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TAX ADVISERS LUXEMBOURG

INSIGHTS

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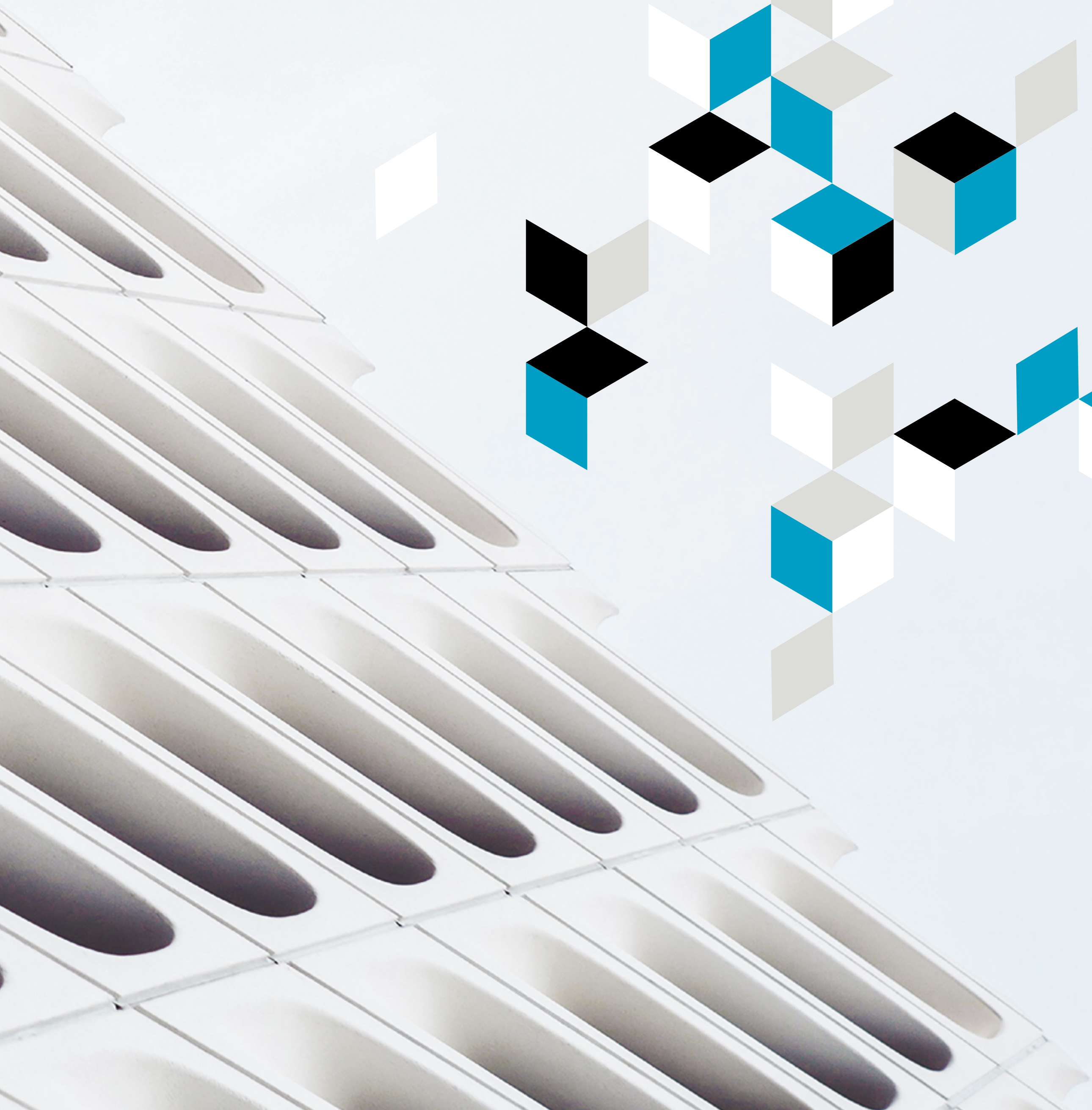

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EDITORIAL

Greetings!

2021 is already coming to an end and 2022 is just around the corner. Some major events have certainly stamped 2021, such as the continued existence of COVID-19, COP26 and, in the tax world, agreement on Pillars One and Two. From a tax and legal point of view, what happened in 2021 will also frame 2022.

On 13 October 2021, the draft 2022 budget law was presented to the Luxembourg Parliament. It does not include any corporate tax reforms. Only individual tax measures and minor adaptations/corrections of existing tax provisions were proposed. Nonetheless, the Prime Minister announced a property tax reform within the next 12 months. We will describe and explain the draft 2022 budget law measures.

On 5 October 2021, the EU list of non-cooperative jurisdictions for tax purposes was updated. The update is an important step as it directly impacts the scope of application of three different Luxembourg tax measures. We will explain the consequences of this list on the measure denying the corporate income tax deduction of interest and royalty expenses and on disclosure requirements under DAC6.

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

On 28 September 2021, more than five years after it was first tabled, the so-called "public Country-by-Country Reporting directive" was finally adopted by the EU Council. This directive requires certain multinationals with revenues of more than EUR 750 million to publicly disclose the corporate income tax that they pay. We will describe and analyse the conditions of application of the public Country-by-Country Reporting directive.

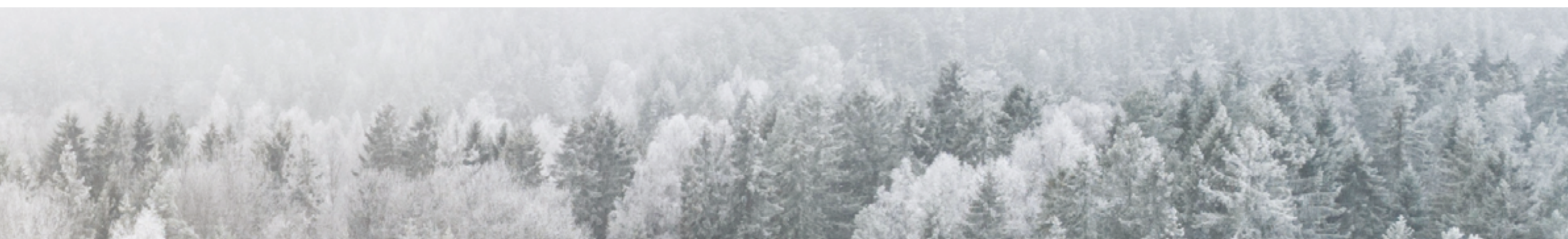
An Agreement on Pillars One and Two to Address the Tax Challenges Arising from the Digitalisation of the Economy and the Detailed Implementation Plan has been approved at OECD level. Pillars One and Two will respectively introduce new taxing rights on MNEs' profits from automated digital services or "consumer facing businesses" and a global minimum effective tax rate of 15%, expected to apply as from 2023. We will describe what it means and involves.

In the Titanium case, the CJEU ruled that a foreign company should not be considered as having a fixed establishment for VAT purposes in a Member State if its activity in that country is limited to the ownership and the exploitation of real estate without having any human resources locally. We will analyse the VAT impacts of this decision for Luxembourg Property companies from an Austrian, German and Dutch perspective.

