TAXAND

LUXEMBOURG AND INTERNATIONAL TAX DEVELOPMENTS

PRESENTATION BY ATOZ

22 APRIL 2021

Your global tax partner

LUXEMBOURG TAX DEVELOPMENTS: TAX MEASURES INTRODUCED BY THE 2021 BUDGET LAW

CONTENTS

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INDIVIDUAL TAX

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Stock options/warrants

- The so-called warrant regime, which evolved from a circular introduced in 2002, has been repealed as from January 1, 2021.
- The repeal of the circular was announced in the commentary to the draft law, a repealing circular was issued on 14 December 2020.
- The entire circular was repealed.

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Stock options/warrants (cont'd)

Context

- Purpose of the amendment: Cancellation of an illegitimate tax benefit, badly perceived by the public opinion.
- The 2002 circular on stock options and warrants created a specific regime but at the same time created confusion and a mismatch between two mechanisms: stock option plans and the warrant plans. The first is a bet on future performance for a company, while warrant plans are a tool to limit the taxation of bonuses (past performance).
- The main contribution of the 2002 circular was to create a lump sum valuation of freely transferable options. Most of the rules introduced by this circular were in fact mere application of the Luxembourg general tax law. Based on that, the stock option measures as described should still be valid. The main impact of the circular is the cancellation of lump sum valuation. Nevertheless, based on the principles of the Luxembourg tax law, options which are valued according to regular financial mathematics could be given a valuation based on these standards.

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Stock options/warrants (cont'd)

- Stock-option plans can be still set up in Luxembourg but without the legal and tax certainty granted by a Luxembourg circular. The timing of the taxation should be the same as well as the method to determine the taxable amount. Nevertheless, the Luxembourg tax authorities' input is much anticipated on this topic.

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Employee profit shares ("Prime participative")

- With effect as from tax year 2021, a new profit share regime (prime participative) has been introduced for employees and will be 50% exempt under certain conditions.

- The amount of profit shares payable in the form of a bonus and benefiting from the 50% exemption will be subject to the two following cumulative limits:

  - The total amount of profit share paid by the employer to its employees will not be able to exceed 5% of the accounting profits of the employer as of the end of the accounting year preceding the allocation of the profit share; and

  - The amount of profit share paid by the employer to an employee will not be able to exceed 25% of the annual salary (excluding the amount of profit share) of the employee concerned.

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Employee profit shares ("Prime participative") (cont'd)

- In our view, these two limits should be interpreted in such a way that should one or two of them be exceeded, only the exceeding part will be fully subject to tax and the part up to the limits will still benefit from the 50% exemption.

- This approach should also be true in respect of the tax deduction of the profit share at the level of the employer: while the draft law specifies that the profit share within the meaning of the new draft law article is tax deductible at the level of the employer, the part of the profit share which exceeds the 5% and 25% limits mentioned above should remain tax deductible at the level of the employer under the standard tax deduction rules applicable to the payment of salary and bonuses.

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Employee profit shares ("Prime participative") (cont'd)

- As soon as the profit share has been put at the disposal of the employees, the employer will have to provide the Luxembourg tax authorities with a list of all employees who benefited from it as well as with all the information needed to evidence that the conditions required to benefit from the 50% exemption are met.

- Purpose of the amendment: Supposed to replace the warrants

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Impatriate regime

- With effect as from tax year 2021, the tax regime of impatriates has been amended. It will no longer be governed by a circular but, instead, by a new article of the Luxembourg income tax law (Art. 115 13b of the ITL).

Context

- The former regime was complex and not really popular for the employers. It was conditioned initially by an LTA approval. The approval was suppressed in 2014, but this cancellation led to a detrimental legal uncertainty.

- Purpose of the amendment: Keep the benefits of the former regime and simplify the process to qualify for it.

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

- A "*Règlement Grand Ducal*" was released on 23 December 2020 in order to provide details on the eligible exempt benefits.

- A 50% exempt impatriate premium will be introduced which an employer will be able to grant under certain conditions to its employees. To benefit from the partial exemption regime, the premium should not exceed 30% of the annual remuneration of the impatriate.

