ATOZ

TAX ADVISERS LUXEMBOURG

INSIGHTS

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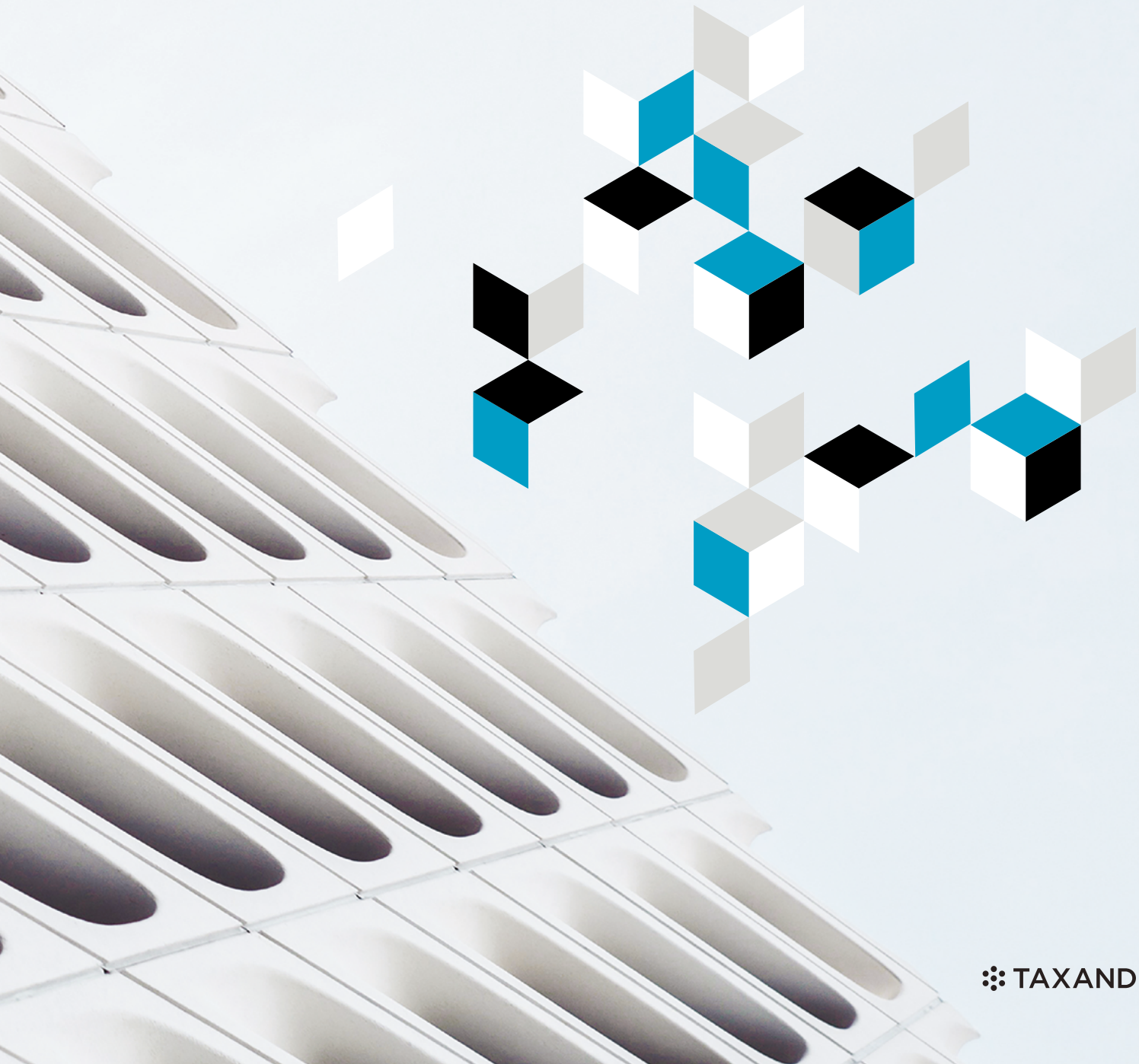

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CONTENTS

EDITORIAL

Greetings!

We have already enjoyed early spring days, so it is time for our first 2022 ATOZ Insights.

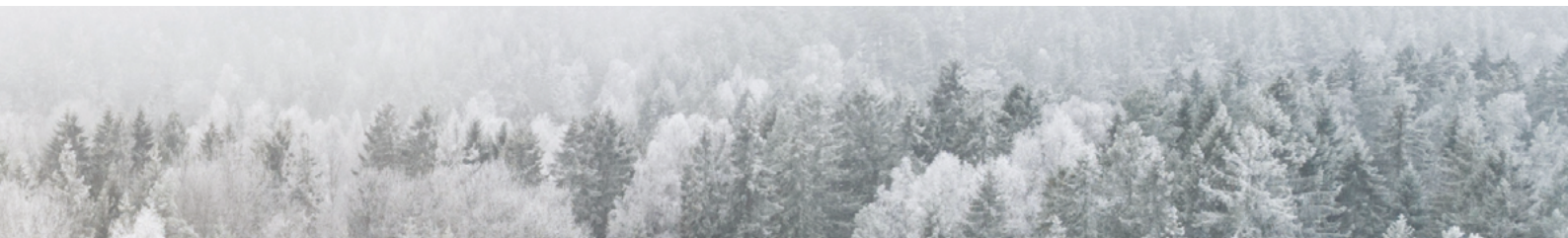
On 9 March 2022, a draft law was presented to Parliament to remove, as from 1 January 2023, the exemption applicable to certain securitisation entities regulated under EU law from the interest limitation rules introduced as from 1 January 2019 following the transposition of ATAD into Luxembourg domestic law. The draft law follows an infringement procedure launched by the European Commission against the way Luxembourg implemented the interest limitation rules of ATAD. We will analyse this repeal.

On 20 January 2022, the Luxembourg tax authorities released a Circular on the new annual 20% real estate levy introduced by the 2021 Budget law. The levy is due on gross rental income and gains arising from real estate assets situated in Luxembourg and realised directly or indirectly by certain categories of investment funds. We will describe the implications of this new levy, notably in terms of reporting and payment obligations.

From an individual tax and social security perspective, despite the fact that the COVID-19 pandemic is slowing down, the possibility for cross-border workers to work remotely has been extended once again. We will update you in this respect.

Back in December 2022, the European Commission released a Directive proposal, the so-called “unshell proposal”, which aims to fight against the misuse of shell entities for tax purposes and ensure that EU entities with no or minimal economic activity are unable to benefit from certain tax advantages. The unshell proposal introduces a new reporting obligation for entities considered as “at risk to be shell” based on certain gateway criteria and denies certain tax benefits to the undertakings assessed as shell entities because they do not meet some minimum substance indicators and cannot evidence that they are not misused for tax purposes. We will present the rules under the unshell proposal and provide some comments on a proposal which is expected to evolve over the legislative process due to the numerous issues it presents and the clarifications it requires.

On 12 March and 28 March 2022, the EU Council released two compromise texts of the Directive proposal on ensuring a global minimum level of taxation for multinational groups in the EU which differ slightly from the initial Directive proposal published on 22 December 2021, mainly, on the time limit for transposition. Recently, on 14 March 2022, the OECD finally published the long-awaited commentary on the application and practical implementation of the OECD Model Rules which provide for a coordinated system of taxation intended to ensure large MNE groups pay a minimum level of tax on the income arising in each of the jurisdictions they operate in. We will discuss the changes introduced in the amended Directive proposal and some of the guidelines provided by the OECD Commentary.

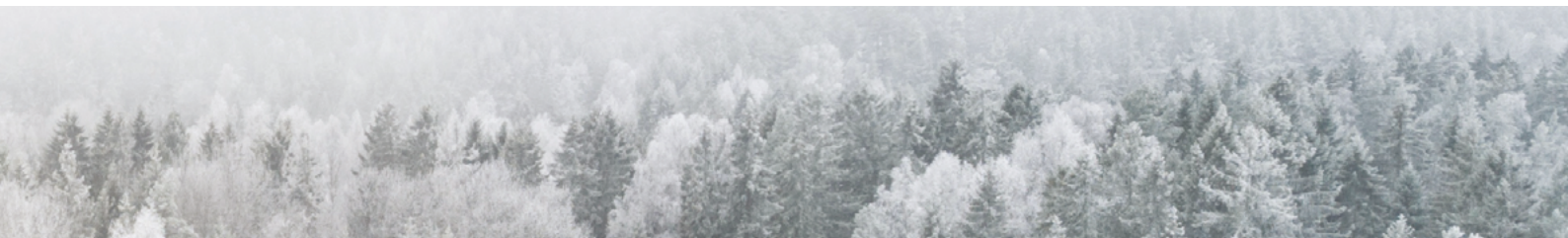


From a legal point of view, on 3 March 2022, the law of 25 February 2022 amending the Luxembourg securitisation law of 22 March 2004 in order to clarify and modernise the legal framework of securitisation in Luxembourg was published in the Memorial. The new law aims at improving the legal certainty by clarifying certain changed market practices, and increasing the flexibility of the Luxembourg regime towards other jurisdictions. We will explain its legal and tax implications and how it creates new opportunities notably for the active management of securitisation vehicles.

Finally, on 27 January 2022, a draft law was presented to Parliament according to which the Luxembourg Government plans to modernise the operations of the business and companies register (*registre de commerce et des sociétés*) and of the beneficial owners register (*registre des bénéficiaires effectifs*) in order to ensure the administrative simplification of the functioning of the registers on the one hand, and the monitoring of the legal compliance of the registered information on the other hand. We will go through the various objectives of this draft law.

We hope you enjoy reading our insights.

The ATOZ Editorial Team



Securitisation entities within the meaning of the EU Securitisation Regulation no longer exempt from the interest limitation rules

OUR INSIGHTS AT A GLANCE

- On 9 March 2022, a draft law was presented to Parliament in order to remove the exemption applicable to securitisation entities within the meaning of EU Regulation 2017/2402 of 12 December 2017 (the "**EU Securitisation Regulation**") from the interest limitation rules that were introduced as from 1 January 2019 following the transposition of ATAD into Luxembourg domestic law.
- The draft law follows an infringement procedure launched by the European Commission against Luxembourg on the way it implemented the interest limitation rules of ATAD.
- As from 1 January 2023, securitisation entities within the meaning of the EU Securitisation Regulation will become subject to the interest limitation rules of article 168bis of the Luxembourg Income Tax Law ("**LITL**").
- Securitisation undertakings which have benefited from the exemption so far should anticipate this change and seek advice from their tax advisers in order to analyse the future potential tax impact and take action if necessary.

On 9 March 2022, a draft law was presented to Parliament in order to remove the exemption applicable to securitisation entities within the meaning of EU Regulation 2017/2402 of 12 December 2017 (the "EU Securitisation Regulation") from the interest limitation rules that were introduced as from 1 January 2019 following the transposition of ATAD (EU Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, the so-called "Anti-Tax Avoidance Directive", or "ATAD") into Luxembourg domestic law. The draft law follows an infringement procedure launched by the European Commission against Luxembourg on the way it implemented the interest limitation rules of ATAD. As from 1 January 2023, securitisation entities within the meaning of the EU Securitisation Regulation will become subject to the interest limitation rules of article 168bis of the Luxembourg Income Tax Law ("LITL").

Financial undertakings excluded from the interest limitation rules of ATAD

The interest limitation rules of ATAD provide a carve-out/exemption for financial undertakings. The definition of financial undertakings of ATAD does not include securitisation entities within the meaning of EU Regulation 2017/2402 of 12 December 2017 since ATAD was adopted in 2016, so before the EU Securitisation Regulation.

However, when implementing the interest limitation rules of ATAD into Luxembourg law, Luxembourg was of the view that securitisation entities within the meaning of the EU Securitisation Regulation should also be considered as financial undertakings. Luxembourg anticipated that the list of financial undertakings of ATAD would evolve over time each time new types of EU financial undertakings become regulated under EU law. In this respect, it is interesting to note that the recent EU Unshell Directive Proposal laying down rules to prevent the misuse of shell entities for tax purposes provides a carve-out for regulated financial undertakings and that the definition of financial undertakings in this EU Unshell Directive Proposal includes securitisation entities within the meaning of the EU Securitisation Regulation.

Infringement procedure launched by the European Commission

On 14 May 2020, the Commission sent a letter of formal notice to Luxembourg asking for the interest limitation rules of ATAD to be correctly transposed. The EU Commission considered that Luxembourg went beyond the allowed

exemptions of "financial undertakings" when providing unlimited deductibility of interest for the purpose of Corporate Income Tax to securitisation entities within the meaning of the EU Securitisation Regulation, which, according to the Commission, do not qualify as “financial undertakings” under ATAD. On 2 December 2021, this letter was followed by a reasoned opinion (final pre-litigation step of the infringement procedure) of the European Commission.

Repeal of the exemption of securitisation entities with effect as from 1 January 2023

Given that the definition included in ATAD has finally not been extended and even though there might be good arguments according to which these regulated securitisation entities should also be considered as financial undertakings, the Luxembourg Government decided to follow the position of the Commission and to repeal the exemption applicable to these undertakings for the purpose of the interest limitation rules of Article 168bis of the LITL.

A draft law was presented to Parliament to this effect, which will remove the provisions exempting securitisation entities within the meaning of Article 2-2) of the EU Securitisation Regulation from Article 168bis of the LITL.

The change will apply to financial years beginning on or after 1 January 2023. The absence of retroactivity in the draft law is most welcome as it reaffirms Luxembourg’s core principles of legal certainty and security.

Next steps and implications

Even though the legislative procedure has just begun, given the type of law change to be introduced, it can be expected that the draft law will be adopted quickly and that the text will not evolve over the legislative procedure. Securitisation undertakings which have benefited from the exemption so far should anticipate this change and seek advice from their tax advisers in order to analyse the future potential tax impact and take action if necessary.

