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## Summary and conclusions

Globalisation has dramatically increased in recent decades. This has led to a proliferation of cross-border transactions; increased mobility of taxpayers; capital shift among different jurisdictions;<sup>3</sup> with consequent challenges for national tax authorities.

In this context, financial crimes, including tax evasion (and corruption) are a threat to the political and economic stability of both developed and developing countries.<sup>4</sup>

Exchange of information (EOI) is one of the answers to these challenges that a globalised economy generates for tax administrations around the world. This form of administrative assistance helps to determine the right to tax for a particular jurisdiction<sup>5</sup> and reduce tax evasion and fraud.

These changes have been paralleled by more globalisation with increasing pressure from other jurisdictions to obtain information relevant for tax purposes. This is motivated by the need to increase tax revenues in such jurisdictions taking advantage of unprecedented technological advances offered by the information data revolution and the appearance of new tools fostering cooperation between tax administrations allowing more effective exchange.

Luxembourg has had a U-turn history in terms of EOI, transforming from a jurisdiction offering limited room for EOI and strong banking and financial institution secrecy protection to a first-mover position swiftly incorporating EU and Organisation for Economic Co-operation and Development (OECD) developments in terms of EOI.

The international (mainly the OECD initiatives including certain BEPS Action plans) and European Union (EU) measures adopted and implemented in Luxembourg in recent years have contributed to the expansion of EOI. This implementation has been done on a consistent basis both within the international and the European frameworks. Indeed, Luxembourg effectively cooperates and effectuates EOI upon request (EOIR), spontaneous EOI (SEOI) and automatic EOI (AEOI) within a consequent, coordinated and harmonised legal framework.

The Foreign Account Tax Compliance Act of 2010 (FATCA) and Common Reporting Standard (CRS) have been the main drivers for the globalisation of AEOI.

Luxembourg is the top EU information sender in terms of Euro amounts. This is partly

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<sup>3</sup> MARINO, Giuseppe (Ed.), *New Exchange of information versus tax solutions of equivalent effect*, EATLP Annual Congress Istanbul, IBFD Volume 13 EATLP International Tax Series. 2015. p. 4.

<sup>4</sup> See TEJEIRO, Guillermo. *Tax evasion and money laundering: The "Whole of Government" OECD Approach*. Kluwer, 2015.

<sup>5</sup> LEBAS, Emilien, *Automatic exchange of information – treaty and OECD aspects in Droit Fiscal Luxembourgeois*, IFA – Legitech (Simon, G. Ed.) 2018. p. 943.

explained by Luxembourg's leading role in the financial services sector (in particular, being the second largest investment funds hub in the world) and the fact that it is a jurisdiction that welcomes workers from neighbouring countries on a massive scale.

Luxembourg today is seen as 'largely compliant' with the OECD's international standard for transparency and EOIR, which evaluates criteria such as availability of ownership and identity information, availability of accounting information, availability of banking information, access to information, rights and safeguards for EOIR mechanisms, network of EOIR mechanisms, confidentiality as well as quality and timeliness of response. Indeed, Luxembourg continues to make efforts in terms of human support and means to allow such exchange.

Despite such efforts, Luxembourg should improve the time spent handling the requests which do not meet the target set by the OECD standard.

In terms of EOIR, Luxembourg incorporated the 'foreseeable relevance' criteria as a condition for the exchange to avoid 'fishing expeditions'. Lack of domestic interest in the information and banking, fiduciary or financial institution secrecy are no longer admitted as valid grounds justifying not proceeding with the exchange.

As EOIR continues to expand, national courts and the Court of Justice of the European Union (CJEU) face more and more controversies related to protection of taxpayers' and concerned persons' rights. This is particularly relevant to Luxembourg. Indeed, since the CJEU's ruling in the *Berlioz* case,<sup>6</sup> the applicable Luxembourg legislation has been significantly amended, in an attempt to adapt to such case findings.

The change is mainly driven by the protection of rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Fundamental Freedoms and the Charter of Fundamental Rights of the European Union (Charter).

The content of taxpayers' rights in light of the Charter will continue to influence how EOIR operates in Luxembourg and in the EU as a whole. Indeed, the CJEU's interpretation of these rights will carry on shaping the law and how the European judges protect such rights. Therefore, the outcome of the latest preliminary questions referred to the CJEU by the Luxembourg courts should be closely followed.

Regarding confidentiality, the Luxembourg tax administration is bound by strict protocols and rules that aim to safeguard it as part of the tax procedures they undertake (including EOIR, SEOI and AEOI).

Furthermore, Luxembourg does not use the information exchanged for any other purpose than tax, and only admits its use for non-tax purposes if the authority providing the information authorises such use.

Confidentiality and data protection rules appear as the first line of defence of taxpayers on all types of EOI, especially as AEOI expands. The data protection Regulation of the European Parliament and Council (EU) 2016/679 of 27 April 2016 (GDPR) reinforces this protection as it is applicable in the context of FATCA and CRS. Therefore, data protection rights claims in courts are no longer a question of if but when. This manifests the Charter's influence in the application and use of the information exchange under the AEOI framework.

Indeed, the protection of taxpayers in the case of EOI should now shift to GDPR and the protection of rights via the Charter, which only broadly cover European citizens.

The rise of new technologies poses a threat to the advantages the tax administrations

<sup>6</sup> CJEU, *Berlioz* Case C-682/15.

have obtained thanks to the EOI and other forms of administrative cooperation enhancement.

However, loopholes continue to be closed thanks to the OECD and EU initiatives (such as the EU Directive 2018/822 of 5 June 2018 (DAC 6)) and their rapid implementation, as is the case in Luxembourg.

Since the set-up of a globalised EOI, the implementation of the widest possible AEOI was the ultimate goal. It should be stressed that if the information obtained through AEOI (or SEOI) is not sufficient with respect to the recipient state of the information, the latter could request complementary information via EOIR. In this case, the ‘foreseeable relevance’ criteria should be fulfilled *a priori*.

In addition, the ‘foreseeable relevance’ criteria had been already weakened under the scope of the EU Directive 2015/2376 of 8 December 2015 (DAC 3)<sup>7</sup> and the narrow scope of control of the criteria granted to tax and judicial authorities. This added to the fact in the future it may be desirable to allow more EOIR, the need for maintaining the ‘foreseeable relevance’ requirement may fade away.

It should be highlighted that, in particular, AEOI measures affect all taxpayers in a cross-border situation, even if the tax evaders represent a non-significant proportion of the above-mentioned taxpayers.

If the deterrent effect of these measures on “non-significant” tax evaders should be important, it is questionable whether the effect would be the same for more organised tax evaders. One could reasonably think that the latter would find other means to circumvent their tax obligations (e.g. using crypto-assets, etc.).

Hence, it appears that only global tax harmonisation could mitigate international tax fraud. This harmonisation is the aim of the OECD and G20. If this harmonisation was implemented, AEOI would lose its purpose.

## 1. Instruments and processes of international application

### 1.1. Introduction

Luxembourg’s economy is mainly orientated towards the financial sector, which amounts to 25% of the national gross domestic product.<sup>8</sup>

Furthermore, Luxembourg has, for a long time, been a member of international organisations that are key to the implementation of the EOI. Indeed, Luxembourg is a (founding) member of the EU, the UN, the OECD and the Global Forum (section 1.5).

Therefore, the implementation of the various EOI rules was more a political and economic issue (e.g. end of the banking secrecy) than a technical issue. Luxembourg was hence an early adopter of the EOI measures, demonstrating its commitment towards transparency.

EOI has evolved in parallel with globalisation and the ‘big data revolution’. Tax administrations have also realised the potential that the use of data has for the purposes of tax audits and as a resource to tackle aggressive tax planning and have been discussing how to

<sup>7</sup> Since the only information available to member states is the summary of the ruling, their ability to formally demonstrate the ‘foreseeable relevance’ of the request is undermined.

<sup>8</sup> See ([https://ec.europa.eu/info/sites/info/files/file\\_import/2019-european-semester-country-report-luxembourg\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-luxembourg_en.pdf)).

effectively use the massive amount of information being collected.<sup>9</sup> This with the aim not only of increasing tax revenues but also of deterring tax evasion and fostering tax transparency.

From a historical perspective, Luxembourg has changed from being a jurisdiction with a particular interest in preserving bank and professional secrecy, to one having a full transparency approach consistent with the legislative evolution seen in the last decade.<sup>10</sup> In effect, Luxembourg is an early adopter of all recent OECD base erosion and profit shifting (BEPS)<sup>11</sup> and EU EOI related measures.

These measures include bilateral and multilateral instruments, including the double tax treaties (DTTs) based on the OECD Model and UN Model, the MC and MCAA (section 1.2), certain BEPS actions as well as the DAC Directives (section 1.3) which have been implemented in Luxembourg law in a swift manner (section 2.1), allowing the Luxembourg tax administration (LTA) to effectively undertake EOI. Additionally, Luxembourg has swiftly introduced FATCA.<sup>12</sup>

However, in certain cases, EOI raises conflicts between (i) privacy and transparency<sup>13</sup> and (ii) between efficiency of the EOI and the Charter's rights (section 2.1.4). These conflicts (i) permeate the powers that the LTA exercises, (ii) influence the way courts safeguard and protect taxpayers' rights, and (iii) can finally alter the content of the law (sections 2.1.1 and 2.4).

There are three main methods to carry out EOI,<sup>14</sup> namely:

- (i) EOI upon request (EOIR): the exchange of certain information 'foreseeably relevant' from a tax perspective to a peer authority in another tax jurisdiction, further to a request normally related to a specific tax audit procedure. Furthermore, no fishing expeditions are allowed, so the information requested must be relevant to the tax affairs of the taxpayer or a determined group of taxpayers.<sup>15</sup> EOIR was the most common method of EOI until the expansion of AEOL;<sup>16</sup>

<sup>9</sup> WESSEL, Reah, Data makes the difference in Tax, No.11, EY. 2014. p. 41.

<sup>10</sup> STEICHEN, Alain, Ch. 18: Luxembourg in: New exchange of information versus tax solutions of equivalent effect, EATLP Annual Congress Istanbul, IBFD Volume 13 EATLP International Tax Series (Marino, G. Ed. 2015). p. 373-379.

<sup>11</sup> BEPS is an OECD initiative developed by G20 mandate, aiming to actualise tax rules to fight tax evasion. This work started in 2013 and finalised in 2015 with the issuance of 15 action plans final reports and concrete measures to be adopted worldwide. Regarding EOI, two actions are particularly relevant: (i) Action 5 on 'Harmful Tax Practices' (considering transparency and substance); and (ii) Action 13 on 'Transfer Pricing Documentation and Country-by-Country Reporting'. It should be noted that Actions 5 and 13 are part of the 4 minimum standard actions whose implementation is subject to more precise monitoring, undertaken by peers and aimed at guaranteeing equality among jurisdictions.

<sup>12</sup> FATCA is US legislation that aims to reduce tax evasion by certain US tax persons with respect to revenues derived from financial assets held outside the US. Accordingly, 'Reporting Financial Institutions' are required to fulfil due diligence and reporting obligations. Non-compliance of such obligations may trigger a US 30% withholding tax in relation to US sourced payments, and the LTA may also impose pecuniary penalties to enforce them.

<sup>13</sup> MARINO, Op. Cit. p. 3.

<sup>14</sup> MARINO, Op. Cit. p. 8.

<sup>15</sup> LEBAS, Op. Cit. p. 943.

<sup>16</sup> CHAOUCHE, SINNIC, *Assistance administrative internationale, procédures luxembourgeoises et droits fondamentaux – Quelques réflexions au lendemain de l'arrêt Berlioz*. Journal des Tribunaux Luxembourg. No 52 Larcier, August 2017, Op. Cit. p.101.

