

BANKING SECRECY EXCHANGE OF INFORMATION IN LUXEMBOURG

Executive Summary

The debate on offshore jurisdictions and the call for an exchange of information at the OECD, EU and national levels (notably the US) has led to a degree of confusion which in turn may cause a reputational damage to jurisdictions traditionally associated with banking secrecy. This debate is relevant to Luxembourg which is renowned as a stable and highly professional platform for the structuring of international M&A transactions, a well established fund industry and, to a certain extent, as a private banking niche.

The present note aims to clarify this debate. It briefly summarises the US anti-tax haven abuse bill which was under discussion in the US during the course of 2009 (S.506 dated March 2, 2009) and looks at the OECD developments that followed the London G-20 Summit of March 2009 concerning the progress made in the area of exchange of information in tax matters under double tax treaties and exchange of information agreements. The note also covers the recent initiatives pushed forward by the EU Commission to improve the exchange of information and transparency between EU Member States.

Finally, the note summarises the process launched by Luxembourg to renegotiate its tax treaties with certain key OECD countries as far as the exchange of tax information is concerned. It provides details of the OECD announcement whereby Luxembourg has subsequently moved into the so called "white list", making it a fully cooperating jurisdiction in the field of exchange of information in tax matters.

Banking Secrecy – Exchange of Information in Tax Matters

1. US STOP TAX HAVEN ABUSE BILL

The US Stop Tax Haven Abuse bill¹ (the "Bill") introduced by Senator Carl Levin replaces (and deviates from) the first bill S.681, dated February 2007 (sponsored, among others, by the ex Senator Obama) and outlines a "black list" of 34 "offshore secrecy jurisdictions", including Luxembourg.

Based on various investigations and specific subcommittees' reports and hearings, the Bill aims to create new tools to mitigate the financial impact on the US of offshore secrecy legislation and practices, estimated at USD 100 billion per year, and to maximise the level of transparency, cooperation, and tax compliance of US taxpayers involved in transactions with certain offshore secrecy jurisdictions.

¹ S.506 dated March 2, 2009.

1.1. SCOPE OF THE BILL

The anti-abuse measures of the Bill would only apply to transactions, entities or accounts in **offshore jurisdictions with corporate, business, bank, or tax secrecy rules and practices which unreasonably restrict the ability of the US government to get needed information and which do not have effective information exchange programs with US law enforcement agencies.**

An offshore jurisdiction is seen as:

- any territory which has corporate, business, bank, or tax secrecy or confidentiality rules and practices, including both formal laws and regulations and informal government or business practices, having the effect of inhibiting access of law enforcement and tax administration authorities to beneficial ownership and other financial information;
- any jurisdiction that may be deemed to have ineffective information exchange practices unless the US Treasury Secretary determines, on an annual basis, that:
 1. such jurisdiction has in effect a treaty or other information exchange agreement with the US that provides for the prompt, obligatory, and **automatic** exchange of information as is foreseeably relevant for carrying out the provisions of the treaty or agreement or the administration or enforcement of this title;
 2. during the twelve-month period preceding the annual determination, the exchange of information between the US and such jurisdiction was in practice adequate to prevent evasion or avoidance of US income tax by US persons and to enable the US effectively to enforce this title, and
 3. during the twelve-month period preceding the annual determination, such jurisdiction was not identified by an intergovernmental group or organisation of which the US is a member (such as the OECD) as uncooperative with international tax enforcement or information exchange and the US concurs in such identification.

1.2. CONTENT OF THE BILL

1.2.1. The presumptions

The Bill creates a number of rebuttable presumptions that would assume the link between a US person and offshore entities, transactions and accounts, unless that US person presents clear and convincing evidence to the contrary. Among other things, the Bill establishes the presumption that:

- a US taxpayer who “formed, transferred assets to, was a beneficiary of, or received money or property” from an offshore entity, such as a trust or a corporation, is in control of that entity;
- funds or other property received from offshore are taxable income, and that funds or other property transferred offshore have not yet been taxed, and
- a financial account controlled by a US taxpayer in a foreign jurisdiction contains sufficient money (USD 10,000) to trigger an existing statutory reporting threshold and allow the IRS to assert the minimum penalty for non-disclosure of the account by the taxpayer.

