

Luxembourg warrant plan regime: continuity amid change

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On 29 November 2017, the Luxembourg tax authorities released the highly anticipated circular on stock option/warrant plans (the "Circular"). The publication of the Circular follows the announcement made by Finance Minister Gramegna during his presentation of the 2018 budget, according to which the regime of stock option/warrant plans would be amended soon. The Circular replaces the former circulars 104/2 (20 December 2012) and 104/2bis (28 December 2015) as well as internal administrative guidelines from the tax authorities.

Far from the announced "aggiornamento" of the taxation regime of stock-options, the new Circular only clarifies some of the rules already applied by practitioners and increases the amount of the taxable value of so called "warrant plans". Conversely, this new Circular does not change the taxation of more classical stock-options, contrary to what was expected by practitioners and businesses.

Scope of the circular

As in the previous circulars, the key feature of this Circular relates to the valuation rules applicable for tax purposes when determining the value of benefits-in-kind granted by employers to their employees (senior executives) in the form of options or warrant plans.

These rules were already in force prior to the issuance of the new Circular. The specific fixed rate valuation method which is presented in the Circular only applies to freely transferable options. In practice, in most cases, these options take the form of "warrants", which are granted over stock exchange indexes and/or stocks of third party corporations. What are described as stock options in practice are generally options

granted to employees on the stock of their employers' company. Since these types of option are, in most cases, not freely transferable, mostly, they will not fall within the scope of the fixed rate valuation rules described in the Circular.

In the following comments, we refer to "warrants" as these are in practice the most commonly used instruments, being warrants over stock market indices. However, it should be noted for completeness that the fixed rate valuation method provided by the Circular can be applied to any option which is freely transferable.

Valuation of warrants - Increase from 17.5 to 30% as from 2018

The Circular amends the rules applicable to the computation of the value of warrants. In the absence of a more precise valuation and subject to certain conditions, a fixed rate valuation is allowed as follows:

- as from 1 January 2018, the value of the warrants will be deemed to be equal to 30% of the value of the underlying assets;
- the valuation at 17.5% of the value of the underlying assets (as applicable since 2013) will remain applicable until 31 December 2017.

A new provision has been added, which specifies that the valuation at 17.5% or 30% cannot be applied when warrants are granted in lieu of a legal or contractual severance payment following the termination of an employment contract. The conditions for being able to apply a valuation at either 17.5% (until 31 December 2017) or 30% (as from 2018) to warrant plans, the so-called "reasonable conditions/circumstances", are now expressly mentioned in the Circular. These conditions were already detailed in unpublished internal guidelines of the tax authorities, some of the content of which had been made public in a response to a parliamentary question 4 years ago.

The Circular now clarifies that the fixed rate valuation at 17.5 or 30% is only possible in the case of warrant plans if the 3 following cumulative conditions are met:

- The value of the warrant should not exceed 50% of the gross annual remuneration (warrant

included). This percentage has to be computed individually, i.e. for each of the participants to the warrant plan;

- The warrant plan can only apply to senior executives within the meaning of article L.211-27 5 of the Labour Law (i.e. "cadres supérieurs");
- The characteristics of the warrant plan have to be such that the price of the warrant cannot exceed 60% of the value of the underlying assets/index.

Should one of these 3 conditions not be met, the Circular states that the value of the benefit in kind subject to tax will be equal to the full allotment price of the warrant, i.e. it will be equal to the "real" value of the warrants. Despite the definition provided by the Labour Law, the notion of "cadres supérieurs" remains vague and open to interpretations. Autonomy, level of remuneration and decision-making power are some of the main criteria defining this status.

Notification to the tax authorities

Arguably, the biggest change brought by the Circular relates to the reporting obligations. The former circular 104/2bis Income Tax law of 28 December 2015 introduced an obligation for employers to inform the Luxembourg tax authorities (RTS office) about the option or warrant plans that they put in place for their employees. The new Circular defines in more detail the rules related to this obligation and more importantly, introduces new sanctions which will apply in case of non-compliance.

