AML and tax transparency
April 27th, 2017
KPMG Luxembourg
Introduction

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A never ending story

Law of 23 December 2016
the 4th Directive

CSSF 17/650
FATCA CRS

HRMC Tax offence
Update of article 506-1 Criminal Code
Introduction

Failure to prevent tax evasion

- Tax crimes
- AML
- FATCA / CRS
- BEPS

ARE YOU READY?

WHAT'S NEXT?
Legislation on tax crime: an introduction

Emilien Lebas
Associate Partner
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Legislation on tax crime: an introduction

Reinforcement of the fight against tax fraud and money laundering (Law of 23 December 2016)

Revised list of infractions

Since 1 January 2017, three types of tax fraud should be distinguished:

• “simple” tax fraud,
• “aggravated” tax fraud (higher amounts), and
• tax swindle (escroquerie fiscale).

Thus, the Law introduces a new concept of “aggravated” tax fraud for direct and indirect tax purposes

Revised definition of money laundering

Money laundering infraction would be extended to cases of “aggravated” tax fraud and tax evasion.

Administrative fee

Filing of a deliberately incomplete or incorrect direct tax return and the non-filing of direct tax returns should be subject to an administrative fine. The fine depends on the amount of the understated tax (or unduly reimbursed tax) and should range between 5% and 25% of that amount.

Penalties that can be imposed in case of late filing of direct tax returns would be increased to a maximum amount of €25,000.
Legislation on tax crime: an introduction

Administrative offence
- Sanctioned by tax authorities
- Attempt not punishable
- Complicity not punishable
- Participation not punishable

Criminal offences
- Sanctioned by a judge (State prosecutor obliged to prosecute
- Attempt punishable
- Complicity punishable
- Participation punishable

All types of direct taxes, registration and inheritance taxes, and VAT
Legislation on tax crime: an introduction

1. Tax evasion (obtain undue tax advantage or cause reduction of tax revenues)

2. Intention (by fraud (tromperie), through intentional act or omission)
   (§ 396 (4) AO “vorsätzlich”)

Simple tax evasion

Article 77 (3) of the law of 12 February 1979 on VAT “avec pour but ou pour résultat”
Legislation on tax crime: an introduction

1. **Tax evasion** (obtain undue tax advantage or cause reduction of tax revenues)

2. **Intention** (by fraud (tromperie), through intentional act or omission)

3. **Volume** (more than 25% of annual tax or reimbursement (both effectively due) and not less than EUR 10,000 or more than EUR 200,000 of annual tax effectively due or of annual reimbursement to be provided)

**Aggravated tax evasion**
Legislation on tax crime: an introduction

1. Tax evasion
2. Intention
3. Amount (Significant in absolute terms or significant in relative terms compared with annual tax or reimbursement due)
4. Systematic use of fraudulent acts

Tax swindle

Article 80 of the law of 12 February 1979 on VAT “ou s’il est membre d’une bande organisée”
### Legislation on tax crime: an introduction

<table>
<thead>
<tr>
<th>Simple tax fraud</th>
<th>Aggravated tax fraud</th>
<th>Tax swindle</th>
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<tbody>
<tr>
<td>▪ Legal entities may also be prosecuted for tax offences and tax crimes</td>
<td>▪ Criminal fine between €25,000 and six times the tax evaded or reimbursement unduly received</td>
<td>▪ Criminal fine between €25,000 and ten times the tax evaded or reimbursement unduly received</td>
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<tr>
<td>▪ <strong>Maximum administrative fine Half</strong> of the tax evaded or reimbursement unduly received</td>
<td>▪ <strong>Imprisonment</strong> between one month and three years</td>
<td>▪ <strong>Imprisonment</strong> between one month and five years</td>
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<td>▪ <strong>Minimum administrative fine 10%</strong> of the tax evaded or reimbursement unduly received</td>
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In addition, for tax fraud in relation to (i) VAT or (ii) registration duties:

- Partial or full **forfeiture of certain civil rights** during a period of five to 10 years *(interdiction à vie de droit)*
Interaction/Link between tax non compliance and money laundering under the 4th Directive

Sandrine Periot
Director Advisory
KPMG Luxembourg
Tax compliance: a broad concept

• How to define tax compliance?

