

**SPECIAL NEWSFLASH  
AUTOMATIC EXCHANGE OF INFORMATION IN THE FIELD OF TAXATION  
AND RELATED CONSIDERATIONS ON DATA PROTECTION  
JUNE 2016**

The Luxembourg law ("AEOI Law") transposing the Council Directive 2014/107/EU of 9 December 2014 ("DAC 2") amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation was adopted on 18 December 2015.

Investment funds, which qualify as reporting financial institutions under the AEOI Law, or any administrative agent which an investment fund may appoint as its delegate, have important obligations under the law of Luxembourg law of 2 August 2002 on the protection of individuals with regard to the processing of personal data, as amended ("Data Protection Law").

In this ALFI Special Newsflash, you will find some information on a few selected topics and questions relating to data protection issues in the context of the automatic exchange of information, prepared by ALFI's implementation working groups.

Luxembourg, 14 June 2016.

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## **Introduction**

On 23 February 2014, the G20 Finance Ministers endorsed the Common Reporting Standard (CRS) which provides for a conceptual framework for automatic exchange of tax information.

On 21 July 2014, the OECD released the full version of the Standard for Automatic Exchange of Financial Account Information in Tax Matters. The Standard called on governments to obtain detailed account information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis. The Standard was approved by the OECD Council on 15 July 2014.

On 29 October 2014, 51 jurisdictions including Luxembourg signed in Berlin the multilateral competent authority agreement (MCAA), which is a multilateral framework agreement to automatically exchange information, with the subsequent bilateral exchanges coming into effect between those signatories that file the subsequent notifications. Those jurisdictions, the so-called “early adopters”, have been re-joined by other jurisdictions since then.

On 9 December 2014, EU Member States adopted Directive 2014/107/EU amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation which provides for mandatory automatic exchange of financial information as foreseen in the OECD global standard. DAC2 amends the previous Directive on administrative cooperation in the field of taxation, Directive 2011/16/EU (“DAC1”).

The Luxembourg law transposing the Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation was adopted on 18 December 2015 and published in the Memorial A No 244 on 24 December 2015.

The law entered into force on 1 January 2016.

The law extends the automatic exchange of information to (i) interest, dividends and other income, (ii) gross proceeds from the sale or redemption of financial assets and (iii) account balances. It requires financial institutions to implement reporting and due diligence rules which are consistent with the Common Reporting Standard developed by the OECD.

You may wish to refer to our previous Newsflash of 23 November 2015 and 28 December 2015 for further information.

In addition, ALFI published Recommendations together with templates of self-certification forms which reporting financial institutions may wish to consider when dealing with their clients and investors. These documents can be downloaded from our website in the ALFI Guidelines and Recommendations Section.

## **Disclaimer**

You will find below some information on a few selected topics and questions which have been prepared by ALFI's implementation working groups for the Automatic Exchange of Information (Common Reporting System and EU Directive 2014/107/EU amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation or "DAC2").

The working groups comprise representatives of asset managers, management companies, securities service providers, audit firms, law firms and document and information management firms. ALFI hopes that this document will serve its members as a reference document when implementing the AEOI. It represents the view of a group of market participants and is not binding for the Luxembourg Tax Authorities, the national regulator or any other government agency in Luxembourg. The document does not diminish the responsibility of management companies or investment companies to comply with national law or regulation. It must not be relied upon as advice and is provided without any warranty of any kind and neither ALFI nor its members who contributed to this document accept any liability whatsoever for any action taken in reliance upon it. The answers are not necessarily definitive and they might not be suitable for every circumstance. The document may be amended without prior notice to incorporate new material and to amend previously published material where the working group considers it appropriate. ALFI will publish amended copies of this document to its members, showing marked-up changes from the immediately preceding copy. ALFI's members are welcome to submit a question to the working group, who will review it and consider whether to respond to it in a future copy of this document. Please send your questions to [info@alfi.lu](mailto:info@alfi.lu). We will acknowledge receipt of each question but we regret that we may be unable to reply individually to each one.

