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## Luxembourg Newsflash - 4 December 2020

### New Luxembourg circular letter on the participation exemption regime regarding Gibraltar companies

Following the European Court of Justice (ECJ) ruling of 2 April 2020 in case C-458-18<sup>1</sup>, the Luxembourg direct tax authorities issued a circular letter (Circular) on 1 December 2020<sup>2</sup> regarding the non-application of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States to companies established in Gibraltar.

Pursuant to the Circular, the withholding tax exemption on outbound dividend distributions and the exemption from corporate income tax (**CIT**) and municipal business tax (**MBT**) on inbound distributions will no longer apply as from 1 January 2021 with respect to companies established in Gibraltar. Similarly the net wealth tax (**NWT**) exemption will no longer apply in relation to shareholdings in companies established in Gibraltar as from 1 January 2021. The exemption will remain available in cases in which the subject-to-tax test is met.

The non-application of the participation exemption is not retroactive: outbound distributions made by Luxembourg companies to Gibraltar companies, inbound distributions received by a Luxembourg company or qualifying permanent establishment from a Gibraltar company, as well as inbound distributions received by a Luxembourg permanent establishment of a Gibraltar company may still benefit from the above exemptions until 31 December 2020, subject to fulfilment of the other conditions of the participation exemption. Regarding NWT however, shareholdings in Gibraltar companies will become taxable as soon as 1 January 2021.

As from 1 January 2021, dividends paid by a company incorporated in Gibraltar to a Luxembourg company or qualifying permanent establishment may be exempt from CIT and MBT where the Gibraltar company is a company limited by share capital, subject to a tax that is comparable to the Luxembourg CIT, i.e. levied at an effective rate comparable to the Luxembourg CIT (at least 8.5%), on a mandatory basis and on a similar tax base (subject-to-tax test), provided that the other conditions of the participation exemption are fulfilled. The same applies to capital gains realised by a Luxembourg company or qualifying permanent establishment on a qualifying participation in a Gibraltar company.

In light of these developments, an increased level of scrutiny from the Luxembourg direct tax authorities regarding the subject-to-tax test on Gibraltar companies is expected. It is hence recommendable to review existing investments involving Gibraltar companies and, as the case may be, to amend as necessary.

## How can we help?

The Tax Law partners and your usual contacts at Arendt & Medernach are at your disposal to further assess and advise on the impact of the Circular on your investment structure and to guide you towards an efficient solution.

<sup>1</sup> For more details, [see our newflash](#).

<sup>2</sup> Circulaire du directeur des contributions L.I.R. n° 147/2, 166/2 et Eval. n°63 du 1er décembre 2020.

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