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INSIGHTS

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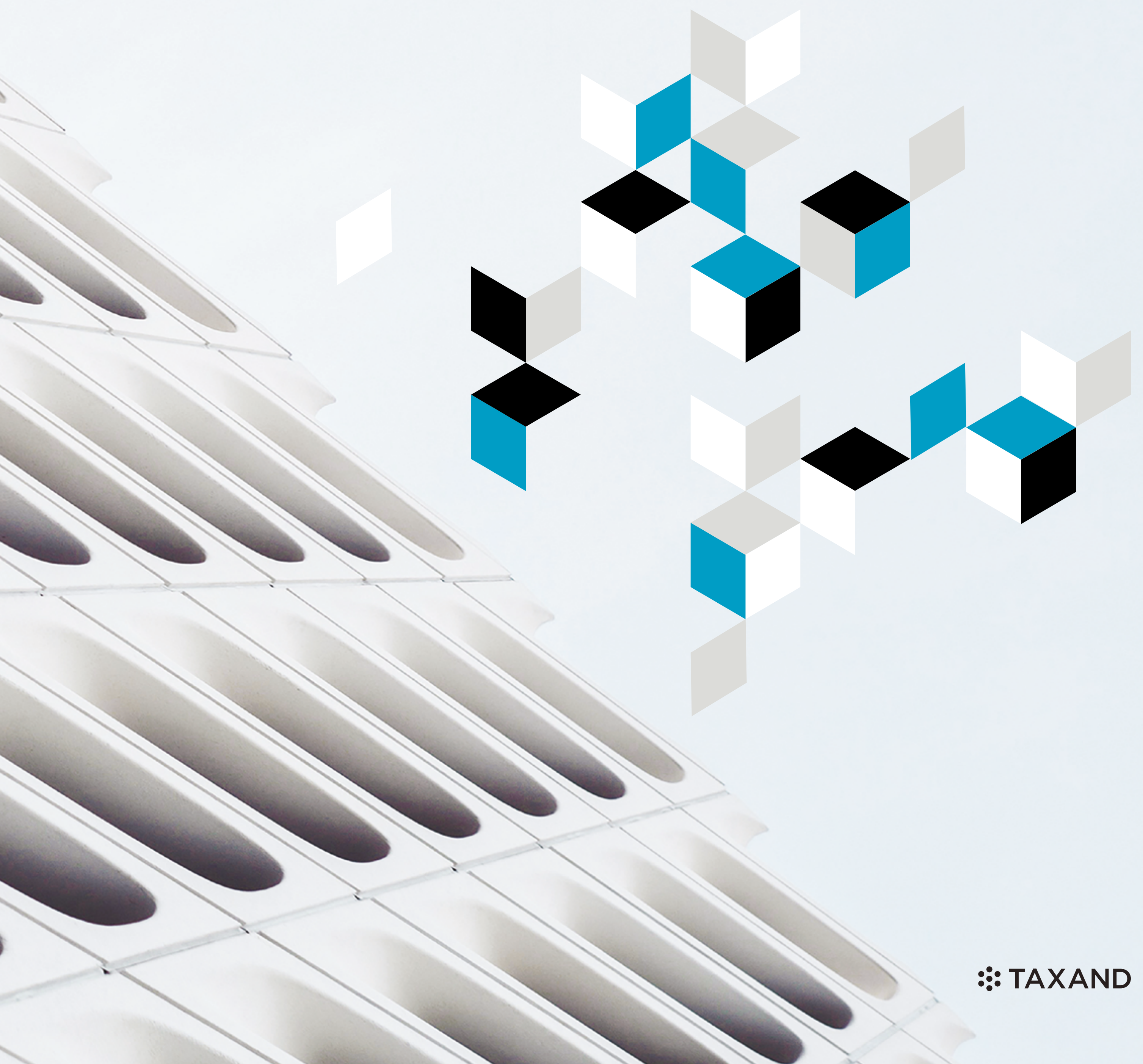

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EDITORIAL

Greetings!

As the first days of spring gradually bring the first rays of sunshine, it is time for us to highlight what has happened in Luxembourg and abroad over the past few months.

On 27 January 2023, the Administrative Tribunal ruled that the **redemption of a class of shares** by a Luxembourg company is to be considered as a **sale of shares** and not as a dividend distribution if the redemption price does not exceed the fair market value of the redeemed share class. We provide an overview of the judgment of the Tribunal and consider its potential implications.

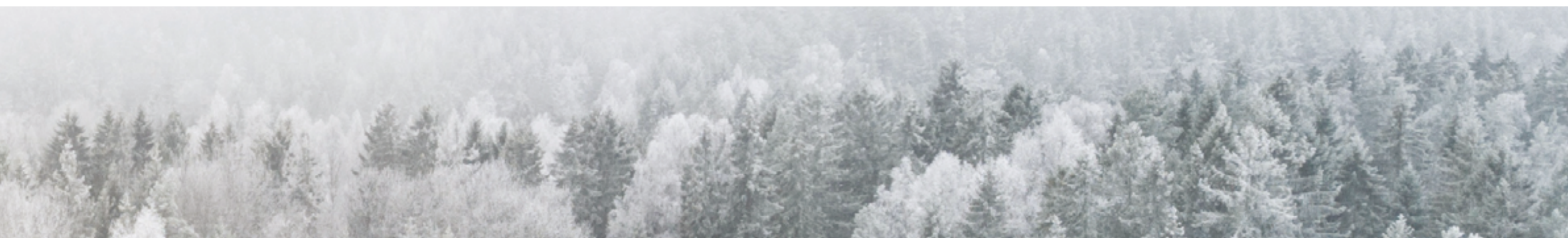
On 24 February 2023, the draft law approving the new double tax treaty with the **UK** was presented to the Luxembourg Parliament. The **new DTT** reflects the latest OECD tax standards and amends the rules in relation to the taxation of Luxembourg entities with **real estate investments in the UK**. We provide an overview of the most important changes to be introduced by the DTT.

On the same day, the draft law implementing the so-called "**public country-by-country reporting Directive**" was also presented to the Parliament. This Directive requires certain large-scale multinationals to publicly disclose (mainly) the **corporate income tax** that they pay. We give an overview of the most important aspects of the new reporting requirements to be introduced.

On 15 December 2022, the Council of the European Union formally adopted the **Pillar Two Directive**. Luxembourg now has to transpose the Directive into its domestic law by 31 December 2023 at the latest. We highlight the impact of this transposition on **investment fund managers** given that not all investment funds will automatically be carved out from the Pillar Two rules. As the new rules should, in principle, apply to tax years starting as from 1 January 2024, this leaves very little time to adapt.

At European level, the **EU list of non-cooperative jurisdictions for tax purposes** was updated on 21 February 2023 by adding the **BVI, Costa Rica, the Marshall Islands and Russia**. This update directly impacts the scope of application of different Luxembourg tax measures. We describe the consequences of this update.

Besides Pillar Two, the European Commission still has a lot of ongoing direct tax projects in the pipeline. We provide an overview of the **state of play** of various **EU direct tax initiatives** such as the "**Unshell**" **Proposal** and the initiative aiming to tackle the role of so-called "enablers" called the "**SAFE**" **Proposal**, but also the "**DEBRA**" **Proposal** to address Debt-Equity bias and **the** "**BEFIT**" initiative aiming to introduce a common set of rules for EU companies to calculate their taxable base and an allocation of profits between EU countries, based on a formula. We also assess their chances of succeeding in the near future.



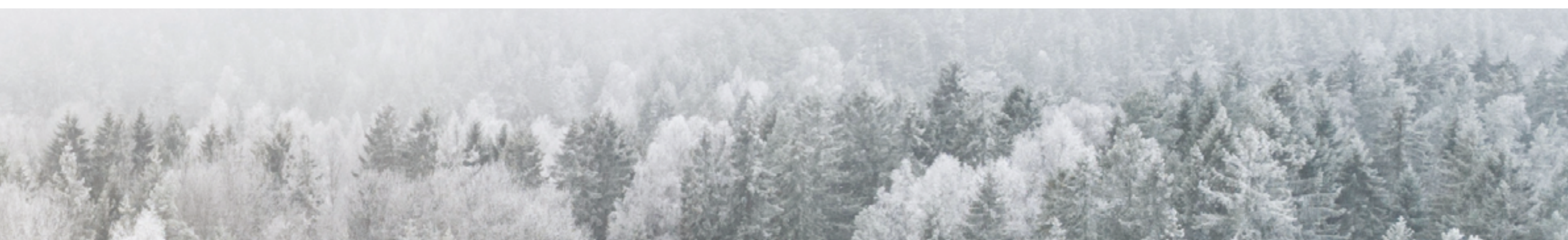
Still at EU level, the EU Commission adopted a new proposal (so-called "**DAC8**") for a Directive amending the Directive on Administrative Cooperation on 8 December 2022. The most important amendment concerns far-reaching reporting obligations regarding **crypto-assets**. We analyse the changes brought about by the DAC8 proposal.

On 8 December 2022, the European Commission also presented the legislative package "VAT in the Digital Age" or "**ViDa**". This initiative aims to modernise the **VAT reporting obligations** through **e-invoicing** and **e-reporting** to address the challenges of **the platform economy** by introducing a new VAT liability for **digital platforms** and to lead the way towards a **single VAT registration** within the EU. We set out the main measures of this package.

Finally, on 22 November 2022, the Court of Justice of the European Union ruled that granting public access to the Luxembourg register of beneficial owners ("**RBE**") was not compliant with EU Law. This decision has shuffled the decks of the Luxembourg RBE and more generally of EU beneficial owners registers. We explain the judgment, the new procedure to access the RBE in Luxembourg and the possible way forward.

We hope you enjoy reading our insights.

The ATOZ Editorial Team



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Luxembourg Administrative Tribunal rules on the tax treatment of share class redemptions

OUR INSIGHTS AT A GLANCE

- The share capital of Luxembourg companies may be divided into different classes of shares that provide the shareholder(s) with different rights. Here, companies have a lot of flexibility as to which rights may be attached to each class of shares. Share classes may, for example, track the performance of specific investments.
- On 27 January 2023, the Administrative Tribunal ruled that the redemption of a class of shares by a Luxembourg company is to be considered as a sale of shares and not as a dividend distribution.
- However, when the redemption price exceeds the fair market value of the redeemed share class, the excessive amount should be qualified as a hidden dividend distribution (which is, in principle, subject to 15% Luxembourg dividend withholding tax) if the excessive price is not justified by economic reasons.
- The determination of the fair market value of the redeemed share class will be crucial and will have to be determined by the Luxembourg tax authorities as the Tribunal was unable to do so in the absence of any evidence submitted in this respect.
- The Tribunal also further concluded that it was no longer necessary to analyse the potential existence of an abuse of law within the meaning of §6 of the Tax Adaptation Law. This is unfortunate as some guidance in respect of the potential application of the concept of abuse of law in the context of classes of shares and their redemption would have been much appreciated.