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Real estate levy for funds: Do not miss the 31 May 2022 reporting deadline!

OUR INSIGHTS AT A GLANCE

- With effect as from 1 January 2021, an annual 20% real estate levy (*prélèvement immobilier* hereafter referred to as "**real estate levy**") has been introduced, which applies on gross rental income and gains arising from real estate assets situated in Luxembourg and realised directly or indirectly by certain categories of investment funds (hereafter "**Investment Vehicles**").
- The aim of the introduction of the real estate levy is to make sure that investors are taxed on income and gains arising from investments into Luxembourg real estate, even when they structure their investment as an investment fund exempt from all taxes on its income and gains.
- On 20 January 2022, the Luxembourg tax authorities released a Circular on the real estate levy. The Circular presents the personal and material scope of application of the real estate levy and provides definitions, examples as well as useful information (the related tax forms having now been released) on the related tax filing obligations.
- As far as tax filing obligations are concerned, the release of the Circular is also a good reminder that all Investment Vehicles, no matter whether they realise Luxembourg real estate income (directly or indirectly) and no matter whether they hold Luxembourg real estate assets (directly or indirectly), have to file an additional return including information on whether or not they have held Luxembourg real estate assets directly or indirectly during the calendar years 2020 and 2021. This tax return has to be filed by 31 May 2022 at the latest.

With effect as from 1 January 2021, the Law of 19 December 2020 (hereafter referred to as the "Budget 2021") introduced a new annual 20% real estate levy (*prélèvement immobilier* hereafter referred to as "real estate levy") on gross rental income and gains arising from real estate assets situated in Luxembourg and realised directly or indirectly by certain categories of investment funds (hereafter "Investment Vehicles").

The aim of the introduction of the real estate levy is to make sure that investors are taxed on income and gains arising from investments into Luxembourg real estate, even when they structure their investment as an investment fund exempt from all taxes on its income and gains.

On 20 January 2022, the Luxembourg tax authorities released Circular PRE_IMM n° 1 (the "Circular") on the real estate levy. The Circular presents the personal and material scope of application of the real estate levy and provides definitions, examples, as well as useful information (the related tax forms having now been released) on the related tax filing obligations. As far as these tax filing obligations are concerned, the release of the Circular is also a good reminder that all Investment Vehicles, no matter whether they realise Luxembourg real estate income (directly or indirectly) and no matter whether they hold Luxembourg real estate assets (directly or indirectly), have to file an additional return including information on whether or not they have held Luxembourg real estate assets directly or indirectly during the calendar years 2020 and 2021. This tax return has to be filed by 31 May 2022 at the latest.

Personal scope of application of the Luxembourg real estate levy

The real estate levy applies to three different types of Investment Vehicles: (1) Undertakings for Collective Investment ("UCI") within the meaning of Part II of the Law of 17 December 2010; (2) Specialised Investment Funds ("SIF") within the meaning of the Law of 13 February 2007; and (3) Reserved Alternative Investment Funds ("RAIF") within the meaning of article 1 of the Law of 23 July 2016.

UCIs within the meaning of Part II of the Law of 17 December 2010

First, the real estate levy applies to UCIs within the meaning of Part II of the Law of 17 December 2010. Part II of the Law of 17 December 2010 covers UCIs which do not fall within the scope of Part I of the same Law because either they are not Undertakings for Collective Investment in Transferable Securities ("UCITS") due to the type of investments they perform, or they are UCITS but do not meet certain requirements applicable to Part I funds (e.g. they are closed-end UCITS instead of open-ended UCITS). Part II UCIs are alternative investment funds.

The real estate levy only applies to Part II UCIs which have a personality separate from those of their partners. Even though it is neither specified in the Budget 2021 and the related commentary nor in the Circular, it means that the real estate levy only applies to SICAVs (set up as SAs, *sociétés anonymes*) and SICAFs (*sociétés d'investissement à capital fixe*) set up as corporations. In other words, the real estate tax applies to Investment Vehicles which are "opaque" from a Luxembourg tax perspective. On the contrary, Investment Vehicles with no legal personality (i.e. *fonds communs de placement*, "FCPs" and *Sociétés en Commandite Spéciale*, "SCSps") as well as Investment Vehicles considered as not having a personality separate from those of their partners for tax purposes (i.e. *sociétés en commandite simple*, "SCSs") are out of the scope of the real estate levy. They remain fully tax transparent, even in the context of the real estate levy, and the taxation of income and gains arising from Luxembourg real estate assets will take place directly at the level of their partners/unitholders.

SIFs within the meaning of the Law of 13 February 2007

Second, the real estate levy applies to SIFs within the meaning of the Law of 13 February 2007. In the same way as in respect of the first category of Investment Vehicles referred to above, the real estate levy only applies to SIFs which have a personality separate from those of their partners, thus excluding SIFs set up as FCPs, SCSps or SCSs from its scope of application.

RAIFs within the meaning of article 1 of the Law of 23 July 2016

Finally, the real estate levy applies to RAIFs within the meaning of article 1 of the Law of 23 July 2016. Since the RAIF Law provides two different types of tax regimes, depending on the activity performed by the RAIF, the question arises as to whether the real estate levy applies to the two types of RAIFs or whether it only applies to RAIFs which are fully exempt from Luxembourg corporate tax on their income. Since both the Budget 2021 and the Circular specify that the real estate levy is an exception to the provisions of article 45 of the RAIF Law (which deals with the exemption regime applicable to the first category of RAIFs), it could be understood that the real estate levy should only apply to RAIFs which are fully exempt from corporate income tax based on article 45 of the RAIF Law and not to the fully taxable ones only investing in risk capital and subject to the specific tax rules of article 48 of the RAIF Law. However, as commented by the Chamber of Commerce when reviewing the text of the draft law on the Budget 2021, a clarification in this respect would have been welcome in order to provide more legal certainty to taxpayers. Unfortunately, the Circular does not address the point and only refers to RAIFs within the meaning of Article 1 of the RAIF Law. Therefore, based on a strict application of the law provisions, and despite the intention of the legislator being to tax the Investment Vehicles, which are fully exempt from tax on their income, it could be argued that fully taxable RAIFs within the meaning of Article 48 of the RAIF Law are also Investment Vehicles within the meaning of the rules governing the real estate levy regime.

In the same way as in respect of the other two categories of Investment Vehicles (i.e. Part II UCIs and SIFs), the real estate levy only applies to RAIFs which have a personality separate from those of their partners, thus excluding RAIFs set up as FCPs, SCSs or as SCSps from its scope of application.

Material scope of application of the Luxembourg real estate levy

The 20% real estate levy is collected on the gross rental income and gains arising from Luxembourg real estate assets realised by Investment Vehicles either directly or indirectly via

one of more tax transparent entities within the meaning of article 175-1 of the Income Tax Law ("**ITL**"), or through one or more FCPs. It is also levied on gains which arise from the disposal of interests held by Investment Vehicles in tax transparent entities within the meaning of article 175-1 of the ITL or through FCPs which hold immovable properties situated in the Grand Duchy of Luxembourg.

The real estate levy applies each time an Investment Vehicle realises income or gains on a real estate asset located in Luxembourg. To fall within the scope of the real estate levy, there is no minimum level to be reached in terms of the value of the real estate assets held in proportion to the value of the total assets of the Investment Vehicle. Thus, any Investment Vehicle holding even one single Luxembourg real estate asset directly or indirectly will potentially be subject to the real estate levy.

More specifically, the real estate levy applies to:

- Gross rental income (excluding VAT) arising from immovable properties situated in the Grand Duchy of Luxembourg and realised by Investment Vehicles either directly or indirectly through one or more tax transparent entity(ies) within the meaning of article 175-1 of the ITL or FCP(s) in which the Investment Vehicle holds an interest;

- Gains on the transfer of immovable properties situated in the Grand Duchy of Luxembourg carried out during operations such as a sale, exchange, contribution, merger, demerger, liquidation or dissolution and realised by Investment Vehicles either directly or indirectly through one or more tax transparent entity(ies) within the meaning of article 175-1 of the ITL or FCP(s) in which the Investment Vehicle holds an interest. The gain is defined as the positive difference between the price of the immovable property stated in the notarial deed drawn up at the time of the alienation of the immovable property and the price at the time of the acquisition, contribution or constitution of the immovable property;

- Gains resulting from the disposal of interests held by Investment Vehicles in tax transparent entities within the meaning of article 175-1 of the ITL or of units in FCPs which hold immovable properties situated in the Grand Duchy of Luxembourg. The gain is defined as the positive difference between the sale price of the interest/units corresponding to the proportion of the value of the real estate asset located in the Grand Duchy of Luxembourg at the time of the sale of the interest/units and the acquisition price of the interest/units corresponding to the proportion of the value of the real estate asset at the time of the acquisition of the interest/units. In addition, when a Luxembourg real estate asset is held by an Investment Vehicle through a chain of several tax transparent entities within the meaning of article 175-1 of the ITL or FCPs, the Luxembourg Investment Vehicle is also subject to the real estate levy on the gains realised on the disposal of any indirect interest through the chain but only up to the portion of the gain corresponding to the value increase of the Luxembourg real estate asset.

Each time income or gains are realised indirectly, the taxable income or gain is computed in proportion to the interest/units held in the entity(ies) holding the Luxembourg real estate asset at the time the income/gain is realised. The Circular provides examples of computation in this respect.

Tax filing and payment requirements

The following reporting and payment obligations apply in respect of the real estate levy:

At the latest on 31 May of the year following the one the real estate income/gain is realised in, Investment Vehicles have to file a tax return (*ACD* (*Prélèvement immobilier*) : *Déclaration pour le prélèvement immobilier*) with the withholding tax office of the Luxembourg tax authorities (*Administration des Contributions Directes, Bureau de la retenue d'impôt sur les intérêts*), using the platform *MyGuichet*, including detailed information on the income subject to the real estate levy, as well as on the amount of levy to be paid. An external auditor (*réviseur d'entreprise agréé*) has to certify in a report that the real estate income has been computed in accordance with the provisions of the law introducing the real estate levy. This report has to be filed together with the tax return.

The related real estate levy has to be paid at the latest on 10 June of the same year (i.e. of the year following the one during which the real estate income/gain is realised).

All Investment Vehicles, no matter whether or not they realise Luxembourg real estate income (directly or indirectly) and no matter whether they hold or do not hold Luxembourg real estate assets (directly or indirectly), have to file an additional return (*ACD* (*Prélèvement immobilier*) : *Déclaration informative sur la détention ou l'absence de détention d'un bien immobilier sis au Grand-Duché de Luxembourg et sur le changement de forme juridique*), using the platform *MyGuichet*, including information on whether or not they have held Luxembourg real estate assets directly or indirectly during the calendar years 2020 and 2021. This tax return has to be filed by 31 May 2022 at the latest.

Finally, Investment Vehicles must inform the Luxembourg tax authorities, using the *MyGuichet* platform and the form *ACD* (*Prélèvement immobilier*) : *Déclaration informative sur la détention ou l'absence de détention d'un bien immobilier sis au Grand-Duché de Luxembourg et sur le changement de forme juridique*, if they changed their legal forms and became tax transparent entities within the meaning of article 175-1 of the ITL or FCPs in the course of the calendar years 2020 and 2021. This requirement only applies to the extent that the Investment Vehicles held at least one Luxembourg real estate asset (directly or indirectly) at the time of the change of their legal form.

Investment Vehicles which do not comply with these tax filing obligations may be subject to a penalty of EUR 10,000.

Implications

The introduction of the 20% real estate levy on investments in real estate assets located in Luxembourg aimed to counter potential abuses arising from the use of SICAV-SIF in the Luxembourg real estate sector. It will finally counter potential abuses arising from the use of any type of non-transparent alternative investment funds which benefit from a full corporate income tax exemption. This makes sense since all these vehicles benefit from the same exemption from Luxembourg tax on their income.

The real estate levy applies, no matter the number/value of the Luxembourg real estate assets held by the Investment Vehicle either directly or through transparent entities or FCPs. In other words, no minimum threshold of Luxembourg real estate investments is required to fall within the scope of the levy. In the same way, any interest/units, even a very minor interest or number of units, held by the Investment Vehicle in a tax transparent entity or in an FCP have to be taken into account. Therefore, a very careful review of the portfolio of Investment Vehicles, transparent entities and FCPs that hold Luxembourg real estate should be performed on a regular basis in order to assess the potential application of the real estate levy and the related tax filing requirements.

Conversely, the changes do not affect the vast majority of Luxembourg investment funds that do not invest in Luxembourg real estate. Still, as far as calendar years 2020 and 2021 are concerned, in scope Investment Vehicles should keep in mind that no matter whether or not they realise Luxembourg real estate income (directly or indirectly) and no matter whether they hold or do not hold Luxembourg real estate assets (directly or indirectly), they have to inform the tax authorities by 31 May 2022 whether or not they have held Luxembourg real estate assets directly or indirectly during the calendar years 2020 and 2021. Given the potential penalty of EUR 10,000 for not complying with this tax filing obligation, Investment Vehicles should urgently seek advice from their tax advisers in order to assess their potential tax filing obligations under the real estate levy rules.

