

INTERNATIONAL TAX CONFERENCES  
OF THE UNIVERSITY OF LUXEMBOURG

# Exchange of Information and Bank Secrecy

Edited by  
Alexander Rust  
& Eric Fort



Wolters Kluwer  
Law & Business

# Exchange of Information and Bank Secrecy

Edited by

**Alexander Rust**

**Eric Fort**



**Wolters Kluwer**  
Law & Business

*Published by:*

Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*

Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspenspublishers.com](mailto:customer.service@aspenspublishers.com)

*Sold and distributed in all other countries by:*

Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

*Printed on acid-free paper.*

ISBN 978-90-411-3995-5

© 2012 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

# Exchange of Information and Bank Secrecy

**International Tax Conferences of the University of Luxembourg**

---

Volume 2

---

**General Editor**

Alexander Rust

*ATOZ Chair for International and European Taxation  
University of Luxembourg*

## List of Editors

Alexander Rust, Prof. Dr., LL.M. (NYU), ATOZ Chair for European and International Taxation, University of Luxembourg.

Eric Fort is Partner in the Tax Law practice of Arendt & Medernach in Luxembourg. He is a lecturer in international tax law at the University of Luxembourg and secretary of the Luxembourg section of the IFA.

## List of Contributors

Marjolein Beynsberger is a lawyer at the law firm Liedekerke Wolters Waelbroeck Kirkpatrick and member of the Brussels Bar.

Stefan Braum, Prof. Dr., Head of the Department of Law, University of Luxembourg.

Valentina Covolo, Science Collaborator, University of Luxembourg.

Ernst Czakert, German Ministry of Finance.

Klaus-Dieter Drüen, Prof. Dr., Chair of Corporate Tax Law and one of the directors of the Center for Business and Corporate Law (CBC) at Heinrich Heine University Düsseldorf, Germany.

Martin Hess, Swiss Federal Tax Administration.

Paul Hondius is Associate in the Tax Law practice of Arendt & Medernach in Luxembourg.

Franck Le Mentec, partner at Cotty Vivant Marchisio & Lauzeral, Paris, France.

Philippe Malherbe is a partner in the law firm Liedekerke Wolters Waelbroeck Kirkpatrick and member of the Brussels Bar. He is a lecturer at the Catholic University of Louvain and a Visiting Professor at the University of Paris-Est Créteil.

Jan Neugebauer is Senior Associate in the Tax Law practice of Arendt & Medernach and heads the Luxembourg tax desk of Arendt & Medernach in New York.

## *List of Contributors*

Jens Schröder, European Commission DG Taxud D. 2 Direct Tax Policy and Cooperation.

Alain Steichen, Dr., partner at Bonn Steichen, Professeur associé, University of Luxembourg.

Jean-Pierre Winandy, Dr., partner at Loyens & Loeff, Assistant Professeur Associé, University of Luxembourg.



## Acknowledgements

This volume, *Exchange of Information and Bank Secrecy*, is the second in a new series presented by the University of Luxembourg on different topics of tax law. Each volume is the culmination of presentations made by leading experts at a recent conference arranged by the University's Chair for European and International Taxation on the particular topic. The goal of this new series is to quickly bring to the reader a timely and current look at some of the more pressing tax issues of the day.

The editors would like to express their sincere gratitude to the authors for not only making interesting presentations at the conference but also quickly converting those presentations into the very readable chapters contained in this volume. Many thanks must also go to our publisher, Kluwer and especially Lijntje Zandee, for their assistance in assuring the swift and timely publication of this work. The editors also want to thank Paul Hondius, Katarina Köszeghy and Suzanne Larsen for their help in arranging the conference and editing the chapters contained herein.

Above all, the editors are grateful to the Luxembourg branch of the International Fiscal Association and particularly to its president, Jean-Pierre Winandy, for their ongoing support and to the tax advisory firm ATOZ who generously sponsors the Chair for European and International Taxation at the University of Luxembourg.

Eric Fort and Alexander Rust

## Summary of Contents

<b>List of Editors</b>	<b>v</b>
<b>List of Contributors</b>	<b>vii</b>
<b>Acknowledgements</b>	<b>xxiii</b>
<b>Introduction</b>	<b>1</b>
<b>PART I</b>	
<b>GENERAL OVERVIEW AND RELATION BETWEEN TAX AND CRIMINAL PROCEEDINGS</b>	<b>7</b>
<b>Chapter 1</b>	
<b>Information Exchange in Tax Matters: Luxembourg's New Tax Policy</b>	<b>9</b>
<i>Alain Steichen</i>	
<b>Chapter 2</b>	
<b>European Criminal Law and the Exchange of Tax Information: Consequences for Luxembourg's Bank Secrecy Law</b>	<b>31</b>
<i>Stefan Braum &amp; Valentina Covolo</i>	