  ➢ Obligation for client to declare its assets and paying its taxes (Luxembourg and Foreign tax resident)
  ➢ Legal entity: ownership threshold to be considered (from 25% directly or indirectly under the 4th Directive to 10% (revised amendments of the Commission to the 4th directive)

  ➢ Responsibility of the client

• No harmonized definition of tax crime under the 4th Directive

• More stringent position from the Luxembourg authorities
Tax compliance: a broad concept

- Update of article 506-1 Criminal Code to include and distinguish
  
  - Simple tax fraud
  - Aggravated tax fraud (evaded taxes > 200 000 EUR or ¼ of tax due)
  - Tax swindle (significant amount of evaded taxes and fraudulent action)

  1. both considered as predicate offence
  2. intentional act to avoid tax and breach tax legislation
  3. criminally sanctioned

- Moral and intentional element already introduced by article 506-1 Criminal Code:
  
  - Money laundering offence: criminally sanctioned (1 to 5 years imprisonment and/or fine between 1250 and 1.250.000 EUR).

- Increasing administrative sanctions and measures under the 4th AML directive
**Tax compliance: a broad concept**

- Money laundering offence even where the predicate offence has been committed abroad

Punishable if predicate offence both in Luxembourg and abroad (including Tax offence)

- All types of direct taxes, registration and inheritance taxes + VAT
- Specific threshold defined

- All tax crimes defined in the Foreign country
- No threshold

What about the double incrimination principle?
Non retroactivity of criminal law
Should a tax non compliant element automatically be associated with money laundering?
Tax compliance: what does it mean for professionals?

- Scope of Law of 23 December 2016 regarding the 2017 tax reform and CSSF 17/650: any tax predicate offence committed since the 1st of January 2017 + attempt to carry out a tax offence

- Impact on new 2017 business relationship as well as existing relationship

- What are you supposed to do?

  - Review of entire population and assess risk
  - Use list of key indicators
  - Start prioritisation
  - Declare in case of reasonable suspicion
Tax compliance: what does it mean for professionals?

- Impact on the Customer Due Diligence obligations

1. Tax obligations in scope
2. Information on the purpose and nature of the relationship
3. Thorough look through on the transactional activities
4. Define what information should be requested
5. Special attention to third party introducer/intermediary
Tax compliance: what does it mean for professionals?

• Prohibition with some relationships?

• Impact on the existing AML/CTF procedures: inclusion of the tax obligations and indicators + Appropriate training of staff

• Lessons learnt from the Panama papers: enhanced transparency, minimized reputational risk

• Keep in mind: You have an obligation of means!

• What is next on your agenda?
  ➢ transposition of the 4th AML directive: issuance of 2 draft bills (UBO register + modification of the law of November 2004)
  ➢ the 4th AML directive bis: stricter rules in terms of transparency and cooperation with authorities
The link between CSSF tax crime circular 17/650, and FATCA/CRS

Gérard Laures
Partner Tax services
KPMG Luxembourg
Tax Transparency risks under CRS (& FATCA)

CRS and FATCA
• Objective: combat tax evasion through **Automatic Exchange of Information**
• Is the system not perfect? Are there loopholes?

CSSF Circular 17/650
• List of 22 indicia of possible tax evasion
• Several in the context of CRS and FATCA, in particular:
  • In relation to entities are not resident in participating jurisdictions
  • In relation to self-certifications (refusal or wrong)

Tax transparency becomes an important element in the AML risk scoring
Tax Transparency risks under CRS (& FATCA)

Account holders outside of Participating Jurisdiction

- Lux FI
- A Financial Institution with Tax residency in Luxembourg
- Account holder outside of a Participating Jurisdiction
- Not Reportable

Controlling Persons outside of Participating Jurisdiction

- Lux FI
- A Financial Institution with Tax residency in Luxembourg
- Trust qualified as a Passive NFE
- Controlling Person outside of a Participating Jurisdiction
- Not Reportable

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Tax Transparency risks under CRS (& FATCA)

**Wrong self-certification**

The Account holder may indicate Lebanon (non Participating Jurisdiction) as country of residence. However, he should be resident from Belgium (Participating Jurisdiction).

A Financial Institution with Tax residency in Luxembourg

Always make a plausibility check with your KYC documents.

**Refusal for self-certification**

The refusal to provide a self-certification under CRS triggers reporting based on indicia and does not for instance prompt an account closure. However, under the CSSF Circular, this is an indicium for potential tax evasion.

