Automatic exchange of information, this time it is (really) for tomorrow

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October 2014 will probably be remembered in the history of Luxembourg's financial center as a decisive month when it comes to tax transparency and exchange of information. Translating into action its commitment for making automatic exchange of information ("AEoI") a reality, the Grand-Duchy took two decisions of paramount importance. One can arguably consider that the process launched on 10 April 2013 by the former Prime Minister Jean-Claude Juncker at the occasion of his speech on the state of the Nation is now close to an end.

Exchange of information has been extensively discussed at both European Union ("EU") and international level ("OECD") in the past three years. At EU level, one of the milestones in this movement was the adoption of the Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation ("DAC"). This directive is now fully transposed in Luxembourg. On 12 June 2013, the EU Commission proposed extending the AEoI between EU Member States to dividends, capital gains, all other forms of financial income and account balance. It is this project, nick-named "European FATCA" by reference to the US law of 18 March 2010 that has been amended to take into consideration recent developments occurred at OECD level.

Indeed, in parallel to the EU process, the OECD pushed forward its own initiative on AEoI and released on 13 February 2014 its global standard for automatic exchange of financial account information (the "Global Standard"). The Global Standard consists of two components, i.e. the Common Reporting Standard ("CRS"), which contains the reporting and due diligence rules to be imposed on financial institutions, and the Model Competent Authority Agreement ("CAA"), pursuant to which governments would agree to exchange the information reported. To become binding, the CRS needs to be implemented via bilateral or multilateral agreements. Building on this principle, the Council of the EU (ECOFIN) reached political agreement on 14 October 2014 on a revised version of the DAC. The revised text aims at bringing the revised DAC closer to the CRS.

Enlarged scope for AEoI within the EU

"Bank secrecy is dead" said Commissioner Semeta at the ECOFIN press conference on 14 October 2014. Within the EU, this statement is true. The agreement on the revised DAC actually brings interest, dividends and other income, as well as account balances and sales proceeds from financial assets, within the scope of the AEoI. Commissioner Semeta's statement is however not true when it comes to relationship on the one hand with non-EU countries (at least for countries that will not apply the CRS) and on the other hand between resident taxpayers of a given Member State of the EU and the local tax authorities (Luxembourg 10% withholding tax on interest payments to resident individuals should remain unaffected for the moment). In March, a group of 44 countries and jurisdictions (known as the "Early Adopters") announced they would implement the CRS with the first exchange of information between them expected to take place in September 2017. Subsequently, on 6 May 2014, 47 countries signed a declaration in which they expressed their determination to implement the new global standard swiftly and called on all financial centers to do so without delay.

Whereas Luxembourg signed the declaration of 6 May 2014, the country did not range among the Early Adopters (i.e. the Grand-Duchy did not take any commitment in terms of timeline for implementing the CRS). Doing so, Luxembourg was the only EU Member States with Austria that was not part of the list of the Early Adopters of the CRS.

The decision of the ECOFIN of 14 October 2014 completely changed the situation. The revised DAC is based on a proposed text from the EU Commission issued in June 2013, with significant amendments to incorporate the CRS developments. An important difference from the original proposal is the date on which the new rules will come into effect. The original proposal was for the new rules to apply to reportable accounts for taxable periods as from 1 January 2014. Under the agreed proposal this date is understood to be 1 January 2016, with first exchanges of information taking place in 2017, except for Austria that would apply the new rules from 1 January 2017, with first exchanges of information taking place in 2018.

Impact on EU Savings Directive

The revision of the DAC raises the question of the future of the other piece of EU legislation dealing with AEoI, i.e. the Directive 2003/48/EC of 3 June 2003 on the taxation of savings income ("EUSD"). Two important reforms of the taxation of savings within the EU have been decided in 2014. First, Luxembourg decided to abolish as from 2015 the 35% withholding tax option it has been authorized in 2005 to offer to individuals being resident of another EU Member State deriving interest income from Luxembourg source as an alternative to exchanging information. The revision of the DAC should have no impact in this respect (i.e. the new rules will start to apply as from 1 January 2015, as foreseen).

