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Brussels, *14* June 2015

Subject: Information on the activities of the TAXE special committee

Dear Mr. President Lamassoure,

We refer to your letter dated 23 April 2015 (Ref. GEDA D(2015) 19095 307247) as well as to our constructive meeting on 18 May 2015.

The Luxembourg government first wishes to express its commitment to fully cooperate with the TAXE Special Committee.

According to its Mandate, the aim of the TAXE Special Committee is to analyse and examine the practice in the application of Article 107(1) TFEU regarding tax rulings and other measures similar in nature or effect issued by Member States since 1 January 1991. Within its mandate, and to help it with its investigation, the TAXE Special Committee is entitled to ask Member States to provide different sets of information.

Notwithstanding the fact that the Luxembourg government is fully committed, as previously underscored, to help the Special Committee to meet the objectives of its mandate, it can only do so within the limits of any legal constraints to which it is subjected.

Indeed, you will appreciate that some of the requested documents such as the overview of the tax rulings are protected by tax secrecy according to §22 of the General Tax Code. The same applies with regard to the tax rulings themselves, which moreover contain a substantial amount of business secrets, i.e. information that "*relates to a business which has actual or potential economic value, the disclosure or use of which could result in economic benefits for other companies*".¹

¹ See for instance Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, para. 10.

Furthermore, the Luxembourg government is concerned by the fact that there is no explicit guarantee that the documents that will be provided to the TAXE committee will in fact be held confidential. According to its mandate, the special committee is not under a legal obligation to keep any information obtained by it confidential.

Regarding the specific set of documents requested, the Luxembourg government would like to provide you with additional information on administrative and legislative actions already undertaken or planned by the Luxembourg authorities:

- **Action taken or planned at national level to increase transparency in the area of corporate taxation**

- Actions taken:

As well as most other countries, Luxembourg has a well-established practice of advance tax decisions ("rulings"). In these decisions, the tax administration sets out how it intends to apply the existing national and international tax rules to a specific situation in order to provide legal certainty to taxpayers.

Luxembourg regularly exchanges upon request information on rulings with other countries, according to non-double taxation treaties as well as directives and agreements concerning administrative cooperation and mutual assistance in tax matters.

On 19 December 2014, the Luxembourg Parliament enacted bill Nr. 6720 (the "Budget Law") and bill Nr. 6722 ("the Zukunftspak"). The new legislation modernizes the system of advance rulings by giving an enhanced framework to its procedure. It makes the procedure clearer and more transparent. It formalizes in §29a General Tax Code the concept of tax rulings and sets up the Tax Ruling Commission ("Commission des décisions anticipées") the modalities of which are implemented by Grand Ducal Decree of 23 December 2014.

The above mentioned Grand-Ducal Decree also provides for the publication of the rulings on a no-name basis in the annual activity report of the Direct Tax Administration.

Furthermore, Luxembourg has taken a number of legislative and practical measures in order to improve the effectiveness of the exchange of information on request for tax purposes and to upgrade the current rating assigned by the Global Forum. A supplementary report will be published by the Global Forum before the end of 2015.

As of 1 January 2015, Luxembourg introduced mandatory automatic exchange of information according to Directive 2003/48/EC.

On 28 March 2014, Luxembourg signed an intergovernmental agreement with the United States which provides for the automatic exchange of financial information pursuant to the FATCA legislation.

On 29 October 2014, Luxembourg signed, as an "Early adopter" the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information in Berlin. It provides, according to the new global standard on Automatic Exchange of Information, for the exchange of non-resident financial account information with the tax authorities in the account holders' country of residence.

In November 2014, Luxembourg agreed to implement the new global standard on Automatic Exchange of Information with other EU Member States (Directive 2014/107/EU - DAC2). As an "Early adopter", Luxembourg will launch the first information exchanges in 2017 concerning income related to 2016.

- Actions planned:

Luxembourg supports the European Commission's proposal of a directive aimed at introducing a mandatory automatic exchange of information on tax rulings between the competent authorities of the EU member states. As incoming Presidency, Luxembourg is planning to achieve a compromise text for adoption before the end of 2015, thus echoing the European Commission's request to implement an ambitious timetable.

• **Action taken or planned at national level to limit corporate tax base erosion and profit shifting (BEPS)**

- Actions taken:

In addition to the before-mentioned law of 19 December 2014, Luxembourg has included the advance pricing agreement process in the Luxembourg tax law, thus formalizing and modernizing the existing practice.

