

## Mandatory automatic exchange of information with regards to advance cross-border tax rulings

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March 2016

**On 22 March 2016 the Luxembourg Minister of Finance submitted to the Chamber of Deputies draft law no. 6972 (“the Draft law”) implementing Council Directive (EU) 2015/2376 of 8 December 2015 (“DAC3”), on the mandatory automatic exchange of advance cross-border tax rulings within the European Union as from 1st January 2017.**

**This Tax Alert summarises some of the main aspects covered by the draft law. Further information on the draft law as it goes through the parliamentary process will be fed in due course in subsequent Tax Alerts throughout 2016.**

### 1. CONTEXT

- :: Council Directive 2011/16/EU of 15 February 2011 (“DAC1”) provides for the mandatory automatic exchange of information between Member States on certain categories of capital and income, mainly of a non-financial nature, that taxpayers hold in Member States other than their state of residence, on the basis of availability. The law of 29 March 2013 on administrative cooperation in the field of taxation, implemented DAC1 into Luxembourg domestic law.
- :: Council Directive 2014/107/EU of 9 December 2014 (“DAC2”) extends the cooperation between EU tax authorities to automatic exchange of financial account information. This extension effectively incorporated the Common Reporting Standard developed by the OECD within DAC1. The law of 18 December 2015 on the automatic exchange of financial account information in the field of taxation, implemented DAC2 into Luxembourg domestic law, and amended the law of 29 March 2013 on administrative cooperation in the field of taxation, as amended.
- :: Council Directive (EU) 2015/2376 of 8 December 2015 (“DAC3”) extends the scope of the mandatory automatic exchange of information established in DAC1 to advance cross-border tax rulings and advance pricing arrangements. The Draft law aims at implementing DAC3 into Luxembourg domestic law, by amending the law of 29 March 2013 on administrative cooperation in the field of taxation, as amended.
- :: On 8 March 2016, the Economic and Financial Affairs Council of the EU (ECOFIN) agreed on the European Commission’s draft directive on the exchange of tax-related information on the activities of multinational companies (“DAC4”). The draft directive aims at

implementing at EU level the OECD recommendation on country-by-country reporting (BEPS action 13), requiring multinationals<sup>1</sup> to report tax-related information, detailed country-by-country, and requiring national tax authorities to exchange that information automatically.

## 2. THE DRAFT LAW IMPLEMENTING DAC3

- - :: The Draft law literally incorporates the wording of DAC3, and extends the scope of the automatic exchange to advance cross-border rulings and advance pricing arrangements, issued, amended or renewed in relation to a particular person or group of persons, upon which that person or group of persons is entitled to rely, irrespective of their binding or non-binding character and the way they are issued.
  - :: The Draft law includes a definition of “advance cross-border ruling”, “advance pricing arrangement”, “cross-border transaction” and “enterprise”.
  - :: The scope of these definitions is sufficiently broad to cover a wide range of situations, including but not limited to the following types of advance cross-border rulings and advance pricing arrangements:
    1. Unilateral advance pricing arrangements and/or decisions;
    2. Bilateral or multilateral advance pricing arrangements and decisions;
    3. Arrangements or decisions determining existence or absence of a permanent establishment;
    4. Arrangements or decisions determining existence or absence of facts with a potential impact on the tax base of a permanent establishment;
    5. Arrangements or decisions determining tax status of a hybrid entity in one Member State which relates to a resident of another jurisdiction;
    6. As well as arrangements or decisions on assessment basis for depreciation of an asset in one Member State that is acquired from a group company in another jurisdiction.
  - :: DAC3 requires Member States to exchange basic information with all other Member States. This requirement is based on the principle that the other Member States are best placed to assess the potential effects and the relevance of a ruling in their respective jurisdiction, rather than the issuing Member State. A limited set of basic information will also be communicated to the European Commission for the purposes of monitoring and evaluating the effective application of the mandatory exchange.
  - :: The information shall be communicated promptly after the advance cross-border rulings and advance pricing arrangements are issued, amended or renewed. The Draft law establishes regular intervals for the communication of the information.

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<sup>1</sup> Multinational Enterprise Groups with total consolidated group revenue equal or higher than EUR 750 million

The Draft law also provides for the retroactive mandatory automatic exchange of advance cross-border rulings and advance pricing arrangements that were issued, amended or renewed within a period beginning five years before 1st January 2017 (i.e. 1st January 2012) and which are still valid on 1st January 2014.

However, a particular person or a group of persons (excluding those conducting mainly financial or investment activities) with a group-wide annual net turnover of less than EUR 40 million (or the equivalent in another currency) in the fiscal year preceding the date of issuance, amendment or renewal of those cross-border rulings and advance pricing arrangements, are excluded from the mandatory automatic exchange.

- - :: For reasons of legal certainty, the Draft law provides, under a set of very strict conditions, to exclude from the mandatory automatic exchange bilateral or multilateral advance pricing arrangements with third countries following the framework of existing international treaties with those countries, where the provisions of those treaties do not permit disclosure of the information received under that treaty to a third party country. In these cases however, the information relating to the requests that lead to issuance of such bilateral or multilateral advance pricing arrangements must be exchanged instead. Therefore, in such cases, the information to be communicated must include the indicator that it is provided on the basis of such a request.
  - :: In order to facilitate the exchange of information, the European Commission will establish a central directory, accessible to all Member States and the European Commission, to which Member States will upload and store information. In the meantime the exchange must be made using a specific form adopted by the European Commission. Where necessary, Member States receiving information may request to obtain additional information, including the full text of advance cross-border rulings or advance pricing arrangements, from the Member State having issued such rulings or arrangements.
  - :: The Draft law excludes from the scope of the mandatory automatic exchange any advance cross-border ruling that exclusively concerns and involves the tax affairs of one or more natural persons.
  - :: Pursuant to Article 2 (1) of DAC3, the directive shall be implemented by Member States, including Luxembourg, by 31 December 2016.

#### Remark concerning the draft DAC4:

The draft DAC4 was agreed in the ECOFIN meeting on 8 March 2016. The adoption of the directive will require the unanimous approval of all Member States, and the European Parliament has not yet given its opinion on the draft directive. It is presently too early to precisely assess the changes that DAC4 may affect to the law of 29 March 2016 on administrative cooperation in the field of taxation, as amended.

**Should you require any further information, please do not hesitate to contact your regular contact person at Tiberghien Luxembourg or:**



JEAN-LUC DASCOTTE

*Partner*

[jean-luc.dascotte@tiberghien.com](mailto:jean-luc.dascotte@tiberghien.com)



JONATHAN NORMAN

*Senior Associate*

[jonathan.norman@tiberghien.com](mailto:jonathan.norman@tiberghien.com)

**Tiberghien Luxembourg**

2 rue Albert Borschette

L-1246 Luxembourg

Tel +352 27 47 51 11

Fax +352 27 47 51 10

**[www.tiberghien.com](http://www.tiberghien.com)**