ATOZ

TAX ADVISERS LUXEMBOURG

INSIGHTS

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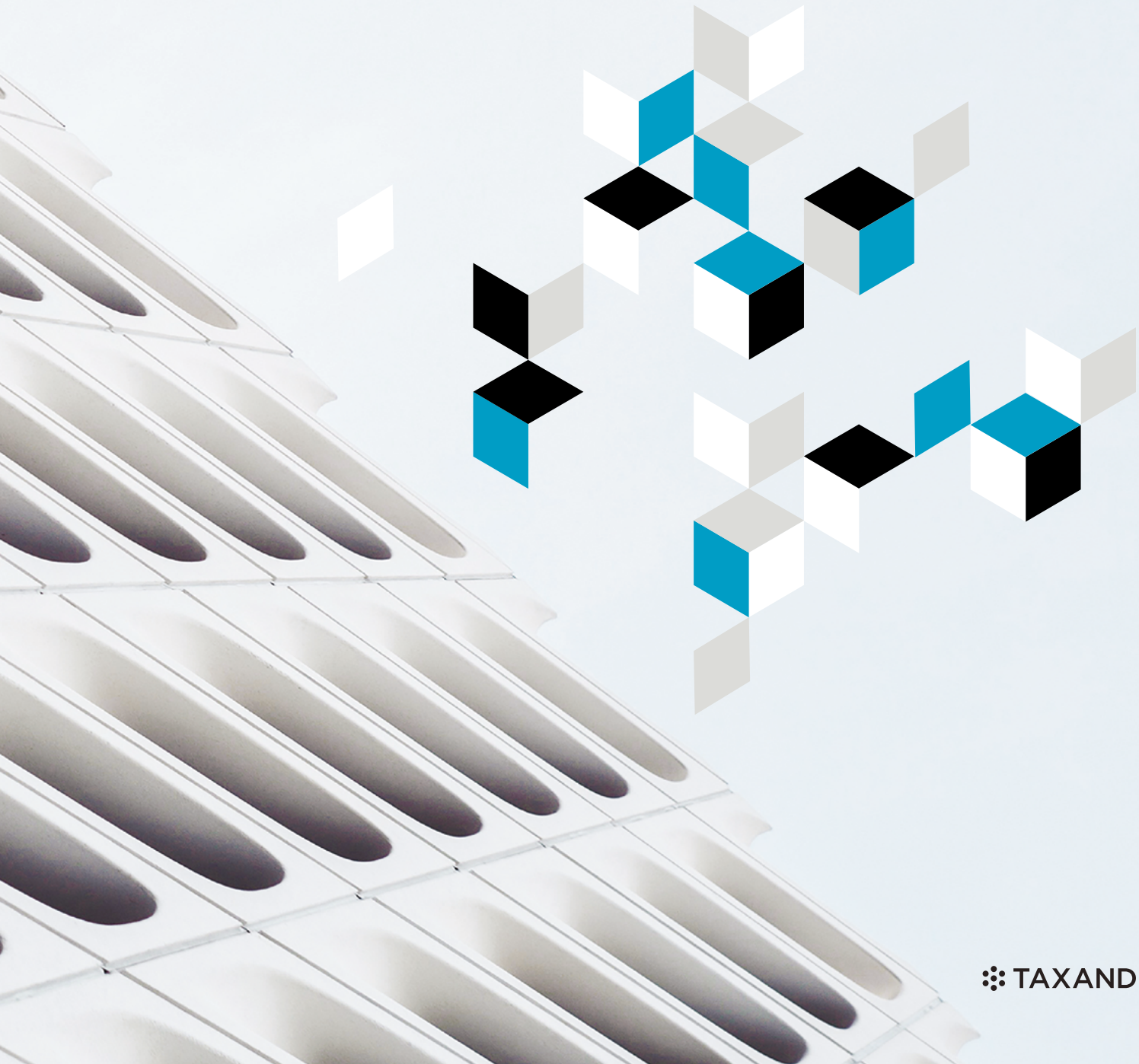

TAXAND

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EDITORIAL

Greetings,

Even if the health crisis is not yet behind us, social and economic life is restarting after the unprecedent lockdown we all encountered.

In this context, many measures have been introduced by the Luxembourg government to support families and businesses. One of the latest was passed by the Parliament on 22 July 2020. It aims to introduce a 6-month deadline extension for reporting under the mandatory disclosure regime applicable to tax intermediaries and a 3-month deadline extension for reporting under both the Common Reporting Standards ("CRS") and the Foreign Account Tax Compliance Act ("FATCA"). We detail the new deadlines for reporting.

The Luxembourg legislation governing CRS and FATCA in Luxembourg was also amended -non-related to the COVID crisis- as regards rules on exchange of information with effect as of 1 January 2021. We also describe these changes.

On 8 June 2020, a draft law to implement the Directive modifying the VAT rules on cross-border B2C sales was submitted to the parliament. The new rules will considerably modify the compliance obligations applicable to businesses involved in e-commerce. We consider the implications of these new rules.

At the level of the European Court of Justice ("CJEU"), the CJEU recently ruled on the Luxembourg tax consolidation regime and took a very positive decision for Luxembourg corporate taxpayers. We analyse this decision and its consequences for the Luxembourg taxpayers.

On 2 July 2020, the CJEU also took a decision in the so-called Blackrock case that could have a significant impact on the VAT position of fund managers. We analyse this decision and its potential impacts.

