

Luxembourg: 2020 tax considerations for MNEs

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Tax year 2020 will give rise to certain changes in the Luxembourg tax landscape that may require prompt action in the new year.

ATAD 2 - Extension of anti-hybrid measures to third countries

The draft law implementing Council Directive (EU) 2017/952 of 29 May 2017 amending the Anti-Tax Avoidance Directive (ATAD) regarding hybrid mismatches with third countries (ATAD 2) is about to be adopted by the Luxembourg Parliament.

ATAD 2 extends the territorial scope of the anti-hybrid mismatch provision to third countries, and it addresses hybrid permanent establishment mismatches, hybrid transfers, imported mismatches, reverse hybrid mismatches and dual resident mismatches. The new provisions will be effective from financial years starting on or after 1 January 2020, except for those with respect to the taxation of reverse hybrid entities which will apply as from 2022.¹

The new legislation is complex and constitutes a major change that needs to be considered by all types of Luxembourg companies, whether they are engaged in holding, financing, operating or any other activities. Existing structures therefore have to be reviewed in detail in light of these changes. Any analysis of the implications of the law will have to also consider changes in tax law elsewhere in the world and other factors affecting business operating models more generally. Even if the provisions of the law do not have an actual cash tax

impact on a particular taxpayer, they have to be analyzed and conclusions and positions will have to be documented (for instance if it requires a release of the valuation allowance on Net Operating Losses (NOLs)).

MLI - First provisions applying as of 1 January 2020

*The Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion and Profit Shifting (MLI)*² entered into force for Luxembourg on 1 August 2019. The provisions with respect to taxes withheld at source (WHT) on amounts paid or credited to nonresidents will have effect where the event giving rise to such taxes occurs on or after 1 January 2020 with respect to those treaty partners that have deposited their instrument of ratification, acceptance or approval before the end of September 2019.

With respect to all other taxes levied by a Contracting Jurisdiction, the first taxes for which the provisions will enter into effect are those which are levied with respect to taxable periods beginning on or after 1 February 2020, provided the treaty partner has deposited its instrument of ratification, acceptance or approval before the end of July 2019.

As of 16 December, this will affect the treaties with:

Jurisdiction	Date of effect of WHT provisions	Date of effect of other provisions: accounting years starting on
Austria	01-01-2020	01-02-2020
Belgium	01-01-2020	01-04-2020
Canada	01-01-2020	01-06-2020
Denmark	01-01-2020	01-07-2020
Finland	01-01-2020	01-02-2020
France	01-01-2020	01-02-2020
Georgia	01-01-2020	01-02-2020
Guernsey	01-01-2020	01-02-2020
Iceland	01-01-2020	01-07-2020
India	01-01-2020	01-04-2020
Ireland	01-01-2020	01-02-2020
Isle of Man	01-01-2020	01-02-2020
Israel	01-01-2020	01-02-2020
Japan	01-01-2020	01-02-2020
Jersey	01-01-2020	01-02-2020

Jurisdiction	Date of effect of WHT provisions	Date of effect of other provisions: accounting years starting on
Latvia	01-01-2021	01-08-2020
Lithuania	01-01-2020	01-02-2020
Malta	01-01-2020	01-02-2020
Mauritius	01-01-2021	01-08-2020
Monaco	01-01-2020	01-02-2020
Netherlands	01-01-2020	01-02-2020
Norway	01-01-2020	01-05-2020
Poland	01-01-2020	01-02-2020
Russia	01-01-2020	01-04-2020
Serbia	01-01-2020	01-02-2020
Singapore	01-01-2020	01-02-2020
Slovak Republic	01-01-2020	01-02-2020
Slovenia	01-01-2020	01-02-2020
Sweden	01-01-2020	01-02-2020
Switzerland	01-01-2020	01-06-2020
Ukraine	01-01-2020	01-06-2020
United Arab Emirates	01-01-2020	01-03-2020
United Kingdom	01-01-2020	01-02-2020

Preparation for reporting under DAC6

On 8 August 2019, the Luxembourg Government submitted the draft law implementing the European Union (EU) Directive on the mandatory disclosure and exchange of information on cross-border tax arrangements (DAC6) to the Luxembourg Parliament. Under DAC6, intermediaries and in certain situations taxpayers are required to report cross-border reportable arrangements from 1 July 2020. However, reports will retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020 (the transitional period). The deadline for the first reporting for the transitional period will be 31 August 2020. The draft law defines intermediary as any person that designs, markets, organizes or makes available for implementation or manages the implementation of the reportable cross-border arrangement as well as any person that has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to such activities mentioned immediately above, provided they have

nexus to Luxembourg (as defined in the draft law). If there are no intermediaries that can report, the obligation will shift to the taxpayer(s).

According to the draft law penalties up to €250,000 can be applied.

Taxpayers and intermediaries who have operations in Luxembourg should review their policies and strategies to make sure they are fully prepared for meeting their obligations.

Analyzing exposure to Brexit

Following the request of the United Kingdom (UK) Government to delay Brexit, the new date for the UK's departure is 31 January 2020. Although the UK and the EU reached an agreement on the conditions for the Brexit process, it must still be approved by the UK and the European parliaments before it can enter into force. The threat of a "no-deal" scenario hence still exists, if such approval is not passed before the deadline of 31 January 2020.

