Luxembourg implements OECD country-by-country reporting obligations

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In brief

On December 13, 2016, the Luxembourg Parliament passed legislation implementing country-by-country (CbC) reporting requirements for Luxembourg entities that are part of a Multinational Enterprise (MNE) Group. The new CbC reporting legislation transposes into Luxembourg law part of the three-tiered standardized approach to transfer pricing documentation introduced in Action 13 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project.

The Luxembourg CbC obligations require Luxembourg ultimate parent entities controlling an MNE group whose total consolidated group revenue (*chiffre d'affaires total consolidé*) exceeds EUR 750 million to file CbC reports with the Luxembourg tax authorities. Other Luxembourg companies that are members of MNE groups also may have obligations to file CbC reports in Luxembourg. Both Luxembourg MNE group parents and other Luxembourg companies that are members of MNE groups also must comply with notification requirements that have deadlines that are potentially imminent.

In detail

The new law (CbC law) enacts Luxembourg parliamentary Bill 7031, and implements into Luxembourg law Council Directive (EU) 2016/881 of 25 May 2016 regarding the mandatory automatic exchange of information in the field of taxation (DAC 4). Although only recently enacted, the measures are applicable for the 2016 fiscal year as well as future fiscal years.

A review of the scope

Under the CbC law, a Luxembourg tax-resident entity that:

- is the ultimate parent entity of an MNE group with consolidated group revenue (*chiffre d'affaires total consolidé*) of EUR 750 million or more in the preceding fiscal year, and
- prepares consolidated financial statements, or would be required to do so if its equity interests were traded on a public securities exchange,

must file a CbC report with the Luxembourg tax authorities within 12 months after every fiscal year-end of the MNE group.

A Luxembourg tax-resident entity also can be appointed as a substitute for a non-Luxembourg ultimate parent entity of an MNE group (a so-called "surrogate parent entity") to file a CbC report in Luxembourg on behalf of such an MNE group. A filing under the surrogate regime in Luxembourg becomes an alternative if the MNE group is tax resident in a country that has not introduced CbC reporting.

In addition, Luxembourg tax-resident entities that are not the ultimate parent entity of an MNE group also fall within the scope of the Luxembourg CbC reporting obligations (under the so-called "secondary mechanism") if any of the following criteria are satisfied:

- The non-Luxembourg ultimate parent entity of the MNE group is not obliged to file a CbC report in its own jurisdiction of tax residence;
- The non-Luxembourg ultimate parent entity of the MNE group is obliged to submit the CbC report in its jurisdiction of tax residence, but there is no agreement with Luxembourg in effect which then allows automatic exchange of CbC reports; or
- The non-Luxembourg ultimate parent entity of the MNE group is obliged to submit the CbC report and there is an agreement with Luxembourg in effect which allows automatic exchange of CbC reports, but such automatic exchange has been suspended or there is a persistent failure to automatically exchange CbC reports.

Observation: Filing the CbC report in any member state of the European Union should satisfy the secondary mechanism and therefore no separate CbC report would need to be filed in Luxembourg.

The information to be included in the CbC report (divided into three tables) is:

- Table 1 – Overview of allocation of income, taxes, and employees by tax jurisdiction: revenues, profit before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, tangible assets other than cash and cash equivalents;
- Table 2 – List of all group entities of the MNE group included in aggregation per tax jurisdiction with indication of main business activities; and
- Table 3 – Additional information.

Amendments during passage of the legislation

As the legislation has been drafted in line with an EU Directive, there have only been minor changes to the text of the draft legislation as set out in Bill 7031 published on August 2, 2016. However, there has been a notable clarification of the penalty regime. The final draft law clarifies the circumstances in which the maximum penalty of EUR 250,000 can be levied, which are as follows:

- Failing to file a CbC report;
- Late filing of a CbC report;
- Disclosing incomplete or inaccurate information;
- Failing to file the notification identifying the reporting entity;
- Late or incorrect filing of such notification; and
- Failing to inform the Luxembourg tax authorities that the ultimate parent entity refused to supply necessary information to the Luxembourg constituent entity filing a CbC report under the secondary mechanism.

Immediate action points

The CbC report filing is due 12 months after the last day of each fiscal year of an MNE group. As the law becomes applicable for fiscal years beginning on or after January 1, 2016, for an MNE group with calendar year-ends, the first CbC report must be filed by December 31, 2017.

Notifications

A Luxembourg resident entity affected by this legislation needs to notify the Luxembourg tax authorities whether it will file a CbC report as the ultimate parent, under the secondary mechanism, or as a surrogate filer. Alternatively, if a Luxembourg entity is a constituent entity (defined as a Luxembourg tax resident entity forming part of a MNE group in scope of CbC reporting), each such entity must notify the Luxembourg tax authorities of which other entity in the MNE group is filing the CbC report, and its residency. This will ensure that the Luxembourg tax authorities will be able to track effectively the filing of CbC reports for constituent entities.

This notification originally was due by the last day of the fiscal year of the MNE group, so for December 31 year-ends the first notification would have been due on December 31, 2016. However, the Luxembourg legislature published a FAQ stating that the deadline for the filing of notifications relating to CbC reporting for fiscal year 2016 is exceptionally **postponed to March 31, 2017**. The Luxembourg legislature did not choose to extend the deadline for notification to the last day of filing the tax return of the Luxembourg constituent entity, despite this option being foreseen in the EU Directive.

The Luxembourg tax authorities have set up a secure electronic filing system. In order to sign into the platform, a Luxembourg constituent entity must authenticate by a device foreseen by the system, e.g., a Token or Smartcard.

Recommendations

Considering that the notification is due by end of March 2017 for fiscal year 2016, it is important to review promptly the following aspects:

- Does the MNE group fall within the scope of the CbC reporting regime, i.e., does consolidated group turnover exceed EUR 750 million?
- If so, which group entity is the ultimate parent entity for the purposes of the legislation, and has the country of this ultimate parent introduced CbC reporting measures? From when are those rules effective? (Note: It is possible that a delay in introduction at group parent level may cause a Luxembourg or other EU subsidiary to have, at least temporarily, extra CbC reporting obligations.)
- If so, does the MNE group have “secondary mechanism” or “surrogate filing” obligations? Particular attention should be paid to the application of the “secondary mechanism” rules, which may impose full CbC reporting obligations on a Luxembourg group entity that is not the ultimate parent entity of the MNE group to which it belongs.
- Which entities are the constituent entities of the MNE group in Luxembourg? Is each ready to file the relevant notifications?
- Are the financial reporting systems ready and able to generate, in a complete, reliable, and accurate way, the data needed for the first filing deadline for CbC reports?

Going forward, the penalties for non-compliance with the Luxembourg CbC reporting obligations may be significant.

The takeaway

Luxembourg reporting entities should consider carefully the potential consequences of the information that must be provided in their CbC reports. CbC reports will not only be reviewed by the Luxembourg tax authorities, but also will be shared with other tax authorities in many if not all the countries where an MNE group has activities. The CbC reports may be used by these tax authorities for the purpose of their assessments of high-level transfer pricing risks and other BEPS-related risks.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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