The share capital of Luxembourg companies may be divided into different classes of shares that provide the shareholder(s) with different rights. Here, companies have a lot of flexibility as to which rights may be attached to each class of shares. Share classes may, for example, track the performance of specific investments.

On 27 January 2023, the Administrative Tribunal (the "**Tribunal**") ruled on the Luxembourg tax treatment of the redemption of a class of shares by a Luxembourg company.

The Tribunal decided that the redemption is to be considered as a sale of shares, not as a dividend distribution. However, when the redemption price exceeds the fair market value of the redeemed share class, the excessive amount should be qualified as a hidden dividend distribution (which is, in principle, subject to 15% Luxembourg dividend withholding tax) if the excessive price is not justified by economic reasons.

This article provides a clear and concise overview of the judgment of the Tribunal and considers its potential implications.

Fact pattern of the case

In 2014, a Luxembourg company ("**Luxco**") redeemed one of 10 classes of shares held by its single shareholder (a Cayman Island company, "**Cayco**"). Prior to the redemption, Cayco held 12,500 ordinary shares of one euro each as well as 10 different classes of shares (classes A to J), each class being composed of 1,425 shares of one euro each. The classes of shares were created at the same time and did not track the performance of specific investments. Class J was the first share class that was redeemed, as the bylaws provided for share class redemptions in reverse alphabetic order. The redemption was followed by a cancellation of the shares with a decrease of the share capital of Luxco.

The redemption of share class J followed a disinvestment (i.e. the repayment of a loan that was granted in 2012 to an operating company). The redemption price of share class J was determined on the basis of all investments made by LuxCo at the time of the redemption.

Depending on the tax treatment of the proceeds on the share class redemption as either a (hidden) dividend

distribution or as a sale of shares (resulting in capital gains), the redemption was either subject to 15% withholding tax (i.e. the Cayman parent company would not benefit from a withholding tax exemption under the Luxembourg participation exemption regime or a reduced withholding tax rate under an applicable tax treaty), or not be subject to withholding tax.

Qualification of the share class redemption from a Luxembourg tax point of view

- **Position of the tax authorities**

The Luxembourg tax authorities ("**LTA**") qualified the share class redemption as a hidden dividend distribution that is subject to 15% withholding tax. Based on the bylaws of Luxco, a preferred profit allocation was made to the remaining classes of shares, whereas the remaining profits (of all investments) were allocated to the last outstanding class of shares that was redeemed (and subsequently cancelled). The LTA denied the qualification of the redemption as a partial liquidation within the meaning of Article 101 of the Income Tax Law ("**ITL**") on the grounds that the classes of shares lacked different economic or legal rights. A partial liquidation would not be subject to Luxembourg withholding tax.

- **Position of the taxpayer (Luxco)**

Luxco argued that the redemption of the share class followed by a cancellation of the shares (resulting in a capital decrease) was to be qualified as a partial liquidation. Thus, the transaction resulted in the realisation of capital gains and not a payment of dividends which is consistent with the case law of the Luxembourg Administrative Court dated 23 November 2017 (Case 39193C). Accordingly, no withholding tax should apply. Luxco considered that Cayco reduced its investment in Luxco upon the end of an investment so that the redemption proceeds were not ordinary income comparable to a dividend but a disinvestment impacting the very substance of the investment.

Luxco further argued that article 101 of the ITL would not require distinct legal or economic rights being allocated to the different classes of shares.

While LuxCo agreed on the absence of different legal rights based on its bylaws, it argued that there were different economic rights due to the redemption order (in reverse alphabetic order) and the allocation of different profit rights to the classes of shares. The redemption of a class of shares gave a preferential and priority right to receive all the available net assets, as well as the amounts allocated to a reserve at the time of the redemption. As a consequence, Luxco considered that the last redeemable classes of shares had a much lower economic value than the first redeemable classes, insofar as the first redeemable classes provided an immediate entitlement to the amounts available while the other classes of shares may only be redeemed once previous classes are redeemed (with entitlement to the amounts available).

- **Position of the Administrative Tribunal**

The Tribunal ruled that a redemption of a class of shares is, in principle, not a profit distribution, but a transaction which triggers a capital gain that is not subject to withholding tax. As a principle, all transactions between a company and its shareholder that affect the substance of the shares within the meaning of article 101 of the ITL, including the repurchase of a participation by the company with a corresponding capital decrease, fall within the scope of article 101, (1) ITA (i.e. "proceeds of a disposal of the participation" within the meaning of article 100 of the ITL). According to the Tribunal, this characterisation applies to the present case insofar as the repurchase of the J share class resulted in a reduction of the share capital corresponding to the nominal value of these shares.

However, the Tribunal considered that this qualification does not preclude the application of the concept of hidden dividend distributions if and to the extent that the redemption price of a class of shares exceeds its fair market value (assuming that the overpricing is not justified by valid economic reasons but can only be explained by the existence of the shareholder relationship).

The Tribunal noticed that, based on the information available, the different classes of shares did not provide for different legal rights. As far as the economic rights are concerned, the Tribunal addressed Luxco's argument

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that a differentiation of share classes would be made from an economic point of view because of their redemption ranking (in reverse alphabetical order). Here, the Tribunal considered that the argument of LuxCo was not convincing insofar as the price of the redeemed shares corresponded to almost the entirety of LuxCo's monetary assets, whereas the share class in question represented only approximately 5% of the share capital.

On this basis, the Tribunal concluded that the LTA were right to qualify the share class redemption and subsequent cancellation as a hidden dividend distribution to the extent the redemption price exceeded the fair market value of share class J. However, the Tribunal clarified that the entire amount of the redemption price could not be classified as a hidden dividend distribution (subject to Luxembourg withholding tax), but only the excessive amount.

The fair market value of share class J had yet to be determined by the LTA and the Tribunal was unable to do so in the absence of any evidence submitted to it in this respect. Therefore, the Tribunal referred the case back to the tax office in charge to determine the fair market value of the shares.

The Tribunal further concluded that it was no longer necessary to analyse the potential existence of an abuse of law within the meaning of §6 of the Tax Adaptation Law. This is unfortunate as some guidance in respect of the potential application of the concept of abuse of law in the context of classes of shares and their redemption would have been much appreciated.

Outlook & recommendations

Neither the taxpayer nor the Luxembourg government have filed an appeal against the judgment before the Administrative Court. Thus, the legal procedure is now finalised and the position taken by the Tribunal in its judgement can no longer be challenged.

The Administrative Court confirmed already in its decision of 2017 that a share class redemption is not a profit distribution and therefore not subject to Luxembourg withholding tax, as long as the redemption price adheres to the arm's length standard. Hence, the determination of the fair market value of share class J by the LTA will be crucial even though the valuation should arguably follow the mechanism provided in the bylaws of LuxCo.

Taxpayers have to carefully draft the articles of incorporation when classes of shares are implemented. The mechanisms of share classes may vary significantly from one case to another and should be tailored to the situation of the company. The different classes of shares should generally be vested with different economic rights (for example, classes of shares tracking specific investments).

Ultimately, the financing of a Luxembourg company should always provide for sufficient flexibility in terms of cash repatriation (considering the expected cash flows and lifetime of the investments) and classes of shares should ideally be used for the repatriation of irregular cash flows to the shareholders (for example, a refinancing or a partial exit).

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Luxembourg launches the ratification of the new UK-Luxembourg Double Tax Treaty

OUR INSIGHTS AT A GLANCE

- On 24 February 2023, the draft law approving the new double tax treaty between the UK and Luxembourg was presented to the Luxembourg Parliament.
- The new DTT and an additional Protocol will replace the Double Tax Treaty signed in 1967. The aim of the new DTT is for the UK and Luxembourg to have a tax treaty that reflects the latest OECD tax standards. Some of these had already been taken into account through the modifications introduced by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. However, the new DTT goes significantly further and the main change is in relation to the taxation of Luxembourg entities with real estate investments in the UK.
- Now that the UK has already ratified the new DTT and Luxembourg launched its ratification procedure, it can be expected that the new DTT will enter into force over the course of this year so that the new provisions should become applicable as from 2024.

On 24 February 2023, the draft law approving the new double tax treaty ("**DTT**") between the UK and Luxembourg was presented to the Luxembourg Parliament.

The new DTT and an additional Protocol will replace the Double Tax Treaty signed in 1967 (the "**old tax treaty**"). The aim of the signature of the new DTT is for the UK and Luxembourg to have a tax treaty that reflects the latest OECD tax standards. Some of these had already been taken into account through the modifications introduced by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**Multilateral Instrument**" or "**MLI**"). However, the new DTT goes significantly further.

As expected, the main change introduced in the new DTT is in relation to the taxation of Luxembourg entities with real estate investments in the UK.

We provide an overview of the most important changes to be introduced by the DTT for corporate taxpayers.

Tax residence

*DTT benefits granted to Collective Investment Vehicles ("**CIVs**")*

In contrast to the old tax treaty, the new DTT grants Luxembourg CIVs treaty benefits under the following conditions (based on Article 2 of the Protocol to the DTT):

- A CIV which is established and treated as a body corporate for tax purposes in Luxembourg and which receives income arising in the UK shall be treated as an individual who is a resident of Luxembourg and as the beneficial owner of the income it receives (provided that a resident of Luxembourg receiving the income in the same circumstances would have been considered as the beneficial owner thereof), but only to the extent that the beneficial interests in the CIV are owned by equivalent beneficiaries.
- However, if at least 75% of the beneficial interests in the CIV are owned by equivalent beneficiaries, or if the CIV is an undertaking for collective investment in transferable securities ("**UCITS**"), the CIV shall be treated as a resident of Luxembourg and as the beneficial owner of all of the income it receives (provided that a resident of Luxembourg receiving the income in the same circumstances would have been considered as the beneficial owner thereof).

"Equivalent beneficiary" means a resident of Luxembourg and, importantly, a resident of any other jurisdiction with which the UK has arrangements that provide for effective and comprehensive information exchange, who would, if he received the particular item of income for which benefits are being claimed under this DTT, be entitled under an income tax convention with the UK, to a rate of tax with respect to that item of income that is at least as low as the rate claimed

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under this DTT by the CIV with respect to that item of income.

For the purposes of this provision, CIV means:

- UCITS subject to Part I of the Luxembourg law of 17 December 2010;
- UCIs subject to Part II of the Luxembourg law of 17 December 2010;
- Specialised Investment Funds ("**SIF**") and Reserved Alternative Investment Funds ("**RAIF**") subject to the "SIF-like" tax regime;
- Any other investment fund, arrangement or entity established in Luxembourg which the competent authorities of the Contracting States agree to regard as a CIV.

The granting of DTT benefits to Luxembourg CIVs is a very positive change compared to the situation of CIVs under the old tax treaty. The fact that the "equivalent beneficiary" requirement will not apply to UCITS is also very positive. In practice, investors in UCITS are numerous and may change daily, which makes it extremely difficult in practice to track particular income streams to particular investors in order to determine whether the UCITS is held by equivalent beneficiaries.

That said, for non-UCITS CIVs, so mainly for alternative investment funds, the analysis of the "equivalent beneficiary" condition will remain a challenging exercise, especially when the investor base is significant.

