

Luxembourg issues new TP Circulaire for the fiscal treatment of intra-group financial transactions

Luxembourg: January 2017

In Brief

On 27 December 2016 the Luxembourg Tax Authorities issued a new Circulaire providing guidance for the fiscal treatment of intra-group financial transactions. The Circulaire is effective as from 1 January 2017 and follows closely the application of the arm's length principle of the OECD TP Guidelines.

The Circulaire no longer includes the rule to determine the equity at risk (i.e. 1% or € 2m) and stipulates the importance of adequate substance and a functional analysis, covering the functions assets and risks of the transacting parties and their commercial relationship to determine the appropriate equity level.

At the time of publication of this circular, the following arm's length compensation may be observed in the market for entities performing:

- similar functions as those who are regulated financial and treasury entities:
a percentage of return on equity, of 10% after tax;
- pure intermediation functions: as simplification a return on invested assets, of 2% after tax.

All existing transfer pricing rulings (unilateral APA) are no longer valid as from 1 January 2017.

In detail

As the new Circular is effective as from 1 January 2017, we recommend every taxpayer applying the 2011 Circular to perform an impact analysis:

- How does the new Circular impact your structure?
- Which level of Equity would be required going forward?
- Does your existing functional analysis and substance require updating?
- Is actual conduct of transacting parties aligned with agreements (substance over form)?
- Will the change result in an increased taxable income?

In line with the OECD guidance (e.g. BEPS) the economic reality gains ground (substance over form) as from 1 January 2017 to determine the arm's length compensation, whereas the legal agreements may be aligned afterwards. The mismatch between economic and legal reality may thus cause a (temporary) deviation between statutory and tax accounts.

Although only published on 27 December 2016, the Circulaire (L.I.R: nr 56/1 – 56bis/1 replacing the circulaires L.I.R. nr 164/2 of 28 January 2011 and L.I.R. 164/bis of 8 April 2011) is effective as from 1 January 2017 (“the Circular”).

In this NewsAlert, we will cover the key elements of the Circular and in a second NewsAlert we will soon provide an additional technical analysis.

A summary of the Circular

The Circular tackles the tax treatment of entities carrying out intra-group financing transactions

Definition

Under the Circular, entities carrying out group financing transactions means any entity which conducts intra-group financing transactions and refers to any activity consisting of granting loans or (cash) advances to related parties which are remunerated by interests and are refinanced by funds and financial instruments like public offerings, private loans, cash advances or bank loans.

General aspects

The new article 56bis L.I.R., introduced by Article 3, number 2 of the law of 23 December 2016 on the budget law for fiscal year 2017, which will enter into force as from 1 January 2017, contains the basic principles to be followed in conducting a transfer pricing analysis. This new article's main focus is on the comparability analysis while applying the arm's length principle and it allows to perform adjustments on the reported profits if the transfer price differs from prices that would have been agreed between independent entities in comparable transactions carried out in the open market in comparable circumstances.

Application of the arm's length principle to intra-group financial transactions

Comparability analysis

The application of arm's length principle to intra-group financing transactions must be in line with the comparability analysis stated at paragraph 4 of article 56bis L.I.R., which consists of two elements:

- (i) identifying the commercial or financial relations between the associated enterprises and determining the conditions and economically significant circumstances attaching to those relations as the way to delineate accurately the controlled transaction, and
- (ii) comparing the conditions and the economically significant circumstances of the controlled transaction, as accurately delineated, with those of comparable open market transactions.

Value Chain Analysis

For the analysis of the arm's length nature of controlled transactions between related parties, the roles of the parties and their commercial or financial relationship are essential. In that context, a value chain analysis is necessary, translating the contribution of the parties to the controlled transaction.

Substance over form

Under the new Circular, the economic reality of the transaction prevails over the contractual terms of the agreement. In fact, if the actual behaviour of the parties to the transaction differs from what was contractually agreed, it is the actual conduct of the parties which must be taken into account for the analysis of the transaction actually performed.

Functional analysis

The purpose of the functional analysis is to identify the economically significant activities, responsibilities and functions, assets employed or provided and the risks assumed by the parties in the context of the transaction.

