How to implement the EU Anti-Tax Avoidance Directive : Part II

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On 20 June 2016, the EU Anti-Tax Avoidance Directive[1] ("ATAD") has been adopted at EU level. The ATAD provides for anti-tax avoidance rules in five specific fields which are meant to be implemented by each EU Member State ("MS"). On 29 May 2017, the EU Council formally adopted a compromise proposal for an EU Directive amending the ATAD (the so-called "ATAD 2").[2] While the ATAD included already measures dealing with hybrid mismatches in an EU context, ATAD 2 replaces the rules on hybrid mismatches and extends their scope to transactions involving third countries. This is the second of two articles[3] which provide an overview of the main provisions of the Directive and consider how Luxembourg should implement the latter.

I. Introduction

The aim of the ATAD and ATAD 2 is to implement at EU level the recommendations regarding Base Erosion and Profit Shifting ("BEPS") made by the OECD and G20 in October 2015. Both Directives cover all taxpayers which are subject to corporate tax in an EU MS as well as EU Permanent Establishments ("PEs") of taxpayers which are not as such in the scope of the Directive.

The ATAD lays down anti-tax avoidance rules in the following fields:
- Deductibility of interest;
- Exit taxation;
- General anti-abuse rule (GAAR);
- Controlled foreign company (CFC) rules and
- Hybrid mismatches in an EU context.

In addition, ATAD 2 replaces the hybrid mismatch rules introduced by ATAD and extends their scope to transactions involving third countries. The measures provided in the Directives are presented as minimum standards whereas certain of these rules are mere recommendations or best practices in the BEPS framework. It follows that the proposed measures go way beyond the BEPS recommendations. Although the concerns expressed by the European Commission to fight against tax avoidance in a coordinated manner are understandable, the ATAD and ATAD 2 raise serious concerns in that they further dilute national sovereignty in tax matters and, by "goldplating" the BEPS recommendations, will make the EU a less attractive environment to do business. However, given that MS have a certain leeway when implementing the ATAD, it is essential that Luxembourg makes the right choices so as to remain attractive to international businesses and investors.

II. Controlled Foreign Company (CFC) Rule

The Directive provides for CFC rules that would re-attribute the income of a low-taxed controlled company (or permanent establishment) to its parent company, even though it has not been distributed. In its final report on BEPS Action 3 (CFC rules)[4], the OECD provided recommendations on how to design CFC rules. However, these are mere recommendations for countries that would like to implement such rules and not a minimum standard. It should be noted that CFC rules may result in double taxation which is harmful for international trade and business.

The framework for the implementation of CFC rules in the ATAD provides for a common definition of the CFC but a number of options concerning the fundamental scope of the CFC rules as well as options to exclude certain CFCs. Accordingly, a MS shall treat an entity or a PE as a CFC where the following conditions are met:
- the controlling taxpayer holds or holds together with its associated enterprises a direct or indirect participation of more than 50% in the controlled entity; and
- the actual corporate tax paid by the entity or PE is lower than the difference between (i) the corporate tax that would have been charged under the applicable corporate tax system in the MS of the taxpayer and (ii) the actual corporate tax paid on its profits by the entity or PE (in other words, the actual tax paid is less than 50% of the tax that would have been due in the country of the controlling taxpayer).

• Option 1: passive income

As a first option, MS may opt for the CFC rules to apply only to passive income (interest, royalties, dividends, etc.). However, under this first option, the CFC rules shall not apply where the CFC carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances. The standard to be applied in this respect should be consistent with the wholly artificial arrangement standard developed in ECJ case law. Broadly speaking, the substance should be appropriate for the activities performed without requiring any artificially high level of substance. As far as CFCs situated in third countries are concerned (that are not party to the EEA Agreement), MS may decide to refrain from applying the "wholly artificial arrangement" test.

In addition, MS may opt to not treat an entity or a PE as a CFC:
- When the passive income earned by an entity or PE represents one third or less of the income accruing to the CFC; and/or
- When the income of a financial undertaking consists of one third or less of passive income derived from transactions with associated enterprises.

In the authors' view, Luxembourg should adopt this option combined with the wholly artificial arrangement standard applying to CFCs resident in MS and third countries. In addition, the Luxembourg legislator should implement all aforementioned limitations to the scope of the CFC rules.