The rules vary depending on the tax year concerned:

- Up to 2015 included, the information will have to be provided to the extent that it is requested by the Luxembourg tax authorities when reviewing the tax situation of the employer.
- In respect of 2016, to the extent that no information has been provided yet to the Luxembourg tax authorities, any benefit within the meaning of the Circular granted by an employer to its employee(s) has to be notified by 31 January 2018 at the latest.
- As far as 2017 is concerned, to the extent that no information has been provided yet to the Luxembourg tax authorities, any benefit within the meaning of the Circular granted by an employer to its employee(s) has to be notified by 31 March 2018 at the latest. In addition, since the new Circular replaces, as from its release, all former notification

requirements (including the requirement, according to which the notification has to be made at least 2 months prior to the plan implementation), employers may still consider implementing a warrant plan before the end of 2017 under the valuation rules applicable until year-end (i.e. fixed rate valuation at 17.5%).

- As from 2018, any employer who intends to grant to its employee(s) benefits falling within the scope of the Circular is required to inform the tax authorities as soon as the benefit is granted.

The Circular provides that notifications are to be made electronically.

What now?

Compared to what was the initial intent of the tax authorities and given the announcement made by Finance Minister Gramegna, the new Circular could be seen as a bit of a "damp squib". However, one positive aspect of the Circular is that the warrant regime is maintained. As a consequence, Luxembourg keeps this interesting remuneration tool which allows employers to attract "high level executives".

On the less positive side, by modifying only marginally the current rules for stock option plans, the Luxembourg authorities have chosen not to amend the rules applicable to "classical" stock-option plans. These plans are common and popular in the "new economy" and in the SME market, with plans that are typically designed to encourage long-term alignment of employees with the growth of the employer's company, something that is generally seen to be a positive aim for society as a whole. Creating an equivalent to the attractive warrant taxation for the tax regime of stock options would have been an opportunity for Luxembourg to attract players of the new economy. For this purpose, the new Circular is clearly a missed opportunity.

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Situation globale des OPC

Au 31 octobre 2017, le patrimoine global net des organismes de placement collectif (OPC), comprenant les OPC soumis à la Loi de 2010, les fonds d'investissement spécialisés et les SICAR, s'est élevé à EUR 4.135,695 milliards contre EUR 4.037,140 milliards au 30 septembre 2017, soit une augmentation de 2,44% sur un mois. Considéré sur la période des douze derniers mois écoulés, le volume des actifs nets est en augmentation de 12,85%.

L'industrie des OPC luxembourgeois a donc enregistré au mois d'octobre une variation positive se chiffrant à EUR 98,555 milliards. Cette augmentation représente le solde des émissions nettes positives à concurrence d'EUR 35,619 milliards (0,88%) et de l'évolution favorable des marchés financiers à concurrence d'EUR 62,936 milliards (1,56%).

Le nombre des organismes de placement collectif (OPC) pris en considération est de 4.098 par rapport à 4.110 le mois précédent. 2.626 entités ont adopté une structure à compartiments multiples ce qui représente 13.239 compartiments. En y ajoutant les 1.472 entités à structure classique, au total 14.711 unités sont actives sur la place financière.

Concernant d'une part l'impact des marchés financiers sur les principales catégories des organismes de placement collectif et d'autre part l'investissement net en capital dans ces mêmes OPC, les faits suivants sont à relever pour le mois d'octobre :

Les catégories d'OPC à actions ont toutes connu des hausses de cours, à l'exception de la catégorie d'OPC à actions d'Amérique latine. Au niveau des pays développés, la catégorie d'OPC à actions européennes a réalisé une performance positive sur fond d'une croissance économique dynamique en zone euro et de la continuation du programme d'achats d'actifs de la BCE. De bons résultats d'entreprise et une possible réforme fiscale aux Etats-Unis ont soutenu les cours de la catégorie d'OPC à actions américaines. La catégorie d'OPC à actions japonaises a également clôturé en territoire positif,

face notamment à un environnement économique globalement favorable et la poursuite probable de la politique monétaire et fiscale expansive suite à la réélection du premier ministre japonais.