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COVID-19: Income tax and social security measures for cross-border workers - Update

OUR INSIGHTS AT A GLANCE

- The protocols to the double tax treaties concluded by Luxembourg with Belgium, France and Germany provide rules allowing cross-border workers to perform their activities outside of their employment state while remaining taxable in their employment state, but only for a limited number of days.
- Given that the maximum number of days can easily be exceeded during the COVID-19 crisis due to travel restrictions and the requirement of "social distancing" resulting in many employees working from home and thus outside of their employment state, the Luxembourg Government concluded agreements with Belgium, France and Germany, according to which the days spent working outside of the employment state (Luxembourg in most cases) due to the current crisis are not taken into account. These three agreements were initially concluded for a limited period of time, were then renewed several times and some of them have now been extended again.
- As far as social security is concerned, the Luxembourg Government also concluded agreements to make sure that cross-border workers remain subject to the social security legislation of their employment state and do not become subject to social security in their residence state, even if they spend 25% or more (threshold applicable under the EU social security rules) of their working time in their residence state due to the COVID-19 crisis. These three agreements were also initially concluded for a limited period of time, were then renewed several times and have been extended again.

The protocols to the double tax treaties concluded by Luxembourg with Belgium, France and Germany provide rules allowing cross-border workers to perform their activities outside of their employment state (Luxembourg in most cases) for a maximum amount of days (19 days in Germany, 34 days in Belgium as from 2022 as soon as the amending protocol of 31 August 2021 has been ratified, and 29 days in France) while remaining taxable in their employment state.

Given that the maximum number of days can easily be exceeded during the COVID-19 crisis due to travel restrictions and the requirement of "social distancing" resulting in many employees working from home and thus outside of their employment state, the Luxembourg Government concluded agreements with Belgium, France and Germany, according to which the days spent working outside of the employment state (Luxembourg in most cases) due to the COVID-19 crisis are not taken into account. These three agreements were initially concluded for a limited period of time and were then renewed several times.

As far as Belgium is concerned, the agreement was supposed to apply until 31 March 2022 and be extended automatically until 30 June 2022 if it was not terminated at the latest 2 weeks before the end of March 2022. Given that the agreement has not been terminated, it has now been extended automatically until 30 June 2022.

As far as France is concerned, the agreement was supposed to apply until 31 March 2022 and be extended automatically until 30 June 2022 if it was not terminated at the latest 1 week before the end of March 2022. Given that the agreement has not been terminated, it has now been extended automatically until 30 June 2022.

As far as Germany is concerned, the agreement was supposed to remain in force at least until 31 March 2022. After that date, the agreement was supposed to be renewed monthly automatically, except if it is terminated by one of the contracting states at the latest 1 week before the end of each month. On 22 March

2022, Luxembourg and Germany agreed to terminate the agreement with effect as of 30 June 2022. Therefore, as from 1 July 2022, the maximum of 19 days will apply again to determine the limit until which employees can remain only taxable in their employment state when working outside of their employment state. However, an amount of 19 days will only remain available to the extent that the days spent working outside of the employment state during the first part of the year (1 January to 30 June 2022) were spent outside of the employment state solely due to the COVID-19 crisis. Any days spent working outside of the employment state during the first 6 months of 2022 for other reasons than the COVID-19 crisis will reduce the remaining number of days available for the period 1 July - 31 December 2022 accordingly.

As far as social security is concerned, Luxembourg also concluded agreements according to which, until 30 June 2022, any days spent working from home due to COVID-19 will not impact the applicable social security rules. In other words, cross-border workers will remain subject to the social security legislation of their employment state and will not become subject to social security in their residence state, even if they spend 25% or more (threshold applicable under the EU social security rules) of their working time in their residence state due to COVID-19.

While these measures are positive since they avoid potential individual tax and social security implications of working from home during the crisis, businesses should keep in mind that employees working from a country other than the country of residence of their employing company may create a permanent establishment of the company in the residence state of the employee. Indeed, despite the recommendations made by the OECD in its Updated guidance on tax treaties and the impact of the COVID-19 pandemic (according to which the exceptional and temporary change of the location where employees exercise their employment because of the COVID-19 pandemic, such as working from home, should not create new permanent establishments for the employer), since no measure has been taken so far in Luxembourg in this respect, Luxembourg companies should carefully monitor the activities performed by their employees outside of their tax residence state.

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The new Directive proposal to fight against the misuse of shell entities

OUR INSIGHTS AT A GLANCE

- On 22 December 2022, the European Commission released a Directive proposal (the so-called "**unshell proposal**", the "**Directive proposal**") which aims to prevent the misuse of shell entities for tax purposes. The European Commission is of the view that legal entities with no or only minimal substance, performing no or very little economic activity, continue to pose a risk of being used for aggressive tax planning structures, despite the various anti-abuse rules already introduced recently, both at EU and international level. Substance is a key element in international taxation and it may in particular be relevant when applying these existing anti-abuse provisions.
- The Directive proposal introduces a new obligation for entities considered as "at risk to be shell" based on certain gateway criteria to report on their substance in their tax returns based on certain minimum substance indicators defined by the Directive proposal. Entities considered as commonly used for good commercial reasons (such as regulated financial undertakings) are out of the scope of the Directive proposal and entities which do not bring any tax benefits to their shareholders or the group as a whole can be exempt upon request.
- The Directive proposal denies certain tax benefits to those undertakings assessed as shell entities because they do not meet the minimum substance indicators of the Directive proposal and cannot demonstrate that they are not misused for tax purposes.
- The Directive proposal further introduces an automatic exchange of the minimum substance information reported by the reporting entities (whether assessed as shell entities or not) between the tax authorities of the EU Member States and introduces a possibility for Member States to request the resident state of the entity to perform tax audits where they have grounds to suspect that the entity might be lacking minimal substance for the purposes of the Directive.
- We present the rules to be introduced and provide some comments based on the proposal in its current version. However, given the various potential issues raised by the proposal, it can be expected that the rules will evolve over the legislative process. Should the Directive proposal be adopted in its current form, it would become applicable as of 1 January 2024.

On 22 December 2022, the European Commission released a Directive proposal (the so-called "unshell proposal") which aims to prevent the misuse of shell entities for tax purposes. The European Commission is of the view that legal entities with no or only minimal substance, performing no or very little economic activity, continue to pose a risk of being used for aggressive tax planning structures, despite the various anti-abuse rules already introduced recently, both at EU and international level (general anti-abuse rules, "GAAR", of the EU Parent-Subsidiary Directive and the EU Anti-Tax Avoidance Directive, "ATAD", Principle Purpose Test, "PPT", in double tax treaties, case law of the Court of Justice of the European Union, "CJEU", etc.) and despite the fact that the impact of those already introduced anti-abuse rules could not be assessed yet. Substance is a key element in international taxation and it may in particular be relevant when applying these existing anti-abuse provisions.

The Directive proposal introduces a new obligation for entities considered as "at risk to be shell" based on certain gateway criteria to report on their substance in their tax returns based on certain minimum substance indicators defined by the Directive proposal. Some entities considered as commonly used for good commercial reasons (such as regulated financial undertakings) are out of the scope of the Directive proposal and entities which do not bring any tax benefits to their shareholders or the group as a whole can be exempt upon request. The Directive proposal denies certain tax benefits to those undertakings assessed as shell entities because they do not meet the minimum substance indicators of the Directive proposal and cannot

demonstrate that they are not misused for tax purposes.

The Directive proposal further introduces an automatic exchange of the minimum substance information reported by the reporting entities (whether assessed as shell entities or not) between the tax authorities of the EU Member States and introduces a possibility for Member States to request the resident state of the entity to perform tax audits where they have grounds to suspect that the entity might be lacking minimal substance for the purposes of the Directive.

We present the rules to be introduced and provide some comments based on the proposal in its current version. However, given the various potential issues raised by the proposal, it can be expected that the rules will evolve over the legislative process. Should the Directive proposal be adopted in its current form, it would become applicable as of 1 January 2024.

Determination of whether an undertaking is a shell entity

The Directive proposal targets schemes involving the setting up of undertakings within the EU which are presumably engaged with an economic activity but that, in reality, do not conduct any economic activities and are in place to enable certain tax advantages to flow to their beneficial owners or to the group which they belong to, as a whole. The Directive Proposal applies in principle to all undertakings that are considered tax resident and are eligible to receive a tax residence certificate in a Member State, regardless of their legal forms. However, to determine whether an entity is a shell entity, a series of tests have to be performed, which, for some of them, require a comprehensive analysis.

It first has to be analysed whether the entity is an undertaking that is excluded from reporting requirements (carve-outs). Then, an entity may only be subject to reporting if it cumulatively meets three gateway criteria. If these criteria are met, the entity has to report in its corporate tax returns on the specific indicators of minimum substance defined by the Directive proposal. If all these indicators of minimum substance are met, the entity is deemed not to be a shell entity. Otherwise, there is a rebuttable presumption that the entity is a shell entity. In this case, the entity has the possibility to evidence on a case-by-case basis that it is not a wholly artificial arrangement. Alternatively, an entity may request an exemption from reporting obligations if it can be established that the entity does not reduce the tax liability of its beneficial owner(s) or of the group as a whole.

In order to determine whether an entity is a shell entity, the following steps have to be followed:

Step 1: Is the undertaking eligible to receive a tax residency certificate in a Member State?

The Directive proposal applies in principle to all undertakings that are considered tax resident and are eligible to receive a tax residency certificate in a Member State. Therefore, fully exempt undertakings are out of the scope of the Directive proposal.

Step 2: Is the undertaking exempt from reporting?

When analysing whether an entity might qualify as a shell entity under the Directive proposal, it then has to be analysed whether the entity is an undertaking that is excluded from reporting requirements (carve-outs). The following undertakings are carved out and thus exempt from reporting because they are considered as commonly used for good commercial reasons:

- Companies which have a transferable security admitted to trading or listed on a regulated market or multilateral trading facility.

- Regulated financial undertakings within the meaning of the relevant EU Directives and Regulations (including credit institutions, investment firms, undertakings for collective investment in transferable securities ("**UCITS**"), management companies of UCITS, alternative investment funds managed by an alternative investment fund manager ("**AIFM**"), AIFMs, insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision, certain pension institutions, securitisation special purpose entities,

insurance holding companies, payment institutions, electronic money institutions, crowdfunding service providers, crypto-asset service providers). While the exclusion of these undertakings is positive, they generally may be expected to have significant own resources that would place such entities far away from what might be considered to be a shell entity. In addition, it is regrettable that entities held by investment funds have not been excluded as well to achieve a more global approach to funds' structures.

- Undertakings that have the main activity of holding shares in operational businesses in the same Member State while their beneficial owners are also resident for tax purposes in the same Member State.

- Undertakings with holding activities that are resident for tax purposes in the same Member State as the undertaking's shareholder(s) or the ultimate parent entity.

- Undertakings with at least five own full-time equivalent employees or members of staff exclusively carrying out the activities generating the relevant income. The five own full-time equivalent employees test seems to apply at the level of the entity rather than at group level. However, given that in an EU context it is legitimate that an entity relies on the infrastructure of other entities of the same group resident in the same Member State, it would be reasonable to extend this carve-out to at least five own full-time equivalent employees in a Member State at group level. In the specific case of alternative investments, it would further be reasonable to apply the test of the five own full-time equivalent employees at the level of the asset manager. Finally, one may wonder if the number of minimum five full-time equivalent employees is not excessive, representing an artificially high level of substance.

Step 3: Does the undertaking meet the three gateway criteria cumulatively?

An entity which does not benefit from a carve-out may only have to report on specific indicators of minimum substance in its corporate tax return if it cumulatively meets three gateway criteria. As stated in the explanatory memorandum to the Directive proposal, the relevant criteria that set up the gateways aim to distinguish as at risk those undertakings that seemingly engage with cross-border activities which are geographically mobile and in addition rely on other undertakings for their own administration, in particular professional third party service providers or equivalents. Therefore, the gateway criteria consist of three tests regarding (1) relevant income, (2) cross-border activities and (3) the management of day-to-day operations and the decision-making on significant functions.

1. Passive income: In order to meet the first gateway criterion, more than 75% of revenues accruing to the undertaking in the preceding two tax years have to be so-called "relevant income" (i.e. interest, royalties, dividends, income from the disposal of shares, income from financial leasing, income from immovable property, income from movable property, other than cash, shares or securities, held for private purposes and with a book value of more than one million euros, income from insurance, banking and other financial activities and income from services which the undertaking has outsourced to other associated enterprises, etc.

An undertaking which holds assets that can generate income from immovable property and income from movable property other than cash, shares or securities, held for private purposes and with a book value of more than one million euros would also be deemed to meet the criterion set out in point 1), irrespective of whether income from these assets has accrued to the undertaking in the preceding two tax years, if the book value of these assets is more than 75% of the total book value of the undertaking's assets.

Finally, an undertaking which holds assets that can generate dividends and income from the disposal of shares would also be deemed to meet the criterion set out in point 1), irrespective of whether income from these assets has accrued to the undertaking in the preceding two tax years, if the book value of these assets is more than 75% of the total book value of the assets of the undertaking.

2. Cross-border activity: In order to meet the second gateway criterion, the undertaking should be engaged in cross-border activity. This would be the case if more than 60% of the book value of its assets that fall within the scope of income from immovable property and income from movable property other than cash, shares or securities, held for private purposes and with a book value of more than one million euros, was located outside the Member State of the undertaking in the preceding two tax years or at least 60% of the undertaking's relevant income is earned or paid out via cross-border transactions. Cross-border transactions should include all income generating arrangements, investments and business activities that involve foreign counterparts, including the ownership of assets located in a foreign jurisdiction.

3. Outsourcing of functions: In order to meet the third gateway criterion, in the preceding two tax years, the undertaking should have outsourced the administration of day-to-day operations and the decision-making on significant functions.

Recital 5 of the Draft Directive provides that "undertakings that do not have adequate own resources tend to engage third party providers of administration, management, correspondence, and legal compliance services or enter into relevant agreements with associated enterprises for the supply of such services in order to set up and maintain a legal and tax presence". It indicates however also that the "outsourcing of certain ancillary services only, such as bookkeeping services alone, while core activities remain with the undertaking, would not suffice in itself for an undertaking to meet this condition."