A Financial Institution with Tax residency in Luxembourg
Tax Transparency risks under CRS (& FATCA)

Active NFEs that should be Passive NFEs

- A Financial Institution with Tax residency in Luxembourg
  - ANFE
  - Controlling Person no matter the resident Jurisdiction
  - Not Reportable
  - Reportable only under CRS (with some exceptions like publicly traded corporation)

FI under AML ≠ FI under CRS / FATCA

- A Financial Institution with Tax residency in Luxembourg
  - Lux FI
  - Professionally managed investment entities (e.g. trusts, PICs) from participating jurisdictions are considered Financial Institutions, thus not being reportable.
  - Not Reportable

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Tax Transparency risks under CRS (& FATCA)

Issues on defining Controlling Person

The definition of Controlling Person is complex (25% test, control by other means, senior managing official, trustee, settlor, beneficiaries, etc.)

The definition is not 100% identical to FATF rules (i.e. FI's in the chain are not blockers under CRS).
Corporate criminal offences of failure to prevent the facilitation of tax evasion

Chris Davidson
Director, tax management services
KPMG UK
Introduction

New corporate offences of failure to prevent the criminal facilitation of tax evasion:
— Royal Assent expected April/May 2017
— Offences expected to be effective from September 2017
What constitutes an offence?

Guilty of an offence unless the corporation had reasonable procedures to prevent the facilitation

Penalties =

- unlimited financial penalties
- ancillary orders such as confiscation orders or serious crime prevention orders

What constitutes an offence?

1. Criminal tax evasion by customer

2. Criminal facilitation of this offence by a person associated with the organisation
Reach

**UK offence**
Any corporation (wherever in the world) fails to prevent its representatives from criminally facilitating a UK tax loss

**Foreign offence**
Relevant bodies with a UK nexus
The defence - Reasonable procedures

Six Guiding Principles

- Risk assessment
- Proportionality of risk-based prevention procedures
- Top level commitment
- Due diligence
- Communication (including training)
- Monitoring and review
Conclusion

Emilien Lebas
Chris Davidson
Anne-Sophie Minaldo
Takeaways

To avoid multiple review of the back book, **higher standards** should be applied.

**Documentation** of processes and strategic decisions taken is paramount.

More than ever the different teams of a company have to speak to each other and **collaborate**.

Tax transparency also means **opportunities**:

- Reinforcement of the ecosystem (**Brexit opportunities**)  
- WHT reclams
Practical steps – Starting off

- Understand the legislation – not a tax issue but a business conduct issue
- Work out who in your organisation needs to be involved
- Create a project team to lead the work
- Understand what criminal evasion and criminal facilitation are
- Plan how you’ll do your risk assessment
Practical steps - Next stages

— Do a high-level risk assessment
  - Assume some of your clients are tax evaders
  - Assume someone in your organisation or an associate will aid and abet
  - Don’t rely on compliance with your processes – criminals will ignore them

— Carry out more focused risk assessments, particularly in areas where the risks are higher
  - Consider financial services, advisory services, etc.
  - But also consider your supply chains, payment processes, etc.

— Map out the procedures you need to ensure your response is reasonable
  - Draw on existing AML and ABC procedures. Do a gap analysis

— Cross-check that you are aligned with the approved guidance: HMRC and sector

— Design changes in procedures, IT, staff training, etc. that you’ll need to deliver. Do not forget to include a ‘Tone from the Top’ message

— Project manage their delivery

— Do what you can by 31 August 2017; do the rest as quickly as is reasonable

— Plan to review and develop your procedures after one or two years

— Record all this – expect that you will need to evidence their reasonableness
How are we helping clients?

— Monitoring the passage of the Bill and the proposals for change
— Help with understanding of the proposals
— Workshop to help assess risk of facilitation, including in the supply chain
— Mould existing controls and procedures (e.g. AML, Bribery Act) which could form part of ‘reasonable procedures’
— Perform a gap analysis
— Advice on design of additional procedures
— Design/deliver training to CRMs
— Review of internal projects, including input into risk assessments and review of methodologies and implementation plans
Unlocking new opportunities

- A world of transparency
- What is your «unique sale proposition»? How do you create sustainable growth?

Reinforcement of digital strategies
Transparent multi-distribution channels
New Markets, Clients
New Products
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