- (ii) spontaneous EOI (SEOI): the exchange of certain information 'foreseeably relevant' but that has not been requested by the state receiving it.<sup>17</sup> This is the case when a state has acquired the information and considers it may be of interest to the other state;<sup>18</sup> and
- (iii) automatic EOI (AEOL): the systematic transmission of information, relevant to one or more categories of income, from one state to another.<sup>19</sup> The information is gathered and transmitted without request, based on predetermined criteria, data and the use of specific and secured transmission mechanisms.<sup>20</sup> Nowadays, AEOL is mainly performed on the basis of FATCA and CRS.<sup>21</sup>

These main methods of EOI may also operate on a combined basis. Other forms of EOI exist, such as simultaneous examinations, tax examinations abroad and industry-wide EOI.<sup>22</sup>

Luxembourg's treaty network (section 1.2) and regional framework of the DAC Directives (section 1.3) allow EOI in all these forms, cover a large number of jurisdictions and contribute to its effectiveness.

From the OECD's perspective, Luxembourg improved its EOI effectiveness between 2015 and 2018 in several areas, notably concerning access to information, EOIR mechanisms and confidentiality.<sup>23</sup>

Consequently, today, Luxembourg is seen as 'largely compliant' with the OECD's international standard for transparency and EOIR,<sup>24</sup> which evaluates criteria such as the availability of ownership and identity information, the availability of accounting information, the availability of banking information, access to information, rights and safeguards for EOIR mechanisms, the network of EOIR mechanisms, confidentiality and quality as well as timeliness of response.<sup>25</sup>

Nevertheless, the OECD also highlighted certain areas where Luxembourg needs to improve, including (i) the availability of beneficial ownership information in relation to Luxembourg stock companies and partnerships; (ii) the application of the rights and safeguards of taxpayers; and (iii) the timeliness of response to EOIR from Luxembourg EOI partners.<sup>26</sup> Specifically, Luxembourg should improve the time spent handling the requests which continues to increase and does not meet the ninety-days response target set by the OECD standard.<sup>27</sup>

In quantitative terms, between 1 October 2014 and 30 September 2017, Luxembourg

<sup>17</sup> LEBAS, *Op. Cit.* p. 944.

<sup>18</sup> OECD (2017) Model Tax Convention on Income and on Capital - Condensed version, p.494 and OECD (2015), Text of the revised explanatory report to the convention on mutual administrative assistance in tax matters as amended by protocol. p. 12.

<sup>19</sup> OECD (2017) Model, *Op. Cit.* p. 494.

<sup>20</sup> LEBAS, *Op. Cit.* p. 944.

<sup>21</sup> Responding to a G20 request, the OECD released its original AEOL initiative and standard (CRS) on 13 February 2014. CRS are rules (concerning due diligence and reporting) for financial institutions to guarantee consistency in scope and quality of AEOL.

<sup>22</sup> OECD (2017) Model, *Op. Cit.* p. 9.

<sup>23</sup> *Ibidem*.

<sup>24</sup> OECD (2019), Global Forum on Transparency and Exchange of Information for Tax Purposes: Luxembourg 2019 (Second Round): Peer Review Report on the Exchange of Information on Request, Global Forum on Transparency and Exchange of Information for Tax Purposes, OECD Publishing, Paris. p. 13.

<sup>25</sup> *Ibidem*.

<sup>26</sup> *Ibidem*, p. 15.

<sup>27</sup> *Ibidem*, p. 106 and 108.



received over 2,309 EOI requests,<sup>28</sup> of which 729 concerned banking information and 13 group requests. Despite such delays, the level of satisfaction of the Luxembourg partners is good considering the answers received (with two exceptions).<sup>29</sup> The OECD also acknowledges the good collaboration between banking institutions and the LTA's EOI team which enabled these group requests to be handled swiftly.<sup>30</sup>

Between the same period, Luxembourg has sent only 46 requests, which are of good quality based on the foreign authorities' view and only one request that required further clarification during this period.<sup>31</sup>

The EU Commission has highlighted that the cost for implementation of EOIR and SEOI under the DAC 1, DAC 2 and DAC 3 (as defined below) cannot be quantified.<sup>32</sup> Still, the EU Commission estimates that this cost should be higher than for AEOI due to the labour-intensity of tax audits, when compared to AEOI, which could be used on an automated basis.<sup>33</sup>

Concerning the cost of AEOI implementation, it has been estimated that the budget for banks in Luxembourg for the implementation of FATCA ranged between EUR 56.8 million and EUR 84.1 million with annual recurring costs between EUR 7.5 million and EUR 7.8 million.<sup>34</sup> In relation to CRS implementation, the budget was estimated at EUR 43.8 million, with a recurring cost of EUR 7 million.<sup>35</sup>

Additionally, the EU Commission estimated a cost of implementation (including development costs and recurrent costs) of DAC 1 and DAC 2 (i.e. including CRS measures) of EUR 7.9 million and EUR 3.6 million, respectively.

Regarding the actual economic output of AEOI measures, the EU Commission has recognised that member states find it difficult to quantify this in terms of additional tax revenue. More importantly, the information helps to set risk profiles for taxpayers and has a deterrent effect for taxation evasion.<sup>36</sup>

However, in September 2019 and based on a larger analysis, the EU Commission concluded, based on limited data, that the benefits of AEOI using the DAC Directives may easily exceed the cost generated by DAC 1, DAC 2 and DAC 3.<sup>37</sup>

Since Luxembourg effectively provides more information than it receives in the context of AEOI,<sup>38</sup> we believe that the financial impact regarding revenue increase has been rather limited when compared to other jurisdictions that effectively receive more information. We were not able though to obtain information in this respect from the LTA.

<sup>28</sup> Ibidem, p. 15.

<sup>29</sup> Ibidem, p. 71.

<sup>30</sup> Ibidem, p. 78.

<sup>31</sup> Ibidem, p. 114.

<sup>32</sup> EU Commission (2019), 'Commission staff working document evaluation of the Council Directive 2011/16/EU (...)'' p. September 2019. p. 50.

<sup>33</sup> Ibidem, p. 52.

<sup>34</sup> EY, Survey on the cost of regulations and its impact on the Luxembourg financial marketplace. 2016 Edition. p. 27.

<sup>35</sup> Ibidem, p. 29.

<sup>36</sup> See EU Commission (2018), 'Report from the Commission to the European Parliament and the Council, on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation', December 2018, p. 13.

<sup>37</sup> EU Commission (2019), Op. Cit. p. 51.

<sup>38</sup> Ibidem, p. 4, 9, 10 and 11.

In addition to this, it is important to highlight that Luxembourg is the leader in AEOL measured in Euros, with more than EUR 9 billion reported, predominantly towards Belgium, France and Germany.<sup>39</sup>

Below, we describe most of the current EOI framework in Luxembourg, as well as other practical issues, uses and cooperation in the context of EOI.

## 1.2. Treaties

Luxembourg is a member of the United Nations (UN) and the OECD. Hence, in principle, international instruments (outside the EU) are addressed within the framework of such organisations and take the form of the following bilateral or multilateral instruments:

- Double tax treaties (DTTs);
- Tax Information Exchange Agreements (TIEAs);
- Convention on Mutual Administrative Assistance in Tax Matters (MC); and
- Multilateral Competent Authority Agreement (MCAAs).

By implementing the MC, signing the MCAA and new DTTs as well as updating their content, Luxembourg continues to increase its EOI network.

TIEAs are an alternative to DTTs with certain tax jurisdictions, particularly those that have no income tax or where the tax burden is low.<sup>40</sup> Luxembourg has not signed any TIEAs to date.<sup>41</sup>

According to the OECD, Luxembourg has made significant progress with respect to EOI agreements being compliant with their standards, and notably, only five DTTs are not currently compliant, relating to jurisdictions that are not covered by the MC.<sup>42</sup>

The international standard for EOIR is contained mainly in the MC (and its commentary), article 26 of the OECD Model (and its commentary) and article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries (the UN Model) (and its commentary).<sup>43</sup>

Luxembourg's treaty network (both bilateral and multilateral) currently covers 136 jurisdictions, of which 130 are in line with the OECD standard on EOI of which 119 are currently in force.<sup>44</sup>

<sup>39</sup> Ibidem, p. 4.

<sup>40</sup> STEICHEN, Op. Cit. p. 380.

<sup>41</sup> See (<https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm>).

<sup>42</sup> See OECD (2019), Op Cit. p. 89-90, which refers to 6 jurisdictions including the US which we have removed further to the recent entry into force of the relevant DTT's protocol. On 9 September 2019, Luxembourg announced the entry into force of the latest protocol to the DTT between Luxembourg and the US which increased to 136 the jurisdictions compliant with the OECD standard. The remaining 5 jurisdictions not in line with the OECD standard are Morocco, Thailand, Trinidad and Tobago, Uzbekistan and Vietnam. These five DTTs do not allow the exchange of information held by banks and other financial institutions.

<sup>43</sup> OECD (2019), p. 5.

<sup>44</sup> The OECD considered a treaty network covering 135 jurisdictions and 129 in line with the OECD standard. See OECD (2019), Op. Cit. p. 98-100. This does not consider the entry into force of the latest protocol to the DTT between Luxembourg and the US.



### 1.2.1. *Bilateral instruments*

The EOI, based on the DTTs signed by Luxembourg, is mainly done on the basis of article 26 of the OECD Model which allows EOIR, SEOI and AEOL. Based on the latter, there is a limitation on the exercise of the powers granted to the tax authorities. Accordingly, only information that is 'foreseeably relevant' should be requested and exchanged, and 'fishing expeditions' are not authorised.

Notably, since 2005, a party's lack of domestic interest in the information requested (article 26(4) of the OECD Model) and banking or financial institution secrecy (article 26(5) of the OECD Model) are no longer acceptable grounds to justify not proceeding with the exchange.<sup>45</sup>

Luxembourg had initially made a reservation in respect of article 26(5) of the OECD Model on banking secrecy in the context of DTT negotiations, but withdrew its reservation in March 2009 as part of its willingness to introduce full transparency regarding EOI.<sup>46</sup>

Accordingly, to achieve such full transparency, Luxembourg entered into the renegotiation of several DTTs (mainly to pass the OECD's twelve DTT threshold and prove its engagement to transparency). More generally, Luxembourg integrated the removal of bank secrecy into its DTT negotiation policy. Consequently, on July 2009 Luxembourg passed from the 'grey list' to the 'white list' in terms of adherence to the international standards of transparency and cooperation.<sup>47</sup>

Currently, Luxembourg's bilateral network includes 85 signed DTTs of which 84 are in force.<sup>48</sup> These agreements contain mechanisms allowing EOI with each relevant jurisdiction, most of which are in line with the OECD standard, and integrate the legal basis to undertake such exchange.<sup>49</sup>

### 1.2.2. *Multilateral instruments*

There are currently two main multilateral instruments that are relevant for EOI in Luxembourg, MC and MCAA(s).

The MC is a multilateral instrument developed by the OECD that allows all forms of EOI. It provides for various forms of administrative co-operation between states to assess and collect taxes.<sup>50</sup>

An MCAA is a multilateral framework agreement providing standardised and efficient mechanisms for AEOL purposes. MCAAs can be used on a bilateral or multilateral basis;<sup>51</sup> in practice Luxembourg undertakes such exchange on a multilateral basis.

<sup>45</sup> STEICHEN, Op. Cit. p. 379-381 and (<https://gouvernement.lu/fr/dossiers/2018/transparence-fiscale.html>).

<sup>46</sup> STEICHEN, Op. Cit. p. 381.

<sup>47</sup> STEICHEN, Op. Cit. p. 384. Also, FORT, JUNG, RUST, Exchange of information and cross-border cooperation between tax authorities, *Cahiers de droit fiscal international*, Studies on International Fiscal Law by the International Fiscal Association, Luxembourg Report, 2013. Volume 98b, p. 475-476.

<sup>48</sup> See ([https://impotsdirects.public.lu/fr/conventions/conv\\_vig.html](https://impotsdirects.public.lu/fr/conventions/conv_vig.html)).

<sup>49</sup> OECD (2019), Op Cit. p. 89.

<sup>50</sup> See (<https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>).

<sup>51</sup> LEBAS, Op. Cit. p. 947.

