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The ATAD general anti-abuse rule in Luxembourg

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The article discusses the implementation of the ATAD general anti-abuse rule into Luxembourg law, reflecting also on the previous Luxembourg anti-abuse regime and its relevance and potential impact in the light of the application of the ATAD general anti-abuse rule.

Introduction

1. Two anti-tax avoidance directives, respectively Council Directive (EU) 2016/1164 of 12 July 2016 ("**ATAD 1**") and Council Directive (EU) 2017/952 of 29 May 2017 ("**ATAD 2**"), designed to tackle tax avoidance within the internal market, have significantly impacted the European tax landscape.

ATAD 1 was introduced into Luxembourg law by the Law dated 21 December 2018 and most provisions have been applicable since 1 January 2019 (*i.e.* those relating to interest limitation, controlled foreign company, hybrid instruments within the EU and general anti-avoidance rule), with the exception of the rules pertaining to exit taxation, which were made applicable only as from 1 January 2020.

On 19 December 2019, the "**ATAD 2**" was implemented in Luxembourg with the intention to extend the scope of anti-hybrid mismatches rules to third countries (effective as from 1 January 2020), with the exception of "reverse hybrid" rules that will only be applicable as from the 2022 tax year.

Luxembourg plays an important role as a financial center in Europe and therefore the consequences of ATAD 1 and ATAD 2 implementations are of great significance to international businesses and investors using Luxembourg as a stepping-stone for their investors in and beyond Europe.

Interest limitation rule	Article 4 of ATAD 1 - Art. 168bis Luxembourg Income Tax Law ("**LITL**")
Exit taxation	Article 5 of ATAD 1 – § 127 Luxembourg General Tax Law (*Abgabenordnung*, "**AO**»)
General anti-abuse rule ("**ATAD GAAR**")	Article 6 of ATAD 1 - § 6 Steueranpassungsgesetz ("**StAnpG**")
Controlled foreign companies ("**CFC**") rules	Articles 7 and 8 of ATAD 1 - Art. 164ter LITL
ATAD 1 anti-hybrid mismatch rules (EU only) and ATAD 2 anti- hybrid mismatch rules (including third countries) ATAD 2 "reverse hybrid" rules	Article 9 of ATAD - Art. 168ter LITL Article 9a of ATAD 2 - Art. 168quater LITL

2. The focus of this article is the implementation and scope of the ATAD 1 general anti-avoidance rule in Luxembourg.

To the extent that the new general anti-abuse rule, as adapted following the transposition of ATAD 1, is relying on the concepts of abuse of law established prior to 2019, this contribution will first reflect on the main features of the previous Luxembourg regime of abuse of law and corresponding case law (**I**) before considering the scope and perspectives of the amended §6 StAnpG brought about by the implementation of ATAD 1 (**II**).

I. Evolution of the concept of GAAR in Luxembourg

A. Luxembourg domestic GAAR as implemented by the legislator prior to ATAD 1

1° Legal basis

3. Prior to the implementation of ATAD 1 into Luxembourg tax law (effective 1 January 2019), Luxembourg tax law already provided for a GAAR in § 6[1] StAnpG which reads as follows:

"*The tax liability cannot be circumvented nor reduced by abusing the forms and institutions of private law*".

This provision empowered the Luxembourg tax authorities with the ability to levy tax "*as they should be levied if the legal structure was appropriate in view of the economic processes, facts and relations*" and codified the general concept of *abus de droit* in Luxembourg tax matters. However, it did not define the notion of abuse, which was instead developed through Luxembourg case law.

Ever since the 19th century, the overarching principle of Luxembourg taxation established by case law was that taxpayers are in principle free to choose, within the course of their business, the most appropriate and least burdensome structure from a tax perspective. Understandably, the limits to that freedom were for a long time at the heart of all relevant tax disputes in the area and have evolved significantly in the course of the last 50 years. Over time, Luxembourg courts established four criteria for the application of § 6 StAnpG[2].