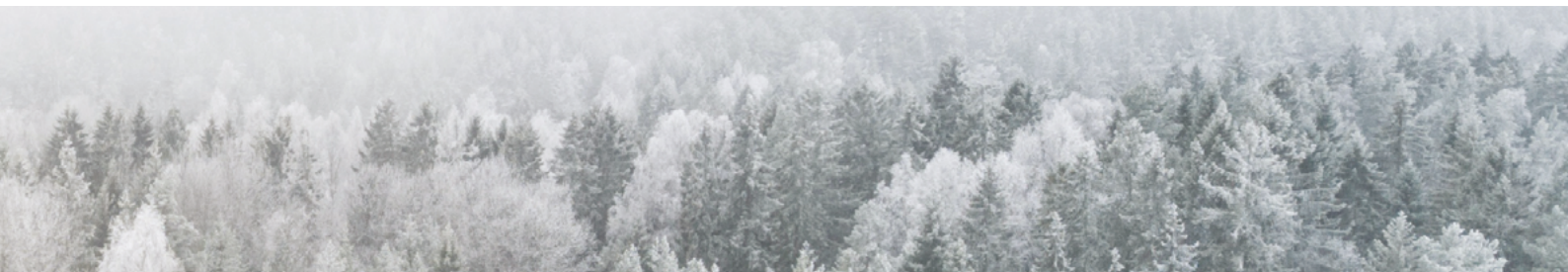
On the same date, Advocate General Juliane Kokott also gave an interesting opinion on questions referred by the Administrative Court of Luxembourg in relation to the Luxembourg rules on exchange of information upon request and their compatibility with EU law. We outline the reasoning of the Advocate General.

From a legal point of view, on 12 December 2019, a European Directive amending the rules as regards cross-border conversions, mergers and divisions was published. The Directive entered into force on 1 January 2020 and Member States are now required to bring their national law in line with the Directive by 31 January 2023. We describe the new rules introduced at European level.

We hope you enjoy reading our insights.

Stay safe.

The ATOZ Editorial Team



COVID-19: Luxembourg extends deadlines for DAC6, CRS and FATCA reporting

OUR INSIGHTS AT A GLANCE

- On 22 July 2020, the draft law which implements the optional deadline extensions of EU Directive of 24 June 2020 amending the EU Directive on Administrative Cooperation to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic was passed by the Parliament.
- The draft law introduces mainly a 6-month deadline extension for reporting under the mandatory disclosure regime applicable to tax intermediaries ("DAC6") and a 3-month deadline extension for reporting under both the Common Reporting Standards ("CRS") and the Foreign Account Tax Compliance Act ("FATCA").
- As soon as the legislative procedure related to the draft law will be finalised, the DAC6, CRS and FATCA deadline extensions will enter into force retroactively on 30 June 2020.
- No penalties for late reporting under the aforementioned reporting frameworks will apply in the meantime.

On 22 July 2020, the draft law implementing the optional deadline extensions of EU Directive of 24 June 2020 (the "Directive") amending the EU Directive on Administrative Cooperation to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic was passed by the Parliament. The draft law introduces mainly a 6-month deadline extension for reporting under the mandatory disclosure regime applicable to tax intermediaries ("DAC6") and a 3-month deadline extension for reporting under both the Common Reporting Standards ("CRS") and the Foreign Account Tax Compliance Act ("FATCA").

New DAC6 deadlines

The draft law implements the optional 6-month deadline extensions of the Directive for reporting and exchanging information under DAC6 and amends the law of 25 March 2020 implementing DAC6 accordingly. As a result, the following reporting and exchange of information deadlines will apply:

- The **30-day reporting period** applicable to reportable cross-border arrangements made available for implementation, ready for implementation, or where the first step in their implementation has been made between 1 July 2020 and 31 December 2020 shall **begin on 1 January 2021**.
- The first quarterly reporting of **marketable arrangements** shall be performed by **30 April 2021**.
- The **10-day deadline** applicable to the notification to be made by intermediaries subject to professional secrecy in respect of reportable cross-border arrangements made available for implementation, ready for implementation, or where the first step in their implementation has been made between 1 July 2020 and 31 December 2020 shall **begin on 1 January 2021**.
- Reportable arrangements the first step of which was **implemented between 25 June 2018 and 30 June 2020** have to be reported by **28 February 2021**.
- The first automatic exchange of information will have to be performed by the Luxembourg tax authorities by **30 April 2021** at the latest.

New CRS deadlines

The draft law implements the optional 3-month deadline extension of the Directive for exchanging information related

to calendar year 2019 and introduces a 3-month deadline extension for reporting under CRS. The law of 18 December 2015 implementing CRS is amended accordingly.

As a result, the following reporting and exchange of information deadlines will apply for reporting information related to calendar year 2019:

- Luxembourg Reporting Financial Institutions will have to submit their reports in relation to calendar year 2019 by **30 September 2020** at the latest (instead of 30 June 2020).
- The Luxembourg tax authorities will have to communicate until **31 December 2020** (instead of 30 September 2020) to the competent authorities of Reportable Jurisdictions the reportable information related to calendar year 2019. The draft law does not make any distinction between EU (thus, covered by the Directive) and non-EU Reportable Jurisdictions.

New FATCA deadlines

The draft law introduces a 3-month deadline extension for reporting under FATCA in relation to calendar year 2019 and amends the law of 24 July 2015 implementing FATCA accordingly.

As a result, Luxembourg Reporting Financial Institutions will have to submit their reports in relation to calendar year 2019 by **30 September 2020** at the latest (instead of 30 June 2020).
According to the FATCA Agreement between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg, information shall be exchanged by Luxembourg within 9 months following the end of the calendar year to which the information relates (i.e. the 2019 calendar year information must be exchanged by 30 September 2020 at the latest). In order to adapt the latter deadline for the calendar year 2019 information, a formal notification through diplomatic channels will be made by Luxembourg, taking notably into account the US Internal Revenue Service's recent announcement to grant such extension.

Additional measures

The draft law introduces some amendments to the recent law of 12 May 2020 addressing the extension of deadlines in fiscal, financial and budgetary matters in the context of the state of the crisis.

- Statutes of limitations

The draft law amends slightly the wording of the law of 12 May 2020 in order to specify that statutes of limitations ending on 31 December 2020 **included**, are extended to 31 December 2021 **included**.