*Summary of Contents*

PART II	
EU AND OECD DEVELOPMENTS	57
<b>Chapter 3</b>	
<b>Savings Taxation and Banking Secrecy</b>	<b>59</b>
<i>Jens Schröder</i>	
<b>Chapter 4</b>	
<b>The Mutual Assistance Directives</b>	<b>77</b>
<i>Klaus-Dieter Driën</i>	
<b>Chapter 5</b>	
<b>Development of the International Information Exchange and Domestic Implementation</b>	<b>87</b>
<i>Eric Fort, Paul Hondius &amp; Jan Neugebauer</i>	
<b>Chapter 6</b>	
<b>2011: The Year of Implementation of the Standards?</b>	<b>119</b>
<i>Philippe Malherbe &amp; Marjolein Beynsberger</i>	
PART III	
COUNTRY SURVEYS: IMPLEMENTATION IN FRANCE, GERMANY AND SWITZERLAND	151
<b>Chapter 7</b>	
<b>Exchange of Information: The French Perspective</b>	<b>153</b>
<i>Franck Le Mentec</i>	
<b>Chapter 8</b>	
<b>Exchange of Information: The German Perspective</b>	<b>163</b>
<i>Ernst Czakert</i>	
<b>Chapter 9</b>	
<b>Exchange of Information: The Swiss Perspective</b>	<b>169</b>
<i>Martin Hess</i>	

PART IV TAXPAYER'S RIGHTS	175
<b>Chapter 10</b> <b>Data Protection as a Fundamental Right</b> <i>Alexander Rust</i>	177
<b>Chapter 11</b> <b>The Exchange of Information Procedure According to Double Tax Conventions: The Swiss Approach or How Taxpayer Rights Are Protected under Swiss Procedural Rules</b> <i>Oliver Untersander</i>	197
<b>Chapter 12</b> <b>Legal Protection against the Transfer of Information (Luxembourg)</b> <i>Jean-Pierre Winandy</i>	221
<b>Index</b>	241

# Table of Contents

<b>List of Editors</b>	<b>v</b>
<b>List of Contributors</b>	<b>vii</b>
<b>Acknowledgements</b>	<b>xxiii</b>
<b>Introduction</b>	<b>1</b>
<b>PART I</b>	
<b>GENERAL OVERVIEW AND RELATION BETWEEN TAX AND CRIMINAL PROCEEDINGS</b>	<b>7</b>
<b>Chapter 1</b>	
<b>Information Exchange in Tax Matters: Luxembourg's New Tax Policy</b>	<b>9</b>
<i>Alain Steichen</i>	
1 What Once Was . . . : The Old Rules	10
1.1 Evolution of the Luxembourg Banking Secrecy Rules	10
1.1.1 An Old Story	10
1.1.2 Lifting of Banking Secrecy in Case of Money Laundering . . .	11
1.1.3 . . . and in Presence of Criminal Tax Fraud	12
1.1.4 European Convention on Mutual Assistance in Criminal Matters	13
1.2 Luxembourg's Exchange of Information Practice up to the Bill	14
1.2.1 International Provisions for Tax Information Exchange	14

## Table of Contents

1.2.2	Reservation on Article 26 § 5 Model OECD Tax Convention	15
1.2.3	Withholding Tax under the Savings Directive	16
1.2.4	Peer Pressure and Threats from Various Countries and Organizations	16
2	..... No Longer Is: The New Rules	17
2.1	Key Features	17
2.1.1	Cut-Off Date: 1 January 2011	17
2.1.2	Taxes Covered	18
2.1.3	Information upon Request Only ...	19
2.1.4	..... for Now	20
2.1.5	No Fishing Expeditions	21
2.1.6	Subsidiarity Principle	22
2.2	Some Specific Aspects	23
2.2.1	Interaction with Luxembourg Banking Secrecy Rules for Luxembourg Residents	23
2.2.2	No Information Exchange in Case of Stolen CD	24
2.2.3	No Court Assistance for Stolen CD Data under International Public Law	26
2.2.4	Procedural Aspects and Taxpayer Rights	28
3	Conclusion	29

## Chapter 2

### **European Criminal Law and the Exchange of Tax Information: Consequences for Luxembourg's Bank Secrecy Law** 31

*Stefan Braum & Valentina Covolo*

1	The Significance of Bank Secrecy in the Sense of Luxembourg' Legislation	32
1.1	A Broad Scope of Application	33
1.1.1	Information Covered by Bank Secrecy	33
1.1.2	The People Subject to the Obligation of Bank Secrecy	34
1.1.3	The Territorial Scope of the Rule	35
1.2	A Rigorous Limitation on Exceptions Lifting Bank Secrecy	35
1.2.1	The Incompatibility of Prudent Surveillance and Tax Collection Purposes	36
1.2.2	The Banker's Obligations as a Party to, or Witness in, a Judicial Proceeding	36
2	The Extraterritorial Effect of Luxembourgish Bank Secrecy before Foreign Tax Authorities	37
2.1	Maintaining Bank Secrecy under Classic Rules of Administrative Mutual Assistance	38

