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INSIGHTS

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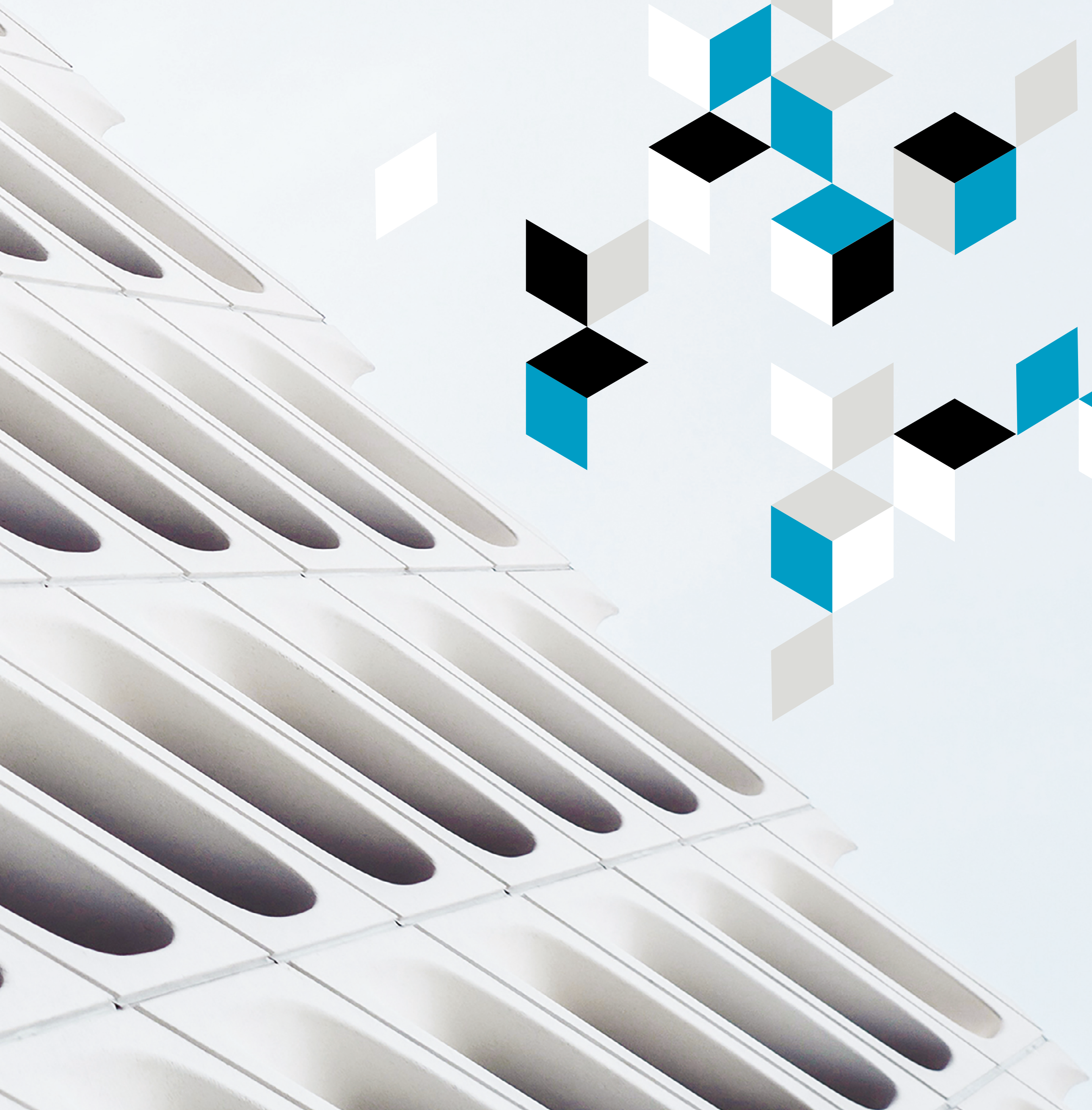

TAXAND

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EDITORIAL

Greetings!

The leaves have fallen from the trees, the first frosts and snow are making a timid appearance, and 2024 is nearly over. This brings us to our annual year-end Insights edition highlighting what has happened in the Grand-Duchy and at European level in the past few months.

The newly elected Luxembourg government quickly made tax proposals to implement its coalition agreement. Over the past few months, several draft laws have been presented by the Luxembourg Government which include (direct) tax changes to strengthen Luxembourg's attractiveness and are still pending before Parliament. We will describe the state of play of these tax initiatives and the likely timing for their adoption.

On 19 July 2024, the Luxembourg tax authorities also released a new circular which deals with the tax treatment of dissolutions without liquidation for corporate income tax, municipal business tax and net wealth tax purposes. We will analyse the implications of the new circular regarding greater legal certainty.

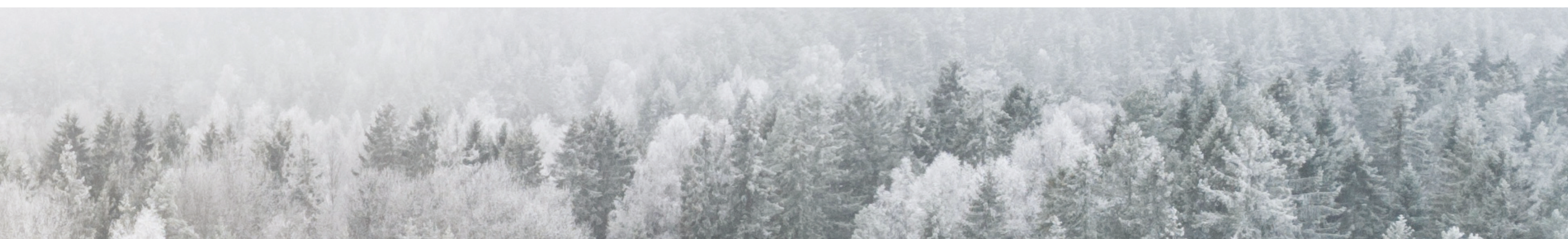
While the Luxembourg government has been very active in proposing new tax measures, at European level, on the contrary, 2024 was relatively quiet. We will explain hereafter the progress of the various tax initiatives at EU level during the past few months.

On 29 July 2024, the Court of Justice of the European Union issued a judgment upholding various provisions of DAC6 as infringing neither the principles of equal treatment and non-discrimination nor the general principle of legal certainty or the right to a fair trial and the right to privacy. We will analyse below the reasoning of the CJEU.

Finally, as part of the Green Deal and to become the first climate neutral continent by 2050, the EU has notably introduced the Corporate Sustainability Reporting Directive (CSRD) as a new regulation for sustainability reporting. We will explain below the implications of the CSRD for European companies.

We hope you enjoy reading our Insights.

The ATOZ Editorial team



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2024 Luxembourg ongoing initiatives in tax matters – State of play

OUR INSIGHTS AT A GLANCE

- Over the past few months, several draft laws have been presented by the Luxembourg Government which include (direct) tax changes and are still pending before Parliament.
- On 24 May 2024, a draft law was presented to Parliament which, with effect as from tax year 2025, mainly amends the minimum net wealth tax rules, as well as the participation exemption regime, and clarifies the tax treatment of partial liquidations. One of the additional changes introduced by the draft law is an amendment of the rules on mandatory electronic filing.
- On 12 June 2024, a draft law was presented to Parliament to amend the Luxembourg law of 22 December 2023 on the minimum effective taxation of multinational enterprise groups and large national groups implementing the EU Directive of 15 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.
- On 17 July 2024, a draft law implementing a new tax package called the "Relief Package. Unity. Future. For Everyone" was presented to Parliament.
- On 18 July 2024, a draft law was released to split the draft law aiming at simplifying and modernising the rules governing the direct tax procedure in Luxembourg dated 28 March 2023 into two different draft laws (draft law 8186A and draft law 8186B). It was felt appropriate to split the initial draft law into two new pieces of legislation in order to take into account the large amount of criticism (see for example the comments of the chamber of commerce dated 9 June 2023) raised with regard to some of the provisions of the initial draft law and also take into account some of the comments and formal objections made by the Council of State.
- On 9 October 2024, the Luxembourg government presented its 2025 budget draft law (n°8444) which includes two additional new tax measures, the main one amending the law dated 22 May 2024 introducing various measures to revive the housing market.
- We describe hereafter the state of play of these tax initiatives and analyse the expected time line for their adoption.

