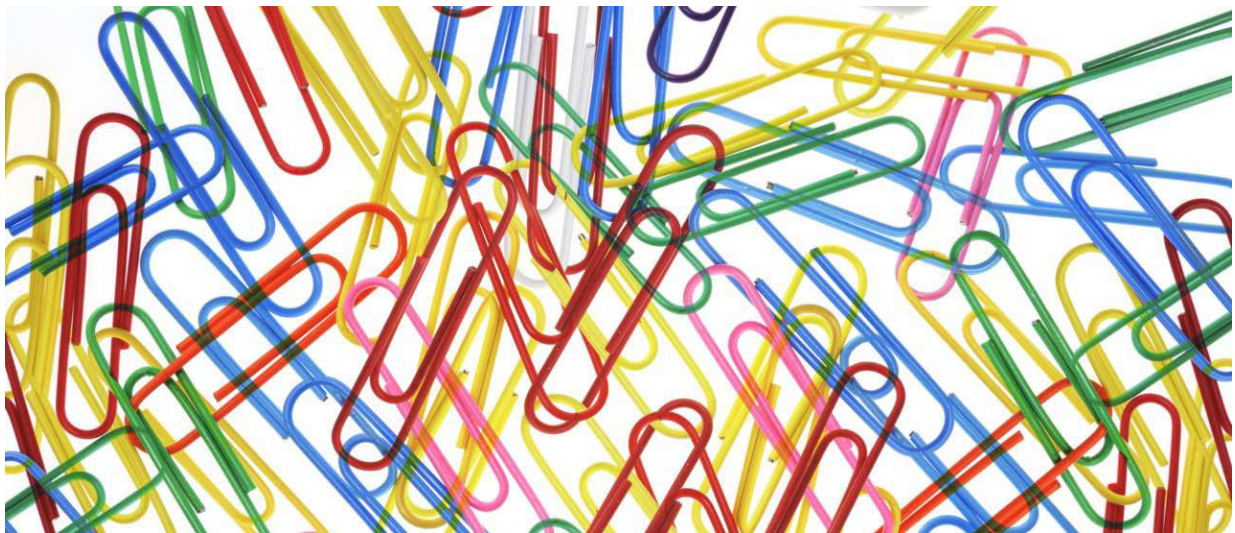


## Implementation by Luxembourg of the standards for the transparency and the exchange of information for tax purposes



Raymond Krawczykowski  
Partner | Tax Leader

Eric Centi  
Partner | Cross-Border Tax

Christophe Diricks  
Partner | Cross-Border Tax

François Guilloteau  
Partner | Cross-Border Tax

---

In the current international context, Luxembourg paves the way to implement standards for the transparency and the exchange of information for tax purposes.

---

By way of introduction, there are three different methods for exchanging information:

- **On request (on demand):** A State shall request from another State to provide information on a case by case basis.
- **Automatic:** States shall automatically exchange information agreed (income, frequency, format...).
- **Spontaneous:** A state shall without prior request forward to another State information of which it has knowledge under a number of circumstances.

Luxembourg takes actions both at international and European levels to apply the different types of exchanges of information.

### i. Luxembourg's actions to become compliant with the OECD's Global Forum on Transparency and exchange of Information for Tax Purposes

As reported in the media, in November 2013 Luxembourg received a non-compliant rating from the Global Forum on Transparency and Exchange of Information for Tax Purposes (hereafter "the OECD's Global Forum").

You will find hereafter the Luxembourg actions to become compliant. Luxembourg will ask reassessment as soon as possible on the basis of the new measures and laws under way. For the sake of completeness, you will find first a few words on what is the OECD's Global Forum.

---

## As mentioned in various Luxembourg government's statements "This is one of the first priorities to get compliance"

Set up in early 2000s, the OECD's Global Forum is a multilateral framework in connection with the tax transparency and exchange of information. The forum is one of the largest tax groups in the world with more than 120 members States (both OECD and non- OECD economies). The OECD's Global Forum conducts peer reviews to assess jurisdictions members on their level of compliance with internationally agreed standard for exchange of information.



The peers review is currently organised under phases as follows with regard to the exchange of information on request

- **Phase 1:** this phase focuses on the legal and regulatory framework.
- **Phase 2:** this phase focuses on the efficiency of the system in place.
- **Phase 3:** this phase ensures a continuous monitoring of implementation of the exchange of information (starting in 2016).

