

International cooperation in tax matters between the Principality of Liechtenstein and the United Kingdom of Great Britain and Northern Ireland (UK) and its effect on Liechtenstein trusts and foundations

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Agreement

The TIEA between Liechtenstein and the UK fulfils the OECD standard according to Article 26 of the OECD Model Tax Convention 2008. The TIEA will be applied as of 1 April 2015 unless an information request is related to criminal tax investigations or to a disclosure of a UK person participating in a disclosure facility. The TIEA only allows an exchange of information upon request in clearly specified and justified cases (foreseeable relevant information).

On 11 August 2009, the Government of Liechtenstein and the Government of the UK have signed a Tax Information Exchange Agreement (TIEA). The TIEA fulfils the OECD standard according to Art. 26 of the OECD Model Tax Convention 2008 and only allows an exchange of information upon request in clearly specified and justified cases (foreseeable relevant information).

On the very same day, Liechtenstein and Her Majesty's Revenue and Customs (HMRC) signed an additional Memorandum of Understanding relating to cooperation in tax Matters (MoU). The MoU covers various matters

The MoU introduces a five-year taxpayer assistance and compliance programme and a special disclosure facility for persons wishing to regularise their UK tax affairs.

Liechtenstein-based entities as such as foundations, trusts and companies (limited by shares, establishment, trust reg.) are explicitly recognized by the HMRC in particular and UK authorities in general.

including the introduction by the Government of Liechtenstein of a five-year taxpayer assistance and compliance programme and the introduction by the competent authority of the UK of a five-year special disclosure facility.

The TIEA therefore will basically enter into force not before 1 April 2015 unless an information request is related to criminal tax investigations or to a disclosure of a UK person participating in a disclosure facility (Ordinary Disclosure Facility [ODF], New Disclosure Opportunity [NDO], Liechtenstein Disclosure Facility [LDF]).

The parties finally signed a first and as of today a second joint declaration concerning the MoU on various agreed matters.

In the MoU and in the relevant joint declarations, all Liechtenstein-based entities as such as foundations, trusts and companies (limited by shares, establishment, trust reg.) are explicitly recognized by the HMRC in particular and by UK authorities in general. Therefore, Liechtenstein entities will no longer be discriminated and will enjoy the same unrestricted recognition as entities located in other financial centres. This officially guaranteed legal certainty together with its excellent reputation will make them additionally attractive for UK persons.

National legislation

As of 1 September 2010, Liechtenstein has enacted the necessary legislation to comply with and give effect to the Agreement.

As of 1 September 2010, Liechtenstein has implemented its national legislation to comply with the Agreement. On this date, the statute (UK tax assistance act, Liechtenstein Legal Gazette No. 248/2010) enacted by the Liechtenstein parliament and the relevant ordinance (Liechtenstein Legal Gazette No. 254/2010) enacted by the competent Liechtenstein Government have come into force. The completion of this legal framework gives UK persons more clarification on how to regularise their UK tax affairs in practice by using the LDF.

Liechtenstein Disclosure Facility (LDF)

Scope

Intention of the parties: Relevant persons with a beneficial interest in relevant property in Liechtenstein can participate in the LDF by making a full, accurate and unprompted disclosure before 1 April 2015.

The LDF is available to existing and new UK clients of Liechtenstein financial intermediaries and UK taxpayers are allowed to take advantage from the LDF by including all undisclosed assets held offshore under the reservation that they have a substantial business relationship in Liechtenstein (footprint).

Liechtenstein financial intermediaries and their duties

Liechtenstein financial intermediaries are under a duty to identify natural and legal persons who or which the respective intermediary knows or has reason to know may be liable to taxation in the UK.

The recovery of UK taxes is limited to a defined 10-year period, not going back beyond April 1999.

Simplified single composite rate tax (SCR) vs. UK taxation on an actual basis.

Persons under investigation are not or not to the full extent eligible for the LDF.