Finally, we will provide a summary of major corporate law developments in 2021 and 2022 that may affect your business and will help you navigate the legal landscape and plan ahead.

We hope you enjoy reading our insights.

The ATOZ Editorial Team



BUDGET 2022: tax measures

OUR INSIGHTS AT A GLANCE

- On 13 October 2021, the draft law on the 2022 budget was presented to Parliament.
- As already announced, the 2022 budget draft law does not include any corporate tax reform.
- Individual tax measures (notably tax provisions on European individual pension schemes) will be introduced, as well as some minor adaptations/corrections of existing tax provisions.
- The lack of (positive) corporate tax measures is understandable in the current context of crisis due to the COVID-19 pandemic.
- We welcome the fact that taxes have not been increased in the short term to fund crisis expenditures.
- Positive corporate tax measures are also a way to promote investments and to help in the economic recovery process, so we hope some investment boosting measures will be forthcoming in the not too distant future.
- Finally, more is expected to come soon: during his state of the nation speech, Prime Minister Bettel announced that a property tax reform would be presented to Parliament within the next 12 months, one of the aims of this reform being the fight against speculation with undeveloped land and unoccupied housing.

On 13 October 2021, the draft law on the 2022 budget was presented to Parliament. As already announced over the past few months, the 2022 budget draft law does not include any corporate tax reform. Instead, individual tax measures (including mainly tax provisions on European individual pension schemes) will be introduced, as well as some minor adaptations/corrections of existing tax provisions.

Pan-European Personal Pension Products

The Budget 2022 draft law introduces a new article 111ter of the Luxembourg Income Tax Law ("**ITL**") which deals with the conditions for the deduction, for Luxembourg income tax purposes, of payments made under a pan-European Personal Pension Product ("**PEPP**"). It further introduces several amendments to existing income tax law provisions in order to make it clear that they will also apply to PEPPs.

The PEPP is a voluntary personal pension scheme that complements existing public and occupational pension systems, as well as national private pension schemes. It is governed at EU level by Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 and is in the process of being introduced in Luxembourg by means of a draft law currently pending before parliament. Thus, the purpose of the various budget 2022 provisions is to define the tax treatment of PEPPs, this tax treatment being very similar to the one already applicable to individual pension contracts within the meaning of Article 111bis of the ITL (conditions for the deduction, whereby payments made under individual pensions schemes and PEPPs are only deductible up to a total amount of EUR 3,200 annually, 50% exemption of the monthly life annuities resulting from pension contracts under Article 115-14a of the ITL), etc.

Building societies saving plan

The tax deduction of payments under a home savings contract made to recognised building societies in Luxembourg or another EU Member State for the financing of the construction, acquisition or alteration of a private dwelling will now also apply to costs for financing an integrated photovoltaic or thermal solar installation. Article 111 of the ITL will be amended accordingly.

Interest received under such home savings contracts will also be exempt up to an amount of EUR 1,500 (doubled for married persons). Article 115-15 of the ITL will be amended to reflect this change.

Flat taxation of payments received from employment agencies

Payments received from employment agencies will be taxed at a flat rate if the payments are received for temporary work and the payments do not exceed EUR 25 per hour. The flat-tax rate is 10% and will apply on an amount equal to the difference between the gross amount of the remuneration taxable in Luxembourg and the social contributions payable in Luxembourg.

Tax credit for hiring unemployed people

The tax credit for hiring unemployed people will be extended until 31 December 2023.

Technical adjustments

BREXIT-related amendments

As from 1 January 2021, the UK is no longer an EU Member State and UK entities are no longer EU undertakings within the meaning of the various EU tax directives. This change does not require any tax law changes each time the specific tax law provision refers to "EU Member State" or "collective undertaking of an EU Member State" as it is clear that the provision no longer applies to the UK in such case. However, since some tax provisions only applicable to EU Member States still include references to UK undertakings, these references have to be removed, which is the purpose of the two following provisions of the 2022 budget draft law:

- UK collective undertakings will be removed from the annex (section 10) of Article 166 of the ITL. This annex includes the various forms of collective undertakings in each of the EU Member States which fall within the scope of the Luxembourg participation exemption regime. This annex is also relevant when applying the exemption of dividend withholding tax based on article 147 of the ITL.
- In the same way, UK collective undertakings will be removed from the annex to § 60 Section 4 of the evaluation law, which is the corresponding participation exemption provision for net wealth tax purposes.

Controlled Foreign Corporation rules and Municipal Business Tax

In Luxembourg, Controlled Foreign Corporation ("**CFC**") rules (which, under certain conditions, tax at the level of controlling companies undistributed profits of their subsidiaries), only apply for corporate income tax purposes and not for municipal business tax ("**MBT**") purposes. As a consequence, any CFC income recognised for CIT purposes is deducted from the taxable basis for MBT purposes (based on § 9, 3a of the MBT Law). When income is distributed subsequently or when a capital gain is realised on the sale of the shares in the controlled subsidiary, certain exemptions apply for CIT purposes in order to make sure the same income is not taxed twice (first as CFC income and subsequently as a dividend/capital gain).

However, the full or partial exemption, for CIT purposes, of dividends or capital gains to avoid double taxation should not apply for MBT purposes given that there was no taxation of the CFC income for MBT purposes so there is no double taxation to avoid.

This is the purpose of one of the tax provisions of the budget 2022 draft law which provides that any income exempt based on Article 164ter, al. 4 n. 6 & 7 of the ITL (CIT exemption granted in order to avoid double taxation) has to be added back to the taxable basis for MBT purposes.

Implications and next steps

As expected, given previous announcements made by Minister Gramegna over the past few months, the 2022 budget draft law does not include any corporate tax reform. Instead, a few individual tax measures will be introduced, as well as some minor adaptations/corrections of existing tax provisions. The draft law will be subject to the review of the chambers and the Luxembourg Council of State and might evolve over the legislative process. However, given the type of tax measures introduced, we do not expect many changes.

Overall, the lack of (positive) corporate tax measures is understandable in the current context of crisis due to the COVID-19 pandemic and we welcome the fact that taxes have not been increased, Still, positive corporate tax measures are also a way to promote investments and help in the economic recovery process so one may have expected at least a few investment boosting measures.

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EU list of non-cooperative tax jurisdictions updated: implications for Luxembourg taxpayers

OUR INSIGHTS AT A GLANCE

- On 5 October 2021, the EU Finance Ministers agreed on an update of the EU list of non-cooperative jurisdictions for tax purposes to remove Anguilla, Dominica and Seychelles from the list.
- The update is an important step as it directly impacts the scope of application of three different Luxembourg tax measures: the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions, the requirement to disclose transactions with entities located in non-cooperative jurisdictions in the corporate income tax return and the mandatory disclosure rules applicable to certain cross-border arrangements (DAC6).
- Luxembourg taxpayers with investments into and from non-cooperative jurisdictions should seek advice from their tax advisers in order to analyse the potential tax impact of the update of the EU list of non-cooperative jurisdictions on their investments and the potential reporting requirements.
- The evolution of the legislation of jurisdictions under the radar of the EU Council should also be closely monitored in order to anticipate an addition to or a removal from the EU list of non-cooperative tax jurisdictions in the future and thus a change in the scope of application of the Luxembourg measures.

