

FAMILY WEALTH MANAGEMENT IN LUXEMBOURG: WE ARE NOT DONE YET, DESPITE THE CHANGES TO THE INFORMATION EXCHANGE

WITH THE ANNOUNCED END OF BANKING SECRECY FOR NON-RESIDENTS, THE TIME HAS COME TO MAKE USE OF FAVOURABLE REPATRIATION SCHEMES, SUCH AS THE VOLUNTARY DISCLOSURE REGIME IN ITALY. DESPITE INCREASING PRESSURE FOR FISCAL TRANSPARENCY AND EXCHANGE OF INFORMATION, BENEFICIAL OWNERS STILL HAVE A CHOICE: MOVE THE CAPITAL OUT (OF LUXEMBOURG), OR MOVE THE OWNER IN.

EXCHANGE OF INFORMATION - A GLOBAL STANDARD AND A LUXEMBOURG REALITY

Over the last few years, the financial landscape in Luxembourg has drastically changed with regard to fiscal transparency and compliance with international standards. The government unambiguously committed to adopt, transpose or implement new legislation, which will ensure that Luxembourg is ranked as a white list country:

- The law of March 31, 2010 introduced the exchange of information upon request in line with OECD standards.
- Since 2010, Luxembourg has approved the entry into and/or updated 37 double taxation treaties that provide for exchange of information on request, following Article 26 of the OECD Model Tax Convention.
- On 26 March 2014, the Luxembourg Parliament adopted the Council Directive¹ on administrative co-operation in the field of taxation introducing the concept of automatic exchange of information for certain information, and providing for an exchange of information procedure applicable under the double tax treaties.
- Luxembourg has signed a FATCA IGA² on March 28, 2014 with the US, leading to automatic exchange of relevant data as defined in the IGA. Together with Council Directive 2011/16/EU, which contains a “Most Favourite Nation’s Clause” in its Article 19, Luxembourg cannot refuse to provide the same data to other EU Member States that it actually provides to the U.S. under the FATCA agreement.

This will ultimately bring about an implicit extension of the scope of EU exchange of information regime.

- The Luxembourg authorities have approved the extension of the EU Savings Directive³ to cover other types of income and move to automatic exchange of information instead of the transitory (anonymous) withholding tax of currently 35%.

In summary, Luxembourg has undergone a paradigm shift over the last few years, following previous criticism from the European Commission and the OECD⁴. The past and current (political) commitments to fully cooperate are proof that the Luxembourg authorities are seriously pushing for a financial industry free of undeclared account or funds.

VOLUNTARY DISCLOSURE - THE ITALIAN WAY

The Italian Parliament is discussing a draft Law (the “Draft Law”) introducing a new way to regularize non-declared foreign assets of Italian resident owners who failed to declare assets and investments held abroad before 31 December 2013 in their Italian income tax return. Under the Draft Law, Italian residents may commence a voluntary disclosure procedure, if the Italian tax authorities have not already started with investigations into the taxpayer’s affairs. Upon voluntary presentation of all foreign non-declared activities (a partial disclosure is not possible), the undeclared assets can be transferred to Italy or to another EEA⁵ country fulfilling the exchange of information requirements. Assets to be regularized can remain in a

non-EEA country if the taxpayer agrees that the foreign financial intermediary exchanges all relevant data in relation to the foreign assets with the Italian tax authorities.

Despite its compliance with international exchange of information standards, Luxembourg continues to find itself on the Italian blacklist for its supposed privileged tax regime. However, given that Italy and Luxembourg have signed a Protocol to the existing double tax treaty, which amended article 27 by including an exchange of information clause in line with OECD standards, Luxembourg is considered as a white-list country for the purposes of the Draft Law. This will lead to a non-doubling of the statutory limitation of fiscal years as foreseen by the Italian Law, and to a reduced penalty ranging from 3 to 15 % of the amount of the non-declared assets.

At the end of the procedure, the sanction for the lack of declaration of foreign assets can be reduced up to 0,5% per year of the amount of non-declared assets.

In sum, for beneficial owners having undeclared assets in Luxembourg, the Italian voluntary disclosure regime, once the Draft Law is approved by the Italian Parliament, might be a suitable way and a decisive incentive to repatriate assets and investments held in Luxembourg. The window to make use of the decree is open until September 30, 2015.

CAPITAL CAN MOVE EASILY - CAN THE OWNER AS WELL?

The Luxembourg legislature made strong commitments to increase attractiveness for individuals wishing to structure their wealth management through Luxembourg and/or considering relocating their tax residence to Luxembourg.

Yet the latest tool for wealth planning is a draft law concerning the creation of the patrimonial foundation (“*fondation patrimoniale*”), which is expected to be adopted in the upcoming months⁶.

The new vehicle will have its own legal personality, which is a main difference compared to a Trust, and



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is set-up as an “orphan structure”, meaning that there are no members, shareholders or associates. In most cases the only persons involved in the structure are the founder, the administrators and the beneficiaries.

The patrimonial foundation holds its own assets which are autonomous and distinguishable from the assets of the founder, the administrators and the beneficiaries.

The foundation may hold a large variety of assets, such as movable or immovable property, tangible or intangible assets; it may take out insurance contracts as a subscriber or beneficiary; it may enter into obligations and take participations in companies (without being involved in the management).

Finally, the legislature foresees a “step up” in basis regime for individuals, allowing the replacement of the original acquisition price of the asset with the fair market value at the time of the migration to Luxembourg, so that only the capital gains realised during the tax residency in Luxembourg are taxable. The patrimonial foundation is yet another example that positively contributes to the positioning of Luxembourg as a centre of excellence when it comes to managing and administering private wealth.

1. Council Directive 2011/16/EU of 15 February 2011.
2. Foreign Accounting Compliance Tax Act (FATCA) Intergovernmental agreement following model 1.
3. Council Directive 2003/48/EU of 3 June 2003.
4. In particular the “Global Forum on Transparency and Exchange of Information for Tax Purposes”.
5. European Economic Area (EEA), consisting of the EU-28 countries plus Norway, Iceland and Liechtenstein.
6. Draft Law n° 6595 of 22 July 2013, not finally voted.

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