Given the very broad drafting of this gateway criterion and the absence of any definition of "out-sourcing", it would be needed to clarify that the outsourcing of day-to-day operations to an associated enterprise (resident in the same jurisdictions) should not be considered as "outsourcing" within the meaning of the third gateway criterium. This position would make sure that the Directive proposal complies with the case-law of the CJEU on substance requirements in the context of anti-abuse rules[1]. Moreover, even when certain day-to-day operations are outsourced, the directors of the entity have to monitor and review the services rendered to the entity.

The decision-making on significant functions is frequently not outsourced but dealt with internally by the directors of the entity during board meetings that should be held in the residence state of the entity. Directors are the very own resources of the entity and the board of directors is the competent body to take all the important decisions regarding the entity's business activities, investments, compliance obligations, etc. Nevertheless, the term outsourcing induces some legal uncertainty in this respect. For example, it is somewhat unclear whether the appointment of "independent" directors, considered best practice in many circumstances, would constitute outsourcing. Moreover, when an independent director offers directorship services through a company that is established for this purpose (for example, for risk management purposes), the agreement for directorship would be entered into between the director's company and the entity. However, as the individual that is appointed to the board of directors of the entity has a duty to fill this role in an independent fashion and is subject to significant personal liability in case of wrongdoings or negligence (irrespective of contractual aspects), it would seem logical to consider that these individuals should still be regarded as own resources of the entity and that there would be no outsourcing in this case.

[1] See for example: decision of the CJEU of 12 September 2006, Cadburry-Schweppes, Case C-196/04; decision of the CJEU of 7 September 2017, Eqium SAS, Case C-6/16; decisions of the CJEU of 20 December 2017, Deister Holding, Case C-504/16 and Juhler Holding, C-613/16; decision of the CJEU of 14 June 2018, GS, Case C-440/17.

Likewise, non-resident individuals who are employees of the group or an asset manager and appointed to the board of directors of a company should not amount to outsourcing of decision-making on significant functions as these people, in their capacity as director, are the entity's own resources.

Moreover, even when the board of directors receives recommendations (for example, recommendations by the portfolio manager in the context of Alternative Investments) or certain board decisions are prepared outside the residence state of the entity, decision-making on significant functions should not be considered as outsourced as the directors have to analyse independently whether a decision is beneficial for the company and take the decision during the board meetings organised in the residence state of the entity. At the very least, directors have a veto right that they would have to exercise if a specific decision would not be in the best interest of the company.

Another uncertainty is the meaning of "in the preceding two tax years": should it be understood as meaning, at one end of a continuum, that outsourcing took place at any moment during the 2 previous years, or, at the other end of a continuum that during the entire 2 year period, the activity was outsourced? Common sense would suggest that the answer is somewhere along the continuum but at present the wording used in the Directive proposal is unclear so that clarifications would be welcome.

Step 4: Reporting of minimum substance indicators in the tax return

Undertakings defined as reporting undertakings because they meet the three gateway criteria cumulatively would have to declare in their annual corporate tax return, for each tax year, whether they meet the following three indicators of minimum substance:

1. The first minimum substance indicator requires that the undertaking has its own premises in the Member State, or premises for its exclusive use. Given the wording used, this indicator seems to be too narrow as, in our view, the availability of premises should require neither the ownership of such premises, nor their exclusive use by the entity. Rather, depending on the requirements of the specific case, an entity may rent premises for its exclusive use, or share them with other group companies located in the same jurisdiction. This is common practice for groups with several entities located in the same jurisdiction where offices are rent by one of the entity and sub-rented to other companies located in the same jurisdiction or shared with them with a recharge. It would be good to clarify that the sharing of office space between companies of a group located in the same jurisdiction complies with this substance indicator. In addition, in the context of alternative investments, a company should further be able to rely on the premises of the asset manager. Such broad interpretation would be consistent with the relevant case law of the CJEU that held that an entity may legitimately rely on the resources and infrastructure of another entity of the same group that is resident in the same jurisdiction [2].

2. The second minimum substance indicator requires that the undertaking has at least one own and active bank account in the Union. While it might be expected that each and every entity has a bank account with a bank in a Member State, the question arises as to what means "active" within the meaning of this indicator. In our view, a bank account should be considered as active when it is operational and used by the entity when needed.

3. The third minimum substance indicator requires that the undertakings meets one of the following two indicators:

[2] See footnote (1) above.

- One or more directors of the undertaking (i) are resident for tax purposes in the Member State of the undertaking, or at no greater distance from that Member State insofar as such distance is compatible with the proper performance of their duties; (ii) are qualified and authorised to take decisions in relation to the activities that generate relevant income for the undertaking or in relation to the undertaking's assets; (iii) actively and independently use the authorisation referred to in point (ii) on a regular basis; (iv) are not employees of an enterprise that is not an associated enterprise and do not perform the function of director or equivalent of other enterprises that are not associated enterprises;

  The first three aspects of this indicator should generally not be problematic, as it is fairly common that entities have local directors that must be sufficiently experienced and qualified for such a position. All directors must further be actively involved in the decision-making process which should be properly documented (for example, in the minutes of the board of directors meetings, internal memos, e-mail correspondence). However, the last aspect of this indicator is problematic as qualified directors may legitimately be appointed to the board of directors of several companies that may, or may not, be part of the same group. Still, in our view, considering the case law of the CJEU in regard to wholly artificial arrangements, such requirement could arguably be considered as not in line with EU law.

- The majority of the full-time equivalent employees of the undertaking are resident for tax purposes in the Member State of the undertaking, or at no greater distance from that Member State insofar as such distance is compatible with the proper performance of their duties, and such employees are qualified to carry out the activities that generate relevant income for the undertaking.

  While this indicator seems to consider exclusively full-time equivalent employees of the entity itself, it would make sense to amend the wording in order to explicitly include employees of other entities of the group that are resident in the residence state of the entity (or are frontier commuters). In the context of alternative investments, it would further be reasonable to include the employees of the asset manager in this analysis.

Overall, in our view, these indicators of minimum substance are not suitable to identify wholly artificial arrangements. In addition, the CJEU specifically held that anti-abuse legislation cannot rely on predefined general criteria but, instead, it must be established on a case-by-case basis that the substance of an entity is not appropriate in view of the activities it performs: "In order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria, but must carry out an individual examination of the whole operation at issue."[3]

The Directive proposal provides that all information reported on the minimum substance indicators has to be accompanied with documentary evidence. The evidence required is aimed at allowing the tax administrations to verify directly the truth of the reported information as well as to form a general overview of the situation of the undertaking so as to consider whether to initiate a tax audit.

While entities which meet all the indicators of minimum substance and provide appropriate documentary evidence, as defined in the Directive Proposal, are deemed to have minimum substance for that tax year, entities which do not meet all the indicators of minimum substance or do not provide appropriate documentary evidence, are deemed (rebuttable presumption) to be a shell entity that lacks minimum substance.

[3] See decision of the CJEU of 20 December 2017, Deister Holding, Case C-504/16.

Step 5: Rebuttable presumption of lack of minimum substance for tax purposes

As mentioned above, entities which do not meet all the indicators of minimum substance or do not provide appropriate documentary evidence, are deemed (rebuttable presumption) to be a shell entity that lacks minimum substance.

However, this presumption is rebuttable, meaning that undertakings presumed not to have minimum substance are able to demonstrate that they have substance or in any case are not misused for tax purposes.

For this purpose, the undertaking would need to provide the following additional supporting evidence of the business activities which they perform to generate relevant income:

- documents allowing to ascertain the commercial rationale behind the establishment of the undertaking;
- information about the employee profiles, including the level of their experience, their decision-making power in the overall organisation, role and position in the organisation chart, the type of their employment contract, their qualifications and duration of employment;
- concrete evidence that decision making concerning the activity generating the relevant income is taking place in the Member State of the undertaking.

An undertaking would be considered as having rebutted the presumption if the evidence that the undertaking has provided proves that the undertaking has performed and continuously had control over, and borne the risks of, the business activities that generated the relevant income or, in the absence of income, the undertaking's assets.

Since the rebuttal process is likely to create a burden for both the undertaking and the tax administration, it would be possible to extend the validity of the rebuttal for another five years after the relevant tax year, provided that the legal and factual circumstances evidenced by the undertaking do not change. After this period, the undertaking would need to renew the process of rebuttal if it wishes to do so.

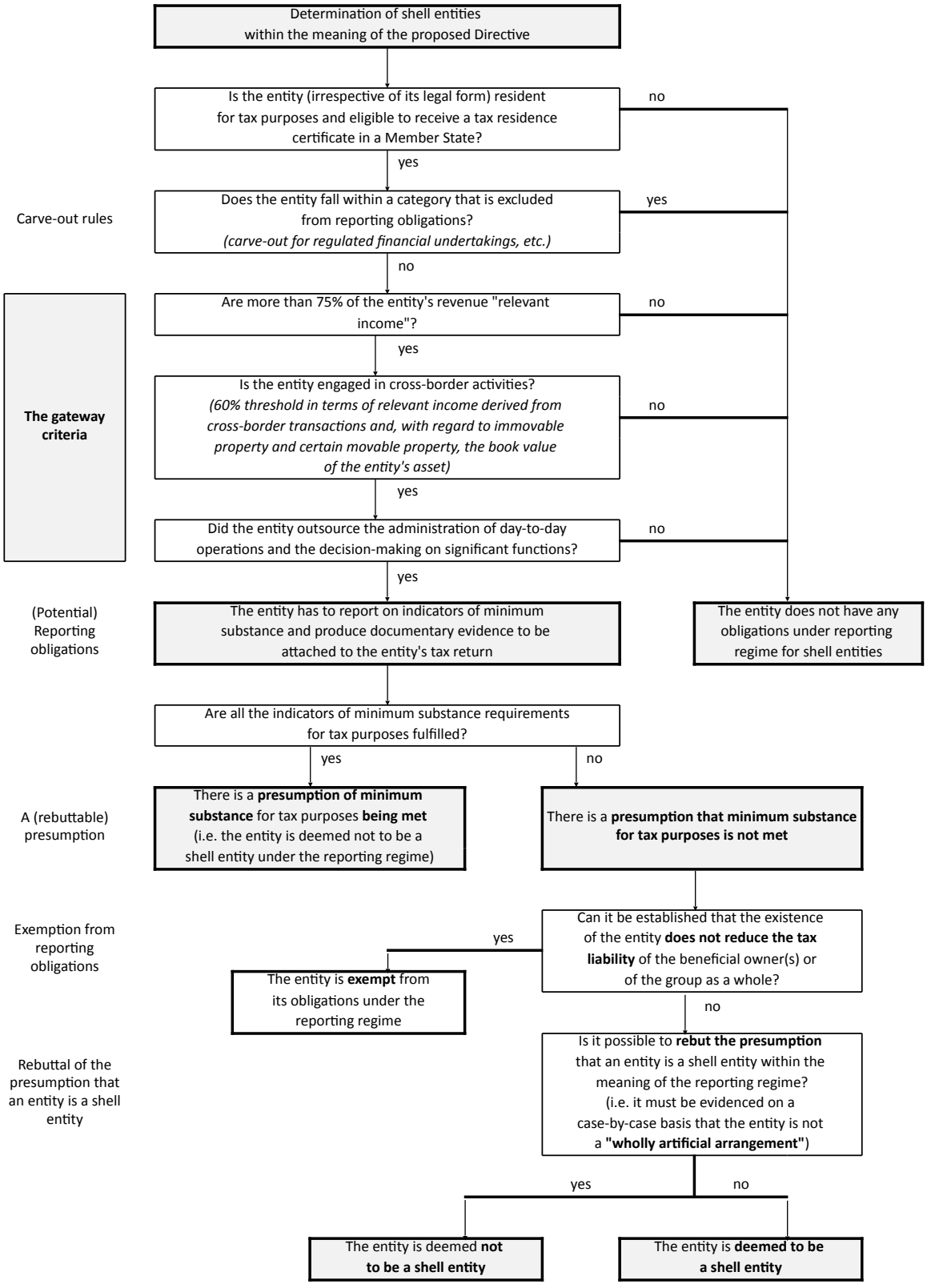
The possibility for undertakings to demonstrate that they should not be considered as shell despite an apparent lack of substance is positive as there is no "one-size fits all" approach and the right level of substance has to be tailored to each individual case. However, here again, it remains to be seen how and how quickly the tax authorities will assess the information provided and, pending this assessment, the undertaking will be in a situation of legal uncertainty. This is due to the fact that the Directive proposal neither requires Member States to review the evidence provided by the undertaking within a certain period of time, nor does it provide protection to the undertaking during the review period (will the undertaking be denied any tax benefits under the EU tax directives and the double tax treaties pending the assessment by the tax authorities?). These issues need to be addressed and clarified over the legislative procedure.

Step 6: Can the undertaking still benefit from an exemption for lack of tax motives?

An undertaking that might cross the gateway criteria and/or does not fulfil the minimum substance based on the indicators of the Directive proposal is still able to request an exemption from its reporting obligations if its existence does not reduce the tax liability of its beneficial owner(s) or of the group, as a whole, which the undertaking is a member of. This exemption is granted, provided that the undertaking provides sufficient and objective evidence that its interposition does not lead to a tax benefit for its beneficial owner(s) or the group as a whole.

While the possibility for an undertaking to be exempt from reporting on this basis is positive as an undertaking that might not fulfil the minimum substance requirements of the unshell proposal could be used for genuine business activities without creating a tax benefit for itself, the group or its beneficial owners, it is questionable how an undertaking will be able to demonstrate that it does not bring any kind of tax benefit and it is also unclear which evidence will be assessed as sufficient by the tax authorities.