2° Four criteria of abuse of law

4. In order for the former § 6 StAnpG to apply to a taxpayer and an abuse of law to be recognized, the Luxembourg (tax) courts had established the following four criteria that needed to be satisfied cumulatively:

- the use of legal forms and institutions of private law;
- which circumvented or reduced the tax burden;
- by using an inappropriate path (structure); and
- thereby lacking non-tax reasons justifying the chosen arrangement.

5. As the former § 6 StAnpG addressed exclusively legal forms and institutions of private law, taxpayers were generally freely allowed to make use of favorable regimes introduced in Luxembourg tax law (*e.g.* fiscal unity or intellectual property regime) which would typically not be covered by the GAAR. Nevertheless, in 2014 case[3], the Luxembourg Administrative Court dismissed the argument that the use of non-private law arrangements (such as the Luxembourg fiscal unity regime) should fall outside the scope of § 6 StAnpG. The Administrative Court ruled that the mere fact of establishing a subsidiary to benefit from the Luxembourg tax unity regime was considered as "use of legal forms and institutions" (for more details see Section I, B. 3° below ; V. § 8).

The second condition requires that the chosen structure results in a circumvention or reduction of the tax liability and thereby by definition applies to taxpayers that themselves are subject to tax and make use of arrangements that reduce/prevent this.

In general, the first two conditions can be established more easily, whereas the third and fourth conditions are more receptive to different interpretations and therefore more often give rise to discussions.

For an arrangement to be considered inappropriate, it should be demonstrated that the (tax) consequences of such arrangement are contrary to the intention and/or purpose of the (tax) law. Although courts generally tend to interpret provisions as literally as possible, an arrangement that falls in the scope of such literal interpretation may still be considered inappropriate in case it conflicts with the purpose of the relevant provision(s)[4]. In other words, understanding the purpose of tax law provisions is essential in determining whether a literal application thereof is successful. Furthermore, if a structure is considered to lack any form of economic rationale or if it is clear, when reviewed in its entirety in conjunction with any other arrangement put in place, that it would not have been set up between third parties, then it may be considered as inappropriate and could be exposed to an abuse of law risk. It is fair to say that this condition is more objectively measured (*i.e.* outcome versus intention/ purpose of law) rather than that it is measured subjectively by reference to the intentions of the taxpayer itself.

The fourth condition, the absence of non-tax reasons, stipulates that the inappropriate path by using legal forms

1 This provision only refers to the abuse of law and does not provide for the notion of simulation which is provided for by §5 StAnpG

2 W. Haslehner, The Meaning of avoidance, abuse and aggressive tax planning, *in* A.-P., Dourado (ed.), Tax Avoidance Revisited in the EU BEPS Context : EATLP International Tax Series, Volume 15, IBFD, 2017.

3 See CA Luxembourg, 18 March 2014, 32984C.

4 *Ibidem*.

and institutions of private law resulting in arrangement(s) put in place were solely tax motivated and lacked any form of economic rationale. Lately, while seeking whether such condition was fulfilled, the case law sometimes referred to the existence of "real" non-tax motives and "sufficient economic benefit"[5].

B. Clarification of the notion of GAAR under the Luxembourg case law

1° Burden of proof

6. Under the former § 6 StAnpG, recognizing the fundamental freedom of taxpayers to arrange their affairs in the most tax-friendly manner and being permitted to take plausible positions in the interpretation of the relevant tax provision(s), the burden of proof for the existence of an abuse primarily lied with the Luxemburg tax authorities. Consequently, they had, within the limits of what can realistically be expected from them, to present facts and circumstances that gave rise to an abuse of law.

However, recent case law resulted in a partial shift of the burden of proof to the taxpayer so that it had been generally accepted that the burden of proof lies with both the Luxembourg tax administration and the person of the taxpayer.