In our May 2024 Insights, we provided an analysis of the law dated 22 May 2024 introducing various tax measures to revive the housing market. Since then, several additional draft laws, which include (direct) tax changes, have been presented over the past months by the Luxembourg Government. They are currently still pending before Parliament even though they are planned to become applicable in the coming months.

The most recent proposal is the 2025 budget law which followed the July draft law introducing a new package of tax measures for both companies and individuals to strengthen the attractiveness of Luxembourg, including a 1% cut of the corporate income tax rate.

Other draft laws introduce welcome changes of tax rules already in force (e.g. the possibility to waive the benefit of the participation exemption for dividends and capital gains under certain circumstances) or clarifications of tax rules already in force (e.g. on the tax treatment of share class redemptions or on how to apply the Pillar Two rules).

Finally, more than 1.5 years after its release, the draft law aiming to modernise the Luxembourg tax procedure is moving again after a long standstill, and some of its provisions are planned to enter into force retroactively as from 2024.

We describe hereafter the state of play of these tax initiatives and analyse the expected time line for their adoption.

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Draft law amending the minimum NWT rules and the participation exemption regime and clarifying the tax treatment of share class redemptions

On 24 May 2024, a draft law was presented to Parliament which, with effect as from tax year 2025, mainly amends the minimum net wealth tax ("**NWT**") rules, as well as the participation exemption regime, and clarifies the tax treatment of partial liquidations. One of the additional changes introduced by the draft law is an amendment of the rules on mandatory electronic filing.

Amendment of the minimum NWT rules to make them compliant with the Constitution: based on the rules currently in force, the minimum NWT due by Luxembourg resident companies is determined based on the types of assets held by the company and the size of its balance sheet. Following a recent ruling of the Court of Constitution according to which the existing minimum NWT regime for companies holding predominantly financial assets is unconstitutional, the draft law removes the distinction currently made based on the types of assets held by the company and provides that, as from tax year 2025, the minimum NWT will amount to EUR 535, EUR 1,605, or EUR 4,815, depending on the size of the total balance sheet of the company, regardless of the types of assets held.

Clarification of the tax treatment of share class redemptions: the draft law further clarifies the cumulative conditions to be met for a share class redemption or withdrawal to be treated as a partial liquidation which is not subject to Luxembourg withholding tax. The main conditions clarified by the draft law are the following: the redemption or withdrawal has to relate to an entire class of shares; each class of shares must have distinct economic rights; the corresponding capital reduction has to take place within a period of time not exceeding six months, the share classes must have been created either upon the incorporation of the company or upon a subsequent increase of the share capital.

New possibility to waive the benefits of the participation exemption regime: currently, the full exemption of dividends and capital gains based on the Luxembourg participation exemption regime (Article 166 of the Luxembourg income tax law, "**LITL**", for dividends and Grand-Ducal Regulation of 21 December 2001 for capital gains) applies automatically as soon as the respective requirements are met. The draft law introduces the possibility for a corporate taxpayer to waive the benefits of the Luxembourg participation exemption. However, this option will only be available where the conditions for the participation exemption are met solely by virtue of the threshold of the acquisition price of the shareholding, i.e. if the Luxembourg taxpayer holds less than 10% in the share capital of the subsidiary, but the acquisition price of the shareholding is equal to at least an amount of EUR 1.2 million for dividends or 6 million for capital gains. When the conditions for the exemption are met on the basis of a shareholding of at least 10%, it will not be possible to exercise this waiver. This limitation is due to the constraints arising from the EU Parent-Subsidiary Directive. The draft law further proposes an amendment to Article 115, number 15a of the LITL to give corporate taxpayers the option of waiving the 50% exemption on income from shareholdings. The option to waive the benefits of Article 115, number 15a LITL and Article 166 LITL will have to be exercised individually for each tax year and for each shareholding.

Amendments to the rules on mandatory electronic filing: with effect as from 1 January 2025, the draft law extends the scope of mandatory electronic filing of tax returns to withholding tax returns on directors' fees and withholding tax forms on remuneration and enhanced tax credits. On 4 July 2024, the Luxembourg tax authorities clarified the new obligations set out in the draft law concerning, in particular, mandatory electronic filing, as from 1 January 2025, for withholding tax returns on directors' fees and withholding tax forms on remuneration and enhanced tax credits. The tax authorities specified in particular which persons are concerned by the mandatory electronic filings. This includes notably companies paying director's fees

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subject to withholding tax to their board members, as well as employers paying salaries to their employees. To read the details provided by the tax authorities, please click here.

On 8 October 2024, the Council of State (which has the task of examining the conformity of the draft law with the Luxembourg Constitution) provided its opinion on the draft law and formulated a formal objection on the article of the draft law that modifies Article 115, number 15a of the LITL to give corporate entities the option of waiving the 50% exemption of dividend income. According to the Council of State, the provision lacked legal certainty because the proposed provision did not define the concept of shareholding while the commentary explains that "the concept of shareholding (…) is to be considered as a whole, and not in isolation with regard to the securities of which it is composed".

On 12 November, the draft law and the Council of State's comments were discussed within the Luxembourg Parliament with the aim of presenting and adopting the required amendments. On that basis, the draft law was modified on 12 November 2024 by the insertion of the following clarification in the provision: "For the purposes of the waiver, all the shares held by the taxpayer in the company are to be taken into account".

On this basis, in its opinion dated 26 November 2024, the Council of State withdrew its formal opposition. Thus, as of today, there is no reason to believe that this draft law cannot be passed and become law before year-end. In addition, since the draft law includes specific provisions dealing with its entry into force (most of the measures entering into force as from tax year 2025), the timing of the finalisation of the legislative procedure is of little relevance. The only provision that will enter into force immediately the day after the publication of the law in the Official Journal is the amendment of Article 101 of the LITL related to the tax treatment of share class redemptions.

While further clarifications will be necessary, e.g. on the impact of the proposed waiver of the participation exemption on the so-called "recapture rule", the changes introduced by the draft law are generally welcomed. They provide more legal certainty and additional flexibility in the current competitive business environment.

To find out more about the measures of the tax package, please click here and read our ATOZ Alert: "Welcome modifications of the minimum NWT and the participation exemption for dividends and clarifications on the partial liquidation in case of the redemption of classes of shares".

Draft law amending the Pillar Two Law to incorporate OECD Guidance

On 12 June 2024, a draft law was presented to Parliament to amend the Luxembourg law of 22 December 2023 on the minimum effective taxation of multinational enterprise ("**MNE**") groups and large national groups (the "**Pillar Two Law**").