Following the phases 1 and 2 of the peer reviews, the members receive ratings on the availability of information, access to information and exchange of information as well as an overall rating.

In 2011, Luxembourg successfully passed the phase 1. As stated by Luxembourg government, the assessment shortly followed the 2009 political decision to introduce the OECD standard provision on exchange of information on request in Double Tax Treaties and the active period of time during which Luxembourg negotiated with many countries to include this provision in double tax treaties.

In 2013<sup>1</sup>, Luxembourg received a non-compliant assessment as an overall rating after the phase 2. It should be noted that the phase 2 covered the period from 2009 to 2011, which matched the setting up the new standard of exchange of information on request<sup>2</sup>.

The first answer is in connection with the identification of owners of bearer shares. The other answers are in connection with an effective tax exchange of information with other States.

### Mechanism to identify the owners of bearer shares

Shares of some companies (SA, SE, SCA) may be issued in bearer form. Under the previous regime, the holders of those shares were not identified in the register of shareholders of these companies.

The OECD's Global Forum concluded that *"although there are parallel mechanisms that ensure the availability of the information in specific situations, there is no overall obligation to identify the holders of bearer shares under all circumstances"*.

In line with the OECD expectations, Luxembourg proposed a new regime to ensure the availability of information relating to bearer securities holders<sup>3</sup>.

The key points of this new regime are:

- The bearer shares continue to exist. Entities, including investments funds, which have issued / will issue bearer shares will have to deposit them with a depository. The depository should be a Luxembourg professional as listed in the law implementing the regime (credit institutions, qualified lawyers, chartered accountants...).
- The evidence of their ownership of will be established through the registration in the share register kept by the depository.
- Management of concerned Luxembourg entities may incur fines if they did not respect the new regime.

As from the entry into force of the new regime in August 2014, existing bearer shares will be:

- cancelled if not deposited within 18 months;
- subject to suspension of their voting rights and dividends rights attached if not deposited within 6 months.

### Implementation of the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters

On 29 May 2013 Luxembourg signed the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Currently more than 60 countries signed this mutual agreement<sup>4</sup> (over 20 countries signed during 2013).



On 1<sup>st</sup> November 2014, this convention will enter into force for Luxembourg.

The convention is a multilateral agreement designed to facilitate international co-operation and collection of taxes between States. It provides for all possible forms of administrative co-operation between States parties in the assessment and collection of taxes:

- Exchange of foreseeably relevant information for taxation following three ways: on request, spontaneously and automatically;
- Tax examinations, including participation in tax examination abroad;
- Assistance in recovery, including measures of conservancy and
- Service of documents.

In connection with the automatic exchange of information, States parties are not able to directly exchange information on the basis of this convention. Two or more States parties shall agree separately what and how they will exchange automatically.

The OECD is developing a common standard for automatic exchange of financial account information. On 21 July 2014, the OECD released the first edition of this common standard. Luxembourg committed to implement this global standard swiftly.

### Double tax treaties concluded by Luxembourg

Luxembourg continues to negotiate double tax treaties including the OECD standard provision on exchange of information on request.



### New pieces of Luxembourg legislation dealing with the procedure of the exchange of information on request

The OECD's Global Forum recommended notably that *"Luxembourg should review its interpretation of the foreseeable relevance concept to conform with the standard"*. *"Luxembourg should exercise its powers to compel production of information and apply sanctions as appropriate."*

On 31 December 2013, Luxembourg Tax Authorities issued a circular providing the interpretation they will follow on some concepts relating to the exchange of information on request:

- the concept of "information that is foreseeably relevant"<sup>5</sup>;
- the principle of non-retroactivity<sup>6</sup>;
- the non-selectivity of data to be provided to the Luxembourg tax authorities<sup>7</sup>.

The Luxembourg tax authorities also precise in this Circular the way they will request information depending notably on the residency of the concerned person<sup>8</sup>.

This tax circular is in line with the last OECD's comments dated 17 July 2012 on the way to interpret the provision on exchange of information on request.



Moreover, the Luxembourg government submitted to the parliament a draft bill on the procedure of the exchange of information on request<sup>9</sup>.