• Option 2: non-genuine arrangements

As an alternative option, MS may choose to include in their tax base the non-distributed income of the entity or PE arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage. According to the ATAD, under this second option, MS may opt to not treat an entity or a PE as a CFC if the CFC is an entity or a PE with accounting profits of no more than EUR 750.000 and non-trading income of no more than EUR 75.000 or of which the accounting profits amount to no more than 10% of its operating costs for the tax period.

Drafting CFC rules in this fashion would introduce a lot of subjectivity which would ultimately increase legal uncertainty. Therefore, the authors believe that this option should not be chosen by Luxembourg. Moreover, the implementation of CFC rules into Luxembourg tax law requires that the Luxembourg tax legislator ensures consistency with the Luxembourg participation exemption regime as well as Luxembourg's obligations under existing tax treaties. When a dividend received by a Luxembourg company from an entity that comes within the scope of a CFC is tax exempt under the Luxembourg participation exemption regime or an applicable tax treaty, it cannot be that CFC income should be taxable in the absence of a distribution before year-end.

Otherwise, it would pressure taxpayers to distribute profits before year-end in order to benefit from a full tax exemption. The same logic must apply where an indirect subsidiary is a CFC when dividends paid by the direct subsidiary would benefit from a tax exemption. Notably, these rules would exclude a large majority of potential CFCs from the scope of application of the CFC rules and significantly simplify the compliance and administration obligations on the part of the taxpayers and the Luxembourg tax authorities.

III. Hybrid mismatches

1. Overview

ATAD 2 follows the recommendations of the OECD in regard to Base Erosion and Profit Shifting (BEPS) Action 2 (Hybrid mismatch arrangements) and covers a number of hybrid mismatches such as financial instrument mismatches, hybrid entity mismatches, reverse hybrid mismatches and permanent establishment mismatches. In general, a hybrid mismatch structure is a structure where a financial instrument, an entity or a permanent establishment is treated differently for tax purposes in two different jurisdictions. Hybrid mismatch may lead to situations in which (i) a payment is deducted in two jurisdictions, (ii) a payment is deductible in one jurisdiction and not taxed in the other jurisdiction or (iii) to a situation in which income is not taxed at all (in accordance with the domestic tax laws of the jurisdictions involved).

In case there is a hybrid mismatch with a third state, ATAD 2 places the responsibility to neutralize the effects of hybrid mismatches on the EU Members States. This entails that EU Member States have to deny the deduction of payments or have to include income that would otherwise not be taxed in the third state.

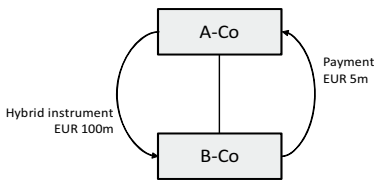
2. Scope of the provision

The anti-hybrid mismatches framework addresses the following types of hybrid mismatch situations:

• Hybrid mismatches that result from payments under a financial instrument

Example: Hybrid financing instrument mismatch

A company resident in State A (A-Co) finances its subsidiary resident in State B (B-Co) with a EUR 100m financing instrument that is treated as equity in State A, whereas the instrument is treated as debt in State B.

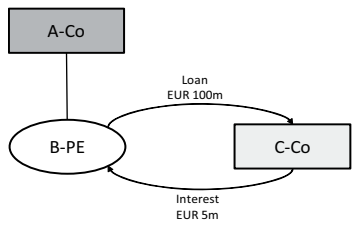


At the level of B-Co, the interest payments of EUR 5m are tax deductible, whereas at the level of A-Co the income is treated as a dividend and benefits from a tax exemption.

• Hybrid mismatches that are a consequence of differences in the allocation of payments made to a hybrid entity or permanent establishment (PE), including situations where payments made to a disregarded PE are not taxed at the level of the head office;

Example: Hybrid PE mismatch leading to a deduction without inclusion

A company resident in State A (A-Co) performs financing activities through a PE situated in State B (B-PE). Although the PE is recognized under the domestic tax law of State A and the applicable tax treaty concluded between State A and State B, under the domestic tax law of State B the PE of A-Co is not recognized for tax purposes. A-Co grants a loan of EUR 100m via B-PE to C-Co, an associated enterprise resident in State C.