In addition, the draft law extends the 3-year statute of limitation applicable to **property taxes** ending on 31 December 2020 to **31 December 2021**. This extension relates to the 2017 property taxes.

- Privileges and guarantees

The draft law amends the law of 12 May 2020 in order to clarify that the privileges and guarantees provided for by the provisions of the amended law of 27 November 1933 concerning the collection of direct taxes whose effects cease on **31 December 2020** (instead of before 31 December 2020) are extended to 31 December 2021. For further information on the

measures introduced by the law of 12 May 2020, please click here and read our ATOZ Alert: COVID-19 crisis: New draft law to extend deadlines in fiscal matters.

Next steps and implications

The proposed deadline extensions aim only to respond in a detailed and limited manner to the practical difficulties generated by the COVID-19 crisis and do not intend to affect the substance of the reporting obligations. Therefore, the scope of the information to be reported remains unchanged.

The measures to be introduced will enter into force on the day following the publication of the law in the Memorial (Luxembourg Official Journal), except for the measures related to the DAC6, CRS and FATCA deadlines which will enter into force retroactively on 30 June 2020. Thus, even though the legislative procedure has not been finalised yet, the deadline extensions can already be considered as granted. Both the Luxembourg Finance Ministry and the Luxembourg tax authorities have communicated officially on their respective website that no penalties for late reporting under the aforementioned reporting frameworks would apply, pending the legislative procedure being finalised.

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The modification of a vertical tax consolidation group into a horizontal tax consolidation group does not end the tax consolidation regime

OUR INSIGHTS AT A GLANCE

- On 14 May 2020, the Court of Justice of the European Union ("CJEU") ruled on the Luxembourg tax consolidation regime and took a very positive decision for Luxembourg corporate taxpayers.
- The ruling of the CJEU calls into question the interpretation and the application of the Luxembourg tax consolidation regime made by the tax authorities.
- Luxembourg taxpayers with a tax consolidation group in place and/or who have submitted a request to modify their tax consolidation which has been denied by the Luxembourg tax authorities should seek advice from their tax adviser in order to analyse the potential impact of this case law.

On 14 May 2020, the CJEU ruled on the Luxembourg tax consolidation regime and took a very positive decision for Luxembourg corporate taxpayers. The ruling of the CJEU calls into question the interpretation and the application of the Luxembourg tax consolidation regime made by the Luxembourg tax authorities.

The position taken by the CJEU is in line with the arguments ATOZ developed extensively in an article published in the *Revue de Droit Fiscal: RDF #5 - L'intégration fiscale : besoin de clarifications suite aux évolutions et controverses récentes* and in our ATOZ Insights dated February 2019.

Background

Since 2015, the Luxembourg tax consolidation regime makes a distinction between the vertical consolidation where the results are consolidated at the level of an integrating parent company and the horizontal tax consolidation where the tax results are consolidated at the level of an integrating subsidiary company.

Horizontal tax consolidation was introduced in 2015 following a CJEU ruling. On 12 June 2014, the CJEU concluded that not allowing a tax consolidation between two Dutch sister subsidiaries, on the ground that the parent company was not resident in the Netherlands, was not compliant with EU law. Despite the fact that horizontal tax consolidation was not possible at all in Luxembourg, the Luxembourg legislator decided to amend its tax consolidation regime to echo the EU case law.

Based on the 2014 CJEU case law, and in anticipation of the introduction of the horizontal tax consolidation regime in Luxembourg tax law, some Luxembourg companies requested the application of such a regime retroactively as from 2013. This was the case of two Luxembourg companies (LuxCo B and LuxCo C) which requested to be integrated into an existing tax consolidation group, meaning that they requested to be horizontally integrated with their sister company LuxCo A, the integrating company of an existing vertical tax consolidation (LuxCo A remaining the integrating entity of the tax consolidation which would have become horizontal).

However, the Luxembourg tax authorities denied the benefit of such a regime and the taxpayers lodged appeals against the tax authorities' position. As a result, on 29 November 2018, the Luxembourg Administrative Court raised prejudicial questions before the CJEU. On 14 May 2020, the CJEU ruled on the Luxembourg tax consolidation regime.

Position of the CJEU

- **EU compliance of the "old" tax consolidation regime**

On the question whether the previous Luxembourg tax

consolidation regime (prior to being amended in 2015) was in line with EU law (in other words, was a regime which did not allow the horizontal tax consolidation EU-compliant or not), unsurprisingly, the CJEU decided that it was contrary to the EU law.

According to the CJEU, the freedom of establishment must be interpreted as prohibiting the legislation of a Member State which, while allowing vertical tax integration between a resident parent company or a permanent establishment in that Member State of a non-resident parent company, and its resident subsidiaries, does not allow horizontal tax integration between the resident subsidiaries of a non-resident parent company.

This part of the CJEU's decision should have a very limited effect for Luxembourg companies in the future as the Luxembourg legislator already amended the tax consolidation regime to introduce the horizontal tax consolidation.

- **Requirement to end the vertical consolidation (with a potential retroactive effect if the 5-year period is not met) in order to benefit from the horizontal tax consolidation**

According to the Luxembourg case law, any modification to the tax consolidation group at the level of the integrated companies does not put an end to the group and the creation of a new group. However, on the basis that the Luxembourg tax law does not allow a company to simultaneously be part of more than one tax consolidated group, the Luxembourg tax authorities require, in case a vertical tax consolidation group is modified by adding one of more sister companies of the integrating company (and thus changing the tax consolidation from vertical to horizontal), to end the vertical tax consolidation (with the consequence that the computation of the 5-year period is interrupted) in order to benefit from the horizontal tax consolidation.

The Luxembourg Administrative Court asked the CJEU whether the strict separation of vertical and horizontal tax consolidation is in line with EU law. In other words, is it EU-compliant to be required to end the vertical tax consolidation before being able to benefit from a horizontal tax consolidation?