Finally, as far as the CIV definition is concerned, the fact that RAIFs subject to the SICAR regime are not CIVs within the meaning of this provision makes sense because they are fully taxable entities under Luxembourg tax law and are therefore already to be considered as tax residents under the DTT.

New tie-breaker rule for dual resident companies

So far, almost all Luxembourg tax treaties include a tie-breaker rule according to which a company is deemed to be resident in the Contracting State which its place of effective management is situated in.

The new DTT (Article 4) now incorporates the mutual agreement procedure for dual resident companies.

These provisions were included in the 2017 OECD Model Tax Convention and require agreement by the competent authorities of Luxembourg and the UK, having regard to a number of factors.

This change will bring a lot of tax uncertainty to corporate taxpayers which rely on DTT benefits and have their place of incorporation in one country and their place of effective management in the other. In those instances, the place of effective management criterion will no longer prevail automatically when determining the tax residence.

In order to determine by mutual agreement the Contracting State of which a company shall be deemed to be a resident for the purposes of the DTT, the competent authorities will have a look notably at the following factors:

- Location of senior management of the company;
- Location of director and board meetings (or equivalent);
- Location of the headquarters;
- The extent and nature of the economic nexus of the company in Luxembourg and the UK; and
- Whether determining that the company is a resident in one of the countries but not the other for the purposes of the DTT would carry the risk of an improper use of the DTT or inappropriate application of the domestic law of the UK or Luxembourg.

Any matters requiring mutual agreement on a case-by-case basis by competent authorities tends to be lengthy. It remains to be seen whether this will result in significant scrutiny by the tax authorities in Luxembourg or HM Revenue & Customs in the UK.

Finally, the Protocol to the DTT provides that the competent authorities of Luxembourg and the UK will not seek to revisit the tax residence status determined under the old tax treaty rules (but only as long as all the material facts remain the same). Any changes to the tax residence status of a company will apply only to income or gains arising after the new determination (or notice to the taxpayer of the absence of an agreement).

Dividends

The DTT introduces a full exemption from dividend withholding tax, provided that the recipient of the dividend is the beneficial owner of the income.

One of the effects of Brexit was that the EU Parent Subsidiary Directive removed the exemption from dividend withholding tax and UK recipients of Luxembourg dividends reverted to the old treaty rate of 5%. The change introduced by the new DTT therefore reinstates the previous position.

The UK does not levy withholding tax on dividends, other than for certain distributions from real estate investment trusts ("**REITs**").

The exemption from dividend withholding tax does not apply to such distributions from UK REITs; they are subject to 20% UK withholding tax at source but the DTT provides for a reduction (by way of reclaim) such that the final rate is 15%.

It is good to see that recognised pension funds[1] can benefit from a withholding tax exemption on UK REIT distributions. This is feature of a number of recently renegotiated treaties of the UK.

Interest

Like in the old tax treaty, Article 11 of the DTT provides that there should be no withholding tax on interest as long as it is beneficially owned by a resident of the other country. While Luxembourg does not levy withholding tax on interest, the UK does at 20%.

Royalties

The change to the DTT in relation to withholding tax on royalties is again reflecting the fact that these were previously covered by an EU Directive. The full exemption from withholding tax on royalties owned by a treaty beneficiary removes the 5% rate of the old tax treaty. This is of primary benefit to Luxembourg taxpayers holding IP investments in the UK as royalties may be subject to up to 20% withholding tax.

Capital gains & real estate rich companies

One of the most significant changes is that the DTT now gives the UK taxing rights on capital gains realised on the sale of shares/interest in companies holding UK real estate where these are owned by Luxembourg tax residents. The old tax treaty gave taxing rights to Luxembourg (with a potential full exemption of the gains in Luxembourg under the participation exemption regime) and this was not in line with the majority of other double tax treaties the UK has.

Given that the UK changed its domestic law in April 2019 to tax non-UK resident owners of commercial property (both direct and indirect), this change was widely expected.

The new DTT (in Article 13) introduces a "real estate rich company" clause according to which gains from the disposal of shares or comparable interests deriving more than 50% of their value directly or indirectly from immovable property may now be taxed in the country where the real estate is located.

Based on this new provision, the UK will now be able to tax gains realised by Luxembourg investors on shares or comparable interests in another company (no matter the country in which that company is a tax resident in), which is considered to be "property-rich" from a UK tax perspective.

As this is not a change to UK domestic law, any gains realised after commencement will be subject to UK tax. This is important given that even gains accrued prior to the DTT coming into force can be subject to tax.

UK tax law provides for the base cost of commercial real estate to be uplifted to April 2019 values and any gain to be calculated by reference to that value. Consideration also needs to be given as to whether this change impacts the recognition of deferred tax in company financial statements.

Methods to eliminate double taxation

Luxembourg will generally apply the exemption method to eliminate double taxation.

However, the credit method will apply in certain situations, including when tax is levied in the UK in accordance with Article 10 (dividend withholding tax) or Article 13 (capital gain taxation). In such case, the deduction shall not exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income or gains derived from the UK.

The UK similarly applies the exemption method to eliminate double taxation. In instances where this is not applicable a UK tax credit should be available, subject to a 10% ownership threshold.

Prevention of DTT abuse

The so-called "principal purpose test", already included in the old tax treaty since the entry into force of the MLI, is

[1] Luxembourg recognised pension funds includes Pension-savings companies with variable capital (***sociétés d'épargne-pension à capital variable***, "**SEPCAV**"), Pension-savings associations (***associations d'épargne-pension***: "**ASSEP**"), Pension funds subject to supervision and regulation by the Insurance Commissioner (***Commissariat aux assurances***) and the Social Security Compensation Fund (***Fonds de Compensation de la Sécurité Sociale***: "**SICAV-FIS**").

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also included in the new DTT. Accordingly, a DTT benefit shall not be granted in respect of an item of income or capital if obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit. These provisions will not be invoked if it can be shown that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the DTT.

In addition, and in line with most other double tax treaties negotiated in recent years, the UK and Luxembourg intend to conclude a DTT without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this DTT for the indirect benefit of residents of third States).

Entry into force

The new DTT will enter into force as soon as it has been ratified by both Luxembourg and the UK. Since the UK has already ratified the DTT and assuming that Luxembourg will finalise its ratification procedure prior to year-end, the new DTT will probably enter into force in the course of 2023. Should it be the case, the new provisions would become applicable as follows:

In Luxembourg, it would apply:

i. in respect of taxes withheld at source, to income derived on or after 1 January 2024; and

ii. in respect of other taxes on income, and taxes on capital, to taxes chargeable for any taxable year beginning on or after 1 January 2024.

In the UK, the DTT would apply:

i. in respect of taxes withheld at source, to income derived from 1 January 2024;
ii. in respect of income and capital gains tax, to any year of assessment from 6 April 2024;
iii. for corporation tax (including corporation tax on capital gains), for any financial year beginning on or after 1 April 2024.

In the UK, whilst for corporation taxpayers, the earliest the new treaty could apply is therefore 1 April 2024, in reality it could be the year after. A number of companies and groups have financial years starting 1 January and for these the DTT would only apply from 1 January 2025.

We will continue to monitor the ratification proceedings and provide updates.

Implications

As highlighted above, the DTT introduces a number of changes and in certain cases (particularly for real estate investors) very significant changes.

It is important that the impact of the changes is carefully considered from a group/fund structure perspective, expected and modelled returns, cash requirements and financial reporting.

The impact of the new DTT should also be carefully considered by dual residence companies in order to make sure that their current tax residence for DTT purposes is not impacted.

It is without doubt that the DTT will be positive for Luxembourg CIVs investing in the UK as they will now be able, under certain conditions, to benefit from an exemption of UK withholding tax on interest and they already benefit from the dividend withholding tax exemption under the UK internal rules.

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Luxembourg launches the implementation of the Public CbCR Directive

OUR INSIGHTS AT A GLANCE

- On 24 February 2023, the draft law implementing the so-called "public country-by-country reporting Directive" was presented to Parliament. The draft law amends the law of 19 December 2002 concerning the register of commerce and companies and the accounting and annual accounts of undertakings as well as the Law of 10 August 1915 on commercial companies.
- The public CbCR Directive requires certain multinationals with consolidated revenues of more than EUR 750 million to publicly disclose (mainly) 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.
- Luxembourg, like all EU Member States, has until 22 June 2023 to transpose the Directive into national law. The new obligations introduced will apply to accounting periods starting on or after 22 June 2024. Thus, for companies with an accounting year corresponding to the calendar year, the first report on income tax information will relate to the year 2025 and will have to be published before the end of 2026.

On 24 February 2023, the draft law ("**Draft Law**") implementing the so-called "public country-by-country reporting Directive"[2] (the "**public CbCR Directive**" or "**the Directive**") was presented to Parliament. The Draft Law amends the law of 19 December 2002 concerning the register of commerce and companies and the accounting and annual accounts of undertakings as well as the Law of 10 August 1915 on commercial companies.

The public CbCR Directive requires certain multinationals with consolidated revenues of more than EUR 750 million to publicly disclose (mainly) 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 twelve months of the date of the balance sheet for the financial year in question. Luxembourg, like all EU Member States, has until 22 June 2023 to transpose the Directive into national law.

We provide an overview of the most important aspects of the new reporting requirements to be introduced.

Background

The public CbCR Directive, first tabled in April 2016, was 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 project. However, public CbCR has nothing to do with the BEPS project and it is more about enhancing public scrutiny than about introducing a new tool for corporate tax transparency.

For more than five years, the Directive proposal only evolved 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 therefore subject to the special legislative

[2] Directive 2021/2101 of 24 November 2021 amending Directive 2013/34/EU (the "**EU Accounting Directive**") as regards disclosure of income tax information by certain undertakings and branches.

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procedure applicable in tax matters (which requires unanimous approval in the Council for its adoption)? Depending on whether the Directive proposal 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. Finally, on 28 September 2021, the EU Council approved the proposal (under qualified majority, as an agreement was reached on moving forward under article 50 of the TFEU).

The idea of a public CbCR has been subject to a lot of criticism during the legislative procedure and the Directive would probably not have been adopted, should unanimity have been required. Today, with the recent introduction of measures aiming to make sure that the big players achieve a minimum of effective taxation (Pillar Two), one may wonder, and this even more than at the time the Directive was adopted, if providing the public with this tax data is worth the additional administrative burden and the risk of damaging the European undertakings concerned if the information is misinterpreted, misunderstood or if commercially confidential information is exposed.

Who will be subject to public CbCR?

