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ABBL CRS-related FAQs

Guidance regarding the implementation of the OECD Common Reporting Standard in Luxembourg

Association des Banques et Banquiers, Luxembourg
The Luxembourg Bankers' Association
Luxemburger Bankenvereinigung

Purpose of this document

- The purpose of the present FAQs is to provide ABBL members with technical guidance regarding specific points of attention identified in relation to the implementation of the OECD Common Reporting Standard (CRS) in Luxembourg. We trust that these FAQs constitute a useful local complement to the extensive commentaries published by the OECD.
- The present FAQs are part of ABBL's commitment to foster a compliant and consistent implementation of tax transparency rules in Luxembourg. Their publication join quite naturally the continuance of the principles of integrity, transparency and professionalism laid down in our Code of Conduct and the ICMA Private Wealth Management Charter, to which 83 of our member banks are signatories.
- The points covered herein were extensively discussed by a dedicated working group gathering project managers and tax officers from the ranks of 16 member banks as well as competent advisors from leading consultancy firms in Luxembourg. The present FAQs reflect essentially the output of these discussions that spanned over 2 years.
- A draft of these FAQs was submitted to the Luxembourg tax authorities and certain points of attention were subsequently discussed with them. The views expressed herein nevertheless reflect our sole understanding of the CRS and are not binding upon the Luxembourg tax authorities.
- Tax transparency remains a dynamic topic. These FAQs are meant to be a living document, meaning that the content can be updated on a regular basis so as to reflect the latest developments at both international and domestic levels.
- The present FAQs do not constitute professional advice. While ABBL has taken reasonable care to ensure that the information contained in the present FAQs is complete and correct, neither ABBL nor any of its members who contributed to it can accept responsibility for any errors, spelling mistakes or omissions. In case of doubt, members are invited to seek competent professional advice.

Note: capitalized terms not defined in the present FAQs shall have the meaning ascribed to them in the AEOI Law, unless expressly provided otherwise. Relevant statutory sources are defined at Section II below.

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Section I: Understanding the CRS

1. What is the purpose of the CRS?

The purpose of the CRS is to detect and discourage tax evasion through a multilateral network of tax cooperation among national tax authorities. In this context, the CRS aims at establishing one global standard, which stimulates the move towards automatic exchange information related to offshore financial accounts.

This new standard, which draws on many aspects of the Model Intergovernmental Agreement developed between France, Germany, Italy, Spain and the United Kingdom on the one hand and the United States on the other hand regarding the implementation of FATCA, is much wider in its scope than the former EU Savings Directive and brings interest, dividends, as well as account balances and sales proceeds from financial assets within the scope of the automatic exchange of information.

The implementation of the CRS by more than 100 jurisdictions reflects the broad consensus that has been reached at international level regarding the fight against tax evasion.

2. What is the role of financial institutions in the context of the CRS?

Financial institutions established in Luxembourg will play a central role in the fulfilment of the commitments taken by Luxembourg to implement the CRS. Most of, if not all, the information to be exchanged under the CRS is indeed not directly available to the Luxembourg tax authorities and should therefore be obtained from financial institutions according to the rules and procedures set out in the CRS, as translated into Luxembourg law.

In this context, the obligations vesting to Reporting Financial Institutions (i.e. financial institutions that are subject to reporting requirements under the CRS) are essentially twofold.

First, Reporting Financial Institutions have due diligence obligations on accounts they maintain. Indeed, a Reporting Financial Institution should link all its account holders with a tax residence. In addition, for account holders that are entities, Reporting Financial Institution should identify their CRS status and, for the entities that qualify as Passive NFEs, the tax residence of their Controlling Persons. These obligations include a monitoring over time of the situation of their customers so as to detect any potential change of their status under the CRS (i.e. changes of circumstances).

Second, Reporting Financial Institutions, as this denomination indicates, have reporting obligations. These obligations consist of an obligation to report, on a yearly basis, to the Luxembourg tax authorities a set of pre-defined personal and financial information regarding any reportable account they maintain.

3. What is the interraction between AML/KYC rules and the CRS?

While AML/KYC rules and the CRS serve different purposes, there is arguably a strong interaction between these two regulations.

As further detailed through the present FAQs, Reporting Financial Institutions may rely in many respects on the information collected pursuant to AML/KYC for the purpose of determining the status of an Accountholder and, where applicable, its Controlling Persons. Also, the definition of Controlling Person under the CRS, which refers to any natural person who exercise control over an entity, must be interpreted in a manner consistent with the FATF Recommendations. Reporting Financial Institutions should therefore refer to the definition of beneficial owner set out in the Luxembourg AML Law.

For the reasons set out above, sound AML/KYC procedures constitute an important prerequisite to the correct implementation of the CRS by a Reporting Financial Institution.

Another notable point of interaction between AML rules and the CRS relates to the customer due diligence obligations applicable in relation to the predicate offences of aggravated fiscal fraud (French: *fraude fiscale aggravée*) and fiscal swindle (French: *escroquerie fiscale*) established under Luxembourg law by a law of 23 December 2016[1].

With respect to the said offences, CRF-CSSF joint circular n° 17/650 of 17 February 2017 provides a list of 21 fiscally relevant indicators for reference by obliged entities in the framework of their customer due diligence[2]. A significant proportion of these indicators refer to the status and circumstances of the client under review under the CRS or FATCA, such as (a) a residence in, or a transfer of residence to, a non-reportable jurisdiction, (b) the refusal to provide the information required by a Financial Institution to complete its due diligence and, where applicable, fulfill its reporting obligations, under the CRS or FATCA and (c) the unjustified reliance on the Active NFE status under the CRS[3].

[1] Loi du 23 décembre 2016 portant mise en oeuvre de la réforme fiscale 2017 (…), article 18
[2] Circulaire CRF-CSSF, Annex 1
[3] The list is not exhaustive and is for general guidance only. Members should refer to the text of the circular at hand for the purpose of their own analysis.

Section II: Relevant sources and competent authority in Luxembourg

1. What is the statutory basis for the implementation of the CRS in Luxembourg?

As such, the CRS does not constitute a binding piece of legislation and needs to be translated into law by each participating jurisdiction. At EU level, this exercise was carried out in a coordinated manner by mean of Directive 2014/107/EU amending Directive 2011/16/EU on administrative cooperation **["DAC2"]**.

(a) In Luxembourg, the CRS was enacted by a law dated 18 December 2015 **[the "AEOI Law"]**. The AEOI Law constitutes the primary reference for the purpose of the implementation of the CRS in Luxembourg and can be accessed via the following link:

http://www.impotsdirects.public.lu/content/dam/acd/fr/legislation/legi15/Memorial-A---N -244-du-24-decembre-2015.pdf

(b) For the purpose of interpreting the definition of Controlling Person under the AEOI Law, financial institutions in Luxembourg should refer in the first instance to the concept of beneficial owner (French: *"bénéficiaire effectif"*) set out in the consolidated version of the Law of 12 November 2004 on the fight against money laundering and terrorist financing **[the "Luxembourg AML Law"]**.

(c) The list of Excluded Accounts, Reportable Jurisdictions and Participating Jurisdictions under Luxembourg law are defined by **Grand Ducal decree**. Further references regarding these decrees, which may be updated from time to time, can be found at Section III below.

(d) Circular ECHA n° 4 of 6 February 2017 issued by the Luxembourg tax authorities defines the technical requirements for the CRS reporting in Luxembourg **["Circular ECHA n° 4"]**. Circular ECHA n° 4 can be accessed via the following link:

http://www.impotsdirects.public.lu/content/dam/acd/fr/legislation/legi17/ECHA4.pdf

It shall be noted that the aforementioned documents are only available in French. An unofficial translation of the Luxembourg AML Law can be downloaded on the website of the *Commission de Surveillance du Secteur Financier*.

2. Which guidance may be referred to for the purpose of implementing the CRS in Luxembourg?

(a) The primary source of interpretation of the CRS should be the Commentaries on the Common Reporting Standard published by the OECD **[the "Commentary"]**. DAC2 provides indeed that *"in implementing this Directive, Member States should use the Commentaries on the Model Competent Authority Agreement and Common Reporting Standard, developed by the OECD, as a source of illustration or interpretation and in order to ensure consistency in application across Member States."*

The Commentary constitutes an essential reference for Financial Institutions in their implementation of the CRS. This document, which is available in English and French, can be accessed on the OECD website via the following link:

http://www.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en

(b) The OECD maintains and regularly updates CRS-related Frequently Asked Questions in order to clarify certain elements of the CRS, based notably on questions submitted by the industry (e.g. reporting, due diligence, classification) **[the "OECD FAQs"]**. These FAQs complement the Commentary. The latest version (June 2016) can be downloaded here:

http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/CRS-related-FAQs.pdf

(c) The OECD has published a CRS Implementation Handbook regarding the CRS **[the "CRS Implementation Handbook"]**. The purpose of this handbook is to provide government officials with practical guidance to the necessary steps to take in order to implement the CRS. This document can be accessed via the following link:

https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf

(d) The Luxembourg tax authorities have issued FAQs to cover some local aspects of the CRS **[the "ACD FAQs"]**. These FAQs can be accessed via the following link:

http://www.impotsdirects.public.lu/fr/echanges_electroniques/CRS_NCD/FAQ_CRS_NCD.html

(e) The ACD FAQs refer to Circular ECHA n° 2 of 31 July 2015 issued by the Luxembourg tax authorities in the context of FATCA **["Circular ECHA n° 2"]** for the purpose of interpreting the definition of Investment Entity under the CRS. This circular can be downloaded here:

http://www.impotsdirects.public.lu/content/dam/acd/fr/legislation/legi15/Circulaire-ECHA-2-du-31-juillet-2015.pdf

(f) General information regarding the CRS can be found on a dedicated portal maintained by the OECD **[the "OECD Portal"]**. The OECD Portal notably contains useful references to national Tax Identification Numbers ("TINs") and national rules on tax residency. The portal can be accessed via the following link:

http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/

3. What is the name of the competent authority in Luxembourg regarding the implementation of the CRS?

The competent authority in Luxembourg is the ***Administration des Contributions Directes***.