2.2	Criminal Cooperation to Curtail Tax Fraud	40
3	'La loi du 31 mars 2010': Opening the Way for the On-Demand Exchange of Information for Tax Purposes	44
3.1	A New Twist on Bank Secrecy	45
3.2	The Uncertain Limits of Information Exchange	47
3.3	A New Image as a Cooperative Country at the Expense of the Right to Defend Oneself?	50
4	Purchasing Information in Regard to the Admissibility of Evidence in Criminal Proceedings	53
4.1	A Political Justification for Informal Practices	53
4.2	Practices Derived from the Disregard of the Obligatory Force of Law	55
PART II		
EU AND OECD DEVELOPMENTS		57
<b>Chapter 3</b>		
<b>Savings Taxation and Banking Secrecy</b>		<b>59</b>
<i>Jens Schröder</i>		
1	Introduction	59
2	EU Legislation on Savings Taxation	62
2.1	The EU Savings Directive 2003/48/EC	62
2.2	Savings Taxation Agreements	63
2.3	The Operation of the Directive 2003/48/EC	64
2.4	Accompanying EU Tax Policy Instruments and Initiatives	65
2.5	Agreements with Third Countries	66
2.6	Implementation of the Council Conclusions of May 2008	67
3	More Details about the Amending Proposal on Taxation of Savings	68
3.1	Determining the Effective Beneficial Owner of Interest Payments	69
3.2	Extending the Scope to Income Equivalent to Interest Payments	70
4	Legislative Discussions and Issues at Stake	70
4.1	Legislative Process	70
4.2	Member States Bilateral Negotiations	71
4.3	Ad-Hoc Report on the Correct and Effective Application of the EUSD	72
5	FATCA	73
6	Conclusion	74

<b>Chapter 4</b>	
<b>The Mutual Assistance Directives</b>	<b>77</b>
<i>Klaus-Dieter Dri�en</i>	
1 Introduction	77
2 Mutual Assistance Directive	79
2.1 Bank Secrecy as Reason for Refusal	79
2.2 Bank Secrecy versus Commercial Secrets	80
2.3 Forms of Information Exchange	80
2.4 Organizational Structure	81
3 Tax Recovery Directive	81
3.1 Bank Secrecy	82
3.2 Standard Forms for Requests of Assistance	82
4 Analysis	82
5 Outlook	83
<b>Chapter 5</b>	
<b>Development of the International Information Exchange and Domestic Implementation</b>	<b>87</b>
<i>Eric Fort, Paul Hondius &amp; Jan Neugebauer</i>	
1 Introduction	87
2 Historical Development of Information Exchange	88
2.1 Exchange of Information from 1963 to 1998	88
2.1.1 The Income and Capital Model Convention of 1963	88
2.1.2 Developments after the Income and Capital Model Convention of 1963	89
2.1.3 The OECD Model Convention of 1977	90
2.1.4 The Convention on Mutual Administrative Assistance in Tax Matters	90
2.1.5 Council Directive 77/799/EEC of 19 December 1977	90
2.2 The OECD Report on Harmful Tax Competition	91
2.3 Increasing Momentum after 1998	92
2.3.1 Global Forum on Transparency and Exchange of Information for Tax Purposes	92
2.3.2 OECD Model Convention of 2000	92
2.3.3 Developments on the Level of the European Union	92
2.3.4 Other Developments	94
2.3.5 The OECD Model Convention of 2005	94
2.3.6 OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes	95
2.4 The Progress after 2008	95
2.4.1 G-20 Summit in London	95
2.4.2 Global Forum	96
2.4.3 Foreign Account Tax Compliance Act	97
2.5 An Outlook	97



3	The Exchange of Information Procedure According to the Luxembourg General Tax Law	99
3.1	Background	99
3.2	Fiscal Secrecy Rules Applicable to the Tax Administration	100
3.3	Communication of Information in the Domestic Scenario	101
3.4	Disclosure of Information to the Luxembourg Tax Authorities	104
3.5	Form of the Information Request and Sanctions	106
3.6	Legal Requirements for the Request	106
3.7	Refusal Rights	106
3.8	'Bank' Secrecy Rules	107
3.9	Consequences	108
4	The Exchange of Information Procedure under the Law of 31 March 2010	109
4.1	Background	109
4.2	Scope of Application of the 2010 Law	109
4.3	Competencies	111
4.4	Material Requirements of the Exchange of Information Request	111
4.5	Summons to the Expected Holder of the Information	113
4.5.1	Addressee of the Summons	113
4.5.2	Motivation of the Summons	114
4.6	Provision of the Requested Information by the Expected Holder	114
4.7	Consequences of Non-Compliance with the Request for Information	115
4.8	Appeals against the Request for Information and against the Fine	115
4.9	Outlook	117
5	Conclusion	118

## Chapter 6

### **2011: The Year of Implementation of the Standards? 119**

*Philippe Malherbe & Marjolein Beynsberger*

1	Introduction	119
2	Towards an Exchange of Information: Landmarks	122
2.1	Tax Havens and Global Forum	122
2.2	The Internationally Agreed Tax Standard on Exchange of Information: What's in a Name?	125
2.2.1	Merits	126
2.3	The OECD Models Facilitating the Exchange of Information and their Implementation	127
2.3.1	EOI—Basic Principles	127
2.3.1.1	Foreseeable Relevance	127
2.3.1.2	No Restrictions on EOI	129
2.3.1.3	Taxpayer's Rights and Confidentiality	132