

# ATOZ NEWS

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## Administrative Tribunal ruling on tax treatment of share-premium repayments raises questions

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On 25 March 2026, the Luxembourg Administrative Tribunal (the “**Tribunal**”) delivered a ruling on the tax treatment of a repayment of share premium carried out in the absence of a concomitant reduction of share capital within the meaning of Luxembourg Law of 10 August 1915 on commercial companies (the “**Company Law**”). The Tribunal held that such a repayment does not fall within the scope of Article 97(3)(b) of the Luxembourg Income Tax Law (“**LITL**”), which explicitly provides that certain allocations, such as the repayment of the share capital, are not to be regarded as income from movable capital.

Instead, the Tribunal characterised the repayment of share premium as income derived from a participation within the meaning of Article 97(1)(1) of the LITL, on the basis that it constituted “a product” allocated by reason of the shareholder’s participation. As a result, the Tribunal concluded that the repayment of share premium was subject to withholding tax (“**WHT**”) pursuant to Article 146 of the LITL.

Although the facts of the case were case-specific, the judgment – reached in a surprising and questionable decision – has broader implications. It adopts a strict and narrowly circumscribed interpretation of Article 97(3)(b) of the LITL, a very broad interpretation of the scope of Article 97(1)(1) of the LITL, and clearly rejects any attempt to rely on economic substance or foreign tax concepts to depart from the statutory framework established under Luxembourg tax law.

In this News, we analyse the decision and discuss its alignment with the parliamentary work on Article 97 of the LITL.

### Background and facts

A Luxembourg public limited liability company (“**LuxCo**”) created a share premium reserve in connection with its stock exchange listing and subsequent capital increases. This reserve was initially used to offset accumulated losses and was later reconstituted through allocations of profits.

At its ordinary general meeting of 10 April 2019, LuxCo resolved to lawfully refund part of its share premium to its shareholders (the “**Refund**”), without implementing a formal reduction of share capital within the meaning of the Company Law.

The Luxembourg tax authorities (“**ACD**”) rejected an advance tax ruling request seeking confirmation that the Refund constituted a non-taxable repayment of contributions.

The ACD issued a final tax assessment under which the Refund was subject to WHT under Article 146 of the LITL, which LuxCo challenged before the Tribunal.

## Positions of the parties

### POSITION OF THE TAXPAYER (LUXCO)

LuxCo argued, *inter alia*, that the Refund at issue constituted a repayment of contributions, more specifically a repayment of share premium, and therefore did not qualify as taxable income. It maintained that Article 97(3)(b) of the LITL, although referring to the notion of “share capital”, should in reality be interpreted as encompassing equity constituted by shareholders’ contributions, rather than being limited to the share capital in the strict Company Law sense.

In this respect, LuxCo relied on case law of the Administrative Court which, according to it, confirms that this provision targets “fiscal capital”. It further maintained that Article 97(3)(b) of the LITL should extend to shareholders’ contributions irrespective of the implementation of a formal reduction of share capital, and that the origin of the distributed funds should prevail over the principle of tax annuality.

LuxCo additionally emphasised that, according to the relevant parliamentary preparatory documents, Article 97 of the LITL – proposed by the Council of State – was intended to reproduce, while refining them, the solutions established under prior legislation. In this context, LuxCo relied on a professorial opinion expressed during the legislative process, according to which the paragraph 3(b) is intended to cover allocations made to shareholders as repayment of the countervalue of the contributions they have made.

LuxCo also argued that the distribution resulted from a decision to reduce its equity and was supported by serious and legitimate economic reasons. In particular, it contended that:

- the equity concerned was no longer required following the end of a crisis period,
- a restructuring had been implemented with a view to
  - concentrating activities and prioritising certain investments,
  - reducing its turnover while increasing its profit margin and focusing on internal growth, and
- the reduction of equity would allow an improvement of the return on equity (ROE).

LuxCo further contended that subjecting such a repayment to taxation would be contrary to economic common sense, and submitted that the German principle of the non-taxable repayment of contributions ought to apply by analogy under Luxembourg tax law.

### POSITION OF THE TAX AUTHORITIES (ACD)

The ACD considered that, in order to benefit from non-taxation, a repayment of capital must meet certain conditions under Article 97(3)(b) of the LITL. It maintained that, in the case at hand, no reduction of share capital had been carried out within the meaning of Company Law, with the result that the conditions for the application of that provision were not satisfied.