### 1.2.2.1. *Multilateral Convention on the Mutual Administrative Assistance in Tax Matters (MC)*

The MC was concluded in 1988 by the Council of Europe and the OECD, and it was later amended in 2010 by a protocol.<sup>52</sup> The protocol aligned the MC with the international standard on transparency and EOI. Most notably, the objective was that states that did not integrate the Council of Europe and the OECD could take part in such convention.<sup>53</sup> In principle, this instrument's scope covers all forms of 'compulsory payments to general government'<sup>54</sup> including taxes and social security contributions<sup>55</sup> and allows cooperation including EOI and recovery of tax claims, but signing states can limit its scope by introducing reservations.<sup>56</sup>

Luxembourg signed this convention on 29 May 2013 and completed its ratification with the publication of the MC Law of 26 May 2014 (section 2.1.2). This convention has been in force in Luxembourg since 1 November 2014<sup>57</sup> and it provides for EOIR, SEOI and AEOI.

The scope of taxes in Luxembourg covered by the MC (and included accordingly in annex A of the MC)<sup>58</sup> include (i) "tax on personal income"; (ii) "tax on communities income"; (iii) "wealth tax"; and (iv) "municipal business tax".

Similar to the OECD Model, the 'foreseeably relevant' information requirement with respect to EOIR<sup>59</sup> is reflected in the MC, and parties to the MC shall provide information "which concerns particular persons or transactions" considering such limitation.<sup>60</sup>

Again, the MC clearly states that no 'fishing expeditions' are allowed, so the information requested must be relevant to the tax affairs of the taxpayer or a determined group of taxpayers.<sup>61</sup>

Under the MC, the SEOI is possible without prior request between states which are party to the MC in cases where (i) the transmitting state has grounds for supposing that there may be a loss of tax in the other state; (ii) a person liable to tax obtains a reduction in or an exemption from tax in the transmitting state which would give rise to an increase in tax or to liability to tax in the state receiving the information; (iii) business dealings between a person liable to tax in one state and a person liable to tax in another state are conducted through one or more countries in such a way that a saving in tax may result in one or the other state or in both; (iv) a state has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises; and (v) information forwarded to the transmitting state by the other state has enabled information to be obtained which may be relevant in assessing liability to tax in the state receiving the information.<sup>62</sup>

Also, the MC allows AEOI based on a mutual agreement.<sup>63</sup>

The MC allows the countries to introduce certain reservations. Accordingly, Luxembourg does not provide any form of assistance in relation to certain taxes including (i) taxes on income,

<sup>52</sup> See ([https://www.oecd.org/ctp/exchange-of-tax-information/2010\\_Protocol\\_Amending\\_the\\_Convention.pdf](https://www.oecd.org/ctp/exchange-of-tax-information/2010_Protocol_Amending_the_Convention.pdf)).

<sup>53</sup> OECD (2015), Op. Cit. p. 2.

<sup>54</sup> OECD (2015), Op. Cit. p. 5.

<sup>55</sup> MARINO, Op. Cit. p. 93.

<sup>56</sup> OECD (2015), Op. Cit. p. 3.

<sup>57</sup> See ([https://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf)).

<sup>58</sup> Art. 2 (2) of the MC.

<sup>59</sup> Art. 4 of the MC.

<sup>60</sup> Art. 5 (1) of the MC.

<sup>61</sup> OECD (2015), Op. Cit. p. 9.

<sup>62</sup> Art. 7 of the MC.

<sup>63</sup> Art. 6 of the MC.

profits, capital gains or net wealth which are imposed on behalf of political subdivisions or local authorities of a party to the MC; (ii) compulsory social security contributions payable to general government or to social security institutions established under public law, and (iii) taxes in other categories, except customs duties, imposed on behalf of a party to the convention or on behalf of political subdivisions or local authorities, namely: (a) estate, inheritance or gift taxes; (b) taxes on immovable property; (c) general consumption taxes, such as value-added or sales taxes; (d) specific taxes on goods and services such as excise taxes; (e) taxes on the use or ownership of motor vehicles, (f) taxes on the use or ownership of movable property other than motor vehicles, and (g) any other taxes.<sup>64</sup>

The MC allows states to introduce reservations to not provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes or only for taxes in one or more of the categories listed in article 2(1) of the MC (Tax Recovery).<sup>65</sup> On the basis of its reservations, Luxembourg does not provide any assistance on Tax Recovery, except for the taxes listed in article 2(1)(a) of the MC, including (i) taxes on income or profits; (ii) taxes on capital gains which are imposed separately from the tax on income or profits; and (iii) taxes on net wealth, imposed on behalf of a party to the MC (the MC Covered Taxes).

States can include reservations to not provide assistance in the service of documents for all taxes or only for taxes in one or more of the categories listed in article 2(1) of the MC (Service of Documents).<sup>66</sup> On the basis of its reservations, Luxembourg only provides Service of Documents in relation to the MC Covered Taxes.

### 1.2.2.2. Model Competent Authority Agreement (MCAA)

There are currently two MCAAs relevant to Luxembourg, namely (i) the Common Reporting Standard MCAA signed by Luxembourg on 29 October 2014 (CRS MCAA), and (ii) the Country-by-Country Reporting MCAA signed by Luxembourg on 27 January 2016 (CbCR MCAA).<sup>67</sup>

#### 1.2.2.2.1. CRS MCAA

The CRS's aim was to respond to offshore tax avoidance and evasion, fostering trust and fairness in the international tax system.<sup>68</sup>

The CRS was approved by the OECD Council on 15 July 2014. The CRS enables jurisdictions which obtain information from financial institutions to automatically exchange that information each year. The CRS specifies which financial information should be exchanged, which accounts and taxpayers are subject to due diligence and reporting obligations as well as the scope of such obligations.<sup>69</sup>

The CRS MCAA was signed by 105 jurisdictions as of 25 April 2019.<sup>70</sup>

<sup>64</sup> Art. 2 (1) (b) of the MC.

<sup>65</sup> Art. 30 (1) (b) of the MC.

<sup>66</sup> Art. 30 (1) (d) of the MC.

<sup>67</sup> LEBAS, Op Cit. p. 947.

<sup>68</sup> See (<https://www.oecd.org/newsroom/oecd-delivers-new-single-global-standard-on-automatic-exchange-of-information.htm>).

<sup>69</sup> See (<https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>).

<sup>70</sup> See (<https://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf>).

According to the OECD's status of AEOL commitments, 109 jurisdictions have undertaken AEOL.<sup>71</sup>

The first AEOL under CRS took place in September 2017 (data relating to 2016). Luxembourg sent information under CRS to 66 jurisdictions in 2018 (data relating to 2017).<sup>72</sup>

#### 1.2.2.2.2. CbCR MCAA

CbCR is a report of a multinational group's global activities and financial characteristics based on standardised rules on transfer pricing (TP) documentation and prepared with a consistent format.<sup>73</sup>

CbCR is a key pillar for transparency in the OECD's BEPS Action 13 'Transfer Pricing Documentation and Country-by-Country Reporting'.<sup>74</sup> Such action requires the adoption of rules on TP documentation to promote transparency. The rules should include a requirement that multinational enterprises (MNEs) provide all relevant governments with the required information on their global allocation of income.<sup>75</sup> They provide tax administrations with valuable information to be used ideally in relation to the global allocation of income.

Luxembourg is an early adopter of these measures.<sup>76</sup>

#### OECD International Compliance Assurance Programme (ICAP)

The ICAP is an OECD multilateral cooperative risk assessment and assurance process linked to CbCR. The objective of this initiative is to increase transparency and tax certainty for multinational groups.<sup>77</sup>

Initially launched in Washington D.C. in 2018 with the participation of eight jurisdictions (Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom and the United States),<sup>78</sup> the second version of the programme ICAP Pilot (ICAP 2.0) was announced at the OECD Forum on Tax Administration Plenary held in Santiago, Chile.<sup>79</sup>

The *Administration des contributions directes* (ACD) participates in ICAP 2.0, and Luxembourg tax resident MNEs have been invited to join the "pre-entry" stage by confirming their participation in the initiative.<sup>80</sup>

<sup>71</sup> See (<https://www.oecd.org/tax/transparency/AEOL-commitments.pdf>).

<sup>72</sup> See (<http://www.oecd.org/tax/automatic-exchange/commitment-and-monitoring-process/AEOL-Exchanges-2018.pdf>).

<sup>73</sup> OECD (2017), Country-by-Country Reporting: Handbook on Effective Implementation, OECD, Paris. p. 9.

<sup>74</sup> OECD (2018), Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 1): Inclusive Framework on BEPS: Action 13, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. (<http://dx.doi.org/10.1787/9789264300057-en>) p. 15.

<sup>75</sup> OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (<http://dx.doi.org/10.1787/9789264241480-en>) p. 9.

<sup>76</sup> LEBAS, Op. Cit. p.957.

<sup>77</sup> See (<https://www.oecd.org/tax/forum-on-tax-administration/international-compliance-assurance-programme.htm>).

<sup>78</sup> OECD (2019), International Compliance Assurance Programme Pilot Handbook 2.0, OECD, Paris. p. 9.

<sup>79</sup> Ibidem.

<sup>80</sup> See (<https://impotsdirects.public.lu/fr/az/i/icapocde.html>).

### 1.3. Regional regulatory framework

#### *Antecedents*

Luxembourg is a founding member state of the EU. Since the content of EU supranational legislation is binding for all member states, Luxembourg regularly and swiftly transposes into legislation the content of the EU Directives in tax matters including those directives discussed below (the Directives on Administrative Cooperation: the DAC Directives) which are relevant for EOI matters. DAC 1 was initially adopted and later on amended by DAC 2 to DAC 6 which amended and broadened its scope.

The value added of DAC Directives compared to other international frameworks is mainly:

- their compulsory character for member states; and
- the set-up of standardised EOI mechanisms via notably the ‘Common Communication Network’ (i.e. a central IT infrastructure for safe EOI).

#### 1.3.1. DAC 1

The EU Council approved on 15 February 2011 the EU Commission's draft of a directive on administrative cooperation<sup>81</sup> becoming EU Directive 2011/16/EU (DAC 1), which has been subsequently amended.

DAC 1 covers (i) EOIR<sup>82</sup>, (ii) AEOL<sup>83</sup> and (iii) SEOL.<sup>84</sup> DAC 1 makes possible the implementation of EOIR based on the OECD Model in an EU context, including the ‘foreseeable relevance’ condition of the request and the removal of the ability to deny the exchange based on banking or financial institution secrecy (section 1.1). However, this should not have a major impact since Luxembourg had already implemented these changes in most of its treaty network under the 2010 Law (section 2.1).<sup>85</sup>

In terms of AEOL, the approach adopted consisted of a progressive implementation with the objective of having a final scope covering (i) income from employment; (ii) director's fees; (iii) certain life insurance products not covered by other EU EOI measures or similar measures; (iv) pensions; (v) ownership of and income from immovable property (the First AEOL Cluster);<sup>86</sup> (vi) dividends; (vii) capital gains and (viii) royalties.<sup>87</sup>

Under DAC 1, member states were only obliged to transfer information on three categories of the First AEOL Cluster. Accordingly, Luxembourg had chosen (i) income from employment; (ii) director's fees and (iii) pensions. Therefore, a big bulk of information held by banks and financial institutions was initially out of scope of DAC 1.<sup>88</sup> Only following the implementation of FATCA (section 1.6.1) and CRS (section 1.6.2) did this information become subject to AEOL in Luxembourg.

<sup>81</sup> MARINO, Op. Cit. p. 50-51.

<sup>82</sup> DAC 1 Ch. II S. I.

<sup>83</sup> DAC 1 Ch. II S. II.

<sup>84</sup> DAC 1 Ch. II S. III.

<sup>85</sup> STEICHEN, Op. Cit. p. 399.

<sup>86</sup> Art. 8 (1) and (2) of DAC 1.

<sup>87</sup> Art. 8 (5) (b) of DAC 1.

<sup>88</sup> STEICHEN, Op. Cit. p. 400.

Member states were required to bring into force the laws, regulations and administrative provisions necessary to comply with DAC 1 with effect from 1 January 2013.<sup>89</sup> With respect to AEOL,<sup>90</sup> a progressive entry into force allowed such measures to be applicable as from 1 January 2015.<sup>91</sup> Luxembourg's first law transposing DAC 1 was adopted with effect from 1 January 2013 (section 2.1.3).