In addition, the Bill establishes two evidentiary presumptions applicable to civil proceedings to enforce US securities laws:

- if a director, officer, or major shareholder of a US publicly traded corporation was associated with an offshore entity, that person would be presumed to control that offshore entity, and
- securities nominally owned by an offshore entity are presumed to be beneficially owned by any US person who controlled the offshore entity.

Furthermore, the Bill proposes to treat foreign corporations managed and controlled in the US as domestic companies for income tax purposes. Under current legislation, contrary to US resident companies, non-resident companies are generally subject to US income tax only on US source income. The management and control test announced by the Bill aims to broaden US corporate tax residency net in order to catch those non-US resident companies, whether or not deriving income from US sources, which are managed and controlled from the US. Therefore, offshore entities which would be suspected to be managed and controlled by persons who are resident or established in the US may, on the basis of the new corporate tax residency test, fall within the ambit of the US income tax system and would, therefore, become subject to an unlimited tax liability in the US as US tax residents.

The Bill also aims to close the offshore dividend loophole. Under this provision, dividend withholding tax on non-residents would apply to all dividend equivalent and substitute dividend payments. "Dividend equivalent" would include "any payment that is made pursuant to a notional principal contract, (i.e., a financial instrument that provides for the payment of amounts by one party to another at specified intervals calculated by reference to a specified index upon a notional principal amount in exchange for specified consideration) and contingent upon the payment of dividend on shares" or instruments similar to shares. "Substitute dividend" would cover payments "made to the transferor of a security in a "securities lending transaction" or a sale-repurchase transaction, of an amount equivalent to a dividend distribution which the owner of the transferred security is entitled to receive during the term of the transaction".

These payments would, therefore, be subject to dividend withholding tax unless there is evidence that such payment had been previously taxed.

Finally, the Bill proposes to expand reporting requirements for US persons who benefit from a PFIC ("Passive Foreign Investment Corporation").

1.3. OTHER MEASURES TO COMBAT TAX HAVEN AND TAX SHELTER ABUSES

The Bill further provides for different measures in view of combating tax havens and tax shelter abuses. These provisions consist of increasing reporting requirements and of the obligation to disclose information regarding activities in offshore jurisdictions. The proposal would, for instance, require any financial institution that (directly or indirectly) opens a financial account, or creates or acquires an entity in an offshore secrecy jurisdiction "at the direction of, or on behalf of, or for the benefit of" a US person to file a report with the IRS.

The Bill also provides for a strengthening of anti-money laundering obligations and stronger tax penalties of up to USD 1 million for any person who knowingly fails to disclose offshore holdings and transactions in violation of US securities law. The Bill adds, in particular, company formation agents to the current US list of those who must comply with anti-money laundering obligations.

The last part of the Bill proposes a codification of the economic substance doctrine. It would reinforce the economic substance requirements which may invalidate transactions that have no meaningful economic substance or business purpose apart from tax avoidance or evasion.

1.4. STATUS OF THE BILL

It would appear that since its announcement in March 2009, the Bill has been on stand-by and no additional legislative step has been taken in view of its enactment. As the debate on tax haven jurisdictions has relatively cooled down, the Bill would appear to have been taken out of the short-term legislative agenda. However, no official announcement has been made by US officials on its final status.

2. LONDON G-20 SUMMIT DISCUSSION AND OECD LISTS

In a summit held in London on April 2, 2009, the leaders of the G-20 called for the end of bank secrecy and threatened to impose sanctions on those jurisdictions which are identified as “uncooperative” in the area of exchange of information for tax purposes. The final statement to the summit indicates that the G-20 leaders “**note**” that the OECD has published a list of “bad” countries in the field of exchange of information. The use of the term “note” clearly reflects the tension between the G-20 leaders on such a highly sensitive issue and reflects the *de minima* compromise reached in the London summit.

The report published by the OECD secretariat immediately after the London Summit is the fruit of more than a decade of OECD work “to bring greater openness and transparency to cross-border financial services” and is based on a standard which requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.

