

Luxembourg – EU developments. Exchange of information: raising the veil of confusion!

Dated 23 December 2010

On 7 December 2010, a political agreement was reached on the draft proposal of an EU Directive for administrative cooperation in the field of taxation. The directive will notably:

- Extend the exchange of information on request, currently foreseen by double tax treaties, to all EU Member States;
- Introduce an automatic exchange of information for certain categories of income (salary, pensions and directors' fees for Luxembourg).

As from 1 July 2017, the scope of application of such automatic exchange of information may be broadened to other categories of income.

We see that the various European developments lead to much confusion in respect of a possible automatic exchange of information that individual account holders could face in the future.

We have summarised below the main EU developments which are part of the "Fiscal package" and have tried to clear up the confusion.

What is the "Fiscal package"?

The "Fiscal package" is discussed each month during the ECOFIN Council meeting and covers notably the following topics: the EU savings Directive, the EU Directive for administrative cooperation and the proposal for an EU Directive on exchange of information.

EU Savings Directive

- Principle: automatic exchange of information between competent authorities of different EU Member States in case of cross border interest payments;
- 25 countries already apply the automatic exchange of information;
- Exception: during a transitional period, Luxembourg is allowed to levy a withholding tax on interest payments (35% as from July 2011);
- The transitional period shall end when the USA, Liechtenstein, Switzerland, Monaco, Andorra and San-Marino will agree to exchange information upon request/automatically (unanimity of the EU Member States is required for signing agreements);
- As no agreement has been signed yet with those foreign countries, no automatic exchange of information can apply.

EU Directive for administrative cooperation in the recovery of taxes

- This Directive covers all taxes and duties and introduces compulsory spontaneous exchange of information, also when the information is held by banks;
- This Directive notably allows officials of one country to actively participate in administrative enquiries on the territory of another country;
- The Directive was adopted by the ECOFIN Council on 16 March 2010.

Proposal of an EU Directive for administrative cooperation in the field of taxation

Based on the political agreement at the ECOFIN Council meeting held on 7 December 2010, a Directive will organise a dual regime of exchange of information:

- Exchange of information on request: in order to allay the risk of Member States making imprecise requests aimed at detecting irregularities (“fishing expeditions”), the ECOFIN Council agreed to identify in the directive certain details that must be specified in requests for information, namely the identity of the person under investigation and the tax purpose for which the information is sought. These details are however less stringent than in the OECD convention, thus allowing more scope of information exchange;
- Automatic exchange of information: the ECOFIN Council agreed on a step-by-step approach aimed at eventually ensuring unconditional exchange of information for eight categories of income and capital (income from employment, directors’ fees, dividends, capital gains, royalties, certain life insurance products, pensions, and ownership of an income from immovable property).

Implementation schedule

- From 1 January 2015, Member States will communicate automatically information for a maximum of 5 categories provided that information is readily available (they will however not be required to send more information than they receive in return).
- Luxembourg has agreed to exchange information on salary, pension and directors’ fees at first (three out of the five selected categories as proposed by the draft directive).
- The Directive should be implemented as from 1 January 2013 regarding the exchange of information on request which will cover income as from 1 January 2011. The implementation date for automatic exchange of information will be as from 1 January 2015.
- The Luxembourg Minister of Finance, Luc Frieden, has declared that Luxembourg will apply the automatic exchange of information to salary and pension as from 2013 and as from 2015 to directors’ fees.

- By 1 July 2017, the Commission will provide a report and, if required, a proposal. The ECOFIN Council will examine the possibilities for removing the condition of availability and extending the number of categories from five to eight.
- The ECOFIN Council will adopt the Directive without further discussions at a forthcoming meeting once the text is finalised.

Globally, the exchange of information on request currently foreseen by double tax treaties will be extended to all EU Member States and an automatic exchange of information will be progressively implemented for certain categories of income (salary, pension and directors' fees at first).

As from 1 July 2017, the EU Member States will assess the situation and consider whether it is appropriate to extend the automatic exchange of information. The gradual approach adopted clearly reflects the ultimate goal of the EU Commission to move on to an automatic exchange of information on capital income. This is still an open debate as some believe that the withholding tax is a more efficient method. While defining their strategic plans, banks will now benefit from an increased visibility on the future legal environment. The six-year period which has been defined in the Directive is a strong invitation to accelerate the move to onshore banking.

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