The ACD took the position that the amounts refunded to the shareholders originated in profits, which had been deliberately allocated to the share premium account prior to their distribution. It argued that such prior allocation did not alter the nature of the payment, which remained a dividend distribution, and could at most be regarded

as a simulation or an abuse of law under §§ 5 and 6 of the *Steueranpassungsgesetz*. The corporate documentation further confirmed the clear intention of LuxCo to distribute profits within the meaning of Article 97(1)(1) of the LITL.

The ACD argued that the taxpayer failed to demonstrate any serious economic reasons justifying the distribution, and even acknowledged the absence of such reasons, as evidenced by the explanations provided during the ordinary general meeting of 10 April 2019.

The ACD also maintained that German tax law and case law were irrelevant for the interpretation of Article 97 of the LITL.

## Decision of the Administrative Tribunal

### STRICT INTERPRETATION OF ARTICLE 97(3)(B) LITL – REDUCTION OF SHARE CAPITAL

As a first step, the Tribunal held that Article 97(3)(b) of the LITL would exclusively apply to allocations that constitute the consideration for a formal reduction of share capital carried out within the meaning of Company Law.

In this respect, it emphasised that:

- Neither the LITL nor the Company Law qualifies the share premium as part of share capital.
- Although share premium forms part of equity, it remains legally distinct from share capital.
- Parliamentary preparatory works (1967) relating to Article 97 of the LITL (the “**Preparatory Works**”) confirm that repayments not taking the form of a regular share capital reduction remain taxable in all circumstances.

The Tribunal also expressly rejected any assimilation of share premium to “fiscal capital” and clarified that earlier case law relied upon by LuxCo did not define capital for the purposes of Article 97(3)(b) of the LITL.

### BROAD APPLICATION OF ARTICLE 97(1)(1) LITL – INCOME FROM MOVABLE CAPITAL

As a second step, the Tribunal concluded that an isolated repayment of share premium without a capital reduction falls within Article 97(1)(1) of the LITL, which encompasses “dividends, profit shares and **other products** allocated, in whatever form, by reason of a participation”.

According to the Tribunal, this provision is deliberately drafted in broad, residual terms, covering any allocation to shareholders made at the expense of net invested assets, unless it falls within the exhaustive exceptions of Article 97(3) of the LITL.

Thus, according to the Tribunal, as the disputed Refund was made at the expense of LuxCo’s net assets, did not affect the substance of the participation, and did not qualify for any of the specific exclusions provided in Article 97(3)(b) of the LITL, it constituted an “other product” allocated by reason of the participation, subject to withholding tax under Article 146 of the LITL.

The Tribunal drew a conceptual distinction between a product, which represents a flow derived from the participation without affecting its legal substance, and a restitution of capital, which directly affects the substance of the participation, notably through a reduction of share capital.

In the case of a share premium repayment made outside a formal reduction of share capital:

- shareholders’ rights remain unchanged,
- the participation is neither cancelled nor reduced, and

- any decrease in value is merely a fluctuation during the holding period.

Moreover, the Tribunal assumes<sup>1</sup> that the Refund does not adjust the acquisition price of the participation, confirming, according to the Tribunal, its classification as a taxable product, rather than a tax-neutral restitution of capital.

Finally, the Tribunal expressly rejected LuxCo's reliance on German legislation, case law and doctrine, holding that such sources are devoid of legal value in Luxembourg domestic law. The Tribunal further held that economic common sense, as a subjective notion, cannot replace or override statutory provisions.

## Analysis

### OPENING COMMENTS

While the Tribunal's conclusions may be understood in light of certain extracts from the Preparatory Works, its reasoning does not reflect a comprehensive legal analysis of those materials. In particular, the Tribunal's assessment appears to have been taken out of context, as it fails to consider the Preparatory Works in their entirety. Consequently, the restrictive aspects of its interpretation cannot be endorsed.

It is therefore preferable to clarify that, although certain passages of the Preparatory Works may explain the Tribunal's reasoning, such an interpretation cannot be upheld, as it overlooks other equally relevant extracts which support a broader reading of the provision and, more importantly, allow the overall coherence of Article 97 of the LITL to be preserved.