The published report is divided into four parts:

- jurisdictions that have substantially implemented the internationally agreed tax standard (informally, the white list);
- tax havens that have committed to the internationally agreed tax standard but have not yet substantially implemented it (the light grey list);
- other financial centres that have committed to the internationally agreed tax standard but have not yet substantially implemented it (the dark grey list), and
- jurisdictions that have not committed to implement the internationally agreed tax standard (the black list).²

Luxembourg has been considered as part of the “light” grey list³ because, on the one hand, it has lifted its reservations to Art. 26 of the 2008 OECD model tax convention relating to the exchange of information but, on the other, it did not bring its entire tax treaty network with OECD countries up to the most recent OECD standards on the exchange of information.

² According to the OECD, the black list is now empty as the countries which hitherto populated that list (i.e. Costa Rica, Malaysia, Philippines and Uruguay) are now considered to have committed to the internationally agreed standards in the exchange of tax information.

³ Together with other countries such as Austria, Belgium, Singapore and Switzerland.

From a strictly legal point of view, the announcements made at the G-20 Summit concerning tax havens and banking secrecy as well as the OECD report that followed do not produce any legal constraint on any jurisdiction to amend its domestic law. They may, however, have a “name & shame” effect that should not be underestimated by the jurisdictions concerned. This explains the recent initiatives taken by Luxembourg to renegotiate and update the exchange of information provisions in its tax treaties with OECD countries, which would help the country gain the label of a fully cooperative jurisdiction according to OECD standards.

3. **EU INITIATIVES TO IMPROVE MUTUAL ASSISTANCE IN THE ASSESSMENT AND RECOVERY OF TAXES**

In the framework of its strategy to better combat tax evasion and fraud and foster transparency and information sharing, the European Commission has announced three initiatives which it intends to implement in the coming years:

- Firstly, to review the EU Savings Directive (2003/48/EC) with the aim of closing certain loopholes.

Most importantly, the Commission believes that the transition period during which certain Member States (including Luxembourg) are entitled to apply a withholding tax (rather than exchange of information) should now come to an end.

By way of background, the Savings Directive as it applies today provides that, the transition period would come to an end, and the withholding tax Member States will have to move to the automatic exchange of information, “at the end of the first full fiscal year following the later of the following dates:

1. the date of entry into force of an agreement between the EU, following a unanimous decision of the Council, and the last of the Swiss Confederation, the Principality of Liechtenstein, the Republic of San Marino, the Principality of Monaco and the Principality of Andorra, providing for the exchange of information upon request as defined in the OECD Model Agreement on the Exchange of Information on Tax Matters with respect to interest payments made by paying agents established within their respective territories to beneficial owners resident in the territory, in addition to the simultaneous application by those same countries of a withholding tax on such payments at the rate defined for the corresponding periods.

According to recent announcements, Switzerland, Liechtenstein, San Marino, Monaco and Andorra would have recently accepted the principle of exchange of information upon request in conformity with OECD standards. The above condition would, therefore, be met.

2. the date on which the Council agrees by unanimity that the US is committed to the exchange of information upon request as defined in the OECD Model Agreement with respect to interest payments made by paying agents established within its territory to beneficial owners resident in the territory.

According to the Commission, the US has an extensive tax treaty network with all EU Member States modeled on the OECD latest standards which provides for the exchange of information at a satisfactory level. This condition would also be met.

Furthermore, Belgium has announced that it will adopt the exchange of information and, according to OECD announcements; Hong Kong and Singapore have announced that they will exchange information according to OECD standards.

Therefore, if the above is confirmed by the EU authorities, Luxembourg would be required to apply the exchange of information **automatically** under the Savings Directive and would have to cease applying withholding tax. The move to automatic exchange of information for tax purposes would hardly be compatible with the domestic banking secrecy legislation as it stands today. Whether Luxembourg would accept to make such a move is yet unknown. Certainly, however, the move from withholding tax to the automatic exchange of information system is not “automatic” and would have to result from a unanimous decision of all EU Member States including Luxembourg.