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

Luxembourg companies in the scope of public CbCR

The following Luxembourg companies will have to draw up, publish and make a report on income tax information accessible:

- Luxembourg ultimate parent undertakings with consolidated revenues on their balance sheet date exceeding a total of EUR 750 000 000 for each of the last two consecutive financial years, as reflected in their consolidated financial statements;
- Luxembourg standalone undertakings with revenues on their balance sheet date exceeding a total of EUR 750 000 000 for each of the last two consecutive financial years, as reflected in their annual financial statements;
- Luxembourg 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 750 000 000 for each of the last two consecutive financial years, as reflected in its consolidated financial statements;

These Luxembourg companies will only be in the scope of public CbCR if they are in the scope of the EU Accounting Directive. As a result, only the following companies are targeted:

- Limited liability companies and similar companies (*Société anonyme*, "**SA**", *Société en commandite par actions*, "**SCA**" or *Société à responsabilité limitée*, "**S.à r.l**".); as well as
- Partnerships (*Société en nom collectif*, "**SNC**" or *Société en commandite simple*, "**SCS**") when all their direct or indirect partners who are indefinitely liable are organised in the form of limited liability companies or similar.

Luxembourg branches in scope

Luxembourg branches of non-EU undertakings will also be subject to these obligations under the following conditions:

- They are Luxembourg branches of a non-EU affiliated undertaking of a group with a non-EU ultimate parent undertaking or Luxembourg branches of a non-EU standalone undertaking, the revenue of which on its balance sheet date exceeded a total of EUR 750 000 000 for each of the last two consecutive financial years as reflected in its (consolidated) financial statements.
- The net turnover of the Luxembourg branch has exceeded the threshold of EUR 8 800 000 for each of the last two consecutive financial years.

Anti-abuse measure

As an anti-abuse measure, the Draft Law provides that Luxembourg companies or branches not subject to the reporting/publication requirements because they do not meet the above-mentioned conditions will still have to publish and make a report on income tax information accessible where such companies or branches serve no other objective than to circumvent the reporting requirements.

Exclusions/Exceptions

The following exclusions and exceptions will apply:

- Total revenue falls below EUR 750 000 000: The entities referred to above will no longer be subject to the reporting obligations if the total consolidated revenue falls below EUR 750 000 000 for each of the last two consecutive financial years.
- Presence only in Luxembourg: The reporting requirements will not apply to Luxembourg standalone undertakings or Luxembourg 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 Luxembourg and in 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 EU Directive 2013/36 known as the « Capital Requirements Directive IV » (i.e. based on Article 38-3 of the Luxembourg amended law of 5 April 1993).
- Non-EU ultimate parent undertakings or standalone undertakings already subject to similar reporting obligations: No reporting obligation will apply to Luxembourg 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.
- Luxembourg branches of non-EU undertakings having a EU medium-sized or large subsidiary undertaking in the group: Luxembourg branches will not be required to report if the non-EU ultimate parent company has an EU medium-sized or large subsidiary undertaking in the scope of the Directive (since, in such case, the publication obligation will lie with the EU undertaking).
- Publication seriously harms the commercial position of the companies which the information relates to: An optional provision of the Directive is implemented by the Draft Law and concerns the possibility to defer the publication of certain information for a maximum of five years where the publication would seriously harm the commercial position of the companies which the information relates to. Any omission must be clearly indicated in the report together with a duly reasoned explanation regarding the reasons therefor. Unfortunately, the commentary to the Draft Law does not provide any explanations or examples of situations where the publication would seriously harm the commercial position of the companies. It also doesn't provide any information on how the related explanations will be assessed and in which case the omission would be considered as justified. This brings some legal uncertainty and some clarification in this respect would be useful. The omitted information must be made public in a subsequent report on income tax information within a maximum period of five years from the date of the original omission. Information relating to tax jurisdictions on the list of uncooperative jurisdictions for tax purposes may never be omitted.

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

The report on income tax information should provide information concerning all the activities of all the affiliated undertakings of the group consolidated in the financial statements of the ultimate parent undertaking or, depending on the circumstances, concerning all the activities of the standalone undertaking.

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;
- 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 as listed in Annexes V and VI of the Directive; or (ii) the income as defined by the financial reporting framework

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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 corporate income tax;
- the amount of corporate 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 in question (this excludes deferred taxes and provisions for uncertain tax charges);
- the amount of corporate income tax paid on a cash basis, which is to be calculated as the amount of tax paid during the relevant financial year, including withholding taxes paid by other undertakings with respect to payments to the undertaking or branch within a group. In the case of Luxembourg, the commentary to the Draft Law indicates that this includes notably corporate income tax, municipal business tax and capital gain tax/tax on income from movable property; and
- the amount of accumulated earnings (i.e. the sum of the profits from past financial years and the relevant financial year, the distribution of which has not yet been decided upon) at the end of the relevant financial year.

To reduce the administrative burden, undertakings may report the information referred to above in accordance with the instructions applicable to the reporting to be made based on the Luxembourg law implementing DAC4 (Law of 23 December 2016 on country-by-country reporting, as amended). 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 available on the 1 March of the financial year for which the report on income tax information is to be drawn up.

Statement and notice

If (1) Luxembourg medium-sized and large subsidiary undertakings controlled by a non-EU ultimate parent undertaking, (2) Luxembourg branches of a non-EU affiliated undertaking of a group with a non-EU ultimate parent undertaking or (3) Luxembourg branches of a non-EU standalone undertaking do not have the information they are required to publish, they must request this information from their non-EU ultimate parent undertaking or their non-EU standalone undertaking, as the case may be. If, despite this, they do not obtain the information, they will have to draw up and publish a statement containing all the information available to them and publish a notice stating that the ultimate parent undertaking or the standalone undertaking has not made the required information available to them.

Practical aspects of the reporting/ publication

In order to avoid the reporting obligation applying to groups which would only occasionally exceed the consolidated turnover threshold of EUR 750 million, as mentioned above, a repetition criterion is introduced by the Draft Law: for the reporting obligation to apply, the consolidated revenue of the group has to exceed the EUR 750 million threshold for two consecutive financial years. Conversely, if the consolidated turnover ceases to exceed the 750 million threshold for two consecutive financial years, then the reporting obligation ceases to apply for the most recent of these two financial years.

While one has to take into account the consolidated revenue of the last two consecutive financial years to determine whether a company or branch falls within the scope of the reporting/publication obligation or not, the reporting obligation only covers one financial year, i.e. the most recent financial year.

The report has to be made accessible to the public in at least one of the official languages of the EU and free of charge no later than twelve 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 one of the following (as the case may be):

- The Luxembourg ultimate parent undertaking or the Luxembourg standalone undertaking; or
- The Luxembourg medium-sized or large subsidiary undertaking or affiliated undertaking controlled by a non-EU ultimate parent undertaking; or
- The Luxembourg branch or the undertaking which opened the branch, or an affiliated undertaking of a non-EU ultimate parent undertaking or standalone undertaking.

The information shall remain accessible on the relevant website for a minimum of five consecutive years.

However, based on a provision of the Draft Law which is optional under the Directive, Luxembourg undertakings/ branches are exempt from publishing the report on income

tax information and, where applicable, the statement relating to cases where the Luxembourg subsidiary or branch did not receive the information needed from the non-EU undertaking if the report on income tax information is filed with the Trade and Companies Register ("**RCS**"), published by way of a notice of filing in the *Recueil électronique des sociétés et associations* ("**RESA**") within twelve months after the balance sheet date of the financial year for which the report is drawn up and made accessible to any EU third party free of charge in an electronic reporting format which is machine-readable on the website of the RCS.

Liability of management and supervisory bodies and potential penalties

In the same way as the Directive, the Draft Law makes a distinction between the liability of management and supervisory bodies of the ultimate parent companies and standalone undertakings on the one hand and the liability of the administrative, management and supervisory bodies of the Luxembourg subsidiary undertakings which are controlled by an ultimate parent undertaking established outside of the EU on the other hand:

- The members of the administrative, management and supervisory bodies of a Luxembourg ultimate parent undertaking or a Luxembourg standalone undertaking which has the obligation to draw up, publish and make the report on income tax information accessible are collectively responsible for ensuring compliance with the reporting obligations.
- The members of the administrative, management and supervisory bodies of a Luxembourg subsidiary undertaking which is controlled by an ultimate parent undertaking established outside the EU or the person or persons in charge of carrying out the disclosure formalities for the branch are collective responsible for ensuring, to the best of their knowledge and ability, that the report on income tax information is drawn up in a manner that is consistent with the Draft Law. This is because they might have limited knowledge of the content of the report on income tax information prepared by the ultimate parent undertaking or might have a limited ability to obtain such information or such a report from the ultimate parent undertaking.

The Draft Law extends the fine of 500 euros to 25,000 provided by the Luxembourg law of 10 August 1915 to the managers or directors of Luxembourg ultimate parent companies, standalone companies and subsidiaries who have not drawn up, published or made the report on income tax information available within a period of twelve months from the closing date of the financial year which it relates to. Furthermore, as this reporting obligation may also apply to a Luxembourg branch, it is foreseen that the permanent representatives of the company for the activity of the branch will also be subject to the same sanctions.

Audited companies

Where the financial statements of a Luxembourg undertaking 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 financial year 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 Draft Law.

Next steps and implications

The new obligations to be introduced will apply to accounting periods starting on or after 22 June 2024. Thus, for companies with an accounting year corresponding to the calendar year, the first report on income tax information will relate to the year 2025 and will have to be published by the end of 2026.

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 defense. Consequently, multinationals should carefully consider their strategy for communicating around taxes.

The Draft Law faithfully transposes the Directive and the fact that the Luxembourg Government decided to introduce the two options offered by the Directive is positive. However, Luxembourg, like any other EU Member State, should carefully deal with the practical details of the implementation of the Directive given the potential risk of the new rules being challenged by the Court of Justice of the European Union ("**CJEU**") on the same ground as in the

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case dealing with the Luxembourg register of beneficial owners: On 22 November 2022, the CJEU ruled that the general public's access to information on beneficial ownership provided for in the EU AML Directive constitutes an interference with the rights guaranteed by the EU Charter of Fundamental Rights. Here, while it will be difficult to restrict the access to a specific category of persons like for the RBE since the purpose of the public CbCR is tranparency towards the EU public, one potential solution could be to make sure that all in scope Luxembourg undertakings have to publish their reports on the website of the RCS. This way, the publication on their website would no longer be required and, to further protect the EU rights of the undertakings concerned, one could also consider requiring the EU public to file a formal request to access the report on income tax information.

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Pillar II – Impact on investment fund managers

OUR INSIGHTS AT A GLANCE

- The Global Anti-Base Erosion rules, also called "**Pillar Two**", provide for a coordinated system of taxation intended to ensure that large multinational enterprise groups pay a minimum level of tax (15%) on the income arising in each of the jurisdictions where they operate.
- On 15 December 2022, the Council of the European Union formally adopted the Pillar Two Directive. Luxembourg, like any other EU Member State, has to transpose the Directive into its domestic law by 31 December 2023 at the latest. The new rules will apply to tax years starting on or after 31 December 2023, so as from 1 January 2024 in most cases, which leaves very little time to adapt.
- While there are certain exemptions available for investment funds that carve them out entirely from the Pillar Two rules, this exemption will by no means automatically apply to all investment funds since a specific set of criteria needs to be fulfilled.
- Investment fund managers should therefore anticipate the upcoming changes now, analyse the impact on their fund structures and adapt, if needed, their procedures and fund documentation accordingly to avoid collateral damage.