The draft law incorporates clarifications, interpretations and additional technical provisions resulting from the three sets of administrative guidance published by the OECD/G20 Inclusive Framework on BEPS in 2023. The proposed amendments to the Pillar Two Law deal with a multitude of aspects of the minimum taxation rules, including clarifications on the scope of application of the rules (excluded entities, turnover definition, etc.) and on how to deal with several issues in practice, such as mismatches in accounting and tax periods within the group, as well as on specific issues related to the computation of the income and loss, the top-up tax and the domestic top-up tax (e.g. which functional currency to apply where constituent entities of the group establish their accounts based on different currencies).

Several clarifications are also included on the transitional rules, including the country-by-country reporting safe harbour, and the rules on how deferred tax assets and liabilities are taken into account in the effective tax rate computation in the transition year, as well as on administrative/filing obligations. To find out the main clarifications for Luxembourg investment funds, please read our ATOZ Alert: "Pillar Two Law to be amended to incorporate OECD Guidance".

On 31 October 2024, the Luxembourg government introduced new amendments to the draft law. The new amendments aim at implementing part of the June 2024 OECD guidance, notably in respect of (1) the notion of "owner" when a flow-through entity is held directly by

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another flow-through entity, (2) the allocation of income/loss of a flow-through entity to owners that are not group entities and whose ownership interests in the flow-through entity are owned directly or indirectly through a tax transparent structure and (3) the treatment of securitisation vehicles.

On 8 October 2024, the Council of State of Luxembourg, however, already approved the June version of the draft law. The Council will now have to issue a new opinion on the amendments proposed by the government. This should delay the approval of the draft law by the Parliament but, as at today, there is no reason to believe that this draft law cannot be passed before year-end.

In this regard, it should be kept in mind that the amendments to be introduced are mainly intended to introduce clarifying provisions so as to guide taxpayers on how to interpret and apply the rules of the Pillar Two Law which are already in force and do not, as such, introduce changes to the rules in place. In addition, the administrative guidance which the draft law proposes to incorporate into the Pillar Two Law was already approved and published by the OECD Inclusive Framework prior to the entry into force of the Pillar Two Law. The commentaries to the Pillar Two Law state in this respect that this law "takes into consideration the guidance that has been released at OECD level". This is why the entry into force of the provisions of the draft law are aligned to those of the Pillar Two Law, i.e. the new provisions would apply to tax years starting on or after 31 December 2023.

Still, it can be expected that the Pillar Two Law will have to be amended again in the future, notably to incorporate additional amendments since the OECD guidance is still being developed.

Draft law introducing tax package to strengthen Luxembourg's attractiveness

On 17 July 2024, Finance Minister Roth presented a new tax package, the "Relief Package. Unity. Future. For Everyone" and a draft law implementing this new tax package was presented to Parliament on the same day.

The draft law introduces targeted tax measures for both businesses and individuals.

The main tax measures concerning businesses include:
- a 1% cut of the corporate income tax rate, and
- a subscription tax exemption for actively managed exchange traded funds.

The main tax measures concerning individuals include:
- an improved employee profit-share regime,
- a more favourable impatriate regime,
- a new bonus for young employees, and
- a new tax credit for cross-border workers.

These measures aim at strengthening Luxembourg's attractiveness, so that Luxembourg remains a suitable jurisdiction for workers, companies and investment funds.

On 22 October, the Council of State issued its opinion on the draft law and raised a minor formal opposition meaning that the draft law requires to be amended in order to be passed. On 15 November, the draft law and the Council of State's comments were discussed within the Luxembourg Parliament with the aim of presenting and adopting required amendments. On this occasion, the government has also introduced an additional amendment. The purpose of this further amendment is to renew, for the 2024 tax year, the existing tax bonus for taking on unemployed workers and to extend it for a further two years, until the end of 2026.

On 26 November 2024, the Council of State confirmed that the draft law, as amended, is not anymore subject to a formal opposition. Given the importance of bringing this bill into force before the end of the year, there is no reason to believe that this draft law will not be passed and become law before year-end.

To find out more about the measures of the tax package, please click here and read our ATOZ Alert: "New tax package to strengthen Luxembourg's attractiveness".

Draft law modernising the Luxembourg tax procedure

On 28 March 2023, a draft law was released in order to simplify and modernise the rules governing the direct tax procedure in Luxembourg. We briefly presented the amendments to be introduced in our ATOZ Alert "Upcoming amendments to the Luxembourg procedure in tax matters"

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and commented them further in our August 2023 ATOZ Insights article "Direct tax procedure: Commentary on upcoming amendments". While some of the amendments to be introduced are positive as they will bring more certainty for taxpayers (e.g. implementation of a procedure to obtain an advance bilateral/multilateral agreement on transfer pricing and clarification of the transfer pricing documentation to be provided to the Luxembourg tax authorities as part of the cooperation duty of taxpayers), it seems that the main purpose of the changes to be introduced is to simplify the direct tax procedure for the tax authorities (e.g via the introduction of an obligation for the taxpayer to file an appeal before the Administrative Tribunal within a certain deadline in case of silence of the Director further to the filing of a tax claim and of a 10% threshold to limit the right to file a tax claim in case of automatic taxation – *taxation d'office*) rather than to increase the tax certainty for taxpayers. In addition, many of the provisions of this draft law raise questions.

On 18 July 2024, the draft law was split into two separate draft laws (draft law 8186A and draft law 8186B). While the two draft laws do not introduce any new measures, it was felt appropriate to split the initial draft law into two new pieces of legislation in order to take into account the large amount of criticism (see for example the comments of the chamber of commerce dated 9 June 2023) raised with regard to some of the provisions of the initial draft law and also take into account some of the comments and formal objections made by the Council of State (see the opinion of the Council of State dated 11 July 2023). The first draft law (i.e. draft law 8186A) now contains the least criticised provisions that are essential to the process of modernising the direct tax procedure, while the second draft law (i.e. draft law 8186B) includes the provisions which require more in-depth analysis and thus more time. In other words, the aim of the transformation of the initial draft law is to make sure that the least criticised, but still very important, provisions can be adopted quickly (the aim being to submit draft law 8186A to the first constitutional vote of the Parliament still before the end of 2024) and that more time can be granted for further analysing and potentially improving the other provisions now included in draft law 8186B.

Draft law 8186A contains notably provisions related to:
- the digitalisation of the tax procedure,
- the administrative cooperation,
- the tax recovery procedure.

On 22 October, the Council of State issued its opinion on the draft law and did not raise any formal opposition meaning that the draft law could be presented to Parliament to be passed. On 12 November, the draft law and the Council of State's comments were discussed within the Luxembourg Parliament. It is therefore expected that the draft law 8186A can be adopted as soon as possible, as planned.

2025 budget draft law

On 9 October 2024, the Luxembourg government presented its 2025 budget draft law (n°8444) which only includes two new tax measures. This is not surprising taking into consideration the various tax measures proposed by the Luxembourg government since the beginning of 2024.

Here is a brief description of these two tax measures:

- **CO2 tax credit**

The draft law proposes to increase the CO2 tax credit by €24 to reach the amount of €192 as from 1 January 2025. Various legislative amendments are proposed to take account of the new amount of the so-called CO2 tax credit for self-employed persons, employees and pensioners, which is scheduled to apply from tax year 2025.

- **Amendment to the Law dated 22 May 2024 introducing various measures to revive the housing market**

The law dated 22 May 2024 provides that the "Bëllegen Akt" tax credit for the purchase of real estate intended for residential use is increased from €30,000 to €40,000 per individual (or €80,000 for a couple) for property acquisitions documented by notarial deeds between 1 January 2024 and 31 December 2024.

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The 2025 draft budget law proposes to add that in the event of a purchase of real estate intended for residential use documented by a notarial deed executed between 1 October 2024 and 30 June 2025, a 50% reduction of the taxable basis used for computation of the registration tax and transcription duties will be granted. The request for such reduction must be included in the notarial deed of acquisition.