In this respect, the CJEU decided that the freedom of establishment should be interpreted as prohibiting a legislation of a Member State which has the effect to force a parent company having its seat in another Member State to dissolve an existing vertical tax integration between one of its subsidiaries and a certain number of its resident sub-subsidiaries in order to allow this subsidiary to proceed with a horizontal tax integration with other resident subsidiaries of the said parent company, when the resident integrating subsidiary remains the same and the dissolution of the vertical tax integration before the end of the minimum period of integration, provided for by national law, implies the rectification, on an individual basis, of the taxation of the companies concerned.

This decision is very positive for Luxembourg taxpayers as it put an end to the restrictive interpretation and application of the Luxembourg tax consolidation regime performed by the Luxembourg tax authorities. As long as the integrating company remains the same and that all the other legal conditions are met, an existing tax consolidation group can now be extended to additional subsidiaries or sub-subsidiaries of the integrating company but also to a sister company of such integrating company, which, so far, was denied by the tax authorities.

- **Timing for requesting the application of the horizontal tax consolidation**

In Luxembourg, tax consolidation is only available upon filing a written request with the Luxembourg tax authorities; This request has to be filed by the integrating company, the integrated entities subject to the tax consolidation as well as by the non-integrating parent company in case of a horizontal tax consolidation. Tax consolidation is effective retrospectively as of the beginning of the fiscal year during which the tax consolidation was requested. As a result, to benefit from the tax consolidation regime as from 1.1.2013, a request has to be filed by 31.12.2013 at the latest.

The last question raised by the Administrative Court to the CJEU was whether, in case the tax consolidation regime was to be considered as not compliant with EU law by the CJEU, the requirement that the tax consolidation request had to be filed before the end of the first tax year in respect of which tax consolidation was demanded is in line with EU law to the extent that it precludes companies to benefit from the lesson learned

from the CJEU rulings on the Dutch tax consolidation regime in 2014. So, in other words, is it compliant with EU law to require the tax consolidation request to be filed before the end of the first tax consolidation year in respect of tax years preceding the CJEU decision?

According to the CJEU, the principles of equivalence and effectiveness must be interpreted as meaning that they do not preclude a law of a Member State relating to a system of tax consolidation which provides that any request to benefit from such a regime must be submitted to the competent authority before the end of the first tax year for which the application of this regime is requested.

As a result, a taxpayer cannot request retroactively the application of the tax consolidation regime based on a CJEU ruling. However, a taxpayer can submit a request to benefit from the tax regime as detailed in the CJEU ruling as from the tax year of the publication of the latter or, if a tax consolidation request was submitted for a previous tax year, but denied by the tax authorities on the basis of the restrictive interpretation of the Luxembourg tax consolidation regime, the taxpayer should in principle be allowed to challenge such denial on the basis of the CJEU decision.

Consequences of the CJEU decision

Pursuant to a well-established case law of the CJEU, national courts cannot apply domestic legal rules considered as incompatible with European law. As a result, national courts which are called upon to apply provisions of European law are under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, and it is not necessary for the courts to request or await the prior setting aside of such provisions by legislative or other constitutional means.

In addition, European provisions produce direct effect and as such confer upon individual rights which national courts must protect. No action can be taken by any official body which might jeopardize or delay their full, complete, and uniform application in the Member States. This must apply a fortiori in the European legal order since all State authorities, including the tax authorities, are bound in performing their tasks to comply with the rules laid down by European law.

Both the Luxembourg tax authorities and the Luxembourg courts are thus bound by the decision of the CJEU and should in principle, as a result, refuse to apply any Luxembourg rule requiring - or interpret a rule in a way which requires - from a non-resident parent company to end an existing vertical tax integration group in before being able to form a horizontal tax integration group.

Luxembourg taxpayers with a tax consolidation group in place and/or who have submitted a request to modify their tax consolidation which has been denied by the Luxembourg tax authorities should seek advice from their tax adviser in order to analyse the potential impact of this case law on their own case.

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Luxembourg rules on exchange of information upon request: Advocate General Kokott opines

OUR INSIGHTS AT A GLANCE

- Back in 2017, in the now well-known Berlioz case, the Court of Justice of the European Union ("CJEU") ruled that the Luxembourg rules on exchange of information upon request in force at that time were not in line with the Charter of Fundamental Rights of the European Union. As a result, the law of 1 March 2019 introduced several amendments to the law of 25 November 2014 on exchange of information upon request.
- On 14 March 2019, less than one month after the law of 25 November 2014 was amended in order to bring it in line with EU law, the Administrative Court of Luxembourg referred some new questions to the CJEU in relation to the said law.
- On 2 July 2020, Advocate General ("AG") Juliane Kokott gave her opinion on these questions and concluded among others that the addressee, the taxpayer concerned and other concerned third parties must be able to obtain judicial review of an order to provide information made in the context of the cross-border exchange of information between tax authorities.
- Should the CJEU decide to follow the conclusions of AG Kokott to answer the new prejudicial questions, this would lead to yet other amendments to the Luxembourg rules on exchange of information upon request in the near future.

On 16 May 2017, in the well-known Berlioz case (C-682/15), the Court of Justice of the European Union ("CJEU") ruled that the Luxembourg rules on exchange of information upon request in force at that time were not in line with the Charter of Fundamental Rights of the European Union (the "Charter"). As a result, the law of 1 March 2019 introduced several amendments to the law of 25 November 2014 on exchange of information upon request. Based on the new rules currently in force, information holders can contest information requests received from the Luxembourg tax authorities and the Luxembourg tax authorities must check the foreseeable relevance of the information requested by foreign tax authorities before requesting the information from the information holder.