The key points of the draft bill are the following:

- The procedure would apply to all requests for the exchange of information on request received from another jurisdiction under one of the various international tax agreements to which Luxembourg is stakeholder, such as a tax treaty, the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (please refer above) and laws transposing the 2010 European directive on mutual assistance for recovery and the 2011 European directive on administrative cooperation in the field of taxation (please refer below).
- The Luxembourg tax authorities would be obligated to verify only whether a foreign jurisdiction's request is formally in line with the applicable treaty or law. If so, the Luxembourg tax authorities would execute the foreign request by sending an injunction notification to the data holder for the requested information. The foreign request would be viewed as confidential and could not be disclosed to the data holder.
- The data holder would be obligated to provide to the Luxembourg tax authorities the information requested in its complete form, without alteration, within one month of the injunction notification. If a document to be provided contains data connected with a third party, such data should not be hidden. Failure to comply (refusal to provide information within one month or alteration of the information) could result in a penalty of up to EUR 250,000.
- The requested data would be able to include data from prior to the entry into force of an applicable treaty or law, provided that the requested data is foreseeably relevant in determining the income tax base for a year following the entry into force of the treaty or law.

In case of urgency or where the notification is likely to undermine the chance of success of an investigation conducted by the requesting jurisdiction, the Luxembourg competent authority would be able to prevent a data holder that is a credit institution, and its directors or employees, from disclosing the existence and contents

of the injunction notification to the client or taxpayer concerned.

Otherwise, the data holder could be subject to a penalty of up to EUR 250,000.

- The procedural rules applicable before the courts would differ from the usual rules, to accelerate the treatment of requests for exchange of information on request (i.e. the period of time to file a claim before the court would be shorter, judges would be required to issue a decision in a specific timeframe, etc.).

The Luxembourg parliament must now review, discuss and, if necessary, modify this draft law before it can be approved.



## ii. Luxembourg's action in connection with FATCA

Luxembourg and the United States have signed on 28 March 2014 a Model I FATCA intergovernmental Agreement (IGA) (IGA type 1 is based on reciprocity and automatic exchange of information) and a Memorandum of Understanding (MOU) to improve international tax compliance between both jurisdictions.

This agreement will be followed by a procedure of Parliament approval in Luxembourg in the last quarter of 2014 before being transposed into local legislation.

On the basis of this agreement the US and Luxembourg tax authorities will automatically exchange information on assets of (I) US citizens and (II) residents of the US held by financial institutions in Luxembourg.

Based on the article 3 of the IGA (Time and Manner of Exchange of Information), the

information shall be exchanged by Luxembourg within nine months after the end of the calendar year to which the information relates.

Following the Luxembourg government communication, the first exchange of information is planned before September 2015 applying to the financial year 2014<sup>10</sup>.

FATCA obligation should also be detailed in:

- In a circular to be issued by the Luxembourg tax authorities;
- In professional guidelines. The Fund association (ALFI) already published on its website a Q&A document. The Luxembourg Bankers' Association (ABBL) released its guidance notes.

### iii. Luxembourg's actions at the European level

At the European level, the actions are in connection with the European Directive on administrative cooperation and the European savings Directive.

#### European Directive 2011/16/EU on administrative cooperation in the field of taxation

The EU Directive 2011/16/EU aims to strengthen tax cooperation between EU Members States and organize the three methods to exchange information (upon request, automatically and spontaneously).

The Luxembourg law of 29 March 2013, transposing the EU Directive 2011/16/EU, introduced as from 1st January 2013 the exchange of information upon request and the spontaneous exchange of information.

The Luxembourg law of 26 March 2014 transposed the remaining portion of the EU Directive 2011/16/EU in connection with the automatic exchange of information between EU member States on specific types of income<sup>11</sup>.

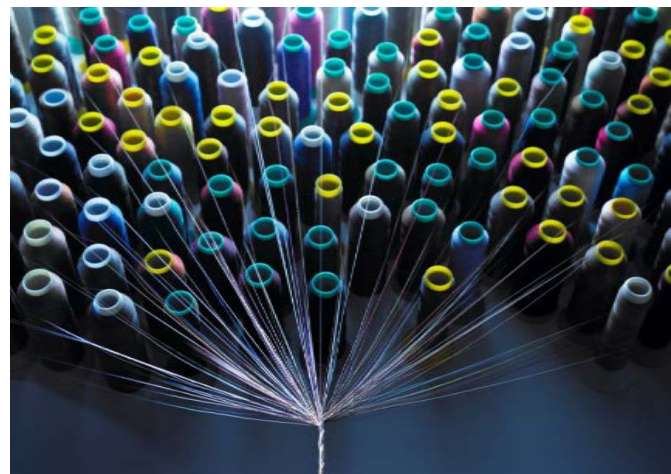
On the basis of this piece of legislation, as from 2015 and for tax periods beginning 1st January 2014<sup>12</sup>, Luxembourg will provide automatically information on three types of income: salaries, directors' fees and pensions and annuities.