The Law dated 22 May 2024 also provides for a new "Bëllegen Akt" tax credit for investment in rental housing. The amount of this tax credit is set at €20,000 per individual acquirer and applies only to individuals. It is intended solely for sales in future state of completion (Ventes en état future d'achèvement - VEFA) documented by notarial deeds executed between 1 January 2024 and 31 December 2024. This tax credit can be used for several acquisitions during 2024 but the cumulative amount cannot exceed €20,000 per individual (or €40,000 for a couple).

The 2025 draft budget law now proposes to add that in the event of an investment in existing or new rental housing between 1 October 2024 and 30 June 2025, a 50% reduction of the taxable basis used for the computation of the registration tax and transcription duties will be granted. The request for such reduction must be included in the notarial deed of acquisition.

These measures are in addition to the ones that had already been introduced as per the "Bëllegen Akt" which was part of the temporary 'housing' package of measures in force until 31 December 2024. After 31 December 2024, the "Bëllegen Akt" drops to €30,000 per person for buyers of a primary residence, and the "Bëllegen Akt" for investors ends. Therefore, for a bit more than one month, property buyers can take advantage of a reduced rate of registration fees and a tax credit on registration fees ("Bëllegen Akt").

According to the draft law, since the new tax measures will be introduced in the course of the year, purchasers will be allowed to request retroactive application of the law if they go to the relevant tax office to sign a declaration of acceptance setting out the legal conditions.

- **Other announcements**

In the draft law, the Government announces that 2025 will see the continued implementation of the tax measures set out in the 2023-2028 coalition agreement. In particular, work on provisions concerning individual taxation will be continued in order to determine a tax model based on a single tax class. In addition, the monitoring of the implementation of Pillar 2 (effective minimum taxation) will still require the active involvement of the Ministry of Finance teams. In this context, the draft budget law announces a substantial increase in the staff of the Administration des Contributions Directes ("**ACD**") as part of its modernisation programme.

At European level, the Ministry of Finance teams will continue to monitor the numerous proposals on direct and indirect tax matters that are currently negotiated (including 'Unshell', 'BEFIT', 'HOT', energy taxation, etc.), as well as the work at the OECD on Pillar 1 (reallocation of certain profits of multinational companies to the jurisdictions where their consumers are located).

Finally, as part of the implementation of Luxembourg's National Integrated Energy and Climate Plan ("**PNEC**"), the carbon price will continue to be increased annually by €5 per tonne of CO_2 in order to reach the level of €50 per tonne by 2027. Revenue generated by the CO_2 tax will continue to be earmarked for measures protecting the climate and promoting the energy transition, and also for social compensation measures for low-income households. One of the measures aimed at mitigating the potential impact of the CO_2 tax on people with low or average income is the CO_2 tax credit.

At the time of writing of this article, the Council of State had not yet commented/opined on the draft budget law so it remains to be confirmed when the legislative procedure will be finalised. However, the draft budget law shall, in principle, become law before year-end.

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Conclusion

Following its recent election at the end of 2023, the Luxembourg government has quickly put its words into action. On 31 May 2024, a law introducing various measures to revive the construction sector in Luxembourg was published. A few days earlier, the Luxembourg government released a draft law modifying the minimum NWT and the participation exemption for dividends and clarifying the tax treatment applicable to the redemption of classes of shares and in July, new tax measures were proposed to strengthen Luxembourg's attractiveness. Given the already numerous ongoing tax initiatives, as expected, the 2025 budget draft law presented to Parliament on 9 October 2024 only introduces a limited number of tax measures, including mainly an increase of the maximum amount of CO2 tax credit, as well as additional measures to revive the housing market. In parallel, the Luxembourg government is working to make sure the OECD guidance on Pillar 2 is duly implemented in Luxembourg, at the same time clarifying a few legal uncertainties introduced by this law. By doing so, the Luxembourg government is working actively on implementing the tax measures announced in its coalition agreement.

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New circular on the tax consequences of a dissolution without liquidation

OUR INSIGHTS AT A GLANCE

- On 19 July 2024, the Luxembourg tax authorities released a new circular which deals with the tax treatment of dissolutions without liquidation.
- The circular confirms that from a Luxembourg corporate income tax point of view, dissolutions without liquidation in accordance with Article 1865bis of the civil code are to be assimilated to a transfer of all assets and liabilities of the company.
- The circular confirms, as a result, the tax treatment of such dissolutions without liquidation for corporate income tax, municipal business tax and net wealth tax purposes.
- We analyse hereafter the implications of this new circular.

On 19 July 2024, the Luxembourg tax authorities ("**LTA**") released a new circular *LIR n°170/1, 170bis/1, ICC n°44, Fort. N°5* ("**the Circular**") which deals with the tax treatment of dissolutions without liquidation (also referred to as "simplified liquidations") within the meaning of Article 1865*bis* of the Luxembourg civil code.

Article 1865*bis* of the civil code was introduced in 2016, confirming and standardising a notarial practice. It provides for a simplified liquidation/dissolution without liquidation procedure for companies with a single shareholder. According to this provision, where one individual holds the entirety of the shares of a company (and therefore all the assets and liabilities), the unique shareholder can dissolve the company at any time. In this case, all the assets and liabilities of the dissolved company are transferred to the unique shareholder, without liquidation.

The tax treatment provisions set out in the Circular only apply to dissolutions without liquidation in accordance with Article 1865*bis* of the civil code and do not apply to dissolutions with liquidation.

We analyse hereafter the implications of the Circular.

Tax treatment for corporate income tax ("CIT") purposes

From a Luxembourg CIT point of view, dissolutions without liquidation in accordance with Article 1865*bis* of the civil code are to be assimilated to a transfer of all assets and liabilities of the company, within the meaning of Article 170 al. 1 of the Luxembourg income tax law ("**LITL**"). This means, as a principle, that a dissolution without liquidation is treated as a liquidation for CIT purposes, triggering the full disclosure and taxation of any latent gains in accordance with Article 169 of the LITL.

However, the Circular specifies that dissolutions without liquidation in accordance with Article 1865*bis* of the civil code can still benefit from the tax neutrality regime applicable to domestic and certain cross-border mergers provided by Article 170 al. 2 of the LITL and Article 170*bis* if some conditions are met, i.e. notably: (1) the participation held by the shareholder in the dissolved entity is cancelled and (2) the transfer is made under conditions exposing the profit to subsequent taxation in Luxembourg, where in the absence of this provision, it would have been taxable there.

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Thus, if all the conditions of Article 170 al. 2 of the LITL are met, the dissolution without liquidation may be carried out in a tax-neutral manner, meaning that, under certain conditions, the transfer of the company's assets and liabilities to its shareholder will not trigger a tax liability. To that end, the absorbing company must continue the book value of transferred assets and liabilities. This implies that the transferred assets and liabilities are deemed to be acquired by the absorbing company at the acquisition dates booked by the absorbed company.

The Circular specifies that the same tax consequences apply in a cross-border context, in accordance with Article 170bis of the LITL, i.e. when the sole shareholder is located in the European Union ("**EU**") or in the European Economic Area ("**EEA**"). The cross-border merger is tax-neutral only to the extent Luxembourg retains the right to tax the deferred gain in the future, which generally means that a permanent establishment has to continue in Luxembourg.

Tax treatment for municipal business tax ("MBT") purposes

In accordance with Paragraph 7 of the MBT Law, the business profit for MBT purposes is determined based on the provisions of the LITL and is then increased in accordance with Paragraph 8 of the MBT Law and reduced in accordance with Paragraph 9 of the MBT Law.

