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TAX ADVISERS LUXEMBOURG

INSIGHTS

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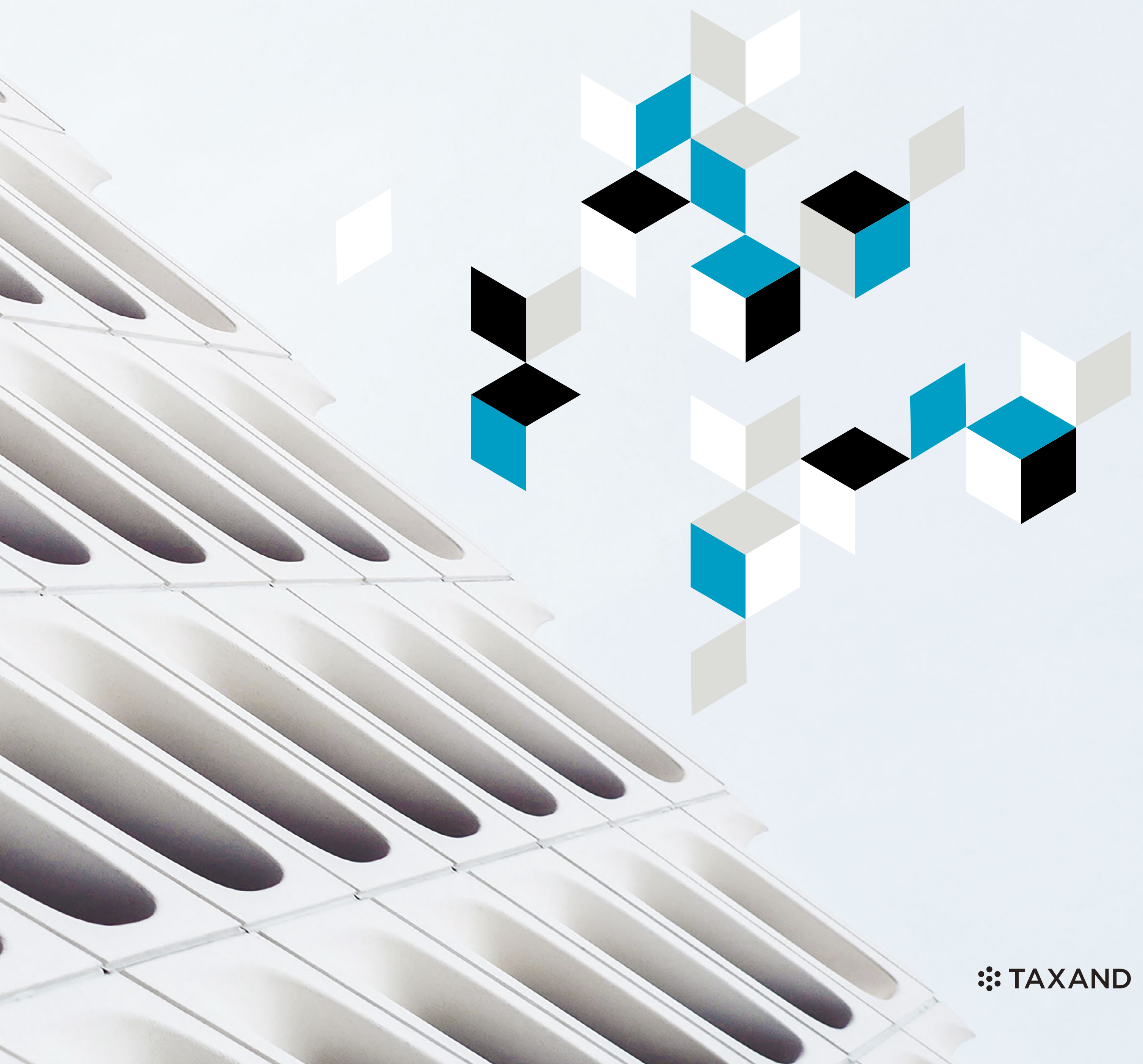

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EDITORIAL

Greetings!

Summer is already in full swing, so the time has come to provide you with a few insights on what has happened in Luxembourg and abroad in the past few months.

On 28 March 2023, a new draft law was released in order to simplify and modernise the rules governing the **direct tax procedure** in Luxembourg. We provide a commentary of the main amendments proposed by the government and some of the shortcomings of the current direct tax procedure.

A protocol amending their **DTT** was signed by **Luxembourg and Germany** on 6 July 2023. We provide an overview of the main changes for corporate taxpayers, investment funds and cross-border workers, which would generally apply as from 1 January 2024.

On 30 March 2023, the Administrative Tribunal ruled that the Luxembourg tax authorities were right to consider it as **abusive** for a company to use its **losses carried forward** generated on its shareholding activity to compensate a short-term gain realised upon the sale of a real estate asset, which was acquired as part of a newly launched activity (management of real estate). We analyse the decision of the Tribunal and assess the position taken, particularly with regard to the *Mantelkauf* doctrine.

On 14 June 2023, the Administrative Tribunal ruled on the **redemption** immediately followed by the **cancellation of classes of shares** and decided that the Luxembourg tax authorities were right to confirm, in the case at hand, the existence of an **abuse of law**. We analyse the grounds on which the Tribunal considered the existence of an abuse and its practical implications.

In view of the recent change in the presidency of the Council of the EU, we provide an overview of the **state of play** of various EU corporate tax initiatives such as the "**Unshell**" Proposal and the initiative aiming to tackle the role of so-called "enablers" called the "**SAFE**" Proposal, as well as 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, on 19 June 2023, the European Commission published the so-called "**FASTER**" Directive proposal to tackle the current burdensome **withholding tax refund procedures** for cross-border portfolio investors in the EU and, at the same time, the risks of tax abuse related to refund procedures. We describe the implications and downsides of such proposal.

On 27 April 2023, an important decision was issued by the **CJEU** striking down a German law according to which a Specialised Investment Fund existing under the laws of Luxembourg is considered partially liable for corporate income tax, whereas resident comparable vehicles are exempt from such tax. We provide you with an analysis of this decision and assess its practical implications.

Further to the QM case of the CJEU concerning the **VAT treatment** of the provision of **company cars**, the Luxembourg VAT authorities issued a **new circular** mainly to give details on the determination of the taxable basis that should be subject to VAT when employers provide company cars to their employees. We detail the content and the potential impact of this circular.

Finally, the regulatory landscape in both Europe and Luxembourg underwent significant developments in the first half of 2023, in particular the **ELTIF 2.0.** and **MiCA** Regulations as well as the **Luxembourg law** modernising the legal framework pertaining to **funds**. We provide you with a description of these various developments.

We hope you enjoy reading our insights.

The ATOZ Editorial Team

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Direct tax procedure: Commentary on upcoming amendments

OUR INSIGHTS AT A GLANCE

- On 28 March 2023, a new draft law was released in order to simplify and modernise the rules governing the direct tax procedure in Luxembourg.
- Even if some provisions are positive, it seems that the main purpose of the changes to be introduced is to ease the duties of the tax authorities or to relieve their congestion rather than to increase the tax certainty for taxpayers.
- We provide hereafter a commentary of the main amendments proposed by the government and some of the shortcomings of the current direct tax procedure.

On 28 March 2023, the Minister of Finance presented a new draft law n° 8186 (the "**Draft Law**") to the Parliament which amends the *Abgabenordnung* ("**AO**") as well as some other laws on tax procedure in order to simplify and modernise the rules governing the tax procedure in Luxembourg. Afterwards, drafts of Grand-Ducal Regulations aiming at implementing various provisions of the Draft Law were also released.

As we reported in our Alert on the subject, some provisions to be introduced are positive as they will bring more certainty for taxpayers. Nevertheless, it seems that the main purpose of the changes to be introduced is to ease the duties of the tax authorities or to relieve the tax authorities' congestion rather than to increase the tax certainty for taxpayers. This is also the conclusion reached by the Council of State in its opinion on the Draft Law released on 11 July 2023[1].

Unfortunately, from our point of view, and also from the point of view of other commentators, this Draft Law clearly lacks ambition in respect of the current needs to modernise the Luxembourg tax procedure. In the press, a lot has been written about this Draft Law, and in Parliament the amendments have for the most part been criticised during the meetings of the Finance and Budget Committee held on 31 March, 24 April and 28 April 2023. In particular, the following comments were made, among others: the need to introduce clarity in the law regarding the deadlines to be respected by both parties, the failure to take into account the comments made by professional chambers in the past years, the limitation of the deadline for the taxpayer to appeal to the Tribunal in the event of silence of the Director of the *Administration des Contributions Directes* ("**ACD**") rather than guaranteeing an answer from the Luxembourg tax authorities ("**LTA**") (cf. *infra*), the necessity to introduce in the law the right for the taxpayer to ask for an oral exchange of view with the LTA (cf. *infra*), the 10% threshold for filing a claim against an automatic taxation, which can represent a substantial amount and looks like a kind of additional penalty (cf. *infra*), etc.

This article provides a commentary on the main changes proposed by the government and some of the shortcomings of the current direct tax procedure which, in our opinion, should be (should have been) amended.

1 Council of State, Opinion n°61.390 dated 11 July 2023, p. 3: "*le Conseil d'État relève que de nombreuses modifications ont pour objet d'imposer des obligations procédurales plus strictes au contribuable*".

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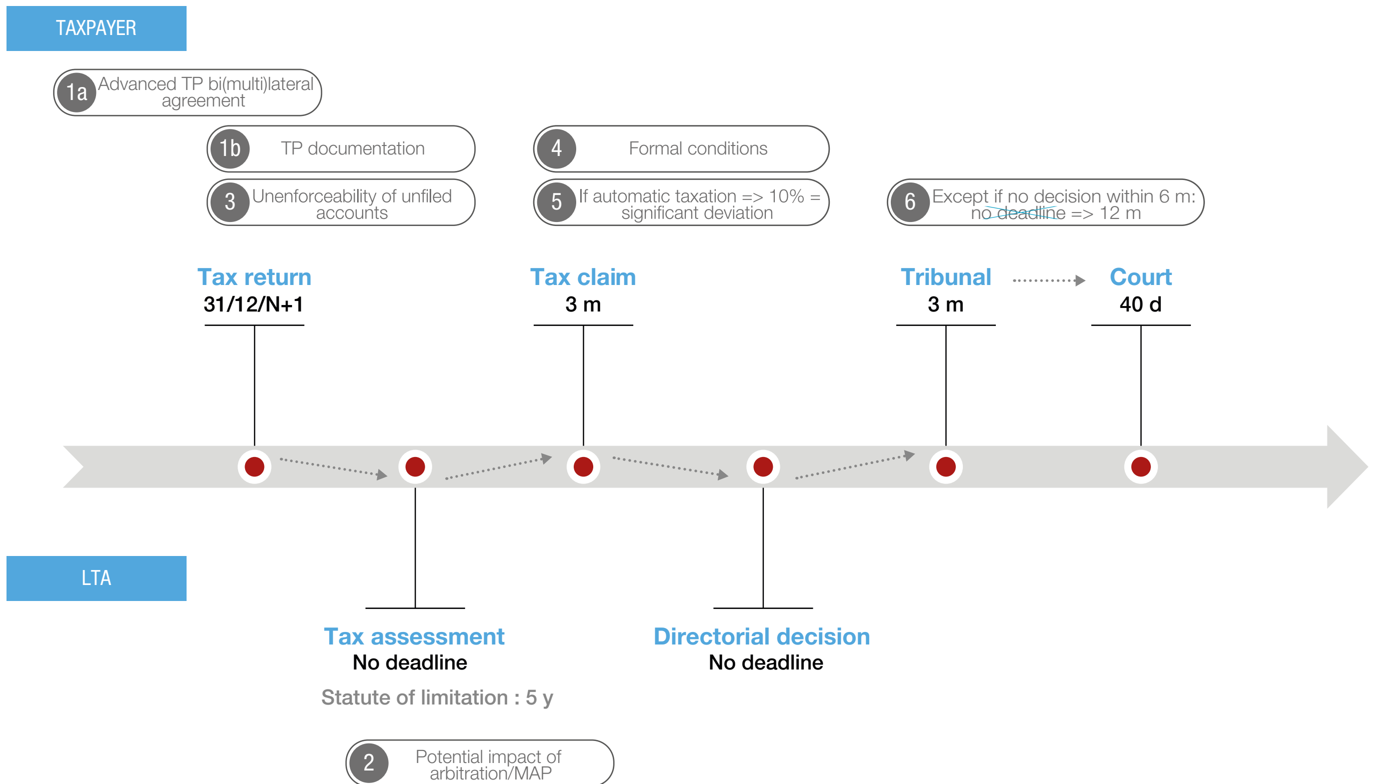
Simplified direct tax procedure timeline: **amendments proposed by the government**



1a *Transfer pricing documentation requirements and new advance pricing procedures*

Request for advanced bilateral or multilateral agreement on transfer pricing

The Draft Law introduces a new procedure (new § 29c AO) for requesting an advanced bilateral or multilateral agreement on transfer pricing pursuant to the double tax treaties ("**DTT**") concluded by Luxembourg. The advanced agreement will be concluded between the competent authorities of the State(s) concerned based on the mutual agreement procedure ("**MAP**") provided in DTTs concluded by Luxembourg with this/these State(s) (Article 25 (3) of the OECD Model Tax Convention ("**OECD MTC**")).

To obtain an advanced bilateral or multilateral agreement on transfer pricing, a written request will have to be sent to the Director of the ACD. A Draft Grand-Ducal Regulation provides more details on the procedure to follow to obtain such advanced agreement and lists all the information the taxpayer's request must contain. The request for an advanced bilateral or multilateral agreement on transfer pricing will be subject to a fee varying from EUR 10,000 to 20,000 depending on the level of complexity and amount of work required.

In our opinion, this price range is too wide, especially as the final price depends on abstract criteria left to the discretion of the LTA, such as the complexity and amount of work. Taxpayers should know the cost of such a procedure with certainty beforehand, for this procedure to be effective and prevent many litigations afterwards, which would be far more time-consuming for the LTA.

In addition, we find it regrettable that the Draft Grand-Ducal Regulation does not provide for a reasonable response time, nor for the possibility of a physical meeting with the LTA to present the various elements of the request or for a communication from the LTA on the status of the request.

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We feel that these points are, however, essential to achieve the objectives of this new procedure and bring it in line with the constraints of economic operators.

Finally, it remains unclear how this new provision will be articulated in practice with the current provision according to which taxpayers can ask for advanced pricing agreements ("**APA**").

1b *Cooperation duty of taxpayers in transfer pricing matters*

The Draft Law specifies the documentation requirements for associated enterprises in relation to transfer pricing, in line with the international standards developed by the OECD (Action 13 of the BEPS Action Plan). The proposed provision (new paragraph (4) to § 171 AO) complements paragraph (3) of § 171 according to which the taxpayers' duty of cooperation applies to transactions between associated enterprises.

As a result, associated enterprises will be required to present, upon request, documentation to justify the transfer pricing policy applied. For this purpose, a Draft Grand-Ducal Regulation specifies the scope and content of this documentation for Luxembourg Constituent Entities of a Multinational Enterprise Group under the Luxembourg Country-by-Country Reporting legislation (i.e. Local File and Master File).

The provision of the new paragraph (4) to § 171 AO refers to the concept of associated enterprises, while the Draft Grand-Ducal Regulation refers to the concept of any constituent entity of a multinational enterprise group, as defined under the Country-by-Country Reporting legislation. Thus, this wording does not make it clear whether the Draft Law establishes a general obligation for all associated enterprises and whether the Draft Grand-Ducal Regulation then establishes specific obligations for the constituent entities of a multinational enterprise group falling within the scope of the Country-by-Country Reporting legislation, or whether the new provision of the Draft Law will only apply to the latter since they are the only ones covered by the Draft Grand-Ducal Regulation.

It seems important to us that the authors of the Draft Law clarify the application of the personal scope provided for in the two texts and that the concepts used therein are aligned. This is also the position of the Council of State, which understands that enterprises will be subject to different documentary obligations depending on whether § 171 (4) AO applies[2]. In addition, the Council of State requests that the terminology of § 171 (3) and (4) AO be amended to replace the term "*entreprises associées*" (associated enterprises) that is defined in the Luxembourg income tax law (**"LITL"**) in relation to the reverse hybrid rules with the term "*entreprises liées*" (related enterprises) that is used in and defined by Article 56 of the LITL in relation to transfer pricing rules and is thus more appropriate when it comes to transfer pricing.

In any event, the Council of State formally opposed the provision under review on the grounds that a documentary obligation constitutes a prerequisite to collection of taxes, which falls within the scope of a matter reserved to the law, and therefore cannot be prescribed by a Grand-Ducal Regulation.

