see under 2016) concerning the automatic exchange of information with respect to tax rulings and advance pricing agreements.

Through the law of 18 December 2015 concerning the State revenue and expenditure budget for the financial year 2016, Luxembourg **repealed the tax regime in favour of intellectual property (Article 50bis L.I.R.)**, in order to follow up on the agreement that was reached both at the OECD and at the European Union level on the modified nexus approach for intellectual property regimes. The repeal of the IP regime takes into account the OECD final report on Action 5 of the BEPS Action Plan ('Base erosion and profit shifting') which details the modified nexus approach for IP regimes, published on 5 October 2015.

By means of the **Law of 18 December 2015 transposing Council Directive 2014/86/EU** of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, and Council Directive 2015/121/EU of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, Luxembourg has incorporated into its national law **two specific anti-abuse clauses relating to the tax regime applicable to parent companies and subsidiaries.**

On the one hand, the aim is to eliminate situations of double non-taxation of profits resulting from the asymmetry of the tax treatment applied to profit distributions between Member States.

On the other hand, Luxembourg has incorporated into its domestic law a minimum common anti-abuse rule to avoid any misuse of Directive 2011/96/EU. The introduction of a minimum common anti-abuse rule thus aims at ensuring greater homogeneity in the application of Directive 2011/96/EU.

The adoption of the OECD BEPS Action Plan by G20 Finance Ministers took place at a meeting on 8 October 2015 in Lima, Peru. At this meeting, the EU Council was represented by the Luxembourg Minister of Finance. The plan provides for 15 actions that have been successively implemented by Luxembourg during the years 2016 to 2020 through the adaptation of its legislative and regulatory framework.

2016

Through the Law of 23 July 2016, Luxembourg transposed **Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU** as regards the automatic and compulsory exchange of information in the field of taxation and amending the amended Law of 29 March 2013 on administrative cooperation in the field of taxation. During the Luxembourg Presidency during the second half of 2015, the Council of the European Union adopted the above-mentioned Directive (commonly known as '**DAC3**') which introduced the automatic and compulsory exchange of information on advance tax rulings within the Union as of 1 January 2017.

The scope of the **automatic exchange has thus been extended to cover advance tax rulings** in cross-border cases and advance pricing agreements issued, modified or renewed in respect of a specific person or group of persons and on which that person or group of persons is entitled to rely, regardless of whether or not they are binding and how they are issued.

On January 27, 2016, Minister of Finance Pierre Gramegna signed the Multilateral Agreement Among Competent Authorities on the Exchange of Declarations on a Country-by-Country Basis, a further key step towards global tax transparency. The Country-by-Country Reporting is a step forward in strengthening cooperation and exchange of information, this time in the area of transfer pricing documentation for multinational enterprises. The latter is the result of Action 13 of the OECD's BEPS project, and was introduced by European Council Directive 2016/881 of 25 May 2016 (commonly known as «**DAC4**») amending Directive 2011/16/EU as regards the automatic and compulsory exchange of information in the field of taxation, and transposed into national law by the Law of 23 December 2016.

Thus, multinational enterprises are obliged to prepare transfer pricing files for submission to the tax authorities. Local entities constituting a multinational group with a turnover of more than €750 million are required to transmit local transfer pricing files to their tax administrations, while their ultimate parent entities transmit a «country-by-country» report in which they provide aggregated information on their financial and tax situation (including rulings). This report is then exchanged between the tax authorities of the countries in which the group's constituent entities are established.

Luxembourg has also incorporated into national law by the law of 23 December 2016 a new additional provision on transfer pricing, namely article 56bis L.I.R.. In accordance with the new standards adopted under the BEPS Transfer Pricing Action Plan, this contains the basic principles to be observed in the context of a transfer pricing analysis concerning the technique to be used and the methodology to be adopted in order to be able to determine the arm's length price on transactions between related undertakings.

Through the law of 23 December 2016, Luxembourg has also introduced two specific measures in the context of the fight against tax fraud.

