

Luxembourg Tax authorities' access to AML information on tax payers

One step further towards more transparency

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On 10 August 2018, new legislation⁽¹⁾ entered into force in Luxembourg which grants to the Luxembourg tax authorities ("LTAs") access to anti-money laundering ("AML") information on taxpayers.

The law implements into Luxembourg law EU Directive 2016/2258 of 6 December 2016⁽²⁾ which ensures tax authorities' access to beneficial ownership information collected pursuant to the AML legislation (so called "Directive on administrative cooperation 5" or "DAC 5").

Background

DAC 5 was adopted in the context of a series of EU directives, the objective of which is to improve administrative cooperation in tax matters between EU countries. DAC 5 is the fourth directive amending the first directive on administrative cooperation in tax matters, i.e. Directive 2011/16/EU (so-called "DAC 1"). So far, DAC 1 has been amended 5 times by the following EU directives:

- Directive 2014/107/EU which introduced an automatic exchange of information on financial accounts and the related account holders - Common reporting standard or "CRS" ("DAC 2"). DAC 2 aims to insure that information on holders of financial accounts is reported to their EU Member State of residence. DAC 2 has been implemented into Luxembourg legislation by the law of 18 December 2015 related to CRS;
- Directive 2015/2376/EU on automatic exchange of tax rulings ("DAC 3"), which has been implemented into Luxembourg law by the law of 23 July 2016;
- Directive 2016/881/EU on automatic exchange of country by country reports ("DAC 4"). DAC 4 has been implemented into Luxembourg legislation by the law of 23 December 2016 related to country by country reporting ("CBCR");
- Directive 2016/2258/EU which ensures that tax authorities have access to beneficial ownership information collected pursuant to AML legislation ("DAC 5"). DAC 5 has been implemented into Luxembourg legislation by the law of 1 August 2018 commented hereafter; and finally,

- Directive 2018/822/EU on automatic exchange of reportable cross-border arrangements ("DAC 6"). Luxembourg will have to implement DAC 6 into Luxembourg law by 31 December 2019 at the latest. The new reporting obligations will apply as from 1 July 2020 and will cover reportable cross border arrangements the first step of which was implemented since 25 June 2018.

Purpose of DAC 5

The first objective of DAC 5 is to grant to the tax authorities the necessary tools to monitor efficiently the application by financial institutions of the due diligence procedures set out in DAC 2. Based on the DAC 5 recitals, in the absence of access by the tax authorities to the AML information, those authorities would not be able to monitor, confirm and



audit that the financial institutions are correctly identifying and reporting on the beneficial owners of intermediary structures.

The second objective of DAC 5 is to give tax authorities access to AML information to ensure that tax authorities are better equipped to fulfil their obligations as regards all other forms of exchange of information set out by DAC 1, as amended, and to combat tax evasion and fraud more effectively. Therefore, based on DAC 5, tax authorities should have access to AML information, procedures, documents and mechanisms for the performance of their duties in monitoring the proper application of DAC and for the functioning of all forms of administrative cooperation provided for in DAC.

The law of 1 August 2018 implements DAC 5 into Luxembourg law by amending:

- the law of 29 March 2013 on administrative cooperation in the tax field (implementing DAC 1);
- the law of 18 December 2015 on CRS (implementing DAC 2), and
- the law of 23 December 2016 on CBCR (implementing DAC 4).

Which tax authorities have access to the AML information?

As far as the CRS and CBCR laws are concerned, the access to AML information is given to the Luxembourg direct tax authorities (*Administration des contributions directes*) only. For all other administrative cooperation procedures in the field of taxation, such as the one set out in the law of 29 March 2013, the access is granted to all LTAs, i.e. to the Luxembourg direct tax authorities (*Administration des contributions directes*), to the Luxembourg Registration Duties, Estates and VAT Authority (*Administration de l'enregistrement, des domaines et de la TVA*) and to the Customs and Excise authorities (*Administration des douanes et accises*).

Based on the above, in case of request by a tax authority, it will be in the interest of the taxpayer to check first whether or not a tax authority is legally authorised to request the AML documentation. However, we assume that when requesting some AML information from taxpayers, the tax authorities will make a reference to the legal basis justifying their request.

How will the LTA have access to the AML information?

The AML information can be obtained by the LTA upon request only. In other words, the AML information does not have to be provided automatically but has to be requested by the authorised LTA first.

Who are the professionals concerned?