### ARTICLE 97(1)(1) OF THE LITL COVERS INCOME FROM PARTICIPATION AND NOT CAPITAL REPAYMENT

The Tribunal mainly based its conclusion that the share premium repayment is, in principle, taxable based on an extract of the Preparatory Work on the scope of Article 97(1)(1) of the LITL according to which "any allocation to shareholders charged against the net invested assets is taxable as capital income" and that this provision does not provide an exhaustive or limiting list of items qualifying as capital income.

However, the conclusions reached by the Tribunal appear difficult to reconcile with the statements set out a few paragraphs earlier in the Preparatory Works on Article 97(1)(1) of the LITL, which clearly conceive the shareholder as a capital investor (capitalist) subject to taxation **solely in respect of amounts allocated as income derived from the participation**, i.e. as remuneration for the capital contributed or maintained at the disposal of the company.<sup>2</sup>

A reading of Article 97(1)(1) of the LITL in light of the Preparatory Works on the categories of entities giving rise to income taxable under this provision, also strongly suggests that the legislator intended to **target income arising from profit distributions**, thereby conceptualising taxable capital income as the remuneration of capital invested in the entity. In the same vein, the Preparatory Works emphasise that taxable income consists of "dividends" and "analogue distributions", while specifying that such distributions are **always charged against the net invested assets** of the company.

This formulation evidences a clear nexus between taxable income and the distribution of profits – whether express or concealed – realised at the level of the entity, thereby excluding repayments of capital from its scope. Given that Article 21 of the LITL defines net invested assets as comprising fixed assets, current assets (including receivables and cash), and liabilities to third parties, the assertion that "any allocation to shareholders charged against the net invested assets is taxable as capital income" cannot be interpreted as encompassing a return of

<sup>1</sup>This assumption seems incorrect. If it is a repayment of capital, it should reduce the acquisition costs/book value of the shareholdings and therefore directly impact future capital gains of the shareholders (for example). This point will be addressed in a separate publication.

<sup>2</sup>"Dans ces sociétés le sociétaire est considéré en conséquence, par le n°1 de l'article 114, comme capitaliste imposable uniquement du chef des sommes a lui allouées en rémunération des capitaux mis ou laissés à la disposition de la société" (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.292)

capital. Indeed, a company's capital – whether in the form of share capital or otherwise – does not constitute part of its net invested assets.

The Preparatory Works further confirm that the taxable event under Article 97(1)(1) of the LITL is therefore not the mere receipt of funds, but the qualification of those funds as a yield generated by a participation.<sup>3</sup>

An income from participation should thus be understood as the **return generated by investments** in movable capital, irrespective of the form the return takes,<sup>4</sup> and encompasses several distinct categories of income. The Preparatory Works provide various examples of such returns, all of which result in an accretion to the shareholder's assets or stem from profit distributions, and none of which resemble a mere repayment of capital contribution.

From this perspective, the notion of “other products” under Article 97(1)(1) of the LITL does not extend to all payments made by a company to its shareholders, but is restricted to those distributions that represent the economic yield of the participation, as opposed to the restitution to its contributor of the capital contribution itself.<sup>5</sup> While the Preparatory Works note that the **yield derived from a participation may take forms other than the customary ones**, this statement fully explains – and exhausts – the rationale for the statutory inclusion of “other products”.<sup>6</sup> Conversely, that extension is not intended to encompass repayments of capital contributions to their contributors when they do not represent the economic yield of the participation.

For the purpose of Article 97(1)(1) of the LITL, the concept of “allocation”, as reflected in extracts of the Preparatory Works relied upon by the Tribunal, should thus be understood as income derived from a participation<sup>7</sup> only to the extent it remunerates capital invested by the shareholders.<sup>8</sup> Such allocation should result in an accretion to the shareholder's assets rather than constitute a repayment of an investment.

Against this background, the repayment of share capital or of capital contributions – whether recorded as share premium or booked to account 115 – does not constitute, in principle, a return on capital but rather a restitution of the invested capital itself, affecting the substance of that investment. In this respect, and contrary to the Tribunal's general assertion that the Refund did not affect the acquisition price of the participation, a repayment of capital to the contributing shareholder should reduce the acquisition cost (or book value) of the shareholding and, accordingly, directly impact the computation of future capital gains (for example).