Readers of these Recommendations are further advised to supplement this document with the legal texts (law, decrees, FAQs and / or circulars).

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## 1. **Data Protection**

When implementing the AEOI Law, Luxembourg reporting financial institutions (such as an investment fund or its representative) must give due consideration to a number of obligations on the protection of individuals with respect to data which is collected, processed and/ or reported on individual investors in the fund.

Readers are further advised to read our Special Newsflash in conjunction with the Luxembourg law of 2 August 2002 on the protection of individuals with regard to the processing of personal data, as amended.

For additional information on data protection issues, it may also be useful to refer to documents and information posted on the website of the National Commission for Data Protection (“CNPD”). Click [here](#) to access the website.

## 2. **Controller and Processor: Definitions**

Source: Law of 2 August 2002 on the protection of individuals with regard to the processing of personal data, as amended.

### a) “Controller” (or data controller) – Article 2 (n)

*“The natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law”.*

### b) “Processor” (or delegate of the controller) – Article 2 (o)

*“A natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller”.*

## 3. **Collecting Data on Controlling Persons of Passive Non-Financial Entities**

It is lawful for a reporting financial institution to collect and process data of controlling persons of Passive Non-Financial Entities (“NFEs”), and to report on those controlling persons as the case may be. Controlling persons explicitly fall within the scope of CRS and the DAC2, to which the Luxembourg AEOI Law refers to.

## 4. **Prior Notification to the CNPD**

As per article 12 (1) of the Data Protection Law, the data controller shall pre-advise the CNPD that it will process data on behalf of individual investors.

In our context, the data controller is the investment fund (irrespective of whether the fund is established in contractual form as a common fund or in corporate form as an investment company with variable or fixed capital).

In the situation where the reporting financial institution, or its processor/ delegate as further detailed below, has already informed the CNPD that it processes data on behalf of individual investors, for instance in the context of FATCA, and the previous notification was broad enough to cover the scope of its obligations under the AEOI Law, there is no need to send an additional notification to the CNPD.

Should the previous notification be too specific to cover the obligations under the AEOI Law, the reporting financial institution must send a new notification to the CNPD. The adequate forms to use for a notification are posted on the website of the CNPD.

It might be worthwhile to note that the exemption from the obligation to notify the CNPD which is set out in article 12 (3) (d) of the Data Protection Law covers the case where a controller processes data referring exclusively to the administration of shareholders, and the data is not communicated to any third party except when the law or the regulation would provide otherwise. As such, it would appear that, in the context of CRS, a reporting financial institution may not avail itself of this exemption for the processing of data.

In the situation where an investment fund or, in the case of a common fund, its management company, enters into a delegation contract with a third party such as its administrative agent, to generally take care of the different tasks required under CRS, it should be possible to consider (subject to a careful analysis of the terms of the delegation agreement) that the third party (the data processor) may assume the role of the data controller.

In such as case, the notification to the CNPD may be done by the third party rather than by the investment fund. There may be instances though where an investment fund will be the data controller and where it will have to notify the CNPD.

In the case of a delegation, it is important to stress that the reporting financial institution will however always retain ultimate responsibility under the AEOI Law and the Data Protection Law.

## **5. Right of Individuals to Information - Preliminary comment**

It is important to make a distinction between the following:

- a) The right of individuals to be informed on the fact that personal data will be collected and processed, as per article 26 (1) of the Data Protection Law.
- b) The right of individuals to request that data which is incorrect or incomplete be corrected as per article 26 (1) (c). This is particularly relevant in the context of reporting to foreign tax authorities as the country (or countries) of residence as known to the reporting financial institution might be improperly assessed or recorded.

As per article 30 (1) (a) of the Data Protection Law, an individual may however not object the processing of data where such processing is explicitly provided for by national legislation, which is definitely the case in the context of the AEOI Law.