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Impatriate regime (cont'd)

- Most of the conditions of the previous impatriate regime in force will remain unchanged. However, to benefit from the regime under the new rules, the impatriate will have to have an annual remuneration of minimum 100,000 euros (instead of 50,000 euros) and he/she will be able to benefit from the regime during a time period of up to eight tax years (instead of currently five tax years).

- Besides the premium, some benefits paid by the employer are tax exempt at the level of the employee, among which:

  - Moving expenses (travel and relocation expenses);
  - Some travel expenses between Luxembourg and the employee's previous country;
  - Housing allocation (submitted to conditions);
  - Tax equalisation;
  - School fees;
  - Impatriate premium.

BUDGET LAW: KEY MEASURES (INDIVIDUAL TAX)

Impatriate regime (cont'd)

- Most of the conditions have been kept:
  - A impatriate must have her/his regular place of abode in Luxembourg;
  - The impatriate must not have been a tax resident in Luxembourg for the last 5 years (or not having lived by 150 km from the Luxembourg border);
  - The impatriate must not replace former employees who are not considered as impatriate employees;
  - The impatriate employment must be her / his main professional activity and receive a minimum compensation of EUR 100 K;
  - In case of secondment the impatriate must have a minimum seniority of 5 years in the sector;
  - In case of new recruitment the employee must have a minimal experience in the sector,

- Concerning the conditions applicable at the level of the employer, all of them were kept except the condition of a minimal staff of 20 employees.

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REAL ESTATE TAX

BUDGET LAW: KEY MEASURES (REAL ESTATE TAX)

SPF regime & real estate investments

- With effect as from July 1, 2021, private wealth management companies (SPFs) will not be allowed to hold real estate investments indirectly via one or more (Luxembourg or foreign) partnerships or FCPs (direct investments into real estate are already prohibited by the SPF law of May 11, 2007).

Context

- The purpose of the SPF was initially to allow private investments into movable assets.
- Since the introduction of the SPF regime in 2007, it was already forbidden to invest directly in real estate assets.
- The consequence of non-respect of this restriction: loss of the SPF status, i.e. the company becomes subject to the standard tax regime applicable to commercial companies.

BUDGET LAW: KEY MEASURES (REAL ESTATE TAX)

Accelerated depreciation rules for real estate investments

- The amortisation rate for new real estate investments into rental housing has been reduced from 6% to 4% as from tax year 2021.
- To be considered as a new residential investment, the real estate cannot be older than five years.
- The 4% amortization rate also applies to expenditures made for the renovation of old dwellings, provided that they exceed 20% of the acquisition price or cost of the building.
- For the renovation of rental accommodation to allow for the use of sustainable energy, the amortisation rate will be increased from 4% to of 6% of the expenses.

BUDGET LAW: KEY MEASURES (REAL ESTATE TAX)

Accelerated depreciation rules for real estate investments (cont'd)

- In addition to the amendment of the amortisation rules, the budget law introduced a special deduction for investments in real estate not older than five years and allocated to rental housing ("*abattement immobilier special*").

- This deduction amounts to 1% of the value used as a basis for the calculation of the accelerated depreciation of 4%, without however exceeding EUR 10,000.

- As a result, real estate investments in rental housing not older than five years will benefit from a combined amortisation and special deduction as follows:

  Value :

  < EUR 1,000,000: 5%

  > EUR 1,000,000: 4% plus a deduction of EUR 10,000.

BUDGET LAW: KEY MEASURES (REAL ESTATE TAX)

Taxation of Luxembourg real estate investments held by certain investment funds

- With effect as from 1 January 2021, a new annual 20% real estate withholding tax ("*prélèvement immobilier*") will be levied on income and capital gains arising from **real estate assets located in Luxembourg** and realised directly or indirectly by certain investment vehicles.