In order to successfully challenge an arrangement as abusive, the Luxembourg tax authorities must evidence the absence of an economic rationale. In this respect, it was usually sufficient for them to show plausibly that other non-tax (*i.e.* economic) reasons were lacking which then shifted the burden of proof (back) to the taxpayer. The taxpayer should then demonstrate the presence of non-tax (*i.e.* economic) reasons justifying the structure[6]. However, just as the tax administration is not expected to demonstrate the elements, which they can reasonably not provide, in case the arguments submitted by both parties are insufficient to show the existence or absence of non-tax reasons, the taxpayer should be given the benefit of the doubt.

2° Losses carried forward

7. Article 114 LITL provides that only the "person" that incurs losses can be entitled to the benefit of the tax losses carried forward provided certain additional conditions are met.

In one of the first cases involving the tax treatment of corporate tax losses upon a change of shareholder (the so-called the *Mantelkauf* case[7]), the Luxembourg tax authorities took the position that a concomitant transfer of a company to a new shareholder and substantial change in the original activities entail the loss of the tax identity of the original taxpayer and the subsequent loss of the tax losses carry-forward.

This case demonstrates that despite their usual "corporate law" approach according to which the right to carry tax losses forward remains available as long as the legal identity of a company is preserved, the Administrative Court does not exclude the application of GAAR if the transaction is abusive.

In a judgment[8] from February 2016, the right to carry tax losses forward following a change of shareholders, was addressed again by the Luxembourg courts. The Administrative Court then ruled that certain circumstances such as the termination of a loss-making activity by a company and the subsequent transfer of its shares to new shareholders in the absence of any employee or infrastructures (empty shell) is to be considered as a strong indication of tax abuse within the meaning of GAAR.

3° Investment tax credits

8. In this case, a company with a real-estate management activity established a subsidiary in order to rent vehicles to companies forming part of a tax consolidated group. The subsidiary applied for an investment tax credit within the meaning of article 152bis LITL. The Luxembourg tax authorities refused the request on the grounds that the vehicles were exclusively rented to the group companies or related parties. The Administrative Court followed this reasoning by qualifying the structure as an abuse of law contrary to the purpose of the article 152bis LITL which is intended to only apply to rental companies offering their services on the general market.

The taxpayer argued that the first of the four criteria required to establish an abuse of law was not met since the fiscal unity regime is not a form or an institution of private law. However, the Court confirmed the existence of the abuse and by considering that the first criterion was met in view of the fact that the incorporation of the subsidiary (and not the tax consolidation regime) was to be viewed as a use of a legal form of private law.

4° Advance tax agreements

9. In two separate decisions rendered in 2017[9], the Administrative Tribunal confirmed the absence of the abuse of law in the presence of a valid advance tax agreement (*i.e.*, meeting the criteria prescribed by the law), without even analyzing the application of the four criteria of the abuse of law. It was considered that the Luxembourg tax administration could not refuse the application of this agreement for which it gave its approval considering that the factual background had not changed and that there had been no change in the law in the period between the approval of the agreement and the issue of the tax assessment. Therefore, these decisions of the Administrative Tribunal seem to give the priority to the principles of legitimate expectations of a taxpayer and legal certainty over the application of § 6 StAnpG, in the presence of a valid advance tax agreement[10].

5 See CA Luxembourg, 16 February 2016, 35978C. – CA Luxembourg. 18 March 2014, 32984C, préc., etc.

6 See CA Luxembourg. 18 March 2014, 32984C, préc.

7 CA Luxembourg, 4 February 2010, 25957C.

8 See CA Luxembourg, 16 February 2016, 35978C, préc.

9 See TA Luxembourg, 31 May 2017, 36320, 37440 and 37441. - TA Luxembourg, 1 June 2017, 37606.

10 See S. Douénais et J. Zielinski-Vogt, Confirmation de l'absence d'abus de droit en présence d'un ruling valable : RGFL 2017/3, p. 70-72.

It should, however, be noted that following the introduction of a §29b AO by the law dated 20 December 2019, advance tax agreements granted by the Luxembourg tax authorities before 1 January 2015 shall no longer be valid after 31 December 2019, unless renewed in accordance with the specific procedure provided for by the same law[11].