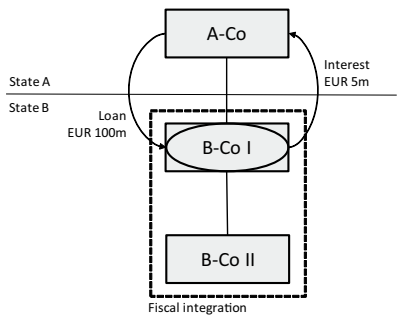


While the interest payments are deductible at the level of C-Co, State B does not tax the interest income as no PE is recognized under domestic tax law of State B. At the same time, State A exempts the income realized through B-PE in accordance with the applicable tax treaty. Hence, the income is tax deductible in State B and not taxable or tax exempt, respectively, in State A and State B.

• Hybrid mismatches that result from payments made by a hybrid entity to its owner or deemed payments between the head office and PE or between two or more PEs;

Example: Hybrid entity mismatch leading to a deduction without inclusion

A company resident in State A (A-Co) finances its subsidiary in State B (B-Co I) with a loan of EUR 100m. While B-Co I is treated as a transparent entity from the perspective of State A, under the domestic tax law of State B, B-Co I is treated as an opaque entity. B-Co I formed a fiscal unity with B-Co II a subsidiary resident in State B.

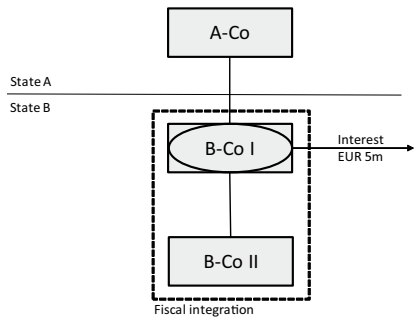


While the interest payments are deductible in State B, reducing the taxable income of B-Co I and the fiscal unity, at the level of A-Co the interest payments are disregarded for tax purposes since such transactions are disregarded between a transparent entity and the owners thereof.

• Double deduction outcomes resulting from payments made by a hybrid entity or PE.

Example: Hybrid entity mismatch leading to a double deduction

A company resident in State A (A-Co) has a subsidiary in State B (B-Co I). B-Co I receives funding from a third party. In this regard, B-Co I pays interest of EUR 5m. While B-Co I is treated as a transparent entity from the perspective of State A, under the domestic tax law of State B, B-Co I is treated as an opaque entity. B-Co I formed a fiscal unity with B-Co II a subsidiary resident in State B.



In this case, the interest payments are deductible at the level of B-Co I and A-Co, resulting in a double deduction due to the hybrid entity classification.

• Options available under the Directive

The Directive provides for options to exclude certain types of hybrid mismatches (at least temporarily) from the scope of the rules that are implemented under domestic tax law. In the authors' view, the Luxembourg legislator should adopt each of the options available.

3. Mechanism for tackling mismatch outcomes

ATAD 2 provides for the following mechanisms to tackle mismatch outcomes:

• Double deductions

Where a hybrid mismatch results in a double deduction, the deduction shall be denied in the Member State that is the investor jurisdiction. As a secondary measure, ATAD 2 provides that in case the deduction is not denied in the investor jurisdiction, the deduction shall be denied in the Member State that is the payer jurisdiction.

• Deduction without inclusion

Where a hybrid mismatch results in a deduction without inclusion, it is stated that the deduction shall be denied in the Member State that is the payer jurisdiction. As a secondary measure, the directive provides that if the deduction is not denied in the payer jurisdiction, the amount of the payment that would otherwise give rise to a mismatch outcome shall be included in the income in the Member State that is the payee jurisdiction. With regard to the latter rule, Member States have the option to not apply the secondary rule to certain types of hybrid mismatches.

• Reverse hybrid mismatches

ATAD 2 also provides for a rule that targets so-called reverse hybrid mismatches. When an entity is established in a Member State and treated as transparent for tax purposes, whereas at the level of the non-resident owners of the entity[5], the latter is treated as opaque, the income might benefit from double non-taxation. In these circumstances, the hybrid entity shall be regarded as a resident of the Member State and taxed to the extent the income is not taxed otherwise under the laws of the Member State or any other jurisdiction.

• Tax residency mismatches

Last but not least, ATAD 2 provides for a rule that deals with situations where an entity is deemed to be resident in two or more jurisdictions and expenses are deductible in both jurisdictions.

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Here, the directive states that a Member State involved shall deny the deduction to the extent that the other jurisdiction allows the duplicate deduction to be set-off against income (that is not dual-inclusion income[6]). Where both jurisdictions are Member States, the Member State where the taxpayer is deemed not to be resident in accordance with an applicable tax treaty shall deny the deduction.