More specifically, the following department is in charge of the implementation of the CRS: ***Division échange de renseignements et retenue d'impôt sur les intérêts***

Relevant contact details can be found here:

http://www.impotsdirects.public.lu/fr/profil/organigramme/direction/division_echange_renseignements_retenue_interets.html

Section III: The Luxembourg approach to the CRS

1. Is Luxembourg an « early adopter »?

Yes. This means that Luxembourg is committed to undertake the first exchanges of information according to the CRS by 2017 on the basis of financial account information relating to the year 2016. This implies an accelerated implementation timeline for Financial Institutions in Luxembourg.

2. Which jurisdictions are recognized as Reportable Jurisdiction by Luxembourg?

The concept of Reportable Jurisdiction refers to those jurisdictions with whom effective automatic exchange of information under the CRS has been agreed upon.

Per the AEOI Law, the list of Reportable Jurisdictions is set by Grand Ducal Decree. As from March 2017, Luxembourg recognizes 48 jurisdictions as being Reportable Jurisdictions.

The list of Reportable Jurisdictions recognized by Luxembourg as of March 2017 can be accessed here:

http://legilux.public.lu//eli/etat/leg/rgd/2017/03/24/a335/jo

The list at hand, as adopted by Grand Ducal decree dated 24 March 2017, delineates the territorial scope of the obligations vesting to financial institutions in Luxembourg with respect to accounts maintained in 2016. This list does not prejudge from the inclusion of additional jurisdictions from 2017 onwards as many jurisdictions are committed to first exchange information in 2018.

Per Circular ECHA n°4, it shall be noted that the following territories are also considered as being Reportable Jurisdictions from 2016 onwards:

- Guadeloupe, French Guiana, Martinique, Mayotte and Réunion as French overseas *département*;
- French Saint-Martin, a French territory being part of the European Union;
- Saint-Barthélemy, a French territory bound to EU current and future *acquis* in the field of the taxation of savings and administrative cooperation between tax authorities;
- Bonaire, Saint-Eustache and Saba, as special municipalities of the Netherlands;
- The Canary Islands, as an autonomous community of Spain.

The concept of Reportable Jurisdiction shall not be confused with the concept of Participating Jurisdiction, which is essentially relevant for due diligence purposes (as per Q&A 3 below).

3. Which jurisdictions are recognized as Participating Jurisdiction by Luxembourg?

As of March 2017, Luxembourg recognizes 86 jurisdictions as being Participating Jurisdiction for the purpose of the CRS. These jurisdictions are those who formally committed to implement the CRS either by signing the relevant Multilateral Competent Authority Agreement (MCAA) or by entering into bilateral agreements with Luxembourg for the purpose of the same. The list of Participating Jurisdiction is set by Grand Ducal Decree and may be updated from time to time.

The list of Participating Jurisdictions recognized by Luxembourg as of March 2017 can be found here:

http://legilux.public.lu/eli/etat/leg/rgd/2016/12/23/n24/jo

It is anticipated that this list will be further updated in the future as additional countries are committed to implement the CRS. According to the AEOI Law, non-EU jurisdictions formally qualify as a Participating Jurisdiction upon inclusion in a list published by Grand Ducal decree. It shall be noted that there might be a time lag in practice between the completion of this formality in Luxembourg and the signature of the MCAA by a given jurisdicton. Should the latter occur, the Luxembourg tax authorities confirmed that Reporting Financial Institution should exclusively refer to the list of Participating Jurisdictions set out in the applicable Grand Ducal decree. It shall be noted that Luxembourg does not recognize the United States as a Participating Jurisdiction for the purpose of the CRS.

The concept of Participating Jurisdiction, which shall not be confused with the concept of Reportable Jurisdiction (as per Q&A 2 above), is essentially relevant in order to assess whether a look-through approach has to be applied on certain Investment Entities (AEOI Law, Annex I, Section VIII, subparagraph (D)(9)(ii)). The said Investment Entities (which are sometimes referred to as « type B » Investment Entities) shall be indeed treated as Passive NFE to the extent that they are resident in a Non-Participating Jurisdiction, i.e. a jurisdiction that is not recognized as a Participating Jurisdiction by Luxembourg. Reporting Financial Institutions maintaining Financial Accounts for this type of entities should monitor the status of the relevant jurisdictions as the qualification attached to the said entities will change from Passive NFE to Financial Institution upon recognition of their jurisdiction of tax residence as a Participating Jurisdiction.

4. Is Luxembourg implementing the « wider approach »?

Yes. The provisions of Annex I to the AEOI Law reflect the alternative language set out at Annex 5 to the Standard so as to require the identification of the status of all foreign accounts. This means that the scope of applicable due diligence obligations is extended, on a mandatory basis, to any person that is resident in a jurisdiction other than Luxembourg. This approach may significantly reduce the costs for financial institutions in Luxembourg because they will not need to perform additional due diligence each time a new jurisdiction commits to the CRS and eventually becomes a Reportable Jurisdiction.

In addition, regarding the due diligence for New Individual Accounts, Reporting FIs in Luxembourg may require the Accountholder's TIN, date of birth and place of birth in cases where the Accountholder is not resident in a Reportable Jurisdiction. Where no

TIN or, as the case may be, date and/or place of birth, are provided by the Accountholder, members should note that some monitoring will be involved after account opening regarding the status of the jurisdiction of residence of the Accountholder under review. Members may therefore consider insisting on obtaining this information upon account opening.

The scope of the reporting remains, however, limited to Accountholders that are resident in a Reportable Jurisdiction, as well as Passive NFEs with one or more Controlling Persons resident in a Reportable Jurisdiction. By contrast, information regarding any other person does not constitute reportable information pursuant to the AEOI Law. Reporting such information may constitute a breach of banking confidentiality rules and the rules on the protection of private data.

5. Which entities are Non-Reporting Financial Institutions in Luxembourg?

Annex I to the AEOI Law, in line with the provisions of DAC2, sets out at section VIII, paragraph B, the various categories of Non-Reporting Financial Institutions (i.e. Financial Institutions that are not subject to reporting obligations). These categories are:

(a) a Governmental Entity, International Organisation or Central Bank, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a Specified Insurance Company, Custodial Institution, or Depository Institution;
(b) a Broad Participation Retirement Fund; a Narrow Participation Retirement Fund; a Pension Fund of a Governmental Entity, International Organisation or Central Bank; or a Qualified Credit Card Issuer;
(c) any other Entity that presents a low risk of being used to evade tax, has substantially similar characteristics to any of the Entities described in subparagraphs B(1)(a) and (b), and is included in the list of Non-Reporting Financial Institutions published by Grand Ducal decree, provided that the status of such Entity as a Non-Reporting Financial Institution does not frustrate the purposes of the AEOI Law;
(d) an Exempt Collective Investment Vehicle; or
(e) a trust to the extent that the trustee of the trust is a Reporting Financial Institution and reports all information required to be reported pursuant to Section I with respect to all Reportable Accounts of the trust.

The exemption at c) above (any other Entity that presents a low risk of being used to evade tax) is only available to specific entities that have been defined in domestic law as Non-Reporting Financial Institution by mean of a Grand Ducal Decree. For the time being no such entities have been identified. This means that the exemption at hand is currently not available.

Regarding other exemptions at (a), (b), (d) and (e) above, these are immediately available to any entity in Luxembourg fulfilling the generic requirements of the relevant category. An assessment shall be made on a case-by-case basis, based notably on the guidance provided in the Commentary (Commentary on Section VIII, paragraphs 31 to 56). Banks generally do not fulfill the requirements of any of the said exemptions.

It shall be noted that the definition of Non-Reporting Financial Institution under the CRS is more restrictive than the corresponding definition under FATCA. A series of exemptions available under FATCA are indeed not applicable under the CRS, such as sponsored investment entities, Luxembourg investment advisors and investment managers and Financial Institutions with a local client base. This means that a number of entities that are treated as Non-Reporting Financial Institutions under the applicable intergovernmental agreement with the United States may not avail themselves of an equivalent status for the purpose of the CRS.

6. Which accounts qualify as Excluded Account in Luxembourg?

Annex I to the AEOI Law, in line with the provisions of DAC2, sets out at section VIII, subparagraph C(17), the various categories of Excluded Accounts (i.e. accounts that are not Financial Accounts and therefore excluded from reporting). These categories are:

(a) retirement and pension accounts;
(b) non-retirement tax-favoured accounts;
(c) term life insurance contracts;
(d) estate accounts;
(e) escrow accounts;
(f) Depository Accounts due to not-returned overpayments; and
(g) Low-risk excluded accounts.

The exemption at g) above (low-risk excluded accounts) is only available with respect to specific accounts that have been defined in domestic law as Excluded Account by mean of a Grand Ducal Decree. For the time being, the following accounts are eligible for the said exemption by virtue of a Grand Ducal Decree dated 15 March 2016:

- pension schemes (*contrats individuels de prévoyance vieillesse*) referred to in article 111bis of the Luxembourg income tax law;
- home savings schemes (*contrats d'épargne-logement*) referred to in article 111, al. 1 of the Luxembourg income tax law; and
- complementary pension schemes (*régimes complémentaires de pension*) referred to in article 110 of the Luxembourg income tax law.

