



Luxembourg Tax alert



Luxembourg Tax
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Luxembourg law on non-public country-by-country reporting passed

Last week on 13 December 2016 the Luxembourg parliament passed the law on non-public country-by-country (“CbC”) reporting thereby transposing the EU Directive 2016/881 of 25 May 2016 (so-called “DAC 4”) into domestic law. The law shall be applicable from 1 January 2016, but has not been published yet in the official gazette.

For more details on DAC 4, please refer to our [Tax Alert of 7 June 2016](#). For more details on the content of the Luxembourg law, please read our [Tax Alert of 5 August 2016](#).

This Tax Alert will focus on the practical implications for our clients.

As a reminder, CbC reporting applies to multinational enterprise (“**MNE**”) groups whose total consolidated group revenue exceeds €750 million (or an amount in local currency approximately equivalent to €750 million) during the previous fiscal year.

Luxembourg group entities may have to comply with filing and notification obligations. Put simply, these obligations may be imposed on all Luxembourg subsidiaries or permanent establishments that (i) are included in the consolidated financial statements of the group, (ii) would be included if they were traded on a public securities exchange or (iii) are excluded solely on size or materiality grounds (together referred to as “**Constituent Entities**”).

Penalties

While the substantive provisions of the law were not changed during the legislative process, the provision on penalties was further clarified.

In theory, Constituent Entities may face a penalty of up to €250,000 (with the final amount being at the discretion of the authorities) in the following scenarios:

- if the CbC report was **not filed** or **filed belatedly**.
- if certain information was **not notified** or **notified belatedly**. A Constituent Entity must notify the Luxembourg Direct Tax Authorities (*Administration des Contributions Directes*) if it is the ultimate parent entity, surrogate parent entity or the constituent entity designated under the secondary mechanism. If it is not a reporting entity, it must notify the Luxembourg Direct Tax Authorities of the identity and tax residence of the reporting entity.
Strictly speaking, for a MNE group with several consolidated entities in Luxembourg, each of them would be obliged to provide this notification. It remains to be seen how and when this notification should be done in practice (more details below).
- if the communicated data is **incomplete or incorrect**.
- if the Constituent Entity is obliged to file a CbC report under the secondary mechanism and **does not inform** the tax authorities that the ultimate parent entity has refused to make the necessary information available.

Practical procedure for filing and notification

As of today, there is no official information from the Luxembourg authorities regarding the practical procedure for filing and notification. While the filing obligation, in principle, needs to be met by one entity only (the reporting entity), all other constituent entities of the MNE group are obliged to notify the tax authorities of the identity and tax residence of this reporting entity. We understand that the filing and notification should be done online via [MyGuichet](#), an interactive platform available on www.guichet.lu. As of today, this online reporting tool is, however, not available for CbC reporting.

We understand that the tax authorities will only accept e-filing and e-notification. Any notification made by letter or email would therefore need to be re-done via MyGuichet.

We encourage our clients to gain access to this interactive platform as soon as possible (if you have not already). Therefore, a signing stick or smartcard should be requested. Please find application forms [here](#).

Deadlines

Although DAC 4 allowed for an extension of deadlines, Luxembourg has not exercised this option. The deadlines are therefore as follows:

Notifications

Notifications about the reporting entity must be provided no later than the last day of the reporting fiscal year of the MNE group, i.e. **by 31 December 2016**, if accounting year is calendar year or – in case of deviating year-end – by any other date after 31 December 2016 (e.g. by 31 March 2017, if accounting period commenced on 1 April 2016).

Practically speaking, this notification deadline of 31 December 2016 is hard to meet. The online reporting tool is not available and, in many cases, the identity of the reporting entity may not be known given that domestic legislations are still being finalised and Qualifying Competent Authority Agreements (QCAAs) may not yet be in place. Therefore, the OECD recommended in their Guidance on the Implementation of CbC reporting of 5 December 2016 to extend this deadline to the filing date of the CbC report (i.e. to 31 December 2017) or the due date of corporate tax returns. DAC 4 also allowed Member States to extend this deadline to the filing date of corporate tax returns (i.e. to 31 May 2017 in Luxembourg).

We expect further guidance from the Luxembourg tax authorities on their application of the notification deadline and penalties for late notification. In view of the practical issues around notification in Luxembourg, given the late publication of the law and the recommendations by the OECD and EU, taxpayers should reasonably expect an equitable treatment, if the notification is provided through the online tool at the beginning of 2017.

Filing of CbC reports

The CbC report must be filed with the Luxembourg Direct Tax Authorities within 12 months of the last day of the reporting fiscal year of the group: (i) **by 31 December 2017**, if the 2016 accounting year of the MNE group ends on 31 December 2016 or (ii) if the accounting period deviates from the calendar year, by any other date after 31 December 2017 (e.g. by 31 January 2018, if the accounting period commenced on 1 February 2016 and ends on 31 January 2017).

Parent surrogate filing – or what to do with the US gap?

In line with DAC 4, the Luxembourg law requires the first CbC report to be filed for the fiscal year of the MNE group commencing on or after 1 January 2016.

However, the reporting period may be different in third countries. For instance, in the US the first CbC report must be filed for the fiscal year commencing on or after 30 June 2016. Consequently, there is a gap for the first half of the year 2016. This gap may create an issue for Luxembourg Constituent Entities of US-based MNE groups, if the annual accounting period of the ultimate parent entity starts between 1 January and 30 June 2016. In principle, the Constituent Entity could be obliged to file a CbC report in Luxembourg under the secondary mechanism.

To address this gap issue, the US Treasury Department and the IRS intend to allow voluntary filing for the fiscal period commencing on or after 1 January 2016. This so-called parent surrogate filing is in line with the OECD Guidance of 5 December 2016.

However, based on a strict reading of the Luxembourg law, this voluntary parent surrogate filing would – for the time being – not release a Constituent Entity from

its obligation to file the first CbC report for 2016 in Luxembourg. This would impose a stricter obligation than the one actually recommended by the OECD.

If we get additional information on this topic, we will inform you quickly thereafter.

Public CbC reporting most likely not to come soon

On 13 December 2016, finance minister, Pierre Gramegna, confirmed that Luxembourg will not support the initiative of the EU Commission for public CbC reporting, as long as there is no consensus at the OECD level on this topic.

On 12 April 2016 the EU Commission proposed an amendment to Accounting Directive 2013/34/EU with the aim to introduce public CbC reporting for MNE groups operating in the EU with global revenues exceeding €750 million. The Commission believed that this amendment could be passed in the Council of the EU with a qualified majority (i.e. 55% of the member states representing 65% of the EU population; a blocking minority must consist of at least four member states). However, the Legal Service of the EU gave a written opinion on 11 November 2016 clearly taking the position that this proposal requires unanimous consent by the Council. The Court of Justice of the EU may be asked to rule on this issue.

Today, it seems unclear whether a qualified majority in the Council – let alone unanimity – supports the initiative of the Commission. Noteworthy in this regard is a recent decision of the French Constitutional Court issued on 8 December 2016 which concludes that a public CbC reporting requirement is unconstitutional in France (for more details, please refer to the Tax Alert of our French colleagues [here](#)).

Stay alert

We will keep you informed about future developments and communications from the Luxembourg tax authorities. Once new relevant information is available, we will issue a new tax alert.

Contact us

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