

BANKING SECRECY EXCHANGE OF INFORMATION IN LUXEMBOURG

Executive Summary

Due to the proliferation of the bailout plans and recovery programmes launched recently to deal with the financial crisis, a number of countries, such as the US, the UK and Germany, have to unexpectedly face unprecedented amounts of public spending. In order to help finance such spending programmes, these countries have to seek and raise revenue wherever possible and, preferably, through means which are less costly and more palatable to ordinary taxpayers. Politicians have immediately turned to favourable tax countries, banking secrecy jurisdictions and offshore territories, not only as a potential source of revenue (through exchange of information and anti-tax avoidance legislation) but also as a means that is politically acceptable for the public/electorate.

The debate on offshore jurisdictions, the exchange of information at the OECD, EU and national levels (notably the US), has created a degree of confusion which, if not dissipated, would most likely cause a reputational damage to the jurisdictions concerned. This 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 lesser extent, a private banking niche.

The present note aims to clarify this debate by summarising the US anti-tax haven abuse bill (S.506 dated March 2, 2009)¹. It provides a brief insight into Luxembourg banking secrecy law and the current status of the exchange of information by Luxembourg in the framework of its double tax treaty network in comparison to most recent OECD standards. The note also covers the OECD report published immediately after the London G-20 Summit concerning the progress made in the area of exchange of information in tax matters under double tax treaties and exchange of information agreements as well as 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 reaction of the Luxembourg authorities and provides an overview of the process launched by Luxembourg to renegotiate its tax treaties with certain key OECD countries as far as exchange of tax information is concerned. It provides details of the recent announcement by the OECD whereby Luxembourg has subsequently moved into the so called "white list" now making it a fully cooperating jurisdiction in the field of exchange of information in tax matters.

¹ The present note focuses on the S.506 Bill of March 2, 2009 even though a number of other bills were introduced before or after that date. In our opinion, the S.506 bill is the most extensive and contains measures, which if implemented, would be the most detrimental to Luxembourg.

Banking Secrecy – Exchange of information in tax matters

1. US STOP TAX HAVEN ABUSE BILL

The US Stop Tax Haven Abuse bill² (the “**Bill**”) introduced by the 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.

1.1. REBUTTABLE PRESUMPTIONS

1.1.1. 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 were 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 US income tax system and would, therefore, become subject to an unlimited tax liability in the US as US tax residents.

² S.506 dated March 2, 2009

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 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 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”).

1.1.2. Limitation of the presumptions

The Bill provides for several limitations to the above described presumptions. For instance, the presumptions would not affect evidentiary rules in criminal cases and would only be applicable in enforcement proceedings (and not to a person’s reporting obligations on a tax or SEC filing). Furthermore, it would only come into play if the IRS or SEC were to challenge a matter in a formal proceeding. It would eventually exclude cases involving a publicly traded company or corporate reorganisations.

1.1.3. Definition of offshore jurisdictions

The presumptions 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:

- 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 United States that provides for the prompt, obligatory, and **automatic** exchange of information as is foreseeable 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.

The initial list of 34 offshore secrecy jurisdictions would be a starting point for the Treasury taken from actual IRS court filing in court proceedings in which IRS asked permission to obtain information about US tax evasion.

The Bill also provides the Treasury with the authority to add or remove jurisdictions from the initial list so that the list can be monitored and changed over time.

1.2. 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.

1.3. CODIFICATION OF THE ECONOMIC SUBSTANCE DOCTRINE

The last part of the Bill deals with the reinforcement of the economic substance requirement which leads to invalidate transactions that have no meaningful economic substance or business purpose apart from tax avoidance or evasion.

2. WHY LUXEMBOURG WOULD TARGETED BY THE BILL

2.1. LUXEMBOURG BANKING SECRECY

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. 468 of the criminal code. Currently, it is explicitly provided by Art. 41 of the law dated April 5, 1993³ 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

³ 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 [...].”

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.

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.

2.2. LUXEMBOURG TAX TREATY NETWORK

All the double tax treaties concluded by Luxembourg which are currently in force, including the Luxembourg-US tax treaty of April 3, 1996 (the "**US-Luxembourg treaty**") includes an exchange of information clause drafted along the lines of the 1977 OECD model tax convention (as updated up to 1995).⁴ 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 authorities 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.

⁴ 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.

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.⁵ 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 apply, including the treaty with the US, is up to date with the current OECD exchange of information standards and would, therefore, 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.

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. A proposal in this respect is scheduled for discussion soon at the ECOFIN meeting.

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:

i. 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:

⁵ 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 [...]”.

ii. the date on which the Council agrees by unanimity that the US is committed to 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:

- extend the scope of the mutual recovery assistance to taxes and duties other than those already covered, including compulsory social security contributions;
- 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;
- adopt a standard form for the notification of documents, relating to the claims covered, on the territory of another Member State;
- 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;
- develop a system of spontaneous information exchange;
- make the conditions for requesting assistance less strict, at least in certain circumstances, in order to improve the recovery chances;
- provide for the adoption of common request forms in order to facilitate the assistance;
- facilitate assistance in practice and make the legislation easier to apply.

4. 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 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).⁶

Luxembourg has been considered as part of the “light” grey list⁷ 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.

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.

5. REACTION OF LUXEMBOURG – RECENT DEVELOPMENTS

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

⁶ 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.

⁷ Together with other countries such as Austria, Belgium, Singapore and Switzerland.

which has led 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.

<u>Treaty Partner country</u>	<u>Date of signature</u>
United States	May 20, 2009
Netherlands	May 28, 2009
France	June 3, 2009
Denmark	June 4, 2009
Finland	July 1, 2009
United Kingdom	July 2, 2009
Qatar	July 3, 2009
Austria	July 7, 2009
Norway	July 7, 2009

In addition to the above, Luxembourg has concluded double tax treaties with Armenia (23 June 2009), Bahrain (6 May 2009) and India (2 June 2008)⁸ 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.

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, to 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 (the Luxembourg-Germany tax treaty of August 23, 1958, would be next on the list). Certain concessions are also expected to be made by Luxembourg on the exchange of information in tax matters in 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.

⁸ 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.

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 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 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 9 of its existing treaties along the lines of the most recent OECD standards for the exchange of tax information. With 3 additional treaties recently concluded with Armenia, Bahrain and India which also adopt the most recent OECD exchange of information standards. Luxembourg now totals 12 treaties which contain OECD model based exchange of information provisions which is 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 very 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. Developments should be expected soon on this front.

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 commitments it has made in 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 a recent press interview, the Luxembourg Premier drew the contours of the exchange of information procedure. He insisted that:

- the request must be made on a 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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