The ACD FAQs emphasize, at Section 3.1, that the legal references linked to aforementioned accounts should be interpreted broadly. In particular, the exemption at hand shall not apply exclusively to those accounts where contributions cannot exceed the amount deductible for income tax purposes.

Regarding other exemptions at (a) to (f) above, these are immediately available to any account maintained in Luxembourg fulfilling the generic requirements of the relevant category. An assessment shall be made on a case-by-case basis, based notably on the guidance provided in the Commentary (Commentary on Section VIII, paragraphs 86 to 103).

7. Which options and other alternative provisions set out in the CRS are applicable in Luxembourg?

The CRS contains a series of optional provisions the application of which is left at the appreciation of each Participating Jurisdiction. Whether a jurisdiction makes use of these options has an impact on the scope of reporting and due diligence requirements vesting to FIs established in the said jurisdiction. A summary of these provisions can be found in the CRS Implementation Handbook (paragraph 17). The CRS Implementation Handbook identifies a total 16 options and alternative provisions throughout the CRS.

Luxembourg offers most, but not all, of these options and alternatives:

(a) Reporting FIs may use third party service providers to fulfill due diligence and reporting obligations (AEOI Law, Annex I, Section II, paragraph E);
(b) Reporting FIs may apply to Preexisting Accounts the due diligence procedures for New Accounts (AEOI Law, Annex I, Section II, paragraph F);
(c) Reporting FIs may apply on Low-Value Accounts the due diligence procedures for High-Value Accounts (AEOI Law, Annex I, Section II, paragraph F);
(d) Reporting FIs may apply to Preexisting Lower Value Accounts held by Individual Accountholders the Residence address test as an alternative to the electronic indicia search for establishing residence (AEOI Law, Annex I, Section III, subparagraph B(1));
(e) Reporting FIs may exclude from their review, identification and reporting procedures Preexisting Entity Accounts with an aggregate account balance or value equivalent to USD 250,000.- or any lesser amount as of 31 December 2015 (AEOI Law, Annex I, Section V, paragraph A);
(f) Reporting FIs may apply a simplified due diligence procedure for certain Cash Value Insurance Contracts or certain Group Annuity Contracts financed by employers (AEOI Law, Annex I, Section VII, paragraph B);
(g) Reporting FIs may use any classification established under a standardized industry coding system (e.g. NACE codes) as documentaty evidence for due diligence purposes (ACD FAQs, section 1.4);
(h) The AEOI Law provides for the use of equivalent amounts in EUR for the purpose of the implementation of the CRS in Luxembourg (AEOI Law, Section VII, subparagraph C(4));
(i) Reporting FIs may treat certain New Accounts held by preexisting customers as a Preexisting Account for due diligence purposes (AEOI Law, Annex I, Section VIII, subparagraph (C)(9)(b));
(j) the definition of Related Entity has been expanded so as to provide that control includes, with respect to Investment Entities described in subparagraph A(6)(b), two entities under common management, provided such management fulfills the due diligence obligations of such Investment Entities (AEOI Law, Annex I, Section VIII, subparagraph E(4));
(k) a grandfathering rule is foreseen regarding bearer shares issued by Exempt Collective Investment Vehicles, provided, *inter alia*, that no such shares have been or will be issued after 31 December 2015 and the collective investment vehicle that has issued such shares has in place policies and procedures to the ensure the shares are redeemed or immobilized before 1 January 2018 (AEOI Law, Annex I, Section VIII, subparagraph B(9))
(l) Luxembourg does not require the filing of a « nil return » by Reporting Financial Institutions to indicate that they did not maintain any Reportable Accounts during the calendar year or ther reporting period. A nil return may nevertheless by submitted to the Luxembourg tax authorities on an optional basis (Circular

ECHA n° 4, paragraph 7.1.3).

By contrast:

(a) the AEOI Law does not contain any alternative approach to calculating account balances for reporting purposes (as per the Commentary on Section I, paragraph 11);
(b) the Luxembourg tax authorities expressly confirmed that Reporting FIs in Luxembourg are not allowed to use a reporting period other than a calendar year (ACD FAQs, section 1.4);
(c) the AEOI Law does not contain any phasing in for the reporting of gross proceeds (as per the Commentary on Section I, paragraph 35)
(d) the AEOI Law does not refer to any alternative approach that would allow Reporting FIs in Luxembourg to report discretionary beneficiaries of trusts that are Passive NFEs only in the year they receive a distribution from the trust (ACD FAQs, section 1.4). Additional considerations on this point can be found at Section VII below.

Section IV: Particular accounts and accountholders

1. How to treat accounts closed after 31 December 2015?

The AEOI Law provides at article 4(1) that any reportable information thereunder relates to taxable periods as from 1 January 2016. This means that any account closed after 31 December 2015 will need to be reviewed under the AEOI Law and, where applicable, shall be reported to the Luxembourg tax authorities. Conversely, accounts closed on or before 31 December 2015 are not reportable under the AEOI Law.

In this context, members should consider reporting all reportable preexisting accounts closed in 2016 by 30 June 2017 notwithstanding the deadline otherwise applicable for completing the review of lower value individual accounts and entity accounts. A reporting of the accounts at hand in 2018 may indeed trigger operational difficulties as a supplementary reporting would need to be submitted with respect to 2016.

2. How to treat pre-existing accounts closed but not yet reviewed?

The treatment applicable will vary depending on whether, on the one hand, the account under review is an individual account or an entity account and, on the other hand, the account under review is a lower value account or a high value account. In any case, in view of the considerations set out at Q&A 1 above in the present section, ABBL recommends members to review closed accounts as soon as practicable after closure.

Regarding Pre-existing individual accounts, in case where indicia of foreign residence have been identified and, where applicable, have not been cured before the end of the year of closure in accordance with the procedure set out in Annex I, Section III of the AEOI Law, the account shall be reported with respect to the year of closure. Where the account under review is a lower value acount and no indicia of foreign residence have been identified in the electronic records of the Reporting Financial Institution maintaining the account, no further action is required. Where the account under review is a high-value account, the Reporting Financial Institution should in addition perform the enhanced due diligence foreseen at Annex I, Section III, paragraph C , in the AEOI Law.

Regarding Pre-existing entity accounts, the account shall be reviewed pursuant to the procedure foreseen at Annex I, Section V, paragraph C in the AEOI Law. Consequently, in the absence of a self-certification provided by the Entity accountholder before the end of the calendar year of closure, the Reporting Financial Institution maintaining the account may determine the status and residence of the Entity under review and, where applicable, of any of its Controlling Persons, on the basis of the information available in its file and/or any information that is publicly available. Where applicable, the account shall be reported to the Luxembourg tax authorities with respect to the year of closure.

Regarding the deadline for the reporting of pre-existing accounts closed in 2016, Reporting Financial Institutions shall report the said accounts either by 30 June of the year following the year of closure (i.e. 2017) or, failing this, by 30 June of the second year following the year of closure (i.e. 2018). In the second occurrence, it is understood that Reporting Financial Institutions shall submit to the Luxembourg tax authorities a supplementary reporting file (and not a correction to the initial reporting file) with respect to the relevant reportable period (i.e. 2016).

3. How does the CRS define dormant accounts?

A definition of dormant account is provided in the Commentary (Commentary on Section III, paragraph 9). Alternatively, an account may be considered as a dormant account under the applicable laws or regulations or the normal operating procedures of the Reporting Financial Institution that are consistently applied for all accounts maintained by such institution, provided that such laws or regulations or such procedures contain substantially the same requirements to those provided in the Commentary.

In this context, reference can be made to Circular CSSF 15/631 of 28 December 2015, which establishes the criteria for defining dormant accounts and determining the conditions for treating such accounts under Luxembourg law. It shall be noted that the definition of dormant accounts under Luxembourg law may further evolve in the future depending on whether current legislative initiatives in this field will materialize.

4. How to treat dormant accounts?

The AEOI Law does not contain any specific provisions in relation to dormant accounts. In the absence of derogatory rules, dormant accounts shall thus be reviewed and classified according to the applicable due diligence procedures and, where applicable, reported to the Luxembourg tax authorities.

The CRS Implementation Handbook provides (at pages 116 and 117) that dormant accounts may be considered by Participating Jurisdictions as Low-risk Excluded Accounts, and may be therefore exempt from reporting, when the annual balance does not exceed USD 1.000,- or its equivalent in another currency. This exemption is not included in the list of low-risk excluded accounts defined by Grand Ducal decree and is therefore not available under the AEOI Law.

Reporting Financial Institution may use, when reporting an account classified as dormant to the Luxembourg tax authorities, the specific attribute « @DormantAccount » to indicate that the account is dormant (as per Circular ECHA n° 4, page 41). This attribute remains optional for Reporting Financial Institutions. The Luxembourg tax authorities nevertheless encourage Reporting Financial Institutions in Luxembourg to use this attribute when reporting dormant accounts as this information would enable the Luxembourg tax authorities to take stock of the number of dormant accounts that are Reportable Accounts under the CRS and thus to eventually better address related concerns.

As an exception to the foregoing principles, the Luxembourg tax authorities advised that dormant accounts that are Reportable Accounts but with respect to which mandatory reportable information is missing should <u>not</u> be reported pending the clarification of the legal framework applicable to dormant accounts in Luxembourg. It is understood that the rationale for this exception, which should be interpreted restrictively, is essentially of technical nature as the electronic schema applicable for CRS reporting does not allow for mandatory data fields being left blank. It shall be noted that the exception at hand does not apply to Reportable Accounts with respect to which the transitional relief set out at Annex I, Section I, paragraph C, in the AEOI Law regarding a missing TIN, date of birth and/or place of birth is available. Accordingly, with respect to reporting years 2016 and 2017, the exception at hand should apply in practice to dormant accounts with respect to which a full residence address (including a valid/current postcode) is not available.