Summary of the steps to identify if the entity is a shell entity



Tax implications for entities qualified as shell entities

Tax implications in the Member State of the undertaking

When undertakings do not reach the predefined level of minimum substance for tax purposes, the Member State in which it is resident for tax purposes will have to take either of the following decisions:

- deny a request for a certificate of tax residence to the undertaking for use outside the jurisdiction of this Member State;
- grant a certificate of tax residence which prescribes that the undertaking is not entitled to the benefits of agreements and conventions that provide for the elimination of double taxation of income, and, where applicable, capital, and of international agreements with a similar purpose or effect and of Articles 4, 5 and 6 of Directive 2011/96/EU ("**EU Parent-Subsidiary Directive**") and Article 1 of Directive 2003/49/EC ("**EU Interest and Royalty Directive**").

It should be noted that not issuing a tax residence certificate or issuing a special certificate, including the warning described above, would not set aside the national rules of the Member State of the undertaking qualified as a shell entity with regard to any tax obligations linked to the shell. It would only serve as an administrative practice to inform the source country that it should not grant the benefits of its tax treaty with the Member State of the shell (or of applicable EU directives) to payments towards the shell. Thus, the Member State of the shell entity will still remain free to continue to consider the shell entity as resident for tax purposes in its territory and apply tax on the relevant income flows and/or assets as per its national law.

Tax implications in other Member States

Undertakings presumed not to have minimum substance and which do not rebut the presumption of lack of minimum substance would be denied tax benefits under double tax treaties in force with the Member State, as well as under the EU Parent Subsidiary Directive and the EU Interest and Royalty Directive.

In addition, the Member State of the undertaking's shareholder(s) would tax the relevant income of the undertaking in accordance with its national law as if it had directly accrued to the undertaking's shareholder(s) and, to avoid double taxation, deduct any tax paid on such income at the Member State of the undertaking, provided that both the undertaking's shareholders and the payer are resident for tax purposes in a Member State.

If the payer is resident in a third country (i.e. it is not resident for tax purposes in an EU Member State), the Member State of the undertaking's shareholder(s) will have to tax the relevant income accruing to the undertaking in accordance with its national law as if it had directly accrued to the undertaking's shareholder(s), without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and, where applicable, capital, in force between the Member State of the undertaking's shareholders and the third country jurisdiction of the payer.

If the undertaking's shareholder(s) is/are resident in a third country, the Member State of the payer of the income will have to apply withholding tax in accordance with its national law, without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and, where applicable, capital, in force with the third country jurisdiction of the undertaking's shareholder(s).

Where property is owned by an undertaking that is presumed not to have minimum substance and does not rebut this presumption, the Member State where the property is situated will have to tax such property according to its national law, as if such property was owned directly by the undertaking's shareholder(s) and the Member State of the undertaking's shareholder(s) will have to tax such property in accordance with its national law as if the undertaking's shareholder(s) owned it directly.

Request for tax audits

Member States will also be able to request the resident state of the entity to perform tax audits where they have grounds to suspect that the entity might be lacking minimal substance for the purposes of the Directive.

In terms of timing, the competent authority of the requested Member State will have to initiate the audit within one month from the date of receipt of the request and conduct the tax audit (in accordance with the rules governing tax audits in the requested Member State). The competent authority which conducted the tax audit will have to provide feedback on the outcome of the audit to the competent authority of the requesting Member State as soon as possible but no later than one month after the outcome of the tax audit is known.

Exchange of information

All Member States will have access to information on all undertakings defined as reporting entities and subject to reporting under the unshell proposal at any time and without a need for recourse to request for information. To this effect, information will be exchanged among Member States from the first step, when an undertaking is classified as being at risk for the purposes of the Directive proposal. Exchange would also apply where the tax administration of a Member State makes an assessment based on facts and circumstances of individual cases and decides to certify that a certain undertaking has rebutted the presumption of being shell or should be exempt from the obligations under the unshell proposal.

The information would be exchanged automatically through a central directory by deploying the existing mechanism of administrative cooperation in tax matters under the Directive on Administrative Cooperation ("**DAC**"), which will be amended in order to reflect the changes introduced by the Directive proposal. Member States will have to exchange the information within 30 days from the time the administration has such information at its disposal. Automatic exchange will also have to take place within 30 days from the conclusion of an audit to an undertaking at risk for the purposes of the Directive proposal, if the outcome of such audit has an impact on the information already exchanged or that should have been exchanged for this undertaking.

Where a Member State's administration assesses a rebuttal of presumption or an exemption from the obligations of the Directive, the information exchanged will have to allow other Member States to understand the reasons for this assessment. Other Member States will always have to be able to request from another Member State a tax audit on any undertaking that passes the gateways of this Directive proposal, if they have doubts on whether or not it has reached the minimal level of substance required. The requested Member State will have to perform the tax audit within a reasonable timeframe and share the outcome with the requesting Member State. If there is a finding of 'shell' entity, the exchange of information will be automatic.

Information to be provided to the European Commission

Member States will finally be required to produce statistical data for each tax year to the Commission, including:

- Number of entities that meet the gateway criteria;
- Number of entities that reported on indicators of minimum substance;
- Penalties imposed for non-compliance with the requirements of the proposed reporting regime;
- Number of entities presumed not to have minimum substance and number of entities that rebutted such presumption;
- Number of entities exempt from the requirement under the Directive proposal;
- Number of audits in regard to entities that meet the gateway criteria;
- Number of cases where an entity presumed to have minimum substance was found not to have substantial activity (in particular following an audit);
- Number of requests for exchange of information submitted and number of requests received;
- Number of requests for tax audits submitted and number of requests received.

The Commission will communicate the information listed above on a biannual basis.

Penalties for non-compliance with the reporting obligations

The Directive proposal leaves it to Member States to lay down penalties applicable against the violation of the

reporting obligations which shall be effective, proportionate, and dissuasive. Member States shall ensure that those penalties include an administrative pecuniary sanction of at least 5% of the undertaking's turnover in the relevant tax year, if the undertaking that is required to report does not comply with such requirement for a tax year within the prescribed deadline or makes a false declaration in its tax return.

Conclusion and next steps

The Directive proposal did not come as a surprise as it is one of the initiatives already announced by the European Commission in its Communication of May 2021 on Business Taxation for the 21st century. However, it came earlier than expected since a public consultation was launched less than four months before the Directive proposal was released in order, among others, to assess whether there was a need to handle in this area (given the various tools already at the disposal of tax authorities to tackle aggressive tax planning schemes) and whether it was really the right time to act (given that the impact of the tools available could not be assessed yet). Obviously, the European Commission came to the conclusion very rapidly that an additional layer of transparency (this time specifically focussing on substance) and the introduction of substance driven anti-abuse rules (that are broadly similar to already existing anti-abuse provisions such as the GAAR, the CFC rules and the PPT) were needed despite similar anti-abuse rules exist already.

The GAAR of both the EU Parent-Subsidiary Directive and under ATAD, the PPT in tax treaties and the case law of the Court of Justice of the European Union already define the conditions under which tax benefits could be denied. In addition, it remains to be seen whether the criteria set in the Directive proposal would be considered as in line with the EU fundamental freedoms, as interpreted by the CJEU. The CJEU has already defined the limits of anti-abuse legislations in an EU context and taxpayers are free to rely on their EU freedoms when organising their investment and business activities as long as the underlying contractual arrangements are not "wholly artificial arrangements". In addition, the CJEU specifically held that anti-abuse legislation cannot rely on predefined general criteria (which is what the European Commission does in its Directive proposal) in order to determine whether an operation pursues an objective of fraud and abuse.

To become a Directive, the unshell proposal will have to be adopted at unanimity, meaning that all EU Member States will have to approve it. Thus, it remains to be seen whether all EU member States will agree on the fact that existing anti-abuse rules are currently not sufficient and that it is worth increasing the administrative burden of EU undertakings and introducing an additional level of legal uncertainty. Ultimately, it can be expected that the provisions of the Directive proposal will evolve over the legislative procedure.

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The global minimum taxation: State of play at OECD and EU level

OUR INSIGHTS AT A GLANCE

- Back in December 2021, the model rules to give effect to the GloBE rules (also called "Pillar Two") were published by the OECD and the EU Council published a proposed Directive.
- Taking some concerns raised by Member States into consideration, the EU Council published two amended proposals for a Directive on GloBE, dated respectively 12 March 2022 and 28 March 2022.
- The amended Directive proposal differs slightly from the initial Directive proposal mainly, on the time limit for transposition.
- On 14 March 2022, the OECD published the long-awaited commentary on the application and practical implementation of the OECD Model Rules under Pillar Two. The OECD commentary provides guidance and clarifies the meaning of certain terms used in the OECD Model Rules and the GloBE Directive proposal.
- Practically, the EU is struggling to reach unanimous agreement on Pillar Two.

The Global Anti-Base Erosion ("**GloBE**") rules, also called "Pillar Two", agreed upon by the OECD/G20 Inclusive Framework ("**IF**") on BEPS in the Statement to Address the Tax Challenges Arising from the Digitalisation of the Economy and the Detailed Implementation Plan, on 8 October 2021, provide for a coordinated system of taxation intended to ensure large multinational enterprise ("**MNE**") groups pay a minimum level of tax on the income arising in each of the jurisdictions they operate in. The model rules to give effect to the GloBE rules (the "**OECD Model Rules**") were published by the OECD on 20 December 2021.

Two days later, the EU Commission published a proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the UE ("**GloBE Directive Proposal**"). The GloBE Directive Proposal follows the OECD Model Rules closely, with some differences to ensure its compatibility with EU law, and sets out how to calculate and apply the OECD global minimum taxation so that it is properly and consistently applied across the EU.

Following to the ECOFIN meeting held in January 2022, where concerns were raised by a few Member States on the GloBE Directive Proposal, the EU Council published an amended GloBE Directive Proposal (the "**Compromise Proposal**"), dated 12 March 2022, which differs slightly from the initial Directive proposal, mainly, on the time limit for transposition. As four Member States were not in a position to approve the Compromise Proposal at the ECOFIN meeting held on 15 March 2022, further work was done to address the last concerns. As a result, the EU Council published a new amended Directive Proposal dated 28 March 2022 (the "**Presidency Compromise Text**" or, together with the Compromise Proposal the "**Amended GloBE Directive Proposal**").

Recently, on 14 March 2022, the OECD finally published the long-awaited commentary on the application and practical implementation of the OECD Model Rules under Pillar Two (the "**GloBE Commentary**").

The below developments will focus on the changes introduced in the Amended GloBE Directive Proposal and some of the guidelines provided by the GloBE Commentary.

What are the main changes under the Amended GloBE Directive?

Under the Amended GloBE Directive Proposal, the time limit for transposition is set to 31 December 2023 instead

of the initially proposed date of 31 December 2022. The provisions of the future Directive will thus apply in respect of the fiscal years beginning as from 31 December 2023 instead of 1 January 2023.

According to October's statement of the OECD Inclusive Framework on BEPS, Pillar Two should be brought into law in 2022 and be effective as from 2023. The EU Commission asserts that with this Directive entering into force in 2022 and the time limit for transposition by the Member States having been set at the latest for 31 December 2023, the EU acts in line with the timeline agreed in October 2021.

This should give 12 additional months to the tax authorities and taxpayers to implement the new GloBE regulations. However, it remains to be seen what will happen if other non-EU jurisdictions do not extend the implementation date to the end of 2023.

According to the Amended GloBE Directive Proposal, the date of entry into force of the undertaxed payment rule has also been postponed. It will apply in respect of the fiscal years beginning as from 31 December 2024 instead of the initially proposed date of 1 January 2024.

Finally, Member States in which no more than twelve ultimate parent entities ("**UPE**") of groups in scope of the Directive are located may elect not to apply the GloBE Rules for six consecutive fiscal years beginning as from 31 December 2023. This addresses the particular situation of Member States in which very few groups are headquartered, and which accommodate such a low number of constituent entities that it would make it disproportionate to immediately require the application of the GloBE Rules by the tax administrations of those Member States. This election should be notified to the EU Commission before the transposition date of the Amended GloBE Directive. Practically, it will remain to be seen on the basis of which information (CbCR reporting or other specific reporting to be implemented) Member States will know whether they are eligible to make this election in advance of the transposition. The Amended GloBE Directive Proposal does not cover this point. It does not deal either with the situation where the number of UPE of groups in scope of the Directive located in a Member State would rise above twelve just after such election.

Is the Amended GloBE Directive ready to be approved at EU level?

On 15 March 2022, the Compromise Proposal was discussed at the ECOFIN meeting. Even though the French Council Presidency was confident that an agreement could be reached soon and that the Compromise Proposal could have been approved at the next ECOFIN meeting to held on 5 April 2022, some Member States clearly expressed that they were still not in a position to approve the Compromise Proposal.

- Sweden considered that it is too early to adopt the proposal considering the current work that is still ongoing at OECD level.
- Poland requested a legally binding provision which links the implementation of Pillar Two with Pillar One as this link is a key element of the October 2021 agreement at OECD level. In this respect, the plan of the French Council Presidency to issue a statement, along with the agreement on the proposed Directive on Pillar Two, confirming the commitment of all Member States to the ongoing process on Pillar One in the Inclusive Framework, is not sufficient for Poland.
- Estonia notably said that some technical details still need to be addressed to be able to maintain its current distribution-based corporate tax system but was confident that an agreement will be reached.
- Malta had two issues with the text of the Compromise Proposal which should faithfully replicate the OECD deal of October 2021 allowing some flexibility for the application of the income inclusion rule and the undertaxed payment rule. Given the small number of UPEs established in Malta, the absence of such flexibility would mean the cost of Pillar Two far outweighs its benefits. As a result, Malta wants a slight extension of the application of the Income Inclusion Rules ("**IIR**") and Under Taxed Payment Rules ("**UTPR**") and the threshold of UPEs to be slightly increased.