2 *Potential impact of MAP and arbitration decisions on tax assessments*

The Draft Law clarifies the consequences of implementing a MAP or arbitration decision (based on Article 25 (1) (2) (3) and (5) of the OECD Model Tax Convention or based on the EU Arbitration Convention) by laying down explicitly that tax assessments may be issued, withdrawn or modified pursuant to MAP or arbitration decisions (new § 96a AO).

2 Council of State, Opinion n°61.390 dated 11 July 2023, p.11: "*Le Conseil d'État comprend que les entreprises seront soumises à des obligations différenciées en fonction de l'applicabilité ou non de l'alinéa 4 du §171 AO. Les entreprises soumises devront tenir la documentation requise à disposition. Les entreprises non soumises demeureront liées par les alinéas 1er et 2 du §171 AO, rendus applicables aux "transactions entre entreprises associées" par son alinéa 3. Ces entreprises seront dans l'obligation de pouvoir prouver l'exactitude de la déclaration fiscale et de mettre à disposition tous les éléments pertinents, sans cependant que cette documentation doive répondre à des conditions de forme particulières. Le Conseil d'État précise qu'une attention particulière devra être apportée à la définition, dans la loi, du champ d'application personnel de l'obligation de tenir la documentation requise à disposition.*"

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3 *Unenforceability of unfiled annual accounts*

The Draft Law envisages penalising the failure to file annual accounts in accordance with the legal requirements (i.e. filing seven months after the closing of the financial year) by making them unenforceable for tax purposes (new § 160, al. 1a AO). As indicated by the Council of State, both the failure to file and the late filing of annual accounts appear to be targeted. In our view, it would be much more consistent and logical if the penalty for failure to file or late filing of annual accounts were modelled on tax obligations, as the deadline for filing tax returns is generally 31 December of year N+1 (i.e. paragraph 167(3) AO).

This measure raises questions however, as this failure is already liable to criminal penalties. In addition, as pointed out by the Council of State, it will prevent the taxpayer from validly exercising their rights of defense by limiting their means of proof. While certain exceptional circumstances may be the cause of late filing of annual accounts, the consequences of such a delay would be disproportionate.

4 *Formal conditions to challenge a tax assessment*

The Draft Law amends the tax procedure rules in order to align the formal conditions for initiating a tax claim (*réclamation*) before the Director of the LTA with those applicable to appeal a decision given by the Director on a tax claim before the Administrative Tribunal. This is important for legal certainty for taxpayers as, currently, due to the lack of clear guidelines in respect to the form of a *réclamation*, there is a lot of debate on a case-by-case basis, in front of the Tribunal, on whether such a claim was effectively filed.

A tax claim will thus have to be made in writing and signed by the taxpayer or its representative. In addition, the request will have to mention expressly the following information in order to be admissible: the name and address of the claimant, a clear designation of the Administration's decision at stake, the purpose of the request, a brief explanation of the facts and arguments of the claimant, the power of attorney if relevant and a list of evidence the taxpayer intends to make use of (new § 249 AO).

This last requirement to provide a list of evidence the taxpayer intends to make use of raises questions. Indeed, this requirement should apply without prejudice to the possibility, which remains open, of adding additional documents during the further administrative and judicial procedure. This would be consistent with the aim of making the procedure more respectful of taxpayers' rights, which is the objective expressed by the legislator. However, as it is not clear from the Draft Law that it would be effectively the case, the Council of State asked for this requirement to be deleted.

5 *Automatic (estimated) taxation*

In accordance with the current case law in relation to automatic (estimated) taxation (*taxation d'office*), the taxpayer is currently only allowed to file a claim if they prove that their real income or wealth deviates significantly from the tax base fixed by the challenged automatic tax assessment. The proposed amendment aims at defining the notion of significant deviation on the basis of objective and easily quantifiable criteria.

For that purpose, the Draft Law provides that an automatic tax assessment can only be challenged by the taxpayer if the difference between the income or wealth assessed and the real income or wealth exceeds 10%. This percentage seems quite arbitrary as 10% of an important amount can be quite significant. If it is understandable that in some cases the amount at stake is not worth a legal proceeding for the tax authorities, what about situations where amounts at stake are substantial? In this case, the real income or wealth of a taxpayer could effectively deviate significantly from the tax bases fixed by the automatic tax assessment challenged even if the difference between the two does not exceed 10% (i.e. 10% of 1,000,000 euros = 100,000 euros). This is also the view of the Council of State which considers that this provision could lead to situations in which the impossibility of filing a claim would be disproportionate. The Council of State also formally opposed this provision, which it considered to be imprecisely worded and therefore contrary to the principle of legal certainty.

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6 *New time limit in the event of silence of the Director of the ACD*

The Draft Law amends the Law of 7 November 1996 on the organisation of the administrative courts concerning the introduction of a time limit for appeals before the Administrative Tribunal in the event of silence on the part of the Director of the ACD. Currently, if no decision has been taken within the six-month period, the taxpayer can appeal to the Administrative Tribunal without any time limit. This new time limit will apply in the context of requests made based on § 228 (claim against a tax assessment), § 131 (non-contentious appeal, *demande de remise gracieuse*) or § 237 (hierarchical appeal). It should be noted in this respect that the Draft Law opens the possibility of an appeal before the Administrative Tribunal after six months of directorial silence against discretionary decisions which the action is a formal hierarchical appeal against.

If the Director of the ACD does not decide on the claim/appeal of the taxpayer within six months following the written request, the taxpayer can consider the claim/appeal as rejected (implicit decision of refusal). According to the Draft Law, at the end of this six-month period, a new twelve-month period (extended by six months if an investigating measure is taken by the Director) will start, during which the taxpayer will be required to take legal action before the Administrative Tribunal. In the absence of such action, the decision initially challenged (i.e. the tax assessment) will be considered as irrevocably confirmed.

While it is understandable that the aim of this new provision is to relieve the LTA of its workload, it is regrettable that the taxpayer should bear the consequences of the LTA's failure to provide a decision. In application of the principle of equality of arms, it would be more judicious to oblige the LTA to respond within a given timeframe. This seems even more reasonable now that the conditions for filing a tax claim are to be clarified and require the claimant to provide an explanation of the facts and arguments (cfr. *supra*).

Giving a contested decision the force of *res judicata* because of the inaction of the authority that issued the decision seems contrary to the Draft Law's objective of putting in place a procedure that is more respectful of taxpayers' rights insofar as, in this case, it is above all a matter of denying the taxpayer the right to be heard and to have their claim duly dealt with by the authority which it was filed before, which seems very unbalanced. Failure to answer a taxpayer's claim deprives them, on the one hand, of a level of decision in the context of their claim and, on the other hand, if they wish to defend their rights, it obliges them to bring an action before the administrative tribunal, without being aware of the LTA's arguments. In its opinion, the Council of State considers that it is not conceivable that the tax authorities could take advantage of a foreclosure due to its own inaction, i.e. by not ruling on a request addressed to it. The Council asks that this draft provision be removed from the Draft Law.

Other changes to be introduced

The Draft Law also aims at introducing the following additional changes:

- The application of tax law provisions which only apply upon request (e.g. the investment tax credit) has to be requested in the tax return and cannot be requested as part of a subsequent claim anymore (§ 85 AO). Again, the Council of State asks that this modification be dropped.
- When they exist in an electronic form, the LTA may request to be provided with books, documents and information in such an electronic format (amendment of § 171 paragraph 2 AO).
- Tax recovery: the Draft Law proposes to empower the tax collector to allow, under certain conditions, taxpayers with financial difficulties to pay the taxes due in instalments. However, in such a case, late payment interest remains due. The Draft Grand-Ducal regulation clarifies the procedure and methods of collection (i.e. that the request must be motivated; the instalment may not exceed six months; withholding taxes are excluded).
- Administrative cooperation: the LTA will be allowed to exchange information necessary for the performance of their respective duties with both the C*ommission de Surveillance du Secteur Financier* and the *Commissariat*

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aux Assurances.

- Finally, the Draft Law repeals several provisions of the General Tax Law that have become obsolete.

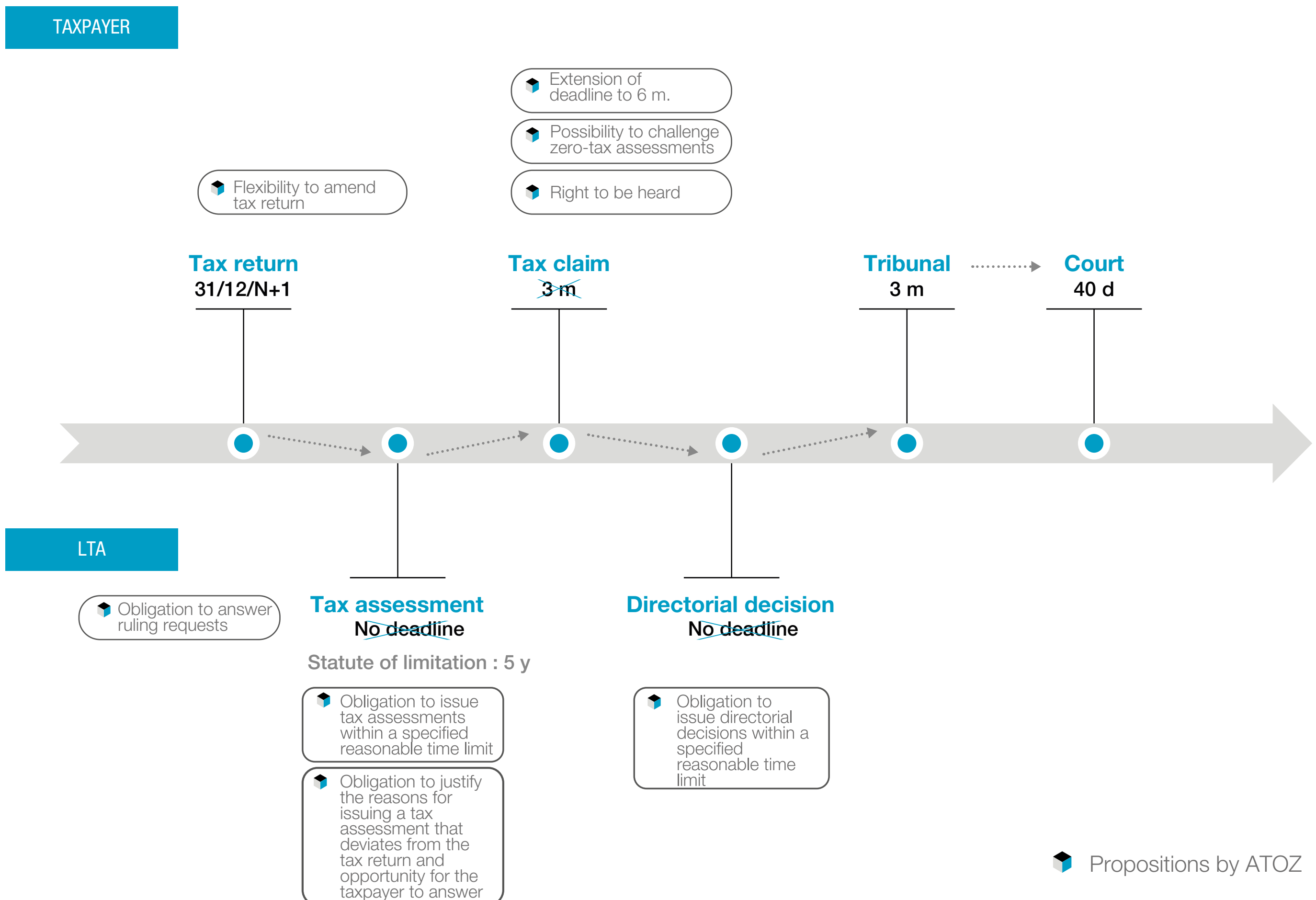
Entry into force and next steps

While most of the new provisions to be introduced will apply as soon as the legislative procedure is finalised and the law is promulgated through the *Journal Officiel* (Memorial), other provisions will apply as from 1 January 2024 (e.g. time limit in the event of silence of the Director of the ACD; accounts unenforceable if not filed in time) or as from tax year 2024 (e.g. cooperation duty in transfer pricing matters).

However, taking into consideration the formal oppositions and the various amendment requests of the Council of State about the Draft Law, as well as the various criticism it raises in Luxembourg, we could expect that the Draft Law will not be adopted as such and that the government will reconsider its text significantly.

Suggestions of amendments

The current Luxembourg direct tax procedure still presents some shortcomings that should be addressed in priority, in line with procedures in neighbouring countries. We took advantage of the publication of this Draft Law to propose our own changes to the procedure, capitalising on our experience and the limits of the current operation, including



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in particular (without the list below being seen as exclusive):

- the possibility to challenge a zero-tax assessment - and thus the amount of tax losses carried forward - which should be confirmed annually given the massive importance of tax losses in the proper management of a Luxembourg fully taxable company;
- the introduction of additional obligations on the part of the tax authorities such as: the obligation to answer advance tax ruling requests; to issue tax assessments and directorial decisions within a specified reasonable time limit; to justify the reasons for issuing a tax assessment that deviates from the tax return, and the opportunity given to the taxpayer to answer;
- the taxpayer's right to be heard during the pre-litigation stage;
- the extension of the taxpayer's time limit for filing a tax claim (from three to six months), which would make it easier to submit a request in application of §94 AO (i.e. amendments to the tax return which the LTA agree with) and would thus help to achieve the objective of relieving congestion, since taxpayers would no longer have to lodge a claim "by default" in order to preserve their right of appeal;
- adding more flexibility in the conditions to file an amended tax return when it is clear that unfortunate mistakes have been introduced in the accounts or the tax returns, even if the amendment would mean a decrease of the tax liability; etc.

You will find above a simplified chart of the suggested tax procedure timeline.

We will keep you informed of developments in the legislative procedure. In particular, it will be interesting to see to what extent the opinions of the Council of State and professional chambers will be taken into account.

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Luxembourg and Germany sign amending protocol to their tax treaty

OUR INSIGHTS AT A GLANCE

- On 6 July 2023, Luxembourg and Germany signed an amending protocol to their DTT.
- The protocol mainly extends the tolerance threshold for cross-border workers to 34 days, incorporates the options taken by the two countries to implement the MLI, amends the provisions applicable to treaty benefits for investment funds and considers some recent German tax law changes.
- We provide hereafter an overview of the main changes to be introduced by the protocol for corporate taxpayers, investment funds and cross-border workers. The Protocol will enter into force as soon as it has been ratified by both countries and would generally apply as from 1 January 2024.

On 6 July 2023, Luxembourg and Germany signed an amending protocol ("**the Protocol**") to the Germany - Luxembourg double tax treaty ("**DTT**") signed in 2012. The Protocol introduces both amendments to the DTT and amendments to the Protocol to the DTT also signed in 2012 (the "**2012 protocol**") currently in force.

The Protocol mainly extends the tolerance threshold for cross-border workers from 19 to 34 days under the DTT, incorporates into the DTT the options taken by the two countries to implement the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**MLI**"), amends the provisions applicable to treaty benefits for investment funds and adapts the current provisions of the DTT in order to take into account some recent German tax law changes (dealing with e.g. Real Estate Investment Trusts, "**REITs**").

We provide hereafter an overview of the changes to be introduced by the Protocol for corporate taxpayers, investment funds and cross-border workers.

New Preamble and Principal Purpose Test

In line with the latest version of the OECD Model Tax Convention and the MLI a preamble has been included in the DTT to clarify that the aim of the DTT is the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements).

In addition, the Protocol adds the principal purposes test ("**PPT**") into the DTT in accordance with Actions 6 and 15 of the Base Erosion and Profit Shifting ("**BEPS**") Action Plan. Under the PPT, a DTT benefit will be denied if it is reasonable to conclude that obtaining that tax benefit was one of the principal purposes of any arrangement or transaction (subjective test). However, DTT benefits will still be granted if it can be demonstrated that granting such benefits, in the circumstances at hand, would remain in accordance with the object and purpose of the relevant provisions of the DTT (objective test). Given the complexity in interpreting and applying this provision which will have to be read in conjunction with EU law (as defined on several occasions by the Court of Justice of the EU), it is recommended to seek advice from a tax adviser when setting up cross-border investment structures.

Persons covered

As far as persons covered are concerned, the Protocol adds a new provision to Article 1 of the DTT according to which tax transparent entities (partnerships) are excluded from the qualification of person for DTT purposes. Nevertheless, the DTT can be applied by either German or Luxembourg residents to income derived through a transparent entity subject to the condition that the tax transparent treatment of the partnership is also recognised by the State in which

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the recipient is resident. This provision is in line with the latest version of the OECD Model Tax Convention and is a mere clarification of the concept of tax transparency that is already applied in practice by both countries.