4. Where ATAD 2 should have no impact

It is interesting to note that the guidance provided in the ATAD 2 clarifies a number of issues in relation to the scope and the application of the rules on hybrid mismatches. ATAD 2 states that the rules provided therein should only apply to **"deductible payments"**. Hence, unless otherwise stated, the rules only apply to payments; not for example to provisions recorded in relation to financing instruments. The payment further needs to be deductible, excluding non-deductible payments from the scope of ATAD 2.

Moreover, as jurisdictions use different tax periods and have different rules for recognizing when items of income or expenses have been derived or incurred, ATAD 2 stresses that these **timing differences should generally not give rise to hybrid mismatches** as long as the income is included within a reasonable period of time. According to the Directive, a payment under a financial instrument shall be treated as included in income within a reasonable period of time where:
- the payment is included by the jurisdiction of the payee in a tax period that commences within 12 months of the end of the payer's tax period; or
- it is reasonable to expect that the payment will be included by the jurisdiction of the payee in a future period and the terms of the payment are consistent with the arm's length principle. Thus, when a timing difference exceeds the aforementioned 12 month period, taxpayers should be free to evidence that the payment will be included in a future period.

ATAD 2 further confirms that any adjustments required in accordance with the Directive should in principle not affect the allocation of taxing rights between Contracting States under applicable tax treaties. This statement acknowledges that treaty law is generally superior to the domestic tax laws of the Contracting States. In addition, the guidance confirms that transfer pricing adjustments should not fall within the scope of a hybrid mismatch.

Last but not least, the Directive provides for a carve-out from the rules when it comes to hybrid regulatory capital. This is of particular importance for the banking sector which has to comply with certain solvency criteria. However, this carve-out should be limited in time until 31 December 2022. With regard to financial traders, a delimited approach is followed in line with that followed by the OECD. ATAD 2 further provides for few options that are meant to limit the scope of the hybrid mismatch rules. In the authors' view, Luxembourg should opt for each of these exceptions.

IV. Conclusion

The provisions provided in ATAD and ATAD 2 will have to be implemented into Luxembourg tax law. From a timing perspective, the first measures should come into force as early as 1 January 2019. The rules on hybrid mismatch arrangements will have to be transposed into national laws and regulations one year later by 31 December 2019 (entering into force as from 1 January 2020).

The implementation of the different provisions into the existing framework of Luxembourg tax law will be an intricate exercise in view of the interdependencies between different tax rules and concepts. For example, the design of the CFC rules need to consider the interdependencies with the Luxembourg participation exemption regime and Luxembourg's obligation under its tax treaties in order to avoid unreasonable outcomes which would be detrimental for Luxembourg's position as an international holding and fund location. Ultimately, the Luxembourg legislator has to make the right choices where the Directive leaves EU MS some leeway and options so as to remain competitive in the post-BEPS environment.

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1) Council Directive (EU) 2016/1164 of 12 July 2016.
2) Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries
3) The article "How to implement the EU Anti-Tax Avoidance Directive: Part II" has been published in the June edition of AGEFI.
4) See: http://www.oecd.org/tax/designing-effective-controlled-foreign-company-rules-action-3-2015-final-report-9789264241152-en.htm
5) Here, the directive sets a threshold of at least 50% of the voting rights, capital interests or rights to a share of profit for the rule to apply. It is interesting to note that in other situations, the ATAD rules apply when a shareholding relationship of at least 25% exists. Hence, the scope of the reverse hybrid rules is a bit more restrictive when it comes to the shareholding threshold.
6) Income that is taxable in two jurisdictions.

Letzbiz Circular - Luxembourg Circular Economy Hotspot 2017

Rencontres et débats autour de l'économie circulaire

Dans le cadre de la deuxième édition de l'évènement international Circular Economy Hotspot, qui s'est déroulé du 20 au 22 juin 2017 au Luxembourg, la Chambre de Commerce et son Enterprise Europe Network-Luxembourg ont organisé une journée spécialement dédiée aux entreprises en général et aux PME et TPE en particulier, pour les informer sur l'économie circulaire et les encourager à nouer des partenariats transfrontaliers sur cette thématique.

Après une première édition ayant eu lieu aux Pays-Bas en 2016, le Luxembourg, qui assure la Présidence de la Grande-Région jusqu'en décembre 2018, était cette année le pays-hôte de l'évènement international Circular Economy Hotspot, dont l'organisation a été menée conjointement par le Ministère de l'Economie, le Ministère des Infrastructures et du Développement durable, Luxinnovation et la Chambre de Commerce.