With regard to the application of transfer prices, Luxembourg's approach is governed by the OECD Transfer Pricing Guidelines. Luxembourg is a founding member of the OECD and its tax treaties include a provision based on article 9 of the OECD model tax convention (stating the arm's length principle between associated companies).

In domestic law, the arm's length principle is embedded in article 164(3) of the Luxembourg income tax law.

Circular 164/2 issued on 28 January 2011 by the Direct Tax Administration and providing guidance on transfer pricing regarding intra-group financing transactions makes an explicit reference to article 9 of the OECD Model Tax Convention for the definition of the arm's length principle that must be respected when implementing intra-group transactions, and to the OECD transfer pricing guidelines for multinational enterprises.

The law of 19 December 2014 has amended the income tax law in order to state explicitly that the profits of enterprises that are linked by conditions that differ from those between independent enterprises shall be determined in accordance with the conditions that prevail between independent enterprises ("at arm's length") and taxed accordingly. It thus explicitly confirms the OECD benchmark that has also been followed in the past.

Furthermore, a specific provision has been introduced in Luxembourg tax law with regard to the documentation on transfer prices. This new provision underlines that the taxpayer is obliged to provide the tax administration with all necessary documents, information and reports in order to enable it to assess the transfer prices and evaluate the economic reality of any relevant transaction.

- Actions planned:

Luxembourg has made the commitment to fully apply the new regulations that will result notably from the BEPS discussions. Luxembourg is currently finalizing how to quickly implement different already agreed recommendations of the BEPS action plan. Important steps already agreed upon are the following:

- Neutralizing the effects of hybrid mismatch arrangements;
- Countering harmful tax practices more effectively by taking into account transparency and substance;
- Country-by-country reporting;
- Preventing the granting of treaty benefits in inappropriate circumstances.

In addition, Luxembourg is currently preparing for the amendment of its existing IP regime, as OECD and EU countries agreed on abolishing their existing IP box regimes by June 2016 or adapting them to the so-called modified nexus. The new nexus based approach is requiring substantial activities, only granting benefits to taxpayers that are engaged in activities that stimulate growth and create employment. The benefits will be limited to patents. Trademarks and other marketing related IP assets will be excluded.

At EU level, Luxembourg has agreed to the revisions of the EU Parent-Subsidiary Directive that took place in 2014 (and which are entirely consistent with the BEPS Action Plan). The first modification in July 2014 was aimed to avoid double non-taxation. The second modification was the introduction of a general anti-abuse clause (December 2014). These two amendments will soon be implemented into national law. Pursuant to these limitations a Member State where the parent company is established shall tax profits distributed by a subsidiary in another Member State to the extent such profits are tax deductible by the subsidiary. The anti-abuse clause will prevent from granting the benefit of the Directive to arrangements that are not genuine.

Luxembourg also fully supports the introduction of a general anti-abuse clause into the Interest and Royalties Directive. As incoming Presidency, Luxembourg is prepared to take forward a possibly upcoming discussion on minimum effective taxation. More generally, Luxembourg is pursuing, as Member State and as incoming Presidency, any efforts to ensure BEPS compliance and fair company taxation within the European Union and beyond.

Luxembourg is committed with regard to the upcoming multilateral instrument and has put its candidature in order to be a member of the Bureau.

- **Overview (including date and name of company) of all tax rulings issued since 1991**

The tax rulings, their overview and the information they include are confidential and covered by tax secrecy according to §22 of the General Tax Code.

Moreover, tax rulings include business secrets of the companies concerned. Tax rulings or documents leading to the conclusion of these rulings contain detailed information about: (i) internal organisation of a company; (ii) internal transactions taking place within a company; (iii) cost or pricing structures related to a company's products; (iv) internal risk assessments; (v) a company's assets that are not yet publicly disclosed; (vi) specific functions within a company and the natural persons employed and hired for these functions; and (vii) commercial strategies of a company.

In Luxembourg, as in almost all other countries, rulings are not made public, but rather are subject to the same confidentiality that applies to all other information concerning the tax situation of natural or legal persons.

The disclosure of information relating to specific taxpayers would infringe the principle of confidentiality of taxation ("tax secrecy"). According to this principle, the tax administration is not allowed to share any related information with third parties, except if authorized by law or court order. In the present context, neither one of those exceptions apply. This principle is not specific

to Luxembourg, but common to most European countries (cf. §30 of the German "Abgabenordnung" or article L103 of the French "Livre des Procédures Fiscales").