In case income derived by a resident of one of the contracting states through an entity that is located in the other contracting state is taxed in both states, because the first mentioned state considers the entity as tax transparent, while the other contracting state considers the entity as opaque (non-transparent), then the tax authorities of both states shall consult each other in the context of a mutual agreement procedure to find a suitable solution to avoid the double taxation. This is clarified by means of an amendment to the 2012 protocol.

Given that mutual agreement procedures can be very long, it is recommended to seek advice from a tax adviser to confirm whether an entity is considered as tax transparent or tax opaque in both jurisdictions in order to avoid diverging qualifications of entities which may cause double taxation.

Dividends

The current DTT provides for a withholding tax ("**WHT**") rate of either 5% (if the beneficial owner is a company which directly holds at least 10% of the capital of the company paying the dividends) or 15% for dividends. The Protocol does not amend these WHT rates. However, in order to clarify that certain dividend distributions can only benefit from the 15% WHT rate, the Protocol amends Article 10 of the DTT and specifies that dividends paid by a German REIT-Aktiengesellschaft ("**REIT-AG**") or by a Luxembourg real estate company, which, from a tax point of view, essentially corresponds to a German REIT-AG, cannot benefit from the 5% WHT rate but only from the DTT rate of 15%. The same applies to dividends paid to an undertaking for collective investment ("**UCI**"), which can also only benefit from the 15% WHT rate.

The dividend definition is also amended to clarify that the distributions made on units issued by a UCI qualify as dividends and are therefore covered by the rules laid down in Article 10 of the DTT.

Finally, the Protocol clarifies that dividends derived by a resident of one of the contracting states through entities that are considered as tax transparent by that state should be treated for WHT purposes as if that resident had received the dividends directly. Therefore, if a Luxembourg company holds, via a foreign partnership that is considered as tax transparent by Luxembourg (e.g. a UK LP), at least 10% in the capital of a German GmbH, and receives dividends from that GmbH, it should benefit from the 5% WHT rate provided by Article 10 (2) of the DTT (subject to also successfully navigating the applicable anti-abuse and anti-treaty shopping rules pursuant to German domestic tax law and the PPT).

Interest

The existing clause in the DTT, according to which interest payments can only be taxed in the state of residence of the recipient and not in the source state, has been amended to clarify that this only applies to the extent the recipient is the beneficial owner of the interest.

As neither Luxembourg nor Germany levy WHT on interest, the application of this clause should be limited in practice.

Amendment of the provisions of the 2012 protocol dealing with treaty benefits for undertakings for collective investment (UCIs)

The 2012 protocol to the DTT already provided for rules concerning investment funds and investment companies and their entitlement to the DTT benefits arising from Articles 10 (i.e. reduced WHT on dividends received) and 11 (i.e. no taxation at source on interests received) of the DTT. This provision has been entirely redrafted and is replaced by the new Protocol, which now provides for treaty benefits for UCIs. According to the new Protocol, UCIs are considered as tax resident in the contracting state in which they are established and as the beneficial owners of the income they realise for the purpose of the DTT. However, this applies only to the extent that the UCI has not been set up as a partnership.

For the purposes of the DTT, the Protocol provides for a definition of UCIs as follows:

- For Germany, this term covers any investment fund in the sense of the Investment Tax Act; and
- For Luxembourg, this term covers investment funds

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within the meaning of the UCI law of 17 December 2017, the SIF law of 13 February 2007 or the RAIF law of 23 July 2016; as well as
- Other undertakings agreed upon by the competent authorities of the contracting states, which may be widely held, hold directly or indirectly a diversified portfolio of securities or with the main purpose of investing directly or indirectly in immovable property with the aim of realising rental income, provided that they are subject to investor protection regulations in the contracting state of their establishment and have been set up in one of the contracting states.

As mentioned above, UCIs set up in the form of a partnership are expressly carved out from the above definition. Thus, the question arises as to whether the Luxembourg common investment fund (*fonds commun de placement*, "**FCP**") will be considered as a UCI based on the new definition introduced by the Protocol. FCPs are considered as tax transparent for Luxembourg tax purposes, since the FCP is a contractual fund and has no legal form, but as tax opaque (non-transparent) from a German tax perspective. Even though FCPs are tax transparent for Luxembourg tax purposes, the FCP is not a partnership and it should therefore be covered by the new UCI definition. However, given the amendment introduced by the Protocol to Article 10 of the DTT (dividends), according to which dividends derived by a resident of one of the contracting states through entities that are considered as tax transparent by that state should be treated for WHT purposes as if that resident had received the dividends directly, a look through approach would apply in certain cases where dividends are received through FCPs, and notably where a dividend is received by a Luxembourg resident through an FCP, which invests in a German Company. In such case, Germany would need to treat that dividend as if the Luxembourg resident had received it directly and would need to apply the reduced WHT rates provided by Article 10 of the DTT accordingly (i.e. the 5% WHT rate would apply if the Luxembourg resident investor is a company which holds, through the FCP, at least 10% of the capital of the German company paying the dividends). In the absence of Luxembourg resident investors, the FCP would be considered as tax resident and beneficial owner of the dividends it receives (because it is a UCI based on the Protocol) and should therefore be able to benefit from the 15% WHT rate on dividends received as soon as the Protocol enters into force. As FCPs are tax transparent pursuant to Luxembourg tax law, a Luxembourg company distributing dividends to an FCP would always apply a look through approach. For German resident investors in the FCP, this means that the Luxembourg company would apply a 5% WHT rate if the German resident investor is a company which holds, through the FCP, at least 10% of the capital of the Luxembourg company paying the dividends and 15% WHT in all other cases.

In addition, the definition of UCIs includes all investment funds within the meaning of the RAIF law of 23 July 2016, without making any distinction between the RAIF that is subject to the same tax regime as the Specialised Investment Fund ("**SIF**") and the SICAR-like RAIF that is subject to Article 48 of the RAIF law of 23 July 2016. The latter, if set up in a corporate form, is a fully taxable entity and should therefore already qualify as a resident in accordance with Article 4 of the DTT. However, as all RAIFs, including those set up in a corporate form and subject to Article 48 of the RAIF law of 23 July 2016, have been included in the definition of UCI, they can only benefit from the 15% WHT rate on dividends, and not from the 5% WHT rate.

As regards the other undertakings and the condition for them to be "widely held", neither the Protocol, nor the Commentary to the OECD Model tax Convention provide for a definition of the term "widely held". The fact that the Protocol makes reference to undertakings that may be widely held suggests that there is no obligation for an undertaking to be widely held, but the mere possibility to be widely held would be sufficient for an undertaking to qualify as UCI for the purposes of the DTT, provided of course that the other conditions listed above (diversified portfolio of securities, subject to investor protection regulation) are also met and that the two contracting states agree to consider that the undertaking is to be considered as a UCI under that definition.

Capital gains

The Protocol amends the last paragraph of Article 13 of the DTT concerning capital gains, providing specific rules applicable to the capital gains realised upon the alienation of shares where the alienator has changed his or her tax residence prior to the sale of the shares and has been subject to exit taxation in his or her former state of residence. In such

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case, the state in which the alienator is resident upon the sale of the shares shall determine the taxable capital gain on the basis of the value that the first-mentioned state has used for the purposes of the exit taxation (unless this value exceeds the fair market value of the shares as of the date of the sale), and can only tax the incremental increase in value of the shares after the change of the tax residence of the alienator.

Employment income

As far as employment income is concerned, the rule remains that income derived by a resident of a contracting state from employment shall be taxable only in that state, unless the employment is exercised in the other contracting state. In other words, a German tax resident employed by a Luxembourg employer is taxed in Luxembourg on his or her employment income, but only to the extent that the work is performed in Luxembourg. Here, Germany was so far entitled to tax proportionally the salary earned by a German tax resident employed by a Luxembourg employer, if the employee performed his/her work either totally or partially in Germany or in a third country on more than 19 days per year. This threshold has been increased by the new Protocol and Germany will not be able to challenge the taxation of the salary in Luxembourg as long as the number of days spent by the employee outside of Luxembourg does not exceed 34 days per year. This amendment is a welcome improvement to further adapt to a changing work environment, including the increased possibility to work remotely and aligns the rules applicable for German cross-border workers with those applicable to French and Belgian cross-border workers, to whom the 34 days threshold already applies.

Moreover, the Protocol clarifies the situation of employees working in the transportation of goods or persons, such as bus drivers, train drivers or train attendants, who cross the border several times per day and work both in Germany and in Luxembourg and even in third countries on a daily basis. Their salary will have to be split equally between all the countries which they work in (without taking into account the time effectively spent in each of the countries), and the part of the salary that is allocated to their residence state and to any third countries is taxable in their residence state, while the part of the salary allocated to the employment state is taxable in the employment state. A German resident bus driver working for a transportation company based in Luxembourg and driving on a working day through Germany, Luxembourg and France, will therefore be taxable in Germany for 2/3 of his or her salary earned for that day and in Luxembourg for 1/3 of his or her salary earned for that day.

According to the Protocol, only the days the work has effectively been carried out on need to be taken into account (meaning that holidays or days of sick leave are not taken into account) for the determination of the 34 days threshold and work is only considered as performed in a country to the extent the employee performs his or her activity for at least 30 minutes in that country.

Pensions

The Protocol also slightly amends Article 17 of the DTT, which relates to pensions. Based on the DTT, pensions received by a resident of a contracting state from the other contracting state are only taxable in the first-mentioned state. However, according to the Protocol, pensions paid by Germany, and which are attributable in whole or in part to contributions which did not form part of the taxable income or were tax-deductible or tax-relieved in some other way in Germany, shall be taxable only in Germany, unless the tax relief was clawed back for any reason.

Methods to avoid double taxation

Germany generally applies the exemption method, with certain limits, to avoid double taxation. The exemption, however, does not apply in case Luxembourg applies the provisions of the DTT to exempt the income or capital from tax. In addition to the items of income which Germany already applies the credit method to as per the current DTT, Germany will also apply the credit method if Luxembourg taxes income or capital in application of the DTT but does not effectively tax such income or capital. According to the Protocol, an item of income or capital is "effectively taxed" if it is included in the taxable base based on which the tax is computed. It is however unclear whether this means that an income that is included in the taxable base but benefits from an exemption would be considered as "effectively taxed". It remains to be seen how the German tax authorities will apply this definition in practice.

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Moreover, the already existing exemption of dividend income derived by a German resident company from a Luxembourg resident company in which the German company directly holds at least 10% of the share capital continues to apply. However, the Protocol clarifies that this exemption does not apply to dividends distributed by a tax-exempt entity, nor to dividends that have been tax deductible in Luxembourg at the level of the distributing company. This latter limitation should however already apply based on domestic law since 2016, as it has already been introduced by the Council Directive 2014/86/EU, which amended the EU Parent-Subsidiary Directive accordingly and had to be transposed by all Member States into domestic law by 31 December 2015.

Luxembourg generally applies the exemption method. However, the credit method applies to dividends, royalties and income of artists and sportsmen. Luxembourg also applies the credit method to income from employment, where Germany has the right to tax such income (i.e. in case of cross-border workers working more than 34 days from Germany or abroad) but does not effectively tax such income.

Mutual agreement procedure and arbitration

The Protocol abolishes the last paragraph of Article 24 of the DTT, which provides for an arbitration procedure, in case both contracting states were unable to reach an agreement to resolve a case that has been submitted to the mutual agreement procedure ("**MAP**") within two years from the presentation of the case. The MAP remains however applicable and can be used in case a taxpayer has suffered double taxation that is not in accordance with the provisions of the DTT.

However, if the competent authorities of both states do not find an agreement after two years, it is no longer possible to submit the case to the arbitration procedure, meaning that the MAP may last for more than two years and the case may eventually remain unresolved, as the contracting states are not obliged to find an agreement under the MAP, but shall merely endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the DTT.

The abolishment of the arbitration procedure is surprising considering that Germany, when ratifying the MLI, had reserved the right not to apply the arbitration procedure included in the MLI to all of its double tax treaties that already provide for mandatory binding arbitration of unresolved issues arising from a MAP case, including the DTT with Luxembourg. Now that the paragraph of Article 24, which provides for the arbitration procedure, is abolished, the question arises as to how this impacts the reservation made upon ratification of the MLI. It remains to be seen if clarifications regarding the reason for the abolishment of the arbitration procedure will be provided in the commentaries to the law once the draft law ratifying the Protocol is issued.

In practice, both Luxembourg and Germany have also implemented the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, which provides for a MAP amongst Member States in case of double taxation disputes arising from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. This Directive also provides for an arbitration procedure (in the form of an Advisory Commission) that can be launched by the taxpayer in case the competent authorities of the Member States cannot find an agreement under the MAP. Therefore, even though the arbitration procedure as per the DTT has been abolished, it will still be applicable in case a MAP is launched in accordance with the aforementioned Directive. However, if a taxpayer has submitted a request for a MAP in application of Article 24 of the DTT, which is not resolved by the contracting states, it cannot directly request the set-up of an Advisory Commission, but it will first have to launch another MAP under the domestic law implementing the Directive. Given that a MAP can only be requested within three years from the receipt of the first notification of the action resulting in taxation not in accordance with the provisions of the DTT, it may in practice be preferable to directly submit a request for a MAP in application of the Directive rather than in application of Article 24 of the DTT.

Entry into force

The new Protocol will enter into force as soon as it has been ratified by both Luxembourg and Germany. For that purpose, on 28 July 2023, the Luxembourg government launched the

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ratification process by approving a draft law in order to ratify the new Protocol.

It will apply:

i. In respect of taxes withheld at source, to income derived on or after 1 January of the calendar year that follows the year in which the Protocol enters into force – that would be 1 January 2024 at the earliest, provided both states ratify the Protocol still in 2023; and
ii. In respect of other taxes on income and taxes on capital, to taxes chargeable for any taxable period beginning as of 1 January of the calendar year that follows the year in which the Protocol enters into force – this means any tax years beginning on or after 1 January 2024 at the earliest, provided both states ratify the Protocol still in 2023; and
iii. With respect to the increase of the tolerance threshold for cross-border workers from 19 to 34 days, the Protocol will apply as from 1 January 2024, regardless of the date as of which the Protocol is ratified by both states.

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Luxembourg Tribunal rules that the use of corporate tax losses amounts to abuse of law: What went wrong?

OUR INSIGHTS AT A GLANCE

- On 30 March 2023, the Luxembourg Administrative Tribunal ruled that the Luxembourg tax authorities were right to deny a Luxembourg company the use of its losses carried forward generated on its shareholding activity to compensate a short-term gain realised upon the sale of a real estate asset, which was acquired as part of a newly launched activity (management of real estate).
- Even though the shareholders of the Luxembourg company had not changed (which is actually required based on the so-called *Mantelkauf* case law and the related guidance of the Luxembourg tax authorities), the Tribunal seems to consider that the economic identity of the Luxembourg company has been lost due to (1) the change in its business activities, (2) the fact that the new activity had not been planned upon incorporation and (3) the fact that the company was dormant for a few years before being "reactivated" for the investing into Luxembourg real estate.
- We will present the decision of the Tribunal and assess the position taken. However, since an appeal against the decision has been filed with the Luxembourg Administrative Court, it remains to be seen whether this position will be confirmed or not.

On 30 March 2023, the Luxembourg Administrative Tribunal (*Tribunal Administratif*, the "**Tribunal**", which is the first instance jurisdiction) held its decision (the "**Decision**") in a case that concerns the use of corporate tax losses by a Luxembourg company ("**LuxCo**"). LuxCo incurred its tax losses when it was a holding company and intended to use these losses, following several years of being dormant, to offset a capital gain realised upon disposal of a Luxembourg real estate property. The Luxembourg tax authorities ("**LTA**") challenged the use of the tax losses based on the abuse of law provision provided in § 6 of the Tax Adaptation Law, *Steueranpassungsgesetz ("***StAnpG***")*, (version in force in 2014, i.e. before being amended by the law implementing the Anti-Tax Avoidance Directive, "**ATAD**"). The Tribunal followed the decision of the LTA and rejected the use of the tax losses.

At the time this article was drafted, an appeal against the Decision had been filed with the Luxembourg Administrative Court (*Cour Administrative,* which is the second instance jurisdiction). As the use of corporate tax losses is a fundamental feature of the Luxembourg (corporate) tax system, the decision of the Administrative Court will be of utmost importance to restore legal certainty. We will assess whether the LTA and the Tribunal were right when concluding that the use of tax losses by LuxCo was an abuse of law.

Fact pattern of the case

LuxCo was incorporated on 14 January 2000 in the legal form of a public limited company (*société anonyme*, S.A.) for the purpose of holding participations. LuxCo was never part of a fiscal unity and, crucially, had a stable shareholder base since 2001 (i.e. the shares of LuxCo have been owned by a Luxembourg resident individual since 2001).