### 1.3.2. *DAC 2 to DAC 6: enhancing the scope of AEOL provisions of DAC 1*

#### — *DAC 2 on CRS*

Mostly mirroring the OECD initiative on CRS (section 1.2.2.2.1),<sup>92</sup> the Council of the EU has adopted Directive 2014/107/EU (DAC 2) on 9 December 2014. As a result, financial institutions located in EU member states are required to fulfil due diligence and reporting obligations with the aim of enabling AEOL between member states.<sup>93</sup>

Similar to the OECD CRS rules, reporting financial institutions are required to provide certain information to local tax authorities, including name, address, tax identification number, account balance or value as of the end of each relevant period, and the gross amount of interest and dividends (depending on the type of account held).<sup>94</sup>

Luxembourg transposed this directive within the deadline of 31 December 2015, to be applicable as from 1 January 2016 (section 2.1.3).<sup>95</sup>

In terms of implementation, Luxembourg is at the centre of the network of bilateral exchanges under DAC 2 being the top sender of information among member states with 17% of the accounts and 80% of the amounts reported from September 2017 to March 2018.<sup>96</sup>

#### — *DAC 3 on exchange of rulings*

Based to a great extent on the initiative of the OECD in BEPS Action 5 on Harmful Tax Practices (section 1.4.1), the Council of the EU has adopted Directive 2015/2376 (DAC 3) on 8 December 2015.

DAC 3 introduces mandatory AEOL of 'advance cross-border rulings' and 'advance pricing agreements'<sup>97</sup> within EU member states and therefore goes beyond the SEOL.

Under DAC 3 there is no direct bilateral AEOL between member states, but the relevant information from tax authorities' decision is uploaded in the 'Central Directory' managed by the EU Commission, where it can be accessed and extracted by all member states.

Luxembourg transposed this directive within the deadline of 31 December 2016, to be applicable as from 1 January 2017 (section 2.1.3).<sup>98</sup>

<sup>89</sup> Art. 29 (1) of DAC 1.

<sup>90</sup> Art. 8 of DAC 1.

<sup>91</sup> Art. 29 (1) of DAC 1.

<sup>92</sup> LEBAS, Op. Cit. p. 951.

<sup>93</sup> Art. 1 (2) (b) of DAC 2.

<sup>94</sup> Ibidem.

<sup>95</sup> Art. 2 (1) of DAC 2.

<sup>96</sup> EU Commission (2018), Op. Cit. p. 8-9.

<sup>97</sup> Art. 1 (1) of DAC 3.

<sup>98</sup> Art. 2 (1) of DAC 3.



### – *DAC 4 on CbCR*

Building on the OECD BEPS' Action Plan 13<sup>99</sup> (sections 1.2.2.2.2 and 1.4.2), the Council of the EU has adopted the Directive 2016/881 (DAC 4)<sup>100</sup> on 25 May 2016.

DAC 4 expands the scope of AEOI to CbCR to be filed annually by multinational enterprise groups (i.e. MNE Groups) and consequently exchanged between member states.<sup>101</sup> The information covered in the reports includes the revenue, profit before income tax and income tax paid and accrued, number of employees, stated capital, accumulated earnings and tangible assets and business activities in relation to each jurisdiction.<sup>102</sup>

Although the content of DAC 4 is very similar to the CbCR MCAA, there are certain minimal differences between these.<sup>103</sup> The most obvious is that DAC 4 applies for CbCR AEOI between member states while the latter is applicable to a larger spectrum of qualifying jurisdictions (section 1.2.2.2.2).

Luxembourg transposed this directive within the deadline of 4 June 2017, to be applicable as from 5 June 2017 (section 2.1.3).<sup>104</sup>

### – *DAC 5 with respect to access to anti-money laundering information by tax authorities*

The Council of the EU has adopted the Directive 2016/2258 (DAC 5) responding to the need to use information gathered for the purposes of anti-money laundering (AML) based on the Directive (EU) 2015/849 for the identification of the beneficial owner(s) (BO(s)) for tax purposes.

Accordingly, DAC 5 allows the use of such BO's AML information for the purpose of CRS,<sup>105</sup> including for the compliance with due diligence obligations.

Luxembourg transposed this directive within the deadline of 31 December 2017, to be applicable as from 1 January 2018 (section 2.1.3).<sup>106</sup>

### – *DAC 6 on reporting of certain cross-border arrangements*

Against the background of the OECD BEPS Action Plan Action 12, the Council of the EU has adopted Directive 2018/822 (DAC 6) on 5 June 2018.

The latest of the DAC Directives' saga aims to gather information on cross-border arrangements that could be useful for the purpose of closing loopholes against harmful tax practices and tax audits.<sup>107</sup>

Accordingly, 'intermediaries' (such as service providers and tax advisors) and taxpayers are required to report certain 'reportable cross-border arrangements' which should then be subject to AEOI between member states.<sup>108</sup> Exclusions based on legal professional privilege may apply.<sup>109</sup>

<sup>99</sup> DAC 4 Preamble points (13) and (14).

<sup>100</sup> Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

<sup>101</sup> Art. 1 (2) of DAC 4.

<sup>102</sup> Ibidem. See also point (6) of DAC 4 preamble.

<sup>103</sup> For these differences see LEBAS, Op. Cit. p 958-959.

<sup>104</sup> Art. 2 (1) of DAC 4.

<sup>105</sup> Art. 1 of DAC 5.

<sup>106</sup> Art. 2 (1) of DAC 5.

<sup>107</sup> DAC 6 Preamble point (2).

<sup>108</sup> Art. 1 (2) of DAC 6.

<sup>109</sup> Ibidem.

Whether an arrangement is considered as reportable depends on general and specific ‘hallmarks’<sup>110</sup> presenting an indication of potential risk of tax avoidance.<sup>111</sup> Certain hallmarks require a ‘main benefit test’ to be met. In the case of non-compliance, DAC 6 requires introducing legislation to impose penalties.<sup>112</sup>

The deadline for DAC 6 transposition is 31 December 2019, to be applicable as from 1 July 2020.<sup>113</sup> Luxembourg has started the transposition of this directive already (section 2.1.3).

#### 1.4. BEPS related measures

##### 1.4.1. BEPS Action 5 – EOI of tax rulings

BEPS Action 5 on Harmful Tax Practices introduced a minimum standard for the compulsory SEOI of tax rulings (Ruling Transparency Framework) to be used by tax administrations for the purposes of risk assessment.<sup>114</sup>

The OECD has identified five types of rulings which should be covered by the Ruling Transparency Framework, namely: (i) rulings related to certain preferential regimes; (ii) unilateral advance pricing arrangements or other cross-border unilateral rulings in respect of TP (APAs); (iii) rulings providing for a downward adjustment of taxable profits; (iv) permanent establishment rulings; and (v) related party conduit rulings.

The issue of tax rulings does not constitute *per se* a “preferential regime or tax practice”. Instead, the idea is to overcome the tax administration’s absence of knowledge about the tax treatment that taxpayers receive in other jurisdictions and which can be relevant for tax effects in their own jurisdiction.<sup>115</sup>

In the second round of their peer review (2019), the OECD found that Luxembourg meets all the terms of reference used for such assessment without any recommendations being made.<sup>116</sup> This second peer review covers implementation measures between 1 January and 31 December 2017.<sup>117</sup>

##### 1.4.2. BEPS Action 8-13 – CbCR reporting

We refer to our comments on CbCR MCAA (section 1.2.2.2.2).

In their 2018 assessment, the OECD found that Luxembourg met all applicable terms of reference for CbCR reporting, including (i) domestic legal and administrative framework, since Luxembourg has put in place primary law (legislation and regulations that require the relevant ultimate parent entity of a qualifying multinational enterprise group to report under

<sup>110</sup> See Annex IV DAC 6.

<sup>111</sup> Art. 1 (1) of DAC 6.

<sup>112</sup> Art. 1 (6) of DAC 6.

<sup>113</sup> Art. 2 (1.) of DAC 6.

<sup>114</sup> OECD (2018), Harmful Tax Practices – 2017 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. (<https://doi.org/10.1787/9789264309586-en>). p. 13.

<sup>115</sup> Ibidem.

<sup>116</sup> Ibidem, p. 289.

<sup>117</sup> Ibidem, p. 25, 26 and 289.

CbCR rules from 1 January 2016 onwards<sup>118</sup>) (section 2.1.3); (ii) EOI framework, given that (a) Luxembourg is a signatory to both the MC and the CbCR MCAA and has provided notifications further to such agreements. Consequently, Luxembourg has activated 61 relations with different jurisdictions<sup>119</sup> as of 30 August 2019. Such relations are based on DAC 4 (section 1.3.2) and bilateral agreements signed by Luxembourg; and (b) Luxembourg has also made efforts to conclude additional qualifying competent authority agreements with certain jurisdictions<sup>120</sup> to satisfy confidentiality, consistency and appropriate use conditions;<sup>121</sup> and (iii) appropriate use, since Luxembourg has taken measures to ensure that CbCR reports which are received are used only to determine high level TP risks and other risks related to BEPS and for economic and statistical purposes. Accordingly, CbCR reports are not used as a substitute for a detailed TP analysis or as full proof of the adequateness of TP practices or to make tax base adjustments to taxpayers.<sup>122</sup> No exchanges of CbCR reports have occurred as yet.<sup>123</sup>

#### 1.4.3. Register of BOs

Since the G20 summit of November 2014 statement on ‘High level principles on beneficial ownership and transparency’,<sup>124</sup> many countries have adopted measures to set up a register of BOs (RBO). The G20 advocates for making such registers public and having minimal BO information directly accessible to tax agencies.<sup>125</sup>

Luxembourg has adopted the law of 13 January 2019 (the RBO Law).<sup>126</sup> Under this law, Luxembourg holds an RBO containing certain information on such BOs, including their name, nationality, date and place of birth, country of residence, address, identification number as well as the nature and amount of interest held.<sup>127</sup> The LTA (including the ACD) is considered a ‘national authority’.<sup>128</sup> As such, it has access to the RBO for the exercise of its functions.<sup>129</sup>

It is a matter for discussion how effective an RBO can be when foreign tax authorities do not have access to it and cannot identify the BOs that are tax residents in their jurisdictions. Also, the fact that an RBO does not include the tax identification number in all countries may not be of much help for EOI purposes.<sup>130</sup>

The OECD considered the adoption of the RBO Law a positive step since it improved the BO definition now fully in line with the OECD standard.<sup>131</sup> This change is relevant considering that, between 1 October 2014 and 30 September 2017, Luxembourg received over 2,300 requests of which over 100 concerned (beneficial) ownership. Accordingly, the

<sup>118</sup> OECD (2018), Op. Cit. p. 455-456.

<sup>119</sup> See (<https://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm>).

<sup>120</sup> For instance, the bilateral competent authority agreement with the US See OECD (2018), Op. Cit. p. 458.

<sup>121</sup> OECD (2018), Op. Cit. p. 455.

<sup>122</sup> OECD (2018), Op. Cit. p. 455-459.

<sup>123</sup> OECD (2018), Op. Cit. p. 458.

<sup>124</sup> See ([https://www.transparency.org/files/content/activity/2015\\_T1\\_G20PositionPaper\\_BeneficialOwnership.pdf](https://www.transparency.org/files/content/activity/2015_T1_G20PositionPaper_BeneficialOwnership.pdf)).

<sup>125</sup> Ibidem.

<sup>126</sup> *Loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs (...)*.

<sup>127</sup> Art. 3 of the RBO Law.

<sup>128</sup> Art. 1 (5) of the RBO Law.

<sup>129</sup> Art. 11 of the RBO Law.

<sup>130</sup> NOKED, Noam. Tax Evasion and Incomplete tax transparency. MPDI, Laws, 2018, 7, 31. p.11.

<sup>131</sup> OECD (2019), p. 30.