On 14 March 2019, less than one month after the law of 25 November 2014 was amended in order to bring it in line with EU law, the Administrative Court of Luxembourg referred some new questions to the CJEU in relation to the said law in joint cases C 245/19 and C 246/19. The two cases deal with two information injunctions of the Luxembourg tax authorities in relation to two information requests of the Spanish tax authorities acting on the basis of the Luxembourg-Spain Double Tax Treaty and the EU Directive on administrative cooperation in the field of taxation. The Administrative Court of Luxembourg, before which those legal disputes were brought on appeal, referred the following two questions to the CJEU:

- Does the 2014 Law comply with EU law in so far as it excludes any remedy, in particular a judicial remedy, on the part of the taxpayer concerned by the investigation in the requesting Member State and a third party to challenge a decision by which the competent authority of that Member State requires a holder of information to communicate information to it for the purposes of implementing a request for exchange of information received from another Member State?
- How is the standard of foreseeable relevance to be interpreted and does a request for exchange of information satisfy the condition that there is no manifest lack of foreseeable relevance where the requesting EU Member State states the identity of the taxpayer concerned, the period covered by the investigation in the requesting EU Member State and the identity of the holder of the information in question, while seeking information concerning contracts and the associated invoices and payments which are unspecified but which are defined by criteria concerning, first, the fact that

the contracts were concluded by the identified holder of the information, and second, their applicability to the tax years covered by the investigation by the authorities in the requesting State and third, their relationship with the identified taxpayer concerned?

Existence of a judicial remedy against information requests for any person concerned (so not only for the information holder)

The draft law released by the end of 2017 in response to the Berlioz case law in respect of the lack of an effective judicial remedy initially reintroduced a possibility for any person concerned by the information request to contest the information request (e.g. on the ground that the information request would not meet the foreseeable relevance principle) before Luxembourg courts. However, over the legislative process, the Luxembourg legislator decided to go a step back and to grant this possibility only to the information holder and no longer to any other person concerned (such as the taxpayer itself).

Nevertheless, one of the questions now referred to the CJEU refers precisely to the question as to whether the Charter prohibits a rule that precludes any recourse, including judicial, by the taxpayer under investigation in the requesting Member State and by any third party concerned, against a decision through which the competent authority of that Member State requires an information holder to provide information with a view to respond to a request for exchange of information from another Member State.

In her opinion, AG Juliane Kokott proposes that the CJEU answer to the first question that the decision by which an authority requested for support pursuant to EU Directive 2011/16 requires a person to provide information on a taxpayer or third parties should be challengeable by that person, the taxpayer and concerned third parties before the courts of the requested Member State.

In our article published in the May 2019 ATOZ Insights, we concluded that the Luxembourg legislation now in force according to which the information holder (but not the taxpayer itself) is entitled to challenge the information injunction of the Luxembourg tax authorities should not be considered as EU compliant. This position is shared by AG Kokott who considers that since the obligation of a third party to transmit a taxpayer's personal data interferes in any event with the latter's fundamental right to the protection of such data, the taxpayer concerned should also have the possibility to have the legality of such an order to provide information reviewed by a court under Article 47 of the Charter. According to the AG, the possibility of challenging any subsequent tax assessment does not provide sufficient protection of the taxpayer's fundamental right to data protection.

In addition, as regards concerned third parties (here, several companies), the AG points out that under the case-law the fundamental right to the protection of personal data (Article 8 of the Charter) relates in principle to individuals. Legal persons may, however, in any event rely on the fundamental right to respect for private and family life (Article 7 of the Charter) where, as in this specific case, information concerning bank accounts and assets is requested. Such third parties should therefore also be allowed to obtain judicial review of the order to provide information based on Article 47 of the Charter.

Consequently, the exclusion of legal protection for the addressee of the order to provide information, for the taxpayer concerned and for concerned third parties infringes Article 47 of the Charter. Should the CJEU follow the AG's opinion, the Luxembourg rules will have to be amended in this respect.

Foreseeable relevance of the information requested

The "foreseeable relevance" of the information requested from one Member State by another Member State is a condition which the information request must satisfy in order for the requested Member State to be required to comply with that request, and thus a condition for assuring the legality of the information order addressed by that Member State to any relevant person as well as of the potential penalty imposed on that person for failure to comply with that information order.

As a consequence of the Berlioz case law, an obligation has been reintroduced into the Luxembourg information exchange upon request legal framework according to which the tax authorities have to verify that the condition of foreseeable relevance is met prior to sending an information request to the information holder.

The last question referred to the CJEU relates to the interpretation of the standard of foreseeable relevance. The debate is whether a request for information exchange, together with an injunction decision from the authority of the requested Member State, satisfy the standard of "foreseeable relevance" where the applicant Member State indicates i) the identity of the taxpayer concerned, ii) the period covered by

the investigation in the Member State and iii) the identity of the holder of the information concerned, while requesting information concerning contracts and related invoices and payments not specified but which are delimited by the criteria relating, firstly, to the fact that they would be held by an identified holder of information, secondly, to the taxation years concerned by the investigation by the authorities of the requesting State and, thirdly, to their link with the identified taxpayer concerned.

With regard to this second question, AG Kokott first clarifies that the CJEU may decide to adopt the OECD approach and interpretation of the concept of "foreseeable relevance" reflected in the Commentary to Article 26 of the OECD Model Tax Convention if the CJEU finds the approach compelling. However, it has no legal obligation to do so as the OECD Commentary only includes useful guidelines which have no direct impact on the interpretation to be given to an EU Directive. Thus the various evolutions and changes to the interpretation of the concept of "foreseeable relevance" reflected in the various updates of the OECD Commentary do not change automatically the interpretation to be given to the same concept under the EU Directive 2011/16.

In a second step, AG Kokott proposes that the CJEU answer that the requesting authority must justify the request for information so that the requested authority can examine whether the information sought does/does not clearly lack foreseeable relevance for the requesting authority's tax assessment. The request must contain specific indications of the facts and transactions that are relevant for tax purposes, so that fishing expeditions are precluded. Thus, the requesting authority must normally mention in the request for information the facts that it would like to investigate or at least specific grounds for suspecting those facts and their relevance for tax purposes. This must enable the requested State to justify before the judicial authorities interference with the fundamental rights of the addressee, the taxpayer or concerned third parties that is attributable to the administrative cooperation. The requirements imposed by the duty to provide reasons justifying the information request increase with the extent and sensitivity of the information sought.

