

# Transforming a tax haven

*The Common Reporting Standard was developed by the OECD in 2014 to combat tax crime. In Liechtenstein, this has led to a pressing need for expert legal advice*



WORDS BY  
**Dr Hannes Arnold**  
SENIOR PARTNER, GASSER PARTNER

As a member state of the European Economic Area, Liechtenstein shares in the regulated framework of the European financial market. In recent years, the country has become a leading area for investment and asset management, due to its high standard of regulation and quality of service. Even the global financial crisis did not affect Liechtenstein as much as it did other small states in Europe, such as Ireland or Iceland.

As such, Liechtenstein has become known as a tax haven. In fact, over the years, this small nation has accumulated more registered companies than citizens due to its low tax rates. In order to maintain its position as a leading financial market within the global community, Liechtenstein has already undertaken numerous initiatives to fight illegal activity. The Financial Action Task Force and the IMF are among the organisations that had positively evaluated the country's legislative and administrative practices prior to the introduction of the Common Reporting Standard (CRS) in 2014.

## An advantageous milieu

As far back as 2009, Liechtenstein declared it would pursue a 'white money strategy' to combat money laundering and tax crimes. Additionally, the nation strived for cooperation in tax issues in accordance with the standards of the OECD.

Following the conclusion of the respective bilateral and multilateral treaties – including the Convention on Mutual Administrative Assistance in Tax Matters, the Multilateral Competent Authority Agreement and the agreement between

the EU and Liechtenstein on the automatic exchange of information on financial accounts to promote tax honesty – Liechtenstein enacted national laws for the CRS in 2016. As an early adopter of the standards, the nation began reporting information on its residents' assets in 2017.

The implementation of the CRS was a logical outcome and foreseeable by all market participants. Contrary to the fears of some, the CRS did not lead to a significant withdrawal of assets or the relocation of typical asset protection vehicles, such as foundations and trusts. Today, many jurisdictions struggle with the CRS because the administrative practice changes frequently and supervisory authorities do not issue guidelines. However, the situation in Liechtenstein is different.

As a financial centre of international importance, Liechtenstein has an interest in complying with its CRS obligations, especially with regards to its reputation within the global community. As a result, the Liechtenstein tax authorities have issued extensive guidelines on the CRS and its application. These guidelines, which are updated on a regular basis, provide assistance with the interpretation of the law, demonstrate the respective reporting obligations with examples of practical relevance, and outline the applicable administrative practices.

Compared with other jurisdictions that follow the CRS and exchange information on tax matters automatically, market participants in Liechtenstein benefit from a high level of legal security and clearly communicated administrative practices.

## Opting in

All legal entities, or *Rechtsträger*, must classify as financial institutions or non-financial entities (NFE), according to the CRS. At the suggestion of market participants, Liechtenstein has created an opt-in measure, which is not provided by the CRS. This allows domestic foreign entities that

classify as passive NFEs to voluntarily classify themselves as investment entities. Consequently, they are considered a reporting Liechtenstein financial institution. However, the opt-in may only be granted under the prerequisite that the voluntary classification will not jeopardise correct reporting.

This option may be particularly advantageous when the balance sheets that are drawn up do not expose, with certainty, how the income of the respective entity will actually be composed. Our experience has shown that the opt-in measure is very well received by market participants.

It also allows an entity to voluntarily classify as an investment entity, and therefore a reporting financial institution, irrespective of whether the necessary tests are fulfilled. The opt-in does not,

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Parliament Building In Vaduz, Liechtenstein

however, provide an opportunity to voluntarily classify as a depository institution, a custodial institution or a specified insurance company.

## Taking control

As Liechtenstein is known as a popular foundation destination, the transposition and interpretation of CRS – and the individuals from whom the respective information has to be procured according to national law – are of considerable interest.

There is no doubt that, according to the national due diligence law, as well as the CRS, the founder of a company is deemed a 'controlling person'. The founder is explicitly addressed in the CRS commentary with regard to controlling persons of foundations.

More interestingly, Liechtenstein law stipulates that members of the foundation board are considered to be controlling persons irrespective of their specific position. At least within the terms of the EU agreement on the automatic exchange of information, it is questionable whether or not foundation board members must be reported, especially as the members of administrative bodies of other legal entities only

have to be reported when no other controlling person can be identified.

However, in the majority of cases, other controlling persons, such as beneficiaries, are identifiable. In addition – and depending on the design of a particular foundation – the board only executes the founder's intention, or *Stifterwille*, without making its own decisions. In such cases, the equivalence to a trustee or protector is questionable, or at least disputable.

From a purely CRS perspective, we are of the opinion that the responsibility and authority of the foundation board would have to be assessed on a case-by-case basis in order to determine if the founding board must be reported as a controlling person, and if so, which members. In this regard, Liechtenstein may have transposed CRS excessively. The same is true in terms of supervisory bodies.

In Liechtenstein, information on mandatory beneficiaries and discretionary beneficiaries must be procured. However, prospective beneficiaries are not considered to be controlling persons until they become beneficiaries. According to CRS information, discretionary trust beneficiaries must only be procured and reported in the years when contributions are received.

Because the reporting obligation of a foundation's beneficiaries is based on the equivalence of the respective position to trust beneficiaries, we believe that the respective exemption must be interpreted in a way that does not put foundation beneficiaries in a less favourable position than trust beneficiaries.

The Liechtenstein tax administration also clearly holds this view: its guidelines stipulate that discretionary beneficiaries, whether they are beneficiaries of a trust or foundation or not, only have to be reported in years when they receive a contribution.

## A helping hand

The implementation of the CRS in Liechtenstein has led to an increased need for legal advice regarding the implications of the new regime.

In order to provide a conclusive overview and sufficient information, all different aspects of Liechtenstein corporate law must be taken into consideration. Gasser Partner is a highly qualified and reliable point of contact in this respect. The firm is significantly involved in advising clients on all aspects of the implementation of the CRS.

As an international independent law firm, Gasser Partner primarily focuses on providing classic attorney-at-law services. This also comprises the legal representation of clients before courts and public authorities, as well as providing advice in all areas of the law.

As one of the leading law firms in Liechtenstein, we have built our knowledge and experience over decades, and we will continue to do so, particularly in the field of business law. We advise private clients, especially high-net-worth individuals, and represent companies from both Liechtenstein and abroad. Our institutional clients include banks, asset managers, fiduciary service providers, insurance companies and fund administrators, as well as local and foreign authorities.

Due to the location of our offices in Vaduz, Zurich and Vienna, and our regular close collaboration with foreign law firms, we have excellent global links. Owing to our size and expertise, we have specialists in every area of the law. In particular, this enables us to efficiently solve complex, international cases. ■