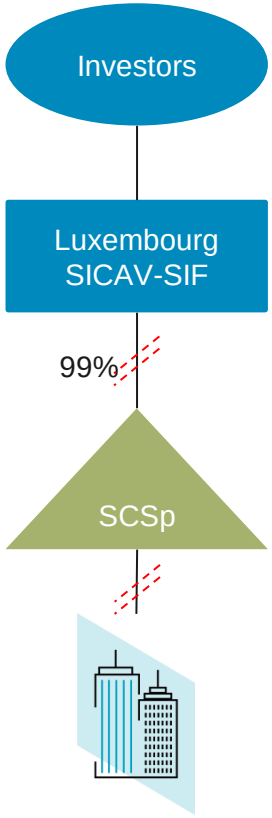
- The new real estate withholding tax will apply to the following Investment Vehicles:

    - Undertakings for Collective Investment ("UCI"), Specialised Investment Funds ("SIF"), and Reserved Alternative Investment Funds ("RAIF") (except Luxembourg partnerships, *sociétés en commandite simple*, "SCS");
    - Only RAIFs which are exempt from corporate income tax are concerned.
    - The real estate withholding tax will only apply to the extent that the Investment Vehicle has a legal personality separate from those of its partners/investors, hence excluding SCSps and FCPs.

BUDGET LAW: KEY MEASURES (REAL ESTATE TAX)

Taxation of Luxembourg real estate investments held by certain investment funds (cont'd)

- Annual real estate **withholding tax of 20%** on :
  - **income arising from Luxembourg real estate assets** (rental income and capital gains) held directly or indirectly through tax transparent entities or through FCPs.
  - **gains** realised by the Investment Vehicle on the **disposal of an interest in a tax transparent entity or of units in a FCP** but only up to the portion of the gain corresponding to the value increase of the Luxembourg real estate asset.



BUDGET LAW: KEY MEASURES (REAL ESTATE TAX)

Taxation of Luxembourg real estate investments held by certain investment funds (cont'd)

- Reporting and payment obligations:
  - At the latest **on 31 May** of the year following the one during which the real estate income has been realised: **file a tax return** with the withholding tax office of the Luxembourg tax authorities;
  - An **external auditor** will have to certify in a report that the real estate income has been computed in accordance with the provisions of the law; this report will have to be filed together with the tax return.
  - The related real estate withholding tax will have to be **paid** at the latest **on 10 June.**

BUDGET LAW: KEY MEASURES (REAL ESTATE TAX)

Taxation of Luxembourg real estate investments held by certain investment funds (cont'd)

- All Investment Vehicles, have to file an **additional return** including information on whether they have been holding (directly or indirectly) Luxembourg real estate assets during the calendar years 2020 and 2021. This tax return has to be filed **by 31 May 2022** at the latest.
- Finally, Investment Vehicles must inform the Luxembourg tax authorities if they **change their legal form** and become a tax transparent entity or a FCP in the course of the calendar years 2020 and 2021(only to the extent that the Investment Vehicles hold at least one Luxembourg real estate asset at the time of the change of their legal form).

BUDGET LAW: KEY MEASURES (REAL ESTATE TAX)

Real estate registration taxes

- Prior to 1 January 2021:
    - Contribution, against issuance of shares, of a real estate asset located in Luxembourg to a Luxembourg or foreign civil or commercial company upon its incorporation or capital increase ("*Apport pur et simple*"): proportional registration duty of 0.5% + 2/10 and 0.5% transcription tax (i.e. a total of 1.1% registration taxes)
    - contribution of a real estate asset located in Luxembourg remunerated by other means than shares ("*Apport à titre onéreux*"): subject to a proportional registration duty of 5% + 2/10 as well as to 1% transcription tax (i.e. a total of 7% registration taxes).
- With effect as from 1 January 2021:
    - Contributions, against issuance of shares, of Luxembourg real estate assets to a civil or commercial company: the registration duties have been increased from 0.5% + 2/10 to 2% +2/10 and the transcription tax has been increased from 0.5% to 1%.
- As a consequence, registration taxes applicable to such capital contributions will become 3 times higher (3.4% instead of 1.1%).

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OTHER TAX MEASURES

BUDGET LAW: OTHER TAX MEASURES

Investment funds & subscription tax

- As from 1 January 2021, sustainable funds set up as UCIs within the meaning of the law of 17 December 2010 will benefit from a lower rate of subscription tax ("*taxe d'abonnement*") - the standard rate being 0.05% - depending on the level of sustainable activity (within the meaning of article 3 of EU Regulation 2020/852) of the fund or its individual compartment:

    - 0.04% if at least 5% of the NAV of the fund, or of its individual compartment, is invested in sustainable economic activities;
    - 0.03% if at least 20% of the NAV of the fund, or of its individual compartment, is invested in sustainable economic activities;
    - 0.02% if at least 35% of the NAV of the fund, or of its individual compartment, is invested in sustainable economic activities; and
    - 0.01% if at least 50% of the NAV of the fund, or of its individual compartment, is invested in sustainable activities.