Declaration of meaningfulness

The intention of the parties is that by the conclusion of the five-year taxpayer assistance and compliance programme, there will be no relevant persons with a beneficial interest in relevant property who are liable to taxation in one party but are using the laws of the other party to disguise such liability without paying appropriate tax in the manner contemplated by this MoU.

The special Liechtenstein disclosure facility is – in comparison to the other facilities offered by HMRC – very privileged. The LDF started 1 September 2009 and shall remain available until 1 April 2015. It offers an attractive option to UK taxpayers to settle their unpaid UK tax liabilities in relation to their Liechtenstein connected affairs. It is not only available to existing clients of Liechtenstein financial intermediaries, but also to new clients who establish relevant connections to Liechtenstein, e.g. set up the requisite structures. It can be pointed out in this regard that UK taxpayers are allowed to take advantage from the LDF by including all undisclosed assets held offshore.

Liechtenstein financial intermediaries are under a duty to identify natural and legal persons who or which the respective intermediary knows or has reason to know may be liable to taxation in the UK within a certain given time period. When such a person is identified, the financial intermediary will be under a duty to notify this person. Unless this person provides evidence to the financial intermediary and certain certification that the person is not liable to UK tax, is compliant with his UK tax obligations in relation to his Liechtenstein connected affairs or is participating in the LDF within the five year period, the Liechtenstein financial intermediary is then required to:

- (a) cease providing relevant services to that person; or
- (b) if the financial intermediary for legal reasons is unable to comply with this obligation, it shall follow a special review procedure set out in the MoU for directions (see below).

HMRC on the other hand obliges itself to make a special disclosure facility available to each person who notifies HMRC pursuant to the taxpayer assistance and compliance programme. The terms of the special disclosure facility foresee limiting the penalty and the applicable period of assessment. Instead of the usual 20 year time-frame, the recovery of UK taxes is limited to a defined 10-year period not going back beyond April 1999. UK taxpayers are also given the option of paying a simplified single composite rate tax (SCR) of 40 % on the income and net gains instead to calculate the actual liability for each UK tax year. The SCR covers all UK taxes and applies for each year where such person elects to use the composite rate with no reliefs or other deductions to be allowed in that year.

Persons already under investigation by HMRC are excluded from benefitting from the LDF as of the date of signing of the MoU. On the other hand, persons who were previously under investigation by HMRC and who knowingly did not disclose their interest in any relevant property will be able to participate in the disclosure facility but will not be able to benefit from the limited penalty and the limited defined 10-year period provided in the LDF. Furthermore, any person previously contacted by HMRC under the terms of the ODF or the NDO will be able to participate in the LDF but will not be able to benefit from the limited penalty or the limited defined 10-year period. The relevant penalty will not, however, be higher than the penalty provided under the NDO.

With the implementation of the UK tax assistance act, new Liechtenstein based relationships need a "declaration of meaningfulness". This means that a relevant person may only be eligible to participate in the LDF if the Liechtenstein financial intermediary confirms to the HMRC in writing that the business relationship in Liechtenstein is substantial. There are no fixed amounts mentioned in the law but a business relationship must not be "meaningless".

The Liechtenstein financial intermediary has either to declare that

- (i) a personal relationship exists with the relevant person and/or the client relationship is not a «one-night stand»,
- (ii) the services rendered are of importance which means that a substantial part of the assets to be disclosed during the LDF is invested or administered in Liechtenstein.

According to the Liechtenstein Government, a company with its statutory domicile outside of Liechtenstein is usually supposed to be also administered and managed abroad and is therefore not eligible for the LDF unless the Liechtenstein financial intermediary has a dominant role therein. This means that the LDF does not only apply to all persons with new or existing fiduciary, company or other holding structures or bank or financial (portfolio) accounts in Liechtenstein but also to foundations and trusts set up in another jurisdiction with the majority of the board members acting from within Liechtenstein.

