

Arrêté grand-ducal du 13 décembre 2017 portant publication du "Arrangement between the Competent Authority of the United States of America and the Competent Authority of the Grand Duchy of Luxembourg on the exchange of country-by-country reports", signé à Washington le 12 octobre 2017.

Nous Henri, Grand-Duc de Luxembourg, Duc de Nassau,

Vu l'article 37 de la Constitution ;

Vu la Convention entre le Gouvernement du Grand-Duché de Luxembourg et le Gouvernement des États-Unis d'Amérique tendant à éviter les doubles impositions et à prévenir la fraude fiscale en matière d'impôts sur le revenu et sur la fortune, signée à Luxembourg, le 3 avril 1996, telle qu'elle a été modifiée ;

Vu la loi du 5 mars 1999 portant approbation de la Convention entre le Gouvernement du Grand-Duché de Luxembourg et le Gouvernement des États-Unis d'Amérique tendant à éviter les doubles impositions et à prévenir la fraude fiscale en matière d'impôts sur le revenu et sur la fortune, signée à Luxembourg, le 3 avril 1996, telle qu'elle a été modifiée par l'échange de lettres entre les deux Gouvernements, du 28 août 1996 ;

Sur le rapport de Notre Ministre des Affaires étrangères et européennes et de Notre Ministre des Finances et après délibération du Gouvernement en Conseil ;

Arrêtons :

Art. 1^{er}.

Le "Arrangement between the Competent Authority of the United States of America and the Competent Authority of the Grand Duchy of Luxembourg on the exchange of country-by-country reports", signé à Washington le 12 octobre 2017, sera publié au Journal officiel du Grand-Duché de Luxembourg pour sortir ses effets.

Art. 2.

Notre Ministre des Affaires étrangères et européennes et Notre Ministre des Finances sont chargés, chacun en ce qui le concerne, de l'exécution du présent arrêté.

*Le Ministre des Affaires étrangères
et européennes,
Jean Asselborn*

Palais de Luxembourg, le 13 décembre 2017.
Henri

*Le Ministre des Finances,
Pierre Gramegna*

**ARRANGEMENT BETWEEN THE COMPETENT
AUTHORITY OF THE UNITED STATES OF AMERICA AND
THE COMPETENT AUTHORITY OF THE GRAND DUCHY OF LUXEMBOURG
ON THE EXCHANGE OF COUNTRY-BY-COUNTRY REPORTS**

Whereas the Government of the United States of America ("the United States") and the Government of the Grand Duchy of Luxembourg ("Luxembourg") desire to increase international tax transparency and improve access of their respective tax authorities to information regarding the global allocation of the income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions in which multinational enterprise groups ("MNE Groups") operate through the automatic exchange of annual country-by-country reports ("CbC Reports"), with a view to assessing high-level transfer pricing risks and other base erosion and profit shifting related risks, as well as for economic and statistical analysis, where appropriate ;

Whereas the laws of the United States and Luxembourg require the Reporting Entity of an MNE Group to annually file a CbC Report ;

Whereas the CbC Report is one element of a standardized approach to transfer pricing documentation which is intended to provide tax administrations with relevant and reliable information to perform an efficient and robust transfer pricing risk assessment analysis ;

Whereas Article 28 (Exchange of Information) of the Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, done at Luxembourg on April 3, 1996 (the "Convention"), authorizes the exchange of information for tax purposes, including the automatic exchange of information ;

Whereas the United States and Luxembourg recognize that each jurisdiction has in place the appropriate safeguards with respect to confidentiality and use of information exchanged and the infrastructure for an effective exchange relationship ;

Whereas the competent authorities of the United States and Luxembourg (the "Competent Authorities") desire to conclude this Arrangement on exchange of CbC Reports based on domestic reporting and reciprocal automatic exchange pursuant to the Convention and subject to the confidentiality and other protections provided for in the Convention, including the provisions limiting the use of the information exchanged under the Convention ;

Now, therefore, the Competent Authorities declare their intent as follows :

SECTION 1 - Definitions

1. For the purposes of this Arrangement, the following terms have the following meanings :

- a) the term "Group" means a collection of enterprises related through ownership or control such that it is either required to prepare consolidated financial statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange ;
- b) the term "multinational enterprise group" or "MNE Group" means any Group that (i) includes two or more enterprises the tax residences of which are in different jurisdictions, or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction, and (ii) is not an Excluded MNE Group ;
- c) the term "Excluded MNE Group" means a Group that is not required to file a CbC Report on the basis that the annual consolidated group revenue of the Group during the fiscal year immediately preceding the reporting fiscal year, as reflected in its consolidated financial statements for such preceding fiscal year, is below the threshold that is defined in domestic law by the jurisdiction of tax residence of the Reporting Entity and is consistent with the 2015 Report (for purposes of the foregoing, the threshold includes any modifications that may result from the 2020 review contemplated in the 2015 Report) ;

d) the term "Constituent Entity" means :