Criminal tax law has been adapted to international standards which had evolved considerably at the level of the Financial Action Task Force (FATF) and European law to strengthen the fight against tax fraud. Three forms of tax fraud are to be distinguished since 2017, namely simple tax evasion, aggravated tax evasion and tax fraud.

As a result of the changes made to criminal tax law, the 2017 tax reform also adapted the amended law of 19 December 2008 on inter-administrative and judicial cooperation and the strengthening of the resources of the Direct Taxation Administration, the Registration and Domain Administration and the Customs and Excise Administration. This new provision ensures that following the extension of the offence of money laundering to criminal tax offences under the Act of 23 December 2016, the Financial Intelligence Unit may request information from the tax authorities that is likely to be useful when it carries out an analysis for money laundering or terrorist financing. Likewise, the judicial authorities may also, following this change, transmit to the Direct Taxation Administration and the Registration and Domain Administration any information that may be useful in the exercise of the tasks assigned to these tax administrations.

2018

With regard to administrative cooperation in the field of taxation, the adaptations necessary to ensure the transposition of the Directive (EU) 2016/2258, commonly known as «DAC5», ensuring access for tax authorities to information relating to the fight against money laundering, were implemented by the law of 1 August 2018.

The year 2018 was also marked by the adoption of the law of 21 December 2018 which transposed into national law the directive commonly known as ATAD 1 («Anti Tax Avoidance Directive»). Following on from the BEPS actions drawn up in autumn 2015 by the OECD, the European Commission presented its Anti Tax Avoidance Package on 28 January 2016, which aims to provide a coordinated European Union response to the problem of corporate tax evasion. The package includes concrete measures to combat aggressive tax planning, improve tax transparency and establish fair tax competition for all companies in the EU. The aim of the ATAD Directive is a coherent, coordinated and flexible implementation through secondary («hard law») implementation of certain commitments made by Member States at OECD level in the framework of the BEPS Action Plan. To this end, the measures contained in the ATAD set out the minimum rules allowing each Member State to go further in national implementation.

The ATAD contains five anti-avoidance measures applicable from 1 January 2019, aimed at combating the phenomena of erosion of the tax base and profit shifting. Three of the five measures are directly derived from the OECD BEPS Action Plan; the other two measures are inspired by the proposed Common Consolidated Corporate Tax Base Directive («CCCTB») in the old version published in 2011:

Limitation of interest deductibility. This measure is intended to discourage companies from setting up artificial debt arrangements in order to minimise their tax burden through tax-deductible interest payments.

Controlled Foreign Company Rule (CFC). This measure aims to avoid the transfer of profits from the parent company established in a high tax country to controlled subsidiaries located in low or zero tax countries in order to reduce the tax burden of the group.

Hybrid schemes: The aim is to prevent companies from exploiting asymmetries arising from the application of national laws in several countries to evade taxes.

The ATAD Directive has been supplemented by specific provisions at the level of hybrid instruments by the so-called ATAD 2 Directive, which aims at extending the application of anti-hybrid rules to third countries. The aim of this directive is to combat hybrid arrangements resulting from differences in the legal classification of payments (financial instruments) or organisations, including in relations with third countries.

Imposition à la sortie: L'objectif de cette mesure mais de la directive ACCIS, a pour objectif d'empêcher les entreprises de délocaliser leurs actifs dans le seul but d'éviter l'impôt.

General anti-abuse clause: This measure targets artificial tax arrangements where no other specific anti-abuse rules exist and serves as a safety net in cases where other anti-abuse provisions cannot be applied.

In addition to the strict transposition of the ATAD Directive, the Luxembourg transposition law also provides further details to two legislative provisions, whose interpretation by taxpayers may have encouraged the introduction of practices which erode the tax base and the transfer of profits, or even lead to situations of non-taxation of certain income.

2019

In 2019, Luxembourg was subject to review by the OECD Global Forum Peer Review Group on transparency and exchange of information for tax purposes.