Written guidance and characterization of Liechtenstein structures

UK clients who benefit from Liechtenstein trusts and foundations can rely on the general qualifications of discretionary, fixed-interest, interest in possession trusts / foundations or of any other possible form used in Liechtenstein practice.

Liechtenstein and HMRC have generally agreed on the written guidance approach concerning Liechtenstein entities (as companies, trusts and foundations), detailed in the appendices to the MoU. This implies that information on Liechtenstein structures and their treatment as a general matter will be provided by HMRC by way of joint declaration, exchange of letters, issuance of frequently asked questions and answers or otherwise written guidance to assist Liechtenstein financial intermediaries to fulfil their obligations under the MoU. This approach also provides clarification to relevant persons making use of Liechtenstein legal entities or fiduciary relationships.

Liechtenstein trusts (Treuhandenschaft) and foundations (Stiftung) are characterized, recognized and treated as trusts for UK tax purposes within the framework of the provisions contained in the MoU. This confirmation from HMRC assures UK clients benefitting from Liechtenstein trusts and foundations that they can rely on the general

qualifications of discretionary, fixed-interest, interest in possession trusts/foundations or of any other possible form the client may find in Liechtenstein practice. Careful planning is nevertheless essential to achieve the adequate qualification and results with respect to UK taxation.

For avoidance of doubt, nothing contained in the appendices to the MoU is to affect the ability to rely on UK law or practice permitting alternative characterization, recognition and treatment. The ultimate UK tax consequences for UK taxpayers hence will depend on the particular facts as is the case where UK or other common law entities or fiduciary relationships such as trusts are involved.

Tax compliance - forms of confirmation

A Liechtenstein financial intermediary dealing with UK clients who have a private bank account in Liechtenstein or are parties to a Liechtenstein trust or foundation, must assure that these UK clients are in fact UK tax compliant.

Although Liechtenstein financial intermediaries know both the concept of foundations as well as of trusts, the MoU stipulates that tax compliance cannot just be established by the UK client and the Liechtenstein professional on their own, even if they are both knowledgeable on the UK tax system. In order to assure that UK clients who have a private bank account in Liechtenstein or are parties to a Liechtenstein trust or foundation, are in process to become UK tax compliant by using the LDF or are in fact UK tax compliant, the Liechtenstein financial intermediary will have to ask for and hence rely on one of the following forms of confirmation on an annual basis in order to continue the business relationship:

- (1) A letter to be issued by a UK professional (tax adviser, accountant or lawyer) confirming that the UK client has no UK tax liability; or
- (2) A letter to be issued by a UK professional confirming that the UK client has submitted an application to disclose the relevant property under an HMRC tax disclosure facility (ODF, NDO, LDF); or
- (3) A letter to be issued by a UK professional confirming that the UK client is tax compliant with specific assets, especially in case of remittances; or

- (4) A certified or notarized copy of the UK tax return issued by a UK professional where the amount remitted from the trust/foundation and the amount reported on the return can be matched. The name of the trust/foundation should be mentioned; or
- (5) A waiver and identification form signed by the UK client authorising the financial intermediary to forward such waiver to HMRC and subsequently provide HMRC with a copy of tax information foreseeable relevant.

Bespoke service

The bespoke service from HMRC offers initial anonymous contact by a UK professional or the involved Liechtenstein financial intermediary to discuss the circumstances on a “no names” basis.

The bespoke service from HMRC is a personalised service available to any eligible person who participates in the LDF to assist them to deal with past, present and future UK tax issues and reporting requirements to HMRC. The bespoke service namely includes the possibility of initial anonymous contact by a UK professional or the Liechtenstein financial intermediary involved to discuss with HMRC the circumstances on a “no names” basis. To ensure consistency of treatment, the bespoke service offers a single point of contact within a discrete HMRC team which facilitates and accelerates the LDF proceedings. Under the reservation of providing evidence, the bespoke service of the HMRC is also competent to accept reasonable offers for tax based on estimated liability to tax as well as for making payments by instalments, although it has to be noted that in such circumstances forward interest will be included.