The Global Anti-Base Erosion ("**GloBE**") rules, also called "Pillar Two", provide for a coordinated system of taxation intended to ensure that large multinational enterprise ("**MNE**") groups pay a minimum level of 15% tax on the income arising in each of the jurisdictions where they operate. The OECD model rules to give effect to the GloBE rules, initially expected to be released by the end of November 2021, were finally published by the OECD on 20 December 2021.

In December 2021, the EU Commission published a Pillar Two Directive proposal. However, this proposal raised concerns for a few member states, a consensus was difficult to reach, and its adoption was postponed many times, keeping everyone in suspense. On 15 December 2022, the EU Council formally adopted the Pillar Two Directive[3] and all EU Member States have to transpose the Directive into their domestic laws by 31 December 2023. The new rules will then apply to tax years starting on or after 31 December 2023, so as from 1 January 2024 in most cases, which leaves very little time to adapt.

The GloBE rules will apply to MNE groups with an 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.

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 Pillar Two Directive 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. In simplified terms, a group involves all constituent entities, i.e. entities (transparent or not) that are related through ownership or control such that the assets, liabilities, income, expenses and cash flows of those entities are included in the consolidated financial statements on a line-by-line basis.

Government entities, international organisations, non-profit organisations, pension funds and investment funds that

[3] Council Directive (EU) 2022/2523 of 15 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

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are ultimate parent entities of an MNE group are so-called excluded entities which are not subject to the GloBE rules. However, a number of Luxembourg investment funds will not be able to benefit from the carve-out rule as they will fail to meet all criteria.

Investment fund managers should anticipate the upcoming changes, analyse the impact on their fund structures and adapt their procedures and fund documentation. There are three main areas in an investment fund context that have to be considered from a Pillar Two perspective: Potential impacts may arise at the level of (i) the fund manager and its related undertakings, (ii) the fund itself and (iii) the portfolio companies directly or indirectly owned by the fund (the latter typically rather being relevant in a private equity context).

The potential impacts vary for every fund manager and fund structure, depending on the individual facts and circumstances of the case at hand such as the underlying asset class, the jurisdictions involved and the composition of the investor base.

While there are certain exemptions available for investment funds that carve them out entirely from the GloBE rules, this exemption will by no means automatically apply to all investment funds since a specific set of criteria needs to be fulfilled in order to be considered as an excluded entity. Typical cases where no carve-outs are available are single investor funds and other managed accounts.

The starting point of any Pillar Two impact analysis is to determine the scope of consolidation for financial accounting purposes.

Fund managers may be required to consolidate funds or fund-related entities for accounting purposes (e.g. on the basis of an extensive level of control over the fund or due to a significant exposure to a variable remuneration). In this case, the fund manager itself may be directly impacted by a potential top-up tax.

Moreover, majority investors may consolidate the fund or its subsidiaries. Even though we would expect this to be rare, fund managers have to request and obtain specific information to be in a position to assess any impact on the fund and to be aware of potential tax filing obligations. Therefore, fund documents have to be updated as of now to identify potential risks in advance and to hold the fund manager as well as minority investors harmless from and against any Pillar Two related claims.

Finally, the portfolio level needs to be assessed, e.g. where the fund directly or indirectly holds majority stakes in one or several MNE groups that exceed the turnover threshold. Since funds are generally exempt from consolidation requirements, this requires a careful analysis of the investment structure to determine the scope of the “group” for Pillar Two purposes and to assess whether the turnover threshold is exceeded or not.

In conclusion, fund managers should act now to be prepared for the upcoming changes and manage their own as well as their funds’ Pillar Two risks and to avoid collateral damage.

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BVI, Costa Rica, Marshall Islands & Russia added to the EU list of non-cooperative tax jurisdictions

OUR INSIGHTS AT A GLANCE

- On 14 February 2023, the EU Finance Ministers decided to add the BVI, Costa Rica, the Marshall Islands and Russia to the EU list of non-cooperative jurisdictions for tax purposes.
- The new list was published in the Official Journal of the European Union on 21 February 2023, which is the date as from which the new list came into force.
- 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 the tax returns and the mandatory disclosure rules applicable to certain cross-border arrangements (DAC6).

On 14 February 2023, the EU Finance Ministers decided to add the BVI, Costa Rica, the Marshall Islands and Russia to the EU list of non-cooperative jurisdictions for tax purposes. The new list was published in the Official Journal of the European Union on 21 February 2023, which is the date as from which the new list came into force. 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 the tax returns and the mandatory disclosure rules applicable to certain cross-border arrangements (DAC6).

The EU list of non-cooperative jurisdictions for tax purposes

The list of non-cooperative tax jurisdictions (the "**Blacklist**") 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 Blacklist 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 21 February 2023 (date of publication of the Blacklist in the Official Journal of the European Union, see Annex I), following the listing of the BVI, Costa Rica, the Marshall Islands and Russia, the Blacklist now includes the 16 following jurisdictions (the "**Blacklisted Jurisdictions**"):

1. American Samoa
2. Anguilla
3. The Bahamas
4. The British Virgin Islands
5. Costa Rica
6. Fiji
7. Guam
8. The Marshall Islands
9. Palau
10. Panama
11. Russian Federation
12. Samoa
13. Trinidad and Tobago

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14. Turk and Caicos Islands
15. US Virgin Islands
16. Vanuatu

In addition to the Blacklist, a list of jurisdictions with pending commitments to implement tax good governance principles (the "**Greylist**") is determined at EU level and also updated twice a year at the same time as the Blacklist. The evolution of the Greylist should be followed closely since Greylisted tax jurisdictions may become Blacklisted tax jurisdictions if they do not fulfil the commitments they took within the agreed time line.

As of 21 February 2023 (date of publication of the Greylist in the Official Journal of the European Union, see Annex II), the Greylist includes the 18 following jurisdictions:

1. Aruba
2. Albania
3. Armenia
4. Belize
5. Botswana
6. Curaçao
7. Dominica
8. Eswatini
9. Hong Kong
10. Israel
11. Malaysia
12. Montserrat
13. Jordan
14. Qatar
15. Seychelles
16. Thailand
17. Turkey
18. Vietnam

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**"), since 1 March 2021, under certain conditions, interest and royalties due to entities located in Blacklisted Jurisdictions are not deductible for corporate income tax purposes. As a matter of principle, additions of countries to the Blacklist only have an effect as from the next calendar year whereas a removal of a country out of the Blacklist may have an immediate effect under certain circumstances.

For 2024, the measure denying the deduction of interest and royalties applies based on the latest version of the Blacklist available as of 1 January 2024. Therefore, it will be necessary to await the update of the list to take place in October 2023 in order to see whether interest and royalties due to entities located in the BVI, Costa Rica, the Marshall Islands and Russia might be non-deductible based on Article 168-5 of the ITL. Should one of these jurisdictions be removed again from the Blacklist at the occasion of the October 2023 update, interest and royalties due to entities located in that jurisdiction will not be impacted. On the contrary, should these jurisdictions remain on the list after the October 2023 update, the deduction of interest and royalties to these jurisdictions will be denied as from 1 January 2024, provided that the other conditions of Article 168-5 of the ITL are met.

For a detailed explanation of the scope of the measure provided by Article 168-5 of the ITL, its conditions and its timing aspects, please read our article "***New guidelines on Luxembourg defensive measures against non-cooperative jurisdictions for tax purposes***" in our July 2022 ATOZ Insights.

Impact on disclosure requirements based on Circular L.I.R. n° 168/2 of 31 May 2022

Based on Section 4 of Circular L.I.R. n° 168/2 of 31 May 2022, the Luxembourg tax authorities ("**LTA**") systematically review transactions entered into by Luxembourg corporate taxpayers with related parties (within the meaning of article 56 of the ITL) located in Blacklisted Jurisdictions 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 return.

The Circular states that the latest Blacklist available as of the

end of the accounting year concerned is key for determining whether reporting is required or not. Therefore, since most companies have an accounting year corresponding to the calendar year, reference generally has to be made to the list reflecting the October update of the year concerned. However, one should keep in mind that for companies with an accounting year which differs from the calendar year (e.g. for companies with an accounting year starting on 1 March), reference may have to be made to the list reflecting the February update. Thus, for these companies, the new list in force as of 21 February 2023 might be relevant. In such case, transactions with entities located in the BVI, Costa Rica, the Marshall Islands and Russia would have to be disclosed in the 2023 corporate tax returns.

Impact on disclosure requirements under DAC6

The listing 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 regarding the 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 to be taken into account to assess whether the recipient is resident in a non-cooperative jurisdiction. In this respect, the FAQ released by the LTA on DAC6 provides that "non-cooperative jurisdictions within the meaning of Hallmark C.1. are those which appear on the list (as published in the Official Journal of the European Union) on the date of the triggering event of the reporting obligation." Here, in our view, reference should be made to the list in force at the time the arrangement was implemented so that the listing or delisting of a jurisdiction after the arrangement was implemented should not have any retroactive effect. Should this approach be followed, reporting would only be required if the arrangement with the entity located in the jurisdiction was implemented at the time when this jurisdiction was on the Blacklist.

As a consequence, only those arrangements implemented with the BVI, Costa Rica, the Marshall Islands and Russia on or after 21 February 2023 (but only as long as these jurisdictions remain on the Blacklist), may have to be reported under Hallmark C.1.b) ii).

Finally, one should keep in mind that as soon as article 168-5 of the ITL applies (provided all its conditions are met), payments to these Blacklisted jurisdictions are not tax deductible so they no longer fall within the scope of Hallmark C.1.b) ii).

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 (both those on the Blacklist and those on the Greylist) should also be closely monitored 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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EU Commission's initiatives in direct tax matters: state of play

OUR INSIGHTS AT A GLANCE

- Following the adoption of the Council Directive on ensuring a global minimum level of taxation for multinational and large-scale domestic groups ("**Pillar 2**"), the European Commission still has a lot of ongoing direct tax projects in the pipeline.
- While some of these projects are moving forward, such as the Proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes (the "**Unshell**" Proposal) and the initiative aiming to tackle the role of so-called "enablers" (Securing the Activity Framework of Enablers – "**SAFE**"), some others have been put on hold (like the Directive Proposal to address Debt-Equity bias, "**DEBRA**") given the many interconnections with other corporate tax projects, including those announced by the Commission in its Communication on business taxation for the 21st century (e.g. "**BEFIT**").
- We provide an overview of the state of play of these various EU direct tax initiatives and asses their chances to succeed in the near future.

On 15 December 2022, the EU Member States finally reached an agreement concerning the Directive on ensuring a global minimum level of taxation for multinational and large-scale domestic groups in the Union ("**Pillar 2**"). The implementation of the rules introduced by Pillar 2 will be challenging for both the tax authorities and the multinational groups concerned, given the very short delay to implement the rules as well as their complexities. Still, taxpayers should be ready to face additional tax changes to come, given the numerous direct tax projects which the EU still has in the pipeline.