The functions assumed in connection with the granting of loans or advances of funds to related entities are in essence comparable to the functions assumed by independent financial institutions subject to the supervision of *Commission de Surveillance du Secteur Financier* ("CSSF"). As a consequence, you need to address the differences between the controlled transaction and those covered by the CSSF regulatory framework

A non-exhaustive list of functions performed by companies conducting intra-group financing transactions has been provided in the Circular covering:

- a) Initiation of the transaction
- b) Transaction management

The identification of the functions performed and the assets used is essential to understand the risks associated with the financing transaction.

Risk analysis and equity level

The main idea of the risk analysis is that before granting a loan or a cash advance, a financial institution will perform a risk analysis to assess the exposure it can be subject to. In this context, the capacity to manage and to assume the risk are economically significant characteristics, which must be identified to accurately delineate the controlled financing transaction.

Safe Harbour for equity level: When the comparability analysis reveals that an intra-group financing entity has a comparable profile to those of entities submitted to the European regulation (EU) n°575/2013 of the European Parliament and Council dated 26 June 2013 concerning the prudential requirements applicable to the credit establishments and to the investment companies and modifying the regulation (UE) n°648/2012 and that it has an amount of equity respecting solvency criteria determined by this regulation, its equity level is then seen as high enough to support the financial consequences if the risks happen.

If the comparability analysis reveals significant differences between the functional profile of the group financing company and the aforementioned regulated entities, it is necessary to determine the appropriate equity level to assume the risks, based on recognised methods to determine the credit risk.

Substance requirements

The Circular also stresses that an intra-group financing entity only controls the risk if it has the decision making capabilities to execute a transaction and to monitor the risk. Outsourcing would only be possible if the entity has the capability to determine the objective for the external service provider, monitor its performance and amend or terminate the contract.

The substance of a Luxembourg based intra-group financing entity needs to meet all of the following conditions:

- The majority of the managing directors with decisions making power to bind the entity need to be either Luxembourg residents or non-residents with a professional activity subject to tax in Luxembourg. In the event that a legal person is a board member, it must have its legal office and central administration in Luxembourg;
- The company needs to employ qualified personnel to manage and control the transactions. Supporting activities may be outsourced. Key decisions need to be taken in Luxembourg. In case the bylaws of the company provide for general meetings, at least one has to be held per year in Luxembourg;
- The company cannot be considered resident of another State.

Determination of the arm's length compensation / guidance for regulated entities

In order to determine arm's length remuneration, you need to perform a comparability analysis.

Safe Harbour for return on Equity: In the case of companies performing similar functions to the ones performed by regulated financing and treasury companies, which are covered in section 3.1.1.3 of the Circular, a percentage of return on equity of 10% after tax may be observed in the market and may be considered as reflecting arm's length compensation for the financing and treasury functions in question at the time of publication of this circular. This percentage will be regularly reviewed by the Tax Authorities on the basis of relevant market analysis.

Comparability adjustments need to meet internationally accepted standards to safeguard the comparability analysis.

Transactions without commercial rationale

If further to a comparability analysis it is concluded that the controlled transactions cannot be observed in the open market, lack commercial rationale and would not be concluded between independent parties under the same conditions, these transactions and the associated tax consequences must be disregarded to ensure full compliance with arm's length principle.

Simplification measures for pure intermediary entities

When a group financing company meets the substance criteria set out in the above section "Risk analysis and equity level" and pursues a purely intermediary activity simplification prevails - transactions are then deemed to comply with the arm's length principle if the analysed company has at least a 2% return after tax on the financed assets.

This percentage will be regularly reviewed by the Tax Authorities on the basis of relevant market analysis. The wording of the Circular, could be read in such a way that for the simplification, no transfer pricing analysis to determine the arm's length compensation is required.

This minimal return for financing entities with limited functions cannot be applied to entities with a different functional profile. To benefit from this simplification measure, the entity has to

communicate its application to the tax authorities with the submission of the tax return.

A deviation from the minimum return of 2% is only accepted exceptionally with a justification by a transfer pricing analysis.