II. Implementation of ATAD GAAR in Luxembourg tax landscape

A. Adaptation and modernization of the GAAR

1° The transposition of ATAD GAAR

10. ATAD GAAR, introduced by Article 6 of ATAD 1, was implemented into Luxembourg domestic law and effective as per 1 January 2019 following the revision of § 6 StAnpG which is now worded as follows:

"*Tax law cannot be circumvented by an abuse of legal forms and institutions of law. There is abuse within the meaning of the preceding sentence if the legal path has been used to obtain, as a main purpose or as one of the main purposes, a circumvention or reduction in the tax burden contrary to the object or purpose of the tax law, is not genuine in the light of all the relevant facts and circumstances. For the purposes of this provision, the legal path, which may include several stages or parts, is considered non-genuine to the extent that it has not been used for sound business reasons that reflect economic reality.*"

Under ATAD GAAR, **an abuse of law should be recognized when the following three criteria are cumulatively met**:

- the use of legal forms and institutions of the law;
- whereby the legal path (forms or institutions of the law) has been used to obtain, as a main purpose or as one of the main purposes, a tax benefit that defeats the object or the purpose of the tax law; and
- the legal path used is not genuine insofar as it has not been put in place for valid commercial reasons reflecting economic reality[12].

2° The new scope of the GAAR

11. The revised § 6 StAnpG provides an adapted and modernized definition of the concept of tax abuse, but at the same time preserves certain key concepts of the "old" GAAR, rather than entirely replacing it with the wording contained in ATAD 1.

12. With respect to the **first criteria**, the scope of the new GAAR is no longer limited to the forms and institutions of private law. The new wording is designed to include all kinds of abuse of forms and institutions (and therefore has been extended to also cover the forms and institutions of public law).

According to the Luxembourg legislator, while it reflects the spirit and objective of ATAD 1, the reference to the "forms and institutions of the law" ensures a certain continuity with the existing concept of abuse developed by the Luxembourg Courts. The intention of the Luxembourg legislator was also to maintain the uniformity of the general concept of abuse of law in tax matters since the Luxembourg law only features a single provision that applies not only to corporate entities but to all taxpayers in the field of direct taxation[13].

In that respect, it is noteworthy that the amended § 6 StAnpG does not refer to the concept of "*arrangement or series of arrangements*", contained in Article 6 of ATAD 1. However, this concept has already been introduced into domestic tax law in 2015 with the implementation of the anti-abuse rule of the Parent-Subsidiary Directive in articles 147 and 166 LITL. The wording of these provisions is nearly identical to the wording of Article 6 ATAD 1[14].

13. Regarding the **second criteria**, the former reference to "tax liability" has been replaced by the words "tax law" aiming to ensure that an abuse of any provision of any tax law falls within the scope of the GAAR (*i.e.* not only abuse leading to a reduction of the tax burden, but also abuse resulting in – for example – a reimbursement or a tax credit for foreign tax paid).

Furthermore, there is no reference to the concept of "*tax advantage*" as contained in ATAD 1. Instead the reference to "*circumvention or reduction in the tax burden*" issued from case law was kept. Such approach ensures continuity and legal certainty in relation to past administrative practice. The circumvention and reduction of the tax burden is assessed by comparison between the tax burden resulting from the legal path used and that which would be due if the non-authentic legal path had not been taken into account[15].

The Luxembourg parliamentary works also clarified that the taxpayers still have the "*choice of the least taxed way*" (*choix de la voie la moins imposée*), except where (i) the main purpose, or one of the main purposes of the legal path chosen is to circumvent or reduce the tax burden in a way contrary to the object or purpose of the tax law, and (ii) the choice is not genuine having regard to all relevant facts and circumstances (i.e. where arrangements have been put in place for no valid commercial reasons which do not reflect economic reality). However, the presence of commercial reasons alone is not sufficient, they must in addition be real and provide an adequate economic advantage beyond the tax advantage obtained.