- Secondly, a communication on good governance in the area of taxation which would cover the exchange of information, transparency and fair tax competition, and
- Thirdly, proposals for new Directives (COM(2009)29 and COM(2009)28). One of the key elements of the proposals is that Member States would no longer be able to invoke bank secrecy in order to decline inter-EU Member State cooperation. The new proposals are thought to be crucial steps due to the ineffectiveness of the current applicable exchange of information arrangements on mutual assistance in the assessment and the recovery of taxes dating back to 1976 (Council Directive 1976/308/EEC) and 1977 (Council Directive 1977/799/EEC).

In particular, the proposals aim to:

1. extend the scope of the mutual recovery assistance to taxes and duties other than those already covered, including compulsory social security contributions;
2. provide for uniform instruments permitting enforcement or precautionary measures, in order to avoid problems of recognition and translation of instruments emanating from another Member State;
3. adopt a standard form for the notification of documents, relating to the claims covered, on the territory of another Member State;
4. enable officials of a Member State to be present in administrative offices in another Member State or to participate actively in administrative enquiries on the territory of another Member State;
5. develop a system of spontaneous information exchange;
6. make the conditions for requesting assistance less strict, at least in certain circumstances, in order to improve the recovery chances;
7. provide for the adoption of common request forms in order to facilitate the assistance, and
8. facilitate assistance in practice and make the legislation easier to apply.

These three initiatives were discussed in the ECOFIN meetings of November 10, 2009, December 2, 2009 and January 19, 2010, where the European Finance Ministers were called on:

- to reach political agreement on a draft directive aimed at amending the existing EU Savings Directive (2003/48/EC);
- to agree on a general approach on a draft directive aimed at strengthening administrative cooperation in the field of taxation;

- to agree on a general approach on a draft directive on the recovery of taxes;
- to agree on a general approach on a draft anti-fraud agreement with Liechtenstein, and
- to adopt a mandate for the Commission to negotiate anti-fraud agreements with third countries.

In the January 19, 2010 ECOFIN meeting, the European Finance Ministers reached agreement on a general approach, pending the opinion of the European Parliament on one of the measures, namely a draft directive aimed at strengthening mutual assistance between Member States in the recovery of taxes. The directive will be adopted at a forthcoming Council meeting, once the Parliament's opinion is available.

The draft directive is aimed at better meeting the Member States' needs with regards to the recovery of taxes, providing an overhaul of directive 76/308/EEC (codified by directive 2008/55/EC), on the basis of which the Member States have engaged in mutual assistance since 1976 aimed at clamping down on tax evasion.

National provisions on tax recovery are limited in scope to national territories. Fraudsters have taken advantage of this to organise insolvencies in Member States where they have debts. Member States increasingly request, therefore, the assistance of other Member States to recover taxes, but existing provisions have only allowed a small proportion of debts to be recovered.

The draft directive is intended to provide for an improved assistance system with rules that are easier to apply, including as regards information held by banks and other financial institutions. It is intended to provide for more flexible conditions for when requesting assistance, requiring the spontaneous exchange of information.

To the contrary, amendments to the EU laws on the taxation of savings interest and on cooperation between tax administrations, as well as the anti-fraud agreements with non-EU neighbours Andorra, Liechtenstein, Monaco, San Marino and Switzerland, remain firmly stalled because of Luxembourg's and Austria's reluctance.

The EU's current Spanish presidency wants to put pressure on Austria and Luxembourg, pressure which some countries such as Britain say will eventually become unbearable in the context of the next G20 move to close tax loopholes around the globe.

However, Mr. Luc Frieden, Luxembourg's Finance Minister is clearly in no hurry to budge, adding: "The debate is extremely limited, to my mind."

Arguing he wants a "level playing field" with G20 nations on information exchange, and not simply an opening up of its books to larger rivals with more political clout, he said the issue needs "an objective, serene debate on several aspects of taxation. All of that must be discussed, unless we want to see financial activity moved to Asia," he stressed.

