



Laga Newsflash

New developments in international exchange of information

Updated OECD list of automatic exchange relationships in the framework of CbC Reporting

The OECD recently published an updated list of automatic exchange relationships established between tax authorities implementing Country-by-Country Reporting ("CbC Reporting"), under the BEPS Action 13 minimum standard.

CbC Reporting

Under the CbC Reporting scheme, countries agreed to enact legislation requiring parent entities of large multinational residents in their jurisdictions to report specified information regarding the MNE's operations in each jurisdiction in which the group operates. The information to be reported relates to revenues, profits, the number of employees, tangible assets and the stated capital, among others. The objective is to help tax authorities determine whether there is a risk of tax avoidance by the multinational, through transfer pricing for example. By sharing this information, these risks are mitigated.

The CbC Reporting applies to fiscal years of MNE groups starting on or after 1 January 2016, and the first automatic exchanges of CbC Reports will take place no later than June 2018.

Update

To date, 57 countries (including Belgium) have already signed the CbC Multilateral Competent Authority Agreement ("CbC

MCAA"). According to the OECD, more are expected to sign. The CbC MCAA sets out conditions and operational aspects for the exchange of CbC Reports under the multilateral convention on mutual administrative assistance in tax matters.

More than 30 of these countries have already provided notifications to the Co-ordinating Body Secretariat, setting out the other countries with which they intend to have an agreement for the exchange of CbC Reports. Furthermore, under Council Directive 2016/881/EU, EU Member States will need to exchange CbC Reports automatically. In total, this amounts to more than 700 exchange relationships between jurisdictions. The OECD CbC Tool can be accessed [here](#).

Belgium

As far as Belgium is concerned, reciprocal automatic exchange relationships with Australia, Mexico and Norway were already in place since December 2016 and effective for taxable periods starting on or after 1 January 2016. In addition, Bermuda and South Africa have since committed to sending information to the Belgian tax authorities with regard to the same taxable periods.

Reciprocal automatic exchange relationships with Brazil, Canada, Guernsey, Iceland, the Isle of Man, Jersey, Liechtenstein, Mauritius, New Zealand, Uruguay and Malaysia have been added to the list. These relationships are effective for taxable periods starting on or after 1 January 2016 (except for the relationships with Brazil, Liechtenstein and Uruguay: 1 January 2017 and Malaysia: 1 January 2018). Furthermore, Belgium has also committed to send information to the South African tax authorities for taxable periods starting on or after 1 January 2016.

Berlioz judgment by ECJ

On 16 May 2017, the Grand Chamber of the European Court of Justice ruled a judgment that offers taxpayers more legal certainty in the field of international administrative cooperation and the exchange of information, as laid down in Directive 2011/16/EU.

Refusal to answer all questions

Berlioz SA, a Luxembourg parent company, received dividends from a French subsidiary. The French tax authorities questioned the withholding tax exemption applied by the French subsidiary distributing the dividends, and directed a request for information at Luxembourg, in application of Directive 2011/16/EU. The Luxembourg tax authorities established an information order requesting the information directly from Berlioz SA. The Luxembourg parent company answered all questions, except for those which it did not consider relevant.

The refusal to answer some of the questions was sanctioned by the Luxembourg tax authorities with a penalty of EUR 250,000. Luxembourg law allowed the company to appeal the penalty, but not to challenge the legality of the request for information or the administrative order itself.

Right to challenge unlawfulness

The Court of Justice confirmed that article 47 of the Charter of Fundamental Rights of the European Union implies that everyone whose rights and freedoms guaranteed by EU law are violated must have the right to an effective remedy before a tribunal. In the present case, Berlioz SA must have the right to protest the legality of the information request and the information order itself.

A request for information is only in accordance with Directive 2011/16/EU, to the extent that the requested information is 'foreseeably relevant' for the requesting administration. The court, as well as the requested administration, must perform a verification and determine whether the requested information manifestly holds no such relevance.

In order to judge this legality and to exercise the right to protest an information request's legality, the Court of Justice confirms that the person concerned should have access to the required information. However, the Court does not consider that the full request for information should be made available to the taxpayer. In principle, to challenge the request for information, it is enough to grant access to the identity of the taxpayer concerned and the tax purpose justifying the information request.

Bill of law against tax fraud

On 10 April 2017, a bill containing measures against tax fraud was submitted before Parliament. In essence, the proposed measures aim at ensuring that Belgium complies as much as possible with its international obligations regarding the exchange of information. The bill has now reached the stage where it was approved by the relevant commission.

Non-disclosure with regard to requests for information

One of the measures would attach confidentiality to information requests by foreign states, as well as the replies and exchange of letters between the competent authorities, unless the foreign state explicitly gives its permission to disclose the information. It should be noted that access to and copy requests of information would only be blocked in cases where allowing it may harm the ongoing foreign investigation. This implies that the Belgian tax administration must assess the effect of the disclosure on foreign investigations. As soon as the investigation of the foreign state is concluded, the prohibition is lifted. It should be noted that this framework will only be implemented in the Income Tax Code.

Confidentiality implies that the taxpayer would no longer be able to request this information's disclosure on the basis of the Open Government Act of 11 April 1994.

Impact of the Berlioz judgment

In its current form, the draft bill might be incompatible with the Berlioz case-law. Article 47 of the Charter implies that taxpayers must be granted access to the request for information and other relevant communication in a way that allows them to challenge the lawfulness of such documents.

This implies – at least – access to the taxpayer’s identity and the tax purpose of the request for information. If the new draft bill is to be construed strictly by the tax authorities and no information would be given to the taxpayers, this would form a violation of art. 47 of the Charter.

The Tax Controversy Solutions Team of Laga will provide updates and is readily available to assist with any questions on this subject.

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