As such, the repayment of share capital or of capital contributions should fall outside the notion of “income derived from the participation” and, consequently, outside the material scope of Article 97(1)(1) of the LITL. This distinction is expressly articulated by the legislator who emphasises, in the Preparatory Works, that “the treatment of capital is considered separately from that of the product”.<sup>9</sup>

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<sup>3</sup>Example: “**Ne sont pas des revenus de capitaux** les parts de bénéfice de l'associé commandité de la société en commandite par actions, lorsque ces parts ne constituent pas la rémunération de la participation au capital-actions” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.293).

<sup>4</sup> “Le produit de la participation peut affecter une forme différente des formes usuelles précitées. C'est pour cette raison que le texte englobe de façon formelle les autres **produits**”. (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.293).

<sup>5</sup> “La désignation du produit est indifférente. Le produit peut consister en une distribution de marchandises à ses sociétaires par une société qui fait usuellement le commerce de ces marchandises, ou même en l'allocation d'éléments désaffectés de l'actif net investi. Un produit peut consister aussi en une prestation gratuite de la société au profit d'un sociétaire. Les “autres produits” comprennent aussi les distributions occultes, c'est-à-dire les avantages alloués sous une forme telle qu'ils n'apparaissent pas ouvertement comme distributions” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.293).

<sup>6</sup> “Le produit de la participation peut affecter une forme différente des formes usuelles précitées. **C'est pour cette raison que le texte englobe de façon formelle les autres produits**”. (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.293).

<sup>7</sup>The notion of “participation” should be understood in a broad and general sense.

<sup>8</sup> “L'article 114 concerne les revenus de capitaux. Les revenus de capitaux sont en principe les produits des placements de toute nature de capitaux mobiliers” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.291).

<sup>9</sup> “Le sort du capital est considéré séparément de celui du produit” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.292).

See also in this sense “A l'endroit des revenus de capitaux, par contre, **la distinction entre capital et revenu doit être observée le plus strictement possible** parce que, d'une part, il est de la nature économique du capital mobilier de produire des revenus sans que, de ce fait, le fonds soit soumis à dépérissement et parce que, d'autre part, la prise en considération des fluctuations de valeur des placements

## ARTICLE 97(1)(1) OF THE LITL IS NOT A RESIDUAL “CATCH-ALL PAYMENT” PROVISION

The Tribunal reasons that, because the disputed payment does not qualify for any of the exclusions listed in Article 97(3) of the LITL, it must necessarily fall within Article 97(1)(1) of the LITL as an “other product” allocated by reason of the participation. In other words, the Tribunal appears to treat Article 97(1)(1) of the LITL as a residual provision, applicable to any payment/allocation made by a company to a shareholder unless expressly excluded. This reasoning is, however, overly reductive or inappropriate.<sup>10</sup>

As explained above, Article 97(1)(1) of the LITL defines income from movable capital by reference to dividends, profit shares and other products allocated by reason of a participation, the defining element being not payment as such, but the circumstance that the payment represents a yield generated by the capital committed to the company. The decisive step in the analysis must therefore be to determine whether the payment in question **qualifies as income in substance**, namely as a yield generated by the participation. Taxation thus arises only if that qualitative condition is met.

In addition, to preserve the coherence of Article 97 of the LITL, paragraph 3 should not be construed as defining the scope of paragraph 1 by setting out “exclusions” from that paragraph, nor as establishing exemptions from a general principle of taxation, as certain extracts of the Preparatory Works might suggest. Rather, it also serves to identify specific situations that are expressly immunised from taxation. In this respect, the Preparatory Works themselves characterise various cases referred to under paragraph 3, as instances of “immunisation”. Accordingly, the absence of a specific immunisation cannot, in itself, transform a payment that does not qualify as income under Article 97(1)(1) of the LITL into taxable income.

Therefore, Article 97(1) of the LITL is not a residual provision taxing all payments not expressly “excluded” or “immunised”; it applies only to **income**, understood as a return on capital. More precisely, a repayment of capital that does not constitute such a return cannot be classified as “other product” merely because it is not listed by Article 97(3) of the LITL.