On 5 October 2021, the EU Finance Ministers agreed on an update of the EU list of non-cooperative jurisdictions for tax purposes to remove Anguilla, Dominica and Seychelles from the EU list of non-cooperative jurisdictions for tax purposes. The update of the list is an important step as it directly impacts the scope of application of three different Luxembourg tax measures: the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions, the requirement to disclose transactions with entities located in non-cooperative jurisdictions in corporate income tax returns and the mandatory disclosure rules applicable to certain cross-border arrangements (DAC6).

Background

The list of non-cooperative tax jurisdictions is determined at EU level. It is a result of a thorough screening and dialogue process with non-EU countries to assess them against agreed criteria for good governance relating to tax transparency, fair taxation, the implementation of OECD BEPS measures and substance requirements for zero-tax countries. The list is updated twice a year, taking into consideration the evolving deadlines for jurisdictions to deliver on their commitments and the evolution of the listing criteria that the EU uses to establish the list. Given these regular updates, the scope of application of all Luxembourg measures which refer to those jurisdictions will constantly evolve over time.

As of 5 October 2021, following the delisting of Anguilla, Dominica and Seychelles, the EU list now includes the 9 following jurisdictions: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

Impact on the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions

Based on Article 168-5 of the Luxembourg Income Tax Law ("**ITL**"), as from 1 March 2021, interest and royalties due to entities located in non-cooperative tax jurisdictions are no longer tax-deductible for corporate income tax purposes if the following cumulative conditions are met:

- The beneficiary of the interest or royalty is a collective undertaking within the meaning of article 159 of the ITL

(thus excluding tax transparent entities); if the beneficiary is not the beneficial owner, then the beneficial owner has to be taken into account;
- The beneficiary of the interest or royalty is an associated enterprise within the meaning of article 56 of the ITL; and
- The collective undertaking which is the beneficiary of the interest or royalty is established in a country or territory which is on the EU list of non-cooperative tax countries and territories.

Interest and royalties remain tax-deductible if the taxpayer can demonstrate that the operation which the interest or royalties relate to has been put in place for valid economic reasons which reflect economic reality.

Article 168-5 of the ITL provides that the measure applies to interest and royalties due as from 1 March 2021 to entities located in jurisdictions considered as non-cooperative tax jurisdictions based on the latest EU list available as of 1 March 2021, i.e. based on the list which was adopted on 22 February 2021 and published in the Official Journal of the European Union of 26 February 2021 and which includes the following 12 countries: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu.

Article 168-5 of the ITL provides further that as from 1 January of each following year, the measure applies to interest and royalties due to entities located in the tax jurisdictions considered as non-cooperative based on the latest list available as of 1 January (so based on the list released in October of the preceding year). This means that the new list adopted on 5 October 2021 will, in principle, be relevant for interest and royalties due as from 1 January 2022. However, as an exception, when a country is removed from the list, the delisting has an immediate effect on the measure as from the date of the publication of the new list in the Official Journal of the European Union. Therefore, depending on whether a country is added to the list or removed from the list, the following applies:

- Countries added in the course of year N (be it in February or in October of year N) are taken into account for interest and royalties due as from 1 January of the following year (N+1). Therefore, there is no retroactive nor immediate effect but only an impact as from the following calendar year;
- Countries removed (such as Anguilla, Dominica and Seychelles based on the October 2021 update of the list) are no longer taken into account for interest and royalties due as from the date of publication of the EU list in the Official Journal of the European Union, which means that the removal has an immediate effect. In other words, interest and royalties due to entities located in Anguilla, Dominica and Seychelles no longer fall within the scope of Article 168-5 as from 12 October 2021 (date of publication of the updated list in the Official Journal of the European Union).

Impact on disclosure requirements based on Circular L.G. - A n° 64 of 7 May 2018

Based on Circular L.G. - A n° 64 of 7 May 2018, the Luxembourg tax authorities systematically review transactions entered into by Luxembourg corporate taxpayers with related parties (within the meaning of article 56 of the ITL) located in non-cooperative jurisdictions (as listed by the EU) in order to assess whether the terms and conditions of the transactions reflect the arm's length principle. Detailed information on these transactions has to be reported by Luxembourg corporate taxpayers in their corporate tax returns.

The Circular states that the list as of the end of the year concerned is relevant for determining whether reporting is required or not. Therefore, the list as of 5 October 2021, including 9 non-cooperative tax jurisdictions, is the one to take into account for the 2021 corporate income tax returns. As far as the disclosure for the 2020 corporate income tax returns is concerned, reference should be made to the EU list in force as of 7 October 2020 (date of publication in the Official Journal of the European Union).

Impact on disclosure requirements under DAC6

The listing/delisting of a jurisdiction as non-cooperative may also have an impact on the reporting obligations applicable according to the Luxembourg Law of 25 March 2020 implementing Council Directive (EU) 2018/822 of 25 May

2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6).

Hallmark C.1.b) ii) of the Annex to the Law of 25 March 2020 implementing DAC6 covers deductible cross-border payments made between two or more associated enterprises where the recipient is resident for tax purposes in a jurisdiction which has been assessed as being non-cooperative. This hallmark is not subject to the main benefit test.

The question arises as to the list (in force as of which date?) to be taken into account to assess whether the recipient is resident in a non-cooperative jurisdiction. In this respect, in our view, reference should be made to the list in force at the time the transaction was implemented and the listing or delisting of a jurisdiction after the transaction has been implemented should not have any retroactive effect. In other words, reporting should only be required if the transaction with the entity located in the jurisdiction was implemented at the time when this jurisdiction was on the list.

Implications

Luxembourg taxpayers with investments into and from non-cooperative jurisdictions should seek advice from their tax advisers in order to analyse the potential tax impact of the update of the EU list of non-cooperative jurisdictions on their investments and the potential reporting requirements. The evolution of the legislation of jurisdictions under the radar of the EU Council should also be closely monitored in order to anticipate an addition to or a removal from the EU list of non-cooperative tax jurisdictions in the future and thus a change in the scope of application of the Luxembourg measures.

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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 amount 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 Luxembourg, the Luxembourg Government concluded agreements with the three countries, according to which the days spent outside of Luxembourg 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 COVID-19.

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, 24 days in Belgium - to be increased to 34 as from 2022 - and 29 days in France) while remaining taxable in their employment state.

Given that the maximum amount 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 Luxembourg, the Luxembourg Government concluded agreements with the three countries, according to which the days spent by employees outside of Luxembourg due to the current crisis are not taken into account. These three agreements were initially concluded for a limited period of time and were then renewed several times.

Based on the latest version of these agreements:

- the agreement with Belgium will apply from 11 March 2020 until 31 December 2021;
- the agreement with France will apply from 14 March 2020 until 31 December 2021; and
- the agreement with Germany will apply from 11 March 2020 until at least 31 December 2021 and will be renewed monthly automatically as from 2022, except if it is terminated by one of the contracting states at the latest one week before the end of each month.