By application of the conclusions reached for CIT purposes and given that the MBT Law does not contain any specific provisions dealing with the taxation of profits realised at the time of a dissolution without liquidation carried out in accordance with Article 1865bis of the civil code, these profits are not subject to MBT each time they are not subject to CIT under the tax neutrality regime of Article 170 al. 2 of the LITL or Article 170*bis* of the LITL.

Net wealth tax ("NWT") aspects

In the Circular, the LTA have clarified the impact of dissolutions without liquidation carried out in accordance with Article 1865*bis* of the civil code on the NWT reduction (within the meaning of Paragraph 8a of the NWT Law). Under this provision, Luxembourg companies may benefit, under certain conditions, from an NWT reduction if they allocate a certain amount of their profits, retained earnings or other available reserves to a dedicated NWT reserve which has to be kept for a minimum period of five years.

The Circular confirms that, when the dissolved entity has an NWT reserve which has not yet been maintained during the required five-year period at the time of the dissolution, the dissolution does not terminate the five-year period automatically and it will not have any impact on the NWT liability of the dissolved entity, provided that the NWT reserve is continued at the level of the shareholder for the remaining time period required so as to meet the five-year period condition. This is in line with the legal provision according to which the same principle applies in case of restructurings falling in the scope of article 170 of the LITL.

The Circular also confirms that for the purpose of reducing the NWT due by the dissolved entity for the tax year during which the dissolution without liquidation takes place, the requirements of Paragraph 8a of the NWT Law remain applicable and thus must be met by the dissolved entity. This means that the NWT reserve must be accounted for by the dissolved entity when allocating the financial year results of the fiscal year immediately preceding the tax year for which the NWT reduction is claimed, and at the latest during the financial year ending during the tax year in respect of which the NWT reduction is claimed. In this respect, since the dissolution results in the closing of the financial year of the dissolved entity, the NWT reserve must be booked by the dissolved entity at the latest at the time of its dissolution. The NWT reserve must then be continued at the level of the shareholder so as to meet the five-year period condition.

The above-mentioned implications only apply in the case of a dissolution without liquidation in accordance with Article 1865*bis* of the civil code and not in the context of dissolutions with liquidation. In the latter situation, after its dissolution, an entity is deemed to exist for the purposes of its liquidation and its tax liability only ends when the liquidation is completed. If, at the time the liquidation is completed, the NWT reserve has not been maintained for a

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minimum period of five years, the NWT liability for the tax year in which the liquidation is completed will have to be increased by 1/5th of the amount of the NWT reserve.

Conclusion

The Circular is welcome as it clarifies the tax treatment of dissolutions without liquidation by confirming the analysis according to which they may benefit from a tax neutrality regime for CIT and MBT purposes. As a result, we can also infer from this Circular that a dissolution without liquidation of an entity of a tax consolidated entity should have no effect on the consolidation regime either. The Circular further confirms that dissolved companies which have not yet met the five-year requirement applicable to benefit from the NWT reduction of Paragraph 8a (1) of the NWT Law will not be impacted negatively, if the NWT reserve is continued at the level of their shareholder.

These clarifications put an end to the uncertainty surrounding the provisions applicable to dissolutions without liquidation, which has existed since the introduction of Article 1865*bis* of the civil code in 2016. They therefore provide greater legal certainty and a unified treatment for simplified liquidations.

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State of play of different proposals at EU level (Unshell, TP, HOT, FASTER, DAC9, etc.)

OUR INSIGHTS AT A GLANCE

- Hungary holds the Presidency of the Council of the European Union from 1 July until 31 December 2024.
- The Transfer Pricing proposal cannot be supported by Member States in its current form and is in the path of being replaced by the creation of an "EU Transfer Pricing Platform".
- The BEFIT proposal came to a standstill but some Member States are calling for political discussions.
- As of today, EU Member States have not managed to reach an agreement on an Unshell proposal due to various technical aspects.
- The EU Council reached an agreement on the compromise text providing for new rules for withholding tax procedures for listed securities. The Council is currently expected to adopt the Proposal in early 2025.
- The EU Commission put forward a new directive proposal, called the "DAC9 Proposal", amending the DAC with the aim to make it easier for companies to fulfil their filing obligations under the 2022 Pillar Two Directive.
- As Pillar One is still not agreed upon at OECD level, the Commission will most likely put its draft digital service tax proposal back on the table.
- We explain hereafter the progress of the various tax initiatives at EU level during the past few months.

In June 2024, the EU Council approved a report to the European Council on tax issues. The report provides an overview of the progress achieved in the Council during the term of the Belgian Presidency, held from 1 January to June 2024, as well as an overview of the state of play of the most important items under negotiation in the area of taxation.

Hungary has now been holding the Presidency of the Council of the European Union since 1 July (and until 31 December 2024). For its presidency, the Hungarian Presidency published a programme setting out the priorities and directions during the term of its rotating presidency. According to this document, the objective of the Presidency for its term in the area of taxation is to "*effectively advance the discussions on the taxation files and international issues currently on the agenda, achieving progress which responds to the needs posed by new business models, international cooperation, and fiscal revenues*". The high priorities in the area of taxation for the Presidency are the fight against tax evasion, ensuring legal certainty for taxpayers and supporting international engagement of the European Union.

The Council also reaffirmed its priorities focusing on enhancing the European Union's competitiveness.

We explain hereafter the progress of the various tax initiatives at EU level during the past few months, from the ones that are the most likely to be adopted in the short term to the ones that have, currently, the least chances to succeed in the near future.

FASTER Proposal

On 19 June 2023, the European Commission published the proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes, the "**FASTER**

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Proposal". With this new initiative, the Commission aims to tackle the current particularly burdensome withholding tax ("**WHT**"). In our previous Insights, we explained the chances of having this directive proposal formally adopted soon were rather high.

For a presentation of the initial FASTER Proposal, please read our ATOZ Alert: "European Commission releases FASTER Directive Proposal".

According to the report, the Belgian Presidency pursued the work on key files, and more specifically, the Council reached a general approach on the Council Directive on Faster and Safer Relief of Excess Withholding Taxes.

On 14 May 2024, the EU Council reached an agreement (general approach) on the compromise text providing for new rules for WHT procedures which presents substantial differences compared to the original text of the proposal published in June 2023.

The European Parliament was consulted and delivered its opinion on the initial text of the Proposal on 28 February 2024. However, due to the changes the Council made to the Proposal during the negotiations, the European Parliament will be consulted again on the agreed text. Following this re-consultation with the European Parliament, the Proposal will need to be formally adopted by the Council (unanimity required) before being published in the EU's Official Journal and entering into force. In this respect, the Council is currently expected to adopt the Proposal in early 2025. Member states will then have to transpose the directive into national legislation by 31 December 2028, but the national rules will, in principle, become applicable only as from 1 January 2030.

To read more about the general approach agreed upon by the Council, please read our ATOZ alert: "The Council reached an agreement (general approach) on new rules for withholding tax procedures (FASTER)".

Directive 2011/16/EU on administrative cooperation

On 7 May 2024, the European Commission launched a public consultation on Directive 2011/16/EU, Directive on Administrative Cooperation ("**DAC**"). As previously announced by the Commission, this consultation aims at assessing the effectiveness, efficiency and continued relevance of DAC, as well as its coherence with other policy initiatives and priorities and EU added value. The consultation ended on 30 July 2024 and focused on the functioning of DAC in 2018-2022. Therefore, DAC7, applicable to digital platforms operators, and DAC8, applicable to crypto-asset service providers, are not covered. The evaluation report of the Commission has no yet been published.