BUDGET LAW: OTHER TAX MEASURES

Investment funds & subscription tax (cont'd)

- Only the portion of the net assets invested in sustainable economic activities will benefit from the reduced rates mentioned above.

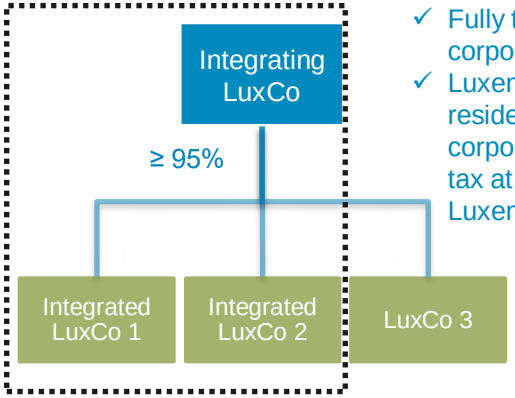
- The portion of the net assets invested in sustainable economic activities will be determined based on the situation as of the last day of the financial year of the UCI and will have to be certified by an external auditor.

BUDGET LAW: OTHER TAX MEASURES

Tax consolidation regime amended to reflect latest CJEU case law

- The provisions of the Luxembourg corporate income tax law dealing with the tax consolidation regime have been amended with effect as from tax year 2020 to reflect the recent decision of the CJEU (C-749/18 of 14 May 2020) regarding the consequences of the change from a "*vertical*" to "*horizontal*" tax consolidation.

VERTICAL TAX CONSOLIDATION



- ✓ Fully taxable Luxembourg corporation, or
- ✓ Luxembourg PE of a non-resident fully taxable corporation subject to income tax at a rate comparable to the Luxembourg CIT

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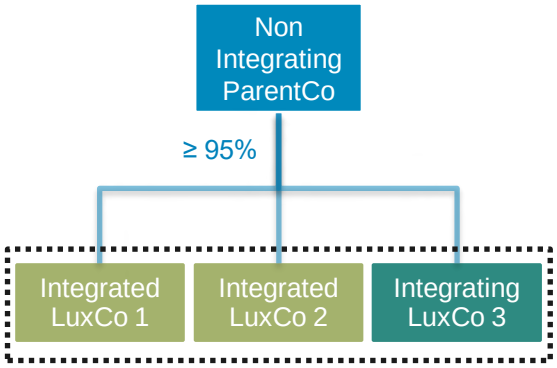
HORIZONTAL TAX CONSOLIDATION



- ✓ Fully taxable Luxembourg corporation
- ✓ Luxembourg PE of fully taxable non-resident corporation subject to income tax at a rate comparable to the Luxembourg CIT
- ✓ Fully taxable EEA corporation subject to income tax at a rate comparable to the Luxembourg CIT
- ✓ Luxembourg PE of fully taxable EEA corporation subject to income tax at a rate comparable to the Luxembourg CIT

- ✓ Fully taxable Luxembourg corporation, or
- ✓ Luxembourg PE of a non-resident fully taxable corporation subject to income tax at a rate comparable to the Luxembourg CIT

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BUDGET LAW: OTHER TAX MEASURES

- The new provision confirms that the change will not entail any negative tax consequences for the members of the consolidated tax group, provided certain conditions are met:

  - The Luxembourg integrating company of the prior tax group needs to remain the integrating company of the new tax group;
  - The change of the tax group needs to occur at the latest for the tax year 2022;
  - The perimeter of the tax group needs to be extended;
  - The members of the new tax group need to stay in the tax group for a minimum period of 5 years. However, the 5 year minimum period continues for the entities that have already been part of the prior tax group, i.e. the 5 year period only starts anew for the new entities having joined the tax group.

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OTHER RECENT LUXEMBOURG TAX DEVELOPMENTS

OTHER RECENT DEVELOPMENTS

Measure denying the tax deduction of interest and royalties to entities in blacklisted jurisdictions

- The entry into force of the new measure was postponed from 1 January 2021 to 1 March 2021.