Pendant 3 jours, les participants ont pu assister à des présentations faites par des experts en économie circulaire venus du monde entier et découvrir les bonnes pratiques mises en œuvre au Luxembourg à travers des visites en entreprises, des conférences, des ateliers thématiques et des événements de networking.

La journée Letzbiz circular du 21 juin, organisée par la Chambre de Commerce et son EEN-Luxembourg, faisait suite à l'événement Smart Benelux Business Forum de juin 2016, qui avait mis l'accent sur les secteurs prioritaires d'une économie digitale et durable (énergies renouvelables, efficacité énergétique, e-mobilité, smart cities et économie circulaire) et qui avait rencontré un vif succès.

La matinée du 21 juin 2017, visait plus particulièrement les PME du Luxembourg, de la Grande Région et du Benelux en général. Lors d'une séance inaugurale expliquant l'importance de l'économie circulaire et ses liens avec l'étude stratégique de Troisième Révolution Industrielle, plusieurs orateurs se sont succédés au micro : Carlo Thelen,

*De g. à dr. : **Herman Bavinck**, Quartermaster / Directeur de Programme, Holland Circular Hotspot; **Alain De Muyser**, Secrétaire Général adjoint, Union du Benelux; **Philip Marynissen**, Facilitateur, Circular Flanders; **Fabian Collard**, Directeur Général, Groupe IDELUX-AIVE; **Dr. Thomas Griese**, Secrétaire d'Etat, Ministère de l'Environnement, de l'Energie, de l'Alimentation et de la Sylviculture de Rhénanie-Palatinat; **Corinne Cahen**, Ministre de la Famille, de l'Intégration et à la Grande Région; **Camille Gira**, Secrétaire d'Etat au Développement durable et aux Infrastructures; **Klaus Wollner**, Key Account Manager - Déchets, Veolia Allemagne; **Elodie Jupin**, ReStart Programme Manager, Tarkett Divison EMEA; **Bernard Mottet**, Directeur Général, Ecotrel Asbl et **Carlo Thelen**, Directeur Général, Chambre de Commerce*

Directeur Général de la Chambre de Commerce, Norman Fisch, Secrétaire Général de l'INDR et Jeannot Schroeder, Gérant de positive Impakt, société d'études et de recherche sur l'économie circulaire.

Carlo Thelen a notamment souligné le fait que le Luxembourg est la première nation à avoir mis en place une stratégie nationale en matière de Troisième Révolution Industrielle : «Notre pays témoigne ainsi de sa volonté claire de mettre l'économie circulaire sur le devant de la scène pour réussir cette transition. A travers sa contribution à l'événement «Circular Economy Hotspot», la Chambre de Commerce accompagne activement les entreprises luxembourgeoises dans cet important processus afin de les aider à relever les défis de ce changement de paradigme. Je suis convaincu que les échanges de bonnes pratiques et les nouvelles impulsions qui ressortiront de ces journées viendront utilement soutenir et alimenter la mise en place progressive de cette importante transition économique. Une sensibilisation précoce aux nouveaux modèles économiques qui sont en train de s'imposer, permettra de mettre toutes les chances de notre côté afin de créer un avantage concurrentiel pour notre pays et d'atteindre une croissance équilibrée et pérenne pour les générations futures.»

Au cours de cette même matinée les entreprises présentes avaient la possibilité de participer à des rencontres b2b ou à divers workshop proposés par les partenaires de la journée :
- Luxinnovation : Le programme «Fit4Circularity» pour faciliter et accélérer la transition des entreprises vers l'économie circulaire ;
- Fedil : Les business models circulaires appliqués à l'industrie ;
- OAI (Ordre des Architectes et des Ingénieurs-Conseils) : L'économie circulaire dans l'éco-construction
- LIST (Luxembourg Institute of Science and Technology) : Les outils pour évaluer et optimiser la durabilité des solutions en économie circulaire.

L'après-midi fut consacré à une table ronde rassemblant des acteurs économiques et politiques de la Grande Région ainsi que des représentants des pays du Benelux pour une discussion sur la possibilité de transformer les défis d'aujourd'hui en opportunités d'économie circulaire de demain, grâce à la collaboration transfrontalière au sein de la Grande Région.