While some of these projects are moving forward, such as the Proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes (the "**Unshell**" proposal) and the initiative aiming to tackle the role of so-called "enablers" (Securing the Activity Framework of Enablers – "**SAFE**"), others have been put on hold (like the Directive Proposal to address Debt-Equity bias, "**DEBRA**") given the many interconnections with other corporate tax projects, including those announced by the Commission in its Communication on business taxation for the 21st century (e.g. "**BEFIT**").

We provide an overview of the state of play of the most important of these various EU direct tax initiatives and asses their chances to succeed in the near future.

The Unshell Directive Proposal

On 22 December 2021, the European Commission submitted a proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU. The objective of the proposal is to prevent tax avoidance and evasion through actions by undertakings without minimal substance. The proposal aims to fight against the misuse of shell entities for improper tax purposes and to ensure that shell companies within the EU that have no or minimal economic activity are unable to benefit from certain tax advantages (for a presentation of the Unshell proposal, please read the article "The new Directive proposal to fight against the misuse of shell entities" in our April 2022 ATOZ Insights).

On 6 January 2022, the French Presidency of the Council announced its intention to launch the discussions of the Council on this file. The technical analysis of the proposal was carried out during various meetings in the first half of 2022 and the first round of article-by-article analysis of the proposal was completed on 23 May 2022.

Under the Czech Presidency of the Council, the technical analysis of the proposal continued, and progress was made on exploring the way forward as regards tax consequences and (unreleased) compromise texts were submitted on parts of the proposal, such as the identification of entities not having minimum substance as well as on exchange of information. While most delegations supported the objectives of the proposal, they were of the view that further important technical work would still be necessary before an agreement could be feasible.

In January 2023, Sweden took over the Presidency of the EU Council. On 17 January 2023, the plenary of the European Parliament adopted its non-binding opinion, which was supportive of the Unshell proposal but recommended several amendments notably on the scope, penalties and reporting obligations. Technical meetings took place in January, February and March and a second (unreleased) compromise text was drafted by the Swedish Presidency.

Even though technical discussions are ongoing and taking place on a regular basis, the proposal has been evolving in opposite directions over time: it has been reported that the Swedish Presidency reintroduced some of the substance requirements that were removed by the Czech Presidency, namely having premises in the Member State, an active bank account in the EU, and a majority of employees performing most of their tasks in the Member State of the entity. As regards the tax consequences for companies considered as shell entities, there are concerns at the level of some EU Member States about the consequences of the Unshell Directive on double tax treaties.

The Unshell proposal is currently on the draft agenda of the ECOFIN meeting of 16 May 2023 for technical analysis and further exchanges of views. Therefore, it can be anticipated that the proposal will probably not become a directive before the end of the Swedish Presidency on 30 June 2023. Given the absence of consensus at the level of the EU Member States on some of the key provisions of the proposal, and the continuing uncertainty regarding the final version of the compromise text, which has not been published yet and is still under discussion at the level of the Member States, taxpayers should rather adopt a "wait and see" strategy before taking any action.

The Debt-Equity Bias Reduction Allowance (DEBRA) Directive Proposal

On 11 May 2022, the European Commission released a Directive Proposal to address Debt-Equity bias. The proposal is one of the targeted measures announced by the European Commission in May 2021 in its Communication to promote productive investment and entrepreneurship and ensure effective taxation in the EU. The proposal lays down rules on the deduction, for corporate income tax purposes, of an allowance on increases in equity and additional rules on the limitation of the tax deductibility of exceeding borrowing costs (for a presentation of the DEBRA proposal, please read the article "European Commission releases DEBRA Directive Proposal" in our July 2022 ATOZ Insights).

Under the Czech Presidency of the Council, three meetings took place for an article-by-article examination of the proposal, giving the delegations the opportunity to ask the Commission questions on the functioning of the mechanism provided for in the Directive proposal. The examination was completed on 15 November 2022.

At the 6 December 2022 ECOFIN meeting, while the DEBRA Directive proposal was not discussed, the Council approved its report to the European Council on tax issues, which indicated that "in light of the many interlinkages with other corporate tax files, both those currently under discussion in the Council and those announced by the Commission in the near future in its Communication on business taxation for the 21st century, the examination of the DEBRA proposal will be suspended and, if appropriate, it would be reassessed within a broader context only after other proposals in the area of corporate income taxation announced by the Commission have been put forward." Here, the Council most probably refers to the Business in Europe: Framework for Income Taxation ("**BEFIT**") initiative of the European Commission, an initiative which would introduce a common set of rules for EU companies to calculate their taxable base and an allocation of profits between EU countries, based on a formula. Since BEFIT will very likely take a lot of time before it becomes a Directive, if ever, the future of

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the DEBRA proposal is very uncertain at this stage. Thus, taxpayers potentially impacted should, for the time being, also adopt a "wait and see" strategy on this proposal before starting to assess its impact as it may, in the end, even be completely abandoned.

The BEFIT initiative of the European Commission

On 17 October 2022, the European Commission announced the launch of a public consultation on Business in Europe: Framework for Income Taxation ("**BEFIT**"), a new framework for EU corporate taxation. BEFIT is one of the initiatives announced by the European Commission in its May 2021 communication on Business Taxation for the 21st Century. The initiative would, according to the Commission, "introduce a common set of rules for EU companies to calculate their taxable base while ensuring a more effective allocation of profits between EU countries, based on a formula."

BEFIT strongly resembles the previous Common Consolidated Corporate Tax Base ("**CCCTB**") proposal, which was withdrawn at the time the BEFIT initiative was announced. According to the Commission, the initiative aims at addressing the complexity and high costs that businesses, notably those with crossborder activities, face as a result of having to comply with 27 different corporate tax systems when doing business across the EU.

At the time of writing this article, the feedback on the consultation has not been released yet. However, a draft Directive is expected to be released during the third quarter of 2023. While it is quite clear that a Directive proposal will be released this year, a number of factors speak against the subsequent rapid adoption of the BEFIT proposal, including the fact that the project looks very much like a remake of the CCCTB which was initially released in 2011 and was relaunched in 2016, but which EU Member States never managed to agree on during these past twelve years. In addition, the BEFIT initiative is controversial on many aspects, including the fact that it would largely remove the Member State's sovereignty in tax matters, which was one of the main factors for the CCCTB proposal to fail. To find out more on the BEFIT initiative, you can read the article "BEFIT - EU Commission wants to introduce a common set of tax rules for EU companies" in our December 2022 ATOZ Insights.

SAFE initiative on "enablers" of tax evasion and aggressive tax planning

When the Unshell proposal was initiated, the Commission announced that it would propose a follow-up initiative to respond to the challenges linked to non-EU shell entities. This follow-up initiative was started on 6 July 2022, when the EU Commission launched a public consultation regarding a proposal for a Council Directive to tackle tax advisers and other professionals rendering tax advice (collectively referred to as "enablers") that facilitate tax evasion and aggressive tax planning.

Interested parties had until 12 October 2022 to provide their feedback in a questionnaire referred to as "EU Survey: Proposal for a Council Directive to tackle the role of enablers that facilitate tax evasion and aggressive tax planning in the European Union (Securing the Activity Framework of Enablers - SAFE)". To tackle the role of enablers involved in facilitating tax evasion and/or aggressive tax planning in the European Union, the Commission presented three options:

- Option 1: Requirement for all enablers to carry out dedicated due diligence procedures, including the requirement for all enablers to carry out a test to check whether the arrangement or scheme they are facilitating leads to tax evasion or aggressive tax planning and to maintain records of these due diligence procedures in all cases.
- Option 2: Prohibition to facilitate tax evasion and aggressive tax planning combined with due diligence procedures and a requirement for enablers to register in the EU. Under this option, enablers would be required to carry out dedicated due diligence procedures as outlined under Option 1 and would have to register in an EU Member State. Moreover, only registered enablers could provide tax advisory services to EU taxpayers or residents.
- Option 3: Code of conduct for all enablers. This option involves the requirement for all enablers to follow a code of conduct that obliges enablers to ensure that they do not facilitate tax evasion or aggressive tax planning.

In addition, EU taxpayers, including both individuals and legal persons, would be required to declare in their annual tax returns any participation above 25% of shares, voting rights, ownership interest, bearer shareholdings or control via other means held in a non-listed company located outside of the EU.

On 31 January 2023, the European Commission published the report "Public consultation on the 'Tax evasion & aggressive tax planning in the EU – tackling the role of enablers' initiative" (Securing the Activity Framework of Enablers - SAFE). The report summarises the online contributions made by stakeholders during the public consultation period. In this respect, less than half of the public consultation survey respondents agree or strongly agree that tax evasion and aggressive tax planning continue to be a substantial problem in the European Union. Most of the respondents who disagree or strongly disagree with the problem consider the existing regulation sufficient. Several stakeholders request a clear definition of aggressive tax planning to ensure legal certainty. Moreover, many respondents do not believe that the issue of tax evasion or aggressive tax planning has continued to increase recently and a significant part of them responded that they did not know whether the issue of tax evasion or aggressive tax planning has continued to increase recently, mainly citing the lack of available data. Some business associations raised the issue that the term "enabler" could have a negative impact on the reputation of intermediaries, some of them and other stakeholders also asking for a clear definition of the term "enabler". Interestingly, according to the survey respondents, the three most "indicative" factors in determining aggressive tax planning are:

- the main business rationale or the purpose behind the company structure;
- the use of preferential tax regimes, tax treaties, or mismatches in national legislations across countries in a company structure;
- the minimum economic substance of the entities used in the structure.

All three factors have already been tackled in different legislative acts, including the Multilateral Instrument ("**MLI**"), which resulted in the implementation of various anti-abuse provisions such as the Principal Purposes Test ("**PPT**") in covered bilateral tax treaties, the anti-hybrid mismatch rules introduced by the two Anti-Tax Avoidance Directives ("**ATAD**" and "**ATAD II**") and the Unshell Directive proposal.

As regards the three policy options presented by the Commission, many respondents to the survey do not believe that due diligence procedures are an effective measure to tackle the problem. The second option, the mandatory registration procedure for enablers, also received mixed support. Finally, several respondents consider that a code of conduct for enablers would not be sufficient and effective at tackling the role of enablers in tax evasion and aggressive tax planning.

According to the summary report, the European Commission will "integrate a broad range of views expressed by stakeholders in the draft legislative proposal and its impact assessment". The European Commission is currently planning to adopt the SAFE Directive proposal on 7 June 2023. At this stage, given that it is unclear which of the options the European Commission will decide to choose to tackle the role of enablers, it is too early to assess its chances to succeed. However, it can be expected that this initiative will give rise to controversial discussions amongst the EU Members States, considering that Member States already have a very comprehensive toolbox to tackle tax evasion and aggressive tax planning. To find out more on the SAFE initiative, you can read the article "SAFE - The new EU initiative targeting tax advisers" in our December 2022 ATOZ Insights.

Other upcoming measures

In addition to these ongoing initiatives in direct tax matters, the European Commission has launched another initiative, indirectly linked to direct taxation, which is called "FASTER". Originally recommended by the European Parliament, it aims at introducing a new common EU-wide system for withholding tax on dividend and interest payments, preventing both the avoidance of double taxation and tax abuse.