## **6. Right of Individuals to Information – Collection of Personal Data**

Any individual on behalf of whom data is collected must be duly informed thereof, at the latest at the time when data is collected (article 26 of the Data Protection Law). The notification to individuals must contain the information listed in the Data Protection Law (article 26) as well as in the AEOI Law (article 5 (4)).

Individuals need only be informed once, except where there is a change of circumstances as further detailed below.

The form of the notification (email, website, hard copy document etc.) and the choice of the medium (self-certification, prospectus of the investment fund and/ or application form and/ or personalized correspondence) is left to the appreciation of the reporting financial institution.

It is to be ensured that all individuals are duly informed without exception, including as the case may be, controlling persons of passive NFEs.

The case of passive NFEs is a particularly delicate subject as the controlling person(s) of a passive NFE is (are) not, strictly speaking, a direct investor in an investment fund. It is however required that controlling persons of passive NFEs be duly informed as any other individual investor in an investment fund. For passive NFEs, the best course of action is probably to directly approach the controlling person(s) or to obtain a self-certification from those controlling persons.

With regards to the timing of this obligation of information in such a situation, without prejudice to other legal or regulatory provisions that may be applicable in the financial or tax framework, in the case data has not been collected directly from the individual(s) or the controlling person(s) (article 26 paragraph (2)), the obligation of information is to be performed *«as soon as the data are registered or, in case a communication of the data to a third party is foreseen, at the latest upon such data communication »*.

## **7. Right of Individuals to Information – Reportable Individuals**

In addition to the right of individuals to information, individual investors on behalf of whom data will be reported to the Luxembourg Tax Authorities and continued to foreign tax authorities, the notification mentioned here above must in addition contain an indication of the country or countries where data will be continued.

As already stated, this is particularly relevant in the context of reporting to foreign tax authorities as the country (or countries) of residence as known to the reporting financial institution might be improperly assessed, recorded or simply no longer up-to-date.

An individual investor in an investment fund has a right to request correction of data provided it can substantiate his or her claim to amend that data.

It is therefore critical that individuals be duly informed, sufficiently well in advance of the actual date of reporting, by the reporting financial information.

Unlike the notification mentioned in the previous section 6 - which may be generic in nature - the notification under section 7 is by definition customized to each individual as it mentions the country (countries) of residence, hence the country (countries) where data will be ultimately transmitted.

Individuals need only be informed once, except where there is a change of circumstances which has a material impact under CRS. In particular, in the situation where there is a change in the country or countries where data will be continued as a result of a change of residence or otherwise, it will be required to send an up-dated notification to the individual concerned.

Although it is not legally required to provide individuals with full particulars of the reportable amounts and categories of income reported, the reporting financial institution may be asked to transmit this information if requested by the relevant individual investor.

#### **8. Obligation of Means**

The obligation to ensure that all individual investors and reportable persons are duly informed is an obligation of means.

The data controller, in this context, the bank or the professional of the financial sector acting as a delegate of the investment fund, or the fund itself, does not have to prove that all the relevant persons have effectively received in concreto the information but only that all required steps to inform them have been performed and undertaken.

Any investment fund should bear the foregoing in mind when deciding to appoint a third party (such as an administrative agent) to fulfil its responsibilities under the AEOI Law.

#### **9. Additional Data Field: Controlling Person Type**

It is lawful for a reporting financial institution to request information on the Controlling Person Type. Whilst the AEOI Law does not specifically refer to that type of information, it refers to Commentaries on CRS as published by the OECD which do mention the Controlling Person Type as a required data field.

#### **10. Additional (4) Data Fields (European legislation and OECD)**

Same holds true for the four additional data fields which the European Commission and the OECD propose to require for reporting as from 2019 (with retrospective effect in 2016). These four additional data fields are nothing else than an amendment in the CRS reporting file as such.

These four additional data fields are (i) new/ existing account (ii) self-certification/ other information source (iii) Depository Account/ Custodial Account and (iv) Controlling Person Type: Status unknown.

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