The European Commission proposed in June 2013 to extend the scope of the exchange of automatic information under this directive to additional types of income (dividends, capital gains, royalties...). This is still a proposition waiting for the political consent of all EU Members States. Nevertheless, taking into account the current position on the Savings directive (see below), the scope of this directive could be extended in a near future.

#### European Savings Directive

The EU savings directive, which has been applicable since July 2005, requires EU member states to exchange information automatically about interest payments made by paying agents located in one EU member state to individual recipients (and to specific types of entities, called "residual entities") resident in another member state.

Currently, 26 member states exchange information automatically under the directive. Two member states—Austria and Luxembourg—still apply a 35% interest withholding tax as an alternative to the automatic exchange of information (unless the beneficial owner of the payment requests the paying agent to exchange information automatically in lieu of the withholding tax). Several "third countries" (such as Switzerland) and "dependent and associated territories" (such as the British Virgin Islands, Cayman Islands and Channel Islands) apply similar or equivalent measures (i.e. an interest withholding tax or automatic exchange of information measures).



An amended version of the EU savings directive has been in the EU legislative pipeline since

2008 (and adopted by the EU Council on 24 March 2014). The amendments aim to close loopholes identified under the current directive. In order to maintain the level playing field between the EU Member States and the “third countries” (Andorra, Liechtenstein, Monaco, San Marino and Switzerland) that have implemented equivalent measures to the current directive), the EU Commission has requested that these five countries update their agreements with the EU to reflect the revised scope of the amended savings directive and to commit to implement, as early adopters, the new single global standard for the automatic exchange of information developed by the OECD and endorsed by the G20.

Luxembourg announced in 2013 that it will unilaterally move from imposing the 35% interest withholding tax to automatically exchanging information for EU savings directive purposes as from 1 January 2015.

As from this date, Luxembourg automatically will exchange information with other EU member states on interest (as defined in the currently applicable EU savings directive) paid to individuals and residual entities with a permanent address in the EU, and with those dependent and associated territories having reciprocity clauses in their bilateral savings taxation agreements concluded with Luxembourg.



On 18 March 2014, the Luxembourg government submitted to parliament a draft bill to implement the necessary changes into Luxembourg tax law<sup>13</sup>.

On 20 March 2014, Luxembourg and Austria dropped their opposition to the adoption of the amended EU savings directive (as sufficient guarantees were provided as to maintaining the level playing field with the above-mentioned third countries). As mentioned above, the amended directive was adopted by the European Council on 24 March 2014, and includes the following changes to the current directive:

- All types of regulated investment funds investing in debt claims will be covered by the directive. In practice, this means that

non-UCITS (“part II”) SICAV, SIF-SICAV and SICAR funds will fall within the scope of the directive;

- Certain life insurance products will be covered (such as certain unit-linked life insurance contracts), subject to grandfathering rules for contracts subscribed before 1 July 2014;
- The definition of residual entities will be extended to include all EU entities that are not subject to effective taxation (the definition under the existing directive is more restrictive). In practice, payments made to a broader range of entities, trusts, foundations and similar legal arrangements within the EU will become reportable (such as payments to a German KG, UK LP, Dutch Stichting and trusts in several member states);
- Look-through rules will apply to payments made to “blacklisted” entities, trusts, foundations and similar legal arrangements outside the EU (such as Bermuda trusts, Hong Kong private limited companies, Panama foundations, etc.).
- 

EU member states must transpose the amended directive into their domestic law before 1 January 2016, and it will apply as from 1 January 2017.