As far as social security is concerned, Luxembourg also concluded agreements according to which, until 31 December 2021, 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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Public Country-by-Country Directive adopted by the EU Council

OUR INSIGHTS AT A GLANCE

- On 28 September 2021, more than five years after it was first tabled, the so-called "public Country-by-Country Reporting ("**CbCR**") directive" was finally adopted by the EU Council under qualified majority voting. The adoption was followed by the approval by the EU Parliament and the Directive has now been published in the Official Journal of the European Union. Following long debates among the EU institutions and the Member States on the need for such a measure (why should multinationals publish information already exchanged between tax authorities?) and on the requirements for its adoption (unanimity vs. majority), the public disclosures of big multinational companies will be increased once again.

- The public CbCR directive will amend the EU Directive 2013/34 (the "**Accounting Directive**") so as to require certain multinationals with revenues of more than EUR 750 million to publicly disclose the corporate income tax that they pay. Non-EU multinationals doing business in the EU through subsidiaries and branches will also have to comply with the same reporting obligations as EU multinational undertakings. The reporting will have to take place within 12 months of the date of the balance sheet for the financial year in question. Member States will have 18 months from the entry into force of the directive to transpose it into national law.

- Multinationals will have to add yet another project to their growing list of tax compliance projects. The new reporting requirements will not provide any additional information to the tax authorities, so it seems hard to see how they will have revenue-raising benefits for governments. However, the reporting creates a serious risk that businesses may now be subject to arbitrary trial in a court of public opinion where there is no judge, jury or right of defence. Consequently, multinationals should carefully consider their strategy for communicating around taxes.

On 28 September 2021, more than five years after it was first tabled, the so-called "public Country-by-Country Reporting ("**CbCR**") directive" was finally adopted by the EU Council under qualified majority voting. The adoption was followed by an approval by the EU Parliament on 11 November and the Directive has now been published in the Official Journal of the European Union. Following long debates among the EU institutions and the Member States on the need for such a measure (why should multinationals publish information already exchanged between tax authorities?) and on the requirements for its adoption (unanimity vs. majority), the public disclosures of big multinational companies will be increased once again.

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Background: why public Country-by-Country reporting?

The proposed public CbCR directive, first tabled in April 2016, is part of the European Commission action plan for a fairer corporate tax system. The idea of a public CbCR emerged shortly after "non-public" Country-by-Country Reporting (i.e. the automatic exchange of CbC Reports between EU Member States) was introduced at EU level by the 4th Directive on Administrative cooperation in tax matters ("DAC4") as one of the measures of the OECD BEPS (Base Erosion and Profit Shifting) project. However, public CbCR has nothing to do with the BEPS project and the OECD has never recommended it at global level.

The purpose of the public CbCR directive is not only to introduce a new tool for corporate tax transparency, it is about enhancing public scrutiny. This objective and its supposed benefits are stated very clearly in the preambles of the CbCR directive proposal:

- *"it is necessary to enhance public scrutiny of corporate income taxes borne by multinational undertakings carrying out activities in the Union";*
- *"it is necessary to promote a better informed public debate regarding, in particular, the level of tax compliance of certain multinational undertakings active in the Union and the impact of tax compliance on the real economy";*
- *"the public should be able to scrutinise all the activities of a group of undertakings if the group has certain types of entities established within the Union";*
- *"it will contribute to regaining the trust of citizens of the Union in the fairness of national tax systems";*
- *"the civil society will become more involved, employees will be better informed and investors less risk-averse";*
- *"undertakings will benefit from better relations with stakeholders, which will lead to greater stability, along with easier access to finance due to a clearer risk profile and an enhanced reputation".*

However, one may wonder if providing the public with this data is worth the additional administrative burden and the risk of damaging the European undertakings if the information is misinterpreted, misunderstood or commercially confidential information is exposed. Indeed, even though EU Member States may under certain conditions allow for some of the information to be temporarily omitted from the report, where their disclosure would be seriously prejudicial to the commercial position of the undertakings, it remains to be seen whether and, if so, how Member States will implement this option. In addition, the data has to be put into its context to be understood properly, so its true value may be circumscribed.

Why such a long legislative procedure?

For more than five years, the proposed directive evolved only very slowly due to, among others, a disagreement on its legal basis and the related requirements for its adoption: should the directive be based on article 50 of the Treaty on the Functioning of the European Union ("**TFEU**") and subject to the ordinary legislative procedure (which requires a qualified majority voting in the Council for its adoption) or should it be based on article 115 of the TFEU and so subject to the special legislative procedure applicable in tax matters (which requires unanimous approval in the Council for its adoption)?

Depending on whether the proposed directive was to be seen as an accounting directive (which would extend the scope of information to be reported and published) or as a tax directive (which would bring tax transparency up to the next level through a mandatory publication of some of the information already exchanged between the EU Member States under DAC4), either qualified majority voting or unanimity would apply.

The European Parliament adopted its position at first reading on 27 March 2019. Negotiations between the co-legislators started in March 2021 and resulted in a provisional agreement on 1 June 2021, with points such as the transition period and the safeguard clause being finalised. On 28 September 2021, the EU Council finally approved the proposal (under qualified majority, as an agreement was reached on moving forward under article 50 of the TFEU).

Who will be subject to public CbCR and under which conditions?

The public CbCR directive will require multinational groups with a total consolidated revenue of EUR 750 million to report if their ultimate parent company is located in the EU or if the ultimate parent company is not in the EU but has EU subsidiaries or branches.

More specifically, the following entities will have to draw up, publish and make accessible a report on income tax information:

- EU ultimate parent undertakings with consolidated revenue on their balance sheet date exceeding a total of EUR 750 million for each of the last two consecutive financial years, as reflected in their consolidated financial statements;

- EU standalone undertakings with revenue on their balance sheet date exceeding a total of EUR 750 million for each of the last two consecutive financial years, as reflected in their annual financial statements;
- EU medium-sized and large subsidiary undertakings controlled by a non-EU ultimate parent undertaking, where the consolidated revenue on its balance sheet date exceeded a total of EUR 750 million for each of the last two consecutive financial years, as reflected in its consolidated financial statements;
- EU branches of a non-EU affiliated undertaking of a group with a non-EU ultimate parent undertaking and EU branches of a non-EU standalone undertaking, the revenue of which on its balance sheet date exceeded a total of EUR 750 million for each of the last two consecutive financial years as reflected in its (consolidated) financial statements. However, these branches will be exempt from the reporting obligation if the non-EU ultimate parent company has an EU medium-sized and large subsidiary undertaking, as defined above.