4. LUXEMBOURG BANKING SECRECY LEGISLATION AND EXCHANGE OF INFORMATION

4.1. DOMESTIC LEGISLATION

Banking secrecy prohibits any person employed by a bank from disclosing information about its customers to third parties.

Historically, the banking secrecy rule was based on a broad interpretation of the professional secrecy principle mentioned in Art. 458 of the Criminal Code. Currently, it is explicitly provided by Art. 41 of the law dated April 5, 1993⁴ relating to the financial sector. Any breach of banking secrecy is punishable under a criminal law procedure.

Banking secrecy is a public order rule ("*règle d'ordre public*") which implies that no exemption/derogation is permitted except by law.

Additionally, the Grand Ducal decree dated March 24, 1989 taken in accordance with the "enabling law" ("*loi d'habilitation*") dated December 29, 1988 (introducing §178b in the general tax law (*Abgabenordnung*, "**AO**") has specified banking secrecy in the tax area and has determined the scope of the right of investigation of the tax authorities. According to this legislation, no information for the purpose of taxation of the income of the taxpayer shall be requested from credit institutions, other professionals of the financial sector, holding companies within the meaning of the law of 31 July 1929, undertakings for collective investment within the meaning of the law of 30 March 1988 and private wealth management companies ("*Société de gestion de patrimoine familial*"). An exception applies to the information that is necessary for the fair and right collection of registration duties and inheritance taxes.

It is, however, to note that the professional secrecy obligation does not waive the statutory obligation imposed on the banker to properly know his/her customer and, where applicable, the beneficial owner of the values in transaction. Anonymous accounts, therefore, cannot be opened in Luxembourg. The banker must have a vigilant knowledge of the holders of numbered accounts (i.e. accounts whose holder is designated by a number) or accounts kept under a pseudonym.

In criminal cases, banking secrecy is lifted in the event of judicial investigations by order of the examining judge who may act on the basis of international letters rogatory. One of the conditions to waive the banking secrecy rule is that the offence under investigation is also punishable under Luxembourg criminal law (i.e. dual criminality rule). Currently, in tax matters, banking secrecy can only be lifted if the offence is characterised as an aggravated tax fraud ("*escroquerie fiscale*"). Aggravated fraud in tax matters is defined under §396 (5) AO and implies the following elements:

- a substantial amount evaded (generally when the evaded amount exceeds Euro 100,000 or when more than 25% of the total tax liability was evaded), and
- systematic use of fraudulent methods.

⁴ Art. 41 of the Law dated April 5, 1993 provides that "(1) directors, members of the management or supervisory board, managers, employees and other persons who are at the service of the financial institutions, or other professionals of the financial sector, [...], are obliged to keep secret the information they are entrusted with in the course of their professional activity. Disclosure of such information is punishable in accordance with Art. 458 of the Criminal Code". (2) Secrecy obligation ceases in case the disclosure of information is authorised or imposed by law [...]"

Furthermore, banking secrecy is lifted for the purpose of preventing money laundering. For that purpose, banks are required to cooperate with the judicial authorities, especially in cases where indications of laundering come to light, regardless of whether the suspected offences have been committed in Luxembourg or elsewhere. The 1993 law also requires other financial professionals such as lawyers to report suspicious transactions to the public prosecutor.

4.2. LUXEMBOURG TAX TREATY NETWORK

Until March 2009 (date of the London G-20 Summit after which OECD report immediately followed), all the double tax treaties concluded by Luxembourg which were currently in force, including the Luxembourg-US tax treaty of April 3, 1996 (the “**US-Luxembourg treaty**”) included an exchange of information clause drafted along the lines of the 1977 OECD model tax convention (as updated up to 1995).⁵ The provisions of Art. 26 of the 1977 model convention allow a contracting State to decline the supply of information in so far as such information “is not obtainable under the laws or in the normal course of administration of that State”. The Luxembourg tax authority could, therefore, without violating its commitments under its tax treaty network, including the US-Luxembourg treaty, decline to provide certain information to their treaty counterparts on the basis of the fact that they cannot communicate information which they are not entitled to obtain in the first place, due to the restrictions under domestic banking secrecy rules. The OECD model tax convention has continued to evolve since 1996, especially with the 2005 update of the provisions of Art. 26 and the addition of a new paragraph 5 which explicitly provides that a contracting State may not decline the supply of information to its treaty partner solely on the grounds of banking secrecy.⁶ Luxembourg had made reservations to the new provisions of Art. 26 as this would have conflicted with its domestic banking secrecy rules. Until 2009, Luxembourg continued concluding tax treaties on the basis of the pre-2005 version of the OECD model exchange of information provisions.