The object of LuxCo was defined very broadly in the company's bylaws which state that "*the company may carry out all commercial, industrial or financial transactions, as well as all transfers of real or personal property. The company's object is also to carry out all operations relating directly or indirectly to the acquisition of participations in any form whatsoever, in any company, as well as the administration, management, control and development of these participations. In particular, it may use its funds for the creation, management, development and liquidation of a portfolio consisting of all securities and patents of any origin, participate in the creation, development and control of any company, acquire by way of contribution, subscription, underwriting or purchase option and in any other way, all securities and patents, realise them by way of sale, transfer, exchange or otherwise, have these businesses and patents developed, and grant to the companies in which it is interested all assistance, loans,*

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advances or guarantees". However, in practice LuxCo mainly performed holding activities until 2008.

From 2009 until 2013, LuxCo ceased its previous activity as a holding company and did not dispose of any corporate assets of significant economic value (i.e. LuxCo was a dormant company during that period). In 2014, LuxCo indicated a change of its activity from the "holding of shares" to the "management/trade of real estate" in its financial statements and its corporate tax returns. On 12 May 2014, LuxCo acquired an immovable property situated in Luxembourg that was resold on 31 October 2014, i.e. less than six months later. LuxCo realised a significant capital gain (circa 80% of the acquisition costs) on its investment which was included as income in the company's 2014 corporate tax return. However, LuxCo's taxable income was offset by tax losses carried forward from the time LuxCo performed holding activities.

The LTA denied the deductibility of LuxCo's tax losses, arguing that the conditions of the abuse of law provision were met. Following the real estate transaction in 2014, LuxCo did not perform any further activities. This was explained by the representants of Luxco with the uncertainty created by the LTA through the challenge of the tax loss carry-forward.

Principles applicable to the deductibility of corporate tax losses under Luxembourg tax law

- **The general rule: Article 114 of the Luxembourg Income Tax Law ("LITL")**

The general rules governing the use of tax losses provided in Article 114 of the Luxembourg Income Tax Law ("**LITL**") also apply to Luxembourg corporate taxpayers. While the deduction of tax losses incurred as from 2017 is restricted to a period of 17 tax years, tax losses incurred before the fiscal year 2017 (like in the Decision) may be carried forward without limitation in time. A carry-back of tax losses is not possible.

The overarching principle governing tax losses is that they may only be deducted from the taxable income of the taxpayer that actually incurred them (*Grundsatz der Personenidentiät*). A transfer of tax losses (for example, to a shareholder or a subsidiary) is not possible. Crucially, all income realised by a Luxembourg company is deemed to be "commercial income" within the meaning of Article 14 LITL (i.e. the income is not segregated into different income categories). Hence, tax losses incurred by a Luxembourg company may offset any taxable income and is not limited to income derived from the same activity. Tax losses incurred during the company's lifetime may also be used to offset latent capital gains realised upon (a deemed) liquidation.

- **The limit: the so-called *Mantelkauf*, as defined by the case law and related guidelines of the LTA**

The "*Mantelkauf*" case law is German case law that specifically deals with the potential application of the abuse of law provision when a dormant company (with tax losses) is transferred to a third party. As such, the "*Mantelkauf*" jurisprudence defines the scope of application of the abuse of law provision in case of corporate tax losses. Based on this jurisprudence, the deductibility of tax losses carried forward may be denied on grounds of the economic approach (*wirtschaftliche Betrachtungsweise*) or the abuse of law provision (*Gestaltungsmissbrauch*) should most, if not all, of the shares of a company be transferred and the economic identity be lost. Given that the economic approach and the abuse of law provision under Luxembourg tax law are similar to the relevant provisions under German tax law (at the time of the Decisions), this case law should be taken into consideration in Luxembourg.

Apart from the German "*Mantelkauf*" jurisprudence, the Luxembourg Administrative Court ruled on 15 July 2010 on the availability of a company's tax loss carry-forward following a transfer of all its shares, accompanied by a business restructuring. While it has been stated that tax losses may only be deducted from the taxable income of the company that actually incurred them, the Administrative Court acknowledged that the legal identity should generally suffice. According to the Court, the economic identity requirement could be deduced neither from the text of the Luxembourg tax law nor from the parliamentary documents relating thereto.

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However, the Administrative Court held that tax losses may, in exceptional circumstances, be disregarded on grounds of abuse of law to avoid the trade of a company's tax loss carry-forward.

The Administrative Court considered an abuse of law to be present in the following circumstances:
(i) the shares of a Luxembourg company are sold to new shareholders; *and*
(ii) upon disposal, the company has no assets with significant economic value (i.e. its sole "asset" is the tax loss carry-forward); *and*
(iii) the company ceases its previous (loss generating) activity following the transfer of the company's shares; *and*
(iv) exercises subsequently a completely different and profitable activity.

Thus, the deductibility of tax losses may be denied where the new shareholder(s) merely acquired the company to benefit from the existing tax loss carry-forward.

The decision of the Administrative Court of 15 July 2010 therefore clarified that tax losses should generally remain deductible regardless of a change in shareholders. Only in "exceptional" circumstances, where a company's business is fundamentally changed following a transfer of most, if not all, of its shares, may a different tax treatment be justified based on the abuse of law provision. However, the trading of "empty shell" loss companies for tax saving purposes is not permissible. Therefore, when the shares of loss generating companies are transferred, genuine economic reasons should be established to demonstrate that the trading of the company's tax loss carry-forward was not the parties' sole purpose.

Following the decision of the Administrative Court of 2010, the LTA released a Circular that provides guidance on when the availability of a company's tax loss carry-forward may be challenged.[1]

The Circular starts from the basic premise that the Administrative Court confirmed that tax losses may be denied when the legal personality of the company is used for the sole purpose of circumventing the personal nature of the right to carry forward tax losses and the resulting prohibition of a transfer of tax losses solely for tax avoidance purposes.

The Circular further repeats a key statement of the decision of the Administrative Court that reads as follows: "*The circumstances in which the tax loss carry-forward is claimed by a company that has ceased its previous activity and no longer has assets of relevant economic value, that the shares of this company have been transferred to new shareholders and that this company then carries out an entirely different activity (possibly already prior to the new shareholders) and that it is profitable, must be qualified as evidence of the existence of an abuse of law.*" In these circumstances, the LTA consider that the tax loss carry-forward of a Luxembourg company should be refused in accordance with the abuse of law provision provided under § 6 StAnpG.

Based on the decision of the Administrative Court, the Circular provides for the following principles:

- the right to carry forward previous losses is not denied for the sole reason that a company's shareholder(s) change (either partially or completely) as long as the company continues its economic activities or extends its corporate purpose;
- the right to carry forward previous tax losses is denied if the LTA can conclude based on the facts and circumstances of the takeover of the loss-making company, such as:
  - the cessation of the previous activity that generated the losses,
  - the absence of corporate assets with economic value (i.e. the company is dormant when its shares are transferred),
  - the transfer of the company's shares with an almost simultaneous change of activity,

  that the takeover can be qualified as an abuse of law if it was carried out for the sole purpose of using the company's tax losses to offset future profits.

Hence, the Tax Circular only seeks to deny the availability

1 Circular L.I.R. n° 114/2 of 2 September 2010

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of corporate tax losses in exceptional circumstances where it is clear from the facts and circumstances that the trading of the company's tax loss carry-forward was the sole purpose of the takeover. In the absence of a change in shareholder(s), there is no starting point for denying the deductibility of corporate tax losses.

Decision of the Tribunal

The Tribunal had to decide whether LuxCo could use its tax loss carry-forward to offset the 2014 taxable income or whether the use of these tax losses was an abuse of law, as claimed by the LTA.

The abuse of law concept applies if four conditions are cumulatively met. The Tribunal analysed these conditions as follows:

- **Use of private law forms and institutions**

The Tribunal agreed with the LTA that the first condition is satisfied since the purchase of a property by a company constitutes the use of forms and institutions of private law within the meaning of § 6 StAnpG.

The Tribunal further pointed out that LuxCo was undisputedly out of business from 2009 to 2013 and did not have any assets of significant economic value at its disposal during that period.

- **Tax saving resulting from the circumvention or reduction of the tax burden**

According to the Tribunal, the use of tax losses allowed LuxCo to substantially reduce the tax burden in relation to the capital gain through a deduction of the operating losses carried forward from previous years.

Here, the Tribunal reiterated that LuxCo ceased all activity between 2009 and 2013, and that the company was "reactivated" in 2014 when acquiring and selling a Luxembourg real estate property within a period of less than six months.

- **Use of an inappropriate path**

The Tribunal stated that LuxCo indicated the "acquisition of participations" as the company's object in its corporate tax returns filed for the fiscal years 2000 to 2013. In 2014, when LuxCo acquired and sold the Luxembourg real estate asset, LuxCo declared "real estate management" as business purpose in its corporate tax return. Likewise, in the 2014 financial statements of LuxCo, it was stated that "the company's main object is the trading of real estate".

The Tribunal emphasised that it was not the initial intention of LuxCo to invest into real estate as no real estate investment had been made since its incorporation in 2000 until 2014. Given the facts and circumstances of the case, it was considered that LuxCo was established for performing holding activities, not for investing into real estate.

According to the Tribunal, it is settled case law that the application of the abuse of law requires an analysis of all the transactions carried out, and the individuals or legal entities involved, regardless of the question of which person is at the origin of the (potential) abuse of law.

The Tribunal considered that:

(v) the tax loss carry-forward was claimed by a company that ceased its previous activity from 2009 to 2014 and had, during that period, no corporate assets of significant value; and

(vi) there is every reason to believe that the company was only "reactivated" in 2014 for the purpose of carrying out the real estate investment.

On this basis, the Tribunal concluded that there is sufficient evidence that the legal and tax personality of LuxCo was used solely to benefit from its tax loss carry-forward and to reduce the tax that would have otherwise been incurred on such a transaction.

The Tribunal further reminded that LuxCo is ultimately owned and controlled by a Luxembourg resident individual who is the actual beneficiary of LuxCo who derives a tax advantage from carrying out this very profitable real estate transaction through LuxCo (that has sufficient tax losses

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to offset the capital gains). The Tribunal highlighted that the speculative capital gain, had it been realised directly by the shareholder, would have resulted in a tax liability.

- **Absence of valid non-tax reasons that could justify the chosen path**

According to LuxCo, its shareholder intended to limit the "significant risks with regard to the work to be carried out and the uncertainty as to the possibility of finding a buyer at the desired price" by "reactivating" a dormant company to carry out the real estate investment.

However, the Tribunal found that these arguments were not sufficient to reverse the finding of the LTA's Director that the disputed transactions carried out by LuxCo constitute an abuse of law and that they are not motivated by considerations other than fiscal ones.

On this basis, the Tribunal concluded that all the conditions of the abuse of law provision (as applicable in fiscal year 2014) were met. Consequently, LuxCo's tax loss carry-forward was not available to compensate the capital gain realised upon disposal of the Luxembourg real estate property.

Assessment of the Decision of the Tribunal

It is undisputed that the legal identity of LuxCo did not change, irrespective of the lack of activity in the years 2009 until 2013. Moreover, absent a transfer of LuxCo's shares, the economic identity was not at stake despite LuxCo changing its activities. Thus, we are of the view that the LTA and the Tribunal were wrong when denying the availability of LuxCo tax loss carry-forward.

A different conclusion could only be reached if most, if not all, of the shares of LuxCo had been transferred to a new shareholder before the implementation of the new activity. This would be consistent with the decision of the Administrative Court of 2010 and the content of the subsequent Circular.

The abuse of law provision can only be applied in exceptional circumstances for avoiding the trade of corporate tax losses. On the contrary, the deduction of corporate tax losses may not be denied when the business activities of a Luxembourg company are reorganised or even completely changed by its shareholder for improving profitability.

Conclusion

The Tribunal held that the tax loss carry-forward of LuxCo could be denied by the LTA on grounds of the abuse of law provision. While there was no change in shareholders, the Tribunal seems to suggest that the economic identity was lost as (i) LuxCo changed its business activities, (ii) investments into real estate were not planned when incorporating LuxCo, and (iii) LuxCo was dormant for a few years before being "reactivated" for the investment into Luxembourg real estate.

However, LuxCo's tax loss carry-forward cannot be denied given that the legal identity remained unchanged, and the economic identity could not be lost absent a change in shareholders. Moreover, as all income of LuxCo is classified as commercial income, tax losses incurred in relation to holding activities may be used to offset capital gains realised upon disposal of the Luxembourg real property.

The Decision of the Tribunal created massive legal uncertainty in an area that was already a concern for many, as tax losses can only be considered final in the fiscal year which they are used in to offset taxable income (and accepted by the LTA). Ultimately, it remains to be seen whether the Administrative Court will reiterate long-standing case law, restore legal certainty and restrain the LTA that appear to excessively invoke the vague abuse of law provision to challenge taxpayers.

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Administrative Tribunal decides in case concerning classes of shares

OUR INSIGHTS AT A GLANCE

- On 14 June 2023, the Administrative Tribunal ruled on whether the use of classes of shares can be considered as an abuse of law.
- The transaction challenged by the tax authorities was the redemption by a Luxembourg company of the class "J" shares and the class "JJ" shares, respectively held by its two Russian individual shareholders, immediately followed by the cancellation of said shares.
- The Tribunal decided that the LTA was right to confirm the existence of an abuse of rights and, consequently, the application of a 15% withholding tax to the entire amount paid.
- Hereafter, we analyse the grounds on which the Tribunal considered the existence of an abuse and put this judgment into perspective with two other Luxembourg decisions concerning the redemption of classes of shares.

On 14 June 2023, the Administrative Tribunal (the "**Tribunal**") ruled on whether the use of classes of shares can be considered as an abuse of law. The transaction challenged by the tax authorities was the redemption by a Luxembourg company of the class "J" shares and the class "JJ" shares, respectively held by its two Russian individual shareholders, immediately followed by the cancellation of these shares.

In the case at hand, the Tribunal decided that the Director was right to confirm the existence of an abuse of law within the meaning of Paragraph 6 of the Tax Adaptation Law ("*Steueranpassungsgesetz*" or "**StAnpG**") and, consequently, the application of a 15% withholding tax to the amount of the redemption price of the shares exceeding their nominal value.

This article aims at providing a clear and concise overview of the judgment of the Tribunal and considers its potential implications notably taking into consideration previous Luxembourg case law on the topic.

Fact pattern of the case

On 22 April 2016, Company A (the Luxembourg taxpayer) transferred its registered office and central administration from Cyprus to Luxembourg. On the same day, Company A set its share capital in euros, divided into ordinary shares. Company A was held by two Russian individual shareholders, Mr. B and Mr. C.

From October until the end of 2017, Company A received several dividends from its wholly - directly and indirectly - owned subsidiary.

On 6 November 2017, i.e. concomitantly with the distribution of dividends received by Company A from its subsidiary, the two shareholders of Company A converted the ordinary shares into 20 classes of shares, all subscribed by the two shareholders themselves - Mr. B subscribed to the A to J share classes and Mr. C subscribed to the AA to JJ share classes. These share classes had no different economic rights amongst themselves. In addition, the rights and obligations of the shareholders remained identical to the ones existing prior to the introduction of share classes.

The Articles of Association of Company A, in their original version of 22 April 2016, were amended, on 6 November 2017 as follows:

- "*5.1 […] Les droits et obligations attachés aux parts sociales de chaque classe, comme défini dans les présents statuts, sont identiques, hormis dans la mesure où la loi ou les statuts prévoiraient autrement* " […] ;
- "*8.7. Dans le cas d'une réduction du capital social par le rachat et l'annulation d'une Classe de Parts Sociales (dans l'ordre prévu à l'article 8.6), cette Classe de Parts Sociales donne droit à ses détenteurs au prorata de leur participation dans cette Classe au Montant Disponible (dans la limite toutefois du*

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> *Montant Total d'Annulation tel que déterminé par l'assemblée générale des associés) et les détenteurs de parts sociales de la Classe de Parts Sociales rachetée et annulée recevront de la part de la Société un montant égal à la Valeur d'Annulation Par Part Sociale pour chaque part sociale de la Classe en question qu'ils détiennent et qui est annulée », les termes « Montant Disponible » étant définis comme englobant notamment « le montant total des bénéfices nets de la Société (y compris les bénéfices reportés)*".

On 29 December 2017, so less than two months after the introduction of the share classes but after receipt of dividends from its subsidiary, Company A repurchased and immediately cancelled the class J shares and the class JJ shares, using its distributable reserves. In accordance with the calculation method set out in the bylaws, the buy-back price enabled the extraction of Company A's net profits, i.e. substantially the amount of the dividends previously received from its subsidiary. The cancellation of the repurchased shares resulted in a subsequent reduction of Company A's share capital.

As from 2019, Company A adopted the status of a Luxembourg private wealth management company ("**SPF**" – *société de gestion de patrimoine familial*).