In the meantime, on 28 October 2024, the EU Commission put forward a new directive proposal, called the "**DAC9 Proposal**", amending the DAC for the ninth time with the aim of making it easier for companies to fulfil their filing obligations under the 2022 Pillar Two Directive which aims to ensure a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the EU.

For once, the DAC is not amended by the addition of new reporting obligations. The DAC9 Proposal rather supports the practical implementation of the reporting obligations under the Pillar Two Directive. This proposal is consistent with and contributes to the Commission's efforts to rationalise and simplify reporting obligations, as well as to reduce the administrative burden for businesses, which is set out as a priority in the Commission work programme 2024.

The DAC9 Proposal introduces a standard form, in line with the one developed by the Inclusive Framework of the OECD, which multinational enterprise groups and large-scale domestic groups will have to use to report certain tax-related information in a centralised manner and sets up a system for tax authorities to exchange information with each other.

However, this new proposal raises various practical questions as it seems it will not prevent entities from filing local Pillar Two tax returns for their own assessment. In addition, the proposal seems to ignore the potential disputes between Member States or between taxpayers and Member States it could create, without addressing them.

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To find out more about the DAC9 Proposal, please read our ATOZ Alert: "EU Commission adopted a DAC9 proposal to ease filing obligations under the Pillar Two directive".

Transfer Pricing directive proposal

On 12 September 2023, the European Commission released the Transfer Pricing ("**TP**") proposal as part of the package that includes the directive proposal on BEFIT. The TP proposal aims at integrating key TP principles into EU law with the objective of putting forward common approaches for Member States. If adopted, the new rules would apply as from 1 January 2026.

So far, the discussions in the "Working Party on Tax Questions" have shown that the TP proposal cannot be supported by Member States in its current form. Member States raised serious concerns about the risk of possibly creating a double standard in the field of TP, as well as about the loss of flexibility that they currently have in negotiating and applying the OECD TP Guidelines. Therefore, further work is required to prepare the basis for possible headway.

A large number of Member States have, however, indicated that it could be useful to establish an "EU Transfer Pricing Platform" - a new "soft law" forum, such as (or to a certain degree similar to) the Joint Transfer Pricing Forum which ceased to exist in 2019. In this respect, Member States are reportedly discussing three options proposed by the Hungarian Presidency for establishing this new TP forum. During their discussions, Member States will have to decide on the exact mandate of such platform, its decision-making procedures and how to ensure the respect of its decisions.

The three options currently proposed by the Hungarian Presidency are not publicly available at this stage. However, the first option discussed would allegedly be like the Platform for Tax Good Governance or other Commission's expert groups. The second option would include a mix of discussions with stakeholders and discussions in Council format. The last option would be shaped on the intergovernmental Code of Conduct on business taxation.

If ever established, this forum is likely to replace the TP proposal.

To read more about the implications of the TP proposal, read notably our ATOZ Alert: "European Commission releases Directive Proposal on Transfer Pricing: A trojan horse?"

Pillar One

On 18 December 2023, the G20/OECD Inclusive Framework on Base Erosion and Profit Shifting (the "**Inclusive Framework**") issued a statement calling for a finalisation of the text of the Pillar One multilateral convention ("**MLC**") by the end of March 2024 with a view to holding a signing ceremony by the end of June 2024.

On 15 February 2024, in light of the revised timeline for adoption and signature of the Pillar one MLC, the USA, Austria, France, Italy, Spain and the UK decided to extend the political agreement set forth in the joint statement issued on 21 October 2021 regarding their agreement that (as part of Pillar One) they will withdraw all unilateral measures concerning the imposition of digital services taxes ("**DST**"s) once Pillar One takes effect from 23 December 2023 until 30 June 2024. However, the OECD has missed the self-imposed 30 June 2024 deadline for the finalisation of the text of Pillar One and its subsequent opening for signature.

As a result, some countries may implement DSTs. Several countries, including for example the UK, the USA, France, Spain and Italy, already have unilateral DSTs and had committed to move away from them as part of the transition to an international solution. They might definitely enact their DSTs. Canada has already enacted their DST as of 28 June 2024 with retroactive effect to 1 January 2022.

As of today, the European Commission has not communicated on the consequence of the potential cancellation or postponement of the Pillar One MLC signing ceremony. We can, however, expect that in the first scenario, the Commission will most likely put its draft DST proposal back on the table.

Unshell proposal

On 22 December 2021, the European Commission submitted a proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and

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amending Directive 2011/16/EU, the "**Unshell Proposal**".

As of today, EU Member States have not managed to reach an agreement on various technical aspects of the proposal.

On 11 June 2024, the European Commission reportedly discussed a new approach for its proposal on the misuse of the shell entities with Member States during a meeting of the High-Level working party on tax questions.

The new approach would allegedly no longer contain an economic substance test and would limit reporting obligations to entities that present a high risk of being used in abusive tax schemes. Entities would have to self-assess whether they are considered as high-risk based on hallmarks. Hallmarks would relate, for example, to the management or the tax residency of the entity. A high-risk entity would then have to report the hallmarks it met and information about its shareholders and beneficial owners to the authorities.

The new approach would also reportedly no longer include common tax consequences, but it would create an obligation for Member States to use the exchanged information and take administrative measures, such as tax audits, to identify possible abuse schemes and apply their national anti-abuse rules accordingly.

Member States have seemingly agreed to relaunch technical talks based on this new approach. But some Member States having issues with the proposal are nevertheless willing to see a redrafted text before. At this stage, there is no official information published neither about the new approach nor about a potential draft text compromise available.

To read a presentation of the Unshell Proposal, please read the article "Using a Sledgehammer to Crack a Nut: The European Commission's Draft Directive to Tackle Shell Entities".

BEFIT Proposal

On 12 September 2023, the Commission tabled a proposal for a Council Directive on Business in Europe: Framework for Income Taxation ("**BEFIT**"), the core objective of which is to develop a common corporate tax framework for large multinationals in the EU.

Given the nature of the concerns raised, with some Member States also calling for a political discussion, it seems that at this stage, discussions relate more to the policy choices that would need to be made with regard to this Commission proposal rather than on the technical analysis of the proposal. Against this background, it is clear that further reflection and technical work are necessary, in order to determine the next steps in these negotiations and that the BEFIT proposal is far from ready to be approved by the Council.

To read more about the implications of the BEFIT proposal, read notably our ATOZ Alert: "Directive Proposal on BEFIT: A real necessity or just another layer of useless complexity?" or "A Critical Analysis of the European Commission's BEFIT Proposal".

Implications

Over the Hungarian presidency, most of the ongoing initiatives of the European Commission in corporate tax matters did not move forward at all and a single new directive proposal implementing a derogation allowed by the Pillar Two Directive was tabled. The fact that the pace of the adoption of new tax regulations at EU level is slowing down compared to the previous years is welcomed, especially in a time where EU businesses are facing important economic and competitiveness challenges due to the current global economic environment.

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The European Court of Justice rules on the validity of DAC6

OUR INSIGHTS AT A GLANCE

- On 29 July 2024, the Court of Justice of the European Union issued a judgment upholding various provisions of DAC6.
- The preliminary ruling request related to the validity of DAC6 and whether the concepts and definitions used in DAC6 infringed the right to a fair trial and the right to privacy.
- The Court of Justice of the European Union concluded that neither the principles of equal treatment and non-discrimination nor the general principle of legal certainty and the right to respect for private life were breached by DAC6.
- We analyse hereafter the reasoning of the Court of Justice of the European Union.

On 29 July 2024, the Court of Justice of the European Union ("**CJEU**") issued a judgment upholding various provisions of the Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU ("**DAC**") as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("**DAC6**") in the case C-623/22.

