Questionnaire on general transfer pricing matters

ARE YOU READY FOR BEPS?

Use the following questionnaire for a high-level self assessment on whether your Group and particularly your Luxembourg entity is prepared with respect to changes in the tax landscape.

This exercise can help you:

- **Adapt current operational group structures to the changing regulatory framework**
- **Minimise risk of a breach of applicable law and limit the corporate's liability**
- **Minimise financial risks such as double taxation or tremendous additional tax payments**
- **Potentially optimise current processes and work flow**

Intercompany agreements

- **Is there any transfer pricing policy available at the group/local level that covers all your intercompany transactions?**
  - *Even if there is a transfer pricing report available that covers all intercompany transactions, we recommend doing a high-level health check to see if this documentation is in line with the latest transfer pricing laws and regulations in Luxembourg.*
- **Do you have any further written legal agreements underlying your intercompany transactions?**
  - *We recommend assessing whether there are contradictions between contractual arrangements and conduct, filling in gaps in the contractual arrangements and interpreting the contracts for transfer pricing purposes with respect to the OECD's updated rule that written contracts alone should not drive the economic outcome anymore.*
- **Are there any intercompany transactions that have not been agreed on in writing before the transaction was conducted?**
  - *In many countries it is generally recommendable for taxpayers to have their internal transactions governed by written legal arrangements that have been entered into prior to the respective transaction.*
- **Is your accounting in line with transfer pricing aspects?**
  - *A thorough check would need to be carried out to see whether your contractual arrangements are also reflected in the accounting system, i.e. in the financial statement or profit and loss accounts.*

Documentation

- **Are you able to justify that your intercompany pricing is comparable to what independent parties would have agreed upon (arm's length principle)?**
  - *Assuming that you fall within the scope of article 56 and 56bis of the Luxemburg Income Tax Law, there is a need for you as a taxpayer to be able to provide the Luxembourg tax administration with transfer pricing documentation sustaining the arm's length character of your intra-group transactions.*
- **Have you already documented your intercompany transactions and applied pricing methodologies?**
  - *Contemporaneous documentation should exist when transactions are carried out. Luxembourg tax law does not include a deadline to produce transfer pricing documentation. The tax authority may request, in the context of an audit, that transfer pricing documentation be provided within a certain timeframe. Such a timeframe may be as short as 14 days, but may be extended upon request.*
- **Have you entered into any advance pricing agreements with the tax authorities?**
  - *We propose to perform a review of the previously filed advanced pricing agreements assessing on the economic rationale of transactions (e.g. functional analysis, economic circumstances, business strategies, etc.)*

Country-by-country reporting

- **Does the Group fall under country-by-country reporting requirements? (I.e. does it have more than 750 million EUR of turnover shown in the consolidated accounts?)**
  - *If yes: you are obliged to prepare and file a country-by-country report which contains summary data by jurisdiction including revenue, income, taxes and indicators of economic activity within 12 months of the last day of the reporting fiscal year of the group: (i) by 31 December 2017, if the 2016 accounting year of the MNE group ends on 31 December 2016 or (ii) if the accounting period deviates from the calendar year, by any other date after 31 December 2017. Therefore you need to prepare your respective data-gathering processes, which means assessing the best sources of data and technology solutions, and determining responsibilities, timeline and process.*
  - *If yes: the Luxembourg entity must notify the Luxembourg Direct Tax Authorities if it is the ultimate parent entity or, if it is not the reporting entity, it must transmit the identity and tax residence of the reporting entity no later than 31 March 2017.*

Economic and commercial substance

- **Are there any artificial legal and tax structures that do not reflect the underlying economic reality (substance)?**
  - *If yes: mismatches in where profits are being taxed vs. where people responsible for generating these profits are located have a high risk to be challenged by tax authorities. We recommend being aware of those.*
- **Have you already prepared a value chain analysis throughout the Group?**
  - *If not: we would recommend scrutinising all functions performed within the group and associated risks in order to ensure that transfer pricing outcomes are consistent with value creation, or to identify ascertained risks.*
- **Do you research, develop and own valuable intangible assets within the group? Are there any contractual arrangements regarding the allocation of risk?**
  - *If yes: BEPS places significant emphasis on the returns to the functions related to development, enhancement, maintenance, protection and exploitation (DEMPE) of intangibles. We recommend that you reassess transfer prices with respect to intangibles by looking at the location of decision-makers and the decisions they have made, especially with respect to risk.*

Financial transactions

- **Do you have any intra-Group financing transactions where a Luxembourg company is involved through back-to-back financing?**
  - *If yes: in light of the new transfer pricing rules for companies principally performing intra-Group financing transactions ("Circulaire du directeur des contributions L.I.R. n° 56/1 – 56bis/1 du 27 décembre 2016") Luxembourg taxpayers will be required to:*
    - ✓ *Document the arm's length character of the interest rate applied on the Luxembourg company loan receivables.*
    - ✓ *Perform an analysis to determine the necessary capital at risk considering the investment under review. The minimum required capital at risk of 1% of the financing volume will be not applicable anymore and an analysis will have to be carried out on a case by case basis.*
    - ✓ *Verify that it has an adequate organisational substance by meeting the substance requirements set in the new circular such as having Luxembourg residents in the board of directors' or managers' who are qualified to control performed transactions.*
- **Have you entered into any advance pricing agreements with the tax authorities?**
  - *Please note that any advanced pricing agreement issued before end of 2016 will not be binding as from 1 January 2017, for the fiscal years following 2016.*

Permanent establishments

- **Are there any agents or commissionaires conducting contracts in their own names with power of attorney on behalf of the principal? Or does the commissionaire/agent prepare legal contract drafts in such a manner that the parent company signs the contracts without any significant changes?**
  - ➢ *If yes: there is the risk of permanent establishments (PE) and therefore of double taxation.*
- **Have you already documented the profit allocation based on significant people functions?**
  - ➢ *Permanent establishments will be largely defined by their 'significant people functions', that is, the functions carried out by the establishments' own personnel. This will an even higher standard of documentation.The taxpayer will be obliged to attribute profits to the PE and to maintain auxiliary and ancillary tax accounts.*