Argument of the tax authorities

The transaction challenged by the tax authorities was the redemption, by Company A, of the 25 class "J" shares and the 25 class "JJ" shares, each with the same par value, held respectively by its two Russian individual shareholders, immediately followed by the cancellation of these shares.

The tax authorities considered this transaction as an abuse of law on the grounds that:

- this transaction took place within a two-month period, during which the Company A (1) converted all its ordinary shares into 20-class shares subscribed by its two shareholders in equal shares and having the same par value as the ordinary shares, and (2) received dividends from its subsidiary; and
- said class "J" and "JJ" shares conferred the same legal and economic rights to its two shareholders and these rights were identical to the ones they would have enjoyed with the ordinary shares.

The tax authorities concluded that this transaction constituted a "repatriation" of profits to the two Russian shareholders, avoiding the 15% withholding tax applicable to dividend distributions.

The tax authorities did not argue that the acquisition price of the two classes of shares "J" and "JJ" was overstated and that the transaction had to be seen as a hidden dividend distribution (like in the case law n°42432 dated 27 January 2023 and commented in a previous article). In this case, the only argument of the tax authorities was that the transaction was an inappropriate way of "repatriating profits" to the shareholders of Company A and therefore the transaction should be treated as an abuse of law in accordance with § 6 StAnpG.

Ruling of the Tribunal

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

The Tribunal ruled that a redemption of a class of shares is, in principle, a transaction triggering a capital gain that is not subject to withholding tax. To that aim, the Tribunal reiterated the principle that all transactions between a company and its shareholder that affect the substance of the shares within the meaning of article 101 of the Luxembourg income tax law ("**LITL**"), including the repurchase of a shareholding by a company with a corresponding capital decrease, fall within the scope of article 101, (1) of the LITL (i.e. "proceeds of a disposal of the participation" within the meaning of article 100 of the LITL). According to the Tribunal, this characterisation applies to the present case insofar as the redemption of share classes by Company A gave rise to a reduction in its share capital corresponding to the nominal value of said shares.

However, the Tribunal considered that, in principle, this qualification does not preclude the application of the concept of hidden dividend distributions in the event that the price actually paid by the company to its shareholder for the repurchase of its shareholding exceeds the real value of this shareholding and where the overpricing is not justified by a valid economic reason but is solely explained by the

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existence of the shareholder relationship.

- **Implications**

The Tribunal ruled in accordance with the previous judgments of the Administrative Court dated 23 November 2017 and of the Tribunal dated 27 January 2023 dealing with the qualification of share class redemptions from a Luxembourg tax point of view.

In the present case, it was not even disputed by the tax authorities that the redemption of a class of shares was likely a transaction triggering a capital gain that is not subject to withholding tax, under the provisions of articles 97, paragraph (3) and 101 of the LITL.

Consequently, it should be accepted that the question of whether the repurchase of "a" shareholding referred to in article 101 of the LITL also includes the redemption of a class of shares, including from an investor who may hold other classes of shares, is no longer in doubt and can be taken as settled. A share class redemption is thus 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 classes will be crucial even though in most cases following the mechanism provided in the bylaws will lead to an arms length price.

The fact that the redemption of a class of shares would not be followed by a capital reduction should have no impact on that qualification. Indeed, in 2017, the Luxembourg Administrative Court held that the net proceeds received by a shareholder upon the redemption by a company of all or part of his/her shares without a corresponding cancellation of the shares so redeemed should not qualify as income from capital (i.e. dividend) falling in the scope of Article 97 of the LITL, but as income from the realisation of a participation (i.e. capital gain) falling in the scope of Article 100 of the LITL or Article 99bis of the LITL.

- **On the existence of an abuse of law**

The Tribunal then analysed whether the four criteria required to qualify a transaction as an abuse of law under § 6 StAnpG (version prior to the 2019 amendments) were met. Following an detailed reasoning, it concluded as follows:

First criterion: the use of forms and institutions of private law

This point was not challenged by the parties and the Tribunal concluded that the operation as described above in the facts met this first criterion.

> *In 2019, the Luxembourg abuse of law concept as defined in § 6 StAnpG was replaced by a new GAAR that keeps the key aspects of the previous abuse of law concept (according to which "the tax law cannot be circumvented by an abuse of forms and legal constructions") whilst introducing the concepts of the GAAR provided under ATAD. Under the new § 6 StAnpG as amended in 2019, this first criterion was replaced so that now "a transaction must be implemented using the legal forms and institutions". As the new version of § 6 StAnpG now targets any kind of abuse of legal forms and institutions (those of private and public law), we doubt that the Tribunal would conclude differently if it had to apply this new provision.*

Second criterion: the purpose of the arrangement is to obtain an elimination or a reduction of its tax charge

Company A argued, implausibly, that it did not seek tax savings of any kind and that a dividend distribution would also not have been subject to withholding tax notably on the basis of Article 147, point 3, of the LITL because Company A would qualify as a Holding29, and on the basis of Articles 10 and 23 of the Luxembourg/Russia Double Taxation Treaty ("**DTT**"). Secondly, according to Company A, the transaction would qualify as liquidation proceeds ("*produit de partage*") which, in any case, would not be subject to any withholding tax based on Article 97 of the LITL.

However, according to the Tribunal, the qualification of "*société de participations financière*", or "holding company" within the meaning of the 1929 law, which Company A relied on, was repealed by a law of 22 December 2006 - ten years before the tax year at stake. In addition, it was common

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ground that Company A was not one of the qualified entities referred to in Article 147, point 3 of the LITL, including the status of an SPF, a status it adopted only as of the 2019 tax year – two years after the tax year at stake. Finally, it was common ground, according to the Tribunal, that the two shareholders of Company A were individuals who could not therefore benefit from a reduced rate, or an exemption, based on the DTT.

On the contrary, the Tribunal considered that if, in the course of 2017, Company A had made a dividend distribution to its two partners in respect of their original ordinary shares, such payment would have been subject to a withholding tax of 15% in accordance with Article 10 of the DTT and Articles 146, 148 and 156 of the LITL.

By carrying out the repurchase and cancellation of the two classes of shares "J" and "JJ", the two shareholders received, in an undisputed manner, a certain amount without withholding tax in Luxembourg, given that it follows from the concordant explanations of Company A and the tax authorities that the income generated by the challenged transaction does not qualify as income from movable capital, but as miscellaneous net income (i.e. "proceeds of a disposal of the participation").

As a result, such income falls within the scope of the provisions of Article 13 (Capital Gains) of the DTT attributing exclusive taxing rights to the Russian Federation in its capacity as the country of residence of the "transferor", in this case the two shareholders of Company A, and thus excluding any taxation in Luxembourg.

In addition, according to the Tribunal, neither the entirely theoretical arguments about the company's competence to decide on the distribution of dividends, interim dividends, or share buybacks, nor the fact that the disputed transaction was validly decided by the board of directors or that it would have complied with the principle of equal treatment of associates, are of such a nature as to influence the question of the existence of a tax saving within the meaning of § 6 StAnpG.

Finally, the fact that the shareholders would have been taxed in Russia on a capital gain (which was not proven in the case at hand) and created a double taxation that should be solved by Russia in application of Article 23 of the DTT, would not call into question the possibility for Luxembourg to exercise its taxing powers in accordance with the DTT, nor to exclude the existence of a possible abuse of rights within the meaning of § 6 StAnpG. In this respect, it would be interesting to understand whether the conclusion of the Tribunal would have been the same if it was proven that the shareholders suffered an effective taxation in Russia of at least 15%, and thus that their global tax bills – and not solely their Luxembourg tax bills - have not been reduced.

On the basis of this finding, the Tribunal concluded that the purpose of the transaction was to avoid or a reduce the tax charge.

Under the new version of § 6, the Tribunal would have to assess whether the main or one of the main purposes of the challenged transaction is to obtain a circumvention or a reduction of the tax burden against the purpose of the tax law. The circumvention or reduction of the tax burden is assessed by comparing the tax burden resulting from the legal route used with that which would be due if the non-genuine legal route were not taken into account, which is exactly what the Tribunal has done. Thus, it is unlikely that the Tribunal would have concluded differently on the existence of a circumvention or a reduction of the tax burden, if it had to apply the new version of § 6 StAnpG.

Third criterion: the use of an inappropriate "path"

With regard to the criterion relating to the use of an inappropriate path, it is settled case law that purely unusual forms, constructions or operations of private laws are not in themselves considered inappropriate, in view of the taxpayer's freedom, in principle, to opt for the least taxed route ("*choix de la voie la moins imposée*"). To be inappropriate, the path must achieve an economic objective in a given economic context in such a way as to allow a tax effect to be obtained which the legislator cannot be considered to have intended to grant in the context of an application of the tax law consistent with their intention. It would cover the case of a taxpayer who did not use the means that the legislator would have

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considered typical to achieve defined economic objectives, but chose other means to achieve them, means that reasonable parties would not have used given the circumstances of the case insofar as they did not conform to generally accepted approaches, i.e. not typical.

According to the tax authorities, the transaction was set up for the sole purpose of "repatriating profits" from Company A to its two shareholders instead of distributing a dividend, which would have been the appropriate way to choose in the absence of any tax considerations. The tax authorities concluded that the transaction was an inappropriate path on the grounds that the shares divided into 20 classes, including the disputed "J" and "JJ" classes, would be characterised by an absence of economic advantages between them and compared with the former ordinary shares. In addition, there was a temporal connection between the conversion of the shares into 20-class shares, the prior receipt of dividends from the subsidiary and the redemption of the "J" and "JJ" classes for a corresponding amount.

The Tribunal confirmed that conclusion taking into consideration the following facts:

- the 20 classes of shares subscribed by each of the two shareholders were indistinguishable in terms of the legal and economic rights;
- the reduction of the share capital following the cancellation of a class of shares entitled the shareholders, in proportion to their holding in that class, to an identically determined amount, irrespective of the class of shares and the selling shareholder concerned;
- the "J" and "JJ" class shares granted the same legal and economic rights to the two shareholders of Company A from the date of their creation until the date of their redemption and neither Company A nor its two shareholders had any intention to attribute different legal and economic rights to the newly created share classes;
- Company A's articles of association provided, in their versions of 22 April 2016, 6 November 2017 and 29 December 2017, that the right of each shareholder in the assets and profits of Company A was proportional to the number of shares held in the share capital;
- by subscribing to "J" and "JJ" class, the shareholders of Company A retained the same legal and economic rights as the ones they enjoyed in respect of their ordinary shares; and
- by simultaneously purchasing said shares of classes "J" and "JJ", each representing 25 shares, followed by their cancellation and a corresponding reduction in its share capital up to their par value, Company A proceeded to a proportional and equal reduction in the shareholding of its two shareholders, and correlatively of their respective rights in its share capital.

The above facts led the Tribunal to conclude that the two shareholders of Company A had neither an intention to withdraw completely from the share capital of the Company nor a desire to withdraw partially. As a result, the challenged transaction could not be seen as an act of disposal affecting the substance of their shareholding in Company A since they have not lost any right to a portion of the specified source of underlying income from their investment in Company A's capital. The Tribunal considered thus that the transaction constituted, from an economic point of view, a distribution of dividends.

It seems thus that the criteria based on which the Tribunal assessed the economic character of a share class redemption was notably the intention of shareholders to withdraw completely, or partially from the share capital of the company buying back its shares. It also assesses whether the transaction can be seen as an act of disposal affecting the substance of the asset sold (i.e. the shareholding); i.e. whether the shareholder lost any right to a portion of the specified source of underlying income from its investment in the company's capital.

The Tribunal did not identify expressly the temporal connection between the conversion of the shares into 20-class shares, the prior receipt of dividends from the subsidiary and the redemption of the "J" and "JJ" classes for a corresponding amount as a criterion based on which the path used constituted a distribution of dividends from an economic point of view. At most, the Tribunal considered that the transaction reflects the intention of Company A to transfer dividends received less than two months before to its shareholders.

As it did not address the point, it is unclear whether another

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conclusion would be reached if the timing between the receipt of dividends and the share classes redemption was different (i.e. longer). It probably would not as it does not influence, as such, the economic character of the share classes buy-back which only refers to the legal and economic characteristics of the classes of shares bought back (i.e. equal share of shareholdings bought-back, identical legal and economic rights, etc.) in order to determine whether the transaction is a dividend distribution from an economic point of view.

Regarding Company A's assertion according to which no tax savings would be recognised based on the premise that the challenged transaction would not generate income from movable capital in accordance with article 97, paragraph 3, point d) of the LITL, the Tribunal decided, by reference to the parliamentary work regarding article 97 of the LITL, that the particular circumstances in which Company A set up the classes of shares and subsequently redeemed the "J" and "JJ" classes correspond precisely to a situation in which the legislator intended to exclude the classification as capital gain for a transaction which, at first glance be qualified as such, but which, in fact, turns out to be a "disguising of a profit distribution".

As a result, the Tribunal concluded that Company A used an inappropriate "path".

Even if not clearly stated by the Tribunal, we cannot exclude that the temporal connection was taken into consideration to assess whether the path used by Company A was inappropriate, as well as the fact that Company A itself had indicated that the transaction was financed by "distributable reserves recorded as a result of dividends received in 2017" and the notes to the company financial statements mentioned: "*Therefore, [an] amount of EUR ... from the Profit of 2017 was distributed to each of the Shareholders of the company*".

Indeed, the Tribunal refers to "particular circumstances" of the case and thus to the challenged transaction as a whole. However, as it did not clearly express the point, it is unclear whether another conclusion would be taken if the timing between the creation of the shared classes, receipt of dividends and the share classes redemption was different (i.e. longer).

Similarly, would the conclusion be different if only part of the distributable reserves recorded as a result of dividends received in 2017 was used to finance the transaction? Probably not if the transaction can be seen as a "disguising of a profit distribution" which is the situation in which the legislator intended to exclude the classification as capital gain and intended to treat the payment as a dividend distribution from a tax point of view.

Under the new version of § 6 StAnpG, the Tribunal would have to assess whether the main or one of the main purposes of the challenged transaction is to obtain a circumvention or a reduction of the tax burden against the purpose of the tax law. As the Tribunal confirmed the tax authorities' position according to which the challenged transaction, to be classified in principle as a capital gain, was set up for the sole purpose of "repatriating profits", instead of distributing a dividend subject to a 15% WHT, which would have been the appropriate way to choose in the absence of any tax considerations, and that in the case at hand, it corresponds precisely to a situation in which the legislator intended to exclude the classification as capital gain, it is unlikely that the Tribunal would have concluded differently, if it had to apply § 6 StAnpG in its new version.

Fourth criterion: the absence of non-tax reasons justifying the use of the chosen "path"

To justify the transaction, Company A invoked the freedom to choose "*la voie la moins imposée*" and argued that the use of share classes is a technique known and used in the Grand Duchy of Luxembourg. In addition, Company A mentioned that the decision to repurchase the "J" and "JJ" classes of shares followed by their cancellation would fall within the scope of its financial management policy and its freedom of investment, as well as the one of its shareholders.

Company A also argued that the economic objective of this legal operation could not be reduced to purely fiscal considerations and that any decision relating to a company's investment and financial management policy would be justified by the desire to derive a real and sufficient economic advantage in the future through the reduction, increase or reorganisation of invested capital.

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However, the argument that the profits were "repatriated" on the grounds that Company A had not planned to reinvest these funds in accordance with its investment policy, which it had the intention to reorganise, did not convince the Tribunal notably because no evidence of any investment or financial management policy was presented and Company A's only corporate purpose consisted essentially in holding of shareholdings.

Finally, the Tribunal considered that any decision relating to investment policy and financial management would not demonstrate *ipso facto* the existence of a real and sufficient economic advantage, given that it is precisely the economic reality of the challenged transaction that is called into question by the tax authorities. To justify the use of the chosen "path" with non-tax reasons, it is not sufficient to "simply" state economic reasons but concrete proof of the existence of these economic reasons must be provided, which Company A was not able to do.

Thus, the Tribunal concluded there was an absence of non-tax reasons justifying the use of the chosen "path". As a result, the Tribunal confirmed the position of the tax authorities and confirmed that the challenged transaction was an abuse of law within § 6 StAnpG.

Under the new version of § 6 StAnpG, the Tribunal would have to assess whether the legal route used has been non-genuine, i.e. not put in place for valid commercial reasons, and, for that purpose, the Tribunal would have to assess whether the commercial reasons highlighted by the taxpayer are real and of sufficient economic benefit to the taxpayer beyond the mere tax benefit obtained. In the case at hand, it corresponds precisely to the analysis made by the Tribunal.