Review and audit procedure

The review and the audit procedure are established and operated by the Government of Liechtenstein and also include a panel comprised of independent persons. Both procedures are confidential and take place in Liechtenstein only.

The review and the audit procedure are part of the taxpayer assistance and compliance programme. Whereas the review procedure assists the Liechtenstein financial intermediary with an individual case, the audit procedure shows in general the level of compliance of the Liechtenstein financial intermediaries with the Agreement and the taxpayer assistance and compliance programme in particular. The review and the audit procedure are established and operated by the Government of Liechtenstein and also include a panel comprised of independent persons. Both procedures are confidential and take place in Liechtenstein only.

The panel is competent to hear applications and gives directions to the Liechtenstein financial intermediary how to proceed, either to cease to provide relevant services within a reasonable period of time or to follow other directions approved and agreed by Liechtenstein and the HMRC.

Under the audit procedure, an independent auditor is under a duty to submit an audit report to the panel. The audit report contains the name of audited financial intermediary and the level of compliance in a way which is statistically significant and anonymous.

The panel gathers the audit reports from the auditors, combine the statistics, and submit the consolidated anonymous summary once a year to HMRC.

Assurance against criminal investigation

Under the LDF, a UK taxpayer is not subject to criminal investigation by HMRC for a tax-related offence unless the source of funds constitutes criminal property within the meaning specified in the UK Proceeds of Crime Act 2002.

The panel is competent to hear applications made by a Liechtenstein financial intermediary to confirm that if it ceases to provide relevant services to a relevant person, such termination of services would give rise either to a breach of fiduciary duty or substantial breach or frustration of contract under the laws of Liechtenstein or give rise to an action for breach of duty in any other jurisdiction. If one of these criteria is met, the panel gives directions to the Liechtenstein financial intermediary how to proceed, either to cease to provide relevant services within a reasonable period of time or to follow other directions approved and agreed by Liechtenstein and the HMRC.

Such directions are given in consideration of the balance between the interests of Liechtenstein in protecting client confidentiality and contractual rights as well as the ability, viability and integrity of the Liechtenstein financial intermediaries to perform their respective duties to a relevant person on one hand and the interests of the UK in protecting its revenue on the other hand.

Under the audit procedure, an independent auditor is under a duty to submit an audit report to the panel. The audit report contains the name of audited financial intermediary and the level of compliance in a way which is statistically significant and anonymous. The panel gathers the audit reports from the auditors, combine the statistics, and submit the consolidated anonymous summary once a year to HMRC. A first audit will probably take place not before 2012.

UK taxpayers with undisclosed assets who make a full, accurate and unprompted disclosure to HMRC under the LDF, will not be subject to criminal investigation by HMRC for a tax-related offence, unless the source of the funds from which the relevant person has benefited or may benefit constitutes criminal property. Criminal property within the meaning specified in section 340 of the UK Proceeds of Crime Act 2002 will not include property that has arisen solely as a result of illegal tax evasion. Therefore, a discussion with a professional acting under a strict legal professional privilege whether

The fulfilment of the obligations of the eligible person to report any interest in relevant property, to account for any tax due thereon and to pay full tax together with interest and applicable penalties to HMRC protects a UK taxpayer from criminal tax investigation and excludes HMRC from “naming and shaming”.

According to HMRC, it is highly unlikely to be in the public interest of the UK to undertake a criminal investigation against Liechtenstein financial intermediaries complying with the MoU.

or not a UK taxpayer is eligible for the LDF and its benefit is highly recommended.

The immunity from criminal tax investigation is only preserved in the LDF which means that the eligible person has to report any interest in relevant property, to account for any tax due thereon and to pay full tax together with interest and applicable penalties to HMRC. In case a UK taxpayer taking part in the LDF withdraws cooperation or fails to provide full disclosure to HMRC, HMRC may request an exchange of information based on the TIEA and/or publish the name of such person as a deliberate tax defaulter. In all other cases, the financial privacy of a UK taxpayer is fully protected and HMRC is excluded from “naming and shaming”.