OECD recommended ensuring an adequate implementation of the RBO Law and specially of such BO definition change.<sup>132</sup>

## 1.5. Global Forum related measures

Luxembourg is a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum), which is the largest body in charge of monitoring tax transparency in the world.<sup>133</sup> The Global Forum has adopted terms of reference to evaluate the implementation of EOIR<sup>134</sup> and AEOL.<sup>135</sup> Luxembourg has been subject to peer review on EOIR obtaining a satisfactory result. Regarding AEOL, the peer review should take place in 2020,<sup>136</sup> but Luxembourg is expected to perform positively given the positive result of the EU Commission assessment on DAC 1, DAC 2 and DAC 3 (section 1.1 and 1.3.2).

## 1.6. Financial information

### 1.6.1. FATCA

Luxembourg signed a Model 1 intergovernmental agreement on 28 March 2014 to implement FATCA, which has been ratified and approved by the law of 24 July 2015 (the FATCA Law).<sup>137</sup>

The ACD has also issued several circulars to clarify the content of the obligations under FATCA as well as the criteria for the classification of entities as 'FFIs'<sup>138</sup> and practical aspects in relation to the format of the reports.<sup>139</sup>

In 2018 Luxembourg received 16,945 reports on financial accounts held by Luxembourg tax residents and sent 29,799 reports to the United States on financial accounts held by US persons, pursuant to FATCA.<sup>140</sup>

### 1.6.2. CRS

Please refer to the comments in sections 1.2.2.2.1 and 1.3.2.

In 2018 Luxembourg sent 3,047,429 reports to 65 'reporting jurisdictions'<sup>141</sup> and received

<sup>132</sup> OECD (2019), p. 16.

<sup>133</sup> See (<https://www.oecd.org/tax/transparency/about-the-global-forum/publications/terms-of-reference.pdf>).

<sup>134</sup> Ibidem.

<sup>135</sup> See (<https://www.oecd.org/tax/transparency/AEOL-terms-of-reference.pdf>).

<sup>136</sup> See (<http://www.oecd.org/tax/automatic-exchange/commitment-and-monitoring-process/>).

<sup>137</sup> *Loi du 24 juillet 2015 portant approbation 1. de l'Accord entre le Gouvernement du Grand-Duché de Luxembourg et le Gouvernement des Etats-Unis d'Amérique (...).*

<sup>138</sup> *Circulaire du directeur des contributions ECHA – n° 2 du 31 juillet 2015.*

<sup>139</sup> Including without limitation the *circulaire ECHA - n° 3 du 19 janvier 2017* and *circulaire ECHA - n° 3 bis – du 19 janvier 2017*.

<sup>140</sup> Luxembourg Ministry of Finance, 2018 Report of Activities (<https://gouvernement.lu/dam-assets/fr/publications/rapport-activite/minist-finances/2018-rapport-activite/Rapport-d-activite-2018-du-ministere-des-Finances-Annexes.pdf>) p.109.

<sup>141</sup> According to the OECD, this number increased to 66 jurisdictions as of 4 October 2018.

333,074 reports on financial accounts validated by 78 'participating jurisdictions', pursuant to CRS.<sup>142</sup>

The Luxembourg government finds that the difference between the number of reports received and sent is explained by the non-reciprocity of certain jurisdictions.<sup>143</sup>

### 1.7. Administrative cooperation

The 2013 IFA General Report had already identified joint audits admissible in most countries.<sup>144</sup> This was the case in Luxembourg where a simultaneous tax examination was possible based on the previous OECD and EU framework.<sup>145</sup>

Today, Luxembourg can also undertake this type of cooperation based on the DAC1 Law (section 2.1.3),<sup>146</sup> or based on article 8 of the MC, in the form of simultaneous tax examinations where there is a common or complementary interest of the relevant states and an aim to exchange information obtained.

EOI is only possible when the information is reliable and available, hence the importance of having proper accounting terms in place.<sup>147</sup> Regarding accounting information record standard for partnerships and companies, the OECD found that Luxembourg applied the Joint Ad Hoc Group on Accounts (JAHGA) standard.<sup>148</sup> Luxembourg also integrates the Joint International Tax Shelter Information Centre (JITSIC), an OECD initiative that aims to reinforce cooperation to tackle tax avoidance in a more efficient and effective way.<sup>149</sup>

### 1.8. Other issues

Luxembourg has not entered as of this date into any Rubik agreement.<sup>150</sup>

<sup>142</sup> Ibidem.

<sup>143</sup> Ibidem.

<sup>144</sup> OBERSON, Xavier, IFA General Report, in Exchange of information and cross-border cooperation between tax authorities, *Cahiers de droit fiscal international*, 2013. vol 98b, p. 43.

<sup>145</sup> FORT, JUNG, RUST. Op. Cit. p. 482-483.

<sup>146</sup> Art. 12 of the DAC1 Law.

<sup>147</sup> OECD (2016), Exchange of Information on Request handbook for peer reviews 2016-2020. (<http://www.oecd.org/tax/transparency/global-forum-handbook-2016.pdf>) p. 167.

<sup>148</sup> OECD (2010) Tax Co-operation 2010: Towards a Level playing field, OECD Publishing (<http://dx.doi.org/10.1787/taxcoop-2010-en>) p. 87.

<sup>149</sup> See: (<https://www.oecd.org/tax/forum-on-tax-administration/jitsic/>).

<sup>150</sup> Rubik agreements were once seen as an alternative in relation to banking secrecy and savings income EOI. In broad terms, they would allow the application of the tax rules of the taxpayer state of residence but on an anonymous basis. See SCHAFFNER, Jean. *Droit Fiscal International*. Larcier.2014, point 591.

## 2. Incorporation of the instruments and processes into domestic legislation

### 2.1. Domestic adoption

#### 2.1.1. *Treaties and OECD Model*

The law of 31 March 2010 (the 2010 Law)<sup>151</sup> is the basis for bilateral EOIR in accordance with article 26 of the OECD Model.<sup>152</sup> This law contains the approval of five treaties and 15 protocols<sup>153</sup> applying the OECD EOIR standard (section 1.1) as well as substantive and procedural rules to allow EOIR. In effect, the 2010 Law overcomes limitations imposed by other rules which would otherwise apply (including general fiscal secrecy and confidentiality)<sup>154</sup>. Also, this law allows demanding the annulment of the request to the Luxembourg Administrative Tribunal (TA).<sup>155</sup> Additionally, the LTA can impose penalties where requirements to provide information are not satisfied by the requested person.<sup>156</sup>

This law was modified by the law of 25 November 2014<sup>157</sup> (the 2014 Law), following certain recommendations contained in the peer review of the Global Forum on EOIR on 22 November 2013, which abrogates certain procedural rules for simplification purposes.<sup>158</sup> This law applies to all types of EOIR whether based on a treaty or relevant laws, including, without limitation, the MC Law and the DAC 1 Law.<sup>159</sup>

Professional (including legal)<sup>160</sup> and banking secrecy<sup>161</sup> are in principle protected under the Luxembourg general tax law (GTL).<sup>162</sup>

These secrecy rules are no longer admissible grounds to refuse provision of information, which should be fully and precisely disclosed without alterations.<sup>163</sup>

The 2014 Law reform also allowed for the acceleration of the EOIR procedure, as it limited the possibilities of challenging requests only to the penalty imposed in case of failure to comply,<sup>164</sup> and LTA control was only “formal”.<sup>165</sup>

However, the CJEU found in the *Berlioz* case (section 2.1.4) the latter point to be contrary to the international and EU legal frameworks. Hence, the 2014 Law was modified by the law

<sup>151</sup> *Loi du 31 mars 2010 portant approbation des conventions fiscales et prévoyant la procédure y applicable en matière d'échange de renseignements sur demande.*

<sup>152</sup> FORT, JUNG, RUST, Op. Cit. p. 475.

<sup>153</sup> Art. 1 of the 2010 Law.

<sup>154</sup> FORT, JUNG, RUST, Op. Cit. p. 478.

<sup>155</sup> Art. 6 (1) of the 2010 Law.

<sup>156</sup> Art. 5 of the 2010 Law.

<sup>157</sup> *Loi du 25 novembre 2014 prévoyant la procédure applicable à l'échange de renseignements sur demande (...).*

<sup>158</sup> Draft law 6680/00 of 29 April 2014. p. 4.

<sup>159</sup> Art. 1 of the 2014 Law.

<sup>160</sup> § 177 of the GTL.

<sup>161</sup> § 178bis of the CTL.

<sup>162</sup> *Loi générale des impôts (Abgabenordnung) du 22 mai 1931, telle que modifiée.*

<sup>163</sup> Art. 2 (2) of the 2014 Law. and draft law 6680/00 of 29 April 2014. p. 5-6.

<sup>164</sup> Art. 6 of the 2014 Law. See also draft law 7223/00 of 30 January 2018, p. 2.

<sup>165</sup> Art. 3 of the 2014 Law.



of 1 March 2019 (the 2019 Law)<sup>166</sup> in particular to take into account such case and notably:

- From now on the LTA should not limit the review of the EOI request to a “formal” one as before, but should also check that the ‘foreseeable relevance’ criteria is fulfilled in relation to (i) the identity of the person under examination or investigation; (ii) the tax purpose for which the information is sought; (iii) the contact details of any person believed to be in possession of the requested information; and (iv) anything that may facilitate the procedure.<sup>167</sup>
- If the request does not fulfil such criteria, the LTA can request further information from the competent authority of the requesting state.<sup>168</sup>
- Also, the notification of the EOIR injunction decision to the person holding the information is no longer considered to be extended to any person concerned.<sup>169</sup>
- The 2019 Law also (i) reintroduced the possibility of requesting the TA to annul the injunction decision in relation to EOIR by the person holding the information;<sup>170</sup> (ii) granted the TA potential access to the injunction decision and any request for complementary information;<sup>171</sup> and (iii) allowed the TA to order that the substance of the information contained in the request and any request for complementary information be shared with the relevant person, in order to guarantee his right of defence.<sup>172</sup>

### 2.1.2. MC

The law of 26 May 2014<sup>173</sup> (the MC Law) approves the MC<sup>174</sup> and its legal base for its application in Luxembourg. This law contains the Luxembourg’s reservations to the MC<sup>175</sup> (section 1.2.2.1).

### 2.1.3. Domestic implementation of the DAC Directives

The DAC Directives were transposed into Luxembourg by (i) the law of 29 March 2013<sup>176</sup> and the law of 26 March 2014<sup>177</sup> (DAC 1 Law), covering all forms of EOI; (ii) the law of 18 December of 2015<sup>178</sup> (DAC 2/CRS Law), implementing CRS due diligence and reporting obligations in Luxembourg; (iii) the law of 23 July 2016<sup>179</sup> (DAC 3 Rulings Law), introducing exchange of

<sup>166</sup> *Loi du 1er mars 2019 portant modification de la loi du 25 novembre 2014 prévoyant la procédure applicable à l'échange de renseignements sur demande en matière fiscale.*

<sup>167</sup> Art. 1 (1) of the 2019 Law. Also, draft law 7223/00 of 30 January 2018, p. 4 and CJEU, Berlioz Case, C-682/15. para 1.

<sup>168</sup> Art. 1 (2) of the 2019 Law.

<sup>169</sup> Art. 1 (3) of the 2019 Law modifying art. 3 (3) of the 2014 Law.

<sup>170</sup> Art. 3 of the 2019 Law.

<sup>171</sup> Art. 3 of the 2019 Law. See also draft law 7223/00 of 30 January 2018, p. 4.

<sup>172</sup> Art. 3 of the 2019 Law.

<sup>173</sup> *Loi du 26 mai 2014 portant approbation de la Convention concernant l'assistance administrative (...).*

<sup>174</sup> Art. 1 of the MC Law.

<sup>175</sup> Art. 2 of the MC Law.

<sup>176</sup> *Loi du 29 mars 2013 portant transposition de la directive 2011/16/UE (...).*

<sup>177</sup> *Loi du 26 mars 2014 portant transposition de l'article 8 de la directive 2011/16/UE (...).*

<sup>178</sup> *Loi du 18 décembre 2015 concernant l'échange automatique de renseignements relatifs aux comptes financiers en matière fiscale et portant 1. transposition de la directive 2014/107/UE (...).*

<sup>179</sup> *Loi du 23 juillet 2016 portant transposition de la directive (UE) 2015/2376 (...).*

rulings; (iv) the law of 23 December 2016<sup>180</sup> (DAC 4/CbCR Law), introducing CbCR requirements in Luxembourg; and (v) the law of 1 August 2018<sup>181</sup> (DAC 5 AML Law) allowing the use of AML information for the purposes of EOIR.