In order to avoid being confronted with recurrent difficulties related to dormant accounts in the longer term, members should, to the extent possible, close any such accounts as early as practicable. ABBL has stressed with competent authorities in Luxembourg that the *Caisse de consignation* shall play an active role in this process by accepting the transfer of the balances of the said accounts.

5. What is an « undocumented account »?

The term « undocumented account » refers to limitatively defined occurrences set out in the Commentary and is technically limited to Pre-existing Individual Accounts with only a « hold mail » instruction or an « in–care-of » address in a Reportable Jurisdiction which has not been cured (Commentary on Section III, paragraphs 28 and 45). The Commentary notes that an "undocumented account" could either be the result of inadequate procedures at the level of the Financial Institution maintaining the account at hand or the Accountholder being non-compliant (Commentary on Section IX, paragraph 13). Either case should be a cause for concern.

« Undocumented accounts » should not be confused with Financial Accounts with respect to which (i) one or more indicia other than an « in–care-of » instruction or an "hold mail" address have been identified or (ii) certain reportable information (e.g. a TIN) are missing. The latter are « Reportable Accounts » and the information reported to Luxembourg tax authorities will be eventually exchanged with the relevant Reportable Jurisdiction(s). By contrast, it is understood that "undocumented accounts" are subject to a specific reporting to the Luxembourg tax authorities. Per the Commentary (Commentary on Section IX, paragraph 14), it is expected that the Luxembourg tax authorities would follow up with any Reporting Financial Institution in Luxembourg that reports an undocumented account. Depending on the number of undocumented accounts reported by the said institution, a full audit might be performed.

Per Circular ECHA n° 4 (page 41), undocumented accounts shall be reported using the specific attribute **«** @UndocumentedAccount ».

6. Which accounts qualify as « account established in connection with a court order or judgment » ?

The AEOI Law provides that an account established with a court order or judgement qualifies as an Excluded Account (Annex I, Section VIII, subparagraph C(17)(e)(i)).

Based on an exchange of views with the Luxembourg tax authorities, ABBL can confirm that accounts opened in the name of a business or a company that has been put into bankruptcy or liquidation by a judgement of a Luxembourg court qualify as Excluded Account for the purpose of the AEOI Law. It is understood that the exemption at hand is limited to accounts opened by the administrator in the bankruptcy proceedings (*curateur*) or, as the case may be, the liquidator (*liquidateur*), appointed by the court in order to place the proceeds of the liquidation of the assets of the bankrupt business or liquidated company. The exemption at hand should be granted upon review of the judgement declaring the bankruptcy (*jugement déclaratif de faillite*) or, as the case may be, ordering the liquidation (*jugement de mise en liquidation*), and solely relates to accounts opened after the said judgement has been delivered. By contrast, accounts

opened by the Entity under review before the inception of bankruptcy or, as the case may be, liquidation proceedings, cannot be treated as Excluded Account under the provision under review.
7. What is the status of non-proprietary accounts held by lawyers and notaries? Lawyers and notaries in Luxembourg are required under their respective statutes[4] to place funds received from third parties in the framework of their professional duties on a specific account opened with a financial institution. The treatment of these accounts under the AEOI Law has been identified as a particular point of attention by members, considering (a) the definition of the term « Accountholder » in the AEOI Law ; (b) the absence of any specific exemption applicable to the accounts under review ; and (c) the simplified customer due diligence that may be applied with respect to the accounts at hand under the Luxembourg AML Law[5]. ABBL has submitted the matter at hand to the Luxembourg tax authorities stressing that the identification and, where applicable, reporting of the beneficiaries of the accounts under review for the purpose of the CRS would be only possible on the basis of an unequivocal exception to the professional confidentiality requirements applicable to lawyers and notaries under Luxembourg law.
8. What is the status of accounts held by syndicates of co-owners? Luxembourg law provides that any sums and assets paid to syndicates of co-owners shall be placed forthwith on a bank account opened in the name of the syndicate[6]. Syndicates of co-owners under Luxembourg law have legal personality[7] and should therefore be considered as accountholder of any account opened on their behalf by the property manager (and not the owners themselves).

[4] *Loi du 9 décembre 1976 relative à l'organisation du notariat*, article 8; *Règlement de l'ordre des avocats du barreau de Luxembourg*, articles 12.1 to 12.5.

[5] *"Article 3-1 – simplified customer due diligence*
(…)
(2) Without prejudice to paragraph 3 of this article, professionals may reduce the customer due diligence measures set forth in Article 3(2) (a) and (b) in the following circumstances:
(…)
(b) beneficial owners of pooled accounts held by notaries and other independent legal professionals from Member States, or from Third Countries provided that they are subject to requirements to combat money laundering or terrorist financing consistent with international standards and are supervised for compliance with those requirements and provided that the information on the identity of the beneficial owner is available, on request, to the institution that act as depository institution for pooled accounts."

[6] *Réglement grand-ducal du 13 juin 1975 prescrivant les mesures d'exécution de la loi du 16 mai 1975 portant statut de la copropriété des immeubles bâtis,* article 28*: « Toutes sommes ou valeurs reçues au nom et pour le compte du syndicat doivent être versées sans délai à un compte bancaire ou postal ouvert au nom du syndicat (…)".*

[7] *Loi du 16 mai 1975 portant statut de la copropriété des immeubles bâtis*, article 11

Unlike certain other EU Member States, Luxembourg does not carve-out accounts held by syndicates of co-owners as Excluded Account. In view of this background, ABBL takes the view that the a syndicate of co-owner established under Luxembourg law should in principle qualify as Passive NFE for the purpose of the CRS. Which individuals should be considered as Controlling Person of the syndicate of co-owner should be determined on the basis of the individuals identified as beneficial owner of the account under review for AML/KYC purposes. This question should be appraised on the basis of the respective prerogatives and entitlements of each co-owner and the management (French*: « syndic »*) according to applicable statutory provisions[8].

9. How to treat bare owners and usufruct holders of a Financial Account?

In accordance with Luxembourg civil law, the usufruct holder is entitled to receive income (interest, dividends, etc.) generated by the assets subject to the usufruct and the bare owner is entitled to receive the assets (capital) and the gross proceeds of the sale or redemption of these assets.

In this context, ABBL takes the view that both the bare owner and the usufruct holder of a Financial Account are to be considered as Accountholders notwithstanding the operational implementation of such account within the FI's system. Should the bare owner and/or the usufruct holder of the account at hand qualify as a Reportable Person under the AEOI Law, ABBL further takes the view that the Reporting Financial Institution maintaining the account under review may either

- with reference to the treatment applicable to joint accounts, report the full account balance or value as well as any related financial information (interest, dividends, gross sale proceeds, etc…) with respect to each reportable Accountholder; or,
- as an alternative, and with reference to the aforementioned legal entitlements, report, (i) with respect to the bare owner, the full account balance or value as well as the gross proceeds of the sale or redemption of the assets held in bare ownership-usufruct, and (ii) with respect to the usufruct holder, any income derived from the account under review (i.e. interests, dividends and similar income).

With anticipate the release of similar guidance by the OECD in a subsequent version of the OECD FAQs.

[8] *Loi du 16 mai 1975 portant statut de la copropriété des immeubles bâtis*

Section V: Tax residency

1. What is tax residency?

The meaning ascribed to tax residency may vary considerably from one jurisdiction to another and will depend on whether the taxpayer under review is an individual or an entity. For individuals, relevant tests refer to the physical presence in a jurisdiction but may also include other factors, such as the ownership of a home or availability of accommodation, family and/or financial interests. For entities, some jurisdictions determine the tax residency on the basis of the place of incorporation, while other jurisdictions may refer to the place of management (or a combination of both tests).

It is worth bearing in mind that residency for tax purposes may be different from the legal residence or domicile.

2. How to determine the tax residency of Accountholders and Controlling Persons for the purpose of the CRS?

Whether an Accountholder and, as the case may be, its Controlling Person(s), are subject to the automatic exchange of information will depend on his/her tax residency, as determined pursuant to the applicable account review procedure foreseen in the CRS.

Depending on the status of the account under review, the tax residency of the Accountholder(s) and of any Controlling Person may be determined on the basis of either (i) indicia of foreign residency identified by the Reporting Financial Institution maintaining the account or (ii) a self-certification signed by the Accountholder or, as the case may be, the relevant Controlling Person(s).

Where a self-certification is required for the purpose of determining the status of the account under review, the determination of the tax residency of the Accountholder and, where applicable, any Controlling Person, is essentially the responsibility of the customer. Per the OECD FAQs (Section II-VII, Q&A 5), a Financial Institution is indeed not required to provide customers with tax advice (and is in many occurrences not even allowed to do so) or to perform a legal analysis to determine the reasonableness of a self-certification. In order to facilitate the process of determination of tax residency, members may nevertheless consider directing customers towards the overview of the tax residency rules published on the AEOI Portal for the purpose of the CRS, which can be accessed via the following link:

http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/

3. How to handle multiple tax residencies?

In certain cases, accountholders might find themselves in a position where, based on the domestic rules of certain jurisdictions, they could be considered a tax resident in more than one jurisdiction. In that case, accountholders may check whether these jurisdictions have a double tax treaty in place, which would attribute the tax residence exclusively to one of these jurisdictions.

Also, where a Reporting Financial Institution has, in accordance to the applicable account review procedure, identified indicia of multiple tax residencies, a self-certification can be sought in order to determine the tax residency(-ies) of the accountholder. In the absence of such self-certification, the account shall be reported to all Reportable Jurisdictions with respect to which indicia of foreign tax residency have identified.