11 See FI 1-2020, n° 11, § 30.

12 See Avis du Conseil d'État sur projet de loi no. 7318.

13 See Exposé des motifs au projet de loi no. 7318

14 See Section II, B. 1° below (V. § 16).

15 See Avis du Conseil d'État sur projet de loi no. 7318.

14. Finally, the **third criteria** is assessed with regard to the non-genuine aspect of the legal path used. A legal path is considered as not genuine if, taking into account all the relevant facts and circumstances, it was not chosen for valid commercial reasons which reflect economic reality. This essentially reflects the approach developed by the Luxembourg case law, which has already accepted the absence of valid non-fiscal reasons as a constitutive element of tax abuse. For the economic reasons to be accepted as valid, they must be considered as real and reflect the sufficient economic advantage that is beyond the sole tax benefit obtained.[16] It is important to note that the parliamentary work emphasized that this approach should also be possible in the context of the application of ATAD GAAR.

While it is true that ATAD GAAR reference to "*main purpose or one of the main purposes*" differs from the old GAAR concept of "*sole purpose*", it is difficult to envisage the possible changes that might result from this revision of the GAAR, given the clearly expressed intention of the Luxembourg legislator to ensure continuity and legal certainty for the taxpayers by maintaining the principle notions of abuse of law established under the former provision.

Lastly, it is worth noting that, as it was the case under its former version, the revised § 6 StAnpG applies not only to corporate taxpayers but to all tax payers. Therefore, the revision of § 6 StAnpG led to more changes than those that were imposed on EU member states under Article 6 of ATAD 1 which limits anti-abuse to the "*corporate tax liability*".

B. The interplay between the new GAAR and other anti-abuse rules

15. There appears to be **no clear hierarchy between the different anti-avoidance rules in Luxembourg**. In the past, the Luxembourg tax authorities tended to invoke them in a combined manner, and courts have not addressed the ranking explicitly[17].

However, given the general principle that special rules override general rules (*i.e. specialia generalibus derogant*), the Luxembourg State Council emphasized in its commentaries as part of the legislative process leading to the adoption of ATAD 1 that specific anti-abuse rules should override the GAAR.

Nevertheless, this would not exclude the subsidiary application of § 6 StAnpG (*e.g.* if in a specific case the conditions of a specific anti-abuse rule would not be fulfilled). This is even more relevant now that the GAAR imposes an obligation to deny a certain tax outcome in abusive situations which may themselves not be covered by a specific anti-abuse rule.

Nowadays, the Luxembourg tax law contains several specific anti-abuse provisions, of which an overview is given hereinafter.

1° Parent-Subsidiary Directive anti-abuse rule

16. Following the adoption of EU Council Directive 2015/121, effective 1 January 2016, Luxembourg introduced a general anti-avoidance rule in its participation exemption regime ("**PSD GAAR**"). It prevents the application of the Parent-Subsidiary Directive where there is "*an arrangement or a series of arrangements which, having been put in place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purposes of the Directive, are not genuine considering all relevant facts and circumstances*".

An arrangement should be considered "*not genuine*" insofar as it was not structured for "*valid commercial reasons that reflect economic reality*". Therefore, on face value, there seems no conflict between PSD GAAR and the GAAR included in § 6 StAnpG, other than that § 6 StAnpG gives an instruction to deny an arrangement.

Looking at the scope of the PSD GAAR, which is limited to income derived from EU participations in abuse situations, it should neither apply to capital gains derived from such participations nor to the net wealth tax exemption applicable to shares held in such participation, and neither to income (including capital gains) derived from non-EU participations. However, despite the existence of this specific PSD GAAR, the denial of these benefits may be possible in cases falling in the scope of the § 6 StAnpG[18]. This is the direct consequence of the obligation to ignore the arrangement itself pursuant to § 6 StAnpG, which is not the case under the PSD GAAR.