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The problem this initiative aims to tackle is the particularly burdensome withholding tax relief procedures for cross-border investors in the securities market. According to the Commission, such withholding tax relief mechanisms for cross-border payments have proved to be lengthy, resource-intensive and costly for both investors and tax administrations due to the lack of digitalised procedures and the existence of complex and divergent forms across Member States. The Commission also noticed that these current procedures could be abused and referred to the "Cum/Ex" scheme and subsequent "Cum/Cum" Schemes in its inception impact assessment.

To tackle these issues, the Commission envisages three different options, which could be combined:

- Option 1: Improving withholding tax refund procedures to make them more efficient. This option would provide for the implementation of several measures to simplify and streamline withholding tax refund procedures by making them quicker and more transparent, such as the establishment of common EU standardised forms and procedures for withholding tax refund claims irrespective of the Member States concerned and the obligation to digitalise current paper-based relief processes.
- Option 2: Establishment of a fully-fledged common EU relief at source system. Under this option a standardised EU-wide system for withholding tax relief at source would be implemented whereby the correct withholding tax rate, as provided in the double tax treaty, is applied at the time of payment by the issuer of the security to the non-resident investor thereby not incurring double taxation.
- Option 3: Enhancing the existing administrative cooperation framework to verify entitlement to double tax treaty benefits. This option would provide for reporting and subsequent mandatory exchange of beneficial owner-related information on an automated basis to reassure both the residence and source country that the correct level of taxation has been applied to the non-resident investor.

A consultation period was launched in April 2022 and a Directive proposal, originally planned for the first quarter of 2023, is now expected to be released at the same time as the draft "SAFE" Directive as a taxation package in June 2023. As opposed to the BEFIT initiative, presented as a project which would lead to simplification, but which may in reality rather add another layer of complexity to the compliance obligations of taxpayers, the FASTER initiative has the potential to actually simplify withholding tax relief procedures.

Outlook

Over the last decade, the international tax environment has undergone a comprehensive transformation following the OECD Base and Erosion and Profit Shifting ("**BEPS**") project. With the Anti-Tax Avoidance Directives ATAD1 and ATAD2, which introduced an extensive number of anti-abuse measures, the 5th amendment of the Directive on Administrative Cooperation ("**DAC6**") to introduce a mandatory disclosure regime that requires reporting on potentially aggressive tax planning schemes, the EU introduced a significant number of tax reforms, which all EU Member States had to implement into their national law within a very short time frame.

By the end of 2022, the Pillar Two Directive was adopted, which, despite its complexity, will also have to be adopted within an extremely short time frame. Both the tax authorities and taxpayers have very little time to adapt to the set of highly complex rules introduced by the Pillar Two Directive. Despite this fact, and even though it is still too early to assess the impact of all the recently introduced anti-avoidance measures, as statistical data measuring their impact is not available yet, the European Commission keeps on introducing additional measures, justifying its action by claiming (with the Unshell proposal) that the anti-avoidance measures taken so far are not sufficient or that the tax system needs to be simplified (with the BEFIT initiative). It is hard to believe that the accumulation of new initiatives and measures will simplify the tax system and make the life of taxpayers easier. Instead, taxpayers are facing the highest level of tax uncertainty they have ever had, given the speed at which tax changes are introduced and the lack of interpretative guidelines on many of these

measures. The fact that the DEBRA proposal has now been put on hold given its various interlinkages with other ongoing tax initiatives shows that the European Commission is probably acting too quickly on some of these initiatives.

Still, taxpayers need to make sure that they are well prepared, should closely follow the current direct tax developments, both at global level (e.g. developments on Pillar One) and EU level, and seek advice from their tax advisers in order to assess the potential impact of these additional measures on their situation and investments.

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DAC8: EU extends administrative cooperation to crypto-assets

OUR INSIGHTS AT A GLANCE

- On 8 December 2022, the EU Commission adopted a new proposal for a Directive, also referred to as DAC8, amending the Directive on Administrative Cooperation.
- The DAC8 proposal puts forward changes to existing provisions on exchanges of information and administrative cooperation and extends the DAC's scope, among others, to the automatic exchange of information with respect to information reported by reporting crypto-asset service providers.
- The proposal also widens the scope of automatic exchange of advance cross-border rulings and advance pricing agreements for persons other than natural persons to include high-net-worth individuals who hold a minimum of EUR 1 000 000 in financial or investable wealth or assets under management, excluding that individual's main private residence.
- Based on the proposal in its current form, most of the amendments provided under DAC8 are meant to apply as from 1 January 2026.

On 8 December 2022, the EU Commission adopted a new proposal for a Directive, the so-called "**DAC8**" (hereafter referred to as the "**DAC8 Proposal**" or "**the Proposal**"), amending the Directive 2011/16/EU on Administrative Cooperation (the "**DAC**").

The Proposal puts forward changes to existing provisions on exchanges of information and administrative cooperation and extends the DAC's scope to mainly the automatic exchange of information with respect to information reported by reporting crypto-asset service providers. The rules on due diligence procedures, reporting requirements and other rules applicable to reporting crypto-asset service providers are based on the OECD crypto-asset reporting framework ("**CARF**").

Extension of the scope of automatic exchange of information

The DAC8 Proposal extends the reporting obligations under DAC as follows:

Information to be reported by reporting crypto-asset service providers

The DAC8 Proposal lays down the scope and conditions for the mandatory automatic exchange of information that will be reported by reporting crypto-asset service providers to the competent authorities. "Crypto-assets" refer to any digital representation of a value or a right which may be transferred and stored electronically, using distributed ledger technology or similar technology.

- **Step 1: Due diligence procedure**

The new rules proposed would include an obligation on the reporting crypto-asset service provider to collect and verify the information in line with due diligence procedures laid down by the Proposal. The aim of the procedures is to allow providers to identify, through self-certification, whether their clients are reportable or not. Specific due diligence procedures are proposed, depending on whether the crypto-asset user is an individual or a legal entity. The processes above should be completed for new customers, but also for pre-existing clients within twelve months after DAC8 enters into force.

- **Step 2: Reporting**

The reporting crypto-asset service providers would

then have to report to the relevant competent authority information on the crypto-asset users, i.e. those who use the service provider to trade and exchange their crypto-assets. The rules would impact crypto-asset service providers[4] and crypto-asset operators[5] facilitating transactions for EU residents, irrespective of the size and location of the providers, i.e. whether based in the EU or in a third country. A reportable user is defined as an EU-resident individual or an entity that is a customer of a reporting crypto-asset service provider for the purposes of reportable transactions.

The DAC8 Proposal also provides for specific carve-outs for users that are:

- companies listed on regulated stock exchanges and their related parties,
- governmental entities,
- international organisations,
- central banks and certain other financial institutions.

Transactions entered into by entities falling within the scope of these carve-outs would not be reportable.

- **Step 3: Exchange of the information reported**

As a final step, the competent authority of the Member State that has received the information from the reporting crypto-asset service provider would have to communicate the reported information to the competent authority of the relevant Member State where the reportable crypto-asset user is resident.

The automatic exchange of information would take place electronically via the EU common communication network ("**CCN**") by using an XML schema developed by the Commission. The information would be communicated to the central directory developed by the Commission and already used for the automatic exchange of information on advance cross-border tax rulings (so called "**DAC3**") and cross-border arrangements (so-called "**DAC6**").

New categories of income and capital to be reported

The DAC8 Proposal widens the categories of income subject to mandatory automatic exchange of information between the Member States to include non-custodial dividend income. It also obliges Member States to exchange all information that is available on all categories of income and capital with other Member States, including:

- income from employment,
- director's fees,
- life insurance products not covered by other EU legal instruments on exchange of information and other similar measures,
- pensions,
- ownership of and income from immovable property and royalties

with respect to taxable periods starting on or after January 2026.

Advance cross-border rulings for high-net-worth individuals

Last but not least, the DAC8 Proposal widens the scope of automatic exchange of advance cross-border rulings and advance pricing agreements for persons other than natural persons to include high-net-worth individuals who hold a minimum of EUR 1 000 000 in financial or investable wealth or assets under management, excluding that individual's main private residence.

Member States would have to exchange information on advance cross-border rulings for high-net-worth individuals issued, amended or renewed between 1 January 2020 and 31 December 2025 with other Member States. Such communication would only have to be performed under the condition that the rulings were still valid on 1 January 2026 (date as from which the DAC8 rules would become applicable, based on the current Proposal).

[4] Crypto-asset service providers are defined as legal entities or undertakings that provide crypto-asset services to third parties on a professional basis and which are authorised to provide these services under the Regulation on Markets in Crypto-Assets ("MiCA").

[5] Crypto-asset operators are any individuals or legal entities providing crypto-asset services to third parties on a professional basis, but falling outside the scope of the MiCA.

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Other amendments

Finally, the DAC8 Proposal provides for the following additional changes to the DAC:

- Reporting of the tax identification numbers of taxpayers.
- Use of information exchanges for other purposes: The DAC8 Proposal amends the DAC to ensure that information reported and exchanged under the DAC can be used for purposes other than direct taxation, provided that the sending Member State has stated the purpose allowed for the use of such information in a list. In addition, the Proposal clarifies that information communicated between Member States may also be used for the assessment, administration and enforcement of customs duties, and anti-money laundering and countering the financing of terrorism.
- Review of the provisions of Directive 2014/107/EU: Since Council Directive 2014/107/EU ("**DAC2**") implemented the OECD Common Reporting Standard ("**CRS**") within the EU, the DAC8 Proposal introduces some changes to reflect the latest developments at global level regarding CRS to cover electronic money products and central bank digital currencies.

Next steps and implications

Should the DAC8 Proposal remain unchanged on its timing aspects, Luxembourg would have to implement most of the amendments into its internal law by 31 December 2025 at the latest so that they would become applicable as from 1 January 2026. Some exceptions apply regarding the implementation timing and dates of application of the provisions on the identification service and on the verification on the tax identification number.

The European Commission opened a feedback period from 8 December 2022 to 2 February 2023, which was extended to 30 March 2023 for citizens and stakeholders to express their views regarding the DAC8 Proposal. Thereafter, the DAC8 Proposal will be negotiated in the EU Council of the European Union, and the European Parliament will be consulted to provide a non-binding opinion.

The EU Commission adopted a proposal for DAC8 that would provide for several amendments to the Directive on Administrative Cooperation (DAC). The most important amendment would concern far-reaching reporting obligations regarding crypto-assets. The other important change of DAC concerns the widening of the scope of automatic exchange of advance cross-border rulings and advance pricing agreements for high-net-worth individuals.

