

## Tax matters

### 1. What has Luxembourg agreed to?

Luxembourg has decided to adopt the OECD standard on administrative assistance in tax matters in accordance with Article 26 of the most recent OECD's Model Tax Convention as the basis for the negotiation of bilateral double taxation agreements. Luxembourg has in particular agreed to adopt paragraph 5 of Article 26, which has recently been modified and has updated the OECD's Model Tax Convention. More specifically, Luxembourg has agreed to exchange information **upon request** in individual cases and on the basis of a specific and justified request by a foreign tax authority.

### 2. What do the OECD Model Tax Convention and, more specifically Article 26 (5) thereof, imply?

The OECD Model Tax Convention is essentially a template for an international double taxation agreement for OECD member states. Rather than being applicable legislation, the Model Tax Convention serves as a template that may be used for treaties that are negotiated and signed by countries.

Article 26 sets out the basis for bilateral exchange of information for tax purposes between signatory states. Luxembourg has concluded many double taxation agreements containing exchange of information clauses based on article 26 of an older OECD model. By implementing the recently changed paragraph 5 of article 26, signatory states agree to exchange information upon request including information held by banks. However, this agreement **does not imply the automatic disclosure of information**. The signatory country looking for information needs to provide **a specific request based on the opening of a procedure and concrete proof of the reasons why this procedure is opened**. This is precisely what Minister Frieden has confirmed at the "ABBL meets members" session on the subject on 16 March 2009.

### 3. When will the OECD standard enter into force?

Although Luxembourg has agreed to the OECD standard, the latter can only be applicable in the context of double taxation treaties that Luxembourg signs with other countries. **Article 26 (5) can thus not be applied on its own**, but only as part of international bilateral treaties. In order to come into force, these treaties will first have to be negotiated as well as signed by governments under the applicable legislative procedures of the signatory countries. Since we are dealing with a case-by-case situation, differing for each partner country, a specific date cannot be provided.

### 4. Will Article 26 (5) be applied retroactively?

The government will have to negotiate new double taxation agreements and very probably needs to change internal law. Normally new double taxation agreements do **not have retroactive effect**. It is further possible to integrate limitations into internal law.

### 5. Does the government's decision have an impact on the EU Savings Directive?

#### Background:

The European Savings Directive (2003/48/EC), agreed on 3 June 2003, foresees an automatic exchange of information between member states about foreign resident individuals receiving savings income outside their resident state. In order to protect client privacy, Austria, Belgium and Luxembourg preferred to opt for a withholding tax system instead of automatically exchanging information (Luxembourg clients can also decide for an exchange of information on demand, if they so wish). Initially at 15%, the rate increased to 20% in 2008 and will be raised to 35% as of the 1st of July 2011. The withholding states transfer the remaining 75% of the tax proceeds to the member state of the recipient.

In light of Luxembourg's decision to adopt OECD standards in tax matters, the government has demanded that the exchange of information upon request, as defined by the OECD Model Tax Convention, becomes the only standard applicable within the European Union. This will be the Luxembourg government's position in the coming negotiations on a number of draft directives that have been proposed by the European Commission and that will be discussed by the ECOFIN Council.

Article 10 of the European Savings Directive stipulates that the transitional period shall end and the automatic exchange of information shall be introduced when **all** third party countries take similar measures and have concluded with the EU (as an organisation) a so called TIEA (tax information exchange agreement), based on the OECD model TIEA from 2002 (which is meant for countries who cannot convince other States to conclude double taxation agreements with them). So far Switzerland has, however, only agreed to modify its bilateral agreements with (EU member) states by implementing the new article 26 (5).

As Minister Frieden has underlined, Article 10 does not foresee the **automatic transition** to the automatic exchange of information if third parties like Switzerland agree to introduce an exchange of information upon request according to the OECD standard.

Moreover, any modification of the Directive must be agreed upon by unanimity.

In the context of the forthcoming negotiations on improving the European Savings Directive, the ABBL supports the government's position that the exchange of information upon request, as foreseen by the OECD, should become the sole European (and worldwide) standard, replacing the automatic exchange of information.

## 6. What are the next steps?

The Luxembourg government will be able to negotiate new double taxation treaties with countries that hitherto have refused to sign such treaties with Luxembourg. As far as existing treaties are concerned, Luxembourg will re-negotiate double taxation agreements with countries that wish to do so. At the European level, Luxembourg will negotiate with its EU partners on amending the Savings Directive. Outside of the EU, Minister Frieden has already announced that the existing double taxation treaty with the US, dating back to 1997, will be amended by summer 2009. Negotiations on the matter will begin shortly.

## Professional secrecy

### 1. How will the government's decision to agree to Article 26 (5) affect client confidentiality in Luxembourg?

Professional secrecy, as defined by Article 41 of the Law of 5 April 1993 on the financial sector, which guarantees the confidential nature of a client's relationship with their bank, will remain intact in principle. The Luxembourg government has insisted that random and indiscriminate investigations for potential tax offenders will not be possible under future double taxation agreements.

### 2. Can foreign tax authorities now undertake "fishing expeditions"?

No. Tax authorities can only conduct investigations under the provisions set out in the relevant double taxation agreements with signatory states. Unlike in a situation of automatic exchange of information, information will only be provided in specific cases upon written request and on the basis of sufficient proof. The foreign tax authority must have sufficient ground to suspect that a citizen has committed a tax offence. As Minister Frieden has emphasised, a procedure in the country where the client is a tax resident must already be under way. Moreover, Article 26 of the OECD Model Tax Convention precludes random and indiscriminate probing.