However, the following exclusions and exceptions will apply:

- Total revenue falls below EUR 750 million: The entities referred to above will no longer be subject to the reporting obligations if the total consolidated revenue falls below EUR 750 million for each of the last two consecutive financial years.
- Presence in one single Member State: The reporting rules will not apply to standalone undertakings or ultimate parent undertakings and their affiliated undertakings where such undertakings, including their branches, are established, or have their fixed places of business or permanent business activity, within the territory of a single Member State and no other tax jurisdiction.
- Banking sector: In order to avoid double reporting for the banking sector, a specific exclusion will apply under certain conditions to credit institutions already subject to reporting obligations under article 89 of the Accounting Directive.
- Non-EU ultimate parent undertakings or standalone undertakings already subject to similar reporting obligations: No reporting obligation will apply to EU subsidiaries and branches of non-EU undertakings where a similar report on income tax information is drawn up by the non-EU undertaking, provided that it meets certain criteria.

Which information will have to be included in the report on income tax information?

The CbCR directive adds a new chapter to the Accounting Directive: “report on income tax information”. The report will have to include the following information on all members of the group:

- Name of the ultimate parent undertaking or the standalone undertaking, the financial year concerned, the currency used for the presentation of the report and, where applicable, a list of all subsidiary undertakings consolidated in the financial statements of the ultimate parent undertaking, in respect of the relevant financial year, established in the EU or in tax jurisdictions included in Annexes I and II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes;
- a brief description of the nature of the activities;
- the number of employees on a full-time equivalent basis;
- revenues, which are to be calculated either as: (i) the sum of the net turnover, other operating income, income from participating interests, excluding dividends received from affiliated undertakings, income from other investments and loans forming part of the fixed assets, other interest receivable and similar income; or (ii) the income as defined by the financial reporting framework on the basis of which the financial statements are prepared, excluding value adjustments and dividends received from affiliated undertakings;
- the amount of profit or loss before income tax;
- the amount of income tax accrued during the relevant financial year, which is to be calculated as the current tax expense recognised on taxable profits or losses of the financial year by undertakings and branches in the relevant tax jurisdiction;

- the amount of income tax paid on a cash basis, which is to be calculated as the amount of income tax paid during the relevant financial year by undertakings and branches in the relevant tax jurisdiction; and
- the amount of accumulated earnings at the end of the relevant financial year.

The information will have to be broken down for each EU Member State which the group is active in and also for each jurisdiction qualified as non-cooperative based on the EU list of non-cooperative jurisdictions for tax purposes for which the report is to be drawn up.

Publication and other requirements

The report on income tax information will have to be made accessible to the public in at least one of the official languages of the Union, free of charge, no later than 12 months after the balance sheet date of the financial year for which the report is drawn up. It will have to be published on the website of either (as the case may be):

- the EU ultimate parent undertaking or the EU standalone undertaking;
- the EU subsidiary undertaking or an affiliated undertaking of the non-EU ultimate parent undertaking; or
- the branch or the undertaking which opened the branch, or an affiliated undertaking.

The members of the administrative, management and supervisory bodies will be collectively responsible for ensuring that the report on income tax information is drawn up, published and made accessible in accordance with the public CbCR directive.

Where the financial statements of an undertaking governed by the law of a Member State are required to be audited by one or more statutory auditors or audit firms, the audit report will have to state whether, for the financial year preceding the one for which the financial statements under audit were prepared, the undertaking was required to publish a report on income tax information and, if so, whether the report was published in accordance with the publication and accessibility requirements of the public CbCR directive.

Next steps and implications

The public CbCR directive will enter into force on the twentieth day following its publication in the Official Journal of the European Union. Member States will have 18 months from the entry into force of the directive to transpose the new rules into national law.

It remains to be seen whether countries which disagreed with the legal basis of the directive and voted against its adoption in EU Council will try to challenge its compatibility with EU law.

For the present, multinationals will have to add yet another project to their growing list of tax compliance projects. The new reporting requirements will not provide any additional information to the tax authorities, so it seems hard to see how they will have revenue-raising benefits for governments. However, the reporting creates a serious risk that businesses may now be subject to arbitrary trial in a court of public opinion where there is no judge, jury or right of defence. Consequently, multinationals should carefully consider their strategy for communicating around taxes.

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Pillars One and Two: one step closer to implementation...

OUR INSIGHTS AT A GLANCE

- As of today, the Statement Agreement on Pillars One and Two to Address the Tax Challenges Arising from the Digitalisation of the Economy and the Detailed Implementation Plan has been approved by 137 of the 141 OECD members of the Inclusive Framework on BEPS.
- Under the Pillar One rules, taxing rights on MNEs' profits from automated digital services or "consumer facing businesses" will be partially re-allocated to market jurisdictions.
- The Pillar Two rules will ensure that large internationally operating businesses pay a minimum level of tax, set at 15%, regardless of where they are headquartered or the jurisdictions they operate in.
- Pillar One will be implemented through a Multilateral Convention expected to be signed during 2022, with effective implementation in 2023.
- Model rules to give effect to Pillar Two will be developed by the end of November 2021 and the OECD will then develop model rules for bringing Pillar Two into domestic legislation during 2022, to be effective in 2023.
- The European Commission also plans to propose a directive implementing the minimum corporate tax rate within the European Union by the end of the year. Such directive proposal would be complemented by another directive proposal for effective taxation to ensure transparency.

On 8 October, Estonia, Hungary and Ireland finally joined the Statement Agreement on Pillars One and Two. The Statement is to Address the Tax Challenges Arising from the Digitalisation of the Economy and the Detailed Implementation Plan. Since then, Mauritania has joined the OECD/G20 Inclusive Framework on BEPS and agreed on its Statement on Pillars One and Two. As a result, the Pillars One and Two Statement is supported by 137 of the 141 OECD members of the Inclusive Framework on Base Erosion and Profit Shifting ("**BEPS**"). At the time of writing, four countries - Kenya, Nigeria, Pakistan and Sri Lanka - had not yet joined the agreement.

At the end of October, at their summit in Rome, G20 leaders also endorsed the political agreement set out in the Statement. In its declaration, the G20 called on the OECD/G20 Inclusive Framework on BEPS to develop the model rules and multilateral instruments swiftly, to ensure the OECD global tax reform comes into effect globally in 2023.

But practically, what does that mean and involve?

Pillar One Agreement

Main principles agreed upon: new taxing rights on "Amount A"

Pillar One deals with the re-allocation of taxing rights on multinational enterprises ("**MNEs**")'s profits from automated digital services or "consumer facing businesses". Pillar One tries, in this respect, to address the questions of business presence and activities without physical presence, of the place where tax should be paid and on what basis and of the profit share that could or should be taxed in the jurisdictions where customers and/or users are located.

Under Pillar One, taxing rights on more than USD 125 billion of profits are expected to be reallocated to market jurisdictions each year. In-scope companies are the MNEs with global turnover above EUR 20 billion and profitability above 10% (i.e. profit before tax/revenue) calculated using an averaging mechanism. Extractives and Regulated Financial Services are nevertheless excluded.

For in-scope MNEs, 25% of residual profit defined as profit in excess of 10% of revenue will be allocated to market jurisdictions with nexus using a revenue-based allocation key. “Amount A”, a share of the residual profit, will, in this respect, be allocated to a market jurisdiction when the in-scope MNE derives at least EUR 1 million in revenue from that jurisdiction. For smaller jurisdictions with GDP lower than EUR 40 billion, the nexus will be set at EUR 250 000. However, where the residual profits of an in-scope MNE are already taxed in a market jurisdiction, a marketing and distribution profits safe harbour, yet to be determined, will cap the residual profits allocated to the market jurisdiction.