On this basis, the Luxembourg government cannot disclose the tax rulings, the identity of the companies subject to them, or any of the related documents. Such disclosure would indeed create a risk of causing serious harm to the companies concerned, which the Luxembourg government is under a legal obligation to avoid.

The alternative of redacting the actual names of the companies is not helpful, given the company-specific nature of the information contained in these rulings. Indeed, on the basis of the corporate structure of the companies identified in these rulings, the information might still allow the identification of individual persons (owners, directors, shareholders) within a specific company.

- **All information since 1.1.2010 shared with other Member States according to Council Directives 2011/16/EU article 9 and 77/799/EEC article 4**

Luxembourg exchanges rulings upon request on a regular basis. A limited number of rulings have been exchanged on a spontaneous basis some time ago. Especially in the case of central management of companies, Luxembourg got in most of the cases a reaction saying that the information was not of interest to the country concerned.

Luxembourg has never received spontaneously any information on rulings from any other Member State.

- **National list, if defined, of non-cooperative tax jurisdictions and its evolution and justification**

There is no specific list of non-cooperative tax jurisdictions in Luxembourg. However, the Luxembourg tax law provides for different requirements such as for example the provision of "equivalent tax" ("impôt comparable") in order to benefit from certain tax reliefs such as reduction of withholding taxes.

- **A list of current international tax treaties having an effect to reduce corporate tax rates**

Luxembourg does not have any such list or treaty. Tax treaties concluded by Luxembourg are based on and fully compliant with the OECD Model Convention. They aim to avoid double taxation and the prevention of fiscal evasion, not to reduce corporate tax rates.

Luxembourg has currently 74 tax treaties into force (see annex which can be consulted on the website of the Direct tax Administration www.impotsdirects.lu/conventions). These 74 tax treaties are based on the OECD model tax convention or the UN model, depending on the positions of the two countries involved. The BEPS project will be fully integrated in the tax treaty policy of Luxembourg.

- **Full report Krecké**

Please find attached a copy of the Krecké report. It is the only version of this report we are aware of and that is at our disposal.

- **Substance requirements**

With regard to the discussion on substance that took place on the day of the visit of TAXE to Luxembourg, the general rule set out in the Direct Tax Administration's Vademecum is that a company is resident in Luxembourg if it has its central administration in the country. This can be inferred from the paragraph 15 of the « Loi d'adaptation fiscale » and of the paragraph 159(1) of the « Loi concernant l'impôt sur le revenu ». In practice a company must have the functional capacity to carry out its activity. This implies that the company has qualified internal or external personnel at its disposal and that the board of directors and the managers must have the professional knowledge required to carry out their functions as well as the capability to engage the liability of the company.

These principles have also been laid down in the context of the Circular 164/2 concerning financing transactions. In this context, it is explicitly stated that a company active in this domain must fulfil clear substance conditions. For instance, the relevant decisions must be taken in Luxembourg by qualified individuals and the company must have at its disposal qualified personnel, which is capable of executing the operations that are carried out. Crucially, the company must be capable of monitoring the functions performed by its personnel. This, together with the requirement that the entity is sufficiently capitalized to assure its activities, implies that it effectively controls the relevant business risks.

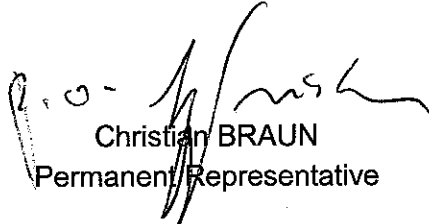
In this context, Luxembourg is committed to ensure and monitor the substance requirements imposed on resident companies. Every entity must be capable to control its relevant functions, assets and risks.

Even if the newly created Luxembourg ruling commission examines these conditions before giving a positive answer, it is necessary to verify this later on when receiving the tax returns. Indeed, when a company files a request for a ruling, the whole functioning of the company is not yet in place.

The conditions and elements described above form an integral part of what the Minister called the Vademecum of the Direct Tax Administration. This is an internal document of the Administration which is not available to the public.

We trust to have provided you with all the information that you require in the framework of your Mandate and we remain at your disposal should you have further comments or questions.

Very faithfully yours,



Christian BRAUN
Permanent Representative

Mr. Alain LAMASSOURE
Chair
Special Committee on Tax Rulings
and other measures similar in nature or effect
European Parliament