Furthermore, a draft law of 8 August 2019<sup>182</sup> has been introduced to the Luxembourg Chamber of Deputies to transpose DAC 6.

#### 2.1.4. *Leading case law on EOIR – Berlioz case*

The *Berlioz* case decided by the CJEU is the landmark case on EOIR. It had significant ramifications in terms of the evolution of the rights that assist taxpayers in the context of the administrative prerogatives member states exercise for the purposes of EOIR.

##### *Facts of the case*

The French tax authorities had requested from the ACD information based on DAC 1. The request concerned Cofima SAS a French company (Cofima) which was a subsidiary of Berlioz Investment Fund S.A., a Luxembourg company (Berlioz), and was related to the verification of withholding tax exemptions on dividends distributed by Cofima to Berlioz.<sup>183</sup>

Berlioz provided most of the information but had refused to release certain information requested on the ground of lack of foreseeable relevance of the request<sup>184</sup> causing the ACD to impose a EUR 250,000 penalty on Berlioz.<sup>185</sup>

Berlioz initiated judicial proceedings against the ACD to assess the legality of the penalty.<sup>186</sup> Consequently, the TA<sup>187</sup> in accordance with article 6 of the 2014 Law accepted to examine the recourse against the amount of the fine but refused to examine the demand of annulment of the EOIR procedure.<sup>188</sup>

Berlioz appealed arguing that the decision of the TA had violated its right to an effective judicial remedy as guaranteed by article 6(1) of the ECHR.<sup>189</sup> The case was reviewed by the Luxembourg Administrative Court (CA).<sup>190</sup> The CA wondered if article 47 (Right to an effective

<sup>180</sup> *Loi du 23 décembre 2016 portant transposition de la directive (UE) 2016/881 (...).*

<sup>181</sup> *Loi du 1er août 2018 portant transposition de la directive (UE) 2016/2258 (...).*

<sup>182</sup> Draft law 7465 of 8 August 2019.

<sup>183</sup> CJEU, *Berlioz* Case C-682/15, para 21-23.

<sup>184</sup> Including the "names and addresses of its members, the amount of capital held by each member and the percentage of share capital held by each member, on the ground that that information was not foreseeably relevant within the meaning of Directive 2011/16 for the assessment as to whether the dividend distributions made by its subsidiary should be subject to a withholding tax, that being the subject matter of the checks being carried out by the French tax administration". See CJEU, *Berlioz* Case C-682/15, para 24.

<sup>185</sup> CJEU, *Berlioz* Case, C-682/15, para 25.

<sup>186</sup> CJEU, *Berlioz* Case C-682/15, para 26.

<sup>187</sup> TA 13 août 2015 (n° 36452 du rôle).

<sup>188</sup> The TA had reduced the penalty amount to EUR 150.000, CJEU, *Berlioz* Case, C-682/15, PAR 27.

<sup>189</sup> CJEU, *Berlioz* Case C-682/15, para 28.

<sup>190</sup> *Appel interjeté devant la CA, numéro du rôle : 36893 CA Inscrit le 31 août 2015.*

remedy and to a fair trial) of the Charter<sup>191</sup> could apply to this case, since it had an equivalent provision to article 6(1) (Right to a fair trial) of the ECHR.<sup>192</sup>

The CA made a preliminary ruling request to the CJEU related to the interpretation of article 1(1)<sup>193</sup> and 5<sup>194</sup> of DAC 1 as well as article 47 of the Charter.<sup>195</sup>

The CJEU followed the below reasoning:

- A. The possibility for a relevant person to challenge an injunction upon an EOIR by examining:
  - the scope of article 51 of the Charter;<sup>196</sup> and
  - hence the possibility of an ‘effective remedy’ (article 47 of the Charter).
- B. The review of the legality of the EOIR by examining:
  - the ‘foreseeable relevance’ criteria;
  - the scope of the requested authorities’ and jurisdictional review of the legality of the information order based on the above criteria.
- A. First, the CJEU had to determine whether the case at hand was within the scope of EU law. As expected, the CJEU ruled that since the 2014 Law had the purpose of ensuring the implementation and efficiency of an EU law<sup>197</sup> (i.e. DAC 1), this law should be read as implementing the EU law. Thus, the present case falls within the scope of the Charter considering its article 51(1).<sup>198</sup>

After confirming the Charter as being applicable, the CJEU then examined whether article 47 of the Charter is applicable to the case at hand and, if so, what is the exact scope of the recourse. For the CJEU, the pecuniary penalty imposed is based on domestic law implementing EU law. Hence article 47 of the Charter is applicable.<sup>199</sup> With respect to the object of the recourse, the CJEU ruled that a relevant person can challenge the legality of the injunction request and related pecuniary penalty.<sup>200</sup>
- B. A second important element raised by the CJEU is whether the ‘foreseeable relevance’ criteria under DAC 1 is a condition for (i) the requested member state (i.e. Luxembourg)

<sup>191</sup> Which states “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”. CJEU, *Berlioz Case*, C-682/15. para 29.

<sup>192</sup> Such article states: “This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2”.

<sup>193</sup> Such article states: “At the request of the requesting authority, the requested authority shall communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries”.

<sup>194</sup> CJEU, *Berlioz case*, Case C-682/15. para 1.

<sup>195</sup> Which states: “Scope 1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”.

<sup>196</sup> In relation to ‘within the scope of the EU law’ meaning. See CHAOUCHÉ, HASLEHNER, ‘Cross-Border Exchange of Tax Information’ in *EU Tax Law and Policy in the 21<sup>st</sup> Century* (HASLEHNER, KOFLER, and RUST (Ed.)) p .187.

<sup>197</sup> CJEU, *Berlioz Case*, C-682/15, paras 32-42.

<sup>198</sup> CJEU, *Berlioz Case*, C-682/15. paras 50 and 52.

<sup>199</sup> CJEU, *Berlioz Case*, C-682/15. para 59.

to proceed with such request; and, hence, (ii) of the legality of the request for information in relation to the member state receiving the request and the person affected thereby.<sup>201</sup> The CJEU ruled that the term 'foreseeable relevance' defines a necessary characteristic of the information requested and operates as a condition for such an information request.<sup>202</sup> The CJEU also addressed the important question of who should assess whether the 'foreseeable relevance' condition is satisfied.<sup>203</sup> They considered that the requesting authority is well placed to assess if the 'foreseeably relevant' condition is met in relation to the information they request. In the first place, the requesting authority initiates the investigation and should, in the exercise of its discretionary power, limit its request to what is strictly necessary.<sup>204</sup> However, the requested state should still verify this condition for the legality of the request before complying with the request for information.<sup>205</sup> The CJEU stated that the purpose of DAC 1 is to create confidence and trust between member states fostering cooperation between them in an expedited way. Consequently, the requested authority may presume the legality of the request based on the domestic law of the requesting authority and the fulfilment of the 'foreseeably relevant' condition.<sup>206</sup>

This does not exempt the requested authority from verifying the 'foreseeably relevant' condition in the context of its own assessment.<sup>207</sup> To facilitate this task, the requesting authority has the obligation to provide an adequate statement of reasons that explain how the information is relevant to the investigation made by the requesting authority.<sup>208</sup> Additionally, the requested authority can, on the basis of DAC 1, ask for additional information from the requesting authority for the purposes of its assessment.<sup>209</sup> Hence, the review made by the requested authority is not of a simple "formal" nature but should also aim to establish that the 'foreseeable relevance' test is met in relation to the request<sup>210</sup> which is key to safeguard the concerned persons' rights.

The CJEU stated that the judicial review must be limited to checking that the request is manifestly devoid of 'foreseeable relevance'.<sup>211</sup> For these purposes, the court should have access to the information request and should be able to request additional information from the requested authority (obtained from the requesting authority) which is deemed to be relevant for its assessment.<sup>212</sup>

In relation to accessing the information request by the relevant person, article 16<sup>213</sup> of DAC 1 provides for secrecy. Accordingly, the requesting authority must ensure that information

<sup>201</sup> CJEU, *Berlioz Case C-682/15*, para 60.

<sup>202</sup> CJEU, *Berlioz Case C-682/15*, paras 63 and 64.

<sup>203</sup> CJEU, *Berlioz Case C-682/15*, para 65.

<sup>204</sup> CJEU, *Berlioz Case C-682/15*, paras 69, 70 and 71.

<sup>205</sup> CJEU, *Berlioz Case C-682/15*, para 74.

<sup>206</sup> CJEU, *Berlioz Case C-682/15*, para 77.

<sup>207</sup> CJEU, *Berlioz Case C-682/15*, paras 77 and 78.

<sup>208</sup> CJEU, *Berlioz Case C-682/15*, para 80.

<sup>209</sup> CJEU, *Berlioz Case C-682/15*, para 81.

<sup>210</sup> CJEU, *Berlioz Case C-682/15*, para 82 and 89.

<sup>211</sup> CJEU, *Berlioz Case C-682/15*, para 86.

<sup>212</sup> CJEU, *Berlioz Case C-682/15*, para 91 and 92.

<sup>213</sup> The relevant section of such article stated: "Information communicated between Member States in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended to similar information under the national law of the Member State which received it".

gathering is done in a discrete way, so that the investigation is not put at risk.<sup>214</sup>

In the context of a judicial review, based on the ‘principle of equality of arms’ each party should have the chance to put forward his case, and access to evidence from both parties is crucial to comply with this principle.<sup>215</sup> However, the CJEU held that in order to safeguard this principle, it is not necessary to have access to the whole information request and, based on DAC 1,<sup>216</sup> the relevant person would only need to know (i) the identity of the taxpayer concerned and (ii) the tax purposes of the information requested. Only a national court would be allowed to extend the scope of the information to be communicated to the person, while preserving any potential confidentiality.<sup>217</sup>

It should be noted that Luxembourg has expressed that this finding should not jeopardise the OECD standard admitting a full disclosure of the request in the context of a judicial review.<sup>218</sup>

Echoing a concern expressed by the doctrine, one should question which judge should be addressed. If it is the judge from the requested state, given the control is “formal”, the scope of its review shall be limited. This may encourage questioning the legality of the measures with the judge of the requesting state, which should be difficult in practice since the concerned person does not have access to the request (only the requested authority does in principle).<sup>219</sup>

Part of the doctrine has also questioned the practical implementation of the judicial review. Indeed, it is unclear how the judge would be able to request additional information in case there is lack of sufficient information, or if the judge would be able to annul or amend the injunction decision or the penalty.<sup>220</sup> We consider that in Luxembourg the judge should be able to do both as this is the object of the control of legality over both the penalty and the injunction.

#### 2.1.5. *Judicial cases after Berlioz*

Since the *Berlioz* case, at least 37 appeals have been lodged in the CA challenging the legality of injunction decisions adopted by the ACD, of which 34 were still pending resolution as of 19 December 2018, causing delays in the EOIR and bringing uncertainty as to the effects of the CJEU decision.

Notably, the TA has addressed a case where, in application of article 6 (1) of 2014 Law (before the 2019 Law modifications), a Spanish tax resident BO of a Luxembourg company did not have the possibility to request the annulment of the injunction decision in the context of a EOIR procedure involving the Spanish tax authorities and the LTA.<sup>221</sup>

In line with *Berlioz*, the TA mentioned that the EU law and the Charter are applicable and

<sup>214</sup> CJEU, *Berlioz* Case C-682/15. paras 93 and 94.

<sup>215</sup> CJEU, *Berlioz* Case C-682/15. para 96.

<sup>216</sup> Art. 20 (2) DAC 1.

<sup>217</sup> CJEU, *Berlioz* Case C-682/15. para 100.

<sup>218</sup> OECD (2019), Op. Cit. p.101.

<sup>219</sup> COUTRON, Laurent, *Contentieux de l'Union européenne : avril-décembre 2017* in *Revue trimestrielle de droit européen RTDEur.* No. 2 Dalloz (2018), p. 350.