Evidently, none of the Luxembourg tax treaties, as they currently applied, including the treaty with the US, were up to date with the current OECD exchange of information standards and, therefore, did not allow the exchange of information that is covered by banking secrecy. This is precisely the reason why Luxembourg was initially flagged by the OECD in its April 2009 report as a jurisdiction which had not yet substantially implemented the internationally agreed exchange of information standards despite its commitment to do so. **Please refer to Section 5 below concerning the recent announcement by the OECD in which it now classifies Luxembourg as a fully cooperating jurisdiction in the field of exchange of tax information.**

5. RECENT DEVELOPMENTS IN LUXEMBOURG

Treaty developments: In March 2009, the Luxembourg government declared its intention to modernise its tax treaty network by amending the exchange of information procedure in line with the most recent OECD standards. Various negotiations have subsequently been initiated with a number of treaty partners leading to the conclusion of the following protocols, which provide for the replacement of the current exchange of information provisions in the relevant treaties with new ones based on the current OECD model convention.

⁵ Luxembourg has also concluded a mutual legal assistance treaty with the US on March 13, 1997. However, no *ad hoc* agreement on the exchange of information on tax matters exists between both countries.

⁶ Paragraph 5 of article 26 of the July 2008 model tax convention provides that “in no case shall the provisions of paragraph 3 [concerning the restrictions to the obligation of supply of information] be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution [...]”.

<u>Treaty Partner country</u>	<u>Date of signature</u>	<u>Treaty Partner country</u>	<u>Date of signature</u>
United States	May 20, 2009	Norway	July 7, 2009
Netherlands	May 28, 2009	Belgium	July 16, 2009
France	June 3, 2009	Switzerland	August 25, 2009
Denmark	June 4, 2009	Island	August 28, 2009
Finland	July 1, 2009	Turkey	September 30, 2009
United Kingdom	July 2, 2009	Mexico	October 7, 2009
Qatar	July 3, 2009	Spain	November 10, 2009
Austria	July 7, 2009	Germany	December 11, 2009

In addition to the above, Luxembourg has concluded double tax treaties with India (June 2, 2008),⁷ Bahrain (May 6, 2009), Armenia (June, 23 2009), Monaco (July 27, 2009) and Liechtenstein (August 26, 2009) which provide for an exchange of information procedure along the same lines as the OECD model convention. These protocols should now follow the ordinary ratification procedure in the relevant countries and should become effective once such procedure is completed and the protocols are in force. In this respect, the tax treaties / protocols with Finland, Norway, Qatar and Denmark have already entered into force.

It is to be noted that the Luxembourg-US protocol contains certain provisions which are not in the OECD model convention according to which, a contracting State shall, if specifically requested, provide information in the form of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings) to the extent allowable under its domestic law. The protocol provides that it "shall have effect for requests made on or after the date of entry into force with regard to tax years beginning on or after January 1, 2009".

It is expected that Luxembourg will continue the trend of modernising the exchange of information procedure in its existing double tax treaty network. Certain concessions are also expected to be made by Luxembourg on the exchange of information in tax matters within the framework of EU legislation (mainly the EU Savings Directive 2003/48/EC dated June 3, 2009). Such a trend will certainly eliminate a major reproach that has traditionally been to Luxembourg as a non-cooperative jurisdiction in the field of tax information due to its rigid banking secrecy rules and will certainly reinforce the country's reputation as a secure and tax competitive financial place.