Implications

In our view, this case law may be interpreted positively when it comes to the redemption of a class of shares with specific economic rights tracking specific underlying investments, which should be considered as a capital gain and therefore not subject to Luxembourg withholding tax. In such a case, it is unlikely that the redemption of a class of shares would not be seen "as a desire of the taxpayer to divest an underlying investment".

Based on the current case law, it should be ensured that the repurchase of a class of shares can be seen as an act of disposal affecting the substance of the shareholding in the taxpayer. For that purpose, shareholders should lose the "right to a portion of the specified source of underlying income from their investment in the taxpayer's capital". The articles of incorporation should be carefully reviewed when classes of shares are implemented, notably on the different legal and economic rights of each share class.

In addition, when the redemption of share classes is seen as a distribution of dividends from an economic point of view, circumstances in which the taxpayer sets up and subsequently redeemed classes of shares should not correspond to a situation in which the legislator intended to exclude the classification as capital gain for a transaction which, in fact, turns out to be a "disguising of a profit distribution" and thus be seen as an abuse of law.

For that purpose, various criteria which could positively or negatively influence the analysis of the redemption of a class of shares as an act of disposal affecting the substance of the shareholding should be taken into account. Please find below certain characteristics and circumstances that, based on the current case law, taxpayers should consider when setting up share classes: on the left, characteristics and circumstances that may raise the attention of the tax authorities - on the right, characteristics and circumstances that should reduce the risk of successful challenge by the tax authorities.

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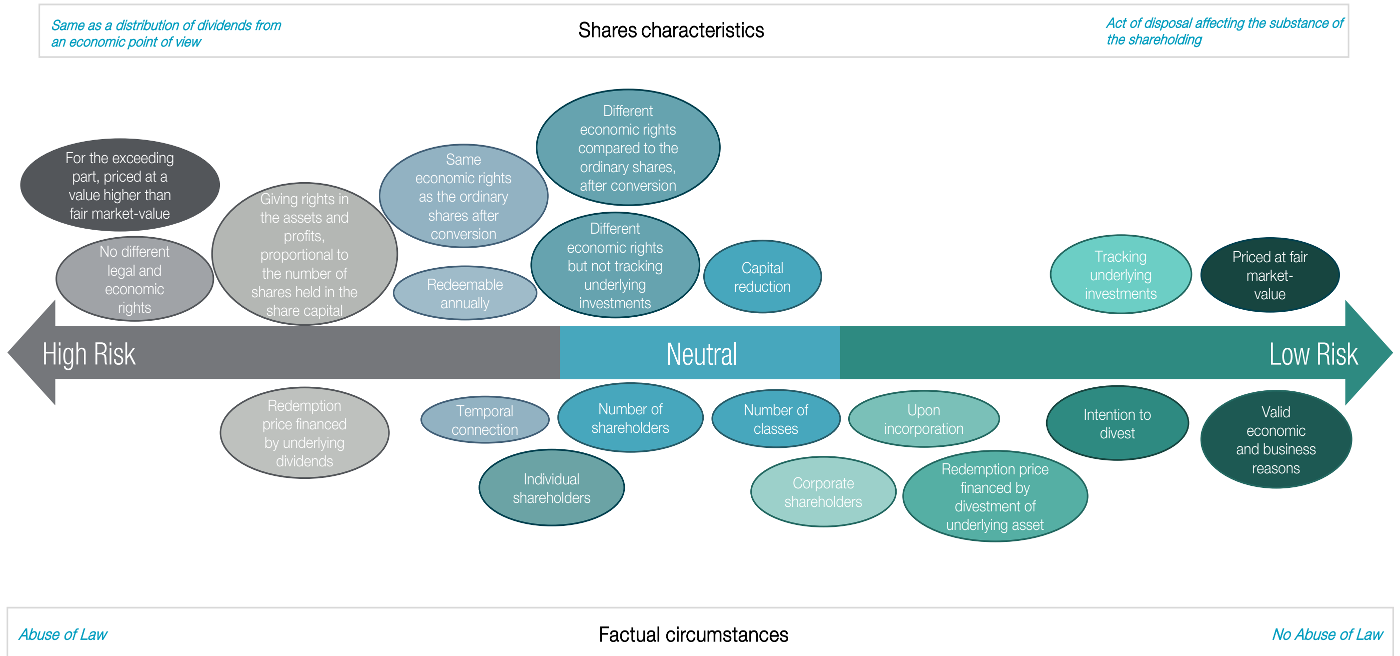
Risk analysis of a share classes redemption based on relevant characteristics and circumstances



No single characteristic or circumstance should be considered as decisive in itself. The analysis of the economic characteristics of classes of shares and whether the set-up and the use of these shares is abusive will need to be analysed on a case-by-case basis. However, share classes structures tracking underlying investments should be "on the safe side" when the redemption price of the shares is set up in the by-laws at fair market-value and the transaction is justified by valid commercial reasons.

Additionally, classes of shares themselves should ideally be used for the repatriation of irregular cash flows to the shareholders (for example, a refinancing or a partial exit) and should ideally not be used for the repatriation of ordinary dividends from underlying investments. In the latter case, there is a risk that the transaction could be seen as the "disguising of a profit distribution" subject to Luxembourg withholding tax.

Conclusion

The decision of the Tribunal reiterates that a share class redemption should, in principle, be treated as a disposal of shares from a Luxembourg tax point of view and therefore should not be subject to Luxembourg withholding tax. In light of the three cases on the subject, this tax classification of the redemption of a class of shares should now be taken as settled law and should not raise any more controversy, which is positive regarding legal certainty for taxpayers.

In this case, the Tribunal also provides us with the first detailed analysis as to whether the use of share classes could be considered as an abuse of law for tax purposes in Luxembourg. In this respect, it should not be overlooked that the present case was very particular and involved some unfavorable facts such as the issuance of share classes without different economic rights, the short time between the creation of the classes of shares and the redemption of the first classes of shares, and the absence of genuine economic reasons for the transaction, which may have led the Tribunal to decide as it did. Even if it might be difficult to derive a definitive conclusion with respect to the risk of abuse of law in the case of classes of shares and their redemption on the basis of this sole ruling, one can nevertheless draw certain lessons from it.

The redemption of classes of shares was assessed taking into account their terms and conditions, as well as the context in which they are set up and their redemption occurs. In this respect, in our view, the current case law should be interpreted positively when it comes to the redemption of a class of shares, in particular with respect to share classes that

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are equipped with specific economic rights tracking certain underlying investments. The intention to divest, whether at shareholder level or in relation to an underlying investment, should also be considered favorably when it comes to the redemption of a class of shares.

Taxpayers have to carefully draft the articles of incorporation when classes of shares are implemented and review the existing share classes structures. 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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EU Commission's Initiatives in Corporate Tax Matters: State of play

OUR INSIGHTS AT A GLANCE

- EU Member States Governments, tax authorities and taxpayers are facing very busy and challenging times. They have to adapt to constantly evolving tax rules and constantly increasing reporting obligations.
- The proposal for a Directive to prevent the misuse of shell entities for tax purposes, i.e. the Unshell Directive proposal, is still under discussion at EU level and, despite positive political statements, nobody is sure when these discussions will end and whether the EU Member States will ever manage to reach an agreement.
- Uncertainties regarding the Unshell Directive proposal led the EU Commission to suspend its initiative on "enablers" of tax evasion and aggressive tax planning, called SAFE.
- The EU Commission also decided to suspend the examination of the Debt-Equity Bias Reduction Allowance (DEBRA) Directive Proposal and it is expected that the project will be kept on hold in the coming months.
- Nonetheless, additional Directive proposals are still in the pipeline, such as the one on Business in Europe: Framework for Income Taxation, i.e. BEFIT, which will introduce a new framework for EU corporate taxation.
- Hereafter, we provide an overview of the state of play of these various EU corporate tax initiatives and asses their chances to succeed in the near future.

With the Directive on ensuring a global minimum level of taxation for multinational and large-scale domestic groups in the Union ("**Pillar2**") in the process of being implemented in EU Member States, the 7th Directive on administrative cooperation in tax matters ("**DAC7**") now in force and "**DAC8**", EU Member States Governments, tax authorities and taxpayers are facing very busy and challenging times. They have to adapt to constantly evolving tax rules and constantly increasing reporting obligations.

Still, the times of changes are far from over. Other tax initiatives are in preparation at EU level and the release of additional draft directives (such as the one on Business in Europe: Framework for Income Taxation ("**BEFIT**"), which will introduce a new framework for EU corporate taxation) is coming closer. A new proposal for a Directive on Faster and Safer Relief of Excess Withholding Taxes has been released and some ongoing proposals are still under review at EU level (such as the Proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes, the "**Unshell**" Directive Proposal).

We will provide an overview of the state of play of these various EU direct tax initiatives and assess their chances of success 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 in 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).

During the French Presidency (January - June 2021), the Czech Presidency (July - December 2022) and the Swedish Presidency of the Council of the EU (January - June 2023), the technical analysis of the proposal was carried out during various meetings of the Working Party on Tax Questions - Direct Taxation ("**WPTQ**"). However,

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as indicated in the Economic and Financial Affairs Council ("**ECOFIN**") report to the European Council on tax issues on 16 June 2023, while the objective of the Swedish Presidency was to make as much progress as possible on this file, focusing inter alia on finding accurate substance criteria and tax consequences, no agreement has been reached among the EU Member States so far.

The ECOFIN report indicates that some progress was made on a number of controversial issues, such as the scope, criteria of minimum substance, tax consequences and tax residency certificate. It indicates further that the Working Party on Tax Questions (High Level) ("**HLWP**") provided guidance for further work on these and also other outstanding issues. Still, further discussions will be needed in order to find compromise solutions on these outstanding issues, also with the common objective to limit administrative burdens for both taxpayers and tax administrations. Delegations of the different EU Member States stressed the interlinkages between different parts of this complex Directive, meaning that an orientation chosen in one part of the Directive might influence the solution in other parts. This probably explains the difficulties encountered to find an agreement. Indeed, what Member States consider appropriate criteria for being a shell entity depends, to some extent, on what the tax consequences of being classified as a shell entity are, and vice-versa.

On 12 July 2023, the Unshell Directive Proposal was discussed at the European Parliament. Many MEPs criticised the Council for "blocking" the file, despite the overwhelming support that this proposal got from the Parliament. Others raised concerns about "red tape" and administrative burdens for tax authorities and law-abiding businesses. The Spanish Presidency has indicated that reaching agreement on the Unshell Directive Proposal is a priority for them and they hope to be able to do so at the ECOFIN meeting in November 2023.

Nevertheless, the fact that technical discussions are ongoing does not mean that EU Member States will manage to agree on all pending issues so the final outcome of this proposal is still uncertain at this stage and we recommend that taxpayers should still rather adopt a "wait and see" strategy before taking any definitive action.

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

When the Unshell proposal was adopted, 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)". The results of this survey were published on 31 January 2023. We summarised these results in our article "EU Commission's initiatives in direct tax matters: state of play" released in our April 2023 ATOZ Insights.

While the European Commission initially planned to adopt the SAFE Directive proposal on 7 June 2023, the Commission finally backed off. Since the SAFE initiative is a follow-up initiative to the Unshell Directive Proposal, which did not evolve as quickly as initially expected by the Commission (no agreement reached so far and still discussions ongoing on several aspects), the Commission has decided to indefinitely postpone the release of the SAFE Directive proposal. Therefore, the timing of the release (if any) will depend on the progress of the negotiations of the Unshell Directive Proposal in the coming months.

At this stage, even though it has been communicated that the SAFE Directive proposal is technically ready, there is still too much uncertainty regarding the proposal (and there will probably not be any SAFE Directive proposal if no agreement can be reached on the Unshell Directive Proposal) and its potential content, to assess its chances of success. However, should the SAFE initiative finally move forward, it can be expected that it will give rise to controversial discussions amongst the EU Members States, considering that Member States already have a very comprehensive toolbox to tackle

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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.

The BEFIT initiative

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. 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.

On 8 May 2023, the European Commission published the report "Public consultation on the "Business in Europe: Framework for Income Taxation – BEFIT" initiative: Factual Summary Report". The report summarises the online contributions made by stakeholders during the public consultation process.

According to the report, almost two thirds of the public consultation survey respondents (50/77) agree or strongly agree that the current situation with 27 different national corporate tax systems gives rise to problems in the internal market. Most of them are business associations, companies and some EU citizens. Respondents who disagree or strongly disagree with the problem (7/77) come from the field of business associations and companies. In our view, the figures reflected in the report, which the European Commission generally uses as a tool to support its actions, should be considered with great care: while 7 out of 77 does not seem to be representative of the opinion of the majority, one should keep in mind that a business association is one single voice representing a lot of interested parties. Many stakeholders, and often the big players, have decided not to contribute to the public consultation on their own but preferred to contribute via the business associations they belong to.

The respondents who do not agree that the current situation with 27 different national corporate tax systems gives rise to problems, and are therefore of the opinion that no EU action is needed, consider the existing regulation sufficient and state that businesses around Europe are already used to the current system. Moreover, they underline that BEFIT could add complexity and costs and cause additional disputes while the European Commission is of the view that its action will bring some simplification. As far as the aim of the BEFIT initiative is concerned, the report indicates that according to the respondents, the three most important objectives of a new corporate tax framework should be: the growth of business activity in Europe (20/77), the attractiveness for investors due to a more competitive single market and greater legal certainty within the EU. Approximately 30% (25/77) considered that raising higher tax revenues should be the least important objective of a new corporate tax framework. The summary report then presents the view of the public on the main features of BEFIT and the different options presented by the Commission to introduce BEFIT.

A draft Directive is expected to be released during the third quarter of 2023. The tentative agenda of the European Commission, as released on 17 May 2023, indicates that the European Commission is expected to adopt a Directive proposal on BEFIT on 12 September 2023. However, this remains to be confirmed (as the planning in terms of release of draft Directives often evolves). As far as the chances of success of BEFIT are concerned, as mentioned in our previous article "EU Commission's initiatives in direct tax matters: state of play" released in our April 2023 ATOZ Insights, a number of factors speak against the subsequent rapid adoption of the BEFIT proposal: the project looks very much like a remake of the CCCTB which was initially released in 2011 and was re-launched in 2016, but which EU Member States have never managed to agree on during the 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

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tax matters, which was one of the main factors causing the CCCTB proposal to fail. And if it might be argued that since Member States have accepted the principle of formulary apportionment by signing up to Pillar One, accepting "CCCTB" by another name is a totally different question.

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 of an allowance on increases in equity for corporate income tax purposes 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).

As mentioned in our previous article "EU Commission's initiatives in direct tax matters: state of play" released in our April 2023 ATOZ Insights, by the end of 2022, it was decided to suspend the examination of the DEBRA proposal in order to, if appropriate, reassess it within a broader context only after other proposals in the area of corporate income taxation announced by the Commission have been put forward. Since then, no development has occurred, and it can be expected that the project will be kept on hold in the coming months and years.

Implications

Over the past few months, the ongoing initiatives of the European Commission in corporate tax matters have evolved. While for some of them, the evolution came as expected (the SAFER Directive Proposal was released), for some other projects, more time will be needed than initially anticipated by the EU for Member States to manage to agree unanimously - if they ever manage to do so (the Unshell Directive Proposal). Because the introduction (vs. the non-introduction) of tax changes at EU level is the result of negotiations and discussions among all EU Member States, it is important for taxpayers to closely follow these developments so as to anticipate, if needed, the implementation of these changes and their potential impacts on their situations and investments. Finally, more is yet to come given the ongoing work at OECD level on the so-called Pillar One agreement, which aims to provide for the reallocation of a share of the residual profits of the largest and most profitable multinational enterprises to end market jurisdictions where goods or services are used or consumed. While negotiating the practical implementation of the agreement is taking more time than initially expected at OECD level, the EU is currently not willing to consider any further measures on the digital sector, while the OECD's Pillar One is in preparation or in place.

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The FASTER EU Directive proposal: Real simplification of withholding tax refund procedures or just new additional reporting and due diligence obligations for financial intermediaries?

OUR INSIGHTS AT A GLANCE

- On Monday 19 June 2023, the European Commission published the Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes, i.e. FASTER, in order to tackle the current particularly burdensome withholding tax refund procedures for cross-border investors in the EU and, at the same time, the risks of tax abuse related to refund procedures.
- The Proposal aims at creating EU digital tax residence certificates that should ease the withholding tax refund procedures.
- Standardised reporting obligations will also be introduced for certified financial intermediaries in order to provide national tax administrations with the necessary tools to check eligibility for the reduced rate and to detect potential abuse.
- A relief at source system and a quick refund system will be introduced as two fast-track procedures complementing the existing standard refund procedure to relieve any excess withholding tax that can be withheld by a Member State on dividend or interest income paid on shares or bonds traded publicly to non-resident investors. The new systems of relief will be assorted with new due diligence obligations for certified financial intermediaries.
- We describe hereafter the implications and downsides of the Proposal.