Revenue will be sourced to the end market jurisdictions where goods or services are used or consumed. Detailed source rules for specific categories of transactions will be developed in the coming weeks. The relevant measure of profit or loss of the in-scope MNE will be determined by reference to financial accounting income, with a small number of adjustments, and in exceptional circumstances, segmentation will be allowed. Losses will be carried forward.

It has been announced that the tax compliance (including filing obligations) will be streamlined and in-scope MNE groups will be allowed to manage the process through a single entity. It remains to be seen how the simplification of such a complex tax compliance project will be set up.

Finally, double taxation of profits allocated to market jurisdictions will be relieved using either the exemption or credit method. The entity (or entities) that will bear the tax liability will be drawn from those that earn residual profits. To improve certainty, in-scope MNEs will benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g. transfer pricing and business profits disputes), in a mandatory and binding manner.

Main principles agreed upon: “Amount B”

The application of the arm’s length principle to in-country baseline marketing and distribution activities will be simplified and streamlined, with a particular focus on the needs of low-capacity countries. This work will be completed by the end of 2022.

Removal of Digital Services Taxes

Parties that joined the Statement Agreement on Pillars One and Two agreed to remove all Digital Services Taxes (“**DST**”) and other relevant similar measures with respect to all companies. These countries will also have to commit not to introduce such measures in the future. Moreover, from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the multilateral agreement implementing Pillar One, no newly enacted DST or other relevant similar measures shall be imposed on any company.

Implementation

Pillar One will be implemented through a Multilateral Convention (“**MLC**”). The MLC is already under development and will be the vehicle for allocation of the newly agreed taxing right under Pillar One, as well as for the standstill and removal provisions in relation to all existing DST and other similar relevant unilateral measures. The implementation of Pillar One could also require, where necessary, related changes to domestic law.

Countries are aiming to sign an MLC during 2022, with effective implementation in 2023.

Pillar Two Agreement

Main principles agreed upon: introduction of a global minimum corporate tax rate set at 15%

Pillar Two develops rules aiming at ensuring that large internationally operating businesses pay a minimum level of tax regardless of where they are headquartered or the jurisdictions they operate in.

The principal mechanism to achieve this outcome consists of two interlocking domestic rules (together with the Global anti-Base Erosion Rules ("**GloBE**") rules):

- an Income Inclusion Rule ("**IIR**"), which imposes top-up tax on a parent entity in respect of the low taxed income of a constituent entity; and
- an Undertaxed Payment Rule ("**UTPR**"), which denies deductions to the extent that the low tax income of a constituent entity is not subject to tax under an IIR.

The minimum tax rate used for purposes of the IIR and UTPR will be 15%, on a jurisdictional basis. In that context, consideration will be given to the conditions under which the US GILTI regime will co-exist with the GloBE rules, to ensure a level playing field.

This set of rules will be completed by a treaty-based rule (the Subject to Tax Rule ("**STTR**") that allows source jurisdictions to impose limited source taxation on certain related party payments subject to tax below the minimum rate of 9%. The STTR will be creditable as a covered tax under the GloBE rules.

The GloBE rules will impose a top-up tax using an effective tax rate test calculated on a jurisdictional basis and using a common definition of covered taxes and a tax base determined by reference to financial accounting income (with agreed adjustments consistent with the tax policy objectives of Pillar Two and mechanisms to address timing differences). If earnings are distributed within four years and taxed at or above the minimum level, there shouldn't be any top-up tax liability.

Pillar Two acknowledges, however, the right of jurisdictions to determine their own tax system, including whether they have a corporate income tax and where they set their tax rates. Jurisdictions are not required to adopt the GloBE rules, but, if they choose to do so, they will have to implement and administer the rules in a way that is consistent with the outcomes provided for under Pillar Two. Jurisdictions will also have to consider the right of other jurisdictions to apply the rules contained in Pillar Two where income is taxed at an effective rate below a minimum rate and accept the application of the GloBE rules applied by other Inclusive Framework members including agreement as to rule order and the application of any agreed safe harbours.

Scope and carve-outs

The GloBE rules will apply to MNEs that meet the EUR 750 million threshold as determined under BEPS Action 13 (Country-by-Country Reporting). However, countries are free to apply the IIR to MNEs headquartered in their country even if they do not meet the threshold. The GloBE rules will 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. The GloBE rules also provide for an exclusion for international shipping income.

Government entities, international organisations, non-profit organisations, pension funds or investment funds that are Ultimate Parent Entities of an MNE Group or any holding vehicles used by such entities, organisations or funds are not subject to the GloBE rules. In addition, special rules may apply to associates, joint ventures and so called "orphan entities" that are not part of the consolidated group.

The GloBE rules will finally provide for a formulaic substance carve-out that will exclude an amount of income that is 5% of the carrying value of tangible assets and payroll. In a transition period of 10 years, the amount of income excluded will be 8% of the carrying value of tangible assets and 10% of payroll, declining annually by 0.2 percentage points for the first five years, and by 0.4 percentage points for tangible assets and by 0.8 percentage points for payroll for the last five years. The GloBE rules will also provide for a de minimis exclusion for the jurisdictions where the MNE has revenues of less than EUR 10 million and profits of less than EUR 1 million.

Implementation

Model rules to give effect to the GloBE rules will be developed by the end of November 2021. The OECD will then develop model rules for bringing Pillar Two into domestic legislation during 2022, to be effective in 2023, with the UTPR coming into effect in 2024. A multilateral instrument ("**MLI**") will be developed by the Inclusive Framework by mid-2022 to facilitate the swift and consistent implementation of the STTR in relevant bilateral treaties.

The European Union Agenda

Apart from the OECD agenda and the progress of the European Union on other initiatives (BEFIT, ATAD3, DEBRA, etc.), the European Union is in the starting blocks to implement its own directives in order to set the European framework in which European Member States will be implementing Pillar Two.

As a result, depending on how fast the OECD publishes its model rules on the implementation of the minimum corporate tax rate expected by the end of November 2021, the EU Commission could propose a directive before the end of the year for its implementation in the European Union. A date of 22 December has been widely mooted, a nice seasonal gesture.

Within the same time framework, the European Commission should also be publishing a directive proposal for effective taxation to ensure transparency. According to this proposal, companies falling under the scope of the minimum tax rate under Pillar Two would also have to publish how much effective tax they pay in each jurisdiction. The idea is to make the effective tax rate of companies public. The legal base (tax or non-tax) used for such a directive is not clear yet (for a similar tax information disclosure measure, public CbCR, a non-tax/Accounting Directive was used).

For Pillar One, the European Commission will examine whether a directive is needed to ensure its consistent and effective implementation at EU level. If it is decided that a Pillar One directive is required, no proposal is expected before Q3 2022, given that the OECD will only agree on multilateral instruments in summer 2022.