## OBJECTIVE OF ARTICLE 97(3)(B) OF THE LITL: THE ROLE OF ECONOMIC SUBSTANCE

In relation to Article 97(3)(b) of the LITL, the Preparatory Works also show why – contrary to the Tribunal’s apparent generalisation – repayments of capital (whether through share premium or account 115) are not automatically taxable, but become taxable in particular where they effectively represent a distribution of profits or reserves (i.e. profits from previous years).

The Preparatory Works relating to Article 97(3)(b) of the LITL start from decisive premises: first that “the fact that an **allocation is made by drawing on accounts other than profits**<sup>11</sup> does not prevent the taxation of that allocation”,<sup>12</sup> and second that the mere **designation** of an allocation as a “repayment” or “amortisation” of capital **does not, in itself,**<sup>13</sup> render it non-taxable.<sup>14</sup>

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*mobiliers présumerait l'existence d'une comptabilité encombrante dont on ne saurait imposer la tenue aux simples particuliers*” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.291).

<sup>10</sup>“*Toutes les allocations qu'une société peut faire à ses membres ne constituent pas nécessairement des produits de la participation*” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.295).

<sup>11</sup>This clarifies that the tax treatment of a payment cannot be determined solely by reference to its accounting origin and that a distribution remains taxable where it economically corresponds to a profit distribution, even if formally charged to other accounts. It indirectly confirms that taxation depends on whether the allocation constitutes, in substance, a return on capital (i.e. an economic yield), typically corresponding to profit distributions.

<sup>12</sup>“*Le fait qu'une allocation est faite moyennant prélèvement sur des comptes autres que le bénéfice n'écarte pas l'imposabilité de ladite allocation*” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.297).

<sup>13</sup>Conversely, a repayment of capital is not automatically taxable either.

<sup>14</sup>“*Ainsi, lorsqu'une allocation se présente sous la désignation d'un remboursement ou d'un amortissement du capital, elle n'est pas pour autant à considérer comme allocation non imposable*” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.297).

Taken together, these elements demonstrate that the Preparatory Works reject any **formalistic or purely accounting-based approach**, and instead require an assessment of the **economic nature of the transaction**. Accordingly, the decisive criterion lies in the economic substance of the transaction – namely, whether the allocation corresponds to a genuine repayment of contributed capital or, instead, disguises a distribution of profits or reserves.

If repayments of capital were, as such, taxable in principle, these premises/clarifications would be deprived of purpose, as there would be no need to distinguish between the accounting source, the legal designation, or the economic substance of the allocation.

Therefore, in the case at hand, the central question that ought to have been examined by the Tribunal is whether the share premium – having been used to offset accumulated losses and subsequently reconstituted through allocations of profits – retained the nature of contributed capital, or whether the transaction, in substance, amounted to a distribution of profits or reserves.

#### **ARTICLE 97(3)(B) OF THE LITL AS AN ANTI-AVOIDANCE PROVISION: LIMITS AND CONDITIONS OF CAPITAL REDUCTION IMMUNISATION**

When the Preparatory Works state, as noticed by the Tribunal, that repayments of capital that do not take the form of a regular capital reduction remain taxable in all cases, this statement cannot be read in isolation. A correct interpretation of Article 97(3)(b) of the LITL requires a combined reading of (i) the concept of income under Article 97(1)(1), (ii) the function of paragraph (3)(b) within the structure of the provision, and (iii) the Preparatory Works in their entirety.

Against the background of Article 97(1) of the LITL, as explained above, Article 97(3)(b) of the LITL cannot be understood solely as introducing a narrowly construed exception to a general principle of taxation of capital repayments.

Rather, its function is twofold:

- **confirmatory**, in that it formally recognises that certain capital repayments do not constitute income (without introducing, *a contrario*, a general principle under which capital repayments falling outside its scope would be taxable).
- **protective**, in that it seeks to prevent the misuse of capital reductions as a vehicle for distributing profits free of tax.

#### Confirmatory function

According to the Preparatory Works, Article 97(3)(b) of the LITL “**formally sanctions the tax immunisation of repayments** made through a share capital reduction carried out by a company for economic reasons”, provided that such capital has not been constituted through the capitalisation of reserves.<sup>15</sup> Article 97(3)(b) should not be understood as an exception in the strict sense,<sup>16</sup> but rather as a clarification of a situation in which a payment/allocation will, as a rule, not qualify as income (i.e. immunisation). It organises the conditions under which that non-taxable treatment can be reliably recognised.