2° Transfer pricing anti-abuse rule

17. Although the arm's length principle was codified since 2015 (for transactions between domestic entities), the legislator empowered as from 2017 the Luxembourg tax authorities with more means to adjust transactions between related / affiliated parties that do not adhere to this principle (art. 56bis LITL).

Under these new rules, the Luxembourg tax authorities can disregard, partially or fully, a transaction between associated enterprises when such transaction contains one or more elements that do not have a valid commercial rationality and have a substantial impact on the determination of the arm's length price.

This specific transfer pricing anti-abuse rule itself doesn't conflict with the revised § 6 StAnpG since article 56bis LITL aims to merely adjust the intra-group pricing to an arm's length price and only targets that part of a transaction that is not considered to be arm's length whereas the by application of the revised § 6 StAnpG, the entire intra-group

16 See CA Luxembourg, 18 March 2014, 32984C, préc. - CA Luxembourg, 16 February 2016, 35978C and 35979C, préc. : « *il ne suffit pas que le contribuable fasse simplement état de motifs économiques pour que ceux-ci doivent nécessairement être admis comme valables, mais il faut que ces motifs puissent être considérés comme réels et présentant un avantage économique suffisant au-delà du seul bénéfice fiscal obtenu* »

17 W. Haslehner, The Meaning of avoidance, abuse and aggressive tax planning, *in* A.-P., Dourado (ed.), Tax Avoidance Revisited in the EU BEPS Context : EATLP International Tax Series, Volume 15, IBFD, 2017.

18 See Avis du Conseil d'État sur projet de loi no. 6847.

arrangement (and all consequences thereunder including all pricing aspects) would have to be ignored.

3° Capital redemption anti-abuse rule

18. Save the application of reduced withholding tax rates or exemptions imposed under applicable treaties or directives, Luxembourg levies a 15% withholding tax on dividends distributed by Luxembourg taxable companies. A capital reduction may be treated similarly as a dividend in case such reduction is not itself based on sound economic reasons (article 97(3) LITL).

In practice, such reasons are considered absent whenever a company has other distributable reserves at the time a capital reduction takes place. There doesn't seem to be a conflict between the anti-abuse rule applicable to capital reductions and the revised § 6 StAnpG, as one may argue that carrying out a capital reduction is a free choice of the taxpayer. However, at the same time, the withholding tax position may be considered to be only deferred and, assuming the withholding tax to be creditable at the level of the recipient, a capital reduction should generally be considered to be less abusive from an overall perspective and itself doesn't carry a link with an *economic reality*.

4° Capital gain anti-abuse rule

19. Under conditions and save the protection available under tax treaties, Luxembourg non-resident taxpayers may be subject to capital gains tax in respect of gains derived from a disposal of shares forming part of so-called *substantial shareholding* held in a Luxembourg tax resident company in the event such gain is derived within a period of 6 months following the acquisition of such shares, or is derived within a period of 5 years after such substantial shareholder has ceased to be a Luxembourg resident after having previously been a tax resident of Luxembourg for more than 15 years (article 156(8) LITL).

This provision aims to prevent specific abusive situations of (re)migrating shareholders of Luxembourg tax resident companies but should not conflict with the revised § 6 StAnpG for the simple reason that a (re)migration is itself not an *arrangement [that] uses legal forms and institutions of the law*.

5° Interest and royalties anti-abuse rule (draft law)

20. On 30 March 2020, the Luxembourg Government published a draft law introducing measures to deny the tax deduction of interest and royalty payments made to affiliated parties established in certain blacklisted countries such as Cayman Islands and Panama.

The draft law aims to modify article 168 of LITL by adding a paragraph providing that interest and royalty payments made to or due to a related collective entity established in a blacklisted jurisdiction, would become non-deductible expenses for both corporate income tax and municipal business tax purposes, unless the taxpayer is able to prove that these expenses have been incurred in respect of transactions that have been carried out for valid commercial reasons and that reflect economic reality.