- (i) with respect to an MNE Group having a Reporting Entity resident for tax purposes in Luxembourg, (A) any separate business unit of an MNE Group that is included in the consolidated financial statements for financial reporting purposes or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange, (B) any separate business unit that is excluded from the MNE Group's consolidated financial statements solely on size or materiality grounds, and (C) any permanent establishment of any separate business unit of the MNE Group included in (A) or (B) above provided the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes ; and
- (ii) with respect to an MNE Group having a Reporting Entity resident for tax purposes in the United States, any "Constituent Entity" as defined in the relevant U.S. Treasury regulations ;

e) the term "Reporting Entity" means the Constituent Entity that, by virtue of domestic law in its jurisdiction of tax residence, files the CbC Report in its capacity to do so on behalf of the MNE Group ;

f) the term "CbC Report" means the Country-by-Country Report to be filed annually by the Reporting Entity in accordance with the laws of its jurisdiction of tax residence and with the information required to be reported under such laws covering the items and reflecting the format set out in the 2015 Report (for purposes of the foregoing, the information and format includes any modifications that result from the 2020 review contemplated in the 2015 Report) ;

g) the term "Fiscal Year" means :

- (i) with respect to an MNE Group having a Reporting Entity resident for tax purposes in Luxembourg, the annual accounting period with respect to which the Reporting Entity prepares its financial statements ; and
- (ii) with respect to an MNE Group having a Reporting Entity resident for tax purposes in the United States, the "Reporting Period" as defined in the relevant U.S. Treasury regulations ; and

h) the term "2015 Report" means the final consolidated report, entitled Transfer Pricing Documentation and Country-by-Country Reporting, on Action 13 of the OECD/G20 Action Plan on Base Erosion and Profit Shifting.

2. The terms "United States," "Luxembourg," "Competent Authority, " and "Contracting State" have the meaning they have in the Convention.

3. As regards the application of this Arrangement at any time by a Competent Authority, any term not defined in this Arrangement, unless the context otherwise requires or the Competent Authorities decide on a common meaning (as permitted by domestic law), is intended to have the meaning that it has at that time under the law of the Contracting State applying this Arrangement, any meaning under the applicable tax laws of that Contracting State prevailing over a meaning given to the term under other laws of that Contracting State.

SECTION 2 - Exchange of Information with Respect to MNE Groups

Pursuant to the provisions of Article 28 of the Convention, each Competent Authority intends to exchange with the other Competent Authority annually on an automatic basis the CbC Report received from each Reporting Entity that is resident for tax purposes in its jurisdiction, provided that, on the basis of the information provided in the CbC Report, one or more Constituent Entities of the MNE Group of the Reporting Entity are resident for tax purposes in the jurisdiction of the other Competent Authority, or are subject to tax with respect to the business carried out through a permanent establishment situated in the jurisdiction of the other Competent Authority.

SECTION 3 - Time and Manner of Exchange of Information

1. For the purposes of the exchange of information in Section 2, the amounts contained in each CbC Report are expected to be stated in a single currency, which is expected to be specified in the CbC Report.
2. A CbC Report is intended to be first exchanged with respect to Fiscal Years of MNE Groups commencing on or after January 1, 2016. Such CbC Report is intended to be exchanged as soon as possible and no later than 18 months after the last day of the Fiscal Year of the MNE Group to which the CbC Report relates. CbC Reports with respect to Fiscal Years of MNE Groups commencing on or after January 1, 2017 are intended to be exchanged as soon as possible and no later than 15 months after the last day of the Fiscal Year of the MNE Group to which the CbC Report relates. Notwithstanding the foregoing, the exchange of CbC Reports is intended to commence only once this Arrangement becomes operative, and a Competent Authority is intended to have until the expiration of the time periods set out in this paragraph or three months after this Arrangement becomes operative, whichever is later, to exchange the CbC Reports.
3. The Competent Authorities intend to exchange the CbC Reports automatically through a common schema in Extensible Markup Language (XML).
4. The Competent Authorities intend to work toward and decide on one or more methods for electronic data transmission including encryption standards.

SECTION 4 - Collaboration on Transmission and Errors

1. Each Competent Authority intends to notify the other Competent Authority when the first-mentioned Competent Authority has reason to believe, with respect to a Reporting Entity that is resident for tax purposes in the jurisdiction of the other Competent Authority, that an error may have led to incorrect or incomplete information reporting or that there is noncompliance of the Reporting Entity with respect to its obligation under the domestic law of the jurisdiction of the other Competent Authority to file a CbC Report. The notified Competent Authority intends to take appropriate measures available under its domestic law to address the errors or the non-compliance with its domestic law described in the notice.
2. Within 15 days of successfully receiving a file containing the CbC Report in the time and manner described in Section 3, the Competent Authority receiving the file is expected to provide notice of such successful receipt to the Competent Authority providing the file. The notice need not express the receiving Competent Authority's view about the adequacy of the information received or whether the receiving Competent Authority believes that the providing Competent Authority should take measures pursuant to paragraph 1 of this Section to address errors or non-compliance with its domestic law.
3. Within 15 days of receiving a file containing information that cannot be processed, the receiving Competent Authority is expected to provide notice of such processing failure to the providing Competent Authority.