The professionals which have to make available to the LTA, upon request, the AML information are all professionals subject to the AML law in Luxembourg, i.e. financial institutions, financial sector professionals, investment funds and their management companies, notaries, bailiffs, lawyers, family offices, accountants, some assets dealers, insurers, brokers etc.

Therefore, the scope of professionals concerned is wide and is close to the definition of intermediaries within the meaning of DAC 6. The key question which remains to clarify is to whom the LTA will request the information first. We assume that it will be banks and the cross-border life-insurance companies and brokers for CRS audit purposes and other tax cooperation matters and tax advisers for CBCR purposes or other tax cooperation matters. However, we could also assume that the tax authority could send an AML information request to other categories of professionals.

Which information will have to be provided by the professionals?

The LTA will access the AML mechanisms, procedures, documents and information collected by professionals to fulfil their due diligence obligations under the AML law, as referred to in article 3 paragraph 2 to 2 quater and article 3 paragraph 6 of the AML law of 12 November 2004, as amended. This comprises the following information:

- General customer due diligence measures taken by the professionals such as identification of customers, identification of ultimate beneficial owner, including trusts and foundations;
- Assessment of the nature of and the object of the business relationship with the customer;
- Constant customer due diligence measures applied by the professional;
- Documents that professionals are obliged to produce and the information

they must collect and store to prove that they have taken such measures;

- Measures, information, documents relating to beneficiaries of payments made under a life insurance policy;
- Measures, information, documents relating to beneficiaries of payments made by fiducies, trusts and similar legal constructions;
- The documents, data and information that the AML law requires professionals to keep (concerning customers, beneficiaries and transactions) for 5 years or more.

How will the AML information be processed by the LTA?

With respect to the laws on CRS and CBCR, the LTA will use the KYC information collected upon request in the frame of its supervisory control over the compliance with these specific laws. In practice, we assume that the LTA, in case of doubt, will request the KYC documentation from the financial institution in order to analyse whether it complied with its CRS reporting obligations.

With respect to the other types of administrative cooperation in tax matters between Member States, a foreign tax authority may request the LTA to provide AML information, but only to the extent that (as in the case of any exchange of information upon request in tax matters) this AML information is to be considered as foreseeably relevant to the administration and enforcement of the domestic laws of the foreign Member States concerning taxes. Indeed, even though the so-called *Berlioz case law*⁽³⁾ of the Court of Justice of the EU has not been yet fully implemented into Luxembourg law (as the draft law is still pending before parliament), in practice, the *Berlioz case-law* is applied by Luxembourg tax courts since 2017 and the LTAs have to verify the foreseeable relevance of the foreign requests they receive before requesting the information from the information holder.

On this last point, should the LTAs send a request to the information holder in respect of which there are doubts on the relevance of the information requested, the information holder could contest the information injunction. It should be reminded that the LTA must respect the fundamental rights and observe the principles recognised by the Charter of Fundamental Rights of the EU. Where the Luxembourg law requires access to personal data by tax authorities, its application should be clear and foreseeable in accordance with the case-law of the Court of Justice of the EU and the European Court of Human Rights.

Practical consequences and recommendations

Based on the above, what would be the consequences?

This represents definitively one additional step towards more transparency in tax matters. This is what it is all about. However, part of the AML information to be provided upon request under the new rules will be soon available to tax authorities through the new ultimate beneficial owner ("UBO") register to be set up in 2019. In addition, beneficial

owners can already be identified by the LTA when performing investigations or in the frame of the exchange of information. The new rules will simplify the access to the information and will make sure that tax authorities can perform their control with more effectiveness.

Consequences of non-cooperating with the LTA

The new law does not provide for any specific fine or penalty for not granting access to AML information, documents and mechanisms. However, if the AML information collected by the tax authorities reveals that the CRS reporting made was not done properly, the penalties provided by the Luxembourg CRS law (maximum penalty of EUR 250,000 or 0.5% of the amount which should have been reported) could potentially apply.

In addition, when the AML request follows a request by a foreign tax authority under the Luxembourg law of 29 March 2013 on administrative cooperation in the field of taxation, the sanctions applicable for not complying with the rules on exchange of information upon requests (e.g. for not providing AML information on time), as provided by the law of 25 November 2014 on the procedure applicable to the exchange of information upon request in tax matters, could be considered as applicable, meaning that a maximum penalty of EUR 250,000 could apply.