This could have an impact on a number of tax provisions, such as the application of the participation exemption to dividends received by or paid to a UK or Gibraltar company (see the section below with respect to a Gibraltar company in the context of the Parent-Subsidiary Directive), the provisions with respect to corporate reorganizations (cross-border mergers or demergers, etc.) or the provisions on fiscal unity.

Taxpayers should thus analyze the impact of and prepare for Brexit.

Possible exclusion of Gibraltar companies from the scope of the Parent-Subsidiary Directive

On 24 October 2019, EU Advocate General Hogan gave his opinion in the case of *GVC Services (Bulgaria) EOOD* (Case C-458/18) on the applicability of Directive 2011/96/EU

of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the Parent Subsidiary Directive or PSD). In the case at hand, a Bulgarian single-member limited liability company distributed dividends to its parent company incorporated in Gibraltar without withholding and paying tax in Gibraltar, as it was of the opinion that its parent company would qualify as a resident for tax purposes in a Member State and could thus benefit from the domestic withholding tax exemption that is based on the PSD. The Bulgarian tax authorities however took the position that the scope of the PSD could not be extended to companies incorporated in Gibraltar and liable to tax there. An action was then brought before the Sofia Administrative Court, which filed a request for a preliminary ruling with the Court of Justice of the European Union (CJEU), seeking to determine whether the PSD is applicable to companies incorporated in Gibraltar.

After having first analyzed the territorial scope of the PSD and acknowledging that the PSD is actually applicable to Gibraltar, the Advocate General concluded that the PSD is inapplicable to companies incorporated in Gibraltar. In his opinion, the expression "companies incorporated under United Kingdom law" cannot be interpreted as also covering companies incorporated in Gibraltar, not least given that Gibraltar is not itself part of the United Kingdom.

The decision of the CJEU will thus have to be closely monitored, as, if the CJEU follows the opinion of the Advocate General and thus confirms the inapplicability of the PSD to companies incorporated in Gibraltar, any dividends received from or paid to a Gibraltar company will no longer be able to benefit from the Luxembourg participation exemption or the WHT exemption, respectively, unless the Gibraltar company is subject to a tax corresponding to Luxembourg corporate income tax, which will in most situations not be the case.

Endnotes

1. For a detailed discussion, see EY Global Tax Alert, [Luxembourg submits draft law implementing EU ATAD 2 to Parliament](#), dated 9 August 2019.
2. For a detailed discussion, see EY Global Tax Alert, [Luxembourg publishes draft law ratifying Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS](#), dated 4 September 2018.

For additional information with respect to this Alert, please contact the following:

Ernst & Young Tax Advisory Services Sàrl, Luxembourg City

- | | |
|--------------------------------------------------------------------------|---------------------------------|
| ▶ Bart Van Droogenbroek, <i>Tax Leader</i> | bart.van.droogenbroek@lu.ey.com |
| ▶ Marc Schmitz, <i>Tax Policy & Controversy Leader</i> | marc.schmitz@lu.ey.com |
| ▶ Olivier Bertrand, <i>Private Equity Tax Leader</i> | olivier.bertrand@lu.ey.com |
| ▶ Dietmar Klos, <i>Real Estate Tax Leader</i> | dietmar.klos@lu.ey.com |
| ▶ Fernando Longares, <i>TMT & Life Science Tax Leader</i> | fernando.longares@lu.ey.com |
| ▶ Christian Schlessner, <i>Commercial & Public Sector Tax Leader</i> | christian.schlessner@lu.ey.com |
| ▶ Jacques Linon, <i>Banking & Insurance Tax Leader</i> | jacques.linon@lu.ey.com |
| ▶ Vincent Rémy, <i>Wealth & Asset Management Tax Leader</i> | vincent.remy@lu.ey.com |
| ▶ Nicolas Gillet, <i>Transfer Pricing Leader</i> | nicolas.gillet@lu.ey.com |
| ▶ Elmar Schwickerath, <i>Global Compliance & Reporting Leader</i> | elmar.schwickerath@lu.ey.com |

Ernst & Young LLP (United States), Financial Services International Tax Desks – Luxembourg, New York

- | | |
|-------------------------|----------------------------|
| ▶ Jurjan Wouda Kuipers | jurjan.woudakuipers@ey.com |
| ▶ Michel Alves de Matos | michel.alvesdematos@ey.com |

Ernst & Young LLP (United States), Luxembourg Tax Desk, New York

- | | |
|------------------|-----------------------|
| ▶ Serge Huysmans | serge.huysmans@ey.com |
| ▶ Xavier Picha | xavier.picha@ey.com |

Ernst & Young LLP (United States), Luxembourg Tax Desk, Chicago

- | | |
|-------------------------|---------------------------|
| ▶ Alexandre J. Pouchard | alexandre.pouchard@ey.com |
|-------------------------|---------------------------|

Ernst & Young LLP (United States), Luxembourg Tax Desk, San Jose

- | | |
|-------------------------|-----------------------------|
| ▶ Andres Ramirez-Gaston | andres.ramirezgaston@ey.com |
|-------------------------|-----------------------------|

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