SECTION 5 - Confidentiality, Data Safeguards and Appropriate Use

1. All information exchanged is subject to the confidentiality and other protections provided for in the Convention, including the provisions limiting the use of the information exchanged.
2. To the extent consistent with Article 28 of the Convention, each Competent Authority intends to limit the use of the information by its tax administration to the uses described in this paragraph. In particular, information exchanged by means of the CbC Report should be used by the tax administration for assessing high-level transfer pricing risks, base erosion and profit shifting related risks, and, where appropriate, for economic and statistical analysis. The information should not be used by the tax administrations as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis. Each Competent Authority acknowledges that information in the CbC Report on its own does not constitute conclusive evidence that transfer prices are or are not appropriate and, consequently, the tax administration should not base transfer pricing adjustments on the CbC Report. Inappropriate adjustments in contravention of this paragraph made by the tax administration are expected to be conceded in any competent authority mutual agreement proceedings under Article 27 (Mutual Agreement Procedure) of the Convention. The CbC Report data may be used as a basis for making further inquiries into the MNE Group's transfer pricing arrangements or into other tax matters in

the course of a tax audit and, as a result of such further inquiries, making appropriate adjustments to the taxable income of a Constituent Entity. For purposes of the foregoing, the term "tax administration" means in the case of the United States, the Internal Revenue Service, and in the case of Luxembourg, the Direct Tax Administration.

3. To the extent permitted under applicable law, each Competent Authority intends to notify the other Competent Authority immediately regarding any cases of use or disclosure inconsistent with the rules set out in paragraphs 1 and 2 of this Section, including regarding any remedial actions or measures taken in respect of such cases that are inconsistent with the above-mentioned paragraphs.

SECTION 6 - Consultations

1. Where a person considers that an adjustment to the taxable income of a Constituent Entity, as a result of further inquiries based on the data in the CbC Report, results for such person in taxation not in accordance with the provisions of the Convention and presents its case to the Competent Authority specified in the Convention, the Competent Authorities acknowledge their obligation to endeavor to resolve the case under Article 27 of the Convention.
2. If any difficulties in the implementation of this Arrangement arise, either Competent Authority may request consultations to develop appropriate measures to fully implement this Arrangement.
3. A Competent Authority intends to consult with the other Competent Authority before the first-mentioned Competent Authority determines that there is a systemic failure by the other Competent Authority, which under its domestic law may result in a local filing requirement for a Constituent Entity that is a member of an MNE Group for which CbC Reports are intended to be exchanged under this Arrangement. For purposes of the foregoing, the term "systemic failure" means, with respect to the exchange of CbC Reports by a Competent Authority, such Competent Authority has suspended automatic exchange under this Arrangement (for reasons other than those that are consistent with the terms of this Arrangement) or has otherwise persistently failed to provide automatically the CbC Reports in its possession that are intended to be exchanged with the other Competent Authority under Section 2 of this Arrangement.

SECTION 7 - Modifications

This Arrangement may be modified by mutual written decision of the Competent Authorities.

SECTION 8 - Term of Arrangement

1. This Arrangement becomes operative on the date of the later of the date of signatures below.
2. A Competent Authority may provide notice in writing to the other Competent Authority that it is temporarily suspending the exchange of information under this Arrangement based on its determination that the other Competent Authority is or has been acting inconsistently with paragraphs 1 and 2 of Section 5 or paragraph 1 of Section 6 of this Arrangement, including the provisions of the Convention referred to therein, or that the Competent Authority is or has been failing to provide timely or adequate information as intended under this Arrangement. Before making such a determination, the first-mentioned Competent Authority intends to consult with the other Competent Authority. A suspension of the exchange of information under this Arrangement is intended to become operative immediately and is intended to last until the second-mentioned Competent Authority establishes in a manner acceptable to both Competent Authorities that there has been no act inconsistent with the paragraphs referenced above or that the second-mentioned Competent Authority has adopted relevant measures that address such inconsistencies.
3. Either Competent Authority may discontinue this Arrangement and is expected to provide notice of discontinuation in writing to the other Competent Authority. Such discontinuation is intended to become operative on the first day of the month following the expiration of a period of 12 months after the date of the notice of discontinuation. In the event of discontinuation, all information previously exchanged under this Arrangement remains confidential and subject to the terms of the Convention.

For the Competent Authority of
The United States of America :

Competent Authority of
the Grand Duchy of Luxembourg :

Douglas W. O'Donnell
Commissioner, Large Business &
International, Internal Revenue Service

Pierre Gramegna
Minister of Finance

WASHINGTON D.C.

Place

WASHINGTON D.C.

Place

October 18, 2017

Date

October 12, 2017

Date