Where several jurisdictions of tax residencies are mentioned in a self-certification, unless the Reporting Financial Institution maintaining the account review knows or has reason to know that the self-certification is incorrect or unreliable, the account shall be reported with respect to all the jurisdictions mentioned in the self-certification that are Reportable Jurisdictions.

4. How to deal with « tax nomads »?

The term « tax nomads » colloquially refers to individuals moving from country to country (or within international waters) so as to avoid being tax resident in any jurisdiction.

It is understood that the treatment of tax nomads is currently under consideration at the level of the OECD but no conclusive guidance is currently available.

Regarding pre-existing individual accounts, Reporting Financial Institutions should refer to the applicable due diligence and account review procedures and thus make an assessment of the account holder on the basis of any relevant indicia available.

5. How to deal with changes of residency in the course of the year?

ABBL has discussed with the tax authorities the particular treatment of an accountholder that has changed his/her tax residency in the course of the year and has closed in the meantime a Financial Account. Two distinct situations have been envisaged.

Where the client under review no longer holds any Financial Account with the Reporting Financial Institution (i.e. the client has left the bank), the residence of the accountholder shall be determined according to his/her residence as of the day of the closure of the Financial Account under review. A self-certification obtained after account closure may be validly taken into account unless the Reporting Financial Institution knows or has reason to know that the self-certification at hand is incorrect or unreliable.

By contrast, where the client still holds one or more Financial Accounts with the bank after the closure of the account under review, Reporting Financial Institutions in Luxembourg are left with the flexibility of determining the residence of the accountholder either in accordance with his/her residence at account closure or in accordance with his/her residence at the end of the relevant reporting period.

6. How to apply the « residence address test » for pre-existing individual accounts?

The residence address test set out in Annex I, Section III, subapragraph B(1) of the AEOI Law allows Reporting Financial Institutions to determine the status of pre-existing, lower value individual accounts on the basis of a current residence address of the Accountholder based on Documentary Evidence. In cases where such an address is available in the file, the Reporting Financial Institution may treat the Accountholder as being a resident for tax purposes of the jurisdiction in which the address is located.

The AEOI Law requires that the residence address test should be applied on the basis of « Documentary Evidence ». This term should be interpreted in the light of the relevant considerations and examples set out in the Commentary (Commentary on Section III, paragraph 10). Based on the said considerations and examples, ABBL takes the view that Reporting Financial Institutions in Luxembourg may validly rely on the tax residency of relevant accountholders previously determined for the purpose of the automatic exchange of information under the EU Savings Directive, as transposed into Luxembourg law, when applying the residence address test set out in Annex I, Section III, subparagraph B(1) of the AEOI Law, unless the Financial Institution maintaining the account under review knows or has reason to know that the said address is no longer correct.

It shall be noted that the test at hand is optional and Reporting Financial Institutions may apply as an alternative the account review procedure set out in Annex I, Section III, subparagraph B(2) of the AEOI Law.

7. Does a temporary change of address automatically constitute a change of circumstances?

After discussion with the Luxembourg tax authorities, ABBL can confirm that a temporary change of address notified by an individual accountholder should not automatically constitute a change of circumstances, which means that Reporting Financial Institutions are not required to immediately request a new self-certification from the said accountholder. In the event, however, the temporary change of address lasts more than 90 days, this occurrence should prompt additional due diligence at the level of the Reporting Financial Institution. It shall be noted that the latter occurrence does not necessarily require a new self-certification on the part of the accountholder. The validity of the original self-certification can be indeed supported by a reasonable explanation and documentation (as appropriate), a copy of which shall be retained by the Reporting Financial Institution maintaining the account under review (per Commentary on Section IV, paragraph 12).

8. How to determine the tax residency of EU civil servants?

The AEOI Law does not contain specific rules regarding the determination of the tax residency of EU civil servants (and their relatives). As a result, Reporting Financial Institutions should refer to the account review and due diligence procedure applicable to the relevant account category.

In this context, it shall be noted that EU civil servants, their spouses (as long as they are not working) and their dependent children keep their domicile for tax purposes in the Member State where they had their domicile at the time they were recruited, if they move their residence only to enter the service of the European Union (source: Article 13 of the Protocol on Privileges and Immunities of the European Union). This may result in inconsistencies between the tax residence claimed by the accountholder and the information collected for AML/KYC purposes by the Reporting Financial Institution maintaining the account under review. In such a case, conclusive evidence regarding the accuracy of the tax residence mentioned by the accountholder may take the form of a certificate issued by the employer of the accountholder (i.e. UE institutions).

Section VI: Active and Passive NFEs

1. What is an Active NFE?

The term « NFE » is an acronym for Non-Financial Entity and means any Entity that is not a Financial Institution. An NFE can be either a Passive NFE or an Active NFE. The concept of Active NFE refers to a series of limitatively defined criteria under the AEOI Law (Annex I, Section VIII, subparagraph D(10)). These criteria can be summarized as follows for ease of reference:

(a) Active NFEs by reason of income and assets;
(b) publicly traded NFEs;
(c) Governmental Entities, International Organizations, Central Banks, or their wholly owned Entities;
(d) holding NFEs that are members of a non-financial group;
(e) start-up NFEs;
(f) NFEs that are liquidating or emerging from bankruptcy;
(g) treasury centers that are members of a non-financial group; or
(h) non-profit NFEs.

If an NFE does not fall within the scope of any of the aforementioned criteria, the said NFE will qualify as a Passive NFE. A sound understanding of the aforementioned criteria is therefore an important prerequisite to a compliant implementation of the AEOI Law by Reporting Financial Institutions. Q&As 2 to 4 below elaborate on certain of these criteria and consider their application to certain types of entities.

2. How to apply the « income and assets » test set out in the definition of Active NFE?

Subparagraph D(10)(a) in the definition of Active NFE set out in the AEOI Law describes the criterion to qualify for the Active NFE status as follows:

« less than 50% of the NFE's gross income for the preceding calendar year or other appropriate reporting period is passive income and less than 50% of the assets held by the NFE during the preceding calendar year or other appropriate reporting period are assets that produce or are held for the production of passive income ».

It shall be noted that the income and assets tests set out in the above definition are cumulative, which means that an Entity that only meets one of these tests fails to qualify as an Active NFE under subparagraph D(10)(a).

The AEOI Law does not provide a definition of passive income. The Commentary (Commentary on Section VIII, paragraph 126) nevertheless lists ten categories of income that would generally qualify as passive income for the purpose of subparagraph D(10)(a).

The OECD FAQs (Section VIII, paragraph D, Q&A 2) confirm that cash should be viewed, for the purpose of the test at hand as producing or being for the production of passive income (interest) even it does not actually produce such income.

Per the Commentary, a Reporting Financial Institution is not obliged to rely upon an audited financial statement to establish that an account holder meets a certain asset threshold. Further guidance in this respect can be found in the Commentary at Section VII, paragrah 6.

3. How to apply the « publicly traded » test set out in the definition of Active NFE?

Subparagraph D(10)(b) in the definition of Active NFE set out in the AEOI Law describes the criterion to qualify for the Active NFE status as follows:

« the stock of the NFE is regularly traded on an established securities market or the NFE is a Related Entity of an Entity the stock of which is regularly traded on an established securities market ».

The Commentary (Commentary on Section VIII, paragraph 128) provides that stock is « regularly traded » if there is meaningful volume of trading with respect to the stock on an on-going basis, and an « established securities market » means on exchange that is officially recognized and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange. Further guidance regarding these definitions can be found in the Commentary on Section VIII at paragraphs 113 to 115.

ABBL takes the view that, at the level of the European Union, all the markets, which have been conferred upon the status of a regulated market pursuant to article 47 of the Markets in Financial Instruments Directive (MiFID)[9], shall be considered as established securities markets for the purpose of the AEOI Law[10]. This includes the Luxembourg Stock Exchange[11]. ABBL further takes the view that markets operated by an exchange established outside the European Union that is a member of the World Federation of Exchanges (WFE)[12], which is the trade association of 62 publicly regulated stock, futures and options exchanges[13], shall be also considered as established securities markets for the purpose of the AEOI Law. For the two aforementioned categories of markets, ABBL takes the view that there shall be no need to check whether there is a meaningful annual value of shares traded on such markets. ABBL also takes the view that a securities market that is neither a regulated market for the purpose of MiFID nor a market operated by an exchange that is a member of WFE shall be also recognized as an established securities market for the purpose of the AEOI Law if it is recognized as such by another Participating Jurisdiction. As for the latter, a conclusive element can be derived from a specific reference to the market or exchange under review in a guidance document produced by the competent public authority of the relevant jurisdiction.

4. What is a « non-profit NFE »?

Subparagraph D(10)(h) in the definition of Active NFE set out in the AEOI Law lists the

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[9] Directive 2004/39/EC.

[10] The full list of the regulated markets for the purpose of MiFID is published on a regular basis in the Official Journal of the European Union:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:348:0009:0015:EN:PDF

[11] https://www.bourse.lu/accueil

[12] http://www.world-exchanges.org/

[13] A member exchange of WFE should in particular (i) be significant within its country of origin and (ii) be regulated by a supervisory body, within a statutory framework.

requirements for « non-profit NFEs » to qualify for Active NFE. One of these requirements is that the applicable laws of the NFE's jurisdiction of residence or the NFE's formation documents do not permit any income or assets of the NFE to be distributed to, or applied for the benefit of, a private person or non-charitable Entity other than pursuant to the conduct of the NFE's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFE has purchased. In addition, the income or assets of the NFE could be distributed to, or applied for the benefit of, a private person or non-charitable Entity as payment of reasonable compensation for the use of property.