Implications

It will be necessary to await the answers of the CJEU to those questions in order to analyse their definitive implications for Luxembourg taxpayers concerned by exchange of information requests in tax matters. However, in our view, it can be expected that the CJEU will follow the opinion of AG Kokott and that the Luxembourg rules dealing with exchange of information upon request will have to be amended in order to enable the taxpayer concerned by the information injunction to challenge an exchange of information request, even in case the taxpayer is not the addressee of the information request and thus not the information holder. Finally, the analysis made by AG Kokott in her opinion on the concept of foreseeable relevance will be very useful for assessing the chances of success when challenging the foreseeable relevance of the information requested.

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CRS and FATCA legislations amended

OUR INSIGHTS AT A GLANCE

- The law of 18 June 2020 introduces some amendments to the Luxembourg legislation governing CRS ("Common Reporting Standards") and FATCA ("Foreign Account Tax Compliance Act"), the two sets of rules dealing with the Automatic Exchange of Information in Luxembourg.
- The changes introduced with effect as of 1 January 2021 are of importance since Luxembourg reporting financial institutions will be subject to additional obligations and lump sum penalties in case of non-compliance.
- The law aims to rectify some elements in respect of which the "Global Forum on Transparency and Exchange of Information for Tax Purposes" considered that the Luxembourg legislation was not compliant with the CRS norms.
- The automatic exchange of information is more than ever at the heart of the concerns of regulators in most developed countries. It can be anticipated that the tax authorities will be uncompromising in respect to the compliance with the rule and will henceforth have a scale of penalties at their disposal that they will apply rigorously if the market players do not meet the expected level of compliance.

The law of 18 June 2020 introduces with effect as of 1 January 2021 some amendments to the Luxembourg legislation governing CRS ("Common Reporting Standards") and FATCA ("Foreign Account Tax Compliance Act"), the two sets of rules dealing with the Automatic Exchange of Information in Luxembourg.

The law of 18 June 2020 reflects the current trends and "state of mind" of the tax authorities in terms of exchange of information and introduces the following changes:

- Even in the absence of reportable accounts, a CRS report must be filed
- The necessary documentation must be kept during a time period of 10 years
- The amounts of lump sum penalties applicable in case of absence of reports are specified
- The powers of control of the tax authorities and the type of documents required are specified

It appears that the real changes resulting from the law are only few, apart from the obligation to file zero CRS reports. Still, since 2019, the tax authorities already require financial institutions to produce such reports. The other amendments provide some details, not on the new obligations applicable to financial institutions, but on the administrative practice in terms of control and on the applicable penalties.

New zero-reporting obligation for both CRS and FATCA purposes

Even in the event of no reportable amounts, financial institutions ("FI") will now be required to file a zero-report annually before 30 June of the year following the end of the calendar year to which the information relates.

Requirement for Reporting Financial Institutions to keep records of the steps undertaken to comply with CRS and FATCA

A specific provision has been added to both the CRS law and the FATCA law according to which Luxembourg reporting FIs must keep (during 10 years) records of the steps undertaken and any evidence relied upon for the performance of the reporting and due diligence procedures. FIs are prevented from adopting practices intended to circumvent the reporting and due diligence procedures and are required to implement policies, procedures and IT systems which shall be proportionate to the nature, specificities and size of the FI. The comments to the draft law clarify that an FI may still

decide to mandate a service provider to fulfil its due diligence obligations. In such cases, the FI will have to make sure that the service provider has the required policies and procedures in place.

New penalties for non-compliance with CRS and FATCA rules

A flat penalty of EUR 10,000 is defined which may apply in case an FI does not comply with the zero-report obligation within the required deadline. In addition, the maximum penalty of EUR 250,000 will now have a much broader scope of potential application as it will apply not only in case of missing or uncomplete reporting but also in case of non-compliance with any of the FI obligations provided by the CRS or FATCA laws.

Powers of investigation of the Luxembourg tax authorities clarified

The draft law clarifies the powers of investigation of the Luxembourg tax authorities which will now have, upon request, access, during 10 years, to the records of the steps undertaken, evidence relied upon for the performance of the reporting and due diligence procedures, policies and procedures and to the IT systems in place.

Implications

The automatic exchange of information is more than ever at the heart of the concerns of regulators in most developed countries. The tax authorities' reactivity to respond to the OECD pressure in this matter is enlightening.

We consider that it is important to understand the implicit message in the law of 18 June 2020. The tax authorities will be uncompromising in respect to the compliance with the rule and will henceforth have a scale of penalties at their disposal that they will apply rigorously if the market players do not meet the expected level of compliance.

In addition, a targeted investment in the consistency and quality of the procedures implemented will not only ensure that an appropriate response to the tax authorities' controls can be delivered, but will also enable the teams in charge to carry out their multiple missions in the most efficient way, without having to do things as they come along in a constantly changing environment.

For a detailed analysis of the implications of the new rules and the actions to be taken in priority, please read our previous article on the subject in our April 2020 ATOZ Insights: New CRS and FATCA legislation: A real change?

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VAT exemption of management services: CJEU confirms that the VAT exemption does not apply in the Blackrock case

OUR INSIGHTS AT A GLANCE

- BlackRock Investment Management (UK) Ltd engaged a US company to provide investment management services in relation to funds that are eligible to receive VAT exempt management services and funds that are not eligible for such exemption.
- In its decision C-231/19 published on 2 July 2020, the CJEU ruled that a single supply of management services, provided by a software platform belonging to a third-party supplier for the benefit of a fund management company, which manages both special investment funds and other funds, does not fall within the scope of the VAT exemption.
- This judgement may have a significant impact on the VAT position of Luxembourg fund managers used to apply different VAT treatments to a single supply of management services based on the regulatory status of the funds benefiting from these services.