As parties that joined the Statement Agreement on Pillars One and Two agreed to remove all DST, the future of the promised EU digital levy is unclear. This EU digital levy was indeed a key element to finance the EU COVID-19 recovery plan. At this stage, there is no clear statement from the Commission that this proposal will be removed from the table, and it seems that the Commission is looking for an alternative levy to finance its recovery plan. For that purpose, ideas such as a single market tax or a 'VAT top-up' for online services and goods have been raised, as well as a possible allocation of some of the taxes applied to Pillar One amount A . All these ideas have their challenges, so we will watch this space with interest.

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CJEU Titanium case: any VAT impacts for Luxembourg PropCos?

OUR INSIGHTS AT A GLANCE

- In its decision C-931/19 ("**Titanium case**"), the Court of Justice of the European Union ("**CJEU**") ruled that a foreign company should not be considered as having a fixed establishment for VAT purposes in a Member State if its activity in that country is limited to the ownership and the exploitation of a real estate without having any human resources locally.
- Consequently, a Luxembourg property company (hereafter "**PropCo**") owning and exploiting foreign real estate should not be considered as having a fixed establishment for VAT purposes in this foreign jurisdiction if it does not have human resources in the country in which the real estate is situated to operate the underlying asset.
- While this case is in continuity of settled case-law on the concept of fixed establishment, it might have specific impacts for Luxembourg PropCos operating foreign buildings. Based on the current practice, PropCos are often registered for VAT purposes in Luxembourg as well as in the jurisdiction where the real estate is located. As real estate transactions are located from a VAT perspective at the place of the property, VAT on rents or on sales is charged by the PropCos and remitted to the foreign VAT authorities following the filing of their foreign VAT returns. Input VAT incurred in relation to the property (immovable works, valuation, etc.) is also deductible in these foreign VAT returns.

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The purpose of this article is to provide an overview of the potential VAT implications of the Titanium case with a specific focus on some of the jurisdictions where Luxembourg PropCos own and exploit real estate.

Potential impacts for the future

In case of a "strict" application of the Titanium case in foreign jurisdictions, the consequences could be as follows for Luxembourg PropCos renting real estate:

1. VAT on the rents would no longer have to be charged by the Luxembourg PropCos but would have to be declared as due by the tenants in their local VAT returns. The EU VAT Directive grants the option to Member States to implement a specific extended reverse charge mechanism for these services. VAT on the rents would therefore no longer be charged and collected by the lessor but would be declared as due by the tenants in their VAT returns;

2. Except in specific situations, PropCos would not be entitled to register for VAT purposes in the country of the real estate and only the Luxembourg VAT number would remain. A foreign VAT number would only be required for the PropCos for some specific transactions (intra-community acquisitions of goods in that foreign jurisdiction, receipt of property related services from sup-pliers not established in the country of the real estate);

3. Foreign input VAT incurred by the PropCos (e.g. VAT on construction work) would remain recoverable but through the filing of VAT refund claims and no longer through foreign VAT returns. The refund claim procedure is based on Directive 2008/9/EC and it requires the filing of quarterly/annual claim(s) through the Luxembourg VAT refund portal. Following its submission, the claim is forwarded by the Luxembourg VAT authorities to the foreign VAT authorities that ultimately grant the refund.

Austria: homeland of the Titanium case

The Austrian VAT law has implemented an extended reverse charge mechanism whereby Austrian VAT taxable customers are liable to self-assess Austrian VAT if the supplier is a foreign taxable person because he has neither established his business nor has a fixed establishment in Austria that is involved in the supply.

However, according to the Austrian tax authorities VAT guidelines[1], a foreign property company owning an immovable property in Austria rented out to another taxable person is deemed not to be a "foreign" taxable person. The consequence is that the extended reverse charge mechanism should not apply and the lessor still has to charge VAT on rents.

Despite the Titanium case, the Austrian tax authorities have not (yet) changed their opinion or published any amended guidelines. The next chance to do so will be when the annual update of the VAT guidelines are published, which is usually to be expected in November or December of each year.
Notwithstanding the fact that some articles and contributions in literature are of the opinion that, based on the CJEU decision, the Austrian Tax Authorities may no longer uphold their position, one may still rely on the existing wording of the VAT guidelines – if more favorable – and await further changes (to be introduced either by the legislator or by the Tax Authorities) before taking any action.

Germany: where many Luxembourg PropCos own real estate

Under German VAT law, reverse charge applies in general to services rendered to taxable persons if the supplier is not established in Germany nor has a fixed establishment in Germany that is involved in the supply. However, the guidelines of the German tax authorities[2] stipulate that an entrepreneur who owns real estate located in Germany and rents it out "is to be treated as a resident of Germany" for VAT purposes.

The question could be raised whether these guidelines are in line with the Titanium case and will have to be changed. However, they do not mention that the PropCo has, as such, a fixed establishment for VAT purposes in Germany, but merely create a fiction based on which such a PropCo is to be treated as if it had such a fixed establishment. Therefore, it is currently unclear whether the German tax authorities will change their current administrative practice because of the Titanium case, as it could be defended that their guidelines are not inconsistent with the settlements of this case. However, should the guidelines be finally amended, it is very unlikely that the German VAT authorities will introduce these changes with retroactive effect for the past. It is far more likely, and would be much more in line with the usual approach of the German tax authorities, that they will apply a non-objection period when amending the German VAT law.

The German Federal Ministry of Finance is currently analysing the impact of the Titanium case on foreign companies holding and operating German real estate. Administrative and/or legal changes are therefore expected in the coming months to clarify the German VAT obligations of such foreign PropCos. It is therefore advisable to await these clarifications before taking any action.

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[1] Recital n°2601

[2] Section 13b.11 (2) sentence 2 of the German VAT Application Decree (UStAE)

The Netherlands

Before the CJEU published its Titanium case, the Dutch Supreme Court already issued a ruling in a very similar case. In 2019, the Supreme Court concluded that a fixed establishment for VAT purposes cannot exist without own personnel being locally present. From the perspective of the Netherlands, the CJEU's Titanium case is in fact a confirmation of existing Dutch case law as well as a continuation of the Dutch market practice and tax authority policy.

Within the long-standing Dutch market practice, Luxembourg PropCos were already considered non-resident VAT taxable persons and are generally VAT registered as such. This implies that the consequences of this judgment are rather limited. Also, the Titanium case does not lead to a different VAT treatment of the lease services rendered by non-resident lessors. So far, and as expected, the Dutch tax authorities have not announced any changes following the Titanium case.

From an input tax recovery perspective, it is debatable whether non-resident taxable persons, such as Luxembourg PropCos, should be entitled to maintain their Dutch VAT registration. However, even if the tax authorities were to change their policy and cancel VAT registrations for Luxembourg PropCos following the Titanium case, such PropCos would still be entitled to recover Dutch VAT incurred through an EU VAT refund request, filed in their country of establishment or directly with the Dutch tax authorities. Considering that the Netherlands accept VAT refund requests for a 5-year retrospective period, an unexpected cancellation of non-resident VAT registrations should not negatively affect the right to reclaim Dutch VAT incurred retrospectively. Non-resident taxable persons that are leasing out Dutch properties are therefore advised to remain VAT registered in the Netherlands going forward.