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VAT IN THE DIGITAL AGE: THE EUROPEAN COMMISSION'S LATEST PROPOSAL

OUR INSIGHTS AT A GLANCE

- On 8 December 2022, the European Commission presented the legislative package "VAT in the Digital Age" or "**ViDa**".
- Amongst the proposed measures, the following may be highlighted:
  - the option for EU Member States to impose **e-invoicing** as of 1 January 2024, which will become the default system for issuing invoices as of 1 January 2028;
  - the obligation for VAT taxable persons to report transactional data for business to business intra-EU sales of goods and services within two working days, applicable as of 1 January 2028 (**e-reporting**);
  - a new VAT liability for **digital platforms** generally facilitating B2B and business to consumer sales of goods and short-term accommodation rental and passenger transport, which will be required to collect and remit VAT to the State as of 1 January 2025;
  - the review of the scope of the current reverse-charge mechanism and One Stop Shop to cover more transactions and, therefore, reduce the obligation of businesses carrying out intra-EU trade of VAT registering in Member States other than the one of establishment as of 1 January 2025 (**single VAT registration within the EU**).
- Being approved, the proposed package will affect all businesses carrying out their activities within the EU. Businesses involved in intra-EU trade and digital platforms will certainly be the most affected and shall, therefore, review their internal processes to ensure compliance with the new obligations to be implemented.

THE PROPOSAL

On 8 December 2022, the European Commission presented the legislative package ViDa[6], aiming to (i) modernise businesses' VAT reporting obligations, (ii) address the challenges of the platform economy and (iii) lead the way towards a single VAT registration system. This package proposes measures to modernise and simplify the EU VAT system and to minimise VAT fraud around the EU, by means of adapting it to the digital age.

We set out below the main measures of this package, split in three pillars:

- **Modernisation of VAT reporting obligations through e-invoicing and e-reporting**

E-invoicing
ViDA package foresees that, **as of 1 January 2024**, EU Member States may impose an obligation for VAT taxable persons to issue e-invoices (which should be issued in a structured electronic format and comply with the European standard on electronic invoicing).

Afterwards, **as of 1 January 2028**, e-invoicing shall be the default for business-to-business ("**B2B**") intra-community supplies of goods and services.

[6] This legislative package (available here) proposes to amend: (i) the Directive 2006/112/EC on the common system of value added tax ("**VAT Directive**"), (ii) the Council Regulation (EU) 904/2010 on administrative cooperation and combating fraud in the field of value added tax and (iii) the Council Implementing Regulation (EU) 282/2011 laying down implementing measures for Directive 2006/112/EC ("**VAT Regulation**").

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Real time reporting of transactional data
It is also proposed that, as of 1 January 2028, transactional data for B2B intra-community supplies of goods and services shall be reported to the Tax Authorities within two working days after the invoice is issued.

- **Address the challenges of the platform economy**

With effect as of 1 January 2025, platforms facilitating **sales of goods** (B2B and business-to-consumer ("**B2C**")) will generally need to collect and remit VAT to the State.

The above-mentioned requirement will also be extended to **short-term accommodation rental and passenger transport** platforms **as of the same date**. These platforms will also be required to collect and remit VAT to the State when the underlying provider is not required to do so (e.g. in situations where the provider is a not a VAT taxable person).

- **Lead the way towards a single VAT registration**

Businesses carrying out transactions taxed in other Member States still face considerable VAT compliance burdens and costs (VAT registration and VAT compliance obligations). The third part of the European Commission's proposal is to allow businesses operating in the European market to avoid having to do multiple VAT registrations in several EU Member States when carrying out their cross-border activities. In order to overcome this obstacle to the single market, the European Commission proposes to introduce a single VAT registration system.

As of 1 January 2025, the VAT reverse charge mechanism will be applicable to all **B2B** supplies of **goods and services (mandatory)** where (i) the supplier is not established in the Member State in which VAT is due and (ii) the customer is VAT registered there.

Furthermore, as of 1 January 2025, the scope of the One Stop Shop ("**OSS**")[7] is proposed to be extended in order to cover new transactions:

- B2C domestic sales of goods in Member States where the seller is not VAT registered.
- Intra-EU movements of own goods (currently covered by the call-off stock arrangement).

OUR INSIGHTS

This legislative proposal will require the unanimous approval of all the EU Member States. The scope of the proposed changes is broad and will certainly impact most businesses operating within the EU. This proposal shows a big step towards the generalised adoption of e-invoicing and real-time reporting obligations. Although these changes will be optional in a first moment, businesses will have to adjust their internal processes in the upcoming years.

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[7] The OSS is an optative scheme in force since 1 July 2021, according to which businesses may opt in and submit a single VAT return to declare B2C sales in other Member States, avoiding the need of a VAT registration in Member States other than the Member State of establishment.

Luxembourg Register of Beneficial Owners: towards the end of public access!

OUR INSIGHTS AT A GLANCE

- By ruling that granting public access to the RBE and related information was not compliant with EU Law, the CJEU has shuffled the decks of the Luxembourg set-up and processes of the Luxembourg RBE and more generally of the EU beneficial owners registers.
- Indeed, the access to the RBE has been temporarily limited to specific categories of persons and both the Luxembourg and EU legislations regarding the public access to the RBE data will have to be amended to comply with the CJEU decision.

In its judgment of 22 November 2022[8] (the "**Judgment**"), the Court of Justice of the European Union ("**CJEU**") ruled that the public access to the Luxembourg register of beneficial owners (*Registre des Bénéficiaires Effectifs*, the "**RBE**") is invalid in so far as it constitutes an interference with the rights guaranteed in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the "**Charter**"). Following the Judgment, the access to the RBE was first blocked and then restricted to specific categories of persons.

This article will focus on the Judgment, the new procedure to access the RBE and the possible way forward.

Background

The RBE has been established in Luxembourg by the law of 13 January 2019 (the "**RBE Law**"), as part of the implementation of Directives 2015/849/EU ("**AMLD IV**") and Directive 2018/843/EU ("**AMLD V**"). Article 30 (3) of AMLD V requires Member States to make all information concerning beneficial owners (the "**BO**") of corporate and legal entities available to the public.

While a few years ago Luxembourg was often critisised for a lack of transparency, when implementing the AMLD into domestic law, the Luxembourg legislator decided to go beyond the minimum imposed by AMLD V and become more transparent than some of its European neighbours by granting free public access to the RBE.

Indeed, the RBE Law provides that the following information on BOs shall be made available to the public free of charge on the RBE website (the "**BO Information**"):

- surname;
- first name(s);
- nationality (or nationalities);
- date and place of birth;
- country of residence;
- nature and % of interest held in the entity.

Therefore, until 22 November 2022, any person could connect on the RBE website and obtain the BO Information on any company registered with the Luxembourg Trade and Companies Register (the "**RCS**") simply by enterring the name of the company or its registration number.

One limitation to accessing the BO Information is granted by Article 15 of the RBE Law which provides that a registered entity or a BO may request that the BO Information may only be accessible to national authorities, credit and financial institutions and court bailiffs and notaries acting in their capacity as public officers. Said limitation is granted only on a case-by-case basis and upon sending a duly motivated request to the Luxembourg Business

[8] In joined cases C 37/20 (WM and LBR) and C 601/20 (Sovim SA and LBR).

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Register ("**LBR**") explaining the exceptional circumstances requiring an exemption and, namely, exposing the BO to a disproportionate risk, to the risk of fraud, abduction, blackmail, extortion, harassment, violence or intimidation or where the BO is a minor or is otherwise incapacitated.

The Judgment

By passing its Judgment, the CJEU ruled that the general public's access to information on beneficial ownership constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data, enshrined in Articles 7 and 8 of the Charter, and therefore that Art 30 (5) of AMLD V is invalid. The Court motivated its ruling by explaining that the necessary balance and proportionality between privacy and transparency had not been respected.

According to the CJEU, it cannot be considered that the interference with the rights guaranteed in Articles 7 and 8 of the Charter, which results from the general public's access to information on beneficial ownership, is limited to what is strictly necessary. It is worth mentioning that the Charter should be treated *pari passu* with EU primary legislation and, therefore, the provisions of AMLD V cannot contradict the provisions of the Charter.

Therefore, the fight against money laundering and financing of terrorism being the objective of AMLD IV and AMLD V, should not necessarily entail the public's access to information on the identity of the BOs of companies. The Judgment has shuffled the decks of the access rules to EU BO registers and has granted a great opportunity to Member States to limit the access to their national register of beneficial owners.

The reaction of the LBR

The **LBR**, which manages the RBE, reacted swiftly to the CJEU Judgment and decided to block the access to the RBE, whilst setting up a new procedure. The LBR has been followed by other EU Member States such as Malta, Austria, Belgium and the Netherlands.

On 19 December 2022, the LBR issued Circular LBR 22/01 implementing a new procedure (the "**New Procedure**") restoring the access to the RBE by "Professionals" within the meaning of Article 2 of the amended law of 12 November 2004 on the fight against money laundering and financing of terrorism (the "**AML Law**").

In order to get access to the RBE, Professionals now have to execute an agreement with the LBR (the "**LBR Agreement**") and use a product issued by Luxtrust SA allowing identification.

One point of interest concerns the use of the RBE data by Professionals. Indeed, according to the LBR Agreement:

- Professionals may access RBE data only in the scope of their AML/KYC obligations; and
- Professionals may re-use the RBE data provided that it is not contrary to public order and other applicable laws such as the General Data Protections Regulation.

Journalists who have a legitimate interest in consulting the RBE data within the context of their research may request access to the RBE on the basis of an agreement between the LBR and the Press Council. This is a major change for journalists, considering that prior to the New Procedure they had public access, which allowed them to gather considerable information leading to major investigations such as "OpenLux" realised by the newspaper "Le Monde" in conjonction with other European newspapers.

More recently, on 1 February 2023, the LBR established a procedure for entities to access their own RBE data by means of a confidential code valid for a period of three years. This code has been/will be sent progressively by post to the head office of each registered entity, registered with the RBE. Entities will only be able to have access to and order extracts concerning their own data.

By allowing RBE access to both Professionals and entities registered with the RCS, the LBR found a quick solution to comply with the CJEU Judgment. However, this solution is only transitory, and both the Luxembourg and European legislators will need to find a more suitable solution in the long term.

The way forward

In March 2023, the Financial Action Task Force ("**FATF**") released its guidance on beneficial ownership of legal entities (the "**BO Guidelines**"). In the section "Access to Information", the FATF mentioned that, while countries may consider facilitating public access to basic and beneficial ownership information, they should also take into account data protection rules and other privacy concerns as well as considering limiting which basic and beneficial ownership information is made publicly available, or applying a tiered approach to information disclosure based on legitimate interest.

The sixth AML/CFT Directive ("**AMLD VI**") included within the AML/CFT legislative package adopted by the European Commission on 20 July 2021 is probably the best opportunity for the EU legislator to amend the provisions of AMLD V regarding the public access to BO information. The European legislator may be tempted to use the concept of legitimate interest mentioned in the FATF BO Guidelines. On the one hand, this solution would ensure that the access to BO information always respects the proportionality principle. On the other hand, this solution could be very cumbersome for Member States considering that each demand will need to be reviewed on a case-by-case basis.

Even if grey zones are still to be clarified by the European legislator in the near future, one thing is certain: it is more than likely the end of the public access to RBE data as we knew it for only a few years of existence!

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