The following entities automatically fulfill the conditions set out at subparagraph D(10)(h):

- *Associations reconnues d'utilité publique, article 26-2 de la loi modifiée du 21 avril 1928*
- *Fondations, articles 27 et suivants de la loi modifiée du 21 avril 1928*
- *ONGD, article 7 de la loi du 9 mai 2012 modifiant la loi modifiée du 6 février 1996*
- Any other entities that may receive tax deductible donations according to article 112 of the Luxembourg income tax law: http://www.impotsdirects.public.lu/az/l/libera_dons/

Non-profit organizations (« *asbl* ») created under Luxembourg law but that are not recognized to be of public utility (« *reconnues d'utilité publique* ») shall be presumed to be Active NFEs pursuant to subparagraph D(10)(h), unless an apparent contradiction can be noted by the Reporting Financial Institution between this status and the information available to the Reporting Financial Institution.

Section VII: Controlling Persons of Passive NFEs

1. Do the definitions of Controlling Person and Beneficial Owner always refer to the same individuals?

A sound identification of account beneficiaries under applicable anti-money laundering regulations is an essential prerequisite to the correct identification of Controlling Persons.

According to the CRS, the term « Controlling Person » refers to the natural persons who exercise control over an Entity and must be interpreted in a manner consistent with the FATF Recommendations with the aim of protecting the international financial system from misuse including with respect to tax crimes. The Commentary (Commentary on Section VIII, para 132) adds that the term « Controlling Person » corresponds to the term « beneficial owner » as described in Recommendation 10 and in the related interpretative note of the FATF Recommendations. Any individual identified as beneficial owner of the Entity under review under applicable anti-money laundering regulations should therefore qualify as Controlling Person of the said Entity for the purpose of the CRS.

Regarding trusts, it shall be noted that the definition of Controlling Person is wider in its scope than the definition of beneficial owner. The Commentary provides that the settlor(s), the trustee(s), the protector(s) (if any), and the beneficiary(ies) or class(es) of beneficiaries, must always be treated as Controlling Persons of a trust, regardless of whether or not any of them exercises control over the trust (Commentary on Section VIII, para 134, second sentence). This implies that specific enquiries might be necessary under the CRS in order to identify the Controlling Persons of trust that is a Passive NFE, notably when the information collected by the Reporting Financial Institution for AML/KYC purposes does not refer to any beneficiaries of the trust at hand as beneficial owner of the same trust. The foregoing considerations should apply *mutatis mutandis* in cases where a trust holds a controlling interest in a corporate entity that is a Passive NFE. Where the settlor, the trustee, the beneficiary(-ies) or the protector of a trust (or a similar legal arrangement) is an Entity, the Controlling Person(s) of the said Entity shall be considered as Controlling Person of the Passive NFE under review as well.

Additional considerations regarding the status of discretionary beneficiaries of a trust can be found at Q&A 4 below.

2. Can one validly conclude that a Passive NFE does not have any Controlling Person?

No. To the extent that the Entity under review qualifies as a Passive NFE, there should be always at least one individual identified and, where applicable, reported, as Controlling Person. Reference is made to the identification requirements regarding beneficial owners set forth in the Luxembourg AML Law, which also refer to individuals.

Reporting Financial Institutions cannot validly invoke any simplified due diligence under the Luxembourg AML Law related to listed entities and their majority-owned subsidiaries as these entities are not Passive NFEs in the first instance. Where a Passive NFE is held, in whole or in part, by a Financial Institution, the Reporting Financial Institution maintaining the account under review is required to determine which individuals exercise control over the said Financial Institution, either through equity ownership or voting rights or, where applicable, through other means.

It shall be further noted that the 25% ownership or entitlement thresholds referred to in the definition of beneficial owner set out in the Luxembourg AML Law constitute deeming rules and are not meant to exclude from the definition of beneficial owner individuals holding an equity interest or property entitlement lower than 25% in the Entity under review. A controlling ownership interest depends in the first instance on the ownership structure of the entity under review. Regarding corporate entities, where no individual can be identified as exercising control on the Entity under review by way of equity ownership or voting rights, members should refer to any natural person who otherwise exercises control over the management of the Entity under review (i.e. control through other means or as senior managing official). Additional considerations regarding how this test shall be applied can be found at Q&A 3 in the present section.

In view of this background, members should not validly accept a self-certification in relation to a Passive NFE that does not refer to at least one individual as Controlling Person of the said entity, unless the required information is obtained in a separate self-certification provided by the relevant individual(s).

3. How and when to apply the senior managing official test?

The Commentary provides that, where no natural person is identified as exercising control over a corporate entity through ownership interest, voting rights or, as the case may be, other means, the Controlling Person(s) of the entity will be the natural person(s) who hold the position of « senior managing official » (Commentary on section VIII, para 133, last sentence).

This test echoes the test applicable for the identification of beneficial owners of corporate entities for anti-money laundering purposes, which requires the identification of any natural person who exercises control over the management of a corporate entity (Luxembourg AML Law, article 1(7)(a)(ii)). As per the interpretative notes to Recommendation 10 of the FATF Recommendations, the identification of the natural person(s) who hold(s) the position of senior managing official is only mandatory if no natural person exercising control over the legal person under review through ownership interests or other means can be identified.

The senior managing official test shall therefore be construed as being subsidiary to the test requiring the identification of natural person(s) exercising control over the entity by equity ownership, voting rights or, as the case may be, other means. It shall be noted that the senior managing official test does not apply where the Passive NFE under review is a legal arrangement, such as a trust or a legal person functionally similar to a trust, such as a foundation.

When the senior managing official test must be applied, in the absence of natural persons otherwise exercising control over the entity under review, this test shall be applied vis-à-vis the Passive NFE that is the holder of the Financial Account under review, and not, where applicable, any entity holding an equity interest in the said Passive NFE.

The foregoing considerations apply *mutatis mutandis* to corporate entities holding a controlling interest (e.g. a corporate trustee) in a Passive NFE holding a Financial Account with a Reporting Financial Institution.

4. What is the treatment of discretionary beneficiaries of a trust?

When a trust is a Passive NFE, the treatment of discretionary beneficiaries will vary depending on whether these are individually identified at the time of the review:

(a) For beneficiaries that are designed by characteristics or by class, Reporting Financial Institutions should obtain sufficient information concerning the beneficiaries to satisfy the Reporting Financial Institution that it will be able to establish the identity of the beneficiaries at the time of the pay-out or when the beneficiaries intend to exercise vested rights (Commentary on Section VIII, para 134, fifth sentence). That occasion will constitute a change of circumstances and will prompt additional due diligence and, where applicable, a reporting of the relevant beneficiaries. It shall be noted that this provision tends to reflect similar obligations regarding beneficiaries of trusts in the 2012 FATF Recommendations. Within the EU, these obligations are translated into EU law by Directive (EU) 2015/849 (the 4th AML directive), which includes in the definition of beneficial owner of a trust *"the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates"*. Also, obliged entities shall obtain *"sufficient information concerning those beneficiaries to satisfy the credit institution or financial institution that it will be able to establish the identity of the beneficiary at the time of the payout"* [article 13(5)(b)];

(b) When the beneficiaries of the trust are individually identified, these are immediately reportable as Controlling Person regardless of any payment. It is indeed understood that the option of carving out of reporting obligations discretionary beneficiaries not in receipt of payment that is set out in the Commentary (Commentary on Section VIII, para 134, last sentence) is not offered to Financial Institutions in Luxembourg. It shall be noted that a similar treatment shall apply in other EU Member States, as the European Commission confirmed that the foregoing is the result of a strict policy adopted by Member States in the framework of the adoption of the DAC. ABBL has expressed its concerns regarding the fact that this policy may disadvantage EU Financial Institutions vis-à-vis their peers established in a jurisdiction that is offering the option of carving out discretionary beneficiaries not in receipt of payment.

When a trust is an Investment Entity, the Commentary provides that discretionary beneficiaries are only reportable in relation to years when they receive payment (Commentary on Section VIII, para 70).

5. How to handle conflicts between the information provided in a self-certification and the information collected for AML/KYC purposes?

Inconsistencies between the information collected for AML/KYC purposes and the information provided in a self-certification should usually prompt additional due diligence on the part of the Reporting Financial Institution maintaining the account under review.

In particular, the validity of a self-certification provided with respect to a Passive NFE shall be questioned if certain individuals recorded as beneficial owner are not mentioned as Controlling Person in the said document. Regarding the reverse scenario, whereby an individual not recorded as beneficial owner is mentioned as Controlling Person in the self-certification, a satisfactory explanation may be derived from the fact that the definition of Controlling Person may be wider in its scope than the definition of beneficial owner when applied to trusts (as per Q&A 1 above).

6. How to treat bare owners and usufruct holders of equity entitlements in a Passive NFE?

The outcome of the analysis will depend on whether the individuals at hand have been identified as beneficial owners of the Entity under review. In this context, members may refer to the provisions of article 1852*bis* of the Luxembourg civil code which estasblishes the respective rights of the bare owner and the usufructary where a share is encumbered by usufruct. Unless the by-laws of the company at hand provide otherwise:

- voting rights shall be exercised by the bare owner, except in case of decisions on the sharing of profits where the voting rights are reserved to the usufructary;
- the usufructary shall have the rights to profits, which the company shall decide to distribute;
- in case of redemption of the shares, the bare owner and the usufructary share the redemption proceeds.

From the foregoing provision, and subject to provisions to the contrary under private deed, one may reasonably infer that both the bare owner and the usufructary of a controlling interest in a Passive NFE should qualify as Controlling Person of such an entity.