The case, referred to by the Belgian Constitutional Court ("**BCC**"), was initiated by the Belgian Association of Tax Lawyers, among others, and related to the validity of DAC6 and whether the concepts and definitions used in DAC6 infringed notably the right to a fair trial and the right to privacy.

The CJEU concludes that DAC6 breaches neither the principles of equal treatment and non-discrimination nor the general principle of legal certainty and the right to respect for private life, as well as the principle of legality in criminal matters nor the legal professional privilege.

This case law is interesting as it provides various guidelines for the interpretation of the DAC6 provisions.

We analyse hereafter the reasoning of the CJEU.

Scope of DAC6 does not infringe the principles of equal treatment and non-discrimination

The first question referred to the CJEU by the BCC related to the validity of DAC6 in the light of the principles of equal treatment and non-discrimination to the extent it applies to taxes other than corporation tax.

The CJEU states in this respect that the DAC6 obligation forms part of the establishment of international tax cooperation to fight aggressive tax planning, which takes the form of an exchange of information between Member States to contribute to combatting the aggressive tax planning and preventing the risk of tax avoidance and evasion. This reference criterion, against which the existence of a possible infringement of the principle of equal treatment must be assessed, makes it applicable to all taxes falling within the scope of DAC. In this regard, the scope of DAC include not only corporation tax, but also direct taxes other than corporation tax and indirect taxes, such as registration fees. VAT, customs duties and excise duties that are excluded from the scope of DAC.

According to the CJEU, indeed, there is nothing to support the conclusion that aggressive tax planning practices may

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be implemented only in the field of corporation tax, to the exclusion of other direct taxation (i.e. income tax applicable to individuals) and the field of indirect taxation which are not subject to specific EU legislation in the context of which the objective of combatting such practices, unlike VAT, customs duties and excise duties.

On this question, the Court thus concludes that DAC6 does not infringe the principles of equality and non-discrimination in that it does not limit the reporting obligation in respect of cross-border arrangements to corporation tax.

The different concept of the general principle of legal certainty and the right to respect for private life

In the main proceedings, the plaintiffs claimed that the concepts of 'arrangement', 'intermediary', 'participant', 'associated enterprise', 'marketable arrangement' and 'bespoke arrangement' and the description 'cross-border', as well as the various 'hallmarks' and the 'main benefit test', were not sufficiently precise. Since the failure to comply with the reporting obligation laid down in DAC6 is enforceable by means of administrative fines provided for under national law, the BCC considered it necessary to refer the question about the validity of DAC6 in the light of the principle of legal certainty, the principle of legality in criminal matters and the right to respect for private life guaranteed in Article 7 of the Charter.

However, according to the CJEU, DAC6 does not infringe these principles and rights in that the various concepts used by DAC6 to determine the scope of the reporting obligation in respect of reportable cross-border arrangements appear to be sufficiently clear and precise. The CJEU drew its conclusion in light of the requirements stemming from the principles of legal certainty and legality in criminal matters. For each word, the ECJ justified its conclusion.

- **Arrangements**

As regards the concept of 'arrangement', the CJEU states that this term must be understood in its usual sense of mechanism, operation, structure or set-up, the purpose of which, in the context of DAC6, is to carry out tax planning. In view of the wide variety and the sophistication of possible tax planning structures, it cannot be ruled out that an arrangement may itself consist of a number of arrangements. That may be the case for an "arrangement that involves the coordinated implementation, especially in different Member States or according to a staggered timetable, of separate legal and tax mechanisms that are not only steps or parts of that arrangement but which already pursue, individually and separately from each other, tax planning and which, taken together, seek to carry out overall tax planning".

It appears to the CJEU that the definition of 'arrangement' is intended to be sufficiently broad and robust to capture any agreement, scheme, plan or understanding and all the steps and transactions that form part of or give effect to that arrangement.

According to the plaintiff, since the reporting obligation refers to each 'reportable arrangement', the fact that such arrangement may consist of a series of arrangements may give rise to uncertainty as to the breadth of the specific reporting obligations to be complied with. Nevertheless, according to the CJEU, it is only if and to the extent that an arrangement is itself composed of mechanisms that pursue, individually and separately from each other, tax planning and which constitute 'reportable cross-border arrangements' by themselves that this reporting obligation applies to each of those arrangements, in addition to applying, at the appropriate time, to the overall arrangement which they comprise. This involves that, individually and separately, these mechanisms contain at least one of the hallmarks set out in Annex IV of the DAC which, each individually and in isolation, entail a 'potential risk of tax avoidance', On the other hand, where a 'reportable arrangement' is composed of mechanisms that do not have these characteristics, the obligation only exists in respect of this arrangement and comes into being only on the date on which the arrangement satisfies one of the temporal conditions provided by DAC6.

- **Cross-border arrangement**

According to the CJEU, this concept is essentially determined in light of the tax of the participant or participants in such

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arrangement, the location of the activity of the participant or participants or the consequences which the arrangement may have on the automatic exchange of information or on the identification of the actual beneficiaries of the arrangement.

Participant in the arrangement

Although not specifically defined, it is understood, according to the CJEU, as covering the 'relevant taxpayer', and as not covering, a priori, an 'intermediary', without prejudice, however, to the possibility that the intermediary might actively take part in the arrangement as the relevant taxpayer.

Impact on the automatic exchange of information or on the identification of beneficial ownership

This wording is, according to the CJEU, sufficiently explained by Annex IV, in so far as in category D this annex refers to specific hallmarks concerning the automatic exchange of information and beneficial ownership. Category D contains lists of various organisational and operational mechanisms by which an arrangement is liable to have the effect of undermining the reporting obligation or of concealing, by recourse to non-transparent ownership channels, the identity of the beneficial ownership of these organisational or operating mechanisms.

- **Marketable arrangement and bespoke arrangement**

The marketable arrangement is a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without the need to be substantially customised. As regards, in particular, the expression 'substantially', the CJEU considers that this is clarified by hallmark A.3 of Annex IV, from which it follows, in essence, that an arrangement which does not need to be substantially customised for implementation is an arrangement the documentation and/or structure of which are largely standardised and which may be made available to a number of taxpayers.

The CJEU restates hat the concept of bespoke arrangement should be defined as being any cross-border arrangement that is not a marketable arrangement.

- **Intermediary**

DAC6 defines an intermediary as 'any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement' and also, 'any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.'

In order to be an intermediary, a person must also satisfy at least one of the following four conditions relating to the existence of a connection with the territory of the Member States, namely:

- to be resident in a Member State for tax purposes,
- to have a permanent establishment in a Member State through which the services with respect to the arrangement are provided,
- to be incorporated in, or governed by the laws of, a Member State, or
- to be registered with a professional association related to legal, taxation or consultancy services in a Member State.

The plaintiff seemed to consider the notion of person who undertakes only to provide 'aid, assistance or advice' (auxiliary intermediaries) was unclear. However, according to the CJEU, DAC6 does not appear to be lacking in the precision necessary to enable the operators concerned to identify themselves as falling, or not falling, within the category of persons subject to the reporting obligation, such as a person who has 'undertaken to provide, directly or by means of other persons, aid, assistance or advice', which is vital for enabling this identification.

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The CJEU compares the notion of auxiliary intermediaries to the terms of 'service providers' used by the OECD Model Rules. Auxiliary intermediaries are also opposed to the persons who design, market, organise or make available for implementation or manage the implementation of the cross-border arrangement ('the main intermediaries') and whom those model rules designate as 'promoters' of the arrangement.

- **Main Benefit Test**

Under DAC6, the Main Benefit Test ("**MBT**") is satisfied where it 'can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage.'