<sup>220</sup> Ibidem.

<sup>221</sup> TA, 21 juillet 2017, n°39887.

that the competent court may recognise the ‘right of defence’ accordingly.<sup>222</sup> Furthermore, the LTA should not limit its control to a formal one but should establish that the ‘foreseeably relevant’ condition is fulfilled in relation to the identity of the concerned taxpayer or a third party affected by the relevant tax audit. Therefore, the requesting state should provide an adequate motivation on the finality of the information requested in relation to a specific taxpayer.<sup>223</sup>

Adding to the significant impact of the *Berlioz* case in Luxembourg on EOIR procedures and the legal framework, since January 2019 the CA has referred to the CJEU three new preliminary ruling procedures<sup>224</sup> to clarify EOIR related points linked to fundamental rights in light of the Charter<sup>225</sup> and DAC 1.

The first procedure,<sup>226</sup> relates to a request made by the Spanish *Agencia Tributaria* in relation to a Spanish tax resident holding participations in a Luxembourg company.<sup>227</sup> Even though no penalty was imposed in this case, the legality of the request itself was contested by the company.<sup>228</sup>

In this context, the CA has referred to the CJEU the question of whether articles 7 (right to private and family life),<sup>229</sup> 8 (right to the protection of personal data)<sup>230</sup> and 52(1)<sup>231</sup> of the Charter, read together with article 47 of the Charter, should be interpreted as rendering illegal legislation that, in the context of EOIR (in particular, implementing DAC 1), deprives the third party holding the information (e.g. a company) from any judicial remedy against a decision issued by the competent authority receiving an information request from another member state.

If so, then the second question raised in this procedure seeks to clarify what ‘foreseeably relevant’ means, in light of article 1(1) and 5 of DAC 1 and the evolving character of article 26 of the OECD Model, when a request does not delimit in a precise and satisfactory way why certain information is relevant.<sup>232</sup>

The second procedure,<sup>233</sup> concerns a similar request this time made in relation to a Luxembourg bank holding information concerning a Spanish tax resident.<sup>234</sup> In this case the CA asked the same questions, but in the context of an action brought by the Spanish tax resident directly affected by the request and a third person holding the information (i.e. the bank).<sup>235</sup>

<sup>222</sup> Ibidem, p. 8.

<sup>223</sup> Ibidem, p.10.

<sup>224</sup> CA, 14 mars 2019, n°41486C; 14 mars 2019, n°41487C et 23 mai 2019, n°42143C.

<sup>225</sup> CHAOUCHE, Fatima, *Chronique de jurisprudence administrative en matière fiscale* in *Revue générale de fiscalité luxembourgeoise*. No. 2019/2. Larcier. p. 53-54.

<sup>226</sup> CA, 14 mars 2019, n°41486C.

<sup>227</sup> Ibidem, p. 2.

<sup>228</sup> Ibidem, p. 1 and 3.

<sup>229</sup> Which states: “Everyone has the right to respect for his or her private and family life, home and communications.”

<sup>230</sup> Which states: “Everyone has the right to the protection of personal data concerning him or her.”

<sup>231</sup> Which states: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.

<sup>232</sup> CHAOUCHE, Op. Cit. p. 54-55.

<sup>233</sup> CA, 14 mars 2019, n°41487C.

<sup>234</sup> Ibidem, p. 2.

<sup>235</sup> Ibidem, points 23-25. See CHAOUCHE, Op. Cit. p. 3.



The CJEU's decision in this case should also determine the outcome of a referral initiated in the Luxembourg Constitutional Court seeking to clarify if the (former) limitation of judicial remedy of article 6(1) of the 2014 Law is contrary to the rule of law (*principe de l'État de droit*) and legality principles.<sup>236</sup>

A third procedure<sup>237</sup> relates to a request made by the French tax authorities in relation to a group of French tax residents holding participations in a Luxembourg company.<sup>238</sup> The company had requested the annulment of a penalty imposed by the ACD in relation to its failure to comply in the above context.<sup>239</sup>

The referral questions if a request targeting a group of persons, where the identification is done in a generic manner (i.e. simply based on their status as a shareholder or BO) rather than on a named, individual basis, is in line with the DAC 1 identification requirements.<sup>240</sup>

Second, if the response to the first question is positive, the CA asks whether, considering the terms of article 1(1) and 5 of DAC 1, a request based on a specific target group of persons can be justified by suspicions of violation of a precise legal obligation.<sup>241</sup>

Third, the CA asks whether, when a penalty is imposed in the context of an EOIR procedure, the person holding the information is entitled to a suspension of its obligation to pay such penalty until the 'foreseeably relevant' condition is assessed, and the sanction confirmed by the competent court.

The content of taxpayers' rights in light of the Charter will continue to inform how EOIR operates in Luxembourg and indeed in the EU as a whole. The CJEU's interpretation of these rights will continue to shape the law and how the European judges protect such rights. Therefore, the outcome of the above preliminary questions referred to the CJEU should be closely followed.

## 2.2. Tax administration authority

The LTA (including the ACD) is vested with significant powers in the context of the tax audits they undertake. In this context, BEPS implementation in Luxembourg raised concerns in terms of fundamental freedoms being at risk.<sup>242</sup>

The Luxembourg 2015 IFA report acknowledged positively the taxpayer's rights protection within the tax procedures undertaken by the LTA.<sup>243</sup> For instance, fiscal secrecy is heavily enforced in Luxembourg, even in relation to other governmental authorities, unless the information can be communicated based on Luxembourg law. Also, the LTA should refrain

<sup>236</sup> *Arrêt de la Cour constitutionnelle No. 00146 of 28 mai 2019.*

<sup>237</sup> *CA, 23 mai 2019, n°42143C.*

<sup>238</sup> *Ibidem*, p. 2.

<sup>239</sup> *Ibidem*, p. 1.

<sup>240</sup> *Ibidem*, p. 20.

<sup>241</sup> *Ibidem*, p. 20-21.

<sup>242</sup> DA CUNHA, GASTON-BRAUD. Assessing BEPS: origins, standards and responses, *Cahiers de droit fiscal international*, Studies on International Fiscal Law by the International Fiscal Association, Luxembourg Report, 2017 Vol. 102b. p. 504.

<sup>243</sup> GOEBEL, ADAMS. The practical protection of taxpayers' fundamental rights, *Cahiers de droit fiscal international*, Studies on International Fiscal Law by the International Fiscal Association, Luxembourg Report. 2015, Vol. 100b. p. 505 and § 177 of the GTL.

from collecting information on behalf of other government authorities not having such powers.<sup>244</sup>

In the context of tax audits, taxpayers must cooperate with the LTA for the assessment of taxes. This cooperation may entail the provision of information, documentation and justifications. However, tax audits (and information requested in such context) are valid if they are the means to assess the specific situation of a taxpayer. The collection of information cannot be extended to other taxpayers, subject to certain exemptions regarding employees and their employer's audit. Professional secrecy rules permit refusing to communicate information received in the context of related professional activities.<sup>245</sup>

It is important to bear in mind that even if the extent of the tax verification is a discretionary act by the LTA, it is still subject to the principles of legality, proportionality and utility.<sup>246</sup> This means that 'fishing expeditions' (even in a domestic context) are invalid.

In the context of EOIR, the LTA EOI team starts the procedure by checking in internal databases whether the information is available, and, if not available, the information is internally requested to other offices within the LTA. Only if the information is not available can an injunction decision be issued to the taxpayer or third person holding it.<sup>247</sup> It is unclear how the taxpayers or third persons can oppose the procedure before an injunction is issued.

### 2.3. Institutional framework

Luxembourg has established a division within the ACD which deals with EOI matters. This division has the following responsibilities: (i) the practical implementation of DAC 1, as amended; (ii) the practical implementation of FATCA; (iii) the international mutual assistance; and (iv) the organisation and surveillance of works related to the office of withholding taxes on interest.<sup>248</sup>

In terms of the practical implementation of the OECD standard on EOIR, the OECD has acknowledged Luxembourg's increase in staff devoted to EOI; however, this is still insufficient to absorb the increase in requests.<sup>249</sup> Accordingly, Luxembourg has taken measures to double the team dedicated to EOI.<sup>250</sup> Similar measures have been taken by the ACD in relation to the team dedicated to exchange of rulings and this has also been acknowledged by the OECD (section 1.4.1).

<sup>244</sup> Ibidem, p. 514.

<sup>245</sup> Ibidem, p. 515-516.

<sup>246</sup> Ibidem. See §2 of the Luxembourg Tax Adaptation Law (*Steueranpassungsgesetz*) of 16 October 1934, as amended. OECD (2019), Op. Cit. p.76.

<sup>247</sup> See ([https://impotsdirects.public.lu/fr/profil/organigramme/direction/division\\_echange\\_renseignements\\_retenue\\_interets.html](https://impotsdirects.public.lu/fr/profil/organigramme/direction/division_echange_renseignements_retenue_interets.html)).

<sup>249</sup> OECD (2019), Op. Cit. p. 107.

<sup>250</sup> OECD (2019), Op. Cit. p. 113.

## 2.4. Confidentiality and data protection

### 2.4.1. Confidentiality

Paragraph 22 of the GTL guarantees the confidentiality of information subject to exchange. Indeed, public servants and tax advisors are liable for any breach of such duty in the context of tax enforcement procedures, tax criminal procedures or communication from a tax authority in another procedure. Further to paragraph 412 of the GTL, such breach may give rise to disciplinary sanctions, fines and/or imprisonment of between six months and five years depending on the motivation for the breach (as the case may require).

In terms of EOIR, the OECD concluded that all Luxembourg's EOIR instruments include a confidentiality clause in the terms of article 26(2) of the OECD Model with an according domestic implementation.<sup>251</sup>

Luxembourg has taken steps to overcome previous concerns with respect to confidentiality on EOIR procedures. This includes limiting the disclosure of an injunction decision to the information that the person who/which holds the information strictly requires to respond to the request. This may be in line with the principles laid down in the *Berlioz* case which limits the disclosure of information (section 2.1.4), but it is still contrary to the OECD standard which allows full disclosure.<sup>252</sup>

Furthermore, in line with the OECD standard on EOI, Luxembourg does not use the information exchanged for any other purpose than tax, and only admits its use for non-tax purposes if the authority providing the information authorises such use.<sup>253</sup>

According to the OECD, confidentiality is heavily enforced in Luxembourg. Access to information subject to exchange and the database on EOIR is only available for LTA agents dedicated to EOI.

Finally, under the 2014 Law the LTA has the power to access banking information for EOIR purposes. However, paragraph 178bis of the GTL, provides that the ACD cannot request information for domestic tax inspections to certain types of entities (including banks).

### 2.4.2. Data protection

The right to data protection is contemplated in article 8 of both the ECHR and the Charter.

Also, based on article 25 of DAC 1, EOI is subject to EU legislation on data protection. Accordingly, under the DAC Directives implementation in Luxembourg, all types of EOI are subject to the law of 2 August 2002<sup>254</sup> (the Data Protection Law).<sup>255</sup> There are certain exceptions to this rule, where protection is limited, including publicly available data (article 15); safeguarding of information rights by concerned persons (article 26(1) and (2)); or if it is necessary to protect a qualifying public interest (listed in article 15(5)(e), article 27(1)(e) and article 29(1)(e)).

<sup>251</sup> OECD (2019), Op. Cit. p. 100.

<sup>252</sup> OECD (2019), Op. Cit. p. 100-101.

<sup>253</sup> OECD (2019), Op. Cit. p. 101.

<sup>254</sup> *Loi du 2 août 2002 relative à la protection des personnes (...).*

<sup>255</sup> Art. 23 para 1 of the DAC 1 Law.

Both the FATCA Law<sup>256</sup> and the DAC 2 / CRS Law<sup>257</sup> contain special provisions regulating the way data protection operates for the purposes of AEOL under the scope of such laws.

According to these provisions, the data process should be performed through secure, limited and controlled access, and such data can only be used for the purposes of the relevant laws. Furthermore, the ACD and 'reporting financial institutions' are considered as data controllers in the sense of the Data Protection Law and should report to individuals any breach of security in relation to their personal data protection or their privacy rights.