---

**The Luxembourg developments regarding the Savings Directive are linked to the adoption of the automatic exchange of information as a new standard at the G20 level, and also to other initiatives such as FATCA, the EU mutual assistance directive on administrative cooperation, the OECD Convention on Mutual Administrative Assistance in Tax Matters and the corresponding common reporting standard on automatic exchange of information**

---

<sup>1</sup> During the session held in Jakarta in November 2013, the OECD's Global Forum adopted ratings for the first 50 jurisdictions on their level of compliance with the internationally agreed standard for exchange of information

<sup>2</sup> The law of 17 March 2010 implemented effectively in the Luxembourg legislation the new standard of exchange of information on request. Nevertheless, taking into account the period of time required to ratify a double tax treaty, most of them entered into force as from 2011 ([http://www.impotsdirects.public.lu/conventions/conv\\_vig/index.html](http://www.impotsdirects.public.lu/conventions/conv_vig/index.html))

<sup>3</sup> Law of 28 July 2014 on immobilising bearer shares and bearer securities

<sup>4</sup> As mentioned in the OECD [Information Brief](#) on the Multilateral Convention (November 2013) *"the Convention was developed jointly by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010. The Convention is the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance, a top priority for all countries. The Convention was amended to respond to the call of the G20 at its April 2009 London Summit to align it to the international standard on exchange of information on request and to open it to all countries, in particular to ensure that developing countries could benefit from the new more transparent environment. The amended Convention was opened for signature on 1st June 2011. The Convention has now taken on increasing importance with the G20's recent call for automatic exchange of information to become the new international tax standard of exchange of information"*

<sup>5</sup> The exchange of information should concern information that is foreseeably relevant (*"vraisemblablement pertinents"*). This is the limit to avoid the fishing expedition. Luxembourg mentions in the Circular that they will not reject a foreign State's request in case the exam of the likely relevant information can be done following the receipt of the information from the concerned person. Once the requesting State has given an explanation on the *"foreseeably relevant"* information requested, Luxembourg should not refuse a request or provide information requested because the Luxembourg authorities estimate that the information is irrelevant for the underlying examination or investigation.

<sup>6</sup> Double tax treaties concluded by Luxembourg are often applicable as from January 1st of the calendar year following the year in which the Convention entered into force. However, the principle of non-retroactivity does not stand against the passing on of data from year(s) prior to the coming into force of the Convention, as long as the data to be passed on is of

likely relevant to determine taxable income in respect of the tax year covered by the Convention. Please note that the Circular refers to the applicable penalty in case of data holder's refusal to provide the requested information (a fine up to € 250,000).

<sup>7</sup> The data to be passed on to the Luxembourg Tax Authorities by the data holder, in order to comply with injunction decisions issued by the LTA following information requests from foreign tax authorities, must be provided in a complete form and with no alteration whatsoever. In case the data holder does not provide information requested in a complete form or alters the content of information to be provided, the Luxembourg tax authorities should impose a penalty up to € 250,000.

<sup>8</sup> The tax circular targets 3 situations:

- Should the concerned person resident in Luxembourg, the Luxembourg authorities will send the request directly to this person;
- Should the foreign tax authorities does not want that the concerned person be informed of the request, the request will be addressed directly to the data holder;
- Should the concerned person by the process is resident in Luxembourg but does not received the request or he/she is no-resident in Luxembourg, the request will be addressed directly to the data holder.

<sup>9</sup> Draft bill n°6680

<sup>10</sup> Answer of the Luxembourg Finance Minister of 28 July 2014 to the parliamentary question [n°378](#)

<sup>11</sup> Five types of income are concerned: (I) salaries, (II) directors' fees, (III) pensions and annuities, (IV) ownership of and income from immovable property, and (V) life insurance products not covered by other Union legal instruments on exchange of information and other similar measures. The EU Directive requires each EU Member State to select income on which the State will automatically exchange information with other EU Member States

<sup>12</sup> The exchange of information will be performed on a regular basis (i.e. at least once a year). Luxembourg commits to provide information for any given year by 30 June of the following year at the latest. For example, for information concerning fiscal year 2014, information would be provided by or before 30 June 2015

<sup>13</sup> Draft bill n°6668

Deloitte is a multidisciplinary service organization which is subject to certain regulatory and professional restrictions on the types of services we can provide to our clients, particularly where an audit relationship exists, as independence issues and other conflicts of interest may arise. Any services we commit to deliver to you will comply fully with applicable restrictions.

Due to the constant changes and amendments to Luxembourg legislation, Deloitte cannot assume any liability for the content of this document. It shall only serve as general information and shall not replace the need to consult your Deloitte adviser.

About Deloitte Touche Tohmatsu Limited:

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see [www.deloitte.com/lu/about](http://www.deloitte.com/lu/about) for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte has in the region of 210,000 professionals, all committed to becoming the standard of excellence.

© 2015 Deloitte Tax & Consulting