Background

BlackRock Investment Management (UK) Ltd ("BlackRock") is a UK company managing both special investment funds ("SIFs" - funds eligible to receive VAT exempt management services) and other funds (non-SIFs - funds non-eligible for VAT exemption and therefore, receiving VAT taxable management services). In the case at hand, only a minority of the investment funds managed by BlackRock qualified as SIFs.

In the frame of its management activity, BlackRock engaged the US company BlackRock Financial Management Inc. ("BFMI") to provide investment management services in relation to the two categories of funds managed. These services were rendered from the US through the software platform "Aladdin" and covered the management of both SIFs and non-SIFs.

Given that part of the services received from BFMI were used in the framework of the management of SIFs, BlackRock considered that part of the services received from the US should benefit from the VAT exemption applicable to fund management services (based on article 135 (1) (g) of the VAT Directive). According to BlackRock, the dual use of the single service received from BFMI must not jeopardize the application of the VAT exemption to the portion of Aladdin costs linked to the management of SIFs.

The UK courts denied the application of the VAT exemption on the services received from BFMI in relation to the management of the SIFs and the Upper Tribunal (Tax and Chancery Chamber) decided to stay the proceedings and to refer a question to the Court of Justice of the European
Union ("CJEU").

Decision of the CJEU and potential impacts

The CJEU started the analysis by recalling its jurisprudence in relation to the concept of single supply and considered that the various services received from BFMI (e.g. market analysis, monitoring of performance, risk assessment, monitoring of regulatory compliance and implementing transactions) should be treated as a single supply made of various elements.

Turning to the question referred to it, the CJEU then examined whether the taxable basis of the single supply could be split into different parts in order to receive different VAT treatments on the grounds that a portion of that supply is used for the management of SIFs which could benefit from the fund management VAT exemption if it was considered separately.

In this respect, the CJEU considered that a single supply of services such as the service rendered by BFMI for the ultimate benefit of both SIFs and other funds should not benefit, even partially, from this VAT exemption on the grounds that:

- it follows from the classification of an operation composed of several elements as a "single supply" that such an operation must be subject to one and the same VAT rate;
- the VAT exemption is based exclusively on the nature of the supply in question, i.e. the management of SIFs. The wording of this article does therefore not permit the tax treatment of a single supply to be dissociated according to its uses;
- the single tax treatment of such a supply cannot be determined according to the nature of the majority of the funds managed;
- the service at issue could not be considered as "specific" to the management of SIFs whereas this is required by the established case law of the CJEU in relation to the VAT exemption of SIF management services. Indeed, to the extent that the services at issue were designed for the purpose of managing investments of various kinds and that, in particular, they may be used in the same way for the management of SIFs as for the management of other funds, these services cannot be regarded as specific for the management of SIFs.

This judgement may have a significant impact on the VAT position of Luxembourg fund managers who were used to apply different VAT treatments to such supplies based on the regulatory status of the funds benefiting from these services. The managers who were used to consider a single service as partly VAT taxable and partly VAT exempt should consider the risk of challenge by the VAT authorities of the VAT exemption applied to the part of the services related to SIFs.

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Entry into force of the VAT e-commerce package postponed to 1 July 2021

OUR INSIGHTS AT A GLANCE

- The entry into force of the VAT e-commerce package adopted by the EU Council on 5 December 2017, initially scheduled on 1 January 2021 is postponed to 1 July 2021.
- By this new regime, B2C cross-border sales of goods within the EU will be taxed in the country of destination. These new rules will considerably modify the compliance obligations applicable to businesses involved with e-commerce.
- The postponed date of entry into force will enable companies and Member States to better prepare the implementation of the new rules and adapt their systems.

On 5 December 2017, in the framework of the Digital Single Market Strategy, the EU Council adopted a Directive modifying the VAT rules on cross-border B2C sales within the EU.

The aim of these new rules is to simplify the VAT obligations for businesses carrying out cross-border sales of goods within the EU and to ensure that VAT is paid in the Member State of destination. These rules were initially scheduled to enter into force on 1 January 2021.

Due to the COVID-19 crisis, this date has been postponed to 1 July 2021. In this context, Member States should adapt their legislations before 30 June 2021 at the latest. You will find hereafter the most important changes that will arise.

New VAT rules applicable to B2C distance sales of goods

Within the EU, cross-border B2C sales (i.e. sales to private consumers) are in principle subject to the VAT of the country where the goods are shipped from. However, if the seller exceeds a national threshold of sales in a Member State (EUR35,000 or EUR100,000, depending on the country), the VAT should be charged at the rate applicable in that Member State. Under the current regime, e-commerce businesses have therefore to VAT register in multiple jurisdictions where they exceed the thresholds and to charge local VAT.

The new regime intends to replace these thresholds by a common threshold of EUR10,000. This means that as soon a seller has exceeded the threshold of sales in a country, he will be obliged to charge the VAT at the rate applicable in that country. In order to avoid having to register in every country, the supplier will be able to apply for a One-Stop-Shop VAT registration (hereafter "OSS") similar to the one applicable to e-services.

The application of the OSS is a genuine simplification as businesses will avoid various local VAT compliance obligations (i.e. VAT registration, filing of VAT returns, etc. in multiple jurisdictions) and will only have to file one VAT return covering all the EU countries.

Considering the low threshold, businesses will have to adapt in order to charge foreign VAT on these specific B2C transactions.

New regime for imports of goods

The e-commerce package also foresees a modification of the rules related to distance sales of imported goods. Similarly to distance sales within the EU, these sales will also be taxable in the country of arrival of the goods at the customer.

The existing VAT exemption for imports of goods within the EU of a value lower than 22 EUR (small consignments) will be abolished.