According to the CJEU, it does not appear particularly difficult to decide whether the main benefit or one of the main benefits that can reasonably be expected of the arrangement they design and/or use is fiscal in nature. In this regard, the CJEU recalls that the BEPS Action 12 Report states that the MBT compares the value of the expected tax advantage with any other benefits likely to be obtained from the transaction and has the advantage of requiring an objective assessment of the tax benefits.

The starting point for the DAC6 reporting deadline does not breach the principle of legality in criminal matters and the right to respect for private life

The plaintiff argued that the provisions of DAC6 do not make it possible to determine, with the requisite degree of precision, the date from which the reporting period provided for in that directive begins to run.

The CJEU considered, however, that DAC6 does not infringe the principle of legality in criminal matters and the right to respect for private life in that the starting point of the 30-day period during which the intermediary or relevant taxpayer must fulfil its reporting obligation in respect of a reportable cross-border arrangement appears to be sufficiently clear and precise.

DAC6 provides that the 30-day period begins on the day after the arrangement is made available for the purposes of implementation, is ready to be implemented or when the first step of its implementation has been made, whichever occurs first. The concept of 'implementation of the cross-border arrangement' refers, as suggested by everyday language, to the transition of the arrangement from its conceptual stage to its operational stage.

As regards the reference to the provision of aid, assistance or advice applicable to the intermediaries, DAC6 requires information to be filed within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice. The CJEU notes in this respect that the provision of this aid, assistance or advice may be spread over a period of time. However, DAC6 does not specify whether the starting point of the reporting period available to the intermediaries is the day after the first day or the last day of the period in which the aid, assistance or advice is provided. The reporting obligation imposed on the intermediaries can thus logically only exist from the moment the person concerned knows or could reasonably be expected to know that he or she has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing or organising a reportable cross-border arrangement and is, therefore, an 'intermediary' subject to the reporting obligation. This moment may only arise after the beginning of the provision, by that person, of aid, assistance or advice. It is, in particular, in this circumstance that DAC6 stipulates that the person has the right to provide evidence that they did not know and could not reasonably be expected to know that they were involved in a reportable cross-border arrangement.

It must also be inferred both from the use by DAC6 of the past tense ('provided') and from the rule applied to the main intermediaries, according to which the reporting period does not run from the beginning of their involvement in the design of the arrangement, but only at the stage of its implementation, that the auxiliary intermediaries' reporting period deadline cannot begin to run until the day after the date they completed their provision of aid, assistance or advice.

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The judgment of 8 December 2022 (C-694/2) applies only in respect of lawyers

On 8 December 2022, the CJEU ruled that the DAC6 obligation imposed on a lawyer who is exempt from the reporting obligation as a result of legal professional privilege to notify other intermediaries involved in the tax arrangement of their own reporting obligations ('the obligation to notify') breached in itself the legal professional privilege.

Today, the CJEU specifies that such ruling only applies in respect of lawyers within the meaning of the directive to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. The CJEU justifies its conclusion in light of the unique position which they accord to the profession of lawyer within society and for the purposes of the proper administration of justice.

In these circumstances, the invalidity of part of DAC6 in light of Article 7 of the Charter, declared by the Court in the judgment of 8 December 2022 (*Orde van Vlaamse Balies and Others*, C-694/20) only applies to persons who pursue their professional activities under one of the professional titles referred to in the Directive 98/5, i.e. lawyers.

Therefore, the 2022 ruling of the CJEU does not apply as regards the other professionals who are not lawyers but are authorised, as the case may be, by a Member State to ensure legal representation, such as university professors in certain Member States and accountants in Luxembourg. The CJEU thus considers that there is nothing to prevent the obligation for the latter to notify other intermediaries involved in the tax arrangement of their own reporting obligations, even it has the consequence that the existence of the consultation link between the notifying intermediary and his or her client is brought to the attention of the notified intermediary and, ultimately, the tax administration.

As a reminder, DAC8 modifies DAC6 in order to comply with the 2022 ruling and amends it in such a manner that its provisions do not have the effect of requiring lawyers acting as intermediaries, where they are exempt from the reporting obligation on account of the legal professional privilege by which they are bound, to notify any other intermediary that is not their client of the intermediary's reporting obligations. However, intermediaries that are exempt from the reporting obligation because of the legal professional privilege by which they are bound remain required to notify their client of their reporting obligations without delay. In light of the ruling of 29 July 2024, this modification should thus not apply to intermediaries that are not lawyers. Luxembourg will have to implement most of the DAC8 provisions into its internal law by 31 December 2025 at the latest so they would become applicable as from 1 January 2026.

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CSRD reporting - between challenges and opportunities

OUR INSIGHTS AT A GLANCE

- As part of the Green Deal, the EU has notably introduced the Corporate Sustainability Reporting Directive, creating a new regulation for sustainability reporting
- Companies in scope of the Corporate Sustainability Reporting Directive will be required to report for the first time at the beginning of 2026.
- To meet this reporting challenge, companies need to identify key topics, define relevant data points and organise themselves to collect reliable and accurate data, which often comes from complex supply chains and numerous subsidiaries.
- We explain hereafter the implications of the Corporate Sustainability Reporting Directive.

As part of the Green Deal and to become the first climate neutral continent by 2050, the EU has notably introduced the Corporate Sustainability Reporting Directive ("**CSRD**") as a new regulation for sustainability reporting. By creating such common reporting framework, the goal of the CSRD is to increase the overall transparency on Environmental, Social and Governance ("**ESG**") matters. In this framework, the adoption of the European Sustainability Reporting Standards ("**ESRS**") has triggered a significant challenge for those obliged to comply.

We explain hereafter the implications of the CSRD.

Companies under the CSRD scope

The CSRD directly affects large companies and groups that meet two of the following three criteria:

- more than 250 employees,
- more than 50 million euros net turnover, or a total balance sheet exceeding 25 million euros.

These companies will be required to report for the first time at the beginning of 2026, covering the calendar year 2025.

Companies below these criteria, so-called small and medium enterprises ("**SMEs**"), are indirectly impacted as well, as they must provide relevant information to their reporting customers. For example, SMEs will need to provide data on their CO2 emissions in relation to the products sold or services provided. This data will be key for large companies as it will have to be included in their own CSRD reporting.

Irrespectively of the CSRD compliance obligations, it seems highly probable that the CSRD standards will also be used in public tenders or in the ESG assessments performed by banks.

Double Materiality: the challenge of data collection and management

The concept of "Double Materiality" is a central component of the CSRD. It requires companies to identify both how their activities impact people and environment, as well as how sustainability impacts their business.

The assessment of the Double Materiality will lead to the identification of topics that are material and to reporting based on the standards defined in the ESRS (over 1800 data points for reporting on relevant topics).

For example, transport companies have a high impact on climate change by the consumption of fuel and can conversely be impacted by price increases or emission taxes.

To meet this reporting challenge, companies need to

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identify key topics, define relevant data points and organise themselves to collect reliable and accurate data, which often comes from complex supply chains and numerous subsidiaries.

One example is the climate change issue, which is relevant to nearly all companies and requires not only the measurement of direct CO2 emissions, but also indirect emissions throughout the entire value chain.

A pragmatic approach

Deveco has developed its own pragmatic method to guide large businesses as well as SMEs in a straightforward and goal-oriented approach on their path to CSRD compliance. This method includes impact analysis, double materiality and ESG strategy formulation, as well as identifying and compiling the necessary data for reporting. With our additional expertise in carbon footprint assessment, we offer an integrated and cost-efficient solution, enabling our clients to efficiently meet CSRD requirements.

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