- As from **1 March 2021**, interest and royalties due to entities located in non-cooperative tax jurisdictions will **no longer be tax deductible**, if the following **cumulative conditions** are met:

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

OTHER RECENT DEVELOPMENTS

Measure denying the tax deduction of interest and royalties to entities in blacklisted jurisdictions (cont'd)

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

- The measure will apply to interest and royalties due to countries listed as of the latest list available at that time and published in the Official Journal of the European Union.

OTHER RECENT DEVELOPMENTS

Measure denying the tax deduction of interest and royalties to entities in blacklisted jurisdictions (cont'd)

- Effect of a country being **added or removed** from the list:
  - Countries added will be taken into account for interest and royalties due as from 1 January of the following year (i.e. there will be **no retroactive nor immediate effect** but only an impact as from the following calendar year);
  - Countries removed will no longer be taken into account for interest and royalties due as from the date of the publication of the relevant EU list in the Official Journal (i.e. the **removal will have an immediate effect**).

List as of 22 February 2021 (date of the latest update): American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu.

OTHER RECENT DEVELOPMENTS

Circular on interest deduction limitation rules (cont'd)

- On 8 January 2021, the Luxembourg tax authorities issued Circular n° 168bis/1 (the "Circular") in order to provide guidance on the interpretation of the interest deduction limitation rules ("IDLR").

- Context: The limitation concerns exceeding borrowing costs (i.e. the amount by which the borrowing costs exceed the interest income in a given year) and corresponds to the higher of EUR 3mio or 30% of the tax EBITDA per fiscal year.

<u>The notion of borrowing costs and interest income</u>

- Borrowing costs are divided into three categories:

    - Interest expenses on all forms of debt;
    - Other costs economically equivalent to interest, and;
    - Expenses incurred in connection with financing.

OTHER RECENT DEVELOPMENTS

Circular on interest deduction limitation rules (cont'd)

- Borrowing costs may only concern deductible interest expenses, i.e., non-deductible interest expenses, regardless of the reason for the non-deductibility (e.g. anti-hybrid rules), do not qualify as borrowing costs.

- The notion of **interest income** and other economically equivalent income should constitute the counterpart of the borrowing costs (application of **a symmetric and coherent approach**):

    - Expenses incurred by a borrower not considered as borrowing costs should also not be considered as interest income at the level of the lender.
    - A charge considered as a borrowing cost for a borrower under the above definition, such expense should also be considered as an interest income for the lender.

OTHER RECENT DEVELOPMENTS

Circular on interest deduction limitation rules (cont'd)

Discounted debt

- A deduction for impairment of (presumably) irrecoverable receivables does not give rise to borrowing costs.
- Hence, the reversal of such impairment should likewise not constitute interest income.

- Could a capital gain on a discounted debt that has been acquired after the write-down qualify as interest income?
- Circular remains silent on this specific case.
- Relying on the general principles, capital gains should not be considered as interest income for the lender when they are not considered as borrowing costs for the borrower.
- Tax exposure where such discounted debt has been financed with interest bearing debt.

OTHER RECENT DEVELOPMENTS

Circular on interest deduction limitation rules (cont'd)

Real estate

- The fraction of capitalised interest included in the acquisition cost, e.g. of a real estate asset, falls within the scope of the IDLR in case of amortisation, depreciation and upon sale.

Tax neutral reorganisations

- Unused interest capacity and the carry forward of exceeding borrowing costs which could not be deducted in a given tax year may be transferred in case of tax neutral reorganisations.

Tax EBITDA (Calculated by adding to the total of net income realised by the taxpayer, its exceeding borrowing costs and the tax values for depreciation and amortization costs)

- The deductible fraction of foreign taxes, as well as interest expenses which benefit from the grandfathering rules, shall not be added back to the tax EBITDA.

- Income and interest expenses from infrastructure projects which qualify for the carve-out from the IDLR should be excluded from the tax EBITDA computation.

OTHER RECENT DEVELOPMENTS

Circular on interest deduction limitation rules (cont'd)

Grandfathering and material modifications

- In case of a modification of existing loans on or after 17 June 2016, the grandfathering would be limited to the original terms of the loan.
- Material modifications include:
  - Extension of the maturity of a loan,
  - Modification of the interest rate or the interest rate computation method or the modification of one or several of the contracting parties if such modifications were not contractually foreseen before 17 June 2016, or a
  - Modification of the principal amount.
- Restructurings such as mergers and demergers are not considered as a material modification
- A mere drawdown under a loan facility granted before 17 June 2016 falls within the scope of the grandfathering rule (provided that the maximum amount of the facility has not been subsequently increased).