In order to avoid a VAT registration in the country of importation or arrival of goods, sellers will under certain conditions be able to register and pay the VAT via a specific Import One-Stop-Shop.

Specific regime for marketplaces

A specific regime will be introduced for businesses that facilitate distance sales through the use of an electronic interface. Marketplaces will be considered as the deemed seller in certain cases and will have to charge and to collect VAT on deemed seller transactions.

Postponed entry into force to 1 July 2021

Due to the COVID-19 crisis, Member States had to shift priorities and re-allocate resources from the implementation of the VAT e-commerce package to fighting the pandemic. Considering the extensive modification of the IT systems certain Member States were not able to guarantee the implementation of the new rules by 1 January 2021. The new regime has therefore been postponed by six months.

Luxembourg has already submitted a draft bill (nr. 7611/00 dd. 8 June 2020) to implement the e-commerce package into Luxembourg VAT law. It also confirmed that Luxembourg would open a VAT one-stop-shop preregistration as from 1 October 2020. It is expected that additional guidelines will be published in the coming months.

Impact assessment

The new regime will have a considerable impact on businesses involved with e-commerce by the modification of the applicable VAT rules and compliance requirements. We strongly advise businesses involved with e-commerce to carefully assess the impact of these new rules on their operations.

Should you have any queries in this respect, ATOZ can provide an in-depth analysis regarding the above-mentioned items.

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Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions – Practical issues during the transposition phase

OUR INSIGHTS AT A GLANCE

- On 1 January 2020, EU Directive of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions entered into force.
- It will have to be implemented into the national of law of EU Member States by 31 January 2023.
- The Directive is meant to facilitate the cross-border mobility of limited liability companies within the EU, introduce extra protection measures for shareholders, employees, and creditors protection and avoid tax abuses within the EU.

On 12 December 2019, Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019[1] (the "Directive") amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions[2] (the "2017/1132 Directive") was published in the Official Journal of the European Union.

The Directive entered into force on 1 January 2020 and Member States (the "MS") of the European Union (the "EU") are now required to bring their national law in line with the Directive by 31 January 2023.

Main aspects of the Directive

The Directive is meant to:

- facilitate the cross-border mobility of limited liability companies within the EU;
- introduce extra protection measures for shareholders, employees, and creditors protection; and
- avoid tax abuses within the EU.

The procedure for a cross-border merger as set out in the 2017/1132 Directive is revised and a new fast-track rule (for "simple" mergers) is introduced.
The Directive notably introduces a harmonised procedure for cross-border conversions and divisions and also puts in place strong safeguards to prevent these procedures from being used to set up artificial arrangements, including those aimed at obtaining undue tax advantages.

A prior-control system is introduced by Article 86m of the Directive, pursuant to which companies will be required to acquire a pre-operation certificate (the "Certificate") certifying that the planned cross-border operation is in line with the relevant national law of the MS of departure.

MS are competent to designate the competent authority for the issuance of the Certificate, when the MS is the departure country, or perform a legality check of the foreign Certificates with regards to that part of the procedure which is governed by local law (e.g. check if the conditions for the incorporation of the company are complied with, if the arrangements for employee participation have been determined lawfully, etc.), when the MS is the country of arrival.

The competent authority of each MS has a month to scrutinise the operation and the documents before taking a decision to issue the Certificate or to refuse it. In case of serious concerns as to the existence of an artificial arrangement, it has two additional months to perform an in-depth examination of a supposedly abusive operation.

MS shall then ensure that the register in the destination MS notifies the register in the departure MS that the cross-

1 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2121&from=FR
2 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1132&from=FR

border operation has taken effect through the system of interconnection of registers.

Can companies rely on the provisions of the Directive before its transposition into national law?

Despite the general absence of direct effect of EU directives, law practitioners might have already noticed that some MS consider the terms and provisions of the Directive as already applicable even though such MS have not yet passed the relevant domestic legislation for transposing the directive into national law. This is notably the case of some German courts which apply the Directive and have issued specific guidelines in this respect.

From a Luxembourg perspective, even though we have not yet faced this situation, it is doubtful that the notaries will accept that a company relies on specific provisions of the Directive while the transposing national law has not been passed.

One of the main aims of the Directive is to introduce a harmonised procedure for cross-border conversions and divisions, which can therefore only be accomplished if it is transposed into national law of all MS.

However, the application of the Directive by some MS without transposition into national legislation may create some legal uncertainties and practical issues until 31 January 2023 (deadline for implementing the Directive into national law).

The main issue encountered in practice by Luxembourg counsels includes the issuance of the Certificate by foreign MS, or the need for MS to receive a Certificate established by a Luxembourg authority.

As indicated above, MS are competent to designate the competent authority for the issuance of the Certificate. In Luxembourg, the draft law which purpose is the transposition of the Directive has not been published yet but it is likely that the notary will be designated as the competent authority to issue or control the legality of the Certificate.

In case of an inbound cross-border operation, a MS can issue the Certificate and this should not cause any issue in Luxembourg as long as such certificate does not need to be controlled by the notary and/or filed with the Luxembourg Trade and Companies Register.

However, in the event of an outbound cross-border operation, there is no certitude that a Luxembourg notary would accept to issue the Certificate.

Recently, a commercial court in Germany informed of its intention to already apply the provisions of the Directive to a cross-border operation where a Luxembourg entity was involved and, as such, to issue a pre-transfer Certificate for an operation involving the migration of a German entity to Luxembourg.

Considering that the Directive has not been implemented yet into Luxembourg law, neither the Luxembourg notary nor the Luxembourg Trade and Companies Register had the authority to issue or control the legality of the Certificate. The German court eventually agreed that the Certificate would not need to be verified by an authority in Luxembourg, or filed, for the time being.

At this point of time, the direct application of the Directive by some MS is causing legal uncertainty. Cross-border operations in the EU shall more than ever be anticipated to ensure that no practical issue delaying the process will arise.

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