On Monday 19 June 2023, the European Commission published the Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (hereafter "**FASTER**" or "**the Proposal**"). With this new initiative, the Commission aims to tackle the current particularly burdensome withholding tax refund procedures - which differ amongst Member States - for cross-border portfolio investors in the EU and, at the same time, the risks of tax abuse related to refund procedures revealed notably by the Cum/Ex and Cum/Cum scandals.

This Proposal aims at creating:

- EU digital tax residence certificates;
- Standardised reporting obligations for financial intermediaries to provide national tax administrations with the necessary tools to check eligibility for the reduced rate and to detect potential abuse; and
- Two fast-track procedures, assorted with new due diligence obligations, complementing the existing standard refund procedure to relieve any excess withholding tax that can be withheld by a Member State on dividend or interest income paid on shares or bonds traded publicly to non-resident investors.

We describe hereafter the implications of the Proposal.

EU digital tax residence certificate

Member States will be required to issue an EU digital tax residence certificate within one working day from the submission of a request. The certificate will notably be used by investors, as adequate proof of residence, to reclaim multiple WHT refunds and will replace the paper-based procedures currently applicable.

A common EU digital tax residence certificate ("**eTRC**") is to be introduced by all Member States in order, mainly, to streamline WHT procedures. It will identify the recipient of a payment subject to WHT (dividend or interest) and confirm its tax residency according to the relevant Member State's national rules[1].

[1] The following information shall be included: (a) the first and last name of the taxpayer and the date and place of birth, if the taxpayer is an individual, or its name and its European Unique Identifier number (EUID), if the taxpayer is an entity; (b) tax identification number; (c) address of the taxpayer; (d) date of issuance; (e) the covered period; (f) identification of the tax authority issuing the certificate; (g) any additional information that may be relevant where the certificate is issued to serve

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Nonetheless, the eTRC will be available to all persons that are resident for tax purposes in a Member State and the eTRC can be used to serve purposes other than relief of withholding tax under this Proposal. Indeed, the Proposal allows Member States to add onto the issued eTRC any additional information that may be relevant to serve purposes other than relief of withholding tax under this Proposal, or information required to be included in a tax residence certificate under EU law.

Provided that no exceptional circumstances occur justifying a delay, Member States will be required to issue an eTRC within one working day. To meet this requirement, a fully automated system to issue the eTRC should be implemented by Member States which allows for requests via an online portal accessible to taxpayers and parties authorised thereby (e.g. financial intermediaries requesting the eTRC on behalf of their clients).

Member States shall recognise the eTRC as adequate proof of residence of the recipient of an income in another Member State. According to the Proposal, the eTRC should cover at least a full calendar year - but could also cover a longer period depending on the concept of tax residence and internal decision of each Member State. Nevertheless, if the circumstances at the end of the year do not support the content of the eTRC issued during that year, such eTRC can be deemed not valid by the issuing Member State and any other Member State concerned.

Member States' National Registers

National Registers of certified financial intermediaries which are large institutions that handle payments of dividends from publicly traded shares (and bonds), as well as central securities depositories that provide WHT agent services for the same payments, will have to be established by Member States.

Member States will have to establish a national register ("**National Register**") of Certified Financial Intermediary ("**CFI**"). A Certified Financial Intermediary is a financial intermediary which meets the requirements of relevant EU regulations and is supervised for compliance therewith.

All large institutions as defined in the Capital Requirements Regulation (i.e. credit institutions and investment firms) that perform custodial activities and, in this context, handle payments of dividends from publicly traded shares originating in their jurisdictions to Registered Owners who are resident for tax purposes outside that Member State, as well as central securities depositories that provide withholding tax agent services for the same payments, will have to register, as CFI, with their National Register. However, Member States can also opt to use the National Register in relation to payments of interest from publicly traded bonds. Payments in relation to non-publicly traded shares or bonds are not in the scope of the Proposal.

The Proposal also aims at tracing payment flows until the final investors through the chain of financial intermediaries, and therefore defines certain reporting and due diligence obligations regarding Registered Owners. "**Registered Owner**" means any natural or legal person that is entitled to receive dividend or interest income from securities subject to tax withheld at source in a Member State.

Non-EU and smaller EU financial intermediaries may join the National Register on a voluntary basis. In this regard, it is expected that registration should be with the Member States their clients have investments in. Non-EU financial intermediaries can, however, not be certified if they are located in a jurisdiction listed on the EU list of non-cooperative jurisdictions for tax purposes or on table I of the Annex to Delegated Regulation (EU) 2016/1675 identifying high-risk third countries with strategic deficiencies.

Financial intermediaries that do not comply with registration requirements may be subject to penalties. In addition, only Registered Owners engaged with financial intermediaries that are certified to provide those services will benefit from the systems of relief described in the Proposal.

purposes other than relief of withholding tax under this Directive or information required to be included in a tax residence certificate under EU law.

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Obligations of CFIs

Standardised reporting obligation

Through the standardised reporting obligation of CFIs, tax authorities will receive, within specific timelines, a relevant set of information allowing them to assess the eligibility of Registered Owners applying for a reduced WHT rate and to trace potential tax abuse situations.

CFIs will have to report a relevant set of information to the competent authority within specific timelines. For that purpose, the Proposal lays down a common set of reporting elements in Annex II, providing national tax administrations with the necessary tools to check eligibility for the reduced rate and to detect potential abuse. Nevertheless, information regarding application of anti-abuse measures described in Heading E of Annex II (i.e. information about the holding period of underlying securities and information about Financial Arrangements linked to the securities for which the taxpayer is requesting relief) does not need to be reported when the total dividend paid does not exceed EUR 1000 or if the information relates to interest payments.

Each CFI will have to report only on the part of the transaction that is visible for it, i.e. from whom it is receiving the dividend/interest and to whom it is paying the dividend/ interest. Thus, national tax administration will have all the information needed to reconstruct the financial chain of the transaction from the investor to the securities' issuer. The information required should be limited to information that is crucial for the tracing and identification of the chain of intermediaries and hence of the income flow from the issuer of the security until the final recipient, i.e. the sole investor or Registered Owner, and therefore useful to prevent risk of fraud or abuse, to the extent that such information is available to the reporting intermediary.

The reporting will take place via a standardised XML format scheme. The timeline to report the information comprised in Annex II is 25 days[2] at the latest from the record date, which is the date at which the issuer of a security checks its records to identify securityholders eligible for a dividend or interest payout.

Financial intermediaries that are not under an obligation to register as a CFI and have not opted to register as such, do not have reporting obligations under this Proposal. Nevertheless, information on the payments handled by such intermediaries that are not CFIs remains relevant and may be considered necessary by a Member State, at its discretion, to ensure transparency and to allow for the proper reconstruction of the payment chain before applying the relief procedures set out in this Directive (relief at source or quick refund). Therefore, Member States may request that CFIs obtain this information from such non-CFI and report accordingly for the relief procedures laid out in this Directive to be applicable.

CFIs that do not comply with registration requirements may be subject to penalties.

Request of systems of relief by CFIs

Complementing the existing standard refund procedure, two fast-track procedures, assorted with conditions and new due diligence obligations, will make the relief process faster and more harmonised across the EU. Member States will be able to choose which one to use – including a combination of both.

The Proposal allows Member States to choose between (or to combine both) two fast-track procedures complementing the existing standard refund procedure: a quick refund system (Option 1) and/or a relief at source system (Option 2).

Taking into account the different approaches in Member States, two types of procedures are envisaged: (i) relief at source by direct application of the appropriate tax rate at the time of withholding and (ii) quick refund within a maximum

[2] "As soon as possible after the record date, unless a settlement instruction in respect of any part of a transaction is pending on the record date, in which case the reporting for that transaction shall take place as soon as possible after the settlement. If 20 days after the record date, settlement is still pending for any part of the transaction, certified financial intermediaries shall report within the next 5 calendar days indicating the part for which settlement is pending".

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of 50 days of the date of payment of the dividend or, as the case may be, of the date when the bond issuer has to pay interest to the bond holder (coupon date).

No matter the option chosen, a CFI maintaining the investment account of a Registered Owner will request the benefit of the system of relief, on behalf of such Registered Owner,

- if the latter has authorised the CFI to request relief on its behalf; and
- if the CFI has performed due diligence duties to verify and establish the Registered Owner's eligibility to a reduced WHT rate. Such verification may also include a risk assessment that takes into account the credit risk and fraud risk.

Due diligence obligations

When requesting tax relief at source or quick refund on behalf of Registered Owners, CFIs will have to verify these Registered Owners are eligible for the reduced WHT rate and the absence of certain Financial Arrangements linked to the securities and which could create a risk of Cum/Cum or Cum/eEx scheme.

According to the Proposal, when requesting tax relief on behalf of the Registered Owners, CFIs will have to put in place adequate procedures to ensure these Registered Owners are eligible for the refunds.

For that purpose, CFIs will need to collect a statement from the Registered Owners indicating that they are the beneficial owners of the paid dividend (or interest) and that they have not engaged in a Financial Arrangement linked to the underlying publicly traded share that has not been settled, expired or otherwise terminated at the ex-dividend date, which is the date as from which the shares are traded without the rights flowing from the shares, including the right to participate and vote in a general meeting, where relevant (i.e. in this respect, "**Financial Arrangement**" refers to any arrangement or contractual obligation whereby any part of the ownership of the publicly traded share, on which a dividend is paid, is or could be, either permanently or temporarily transferred to another party).

CFIs will also have to collect the eTRC of the Registered Owner, and/or appropriate proof of residence in a non-EU country, and will have to verify this information against their own records. CFIs will need to collect certain information from Registered Owners, including a declaration that they are the beneficial owners of the income and the absence of certain Financial Arrangements linked to the securities and which could create a risk of cum/cum or cum/ex. One aspect particularly interesting of the Proposal is that CFIs will also have to verify, based on the investor's specific circumstances, (1) the Registered Owner's entitlement to a specific reduced withholding tax rate in accordance with a double tax treaty between the source Member State and the jurisdictions where the Registered Owner is resident for tax purposes or specific national legislation of the source Member State, and (2) the possible existence – and thus not the existence as such but only the potentiality - of any Financial Arrangement involving the underlying securities that has not been settled, expired or otherwise terminated at the ex-dividend date, unless the dividend paid to the Registered Owner for each group of identical shares held does not exceed EUR 1000.

At this stage, the scope of the verification required is, however, unclear. Should CFIs perform a complete legal and tax analysis of the situation of the Registered Owner, or would a "reasonable" verification be sufficient? Moreover, taking into consideration legal uncertainties around the single notion of "beneficial owner" for which there is neither a legal definition nor a unanimous and constant case law defining that notion, on which basis could CFIs verify the entitlement to a specific reduced WHT rate?

In this respect, the burden put on CFIs seems heavy taking into account on the one hand uncertainties attached to the due diligence duties requested and on the other hand the financial sanction that could be applied. The Proposal states indeed that CFIs should be held liable for tax revenue losses that have been incurred due to the inadequate fulfilment of these due diligence obligations, to the extent that national law of the Member State where the loss incurred so provides.

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- **Option 1: Relief at source system**

Under this option, CFIs maintaining a Registered Owner's investment account will be allowed (or will be required) to request relief at source on behalf of such Registered Owner by providing the withholding tax agent with the tax residence of the Registered Owner and the applicable withholding tax rate on the payment in accordance with a double tax treaty or specific national legislation.

Under this option, the correct amount of taxes is applied at the time of the dividend or interest payment directly without any further action required. CFIs are supposed to have verified the eligibility for a reduced WHT rate in advance.

- **Option 2: Quick refund system**

Under this option, CFIs maintaining a Registered Owner's investment account will be allowed to request a quick refund of the excess withholding tax on behalf of such Registered Owner, if some information is provided by the CFIs at the latest within 25 calendar days from the date of payment of the dividend or interest.

For that purpose, CFIs will have to identify the dividend or interest payment at stake, the legal basis of the applicable withholding tax rate and total amount of excess tax to be refunded, the tax residence of the Registered Owner and provide the Registered Owner's declaration according to which he is the beneficial owner of the paid dividend (or the interest) and he has not engaged in a Financial Arrangement.

In such situation, the initial payment is made taking into account the withholding tax rate of the source Member State, but the refund for any overpaid taxes, including late payment interest if applicable[3], is made within 25 days from the date of the request or from the date reporting obligations under this Proposal have been met by all relevant CIFs, whichever is the latest. This should take place within 50 calendar days from the date of payment.

Non application or limitations to the application of the systems of relief

Each Member State is allowed to limit the benefit of the systems of relief to low risk taxpayers and exclude the benefit of such systems to specific situations.

Each Member State needs to ensure that at least one of the two systems is available to all investors when the conditions set out by this Proposal are met. Nevertheless, within these two systems Member States have the discretion, for instance, to only allow low risk taxpayers to request relief at source whilst other taxpayers can only request a quick refund.

In addition, Member States may exclude the benefit of systems of relief under the Proposal where at least one of the financial intermediaries in the securities payment chain is not a CFI and a subsequent CFI in the chain has not provided to the competent authority the information that the financial intermediary should report under this Directive if it were a CFI. Member States may also exclude the benefit of systems of relief under the Proposal when a full exemption of the withholding tax is claimed (as opposed to the application of a reduced rate). It will be interesting to note whether this choice is made by Members States, and how the additional review and checks of the requester's eligibility will translate in practice. In any case, the objectives of the Proposal do not raise hope of any ease of the current applicable relief system experienced by private equity structures and non-listed securities for which it sometimes takes several years to recover excess WHT and which are subject to more and more questions on the beneficial ownership of payments and on the application of anti-abuse rules.

Moreover, systems of relief under the Proposal are never provided where the dividend has been paid on a publicly traded share that the Registered Owner acquired within a period of two days before the ex-dividend date or when the

[3] At a rate equal to the interest or equivalent charge applied by the Member State to late payments of income tax by Registered Owners, or, if the national legislation of the Member States does not include such provision, at the Euro short-term rate plus 50 basis points or the equivalent interest rate used by their Central Bank plus 50 basis points, if they are not part of the European Exchange Rate Mechanism.

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dividend payment on the underlying security for which relief is requested is linked to a Financial Arrangement that has not been settled, expired or otherwise terminated at the ex-dividend date.

Where the relief at source and quick refund systems set out in this Proposal do not apply, the standard refund procedure will be applied, where the taxpayer or its appointed representative, which does not necessarily have to be a financial institution, are able to directly request a refund from the tax authority.

Implications

The Proposal should simplify WHT relief procedures but creates new heavy reporting and due diligence duties on CFIs with a potentially high degree of liability.

We welcome the Proposal since it has the potential to simplify withholding tax relief procedures and to improve withholding tax procedures for non-resident portfolio investors to the extent it should facilitate cross-border investment within the EU. We especially welcome the introduction of the eTRC, its broad scope of application and the very short deadline in which tax authorities will have to provide it.

Nevertheless, this Proposal creates new heavy reporting and due diligence duties on CFIs with a potentially high degree of liability. At this stage we can, however, already note that, as the systems of relief apply only at the request of the recipient of the dividend (or interest) payment and as the due diligence duties must be performed when the systems of reliefs are requested, if the recipient of the dividend (or interest) payment does not authorise the CIF to request a relief on its behalf, such CIF does not have to perform the due diligence duties to verify and establish the recipient's eligibility.

The Proposal guarantees that all investors can benefit from at least one of the two standardised systems, as long as they meet the conditions set out in the Proposal, but if the CFI concludes that they do not meet the eligibility condition it can thus refuse to request the benefit of a system of relief on behalf of a Registered Owner. However, it is not clear at this stage whether CFIs could refuse, for any reason, to apply the systems of relief, notably when the verification required is not possible or their liability could be engaged. In the latter case, the CFI could also be exempt from the due diligence duties to verify and establish the recipient's eligibility.

In any case, notwithstanding that CFIs must perform a due diligence verification to request the benefit of the relief at source system or the quick refund system on behalf of the Registered Owner of a security, it appears nowhere that the due diligence conclusions of the CFIs on the non-eligibility of a Registered Owner for a reduced WHT rate should be communicated to the tax authorities. In such a case the systems of relief would not apply and the Registered Owner or its authorised representative could still request a refund of the excess withholding tax, under the condition that they provide, if required, at least the information required under Annex II, heading E (i.e. information about the holding period of underlying securities and information about Financial Arrangements linked to the securities for which the taxpayer is requesting relief) to the competent authorities.

Next steps

The Proposal is now in the hands of the Council of the EU and the EU Parliament. Once adopted, the Proposal should be implemented into national legislation by 31 December 2026 and should come into force on 1 January 2027.

If you have any questions about the practical impact of this new draft regulation, please do not hesitate to contact us.