On 5 April 2022, during the ECOFIN meeting, things did

not really happen as expected by the French Presidency. If Estonia, Sweden, and Malta were finally in a position to approve the Presidency Compromise Text because they were confident their concerns had been addressed, Poland maintained its position that Pillar One and Pillar Two should be seen as a package in a single reform. According to Poland "*we should be mindful of the inadequacy of placing additional burden on EU businesses under Pillar Two without ensuring that digital giants are fully taxed under Pillar One especially when faced with difficulties of the current post pandemic times. We should be also aware of some risks indicating that the scheduled entry into force of Pillar One is not guaranteed. Lack of participation of some jurisdictions in Pillar 1 undermines the balance and the objective behind the all 2 Pillars solution.*" On this particular issue, it is interesting to note that the Commission and the Council Legal Service have confirmed the legal difficulties involved in the request of Poland to link the entry into force of the two pillars by making the entry into force of Pillar Two contingent on the entry into force of the multilateral convention implementing Pillar One. This is probably the reason why the French Presidency proposed only to issue a statement, along with the agreement on the proposed Directive on Pillar Two, confirming the commitment of all Member States to the ongoing process on Pillar One, and does not seem to be in a position to propose another solution to try to meet Poland's request.

As a result, it remains to be seen whether they will find a legal solution to this issue and if, and how, the position of Poland will evolve. In the meantime, the GloBE Directive Proposal seems currently in a deadlock.

The OECD GloBE Commentary

The GloBE Commentary is welcomed as the OECD Model Rules and the Amended GloBE Directive Proposal (the "GloBE Regulations") are drafted in a complex way and a first reading does not allow to understand all their nuances and implications. The GloBE Commentary provides guidance and clarifies the meaning of certain terms used in the OECD Model Rules. However, in implementing the Amended GloBE Directive Proposal, the OECD Commentary shall also be used as a source of illustration or interpretation in order to ensure consistency in application across Member States to the extent that they are consistent with the provisions of the Amended GloBE Directive Proposal and with Union law.

Scope and carve-outs of the GloBE Regulations

Annual group turnover of at least EUR 750 million

The OECD Model Rules apply to groups of MNEs that have a combined annual group turnover of at least EUR 750 million based on consolidated financial statements in at least two of the four fiscal years immediately preceding the tested fiscal year. To ensure that an MNE group knows, at the beginning of the tested fiscal year, whether it will be subject to the GloBE Rules in that year, consolidated revenue for the tested fiscal year is not factored into the four-year calculation and is thus excluded from the revenue threshold test. This threshold was decided by the Inclusive Framework in order to ensure consistency with existing international corporate tax policies such as the rules on Country-by-Country Reporting. The GloBE Commentary notably provides guidance regarding the computation of this threshold in cases where consolidated financial statements are not available in respect of the four fiscal years immediately preceding the tested fiscal year. It deals with, for example, the case where the entities that make up the MNE group have been recently created, so that there are no financial statements for entities in any prior year, or where, prior to the tested fiscal year, the entities forming the group were standalone entities that were not required to consolidate.

An MNE group means any group that includes at least one entity or permanent establishment that is not located in the jurisdiction of the parent entity. However, at EU level, to ensure compliance with the fundamental freedoms, the Amended GloBE Directive Proposal also targets large-scale domestic groups that have a combined annual group turnover of at least EUR 750 million based on consolidated financial statements. An entity or permanent establishment that is part of an MNE group or a large-scale domestic group is considered as a "constituent entity". According to the GloBE Commentary, entities that are joint ventures

and associates for accounting purposes are not treated as constituent entities because they are not controlled by the MNE group.

Excluded Entities

Government entities, international organisations, non-profit organisations, pension funds and investment funds that are ultimate parent entities ("**UPEs**") of an MNE group (the "**Excluded Entities**") are not subject to the GloBE Rules. Investment funds and real estate investment vehicles are excluded from the scope only when they are at the top of the ownership structure.

To be a UPE of the MNE Group, an investment fund must comply with two requirements:

- First, the investment fund owns a controlling interest directly or indirectly in another Entity. The definition of controlling interest uses a consolidation test (including a deemed consolidation test) to determine whether an entity owns a controlling interest in another entity. This requirement is met if the investment fund is required to consolidate the assets, liabilities, income, expenses and cash flows of another entity on a line-by-line basis in accordance with an Acceptable Financial Accounting Standard or if it would have been so required if the investment fund had prepared consolidated financial statements in accordance with an Authorised Financial Accounting Standard.
- Second, the controlling interests of the investment fund should not be owned directly or indirectly by another entity. Therefore, it disqualifies an investment fund from being the UPE of a Group if the controlling interests in that investment fund are held by another Entity. Stated differently, the investment fund is not considered the UPE of a Group if there is another Entity higher in the ownership chain that is required, or that would have been required, to consolidate the first-mentioned Entity on a line-by-line basis.

Qualification as an Excluded Entity has three practical effects under the GloBE Rules:

- The IIR and UTPR do not apply to Excluded Entities. Therefore, an Excluded Entity that is the UPE of the MNE Group is not required to apply the IIR, and the rule must be applied by the next entity in the ownership chain (that is not itself an Excluded Entity).
- The GloBE attributes of Excluded Entities (including their profits, losses, taxes accrued, tangible assets, and payroll expenses) are removed from the various computations under the GloBE Rules, except for the application of the revenue threshold of 750 million described above.
- Excluded Entities do not have any administrative obligations under the GloBE Rules, such as the filing of a "GloBE Information Return", and information related to their income, taxes, assets, etc. is not reported in the GloBE Information Return other than the required information relating to Excluded Entities.

Finally, entities that are owned under certain conditions by Excluded Entities are also excluded from the scope of the GloBE Rules. This exclusion targets notably holding companies. This exclusion recognises that Excluded Entities may be required, for regulatory or commercial reasons, to hold assets or carry out specific functions through separate controlled entities. For example, commercial or regulatory requirements may prevent an investment fund (that is considered as an Excluded Entity) from investing directly in an asset and may require the investment to be made through a separate vehicle to limit the investment fund's liability. The rule addresses these types of situations and may permit such a holding vehicle to qualify as an Excluded Entity. The exclusion targets situations where an Excluded Entity:

- sets up an entity to hold its assets or invest its funds, or to carry out activities that are ancillary to the Excluded Entity's activities. Under this exclusion the entity must meet two tests: an ownership test and an activities test:
  - Under the ownership test, one or more Excluded Entities must own at least 95% of the value of the entity. The expression "value of the entity" refers to the total value of the ownership interests issued by the entity. In the case of shares, it refers to the value of the issued and outstanding shares that are held by

shareholders. The value of the entity is different from a direct measurement of the amount of ownership interests held by the Excluded Entity which refers to the underlying rights to profits, capital or reserves of such entity. The GloBE Commentary explains how to compute this "value".

- Under the activities test, the entity operates "exclusively or almost exclusively to hold assets or invest funds". As a result, the entity must not actively carry out activities other than holding assets or investing funds. Alternatively, the activities test is met if the entity only carries out activities that are ancillary to the activities carried out by an Excluded Entity.
- owns at least 85% of the value of another entity whose financial accounting net income or loss would otherwise be excluded from the GloBE income or loss because "substantially all of its income" (i.e. all or almost all of its income) is composed of "Excluded Dividends or Excluded Equity Gains or Losses" that are excluded from the GloBE income. These types of holding vehicles would not be expected to be subject to a "Top-up Tax" under the GloBE Rules because all of their income is excluded from the GloBE income.

The ownership percentage in the second hypothesis is lower than in the first one in order to provide greater flexibility, in particular, in the context of vehicles held by investments funds where third parties may hold a greater stake or where the interests in the holding vehicle are issued to management or other employees of the operating company.

Joint Ventures

According to the GloBE Commentary, Joint Ventures do not meet the definition of a Constituent Entity, which requires an entity to be consolidated on a line-by-line basis. In general, entities whose Ownership Interests are accounted for under the equity method are not constituent entities. Thus, on this basis, if two MNE Groups subject to the GloBE Rules each owned 50% of the ownership nterests of a joint venture, neither MNE Group should be subject to the GloBE Rules on its share of the JV's income.

However, pursuant to a specific provision, entities in which the UPE of an MNE Group holds directly or indirectly at least 50% of its ownership Interests will be treated as if they were constituent entities. This definition encompasses entities that are considered joint ventures for accounting purpose and some that are considered associates for accounting purposes. This ensures that all of the income of a 50/50 Joint Venture owned, directly or indirectly, by the UPE of an MNE Group will be subject to the GloBE Rules and that the rule extends to any venture in which the MNE Group holds 50% or more of the ownership interests (without having unilateral control).

Effective Tax Rate and Top-Up Tax

The GloBE Regulations apply a system of Top-up Taxes that brings the total amount of taxes paid on an MNE's excess profit of low-taxed constituent entities located in a jurisdiction up to the minimum rate. This Top-up Tax does not operate as a typical direct tax on income of an entity. Rather, it applies to the excess profits calculated on a jurisdictional basis and only applies to the extent that those profits are subject to tax in a given year below the minimum rate.

The Top-up Tax percentage for a jurisdiction for a fiscal year shall be computed in accordance with the following formula:

$$Top{-}up\ \mathrm{T}ax\ percentage = minimum\ tax\ rate - effective\ tax\ rate.$$

The GloBE Regulations set the minimum effective tax rate at 15% and describe how to calculate the effective tax rate

("**ETR**") of an MNE group (or a large-scale domestic group) in a jurisdiction. The ETR is obtained by dividing the adjusted covered taxes of the group (corporate and equivalent taxes) by the net qualifying income earned by the constituent entities of the group in that jurisdiction. The ETR is calculated by fiscal year.

When investment entities are not UPEs, and thus are not Excluded Entities, they are subject to the GloBE Regulations which provide for specific rules for the determination of the ETR and Top-up Tax of an investment entity that is not a tax transparent entity and that has not made an election to be treated as tax transparent or to apply a taxable distribution method. In that case, the effective tax rate of such investment entity shall be computed separately from the ETR of the jurisdiction in which it is located. Under these specific rules for these investment entities, the ETR shall notably be equal to its adjusted covered taxes divided by an amount equal to the allocable share of the MNE group in the qualifying income or loss of the investment entity. In respect of the calculation of the Top-up Tax of an investment entity, it shall be an amount equal to the Top-up Tax percentage of the investment entity multiplied by an amount equal to the difference between the allocable share of the MNE Group in the qualifying income of the investment entity and the substance-based income exclusion computed for the investment entity.

The Top-up Tax due for the constituent entities located in a jurisdiction shall be equal to zero for a fiscal year if for such fiscal year the average qualifying revenue of the constituent entities located in that jurisdiction is less than EUR 10,000 000 and the average qualifying income or loss of that jurisdiction is a loss or is less than EUR 1,000,000.

What is the net qualifying income to be taken into account?

The qualifying income or loss of each constituent entity used for the calculation of the effective tax rate and the Top-up Tax shall be computed by making the adjustments to the financial accounting net income or loss of the constituent entity for the fiscal year before any consolidation adjustments for intra-group transactions, as determined under the accounting standard used in the preparation of the consolidated financial statements of the UPE.

To determine its qualifying income or loss, the financial accounting net income or loss of a constituent entity shall notably be adjusted by the amounts of "excluded dividends" and "excluded equity gains or losses". The GloBE Regulations also provide for a specific international shipping income exclusion and substance based income exclusion.

"Excluded dividends"

According to the Amended GloBE Directive Proposal, the first type of "excluded dividend" means a dividend or another distribution received or accrued in respect of an ownership interest, except a dividend or another distribution received or accrued in respect of: (i) an ownership interest in an entity of less than 10% (a "**Portfolio Shareholding**") in respect of which a constituent entity is entitled to all or substantially all of the rights to profits, capital or reserves, irrespective of whether the constituent entity has owned the legal ownership of such portfolio for less than one year at the date of the distribution; and (ii) an ownership interest in an investment entity that is subject to an election to apply a taxable distribution method.

According to the GloBE Commentary, the intention is to provide for a broad exemption for dividends that aligns with the operation and scope of participation exemptions in many Inclusive Framework jurisdictions and covers both substantial and long term shareholdings, while, at the same time, ensuring that the exclusion does not provide unintended benefits for dividend income received by a constituent entity as part of its trading activity.

Dividends or other distributions received or accrued in respect of:	Portfolio Shareholding (i.e. carrying rights to less than 10% of the profits, capital, reserves or voting rights of the distributing entity)	Non-Portfolio Shareholding (i.e. carrying rights to at least 10% of the profits, capital, reserves and voting rights of the distributing entity)
Short-term shareholding (i.e. economically held for less than one year)	**Included dividend**	Excluded Dividend
Non- Shot-term shareholding (i.e. economically held for at least one year)	Excluded Dividend	Excluded Dividend

source : GloBE Commentary

'Excluded equity gain or loss'

'Excluded equity gain or loss' means a net gain or loss, included in the financial accounting net income or loss of the constituent entity, arising from:

(i) gains and losses arising from changes in the fair value of an ownership interest, except for a Portfolio Shareholding. Unlike the rule that applies for purposes of Excluded Dividends, the period during which the Portfolio Shareholding is held is not relevant for determining whether gains and losses arising from the disposition of that shareholding are includible in GloBE Income or Loss.

Gains and losses arising from the disposition of:	Portfolio Shareholding (i.e. carrying rights to less than 10% of the profits, capital, reserves or voting rights of the distributing entity)	Non-Portfolio Shareholding (i.e. carrying rights to at least 10% of the profits, capital, reserves and voting rights of the distributing entity)
Short-term shareholding (i.e. economically held for less than one year)	**Included gain/loss**	Excluded gain/loss
Non- Shot-term shareholding (i.e. economically held for at least one year)	**Included gain/loss**	Excluded gain/loss

source : GloBE Commentary

(ii) gains or losses in respect of an ownership interest that is included under the equity method of accounting. Financial accounting standards typically require equity method accounting when the MNE group holds a significant but non-controlling interest in an entity, ordinarily between 20% and 50% of the equity interests in an entity. These entities are referred to as joint ventures or associates under financial accounting standards.