Corine Cahen, en tant que Ministre à la Grande Région, Camille Gira, Secrétaire d'Etat au Développement durable et aux Infrastructures et Dr. Thomas Griese, Secrétaire d'Etat au Ministère de l'Environnement, de l'Energie, de la Nutrition et de la Sylviculture de Rhénanie-Palatinat ont notamment participé au débat. Quelques bonnes pratiques transfrontalières déjà engagées ont pu être soulignées à cette occasion. Bonnes pratiques qui ont fait également le sujet d'une exposition mettant en valeur les exemples de mise en application de solutions et de technologies d'une vingtaine d'entreprises et organisations du Luxembourg et de la Grande Région.

Les participants ont ainsi pu mesurer l'avance concrète de ces nouvelles pratiques dans l'économie Luxembourgeoise et Grand-régionale et utilement échanger entre eux, comme en témoigne notamment Vera Moll (Circle Economy) : «An afternoon buzzing with circular business conversations. Great to see so many actively engaged in the topic of circularity and looking to do business in this field.» et Pieter Ijben (Euro Central AG) : «Die Kooperation mit der Großregion ist sehr wichtig für uns und vor allem die direkten Kontakte zwischen Unternehmen mit den unterstützenden Instanzen sind von gro?er Bedeutung für uns.»

Source : Chambre de Commerce

Nouveaux régimes d'aides à la recherche, au développement et à l'innovation pour les entreprises luxembourgeoises

La nouvelle loi relative aux régimes d'aides à la recherche, au développement et à l'innovation[1] (RDI) vient d'entrer en vigueur. Les nouvelles dispositions concrétisent la réforme des aides à la recherche, au développement et à l'innovation entamée dans le cadre de la mise en conformité des régimes d'aide aux entreprises par rapport aux objectifs de la politique communautaire en la matière.

Le ministère de l'Économie a choisi de transposer toutes les opportunités offertes par le cadre européen pour inciter les entreprises privées à accroître les dépenses de R&D, à amplifier leurs efforts d'innovation ainsi que pour encourager les partenariats entre des entreprises privées et les centres de recherche publics.

La nouvelle loi relative à la promotion de la RDI reprend les régimes d'aides qui existaient déjà :
- les aides aux projets ou programmes de recherche-développement;
- les aides à la réalisation d'études de faisabilité technique;
- les aides à l'innovation en faveur des PME;
- les aides aux jeunes entreprises innovantes;
- les aides à l'innovation de procédé et d'organisation;
- les aides en faveur des infrastructures de recherche et des pôles d'innovation.

Le régime d'aides à l'innovation en faveur des PME regroupe plusieurs anciennes mesures destinées spécifiquement à soutenir la RDI au sein des petites et moyennes entreprises et doit leur faciliter l'accès aux aides RDI. D'autres changements concernent le régime d'aide relatif aux études de faisabilité technique pour lequel un taux unique sera applicable et le plafond des aides octroyées aux jeunes entreprises innovantes qui sera fixé à 800.000 euros. De plus, les taux plafonds applicables pour les projets d'innovation de procédé et d'organisation portés par les PME sont augmentés à 50%.

Complétant les aides existantes pour soutenir la RDI, une nouvelle mesure d'aide à l'investissement en faveur des infrastructures de recherche permet désormais de soutenir l'acquisition d'équipements de recherche qui ont vocation à être partagés.

De plus, la nouvelle législation prévoit la possibilité à l'avenir d'accorder l'aide sous forme d'avances remboursables, d'apports en fonds propres pour les jeunes entreprises innovantes ou encore sous forme de prêts bonifiés et de crédits d'impôt en complément des subventions telles que pratiquées jusqu'à présent. Les modalités d'application des aides à la RDI ainsi que les conditions d'éligibilité pour ces aides peuvent être consultées en sur le guichet.lu[2], ainsi que sur le portail de l'innovation[3].

Au titre de l'ancienne loi des aides à la RDI (loi modifiée du 5 juin 2009 relative à la promotion de la RDI), le ministère de l'Économie a versé pendant la période d'application de cette loi entre juillet 2009 et juin 2017 au total 375 millions d'euros sous forme des différents régimes d'aides, soutenant ainsi financièrement 655 projets liés à l'innovation et à la recherche. Grâce à ces aides, les entreprises concernées ont pu investir au Luxembourg plus d'un milliard d'euros.

1) http://legilux.public.lu/eli/etat/leg/loi/2017/05/17/a544/jo
2) http://www.guichet.public.lu/entreprises/fr/financement-aides/aides-recherche-developpement/index.html
3) http://www.innovation.public.lu/fr/financer/competitivite/index.html.

Source : ministère de l'Économie