#### Protective function

The statement in the Preparatory Works, relied upon by the Tribunal, according to which repayments not effected through a formal capital reduction remain taxable in all cases must therefore be read in context. The same

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<sup>15</sup>“ *Le texte inséré sub b consacre, d'une façon formelle, l'immunisation des remboursements par réduction de capital social opérés pour des raisons économiques par une société de capitaux. Il faut évidemment qu'il s'agisse d'une réduction du capital social dans les formes à ce prévues par les lois concernant les sociétés de capitaux. Il faut, d'autre part, qu'il s'agisse du capital social constitué par les apports des sociétaires, et non pas du capital provenant éventuellement de l'incorporation de réserves en exemption de l'impôt sur le revenu*” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.297).

<sup>16</sup>As genuine capital repayment does not, in principle constitute income, it does not need an exemption. Taxation may nevertheless arise where the transaction, in substance, operates as a distribution of profits or reserves.

Preparatory Works also explain that the designation or accounting source of a payment is not decisive and that taxation depends on whether the allocation economically corresponds to profits or reserves.

They further emphasise that a reduction of share capital must not be carried out, in the presence of distributable reserves or profits, for the sole purpose of avoiding the taxation of distributions. Where distributable reserves exist, the share capital reduction would generally not be considered as justified by serious economic reasons. In that case, the taxation of income cannot, in principle, be circumvented through a repayment of capital, as such transactions may be treated as functionally equivalent to profit distributions, regardless of their legal form. This also explains why a reduction of share capital, to the extent that it reflects previously capitalised reserves, remains taxable. **The Preparatory Works confirm that the legislator's primary concern is to prevent the use of capital repayments as a substitute for taxable profit distributions.**

Against this background, the statement that “the only case in which the repayment of capital does not constitute a taxable advantage for the shareholder is where such repayment constitutes the counterpart of a reduction of share capital” must be read in conjunction with:

- the immediately preceding premises, namely that (i) the fact that an allocation is made by drawing on accounts other than profits does not preclude its taxation, and (ii) the mere designation of an allocation as a “repayment” or “amortisation” of capital does not, in itself, render it non-taxable; and
- the following statement that it is still “necessary that the reduction of share capital is not carried out, in the presence of distributable reserves or profits, for the sole purpose of avoiding the taxation of distributions”.

Taken literally, the statement relied upon by the Tribunal would contradict these same principles. It would elevate legal form to a decisive criterion, despite the Preparatory Works, and Article 97(3)(b) of the LITL itself,<sup>17</sup> expressly rejecting a purely formalistic or accounting-based approach and requiring an assessment of the economic substance of the transaction.

On the contrary, read together, these elements indicate that neither the accounting origin nor the designation of the payment is decisive, and that the reference to a share capital reduction identifies the only situation in which legal form may, in principle, serve as a **reliable indicator**<sup>18</sup> of a genuine capital restitution.

The absence of such formalism is not intended to automatically trigger taxation, but rather to signal that the transaction may have to be subject to closer scrutiny from a substantive perspective. In that context, the reference to a “regular capital reduction” does not deny the non-taxable nature of other forms of genuine capital restitution.

These elements show that the legislator was addressing **specific risks of tax circumvention**. It specifically targets situations in which capital repayments are used as a substitute for taxable profit distributions.<sup>19</sup> Without this anti-abuse provision, therefore, profitable companies could repay share capital instead of paying a dividend, thereby postponing the moment of taxation at shareholder level.

In this context, the view that repayments of capital – whether relating to share capital, share premium or account 115 – are generally taxable unless they fall within a specific statutory case of non-taxation is inaccurate, misleading and inconsistent with a thorough analysis of the Preparatory Works and Article 97 of the LITL. Such an approach gives undue precedence to legal form over economic substance and ultimately risks equating capital

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<sup>17</sup>A formal share capital reduction within the meaning of the Company Law remains taxable when the share capital is constituted by capitalised reserves or when it is not justified by serious economic reasons (i.e. the company has distributable profits).