These developments evidence the intention of the Luxembourg government to fully cooperate with its tax treaty partners in exchanging information in tax matters, notwithstanding its domestic banking secrecy rules, as may be required for the correct and fair assessment of tax by the revenue authorities of these countries of its own taxpayers. The business community in Luxembourg has welcomed this move by the Luxembourg

⁷ Article 27 of the treaty with India is drafted along the lines of the pre-2005 OECD model convention. However, the protocol to the treaty contains a most favoured nation clause which obliges Luxembourg to apply in its relations with India any exchange of information arrangement agreed a tax treaty or protocol concluded by Luxembourg with an EU Member State that is more favourable or effective than the one agreed in the Luxembourg-India tax treaty.

government. Had the Luxembourg government attempted to resist the international pressure in this matter, it would certainly have damaged its reputation as a prime jurisdiction for capital market and M&A transactions and as a traditional location for holding and intra-group financing activities for which banking secrecy is merely irrelevant.

On the OECD front: in March 2009, Luxembourg withdrew its reservations to Art. 26 of the current OECD model convention. More recently, in less than a five-month period, Luxembourg has renegotiated 17 of its existing treaties along the lines of the most recent OECD standards for the exchange of tax information. With 6 additional treaties recently concluded with India, Armenia, Bahrain, Monaco, Liechtenstein and Barbados which also adopt the most recent OECD exchange of information standards. Luxembourg now totals 23 treaties which contain OECD model based exchange of information provisions which is over the minimum threshold that would appear to be required by the OECD for a jurisdiction to be considered as a fully cooperating (or so-called “white list”) jurisdiction in the field of exchange of information.

The intensive efforts made by Luxembourg in such a short period of time has, therefore, paid dividend. Such efforts have been “congratulated” by the OECD officials and have been much welcomed by the business community and tax practitioners in Luxembourg.

Within the EU: as a matter of principle, in so far as it is related to tax matters, EU legislation (such as directives) can only be adopted by the unanimous vote of all Member States. As a Member State, Luxembourg has a veto right on that front and no directive could be adopted without Luxembourg fully agreeing to it. According to unofficial views, Luxembourg would not vote for the directives on the exchange of information as they are currently proposed.

The commitment made by Luxembourg to move to the automatic exchange of information system if the required conditions under the Savings Directive are met (which would appear to be the case) is a steeper hurdle for Luxembourg. On the one hand, Luxembourg has committed to make such a move when the Directive was initially adopted, and on the other, however, the Luxembourg government (through the voice of Prime Minister Juncker) has on numerous occasions reiterated that his country will not give up banking secrecy altogether whether within the EU or in relation to third countries. In the framework of the last ECOFIN meetings (December 2, 2009 and January 19, 2010), Luxembourg Finance Minister Luc Frieden indeed emphasised: “We are open to compromise. We agree to an extension of the scope of the savings directive. We agree to improve the mechanisms of cooperation between tax administrations. But we cannot agree to the existence of a different exchange of information in Europe and in Luxembourg than the one applied in third countries. We insist that in Europe, the same things are taxed and in the same manner as in third countries. And it was precisely on this issue that we wanted to have a discussion”.

6. CONCLUSION

It is legitimate to think that the time when the Luxembourg tax authorities considered that banking secrecy was untouchable and non-negotiable is now over. The concessions made by Luxembourg in the framework of tax treaties by recognising the precedence of the principle of exchange of information over its domestic banking secrecy (i.e. in conformity with OECD standards) may be considered by the international community as a “small step” forward but it is certainly a “giant step” for Luxembourg which has long considered banking secrecy as a matter of national interest.

Undoubtedly, Luxembourg will live up to the commitments it has made in respect of its tax treaties and will effectively exchange information with its treaty partners in good faith notwithstanding its domestic banking secrecy rules. While doing so, Luxembourg has made it clear that the information will not be exchanged unconditionally. In the Luxembourg law dated March 31, 2010 ratifying the above mentioned tax treaties and protocols including an exchange of information upon request clause, drew the contours of the exchange of information procedure.:

- the request must be made on concrete, clear and precise evidence of tax evasion which excludes any “fishing expeditions”;
- the requesting authority must have first sought to obtain the relevant information in its own country;
- the information must be limited to tax matters, and
- the information will be provided on a case by case basis and not automatically.



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