Liechtenstein financial intermediaries have an important and valuable role to assist UK taxpayers to become tax compliant. They ensure that by the final compliance date there will be no persons liable to UK taxation who are using the laws of Liechtenstein to disguise such liability. With this explicit commitment – again stated in the Joint Declaration – HMRC wishes to ensure that the taxpayer assistance and compliance programme as well as the LDF are successful. HMRC also records in the MoU that it is highly unlikely to be in the public interest of the UK to undertake a criminal investigation against such financial intermediaries. Therefore, Liechtenstein financial intermediaries are protected from criminal investigation when complying with the MoU, which also contains protection for past actions or inactions relating to possible breaches of tax laws.

Need for speed?

The risk of being investigated by HMRC potentially leading either to be excluded from the LDF combined with the loss of immunity and financial benefits or leading to higher penalties, interest and sanctions should encourage UK taxpayers to get their UK tax affairs in order as HMRC is continually extending its sources of information by different means.

With the view only focused to the Agreement, UK taxpayers with undisclosed assets and relevant UK tax liabilities could get the impression that they have plenty of time yet to decide whether or not to participate in the LDF. Having the whole picture in mind, there are various reasons why UK taxpayers are strongly recommended to take action now and get their UK tax affairs in order. Besides the fact that the terms are quite attractive and this part amnesty offered by HMRC is unlikely to be better in the future, the risk of being investigated by HMRC

potentially leading either to be excluded from the LDF combined with the loss of immunity and financial benefits or leading to higher penalties, interest and sanctions has to be kept in consideration. The risk is getting higher and becomes real as HMRC is continually extending the sources of information

- from financial institutions domiciled in the UK through Compulsory Disclosure Notices,
- from banks domiciled in the EC through the European Savings Directive and
- from institutions located in other and especially in offshore jurisdictions through TIEA or Double Tax Treaties with exchange of information clauses.

Cases

Case 1

A father living in a foreign country sets up a trust or a foundation for his family members who are moving to the UK. Let us assume this happens after 5 April 2008, and all of the beneficiaries are 18 years or older. The settlor grants GBP 2 million to the structure. The beneficiaries of this discretionary structure are his family members who move to the UK, and let us furthermore assume they plan to stay there for various reasons for around 5 to 10 years. The structure will hold its bank account outside of the UK.

Especially, in the first seven years, the situation is favourable for these beneficiaries. As long as no distribution is made by the foundation board or trustees and remitted to the UK for the use of a beneficiary, no tax falls due. The beneficiary must however report upon distribution the amount remitted to the UK as income and/or gain (if no income is available out of the capital payment by the foundation/ trustee) and will have to pay taxes which will start at 18 % (28 %) and go up towards 40 % (or more, depending on the annual budget results submitted by the UK Treasury).

After seven years further restrictions will apply. And, as stated above, the Liechtenstein financial intermediary acting as foundation board or trustee must assure himself that a distribution to this person in fact is declared to HMRC for tax purposes. The proposed foundation/trust

solution guarantees that the beneficiaries will use the funds in the way which the settlor (father) has initially laid out since foundation board/the trustees will implement the initial wishes of the settlor by exercising their full and unfettered discretion (if a discretionary structure). This structure offers options like protection from creditors (if a beneficiary goes bankrupt) and from forced heirship claims (within certain restrictions as for example the two year limitation period), assures protection against spendthrift family members, provides for succession into family businesses (in case of further 'underlying' structures), or simply offers tax planning purposes.

In addition, a foundation or trust upholds confidentiality, guarantees automatic "succession" into the investments / assets upon the death of any beneficiary as they no longer belong to the founder/settlor nor beneficiary, and also the 'transfer' to the successor beneficiary is automatically provided by the provisions of the by-laws or trust deed. No court intervention is required, and no special application to any authority must be made if any family member being a beneficiary of such a structure passes away in a foreign country.