Conclusion

New rules in a changing environment: in the past few years, the world has changed completely and we are now in the area of full transparency, with some very positive effects, notably in terms of the fight against tax fraud and money laundering. One may wonder how the LTAs will collect the AML data. However, since requests for access to AML information can only occur within the scope of CRS reporting, CBC reporting or following a request by a foreign tax authority, it can be assumed that it will not be performed systematically but only in cases of tax audit or suspicion of tax fraud. In addition, in case of a request by a foreign tax authority, the LTA will have first (i.e. prior to requesting the information from the information holder) to analyse whether the information requested is foreseeably relevant and proportionate in order to avoid fishing expeditions and ensure the protection of the rights of the taxpayers. Therefore, the number of requests should be limited. However, since nobody can currently anticipate the impact of the new rules, the practice will tell whether our conclusions were right or not.

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1) "Loi du 1^{er} août 2018 portant transposition de la directive (UE) 2016/2258 du Conseil du 6 décembre 2016 modifiant la directive 2011/16/UE en ce qui concerne l'accès des autorités fiscales aux informations relatives à la lutte contre le blanchiment de capitaux (Mémorial n° 651 du 6 août 2018)"

2) Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities

3) Judgment of the Court of Justice of the EU of 16 May 2017 (C-682/15) - *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes*

Woop, première battle conférence au Luxembourg pour décider du futur

InTech et Win-Win organisent la première édition de la «battle-conférence» Woop le 6 février 2019 à La Maison du Savoir d'Esch Belval, en partenariat avec Digital Luxembourg.

Woop (World of Possibilities) est le premier événement organisé au Grand-Duché qui invite les dirigeants, les managers et les entrepreneurs à trancher les grandes questions du futur lors de «battles» entre les meilleurs décideurs de notre époque. Pour cette première édition, c'est le thème de «La liberté à l'heure du numérique» qui a été retenu. Plus de 800 visiteurs sont attendus.

Le Concept : Adieu TedX, place aux «Battles»

Woop innove, tant sur le fond que sur la forme. Sur le fond, puisque le thème choisi permettra l'explo-

ration de sujets de société tels que l'intelligence artificielle, le transhumanisme, les datas ou la mobilité, vus au travers du prisme d'un sujet de société : la liberté pour cette édition. Sur la forme, car plutôt que d'inviter des conférenciers à intervenir sur ces sujets en format keynote, comme cela se fait sur la majorité des conférences, Woop leur propose de débattre lors de «battles».

Diplômé d'HEC, entrepreneur, auteur, et co-fondateur du think tank international OuiShare, Marc-Arthur Gauthey, le directeur général de l'événement se réjouit de concevoir un événement mêlant entertainment et connaissances : «Nous souhaitons proposer un concept innovant et ludique explique-t-il. Woop se situe à la croisée de la conférence et d'un Talkshow durant lequel les décideurs nationaux et internationaux débattront devant le public, orchestrés par un journaliste professionnel.»

Pourquoi Woop ? Le mot des organisateurs

«La technologie n'est pas neutre, explique Fabrice Croiseaux CEO d'InTech. Derrière des expressions de plus en plus communes comme Big Data, Intelligence Artificielle, Smart City ou transhumanisme, ce sont de nouveaux enjeux de société qui s'imposent à nous. Plusieurs futurs sont possibles mais tous ne sont pas souhaitables. Nous avons créé Woop pour prendre de la hauteur, débattre et se faire un avis.»

Christophe Cousin, PDG de Win-Win, a imaginé le format des «battles» entre intervenants : «Historiquement, le Luxembourg incarne la neutralité dans le concert des nations. C'est l'idée que nous souhaitons développer. Garder notre indépendance et refuser la pensée dominante pour permettre aux participants de se forger un avis personnel autour des sujets qui cimentent notre avenir.»

Ils seront présents

Le philosophe Eric Sadin, dont les travaux reconnus dans le monde entier interrogent l'impact du numérique dans nos sociétés. En octobre 2018, il publie *L'Intelligence Artificielle*, ou l'enjeu du siècle. Amel Hammouda, directrice de la transformation d'Air France et membre du comité exécutif. Sven Clement, député, co-fondateur du Parti Pirate Luxembourgeois (PPL).

Save the date

Woop c'est le 6 février de 8h à 18h. Une journée de débats, conférences et ateliers à la Maison du Savoir d'Esch-Belval, au milieu d'anciens hauts fourneaux transformés en un campus ultra moderne.

Renseignements & Inscription sur www.woop-events.com