<sup>18</sup>“Le texte inséré sub b consacre, d'une façon formelle, l'immunisation des remboursements par réduction de capital social opérés pour des raisons économiques par une société de capitaux. Il faut évidemment qu'il s'agisse d'une réduction du capital social dans les formes à ce prévues par les lois concernant les sociétés de capitaux. Il faut, d'autre part, qu'il s'agisse du capital social constitué par les apports des sociétaires, et non pas du capital provenant éventuellement de l'incorporation de réserves en exemption de l'impôt sur le revenu” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.297).

<sup>19</sup>“Les remboursements qui n'affectent pas la forme d'une réduction régulière de capital social restent imposables en toutes hypothèses. Il en est ainsi notamment des amortissements de capital au moyen de réserves ou de bénéfices” (Preparatory Works, Comments on article 114 (now article 97) of the LITL, p.297).

restitution with income distribution, thereby deviating from the conceptual framework and legislative rationale underlying the provision.

### Articulation of form and substance

In order to preserve both the wording of Article 97 of the LITL and the intention reflected in the Preparatory Works, the correct approach should not oppose form and substance, but should articulate them.

A repayment to shareholders should therefore be treated as non-taxable where the following cumulative elements are met:

- Origin of the funds: The amounts distributed correspond to contributions effectively made by the shareholders, and not to profits or reserves (including reserves that are converted into share capital or share premium).
- Impact on the participation: The transaction results in a reduction of the economic substance of the investment (whether or not formally expressed through share capital), as opposed to a mere distribution of yield.
- Absence of abuse indicators: The operation is supported by genuine economic reasons<sup>20</sup> and is not part of a scheme aimed at circumventing the taxation of distributable profits.

### Application to Capital repayments without formal capital reductions

The same analytical framework should apply to repayments of share premium or amounts booked to account 115. Such repayments should not, in itself, suffice to be regarded as taxable merely because they affect the company's net asset or do not qualify as a reduction of share capital within the strict meaning of Company Law. Rather, they should become taxable only where they do not reflect the restitution of contributed capital, but instead stem economically from profits or reserves.

### PARADOXICAL CONCLUSION OF THE TRIBUNAL

Finally, it seems that the Tribunal's conclusion implies that the legal and tax nature of an economic transaction – specifically, the repayment of share premium – can change depending solely on whether it is accompanied by a formal reduction of share capital.

Using this approach, the repayment of contributed funds would be treated as non-taxable restitution of capital when linked to a capital reduction, but as taxable income if carried out without this formality. This leads to form-driven inconsistencies according to which the same transaction could affect the substance of the participation or merely be a product of it, depending not on its economic nature, but on the legal mechanism chosen to implement it.

Such reasoning, which subordinates the distinction between capital and income to corporate formality rather than economic and legal substance cannot be followed. This undermines the differentiation between value fluctuation, capital substance, and taxable yield that the Tribunal claims to uphold, and the coherence of Article 97 of the LITL as a whole.

## Conclusion

In its decision of 25 March 2026, the Luxembourg Administrative Tribunal adopted a strict and formalistic interpretation of Article 97 of the LITL. The Tribunal treated the repayment of share premium, in the absence of a formal share capital reduction, as taxable income from a participation.

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<sup>20</sup>“*Les raisons économiques d'une réduction font généralement défaut, lorsqu'une société procède à une réduction de capital, bien qu'elle possède des réserves importantes, dont elle n'entend pas se dessaisir au profit des sociétaires*”. (Parliamentary work on Comments on article 114 (now article 97) of the LITL, p.297)

This departs from the logic of the Preparatory Works, which confirms that capital repayments are not inherently taxable and that taxation should only arise where a repayment constitutes an economic distribution of profits or reserves, or where there are no reliable indicators of genuine capital restitution.

By effectively subordinating substance to Company Law form, the judgment challenges long-standing principles that distinguish capital restitution from taxable yield, and it may therefore be considered both conceptually and technically questionable.

Given the tension with the Preparatory Works and established principles, the decision may not be the last word on the matter, and further litigation can reasonably be expected. In this respect, it is reported that this decision will be appealed to the Administrative Court.

Ultimately, this decision created much legal uncertainty surrounding a common business transaction, and this uncertainty will persist until the Administrative Court decides otherwise. In the meantime, companies should exercise caution when planning to return capital to their shareholders.

## Questions?



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