Substance-based income exclusion

The policy rationale behind a formulaic, substance-based carve-out, based on payroll and tangible assets, is to reduce the impact of Pillar Two on MNE groups in a jurisdiction, where they are carrying out real economic activities. The use of payroll and tangible assets as indicators of substantive activities is justified because these factors are generally expected to be less mobile and less likely to lead to tax-induced distortions. According to the GloBE Commentary, excluding a fixed return from substantive activities focuses GloBE on "excess income", such as intangible-related income, which is most susceptible to BEPS risks. While the GloBE Regulations aim only at a global minimum taxation, without any anti-profit shifting objectives, this exclusion carves-out income that is less at risk of profit shifting with the effect of introducing a scope for tax competition. The substance-based income under the GloBE Regulations are indeed not subject to a global minimum taxation.

The net qualifying income for a jurisdiction shall be reduced, for the purpose of calculating the Top-up Tax, by an amount

equal to the sum of the payroll carve-out and the tangible asset carve-out for each constituent entity located in the jurisdiction. The payroll carve-out and the tangible asset carve-out of a constituent entity located in a jurisdiction shall be equal to 5% respectively of its eligible payroll costs of eligible employees who perform activities for the MNE group in such jurisdiction and of the carrying value of the eligible tangible assets located in the jurisdiction. The substance-based income exclusion shall not include the payroll carve-out and the tangible asset carve-out of investment entities.

For the purposes of the payroll carve-out, eligible employees are employees, including part-time employees, of a constituent entity and independent contractors participating in the ordinary operating activities of the MNE group under the direction and control of the MNE group. Independent contractors include only natural persons and may include natural persons who are employed by a staffing or employment company but whose daily activities are performed under the direction and control of the MNE group. Independent contractors do not include employees of a corporate contractor providing goods or services to the constituent entity. Independent board directors provided by third-party service providers should thus not be treated as eligible employees.

A constituent entity's eligible payroll costs include expenditures for salaries and wages, as well as for other employee benefits or remuneration such as medical insurance, payments to a Pension Fund or other retirement benefits, bonuses and allowances payable to eligible employees, and stock-based compensation. Eligible payroll costs also include payroll taxes (or other employee expense-related taxes such as fringe benefits taxes), as well as employer social security contributions.

Eligible tangible assets include a broad range of tangible assets such as the carrying value of property, plant and equipment, natural resources, and a lessee's right-of-use assets that are located in the jurisdiction in which the constituent entity is located. The tangible asset carve-out requires that the tangible assets are located in the same jurisdiction as the constituent entity that owns them or in the same jurisdiction as the constituent entity that holds the right-of-use of the asset. Tangible assets should not include cash or cash equivalents, intangibles, or financial assets.

For the calculation of the substance carve-out of an investment entity that is not a tax transparent entity and that has not made an election to be treated as tax transparent or to apply a taxable distribution method, the eligible tangible assets and eligible payroll costs of eligible employees taken into account for the substance carve-out shall be reduced in proportion to the allocable share of the MNE group in the qualifying income of the investment entity divided by the total qualifying income of such investment entity.

The substance-based income exclusion is subtracted from the net GloBE income of low-taxed constituent entities of a jurisdiction in order to arrive at a measure of excess profit of that jurisdiction that would be subject to the Top-up Tax. If the exclusion determined for a fiscal year exceeds the net GloBE income of the jurisdiction for that year, there will be no excess profit, and thus no Top-up Tax computed for that year unless there is additional current Top-up Tax for that fiscal year (ex.: if there is a retroactive recalculation of the ETR and Top-up Tax for a previous fiscal year). The excess of the substance-based income exclusion over the net GloBE income of the jurisdiction for a fiscal year cannot be carried forward or backward to reduce the net GloBE income of another fiscal year.

Allocation of the Top-up Tax

*Income Inclusion Rule ("**IIR**")*

The IIR imposes a Top-up Tax on a parent entity that can be either a UPE that is not an Excluded Entity, or an Intermediate Parent Entity ("**IPE**"), or a Partially Owned Parent Entity ("**POPE**") in respect of the low-taxed income of its constituent entities. In principle, the IIR applies on a top-down basis, which means that it is applied by the entity that is at, or near, the top of the ownership chain in the MNE Group, which is normally the UPE. However, in cases where the UPE does not apply the IIR, one or more IPE will have to apply the IIR to its allocable share of the Top-up Tax based on its direct or indirect ownership interest in low-taxed constituent entities.

The OECD Model Rules provide that the jurisdictions which apply the IIR take into account the ETR of foreign constituent entities only. However, the Amended GloBE Directive Proposal provides that the Member State of a constituent entity applying the IIR, which is usually the jurisdiction of the UPE, is required to ensure effective taxation at the minimum agreed level, not only of foreign subsidiaries but also of all constituent entities resident in that Member State and permanent establishments of the MNE group established in that Member State. In this respect, the EU makes use of an option offered in the Commentary to the Model Rules.

More than one IPE in the same MNE group could be required to apply the IIR with respect to its allocable share of Top-up Tax from a low-tax constituent entity. In this case, each IPE is required to apply the IIR. However, where two or more IPEs are part of the same ownership chain and are required to apply the IIR with respect of the same low-tax constituent entity, double taxation is avoided by applying the top-down approach and turning off the IIR at the level of the lower-tier entity, or by reducing the Top-up Tax of the upper-tier entity by the amount of the Top-up Tax that has been brought into charge by the lower-tier entity.

Where some of the low-taxed constituent entities have a significant (i.e. more than 20%) minority interest holder outside the MNE group (the so-called "split-ownership structures"), the GloBE Rules depart from the top-down approach and instead require a POPE to apply the IIR notwithstanding that it is in a lower-tier of the ownership chain. The POPE has priority to apply the IIR irrespective of whether the UPE is also applying a qualified IIR. To avoid double taxation, the UPE (or next tier IPE, if the UPEs is not applying the IIR) will then reduce its Top-up Tax liability with respect to any portion of the Top-up Tax that would be charged to the POPE.

In addition, to preserve the sovereignty of Member States, the Amended GloBE Directive Proposal also provides that a Member State can opt to apply the Top-up Tax domestically to constituent entities located in its territory (the "**Domestic Top-up Tax**"). This election allows that the Top-up Tax is charged and collected in a jurisdiction in which a low level of taxation occurred, instead of collecting all the additional tax at the level of the UPE. When this election is exercised, the parent entity applying the IIR will be obliged to grant a credit for the qualified domestic Top-up Tax when calculating the Top-up Tax in respect of the relevant jurisdiction. Whether jurisdictions will apply this Domestic Top-up Tax or not will have a huge impact on the economics of the GloBE effects. So far, estimations of GloBE financial impact for jurisdictions have been made as if no adjustments were made at local level. In this respect, the Domestic Top-up Tax will be a determining factor. Moreover, as a result, competition could exist on enforcement. Due to the way the Domestic Top-up Tax works, jurisdictions could still reduce their tax rate to remain competitive. In theory, for example, we could indeed see scenarios where the CIT rate would be 0% and the qualified Domestic Top-up Tax would be 15% on the excess profit.

The Undertaxed Payments Rule ("UTPR")

Scope

The UTPR allocates the Top-up Tax to a jurisdiction to the extent that the low-tax income of a constituent entity is not subject to tax under an IIR. The UTPR acts thus as a backstop to the IIR and applies in situations where there is no qualifying IIR in the jurisdiction of the UPE or where a low level of taxation arises in the jurisdiction of the UPE. According to the UTPR, a constituent entity of an MNE group will have an additional cash tax expense equal to its share of Top-up Tax that was not charged under the IIR in respect of the low-taxed constituent entities of the group.

In circumstances where the UPE is located outside the EU in a jurisdiction that does not apply a qualifying IIR, all its constituent entities in jurisdictions with an appropriate UTPR framework will be subject to the UTPR. In this circumstance, constituent entities of such an MNE group that are located in a Member State will be apportioned, and will have to pay a share of the Top-up Tax in their Member State linked to the low-taxed subsidiaries of the MNE group.

Where the jurisdiction of the UPE operates a qualifying IIR but the UPE, together with its subsidiaries located in that same jurisdiction, are low-taxed, the Top-up Tax corresponding

to the low-taxed UPE and its domestic subsidiaries will be charged through the UTPR to all the eligible entities across the MNE Group.

Constituent entities that are investment entities and pension funds shall not be subject to the UTPR Top-up Tax.

The GloBE Regulations finally provide for an exclusion from the UTPR for MNEs in the initial phase of their international activity, defined as those MNEs that have a maximum of EUR 50 million tangible assets abroad and that operate in no more than five other jurisdictions.

Mechanism

According to the GloBE Model Rules, under the UTPR, the constituent entities of an MNE Group shall be denied a deduction for otherwise deductible expenses (or be subject to an equivalent adjustment under domestic law) in an amount sufficient to result in the constituent entities located in the UTPR jurisdiction having an additional cash tax expense equal to the UTPR Top-up Tax amount allocated to that jurisdiction. For instance, if a constituent entity located in a UTPR jurisdiction is allocated UTPR Top-up Tax amount of 10 and the CIT rate is 25%, then denying the deduction for an otherwise deductible payment of 40 results in an incremental cost equal to the UTPR Top-up Tax amount allocated under the rule (40 x 25% = 10).

The UTPR may also take the form of an adjustment that is equivalent to a denial of a deduction. The GloBE Commentary does not prescribe the mechanism by which the adjustment must be made. According to the Amended GloBE Directive Proposal, such adjustment may take the form of either a Top-up Tax due by those constituent entities or a denial of deduction against the taxable income of those constituent entities resulting in an amount of tax liability necessary to collect to the UTPR Top-up Tax amount allocated to that Member State. This will be a matter of domestic law implementation that will be left to the UTPR jurisdictions.

Like the IIR, the UTPR relies on the same computation made for determining the MNE Group's jurisdictional ETR and the amount of Top-up Tax. The UTPR allocates Top-up Tax to jurisdictions based on a UTPR percentage which is determined on the basis of factors that reflect the relative substance of the MNE Group in each UTPR jurisdiction. In this respect, the substance of UTPR jurisdictions is determined on the basis of a ratio based on the number of employees and the net book value of tangible assets of the constituent entities that are located in those respective jurisdictions.

Next steps at OECD level

The next step in the work on the GloBE rules will be related to the development of the Implementation Framework as agreed under the Detailed Implementation Plan set out in the October Statement. The GloBE Implementation Framework will facilitate the co-ordinated implementation and administration of the GloBE Rules. It will provide agreed administrative procedures, such as filing obligations, and multilateral review processes as well as consider the development of safe harbours to facilitate both compliance by MNEs and administration by tax authorities. For that purpose, a public consultation ending on 11 April 2022 was launched to seek stakeholders input on issues of administration, operation, compliance and rule coordination.

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Luxembourg improves the flexibility and attractiveness of its securitisation regime

OUR INSIGHTS AT A GLANCE

- On 3 March 2022, the law of 25 February 2022 ("**the Law**") amending the Luxembourg securitisation law of 22 March 2004 (the "**Securitisation Law**") in order to clarify and modernise the legal framework of securitisation in Luxembourg was published in the Memorial.
- The Law provides with some adjustments of the Securitisation Law in order to improve the legal certainty by clarifying certain changed market practices, and to increase the flexibility of the Luxembourg regime towards other jurisdictions.
- New opportunities are created for the active management of securitisation vehicles. New or improved tools are now available to efficiently structure securitisation.
- These adjustments may also provide workable solutions to the interest deduction limitation rules conundrum faced by many existing securitisation vehicles.

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Corporate structuring

The Law opens securitisation transactions to new legal forms of companies which have gained in popularity in recent years, in particular among private equity houses and real estate players:

- Partnerships: the common limited partnership (*Société en commandite simple*, "SCS"), the special limited partnership (*Société en commandite spéciale*, "SCSp") and the unlimited company (*Société en nom collectif*, "SNC"); and
- One additional type of corporation: the simplified joint stock company (*Société par actions simplifiée*, "SAS").

The possibility to use these new types of structures provides with a fertile environment for product development, allowing more flexibility and efficiency in the structuring of transactions, in particular through partnerships such as the SCS or the SCSp which are transparent for Luxembourg tax purposes (please refer to the "Tax consequences" part hereafter). The Law further confirms that securitisation partnerships will have to publish financial statements and shall no longer benefit from the existing exemption in this respect.

As far as securitisation vehicles with several compartments are concerned, the treatment of profit distributions where a compartment is financed by equity is clarified in the Law. The shareholders of a compartment have to approve the financial statements relating to such compartment only and the assessment of the distributable amounts and of

the allocation to the legal reserve also has to be performed on a compartment basis. The Law provides with a set of subordination rules governing the rank of different classes of funding, with the option to opt for a different order. As a matter of principle, (i) debts are subordinated to shares, units, and beneficiary units, and (ii) non-fixed-rate debts are subordinated to fixed-rate debts issued by the securitisation vehicle.

Securitised assets

The Law confirms that a securitisation vehicle may acquire securitised assets directly or indirectly. The securitisation vehicle may then acquire the risks to be securitised indirectly through a wholly or partially owned subsidiary. Active management by the securitisation vehicle or a third party is now expressly allowed for Luxembourg securitisation vehicles for risks linked to loans (collateralised loan obligations, "**CLOs**"), bonds, or other debt instruments, unless the securitisation is offered to the public. This clarification removes uncertainty and offers an efficient framework for CLO structures. This improves the attractiveness of Luxembourg for CLO managers who historically implemented their structures in other countries.