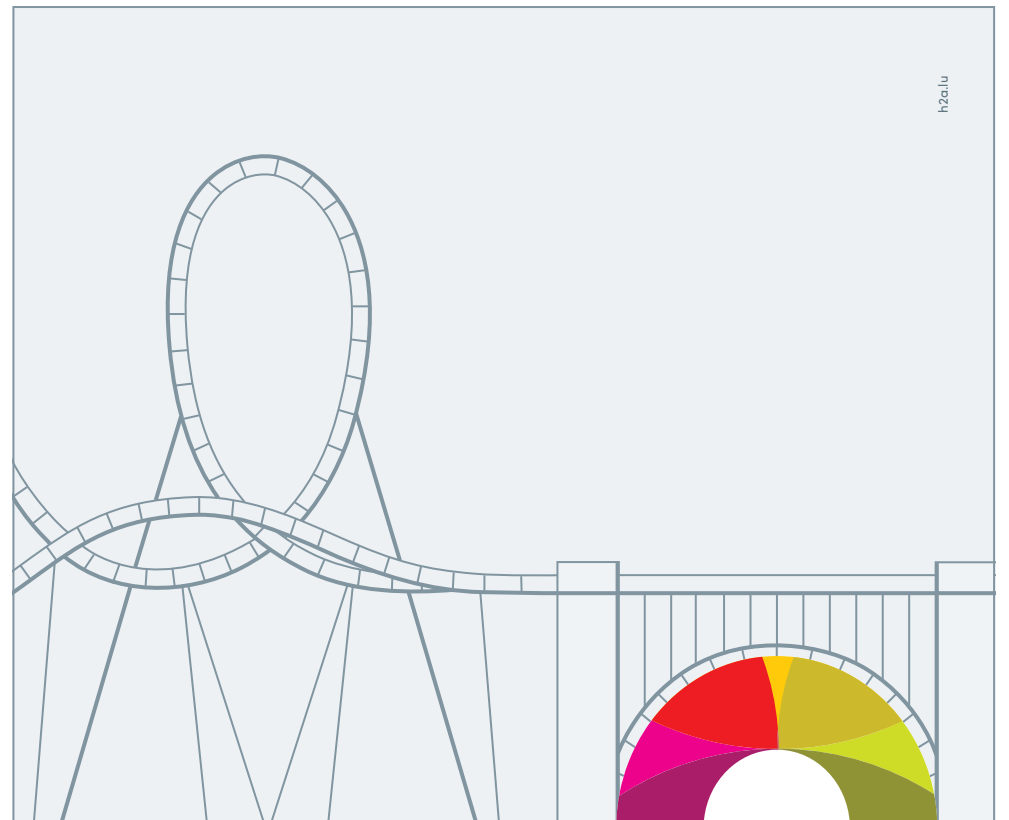
Au niveau des pays émergents, la catégorie d'OPC à actions d'Asie a progressé sous l'effet principalement des données économiques stables en Chine et de l'environnement conjoncturel global favorable. Les bons chiffres économiques dans plusieurs pays de l'Europe de l'Est et la hausse du prix du pétrole expliquent la performance positive de la catégorie d'OPC à actions de l'Est, alors que la catégorie d'OPC d'Amérique latine a subi des baisses de cours face à des incertitudes politiques et commerciales. Au cours du mois d'octobre, les catégories d'OPC à actions ont globalement affiché un investissement net en capital positif.

En Europe, les rendements des obligations ont légèrement baissé en relation avec le prolongement du programme d'achat d'actifs de la BCE. De même, les écarts de taux entre pays à haute notation et pays à faible notation en zone euro se sont réduits. Les rendements sur les obligations d'entreprises ont suivi cette tendance, de sorte que la catégorie d'OPC à obligations libellées en EUR a en somme réalisé des gains de cours.

Si les rendements des obligations libellées en USD ont augmenté face notamment aux indicateurs de conjoncture au-dessus des attentes et à la possible réforme fiscale, l'appréciation de l'USD par rapport à l'EUR a fait clôturer la catégorie d'OPC à obligations libellées en USD en territoire positif.

Le fort afflux de capitaux dans les obligations des marchés émergents et la hausse des prix des matières premières ont été compensés par les perspectives d'une politique monétaire moins expansive à l'avenir en Europe et aux Etats-Unis, de sorte que la catégorie d'OPC à obligations des pays émergents a en somme peu varié sur le mois sous revue. Au cours du mois d'octobre, les catégories d'OPC à revenu fixe ont globalement affiché un investissement net en capital positif.

Source : Commission de Surveillance du Secteur Financier (CSSF)



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