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Refunds of WHT – European court decision on discrimination of Luxembourg Specialised Investment Fund

OUR INSIGHTS AT A GLANCE

- On 27 April 2023, an important decision was issued by the CJEU striking down a German law according to which a Specialised Investment Fund existing under the laws of Luxembourg is considered partially liable for corporate income tax on German real estate income.
- According to the Court, Article 63 TFEU must be interpreted as precluding legislation of a Member State under which income received from non-resident specialised property funds is subject to corporate income tax, whereas resident comparable vehicles are exempt from such tax.
- Hereafter, we provide you with an analysis of this decision and assess its practical implications.

A few weeks ago, an important decision was issued by the Court of Justice of the European Union (the "**Court**") striking down a German law according to which a Specialised Investment Fund ("**SIF**") existing under the laws of Luxembourg is considered partially liable for corporate income tax on German real estate income (Case C-537/20 from 27 April 2023).

Background

The request for preliminary ruling was filed by the German Bundesfinanzhof ("**Federal Finance Court**"). The claimant in the main dispute was a Luxembourg domiciled closed-end investment fund - a Luxembourg SIF set up as an FCP in the case at hand ("**the Fund**") with only two institutional investors. In the course of 2008 to 2010, the Fund received rental income and realised capital gains from the properties it held in Germany. In July 2013, the Fund filed corporate income tax returns in Germany for these years in respect of its limited (non-resident) liability to corporate income tax, but stated that, in its view, it should not be liable for corporate income tax in the same way as comparable domestic resident vehicles.

The responsible tax office considered that the exemption available to resident funds can not be applied to foreign funds and issued their assessment with this regard. After appeals to the Munster Finance Court and the Federal Finance Court, a referral was made to the Court.

Legislation in place

According to the German Law applicable at the time, in general, the transparency principle applies i.e. income received by the investors in a domestic fund would be liable to tax and not the vehicle itself. In this way, it is ensured that the income is only taxed once. The investors must pay tax even in cases when the income is retained by the fund. Since the aim is to ensure effective taxation of the income received, this rule is not applied in cases where the investors are exclusively non-residents in Germany. In such cases, although the tax is attributable to the investors, the fund would levy 25% WHT on its distributions. This exclusion is implemented to prevent tax avoidance via investments through German resident funds. However, technically, a domestic specialised property fund would not be subject to tax but levy it on behalf of its foreign investors.

However, a comparable foreign specialised fund is taxed at the level of the fund and cannot benefit from the exemption described above.

The German Investment Tax Act was amended in 2018 with the effect that both domestic and foreign investment funds are now, in principle, subject to corporate income tax in accordance with Sec. 6 German Investment Tax Act. Consequently, there should be no more discrimination against the freedom of movement of capital from 2018.

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Question referred

The question asked by the Federal Finance Court is whether the applicable German legislation was a restriction contrary to Art. 63 of the Treaty of the Functioning of the European Union ("**TFEU**") and if a restriction existed, could it be justified.

Analysis of the CJEU

For the first part of the question, the Court took a methodical approach, analysing first the existence of a restriction of the free movement of capital as provided by Art. 63 TFEU, then analysing the comparability of the Fund and German resident funds.

With regards to the existence of the restriction of the free movement of capital, the Court noted that while resident specialised property funds are exempted from CIT, non-resident funds, such as the Fund, are not able to benefit from this exemption. The taxation of German investors by a German fund can not justify this restriction, as the possibility to benefit from the exemption at fund level is not conditioned upon the actual taxation of all the income at the hands of the investors. Moreover, as the purpose of the transparency principle is to ensure that the income is only taxed once, if the investors in the Fund were German residents, the income would have been taxed twice (once at the level of the Fund and second time at the level of the investors). Therefore, the Court concluded that the legislation in question constitutes a restriction of the free movement of capital.

The CJEU also analysed the comparability of the Fund and German resident specialised property funds.

The principle that has been repeatedly established in CJEU jurisprudence is that a non-resident fund should be entitled to the same tax treatment as a resident fund if it can prove that it is comparable to a resident fund.

The distinguishing criterion within the German legislation in question is solely the place of residence of the Fund. The Court clearly states that the exceptions to the freedom of movement of capital are to be interpreted strictly. Therefore, discrimination, purely based on residency, is not acceptable. While drawing their conclusions, the Court also analysed if the restrictions resulting from the German legislation could be justified under Art. 65 (1)(a) TFEU[1] as well as related jurisprudence of the Court.

The Court again systematically analysed the arguments brought up by the German Government (firstly, the need to preserve the coherence of the national tax system and, secondly, the need to preserve a balanced distribution of taxing power between the States).

With regards to the first argument, the CJEU noted that such argument can be accepted if a direct link between the tax advantage and a specific tax levy can be drawn. While the CJEU leaves it to the referring court to analyse this matter, a particular point of attention could be whether all investors in the resident specialised property funds are always taxed with no possibility for an exemption. However, we understand that certain categories of German investors (notably certain pension funds) are exempted from this income tax on real estate income, so we would expect the referring court to find that there is no direct link.

With regards to the second argument (a balanced distribution of taxing power between the States) the Court referred to the previous issued decision in the *AllianzGI-Fonds AEVN* case (C-545/19) and recalled that such a restriction can be justified if the restriction in question is aimed at protecting the exercise of the taxing right of the Member State. This can not, however, be the case if the Member State chooses not to tax the comparable resident vehicles in the first instance. Therefore, as in previous cases (notably Fidelity

[1] The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

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Funds and Others, C-480/16), the Court did not accept this argument.

Conclusion

As a conclusion, according to the Court, Article 63 TFEU must be interpreted as precluding legislation of a Member State under which income received from non-resident specialised property funds is subject to corporate income tax, whereas resident comparable vehicles are exempted from such tax.

Although the decision is positive for the taxpayer, it should be noted that wide application to all pending cases might not be possible. In particular, the comparability of each fund in question to a German resident specialised property fund needs to be assessed as well as the specific circumstances of each dispute.

A decision from the referring court following this should shed even more light on the situation.

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Additional guidance from the Luxembourg VAT authorities on the provision of company cars

OUR INSIGHTS AT A GLANCE

- In its QM case, the CJEU ruled that the provision of a company car by an employer to an employee against remuneration should be considered as the hiring of a means of transport and be subject to VAT in the country where the employee resides.
- Further to this case, the Luxembourg VAT authorities issued a new circular mainly to give details on the determination of the taxable basis that should be subject to VAT when employers provide company cars to their employees.
- Hereafter, we detail the content and the potential impact of this circular.

Background

- **The CJEU case C-288/19**

In its QM v. Finanzamt Saarbrücken case (C-288/19), the Court of Justice of the European Union ("**CJEU**") ruled that the provision of a company car by an employer to an employee against a remuneration should (i) be considered as the hiring of a means of transport and (ii) be subject to VAT in the country where the employee resides.

In particular, the CJEU stated that the provision of a car by an employer qualifies as the long-term hiring of a means of transport when:

(i) the provision of the car is made against a rent (i.e. in the form of a payment from the employee to the employer, the retention of a part of the employee's salary or the renunciation by the employee of other benefits),
(ii) the car remains at the disposal of the employee who can use it for private purposes, and
(iii) the employee has the right to use the car for a period exceeding 30 days.

On the contrary, when the provision of the car does not involve a payment from the employee, a salary retention nor the renunciation of some benefits, such car provision is not to be seen as made against remuneration and therefore should not be considered as a VAT taxable supply of a means of transport.

- **Circular n° 807**

Further to the QM case, the Luxembourg VAT authorities issued circular n°807 on 11 February 2021, mainly reiterating the principles that emerge from the case law. Three different scenarios were identified:

- When a company car is exclusively put at the disposal of an employee against a remuneration (as defined by the CJEU) for a period exceeding 30 days, the employer should be considered as supplying a means of transport for a long term and the place of supply of such service is the country where the employee resides. If this country is Luxembourg, the employer has to charge Luxembourg VAT on the leases. If the employee resides in another EU member State, this would likely trigger a VAT registration obligation for the employer in that country in order to comply with local VAT obligations[1]. The Luxembourg VAT authorities added that the taxable basis of such supply corresponds to the rent paid to the employer;
- When a company car is not put at the disposal of an employee against a remuneration, but the employer (partially) deducts the input VAT incurred on the

[1] Or the registration and the payment of the VAT through the VAT One Stop Shop (OSS).

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acquisition/leasing of the car, the employer should declare the portion of the use of the car made for private purposes as a private use of company assets (i.e. use for purposes other than those of its business) in its VAT returns. In such case, the taxable basis corresponds to the percentage of private use of the car applied to the amount of expenses related to the car which the employer was in a position to (partially) deduct input VAT for;

- When there is no consideration paid by the employee and when the employer did not deduct any input VAT with respect to the acquisition/leasing of the car, the supply to the employee should fall outside the scope of VAT.

It is important to note that following that circular, important uncertainties remain, notably as to whether the Luxembourg VAT authorities or foreign VAT administrations would require adjustments to be made for the past.

Circular n° 807 bis

On 28 April 2023, the Luxembourg VAT authorities issued a second circular intending to clarify the application of the first circular published in 2021.

The new circular provides details on the determination of the taxable basis that should be subject to VAT. By referring to the concept of "open market value" between unrelated parties, the circular states that the taxable basis of the rents should correspond to at least its "normal" economic value (i.e. the costs incurred by the employer to provide the car to the employee).

In a scenario where the company car is leased by the employer from a leasing company, the taxable basis of the rent to the employee should correspond to at least the rent paid to the leasing company by the employer, together with any additional expenses incurred by the employer in order to put the car at the disposal of its employee.

In the scenario where the employer has acquired the car, the normal value of the supply cannot be less than the depreciation value of the car computed over a period of five years, together with any additional expenses incurred by the employer (maintenance, repairs, etc.).

In case the company car is also used for business purposes, the circular clarifies that the normal value of the supply to the employee should be reduced in due proportion to the business use, meaning that the taxable basis should only reflect the private use of the car.

As well as the clarifications on the taxable basis of the rents, the circular addressed the potential regularisations to be made for the past. In that respect, the circular specifies that when a Luxembourg employer is required to charge VAT retroactively on the rents, notably in another jurisdiction, a corresponding adjustment could be undertaken in Luxembourg for the years not covered by the period of limitation (five years).

Conclusions

Companies providing company cars to Luxembourg and/or non-Luxembourg resident employees should carefully review on a case-by-case basis the leasing contracts concluded in order to determine whether VAT has to be charged on the rents and if regularisations are required in Luxembourg and in the neighbouring countries.

We would be happy to help you have a clearer view on this matter and to assess the impact of this CJEU decision and circulars on your business.

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Retrospective of key regulatory developments in the first half of 2023

OUR INSIGHTS AT A GLANCE

- The regulatory landscape in both Europe and Luxembourg underwent significant developments in the first half of 2023. The ELTIF 2.0. aiming to enhance the effectiveness and attractiveness of long-term investment funds within the EU became effective.
- The MiCA Regulation was adopted, officially marking the launch of a harmonised regulatory framework for the crypto-asset market for the first time in the world.
- The Law modernising legal framework pertaining to Luxembourg investment funds was adopted, with the objective to further enhance Luxembourg's position as a leading global hub for investment funds by streamlining and improving the regulatory framework.

During the first half of 2023, Luxembourg consistently strengthened its regulatory framework to maintain its allure as a prime destination for businesses and investors. At European level, those six months saw notable advancements in the regulatory environment, focused on bolstering legal efficiency, transparency, investor protection and sustainable finance.

ELTIF 2.0

The new regulation relating to the European Long-Term Investment Fund ("**ELTIF 2.0**")[1] was published in the Official Journal of the European Union on 15 March 2023. It became effective on 9 April 2023, with the revised regime set to apply from 10 January 2024.

The ELTIF 2.0 reform aims to enhance the effectiveness and attractiveness of long-term investment funds within the European Union. ELTIFs are investment vehicles designed to facilitate financing for projects requiring long-term capital, such as infrastructure development, real estate and other productive sectors.

The ELTIF 2.0 reform introduces several key changes to the existing ELTIF framework:

- wider range of eligible investments and clearer definition of real assets;
- structuring opportunities for master-feeder structures and fund-of-fund strategies;
- amended thresholds in portfolio composition and diversification requirements;
- lighter requirements for retail investors.

Overall, the ELTIF 2.0 reform strives to promote long-term investments, boost economic growth and support sustainable development within the European Union. By expanding the investment opportunities, enhancing transparency and simplifying regulations, the reform aims to create a more conducive environment for long-term investment funds and attract a broader range of investors. This is of particular importance for Luxembourg, given its recognised leadership in the European fund industry.

MiCA

On 16 May 2023, the European Council formally adopted

[1] Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements, the borrowing of cash and other fund rules, *OJUE*, L 80/1, 20 March 2023 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0606

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the long-awaited regulation on markets in crypto-assets ("**MiCA**"), officially marking the launch of a harmonised regulatory framework for the crypto-asset market for the first time in the world. The framework applies to both traditional institutions of the financial sector and new players emerging in the crypto ecosystem.

MiCA aims to establish a harmonised regulatory regime that promotes investor protection, market integrity and financial stability while fostering innovation in the crypto-asset industry. MiCA applies to various types of crypto-assets, including cryptocurrencies, utility tokens and stablecoins, regardless of whether they are centralised or decentralised. The regulation sets out requirements for issuers, service providers and trading platforms operating within the EU.

However, MiCA expressly excludes a number of crypto-assets from its scope, notably:

- crypto-assets that qualify as financial instruments within the meaning of MiFID II[2];
- crypto-assets representing services or physical assets that are unique and not fungible with other crypto-assets, including digital art and collectibles, product guarantees and real estate;
- digital assets issued by central banks acting in their monetary authority capacity, including central bank money in digital form or crypto-assets issued by other public authorities, including central, regional and local administrations.

Under MiCA, crypto-asset issuers must comply with disclosure obligations, providing comprehensive information to potential investors regarding the asset, its underlying technology, the associated risks and the costs and charges linked to their operations. They are also required to meet capital requirements, ensuring that they have adequate financial resources to support their operations and safeguard investors' interests.

Additionally, MiCA introduces a new concept of "crypto-asset service providers" ("**CASPs**") that offer services such as exchanging, transferring and safeguarding crypto-assets on behalf of clients. CASPs are subject to authorisation and extensive regulatory requirements, including measures to prevent money laundering and terrorist financing, and shall meet strict operational and security standards to protect clients' assets.

Overall, MiCA aims to create a comprehensive and consistent regulatory framework for crypto-assets across the EU. By implementing these rules, the European Commission intends to foster investor confidence, mitigate risks and support the development of a well-regulated and competitive digital finance market in Europe.

Law modernising Luxembourg investment funds

On 11 July 2023, a new law to modernise the Luxembourg legal framework pertaining to investment funds, specifically amending the SICAR Law[3], the SIF Law[4], the AIFM Law[5] and the RAIF Law[6], was adopted (the "**Law**").

The objective of this legislation is to further enhance Luxembourg's position as a leading global hub for investment funds by streamlining and improving the regulatory framework.

The Law encompasses several key measures, including:

- Extension of legal corporate forms available for Part II UCIs;
- Decrease of the minimum investment threshold for well-informed investors from EUR 125,000 to EUR 100,000;
- Extension of the timeframe provided to achieve the minimum regulatory capital from 12 to 24 months for SICARs, SIFs and RAIFs, and from 6 to 12 months for Part II UCIs.

[2] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJUE, L 173/349, 12 June 2014.
[3] Law of 15 June 2004 relating to the investment company in risk capital.
[4] Law of 13 February 2007 relating to specialised investment funds.
[5] Law of 12 July 2013 on alternative investment fund managers.
[6] Law of 23 July 2016 on reserved alternative investment funds.

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These measures aim to facilitate the operations of investment funds in Luxembourg by providing greater flexibility and adaptability to market conditions. By modernising the legal framework, Luxembourg strives to attract and retain investment fund managers and investors, reinforcing its status as a prominent player in the global investment fund industry. As far as ELTIFs and PEPPs are concerned, the Law added them to the list of funds and investments benefiting from the subscription tax exemption in the framework of the latest action plan of the Capital Markets Union by which the European Commission has encouraged Member States to put in place national tax incentives to accompany the emergence of these European products.

Conclusion

The regulatory landscape in both Europe and Luxembourg underwent significant developments in the first half of 2023. These initiatives not only solidify Luxembourg's position as a premier global hub for investment funds, but also ensure that the jurisdiction continues to be appealing to fund managers and investors alike. The progressive regulatory measures implemented during this period enhance transparency, investor protection, legal certainty and sustainable finance, making Luxembourg an attractive destination for businesses and investors seeking a robust and secure environment. These advancements further establish Luxembourg's leadership in the European fund industry and contribute to its ongoing success as a preferred choice for international fund activities.

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