The manner in which this provision operates is fundamentally different than that of the revised § 6 StAnpG in the sense that the mere payment to such blacklisted jurisdiction is considered to be (somewhat) abusive or in any event constitutes elements of perceived abuse whilst the existence of *commercial reasons reflecting economic reality* can be an escape to its application. Whilst there can be an overlap between both articles, article 168 LITL itself, when applicable, does not disregard the arrangement itself.

6° CFC rules

21. Luxembourg has introduced controlled foreign company ("**CFC**") rules by means of a new article 164ter LITL for the first time in national legislation as part of its transposition of the ATAD 1 Directive. The provision aims to attribute net income (even if this income is not distributed) to a Luxembourg taxpayer when its subsidiary or permanent establishment is located in a low tax or no tax jurisdiction.

For CFC rules to apply, in addition to the so-called "control test" (the participation of above 50% in a CFC, held directly or indirectly together with any associated enterprises) the "effective tax test" must be met: the actual tax paid by the CFC is lower than 50% of the Luxembourg corporate income tax that would have been paid in Luxembourg had such CFC been resident in Luxembourg for tax purposes.

As indicated by the State Council, whilst CFC rules prevail over the new GAAR, the latter may still be applicable if for example the conditions of the CFC rules would not all be complied with[19].

7° Tax treaty anti-abuse rules

22. The OECD *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* ("**MLI**") entered into force for Luxembourg on 1 August 2019. With respect to the general anti-abuse provision, Luxembourg opted for the principal purpose test. The MLI introduced such principal purpose test into most of Luxembourg's tax treaties, which will deny the benefits of the applicable treaty where one of the principal purposes of the arrangement or transaction is to obtain the benefits of the treaty, unless granting such benefits would be in accordance with the object and purpose of the relevant tax treaty.

The principal purpose test is similar to the one included in Article 6 of ATAD 1 and overlaps between the application of the PPT and the new GAAR are possible, notwithstanding the fact that Luxembourg applies treaty-override in case of conflict with domestic tax law provisions.

19 *See* Avis du Conseil d'État sur projet de loi no. 7318.

Conclusion

23. The § 6 StAnpG has been amended as from 1 January 2019 in order to implement the new general anti-abuse rule of Article 6 of ATAD 1 with the aim to improve countering the tax evasion practices affecting the functioning of the internal market.

The amended wording of § 6 StAnpG introduced in Luxembourg law the precise definition of the concept of abuse of law in tax matters. Through this revision, the Luxembourg legislator completed and modernized the former § 6 StAnpG that was in force since 1934.

In accordance with the new wording, the taxpayer continues to enjoy the freedom of choice of the least imposed route. However, such freedom will be denied where (i) the main purpose, or one of the main purposes of the legal path chosen is to circumvent or reduce the tax burden in a way contrary the object or purpose of the tax law, and (ii) the choice is not genuine having regard to all relevant facts and circumstances.

While ensuring the conformity of the Luxembourg GAAR with the requirements of ATAD 1, this revision was at the same time conducted in such way that the new GAAR would keep relying on the legacy of the former GAAR including the case law that developed over many decades, providing continuity and legal certainty.

The revised § 6 StAnpG finally demonstrates the will to maintain the uniformity required for the provision to continue to apply to not only corporate but all Luxembourg taxpayers.

While it is likely that the takeaways from existing case law will remain relevant for the purpose of applying the amended provision of paragraph 6 of the StAnpG[20], it remains however to be seen whether the administrative practice and future case law will indeed confirm this reading.

An administrative circular in this area could bring about a welcome clarification in that sense.

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20 F. Castellani, Abus de droit : évolutions jurisprudentielles récentes *in* Droit fiscal luxembourgeois, livre jubilaire de l'International Fiscal Association Luxembourg : Legitech 2018, p. 47-48. - See also S. Douénias, E. Gille, Transposition de la clause anti-abus de la directive ATAD 1 en droit luxembourgeois : ACE 2019/5, p. 2-11.