The tax payers selecting this option will be subject to exchange of information.

Content of an information request binding the “Administration des contributions directes” in respect to transfer pricing to an intra-group financing company (extract of the Circular)

Any request for an advance ruling should include a transfer pricing study in compliance with the principles set out in the previous sections and as recommended by the OECD in this area. This report should include for example:

- a description of the computation of equity allocation required to be able to assume the risks;
- a description of the value creation, by the enterprises which are party to the transactions;
- The full comparability analysis on the basis of which the enterprise has determined the arm's length price applied to the intra-group transaction(s) whose scope has been determined precisely;
- projected profit-and-loss accounts for the years covered by the advance ruling.

Decisions made by the Luxembourg direct tax authority before article 56bis of the L.I.T.L. enters into force

Any individual decision relating to the arm's length principle that the authority has made on the basis of the rules applicable before article 56bis L.I.T.L. enters into force is no longer binding.

Immediate action points

We strongly recommend performing an assessment of the impact of these new measures on the taxpayers' existing and future structure(s) and what actions need to be taken.

Step 1 - GAP and impact analysis

Identify whether the financing structure(s) fall(s) within the scope of the changes. Depending on the current equity at risk level and specific circumstances, certain structures may not be impacted

Analyse the impact on the identified financing structures from a substance and equity at risk requirements taking into account the functional and risk profile of the financing structure and assess the equity required to assume the risk.

Determine the consequences for the financing structure(s) with a limited risk profile. This analysis requires to identify commercial rationale, including risk limitations.

Step 2 - Identify alternatives and actions needed to become compliant

Once the substance, equity at risk and remuneration impact has been established, alternative approaches to determine the total arm's length compensation could be simulated. Based on this, the recommendations for the implementation of the actions to become compliant with the Circular should be formulated.

In conclusion

As a final remark, we would stress that Luxembourg entities should consider carefully assess the impact of these new measures on the existing and future structure(s) and what actions you need to take:

- Financial structures under the 2011 Circular and with notably limited functional and risk profile are impacted by the new TP regulations, including the new Circular.
- The new TP regulations (including the new Circular) are applicable as from 1 January 2017 while no grand fathering provision has been foreseen.

We strongly recommend that you consider the impact of the expected changes.

Contact

Uwe Stoschek
Global Real Estate Tax Leader
Phone: +49 30 2636-5286
uwe.stoschek@de.pwc.com

Jeroen Elink Schuurman
EMEA Real Estate Tax Leader
Phone: +31 88 792-6428
jeroen.elink.schuurman@nl.pwc.com

Luxembourg

Marc Rasch
Partner
Phone: +352 49 48 48 3712
marc.rasch@lu.pwc.com

Loek de Preter
Partner
Phone: +352 49 48 48 2023
loek.de.preter@lu.pwc.com

Caroline Goemaere
Partner
Phone: +352 49 48 48 3002
caroline.goemaere@lu.pwc.com

Pawel Wroblewski
Director
Phone: +352 49 48 48 3401
pawel.wroblewski@lu.pwc.com

Alexandre Jaumotte
National Real Estate Tax Leader
Phone: +352 49 48 48 5380
alexandre.jaumotte@lu.pwc.com

Thierry Braem
Real Estate Tax Partner
Phone: +352 49 48 48 5106
thierry.braem@lu.pwc.com

Germany

Sven Behrends
Partner, München
Phone: +49 89 5790-5887
sven.behrends@de.pwc.com

Helge Dammann
Partner, Berlin
Phone: +49 30 2636-5222
helge.dammann@de.pwc.com

Marcel Mies
Partner, Düsseldorf
Phone: +49 211 981-2294
marcel.mies@de.pwc.com

Dr. Michael A. Müller
Partner, Berlin
Phone: +49 30 2636-5572
mueller.michael@de.pwc.com

Josip Oreskovic-Rips
Partner, Frankfurt am Main
Phone: +49 69 9585-6255
josip.oreskovic-rips@de.pwc.com

Uwe Stoschek
Partner, Berlin
Phone: +49 30 2636-5286
uwe.stoschek@de.pwc.com