External staff?

The Titanium case could trigger additional discussions as to whether it might be considered as creating distortions and, with that, impact the neutrality of the VAT system. For example, the case raises the question of whether staff hired from external employment agencies could qualify as "own" staff for assessing the presence of a VAT fixed establishment. Would there not be situations in which such hired staff could be considered as sufficiently comparable to own staff and, with that, allow the conditions of the fixed establishment to be met? This question has not yet been answered...

Conclusion: time will tell...

Once these new regulations/guidelines have been published, it will be possible to determine accurately the foreign VAT obligations of Luxembourg PropCos and the related potential impacts. Indeed, Luxembourg PropCos will maybe have to review their VAT set-up (foreign VAT de-registration, issuance of invoices without VAT, etc.) and anticipate potential adverse impacts (VAT pre-financing before receiving the refunds of the foreign input VAT through the VAT refund claims, additional formalities, etc.).

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Main corporate implementation trends for 2021 and 2022

OUR INSIGHTS AT A GLANCE

- Luxembourg key corporate implementation developments today and tomorrow – a summary of major developments in 2021 and 2022.
- This article provides an overview of the new key areas which you need to be aware of that may affect corporate law aspects of your business and helps you navigate the legal landscape and plan ahead.

Major developments already in place

Anti-money laundering

The law of 25 March 2020 implemented parts of Directive (EU) 2018/843 of 30 May 2018 (so-called 5th AML Directive) amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU in order to:

- improve international cooperation between supervisory authorities;
- monitor the use of virtual currencies and prepaid cards; and
- apply enhanced due diligence measures to strengthen the treatment of "high risk countries".

The law of 10 July 2020 implemented inter alia Article 31 of (EU) Directive 2015/849 (so-called 4th AML Directive), as modified by the 5th AML Directive and established a register of fiduciary contracts and trusts. It also created new obligations for fiduciary contracts and trusts.

The law of 25 February 2021 amended the law of 12 November 2004 on the fight against money laundering and terrorism financing in order to improve the transposition of the 4th AML Directive into Luxembourg law, in line with GAFI recommendations. Professionals are now required to identify beneficial owners in all cases. The rules applicable to politically exposed persons and virtual asset service providers have been reinforced. The law also provides with transitory measures in the context of BREXIT, that were applicable until 31 July 2021.

Dematerialised securities

The law of 22 January 2021 modifying the law of 5 April 1993 on the financial sector and the law of 6 April 2013 on dematerialised securities has modernised the legal framework for dematerialised securities. It forms part of a continued modernisation of the legal framework of financial transactions and is a continuation of the law of 1 March 2019, stating in essence that account keepers may hold securities accounts and register securities within or through secure electronic recording systems, including distributed ledgers or databases. This initiative supports the players concerned and, more generally, the attractiveness of the financial place in the digitalisation and use of new technologies in the field of issuance and circulation of dematerialised securities. The law introduces changes regarding issuance accounts and it broadens the scope of entities able to act as central account keepers for debt securities.

For more details, please read our article "Luxembourg: a new hub for fintech businesses and issuers willing to use new technologies for issuing their securities?" in our March 2021 ATOZ Insights.

Financial sector

The law of 21 July 2021 amending the law of 5 April 1993 on the financial sector entered into force on 31 July 2021 in order to transpose into Luxembourg law the European prudential regime applicable to investment firms authorised under the Markets in Financial Instruments Directive II set out under the Investment Firms Directive and the Investment Firms Regulation.

The law introduced new classes of investment firms in order to better suit the nature, scale, and complexity of investment firms' activities compared to the Capital Requirements Regulation and the Capital Requirements Directive framework applicable to traditional credit institutions. The law has also extended the powers of the supervisory authority of both the financial sector ("**CSSF**") and insurance sector ("**CAA**") as far as the agreement procedure of supervised authorities is concerned.

Company law

The law of 6 August 2021 modifying the law of 10 August 1915 on commercial companies removes uncertainty and confirms that the financial assistance prohibition does not apply to private limited liability companies.

Holding of company meetings during the COVID-19 pandemic

Since the COVID-19 pandemic may impact the good governance of legal entities, the law of 23 September 2020 introduced exceptional measures on the holding of company meetings in order to make sure that these can take place remotely without any physical presence. This law was adopted for a limited period of time which was extended several times as the COVID-19 pandemic continued to impact the good governance of legal entities. Based on the law in its version currently in force (as amended by the Law of 30 June 2021), the exceptional measures provided by the law will remain in force until 31 December 2021. However, on 24 November 2021, a draft law was presented to Parliament, which will amend the law of 23 September 2020 so as to extend the application of the exceptional measures until 31 December 2022.

Major developments expected

Luxembourg modernisation of insolvency law

The draft law n°6539, which was presented to Parliament 8 years ago, is still pending before Parliament but has been subject to several amendments over the summer and has been divided into two different draft laws (draft law 6539A and draft law 6539B). Thus, it can be expected that the legislative procedure will move forward quickly. The draft laws intend to modernise Luxembourg bankruptcy law, and to prevent bankruptcies through various measures to reorganise companies experiencing financial difficulties. The declared objective is to prioritise the survival of a company by allowing the recovery of a commercial enterprise in difficulty in order to avoid bankruptcy. The draft laws propose that prevention is based on the early detection of financial difficulties and the treatment of these by appropriate procedures rather than liquidation.

Non-profit associations and foundations

The draft law n°6054 on non-profit associations and foundations intends to simplify the existing provisions (which date from 1928), while leaving out those which are no longer useful, in particular:

- simplify the formalities of non-profit organisations and the procedures for approving donations and gifts;
- increase the legal security of structures;
- develop transparency and consistency in the operating rules of non-profit organisations; and
- provide better information to members and third parties, to improve monitoring activities in this sector.

The draft law was presented to Parliament more than

10 years ago but has been amended by the Luxembourg Government very recently so we may expect that it will become law in the coming months.

Patrimonial foundations

The draft law n°6595 intends to introduce an orphan structure called "patrimonial foundation" as a new wealth management vehicle in the form of a private foundation with an attractive tax regime, to be used for patrimonial and inheritance structuring and planning.

There have been no recent developments as regards this draft law.

Securitisation

A draft law presented to Parliament on 21 May 2021 aims to amend the Securitisation Law to further improve the flexibility and attractiveness of the (already very successful) Luxembourg securitisation framework. The draft law provides 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 will be created for active management of securitisation vehicles. New or improved tools will be available to efficiently structure securitisation.

For more details, please read our article "Luxembourg further improves the flexibility and attractiveness of its Securitisation Law" in our July 2021 ATOZ Insights.

Luxembourg Business Register

The Luxembourg Business Register issued a public notice on 1 October 2021. At the end of the first quarter of 2022, the Luxembourg Identification Number (matricule) will have to be provided for any natural person registered with the RCS. Persons who do not have such a number will be given one when they register with the RCS. This number will not be available to third parties on the dedicated RCS portal.

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