The Law increases the flexibility to also allow to give securities for obligations of third parties to the extent that these obligations relate to the securitisation transaction.

Financing of the securitisation

The Law allows the securitisation vehicle to fund itself using financial instruments and also to incur indebtedness by borrowing via loans, provided that the value or return of such borrowing depends on the securitised underlying risk.

A securitisation vehicle issuing securities on a continuous basis to the public has to be authorised by the CSSF. The Law introduces a definition of the concept of "on a continuous basis to the public", whereby any vehicle which issues financial instruments to the public more than three times per year would need to be authorised.

The Law clarifies that the issuance will not be deemed to be offered to the public if any of the following criteria are met:

- the issuance is solely intended for professional clients within the meaning of the law of 5 April 1993 on the financial sector; or
- the denomination of the financial instruments is more than EUR 100,000; or
- the financial instruments are distributed in the form of a private placement.

Tax consequences

As mentioned above, the Law introduces the possibility for a securitisation vehicle to take the legal form of a partnership, namely an SCS or an SCSp. This has important tax consequences since such partnerships are normally considered as transparent for Luxembourg tax purposes, meaning that the income they realise is not taxable at the level of the securitisation vehicle itself, but is allocated directly to the investors.

So far, securitisation vehicles could be set up either as funds or as corporations (for example as a *société anonyme* or as a *société à responsabilité limitée*). As opposed to securitisation vehicles set up as partnerships, securitisation vehicles established under the form of a corporation are fully subject to tax on income and gains deriving from the assets they hold. Interest payments (e.g. on asset-linked notes issued by the securitisation vehicle), as well as certain commitments to investors, are however deductible under Luxembourg tax law, and, as a result, securitisation structures are meant and expected to achieve tax neutrality, while investors are ultimately subject to taxation based on their own tax status and residency. With effect as from 1 January 2019, however, the interest limitation rules included in Article 168bis of the Luxembourg Income Tax Law ("**LITL**") as a result of the Council Directive (EU) 2016/1164 of 12 July 2016 (also known as the Anti-Tax Avoidance Directive, "**ATAD**") established a new paradigm under which interest expenses and other costs economically equivalent to interest are only deductible up to certain thresholds. While certain carve-out and grandfathering provisions exist, the very broad and general scope of application of the interest limitation provision has brought a significant level

of uncertainty as to which expenses of a securitisation vehicle are effectively subject to the interest limitation rules, and many have seen a need to reconsider the way certain securitisation transactions are structured and operated.

As a tax transparent entity, an SCS or an SCSp is normally not subject to the provisions of Article 168bis LITL, as it is not considered as an entity separate from its partners for Luxembourg tax purposes. Circular 168bis/1 of the Luxembourg tax authorities dated 25 March 2022 confirms that the interest deduction rules apply to the holder of a participation into a tax transparent vehicle and not to the vehicle itself. Investors into securitisation partnerships will therefore need to apply these rules by monitoring the portion of income, gains and interest expenses allocated to them because of the tax transparency of the securitisation vehicle.

The Law introducing the option to use partnerships, which may benefit from a pass-through tax treatment in Luxembourg, may therefore be an interesting step towards increasing tax certainty for securitisation structures, but it will also require an accurate review of the tax position of each of the investors in such structures.

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Modernisation of the Luxembourg RCS and RBE

OUR INSIGHTS AT A GLANCE

- The Luxembourg Government plans to modernise the operations of the business and companies register (*registre de commerce et des sociétés*, hereafter "**RCS**") and of the beneficial owners register (*registre des bénéficiaires effectifs*, hereafter "**RBE**") in order to ensure the administrative simplification of the functioning of the registers on the one hand, and the monitoring of the legal compliance of the registered information on the other hand.
- To this effect, on 27 January 2022, a draft law (the "**Draft Law**") was presented to parliament, which will amend the law of 19 December 2002 on the business and companies register, as amended, and the law of 13 January 2019 establishing the beneficial owners register, as amended.
- The updates to be introduced by the Draft Law have multiple objectives, such as (i) to improve the quality of the information registered with the RCS and the RBE, (ii) to enable the RCS and the RBE managers to efficiently enforce the registration obligations incumbent on the businesses, (iii) to achieve the interconnection between the RCS and the RBE in terms of registrations, control of the updates and consultation of the information registered, but also to extend the interconnection to other existing registers, (iv) to implement the interconnection between the RBE and the European beneficial ownership registers, as requested by Directive (EU) 2015/849 and, finally, (v) to permit the Luxembourg state authorities to use reliable and up-to-date databases. The ultimate goal is to guar-antee that the two registers display exact, complete and useful data.

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Improving the quality of the information registered with the RCS and the RBE

The Draft Law proposes to improve the quality of the information registered with the RCS and the RBE by several means: coherence, control and constraint.

The coherence between the RCS and other source national registers (such as a national register for natural

persons) will be ensured by checking that the relevant data is identical in both registers and by automatically updating the RCS when the source register is modified (for example, when the names of localities or streets change). The interconnection between the RCS and the RBE databases will ensure that the information registered with the RCS can be imported into the RBE for instance, when the beneficial owners of legal entities are individuals registered as shareholders or senior managing officials already registered as directors in the RCS. This would ease process and multiple registration formalities.

The RCS manager will be responsible for actively controlling the information in the RCS database and it will be entitled to remove the obsolete data and to prompt the registered persons and entities to swiftly replace it with up-to-date information. In addition, the RCS manager must better support the registered entities by regularly reminding them of their obligations and effectively following-up when they fail to make a mandatory deposit (such as filing the annual accounts) or renew a registration (such as renewing the directors' mandates or the auditor's mandates when their term expires). Automatic controls to ensure the data is up-to-date will be implemented in the RBE as well, in particular with regard to the fight against money laundering and the financing of terrorism.

In order to ensure an effective monitoring and update of the RCS and the RBE, the managers of the registers will dispose of administrative measures against the obliged entities and, as an ultimate recourse, they will be entitled to make a denunciation to the public prosecutor's office against the most serious cases or refractory persons.

Efficient enforcement of the registration obligations incumbent on the businesses

The manager of the registers will put in place regular checks of the RCS and RBE databases, in order to encourage registered entities to keep their data up-to-date. On the basis of these checks and in order to bring the persons and entities into compliance with their legal filing, publication and registration obligations, the manager will carry out a three-phase procedure: prevention, coercion and repression.

During the prevention phase, the manager of the RCS and RBE registers will regularly remind the registered persons (or their attorneys in charge of filings) of their obligations, via targeted messages sent to them either by email or as part of a filing process, which will indicate the elements of their file which could be missing or soon to expire.

Secondly, in the absence of a deposit or registration of mandatory information or non-renewal of a registration within the time limits prescribed by law, the RCS and RBE manager will have recourse to coercive measures. The manager will send the persons concerned (or their attorney) a request to update their file by registered mail. If the persons concerned have not regularised their file within 30 days of the manager's request being sent, the manager of the registers will be entitled to warn the public. This will be initially done by a publication of a warning on the website of the RCS or the RBE and, a month afterwards, by issuing a certificate attesting to the breaches noted. If the concerned persons regularise their files swiftly, the RCS and RBE manager will remove the posting from the website and from the certificate.

Finally, and if, despite the first measures taken, the person or entity concerned still does not comply with the filing, publication or registration obligations, the RCS and RBE manager will implement the last phase of the follow-up procedure, the repressive phase. In this phase, the panel of administrative measures unfolds gradually and chronologically, and the manager of the RCS and the RBE can:

- pronounce an administrative fine of EUR 3,500 if the concerned entity has not updated its file seven months after being requested to do so. An appeal

against this administrative sanction can be filed before the administrative courts.
- automatically delete the file, when the person concerned has not updated it twelve months after being requested to do so. This is an administrative deregistration, which does not affect the existence of the legal personality of the person concerned and will not trigger the dissolution (but this will prevent filings, which would lead to a breach of its obligations and could constitute a cause for judicial dissolution).
- denounce these persons or entities to the public prosecutor's office in the event of serious breaches of the law and in the absence of regularisation.

In addition, increased registration fees and costs will apply if the concerned persons update the information in the RCS or the RBE 30 days after being required to do so. The increased amounts of the fees and costs will be determined by a Grand-Ducal regulation.

The criminal fine previously in place for the persons failing to do the necessary registrations in the RCS has been removed. Nevertheless, omitting an entry or an update in the RBE remains a criminal offense when the omission to register is the result of an intention, and it is thus punished with a fine of EUR 1,250 to EUR 1,250,000.

Interconnection between national registers

RCS-RBE

The Draft Law sets up a gateway between the databases managed by the RCS manager, namely the RCS and the RBE, which are currently independent and do not permit communication between them. According to the Draft Law, the persons making a declaration with the RBE will be proposed to directly upload existing data from the RCS into the RBE and avoid having to register the same information twice. The interconnection between the two databases will also enable the RCS manager to carry out automatic checks and ensure the data update.

RCS-National registers and other State files

The manager of the RCS will have access to the national register of natural persons and to the register of localities and streets and changes operated in the latter registers will be automatically updated and registered in the RCS. For instance, if a natural person, having a Luxembourg national identification number, changes his or her surname or first name and is also registered in the RCS as an agent of a registered company, this change entered in the national register of natural persons will automatically be passed on to the RCS, without waiting for the concerned company to modify the RCS. You may refer to our ATOZ Alert dated 25 November 2021 regarding this new requirement to be implemented soon.

In addition, the manager of the RCS will have a right of access to the information held in other State files. However, this right of access needs to be exercised within the limits of its missions of control of the information communicated by a depositor and of updating the information to be entered in the RCS.

The interconnection system between the IT applications of the Justice department and those of the RCS will enable the registration of judicial decisions in the RCS by the clerks of the competent court themselves.

Finally, the RCS manager will collect additional information on top of that provided in the context of the registration of a company, for the sole needs and on behalf of the Central Statistics and Economic Studies Service ("STATEC"). The information to be collected is necessary for assigning the Nace code and establishing national statistics and, once transferred to the STATEC, it will not be stored in the RCS and will not be public information.

Interconnection between the European registers

The RCS is interconnected with other business

registers in the EU Member States via the Business Registers Interconnection System ("**BRIS**"), drawn up in accordance with Directive 2017/1132/EU of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law and certain information is already communicated by the RCS to the European central platform.

The RBE will also be interconnected with the other beneficial ownership registers referred to in Article 30(10) of the Fourth AML Directive set up in the other Member States by the intermediary of a European central platform. The information on the beneficial owners entered in the RBE will be accessible via the central platform.

Access of the Luxembourg State authorities to the databases

Part of the overall objective of the Draft Law is to ensure the access of the Luxembourg authorities to up-to-date and accurate databases, whether in the RCS or the RBE. In addition, the Draft Law further aims to facilitate the access for national authorities to the RBE. The current access by national authorities will be eased by removing the requirement for a strong authentication and strict tracking. Moreover, the draft legislation creates a legal framework for an automated exchange of data between the manager of the registers and the national authorities, the operational implementation of which is left with the latter to determine.

National authorities as well as professionals will be obliged to consult the data entered into the RBE as part of their respective verification or monitoring missions, in order to promote an a posteriori control of the quality of the information contained in the RBE and they will need to inform the RBE manager of any irregularities they find.

Other miscellaneous measures relating to the RCS or the RBE:

- going forward, the RBE will also be hosted on an electronic platform similar to the RCS one. This will enable declarants, in particular those making a large volume of declarations to the RBE, to automate the transfer of their requests and perform mass operations, without having to go through the manager's website;
- all Reserved Alternative Investment Funds ("**RAIFs**") must now be registered with the RCS;
- the identification details of the AIFMs of all RAIFs must be registered with the RCS;
- registered persons may provide the RCS with an email address, in order to allow the RCS to send reminders and electronic communication;
- the identification information to be registered with the RCS with regards to individuals or legal entities (whether registered in Luxembourg or abroad) is grouped into a single, comprehensive article;
- individuals registered with the RCS will need to disclose their gender (in order to allow the RCS to measure the gender gap), country of residence and country of nationality (in order to ensure a coherence between the RCS and the RBE, but also to respond to the needs of the anti-money laundering and terrorism financing national risk assessment and enable reporting to supranational bodies);
- all branches in Luxembourg will need to be registered separately with the RCS, including those of individual merchants, whether residents in Luxembourg or abroad;
- foreign registers in the Member States will directly transmit the information relating to the appointment of the agents of a legal person governed by foreign law to the RCS via the central platform. Thus, the branch in Luxembourg will not have to take any particular registration procedure with the RCS in this case;
- on the other hand, information on the branches of commercial or civil companies, of economic interest groups or of European economic interest groups governed by Luxembourg law will no longer be registered in the RBE;

- the RCS will communicate directly and electronically with the Minister responsible for the Economy in order to obtain a copy and the number of the authorisation of establishment;
- the Registration Duties, Estates and VAT Authority will no longer be obliged to communicate the VAT number to the RCS, as that was never the case in practice anyway.

The Draft Law is still undergoing the legislative process and might be adopted and in force later this year.

How we can help:

At ATOZ Services, we can review your RCS and RBE files in order to ensure they contain accurate and up-to-date information and in order to identify the additional information to be registered, following the adoption of the Draft Law. At any time, we can assist with your timely filing, publication and registration obligations, with both the RCS and the RBE, to support your business needs in case of onboarding processes or third-party transactions, for instance. By ensuring your compliance with your legal filing obligations, we can keep your costs down, prevent your legal persons or individuals from being inflicted with administrative fines and help you avoid the reputational risk of being the subject of the publication of breaches of the filing obligations in the RCS and RBE registers and certificates.

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