Second, on 24 March 2014, the Council of the EU adopted new rules on the taxation of savings income (i.e. a revised EUSD with a wider scope designed to closing existing loopholes in its current scope). As per the discussions of the ECOFIN meeting of 14 October 2014, the revised EUSD shall be repealed. The Minister of finance Pierre Gramegna usefully reminded its peers during the ECOFIN meeting that the repeal of the EUSD was of paramount importance for the Grand-Duchy with the view of reinforcing legal security and avoiding additional costs associated to multiple reporting standards.

Signing of Multilateral CAA

On 29 October 2014, Finance Ministers from 50 countries and jurisdictions have signed a Multilateral Competent Authority Agreement (the "Multilateral CAA") on the implementation of the Global Standard for the automatic exchange of financial account information. The signature of the Multilateral CAA during the 7th Meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes (the "Global Forum")(1) in Berlin follows on quickly from the political agreement reached by Member States on 14 October to apply the Global Standard in relations between each other by way of a Directive (the future revised DAC).

The OECD/G20 Global Standard was endorsed on 29 October 2014 by all OECD and G20 countries as well as major financial centers participating in the annual meeting of the Global Forum. A status report on committed and not committed jurisdictions will be presented to G20 leaders during their annual summit in Brisbane, Australia on November 15-16. Fifty-one jurisdictions translated their commitments into action during a massive signing of a Multilateral CAA that will activate AEoI, based on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

Early adopters who signed the agreement have pledged to work towards launching their first information exchanges by September 2017. Others are expected to follow in 2018. The Global Forum will establish a peer review process to ensure effective implementation of AEoI. Governments also agreed to raise the bar on the standard of exchange of information upon request, by including a requirement that beneficial ownership of all legal entities be available to tax authorities and exchanged with treaty partners.

Luxembourg joins the Early Adopters list

The decision of 14 October 2014 changed Luxembourg's position not being an Early Adopter, when Luxembourg confirmed at the occasion of the ECOFIN meeting its agreement on the future revised DAC. Under the agreed proposal the new rules on AEoI within the EU will apply to reportable accounts for taxable periods as from 1 January 2016, with first exchanges of information taking place in 2017, except for Austria that would apply the new rules from 1 January 2017, with first exchanges of information taking place in 2018.

Logically enough, Luxembourg confirmed yesterday that it will also commit on the deadline of September 2017 for the first information exchange with non-EU countries and jurisdictions having signed the Multilateral CAA. As it did in the context of the future revised DAC, Austria signed the Multilateral CAA but only committed on September 2018 for the first exchange of information. Doing so, Austria is the only EU country not having committed on September 2017 but not the only European country in a wider meaning since Switzerland did the same.

Important countries ranging among those countries having expressed their determination to implement the new Global Standard swiftly and called on all financial centers to do so without delay on 6 May 2014 are not mentioned in the list of fifty-one jurisdictions having "translated their commitments into action during a massive signing of a Multilateral CAA" as the Global Forum press release says on 29 October 2014. It is in particular the case of Singapore and even the United States in a quite paradoxical way for the country being at the origin of the process with its FATCA legislation.

Furthermore, despite the multilateral nature of the agreement, countries will still be allowed to choose on a case-by-case basis the countries with which they will effectively exchange information. Switzerland is reported to have announced that it will only exchange information with those countries "considered important (…) for the financial industry" in Switzerland, whatever that means. Other countries such as Panama did not define a date for a potential implementation of the AEoI.

The decisions of October 2014 had probably to be taken to reinforce the image of the country and its financial sector at the International level and to cut through half-truths and amalgamations spread out by certain foreign media. For the reasons detailed above, however, the level playing field to which Luxembourg is so attached is not guaranteed at this stage. The country will therefore need to stay vigilant in this respect.

1) The Global Forum is the world's largest network for international cooperation in the field of taxation and financial information exchange gathering together 123 countries and jurisdictions on an equal footing. Peru and Croatia joined the Forum at the Berlin meeting.