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INTERNATIONAL TAX DEVELOPMENTS

OTHER RECENT DEVELOPMENTS

Taxation of the Digital Economy - OECD Pillar One and Pillar Two

- OECD's work on addressing the tax challenges arising from the digitalisation of the economy (i.e. Pillar One and Two)
- In 2019, members of the Inclusive Framework agreed to examine proposals in two pillars, which could form the basis for a consensus solution to the tax challenges arising from digitalisation.
- **Pillar One** focuses on new **nexus and profit allocation rules**:
  - Ensure that, in an increasingly digital age, the allocation of taxing rights with respect to business profits is no longer exclusively made by reference to physical presence
  - Grant greater taxing rights to the market jurisdictions.

OTHER RECENT DEVELOPMENTS

- **Pillar Two** explores options and issues in connection with the design of a **global minimum tax** that would address remaining BEPS issues:
  - Income Inclusion Rule
  - Undertaxed Payment Rule
  - Switch-Over Rule
  - Subject to Tax Rule

OTHER RECENT DEVELOPMENTS

Taxation of the Digital Economy - OECD Pillar One and Pillar Two

- Timeline:
  - Several delays of the OECD-level discussions in 2020 due to Covid 19 pandemic
  - Blueprint reports issued on 14 October 2020 and launch of public consultation process
  - Objective: Consensus-based solution and final reports by mid-2021
  - Achievable?

OTHER RECENT DEVELOPMENTS

Interaction with initiatives at EU level

- In 2018, the EU Commission had issued two proposals for Directives:
  - Directive on a digital services tax
  - Directive on the concept of significant digital presence
- Work on these two proposals was suspended in light of the work undertaken at OECD level on Pillar One and Pillar Two
- The EU Commission however announced that in the absence of a final consensus at OECD level by mid-2021, it would set out the next steps for a reform of the corporate tax system to fit the digitalised economy at EU level, notably to avoid that member states take unilateral measures, and to achieve a harmonised approach at EU level.

OTHER RECENT DEVELOPMENTS

Mutual Assistance Directive on administrative cooperation in the field of taxation (2011/16) (“DAC”) - amendments

- On 22 March 2021, a Directive amending the Mutual Assistance Directive on administrative cooperation in the field of taxation (2011/16) to extend the EU tax transparency rules to digital platforms (**DAC7**) was adopted.

- DAC7 provides for:
  - An obligation on reporting platform operators to collect and verify information in line with due diligence procedures.
  - An obligation on reporting platform operators to report information on the reportable sellers which use their platform on which they operate, to sell their goods and provide their services.
- Targeted activities : the rental of immovable property, the provision of personal services, the sale of goods (i.e. tangible properties) and the rental of any mode of transport.

- DAC7 also introduces a definition of the “foreseeable relevance”, allows information requests on groups of taxpayers, provides a framework for the conduct of joint audits and finally includes royalties in the list of income subject to mandatory automatic exchange of information under DAC.

OTHER RECENT DEVELOPMENTS

Mutual Assistance Directive on administrative cooperation in the field of taxation (2011/16) (“DAC”) - amendments

- On 24 November 2020, an Inception Impact Assessment concerning a potential future proposal for an EU Council directive amending DAC to include crypto assets and e-money (DAC8) was published.
    - No draft directive proposal yet.
    - Public consultation ongoing (until 2 June 2021)

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Petya is qualified as a Chartered Accountant in Luxembourg (“Expert-Comptable”). She holds a master’s degree in Business and Tax law from the University of Nancy (France). She speaks English, French and Bulgarian.

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Christina is a Chartered Accountant in Luxembourg (“expert-comptable”). She holds a post-graduate degree in Luxembourg tax as well as a degree in Business Administration (with a specialisation in Tax) from Europa Universität Viadrina in Frankfurt (Germany). She also holds a Master II in Business Administration from Reims Management School (France). She speaks German, English and French.

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ABOUT TAXAND

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