A costly application to relevant courts/authorities hence is not necessary and no delay is involved with the 'transfer' of investments/assets to successor beneficiaries. This, amongst others is the clear advantage created by the use of such structure: the settlor is freed of all worries on how to fulfil the legal requirements for the transfer of patrimonial rights of a deceased person. The passing away of the settlor(s)/beneficiaries does not have any consequence with respect to the transfer of property rights, as the foundation itself/the trustees and no longer the settlor are the legal owners of the assets.

Case 2: Composite tax rate

I acquired my father's estate on his death in 2002. What are my obligations to get UK tax compliant? The figures are:

- Income and capital gains 1990 to 1999: GBP 400
- Income and capital gains 1999 to 2002: GBP 250

- Income and capital gains 2002 (post death) to 2009: GBP 200.
- Value of bank account at date of death: GBP 2 million

Within the LDF, you declare relevant assets from 2002 and provide HMRC with sufficient details regarding the source of funds for reasons of completeness. HMRC may also seek to recover taxes for the period prior to 2002 from your father's estate and its executors.

If you elect for the simplified single composite rate tax (SCR), you have to declare all undisclosed assets for the period commencing April 1999. HMRC does not take any further action against the estate or its executors regarding this source as it is now covered by LDF terms.

This case takes the legal basis valid in 2009/2010 (for calculation).

Tax	Normal circumstances	LDF	LDF-SCR
Income and capital gains 1990 to 1999 and 1999 to 2002: 250 X 40 %	Out of date of assessment as passed away.	Out of date of assessment as passed away.	100
IHT charge: 2m X 40 %	800 (liability of estate)	800 (liability of estate)	-
Income and capital gains from death to 2009: 200 X 40 %	80	80	80
TOTAL	880	880	180

Opportunities arising from the conclusion of the Agreement

Although the UK tax laws changed again on 6 April 2008 and restricted a lot of options which previously had favoured trusts or foundations, there are still various opportunities for foreign (offshore from the UK point of view) persons who (or whose family members) move to the UK for a certain period of time. As the UK differentiates between a resident and domiciled status, a trust or

Foreign persons moving to the UK for a certain time period as well as fully UK tax compliant UK clients have and still have beneficial options to invest and structure their assets by using a trust or a foundation having the benefit of a sustainable asset protection combined with a strong protection of client's confidentiality.

Services of ATU

The proactive cooperation approach by ATU with selected UK professionals specialized in the LDF as well as in planning opportunities serves the international client needs by using a qualified and dedicated team to render professional cross border services and to best protect clients confidentiality and their interests.

ATU – A reliable connection – even in times of continuous change.

a foundation can be very beneficial to any foreign person moving to the UK. Such clients by making use of a trust or a foundation, may optimize their tax situation having a tax benefit by either not being within the scope of a UK tax or by simply deferring the tax liability.

Furthermore, fully tax compliant UK clients are absolutely free to invest and structure their assets by using a trust or a foundation having the benefit of a sustainable asset protection combined with a strong protection of client's confidentiality in a foreign and stable jurisdiction like Liechtenstein.

ATU has entered in proactive cooperation with reliable and renowned UK professionals also specialized in the LDF as well as in planning opportunities. This approach gives UK taxpayers with undisclosed assets full comfort to regularise their UK tax affairs as well as to give UK tax compliant clients and clients planning to move to the UK for a specific time period by using a qualified and dedicated team to render professional cross border services. Under this new regime of international cooperation between Liechtenstein and the UK, Liechtenstein trusts and foundations can offer planning opportunities by focussing on asset protection, capital preservation, estate planning, succession planning and tax minimization. And if a client can draw a benefit from such privileges in a foreign jurisdiction which at the same time is acceptable to his/her country of residence, then all the better.

Important Note: The content serves only to provide general information and is no substitute for legal advice. ATU strongly recommends that proper tax and legal advice be obtained prior to implementing any type of structure.