### 3. Are Luxembourg residents affected by these changes?

No. For Luxembourg taxpayers nothing will change. Professional secrecy will remain intact.

### 4. What about foreign clients?

Depending on the provisions of the new double taxation agreements, the information of clients living outside of Luxembourg may be disclosed to foreign tax authorities in justifiable cases of tax offence. As previously mentioned, however, "fishing expeditions" will not be possible. But administrative assistance is possible in cases where a foreign tax authority has sufficient grounds to suspect that a tax offence has been committed. The privacy of foreign clients not under suspicion will continue to be protected as before. Because other important financial centres like Switzerland, Liechtenstein or Singapore, have agreed to take similar measures, a level-playing field has been achieved. Foreign clients in Luxembourg will thus continue to benefit from Luxembourg's outstanding financial expertise, save in the knowledge that their relationship with their bank remains bound to confidentiality.

## Investor protection

### 1. Will Luxembourg remain a leading European financial centre?

In its efforts to ensure a level playing field, the Luxembourg government has always insisted that its position in tax matters needs to take into account international developments. The government took the decision to adopt the OECD standard on administrative assistance in tax matters fully aware that leading financial centres, with comparable legislation to ours, have agreed to take similar steps. However, in order to safeguard this global level playing field, other countries, including the UK and the US, will need to take similar steps, particularly in becoming more transparent with regards to the disclosure of beneficial owners. Luxembourg will thus remain a well-regulated and highly competitive centre of excellence, renowned for its cross-border expertise. Acknowledging this fact and also taking into account recent developments, the European Council has confirmed that Luxembourg, a full member of the European Union, cannot feature on a list of non-transparent, non-cooperative and loosely regulated jurisdictions. On 23 March 2009, Minister Frieden also got assurances from the US administration that Luxembourg should not appear on a black list.

### 2. Is client protection safeguarded in Luxembourg?

In addition to ensuring that there exists a level playing field in terms of client confidentiality, the Luxembourg government also put our financial centre on an equal footing with its neighbours by raising the deposit guarantee to 100,000 € as of 1 January 2009. The Luxembourg Deposit Guarantee Scheme (AGDL) adapted its statutes accordingly.

## Documentation Watchlist

## Taxation

### National

- Loi du 21 juin 2005 transposant en droit luxembourgeois la directive 2003/48/CE du 3 juin 2003 du Conseil de l'Union européenne en matière de fiscalité des revenus de l'épargne sous forme de paiement d'intérêts. Elle a pour objet d'introduire une retenue à la source sur les revenus de l'épargne sous forme de paiement d'intérêts effectués au Luxembourg en faveur de bénéficiaires effectifs, personnes physiques qui sont des résidents fiscaux d'un autre Etat membre de l'Union européenne.

<http://www.legilux.public.lu/leg/a/archives/2005/0086/index.html>

- Loi du 19 décembre 2008 ayant pour objet la coopération interadministrative et judiciaire et le renforcement des moyens de l'Administration des contributions directes, de l'Administration de l'enregistrement et des domaines et de l'Administration des douanes et accises.

<http://www.legilux.public.lu/leg/a/archives/2008/0206/index.html>

### Europe

- COUNCIL DIRECTIVE 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:157:0038:0048:en:PDF>

- European Commission : Proposal for a COUNCIL DIRECTIVE amending Directive 2003/48/EC on taxation of savings income in the form of interest payments

[http://ec.europa.eu/taxation\\_customs/taxation/personal\\_tax/savings\\_tax/savings\\_directive\\_review/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/savings_directive_review/index_en.htm)

- European Commission : Proposal for a COUNCIL DIRECTIVE concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0028:FIN:EN:PDF>

- European Commission : Proposal for a COUNCIL DIRECTIVE on administrative cooperation in the field of taxation

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0029:FIN:EN:PDF>

### International

- OECD : Articles of the model convention with respect to taxes on income and on capital

<http://www.oecd.org/dataoecd/43/57/42219418.pdf>

- OECD : Agreement on exchange of information on tax matters (TIEA)

<http://www.oecd.org/dataoecd/15/43/2082215.pdf>

- US Congress : Stop Tax Haven Abuse Act

<http://levin.senate.gov/newsroom/supporting/2007/PSI.OffshoreTaxBill.021707.pdf>

## Professional secrecy in Luxembourg

- Article 41 de la loi du 5 avril 1993 relative au secteur financier

[http://observatoire.codeplafi.lu/pdf/loi/19930405\\_loi\\_update191208.pdf](http://observatoire.codeplafi.lu/pdf/loi/19930405_loi_update191208.pdf)

- Article 458 du Code Pénal

[http://www.legilux.public.lu/leg/textescoordonnes/codes/code\\_penal/index.html?highlight=code%22penal](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_penal/index.html?highlight=code%22penal)

- Règlement grand-ducal du 24 mars 1989 précisant le secret bancaire en matière fiscale et délimitant le droit d'investigation des administrations fiscales

<http://www.legilux.public.lu/leg/a/archives/1989/0015/a015.pdf#page=3>

- Loi du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel

<http://www.legilux.public.lu/leg/a/archives/2002/0091/a091.pdf#page=2>

## Investor protection

### Luxembourg

- Amendement au projet de loi n° 5900 destiné à passer le niveau de la garantie des dépôts de 20.000 euros à 100.000 euros

[http://www.gouvernement.lu/salle\\_presse/actualite/2008/10-octobre/31-garantie/amendement.pdf](http://www.gouvernement.lu/salle_presse/actualite/2008/10-octobre/31-garantie/amendement.pdf)

### Europe

- DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay

<http://register.consilium.europa.eu/pdf/en/08/st03/st03743.en08.pdf>