GDPR is applicable in Luxembourg as from 25 May 2018. GDPR's scope is limited to personal data that is processed, at least partly, "by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system".<sup>258</sup> Hence, according to the OECD its application in the context of EOIR is rather limited.

For AEOL purposes GDPR is rather key, while tax administrations' powers expand, supported by new technologies,<sup>259</sup> GDPR establishes 'Rights of Data Subjects' (including privacy and data protection rights) which are applicable for the purposes of FATCA<sup>260</sup> and CRS.

Individuals should have access to the data processed by an authority,<sup>261</sup> falling within GDPR, including any data gathered for the purposes of DAC1.<sup>262</sup>

In a similar manner to the Data Protection Law, GDPR contains limitations on the right to access information in the event it is necessary to protect a qualifying public interest.<sup>263</sup>

### 2.4.3. Whistleblowing protection

#### *Legal protection*

The Luxembourg framework for whistleblowing protection includes the law of 13 February 2011<sup>264</sup> (the 2011 Law) and the law of 8 June 2004 on the freedom of expression in the media (the 2004 Law).<sup>265</sup>

The 2011 Law protects a person denouncing taking illegal advantage (*prise illégale d'intérêts*), corruption or traffic of influence (the Criminal Offences) and applies to public officers. Denouncing tax offences is not protected by this law.

<sup>256</sup> Art. 3 of the FATCA Law.

<sup>257</sup> Art. 5 of the CRS Law.

<sup>258</sup> Art. 2 of the GDPR.

<sup>259</sup> GARBARINO, C. FATCA legislation and its application at International and EU Level. Study for the PETY Committee. European Parliament. Policy Department for Citizens' Rights and Constitutional Affairs. Directorate General for Internal Policies of the Union. PE 604.967 May 2018. p. 29.

<sup>260</sup> Ibidem, p. 30.

<sup>261</sup> Art. 15 of the GDPR.

<sup>262</sup> OECD (2019), Op. Cit. p.104.

<sup>263</sup> Art. 23 of the GDPR.

<sup>264</sup> Loi du 13 février 2011 renforçant les moyens de lutte contre la corruption et portant modification 1) du Code du Travail, 2) de la loi modifiée du 16 avril 1979 fixant le statut des fonctionnaires de l'État, 3) de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux, 4) du Code d'instruction criminelle et, 5) du Code pénal.

<sup>265</sup> Art. 7 (1) and (2) of the 2004 Law.

The 2004 Law protects<sup>266</sup> (i) journalists<sup>267</sup>, (ii) editors<sup>268</sup>, as well as (iii) any other person that acts as a source i.e. a person that furnishes qualifying information to a journalist (source)<sup>269</sup>. There is no straight ‘whistle-blower’ definition contained in the 2004 Law; however, we understand that the definition of source is pertinent for these purposes.

### *‘Lux-leaks’ case*

International public opinion was shaken in recent years by various scandals in the field of taxation (e.g. UBS, Swissleaks and the Panama Papers) and by the ‘Lux-Leaks’ case. The latter case is different from the others as it was not related to non-declared accounts or opaque arrangements in jurisdictions considered as tax havens, but involved the unauthorised disclosure of LTA’s tax rulings by a ‘whistle-blower’ to the International Consortium of Investigative Journalists (ICIJ), which then made such rulings public.

In effect, Antoine Deltour, a PwC employee, downloaded in October 2010 a significant amount of data from the PwC database, in particular 548 tax rulings prepared by PwC, with respect to 343 companies. Mr. Deltour released these rulings to Edouard Perrin an ICIJ journalist, and the latter then published these in November 2014 in newspapers and broadcast them on television stations. Another PwC employee, Raphaël Halet, then disclosed to the press further tax rulings.

They were prosecuted notably for theft of these documents and their release, claimed to be ‘whistle-blowers’ and applied for protection under article 10 of the ECHR on freedom of speech.

They were sentenced in first instance on 29 June 2016. This sentence was partially confirmed by the Luxembourg Court of appeal on 15 March 2017.<sup>270</sup> In its decision, considering notably article 10 of the ECHR, the Court of appeal:

- partially recognised Mr. Deltour as a ‘whistle-blower’ (only in relation to professional secrecy violation);
- denied ‘whistle-blower’ status to Mr. Halet on the grounds that at the time he released the last few rulings, since the low relevance of these documents causes a prejudice to the employer greater than the general interest, by the disclosure, at a moment where public debate on tax rulings was already engaged; and
- granted protection to Mr. Perrin as a ‘responsible journalist’ who was acquitted of all charges.

Mr. Deltour and Mr. Halet lodged an appeal in the Luxembourg *Cour de Cassation*. By two decisions rendered on 11 January 2018,<sup>271</sup> the Court annulled the decision which sentenced Mr. Deltour, fully granting him the status of ‘whistle-blower’ but dismissed the appeal of Mr. Halet on the grounds that it should not rule on the factual basis of a decision adopted by the Court of appeal. Mr. Halet indicated his desire to bring the case to the ECHR.

This case had a major impact at the European level, on two particular aspects:

<sup>266</sup> Art. 7 (1) and (2) of the 2004 Law.

<sup>267</sup> Art. 3 (6) of the 2004 Law.

<sup>268</sup> Art. 3 (3) of the 2004 Law.

<sup>269</sup> Art. 3 (12) of the 2004 Law.

<sup>270</sup> *Cour d'appel, arrêt n°117/17 X. du 15 mars 2017.*

<sup>271</sup> *Cour de cassation, arrêt No. 3912 du 11 Janvier 2018.*

- the protection of the ‘whistle-blower’; and
- the tax ruling practice.

Among other scandals, ‘Lux-leaks’ has driven the European Parliament to adopt, on 16 April 2019, the proposal for a directive on strengthening whistle-blowers’ protection (Whistleblowing Proposal). The proposal provides “*protection against retaliation for those who report on evasive and/or abusive arrangements that could otherwise go undetected*”. The scope of the proposal protects the reporting of certain breaches relating to the internal market, including those “related to corporate tax rules or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law”.<sup>272</sup>

‘Lux-Leaks’ struck the European public opinion by denouncing tax dumping within the EU. Consequently, the EU Commission decided to release the ‘Tax Transparency Package’ on March 2015 and further on adopted DAC 3 on the exchange of rulings in December 2015 (section 1.3.2).

Even if ‘whistle-blowers’ have gained protection, it is unclear how information obtained by whistleblowing can be used in practice in Luxembourg. Part of the doctrine affirms that if the LTA obtained the documentation (information) irregularly without the intervention of a ‘whistle-blower’, the response seems obvious, but less so if they have access to the information thanks to the intervention of a third person. It could be argued that thanks to the freedom of evidence, the LTA should be able to regularly use that information for tax procedure purposes. This would be justified by the fact that any means should be admissible to fight tax fraud. But perhaps an approach closer to the applicable deontology is advisable and the LTA should not ignore the fact that the information was illegally obtained. This is a way to legitimise the public function that the LTA exercises, and which should strictly preserve the legality. Therefore, the documents (information) should not be used for the purposes of imposing supplementary taxes.<sup>273</sup>

In practice, further to the publication of the ICI’s publication of the Panama Papers, the LTA has sent 100 requests for information to intermediaries, aiming at identifying the BOs of Panamanian companies,<sup>274</sup> which evidences tax administrative action based on ‘whistleblowing’ in Luxembourg.

### 3. Impacts of digitalisation on the established frameworks

Luxembourg’s financial services sector amounts to 25% of the national gross domestic product.<sup>275</sup> Considering its strategic place in the Luxembourg economy, the Luxembourg government has taken steps to make the digital transformation of this sector a priority.<sup>276</sup>

In fact, the progressive digitalisation of taxation allows a quasi-real time tax compliance and is expected to generate more and better data-quality within a short timeframe, thus enhancing the usefulness and quality of AEOL.

<sup>272</sup> Art. 2 (1) (c) of the Whistleblowing Proposal.

<sup>273</sup> STEICHEN, Alain. *Manuel de droit fiscal général*. Editions St. Paul. 2015. p. 213-214.

<sup>274</sup> See (<http://www.europarl.europa.eu/cmsdata/124709/Luxembourg%20fiche.pdf>).

<sup>275</sup> See ([https://ec.europa.eu/info/sites/info/files/file\\_import/2019-european-semester-country-report-luxembourg\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-luxembourg_en.pdf)).

<sup>276</sup> Luxembourg for Finance, FINTECH. June 2018. p. 10.



Luxembourg embraces innovation in the financial services sector. The Luxembourg financial services regulator (*Commission de surveillance du secteur financier* - CSSF) closely monitors the application of new technologies in this respect, constantly issuing and updating regulations. For instance, the CSSF was the first regulator in Europe to take a position on the treatment of virtual currencies.<sup>277</sup> Similarly, the LTA (including the ACD) has clarified its tax treatment.<sup>278</sup>

In terms of AEOI, it is affirmed by part of the doctrine that cryptocurrencies are not subject to FATCA and CRS, where they are not held by 'financial institutions' and where they are not classified as 'financial assets'.<sup>279</sup> The authors deem that cryptocurrencies cannot be considered as 'financial accounts' since this definition is limited to debt and equity interests<sup>280</sup> and are therefore excluded from any reporting obligations. FATCA and CRS do not give guidance on the classification of cryptocurrencies either. Anonymous cryptocurrencies give rise to a high level of risk of tax avoidance (e.g. Monero).<sup>281</sup> EOIR should, therefore, remain as an option to tackle this issue, subject to the 'foreseeable relevance' limitation (see section 1.1 above).<sup>282</sup>

EOIR mechanisms should be particularly useful in Luxembourg, as there is no specific guidance on how cryptocurrencies should be treated for FATCA or CRS purposes. Still, with the ongoing transposition of DAC 6, new tools to tackle the use of cryptocurrencies (as a product or investment not meeting the 'financial account' definition) to circumvent FATCA and CRS (reporting) will be available.<sup>283</sup>

A new challenge for tax administration authorities is the rise of 'stablecoins' (Facebook's 'libra' is the most famous example).<sup>284</sup>

Indeed, 'stablecoins' (as other 'cryptoassets') could facilitate tax avoidance. Jurisdictions could apply the provisions and obligations of financial institutions to the operators of 'stablecoin' arrangements, but the lack of a central intermediary in a distributed ledger technology (DLT) system could make this difficult to enforce. Furthermore, the degree of anonymity provided by a 'stablecoin' arrangement may make it more difficult for authorities to track transactions and to identify the BOs of 'stablecoins', making identifying tax evasion more difficult.<sup>285</sup>

These issues will intensify as 'stablecoins' become globally widespread.

The reinforcement of AEOI and SEOI in the coming years should be the trend as the OECD's Forum on Tax Administration develops practical tools and cooperation to assess the tax impact of new technologies such as cryptocurrencies.<sup>286</sup>

<sup>277</sup> Ibidem, p. 26.

<sup>278</sup> See *Circulaire du directeur des contributions L.I.R. n° 14/5–99/3–99bis/3 du 26 juillet 2018* and *Circulaire du directeur de l'enregistrement et des domaines n° 787 du 11 juin 2018 Opérations portant sur les devises virtuelles*.

<sup>279</sup> NOKED, Op. Cit. p. 1 and 5.

<sup>280</sup> Art. 1. s) of the Luxembourg–US IGA.

<sup>281</sup> NOKED, Op. Cit. p. 5.

<sup>282</sup> Ibidem.

<sup>283</sup> DAC 6, Point 4 and Annex IV D.1.a.

<sup>284</sup> "Stablecoins have many of the features of crypto assets but seek to stabilize the price of the coin by linking its value to that of a pool of assets". G7 Working Group on Stablecoins, "Investing the impact of global stablecoins, October 2019, p.(i).

<sup>285</sup> Ibidem, p. 11.

<sup>286</sup> OECD, Brief on the tax challenges arising from digitalisation: interim report 2018 (<https://www.oecd.org/tax/beps/brief-on-the-tax-challenges-arising-from-digitalisation-interim-report-2018.pdf>) p. 2.



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