Section VIII: Due diligence requirements

1. What is the purpose of the due diligence procedures set out in the CRS?

Reporting Financial Institutions are required to perform a review of the Financial Accounts they maintain in order to determine whether the said accounts are Reportable Accounts for the purpose of the CRS, i.e. whether the said accounts are held directly, or, in case of an accountholder that is a Passive NFE, indirectly, by a person residing in a Reportable Jurisdiction.

The level of due diligence required will vary depending on whether the account under review is, on the one hand, a pre-existing account (i.e. an account existing on or before 31 December 2015) or a new account and, on the other hand, a lower value account or a high value account. These procedures are set out in Annex I to the AEOI Law.

The quality of the account review and due diligence procedures put in place by a Reporting Financial Institution will condition to a great extent its compliance with applicable reporting obligations under the AEOI Law. In this respect, it is worth noting that the AEOI Law provides, in line with Section IX of the CRS, that the Luxembourg tax authorities shall control the effective implementation of, and compliance with the due diligence procedures set out in the AEOI Law by Reporting Financial Institutions in Luxembourg and whether the said institutions do not adopt practices aimed at avoiding the reporting of reportable information under the AEOI Law.

2. To what extent can Reporting Financial Instititions rely on third-parties for the performance of their account review and the fulfillment of related due diligence requirements?

The AEOI Law provides that Reporting Financial Institutions in Luxembourg are allowed to use service providers to fulfill the due diligence obligations imposed on them (AEOI Law, Annex I, Section II, paragraph E). In such cases, the AEOI Law provides that the Reporting Financial Institution remains reponsible for their due diligence obligations, which means that the service providers' actions are imputed to the Reporting Financial Institution.

Any such delegation to third-parties shall be without prejudice to the obligations vesting to Reporting Financial Institutions under Luxembourg law on confidentiality and data protection, as per the Commentary (Commentary on Section II, paragraph 6).

3. To what extent is a self-certification required for the purpose of the CRS?

The requirement for, and content of, a self-certification for the purpose of determining the status of accountholders and, where applicable, their Controlling Persons, for the purpose of the CRS will depend as to whether the account at hand is a Pre-existing account or a New account and whether the accountholder is an individual or an Entity.

Regarding Preexisting Individual Accounts, unless the Reporting Financial Institution opts to apply the due diligence procedure for New Accounts to Pre-existing Accounts, the reliance on a self-certification for the purpose of determining the status of accountholders is essentially optional and is therefore left at the appreciation of Reporting Financial Institutions. In this context, a self-certification may be required in order to cure indicia of residence in a Reportable Jurisdiction identified upon review of the account at hand. In cases where such indicia of foreign residence are not cured, the accountholder(s) shall nevertheless be informed about the fact that his/her personal data will be reported to the Luxembourg tax authorities and will be eventually continued to the authorities of the relevant Reportable Jurisdiction(s) for the purpose of the CRS. Additional details regarding the obligations vesting to Reporting Financial Institutions under data protection rules can be found at Section XI below.

With respect to New Individual Accounts, Reporting Financial Institutions must obtain a self-certification upon account opening, which may be part of the account opening documentation that allows the Reporting Financial Institution to determine the Accountholder's residence(s) for tax purposes.

Regarding Entity Accounts, the requirement for a self-certification will essentially vary depending on the circumstances of the Entity under review and the information available to the Reporting Financial Institution. ABBL nevertheless recommends Reporting Financial Institutions in Luxembourg to systematically seek a self-certification from their Entity accountholders in the interest of the quality of their due diligence for the purpose of the CRS.

4. What are the conditions attached to the validity of a self-certification?

In order to be valid, a self-certification needs to fulfill certain formal requirements set out in the AEOI Law and must include the minimum information required under the AEOI Law. This information will vary depending on whether the underlying account is an individual account or an Entity account. The full details of the information required can be found in the Commentary (Section IV, paragraph 7 and Section V, paragraph 14).

A self-certification may be signed (or otherwise positively affirmed) by any person authorised to sign on behalf of the Account Holder under Luxembourg law.

The self-certification may be provided in any manner and in any form (e.g. electronically, such as portable document format (.pdf) or scanned documents) provided that it is complete with respect to the required information described above and that the Reporting Financial Institution is able to reasonably identify the person who sends the self-certification.

The self-certification may be pre-populated by the Reporting Financial Institution to include the Account Holder's information, except for the jurisdiction(s) of residence for tax purposes, to the extent already available in its records.

Beyond these formal requirements, a self-certification may be invalid because the Reporting Financial Institution knows or has reason to know that the self-certification is incorrect or unreliable (the « reasonableness test »). Additional details in this respect can be found under Q&A 8 below.

5. Is a self-certification also valid with respect to elapsed reportable periods?

Yes. ABBL takes the view that a Reporting Financial Institution in Luxembourg may validy assume that the status (and residence) claimed in a self-certification also applies with respect to precedent reporting periods unless elements to the contrary are available in the client file and/or are publicly available. This means for instance that a self-certification signed in 2017 is also valid with respect to 2016 unless an apparent contradiction can be noted by the Reporting Financial Institution between the status claimed and the information available to the Reporting Financial Institution.

6. Which self-certification forms shall be used?

The AEOI Law does not prescribe mandatary forms or examples of such forms for self-certification under the CRS. This means that Reportable Financial Institutions may in principle use any form the content of which reflects the information required under the AEOI Law for a self-certification to be valid. Regarding New Accounts, it shall be noted that the self-certification may be embedded in the account opening documentation, i.e. the information required shall not be necessarily confirmed on a separate document.

The OECD has published on the AEOI Portal a series of templates for the purpose of self-certification under the CRS, which have been drafted by the Business and Industry Advisory Committee to the OECD (BIAC). It shall be noted that the OECD has not formally approved the forms and neither the OECD nor BIAC regard them as mandatory or as best practice documents. They serve only to illustrate how financial institutions may consider requesting customer information from their accountholders.

- Link to the Entity self-certification template on the AEOI Portal:

http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/CRS_ENTITIES_Self-Cert_Form.pdf

- Link to the Controlling Person self-certification template on the AEOI Portal:

http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/CRS_CONTROLLING_PERSONS_Self-Cert_form.pdf

- Link to Individual self-certification template on the AEOI Portal:

http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/CRS_INDIVIDUAL_Self-Cert_Form.pdf

Finally, it shall be noted that ABBL has issued a FATCA-CRS self-certification template, which may be used by Reporting Financial Institutions in Luxembourg. This template is not official and its use remains optional for members.

- Link to the ABBL FATCA-CRS entitty self-certification template:

http://www.abbl.lu/en/professionnals/legaltax/abbl-guidance-notes-on-the-implementation-of-fatca-rules-in-luxembourg

7. Which documentary evidence is acceptable to support the status of an accountholder for the purpose of the CRS?

According to the AEOI Law, the term Documentary Evidence includes any of the following:

- a certificate of residence issued by an authorised government body (for example, a government or agency thereof, or a municipality) of the jurisdiction in which the person claims to be a resident.
- with respect to an individual, any valid identification document issued by an authorised government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes.
- with respect to an Entity, any official documentation issued by an authorised government body (for example, a government or agency thereof, or a municipality) that includes the name of the Entity and the address of its principal office either in the jurisdiction in which it claims to be a resident or in the jurisdiction in which the Entity was incorporated or is organised.
- any audited financial statement, third-party credit report, bankruptcy filing, or regulator's report.

According to the Commentary (Section VIII, paragraph 155), Documentary Evidence that contains an expiration date may be treated as valid on the later of that expiration date, or the last day of the fifth calendar year following the year in which the Documentary Evidence is provided to the Reporting Financial Institution. However, the following Documentary Evidence is considered to remain valid indefinitely:

- Documentary Evidence furnished by an authorised government body (such as a passport);
- Documentary Evidence that is not generally renewed or amended (such as a certificate of incorporation); or
- Documentary Evidence provided by a Non-Reporting Financial Institution or a Reportable Jurisdiction Person that is not a Reportable Person.

It is reasonable practice to consider that passports or ID-cards that have expired at the moment of their receipt do not constitute acceptable documentary evidence since Documentary Evidence that contains an expiration date will be treated as valid until it expires.

8. How to apply the « reasonableness test »?

The AEOI Law provides that a Reporting Financial Institution may not rely on a self-certification or Documentary Evidence if the Reporting Financial Institution knows or has reason to know that the self-certification or Documentary Evidence is incorrect or unreliable.

The CRS and the related Commentary provide ample guidance regarding the application of this « reasonableness test » (please refer to: Commentary to Section IV, paragraphs 22 to 25; Commentary to Section VII, paragraph 8 to 10).

In particular, it shall be noted that Reporting Financial Institutions are not required to perform a tax analysis in order to ascertain the plausibility of the claim set out in the

self-certification or Documentary Evidence at hand. However,
the fact that the professional address of a given individual is located in another jurisdiction than the private address of the same individual in the file maintained by the Reporting Financial Institution should prompt additional due diligence.

Whether a self-certification provided by an Entity accountholder shall be questioned as to the status of the Entity at hand should depend on the general circumstances of the said Entity. In case where no apparent contradiction can be noted by the Reporting Financial Institution between the status claimed by the Entity and the information available to the Reporting Financial Institution, the self-certification can be accepted as such. By contrast, where a contradiction between the status claimed and the information available is noted, this situation shall trigger further due diligence on the part of the Reporting Financial Institution. Such a situation can occur for instance where the corporate object or the NACE code ascribed to the Entity under review is not compatible with the status claimed by the said Entity under the AEOI Law. Likewise, the fact that an Entity is claiming a different status under FATCA and the CRS should prompt additional due diligence on the part of the Reporting Financial Institution maintaining the account under review.