The efforts undertaken by Luxembourg in the field of fiscal transparency during the last legislature have been fruitful. Luxembourg has been awarded the overall rating of «largely compliant» with the international standard of transparency and exchange of information on request. The Global Forum's report, published on 18 March 2019, highlights that Luxembourg has correctly applied the international standard for exchange of information on request during the evaluation period, both from a legislative and practical point of view.

The year 2019 was also marked by new measures in the fight against tax fraud, tax evasion and aggressive tax planning.

Following the transposition of the ATAD I Directive by the law of 21 December 2018, the law of 26 April 2019 made fundamental changes to Article 164bis L.I.R. concerning the tax consolidation regime allowing the application of the rule limiting the deductibility of interest at group level for companies under the tax consolidation regime.

The law of 20 December 2019 transposed into national law Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 with regard to hybrid devices involving third countries, the so-called ATAD 2 Directive.

Indeed, the ATAD 2 Directive is intended to supplement the provisions of ATAD 1 and contains measures to neutralise hybrid devices involving third States. The text of TA TAA 1 is limited to rules aimed at neutralising certain hybrid arrangements (hybrid entities and hybrid financial instruments) exploiting differences between the tax provisions of two Member States.

The text of ATAD 2, approved by Finance Ministers at the ECOFIN meeting on 21 February 2017, tackles hybrid arrangements between Member States and third countries and extends the scope of ATAD to other hybrid arrangements (hybrid permanent establishments, imported mismatches, hybrid transfers, dual resident entities).

In addition, the law of 20 December 2019 concerning the State revenue and expenditure budget for the financial year 2020 provides that any advance ruling issued prior to 2015 to be terminated at the end of the 2019 tax year. This limitation is therefore intended to ensure that the condition of a maximum validity period of 5 tax years also applies to advance rulings issued before 1 January 2015.

At the end of 2019, the legislator also transposed Council Directive (EU) 2017/1852 of 10 October 2017 on the mechanisms for settling tax disputes in the European Union by the law of 20 December 2019 establishing a mechanism for settling tax disputes. This Directive is more specifically based on Action 14 of the OECD BEPS Action Plan. The objective of the law is therefore to set up, under Luxembourg law, a procedure for the settlement of tax disputes concerning disputes that may arise between Member States of the European Union in connection with the divergent interpretation or application of agreements and conventions providing for the elimination of double taxation in the field of taxes on income and, where applicable, on capital or with the arbitration convention of the Union and which are likely to result in double taxation.

Another measure developed in the framework of the BEPS Action Plan was adopted by the legislator by the law of 7 March 2019 approving the Multilateral Convention. Action 15 led to the Multilateral Convention for the Implementation of Measures Relating to Tax Treaties to Prevent the Erosion of the Tax Base and the Transfer of Profits (hereafter «Multilateral Convention»). Given that the number of bilateral tax treaties in force based on or inspired by the OECD Model Tax Convention is estimated to be over 3,000, implementation required an effective and timely specific instrument to take into account the remedial measures from the BEPS Action Plan to be introduced in tax treaties. The main objective of the Multilateral Convention is therefore to amend existing bilateral tax treaties in a timely and effective manner in order to implement the measures relating to the tax treaties developed during the BEPS Action Plan without having to devote additional resources to renegotiate each of the existing treaties bilaterally.

2020

In February, Luxembourg had the opportunity to host the 34th meeting of the Peer Review Group of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes. The meeting was attended by around 100 delegates.

In March, the Chamber of Deputies adopted the law on cross-border devices subject to a declaration transposing Directive (EU) 2018/822 , commonly referred to as «DAC6». It imposes declaration obligations on intermediaries who design, market or organise cross-border tax planning arrangements that are potentially aggressive for their clients. The law entered into force on 1 July 2020.

2021

It is also worth mentioning the law passed on 28 January 2021 amending the amended law of 4 December 1967 on income tax, related to the work launched at European level on the EU list of non-cooperative countries and territories for tax purposes (hereafter «UE list»). The objective of the law is to introduce a specific rule of non-deductibility of interest or royalties paid or due to a related company established in a country or territory on the EU list.