9. How and when to apply the relationship manager enquiry?

The relationship manager enquiry is required for high value individual accounts in addition to the electronic search and the paper record search. The Financial Institution must consider whether any relationship manager associated with an account, which includes any accounts aggregated with such an account, has knowledge that would identify the Account Holder as a Reportable Person.

Per our exchange of views with the Luxembourg tax authorities, the relationship manager enquiry shall be applied to all pre-existing high value individual accounts maintained by a Reporting Financial Institution, irrespective of whether the account at hand has been identified as a Reportable Account on the basis of the electronic/paper record search.

For the avoidance of doubt, it shall be noted that the special aggregation rule applicable to the relationship manager enquiry set out in the Annex I to the AEOI Law (Section VII, paragraph C(3)) relates to Financial Accounts held by the person under review with the relevant Reporting Financial Institution.

A relationship manager is an employee or officer of the Financial Institution who has been assigned responsibility for specific Account Holders on an ongoing basis. A relationship manager will provide advice to Accountholders regarding their accounts as well as recommending and arranging for the provision of financial products, services and other related assistance. Relationship management must be more than ancillary or incidental to a person's function. Thus, a person with some contact with Accountholders, but whose functions are of back office, administrative or clerical nature, shall not be considered to be a relationship manager. Also, the mere allocation of a contact name to a client is not sufficient for the employee or officer at hand to be considered as relationship manager for the purpose of the CRS.

Further guidance regarding the relationship manager enquiry can be found in the Commentary (please refer to: Section III, paragraphs 38 to 42).

Section IX: Tax Payer Identification Number (TIN)
1. Where can information be found about foreign TINs? The CRS includes an expectation that Participating Jurisdictions will provide Reporting FIs with information with respect to the issuance, collection and, to the extent possible, the practical structure and other specification of TINs (Commentary on Section VIII, paragraph 149). The OECD is facilitating this process through a centralized dissemination of jurisdiction-specific information on the AEOI Portal: https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-identification-numbers/
2. Are Reporting FIs required to perform any check on TINs? Reference is made to the corresponding question and answer in the OECD FAQs (Sections II-VII, Q&A 6). A Reporting FI will have reason to know that a self-certification is unreliable or incorrect if the self-certification does not contain a TIN and the information included on the AEOI Portal indicate that the relevant Reportable Jurisdiction issues TINs to all tax residents. The CRS does not require Reporting FIs to confirm the format and other specifications of a TIN with the information provided on the AEOI Portal. However, a Reporting FI may nevertheless wish to do so in order to enhance the quality of the information collected and minimise the administrative burden associated with any follow up concerning reporting of an incorrect TIN.
3. Is a TIN a prerequisite for opening a Financial Account ? Reference is made to the related question and answer in the OECD FAQs regarding the the timing of self-certifications (Sections II-VII, Q&A 20) and related considerations in the ACD FAQs (section 4.2). Obtaining valid self-certifications for New Accounts is a critical aspect of ensuring that the CRS is effective and the collection of the TINs issued by any relevant Reportable Jurisdiction with respect to the said accounts is an integral part of this exercise. Reporting FIs are nevertheless allowed to obtain a self-certification within a period of 90 days after account opening in a limited number of circumstances, which are not defined in the aforementioned litterature. ABBL takes the view that, where a client has recently moved to another juridiction but a TIN has not yet been issued by the said jurisdiction, Reporting FIs in Luxembourg should be allowed to open a Financial Account without obtaining beforehand the client's TIN of his/her new jurisdiction of residency. Members are recommended to obtain before opening the account a written declaration from the prospective accountholder stating that his/her TIN or equivalent number has not yet been issued, or has been applied for, and containing a commitment to provide such TIN or equivalent number within a period of 90 days. Where the TIN is not available when the 90-day period has lapsed, members should take

appropriate actions as prescribed by in the ACD FAQs (e.g. by closing the account or by restricting the access to the account). As an exception to the foregoing, where the accountholder provides tangible evidence that the delay in the issuance of the TIN is not attributable to him/her but rather to the internal processes of the issuing jurisdiction, ABBL takes the view that a Reporting Financial Institution may validly assume that no TIN has been issued by the said jurisdiction until such TIN becomes effectively available (as per the Commentary on Section I, paragraph 30). Such tangible evidence should preferably take the form of a certificate from the competent authority of the issuing jurisdiction. In any case, members should ensure that they have obtained and validated the relevant self-certification in time to be able to meet their due diligence and reporting obligations with respect to the reporting period during which the account at hand was opened.

Section X: Data protection

1. Does the implementation of the CRS trigger specific obligations for FIs under data protection rules?

Yes. An outline of the said obligations can be found in ABBL Member Briefing n°33 (« Automatic Exchange of Information: Banks as Data Controllers ») dated 11 February 2016. An update reflecting subsequent exchange of views with the National Commission for Data Protection (CNPD) can be found at Q&A 2 below.

As a reminder, obligations vesting to Reporting FIs pursuant to the Luxembourg Data Protection Law[14] are essentially threefold:

(a) Reporting FIs in Luxembourg are required to notify to the CNPD the processing of personal data for the purpose of the AEOI Law;
(b) Individual Accountholders and Controlling Persons of Passive NFEs shall be informed about the processing of their personal data for the purpose of the same; and
(c) The individuals that qualify as Reportable Person shall be informed about the fact that their personal data will be disclosed to the Luxembourg tax authorities and will be eventually continued to the tax authorities of the jurisdiction(s) identified as his/her jurisdiction(s) of tax residence. The individuals concerned have a right of access and rectification regarding their reportable data.

Any questions regarding the foregoing should be discussed in priority with the CNPD.

2. Are the relevant information requirements obligations of means or obligations of result ?

It was initially understood that the aforementioned information requirements under article 26 of the Data Protection Law were obligations of result for the perspective of Reporting FIs[15]. However, based on subsequent exchange of views with the CNPD, it appears that Reporting FIs cannot be legally required to establish that the relevant individuals have effectively received the required information. Rather, Reporting FIs should be able to establish that they have dedicated appropriate resources to fulfilling the information requirements vesting to them under data protection rules. In this context, it is noted that article 27(3) of the Data Protection Law provides that the aforementioned information obligations do not apply in the first instance where *« it is not possible to notify the data subject or doing so entails disproportionate efforts ».* The scope of this exemption is left to the individual judgement of members. Members are reminded that the aforementioned information requirements remain their legal responsiblity in case of outsourcing and vis-à-vis Controlling Persons of Passive NFEs.

[14] *Loi modifiée du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel*

[15] As per ABBL Member Briefing n°33 (« Automatic Exchange of Information: Banks as Data Controllers ») dated 11 February 2016

3. How and when shall individual Reportable Persons be informed about the fact that their personal data will be disclosed to the Luxembourg tax authorities?

The practicalities and timing of the notification are left at the appreciation of individual members and will notably vary depending on whether the underlying self-certification was obtained from the individual under review or, in case of an account held by a Passive NFE, the controlled entity. It shall be noted though that the information shall be provided sufficiently in advance for the individual at hand to exercise his/her data protection rights and shall *explicitly* and *unequivocally* designate the Reportable Jurisdiction(s) identified by the Reporting Financial Institution as being the country(-ies) of tax residence of the individual under review.

Section XI: Reporting

1. What is the deadline for reporting Reportable Accounts to the Luxembourg tax authorities?

Reporting Financial Institutions in Luxembourg are required to report the information required with respect to each Reportable Account under the AEOI Law no later than 30 June of the year following the relevant reportable period. This means for instance that the reporting of information with respect to 2016 should be completed by 30 June 2017.

2. How to report Financial Accounts with a nil or negative balance?

Per the Commentary, (Section I, paragraph 10), Financial Accounts with a nil or negative balance must be reported as having an account balance (or value) of zero.

3. Is the type of control exercised by a Controlling Person over a Passive NFE a mandatory information for reporting purposes?

Circular ECHA n° 4 provides at section 7.7.2.2.2.3.4 (page 51) a series of 13 alternative data elements regarding the type of control exercised by a Controlling Person over a Passive NFE. The Luxembourg tax authorities confirmed that this information is mandatory in the reporting file.

This point should constitute a point of attention for Reporting Financial Institutions, who will need to capture the relevant data in their systems if not done so yet.

ABBL has expressed its reservations regarding the mandatory character of the information at hand, as the AEOI Law does not require Reporting Financial Institutions to collect and report the type of control exercised by Controlling Persons over a Passive NFE.

4. How to report a Financial Account when a TIN is missing?

Circular ECHA n° 4 provides (at page 44) that, in case where a Reporting Financial Institution was unable to collect a TIN, the Financial Account shall be reported using the specific code #NTA001# (i.e. *« No TIN has been obtained despite reasonable efforts engaged by the RFI. »)*. The relevant data field in the reporting file cannot be left blank, otherwise the file will be rejected.

The Luxembourg tax authorities advised that additional codes will be issued regarding missing TINs in the future.

5. How to report Financial Accounts denominated in CNH (offshore *renminbi*)?

The acronym « CNH » refers to the Chinese currency (*renminbi*) when traded outside China, as opposed to the acronym CNY, which refers to the same currency when traded within the People's Republic of China. This reflects the current separation between the domestic and offshore renminbi markets. It shall be noted that the currency « CNH » is reportedly not referenced in the XSD schema published by the OECD.

The Luxembourg tax authorities advised that Financial Institutions in Luxembourg maintaining Reportable Accounts denominated in CNH should, for the purpose of the reporting of the said accounts, either (a) convert the CNH amounts in EUR prior to reporting or (b) report these amounts as CNY amounts without performing any currency conversion.

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