



detrimental to EU members' budgets, and there do not appear to be existing efficient solutions to these problems at the national level. Selecting the most appropriate one will take into account the need for a proportionate response.⁹

The roadmap/communication inquires whether any or all of the options have significant impacts on simplification, administrative burden, relations with other countries, implementation arrangements, and whether any options could be difficult to transpose for certain EU members.

The Commission's proposal is complicated by divisions of opinion within the EU. Luxembourg and Austria have not supported EU cross-border savings tax legislation that would institute an automatic tax exchange system that would force them to eliminate their bank secrecy laws. In recent months the Swiss tax agreements with Germany and the U.K. imposing various penalties on citizens from both countries with Swiss bank accounts but not calling for automatic information exchange and containing limits on exchange requests has also caused controversy in devising appropriate tax enforcement cooperation policy with third countries.¹⁰

The European Commission's initiative with respect to so-called tax havens, uncooperative jurisdictions, tax evasion, and tax avoidance has critical aspects not only for the EU, but also for international organizations, such as the OECD, IMF, and informal groups such as the Financial Action Task Force, and the Financial Stability Board. Since the EU has significant power in these organizations and informal groups and has a foreign policy, the EU tax enforcement policy has impact far beyond the EU.

B. Switzerland: New Standards on the Exchange of Tax-Related Information

by Sandrine Giroud and Simone Nadelhofer¹

1. Introduction

In the spring of 2009 the names and account information of 285 US citizens holding undeclared accounts with UBS in Switzerland were handed over to the US tax authorities. At the same time, judicial proceedings were filed in Germany and France against holders of Swiss accounts based on tax data stolen by former employees of Swiss banks. These events added to the growing international pressure, in particular from the OECD, on Switzerland to soften its standards on the exchange of information in tax matters. The present contribution aims at providing an overview of the main changes shaping Switzerland's new standards.

2. Swiss Standards on the Exchange of Information in Tax Matters

Foreign States can use two channels to obtain from Switzerland tax-related information on holders of Swiss bank accounts. When foreign tax authorities are involved, the exchange of information is carried out by means of *administrative assistance* within the legal framework of bilateral double taxation agreements ("DTAs"). Alternatively, in the case of criminal proceedings, information can be exchanged by way of *mutual legal assistance in criminal matters* ("MLA") based on multi- or bilateral agreements or in accordance with the Federal Act on International Mutual Assistance in Criminal Matters.

⁹ *Id.*

¹⁰ Kirwin, *supra*.

¹ Both attorneys-at-law with LALIVE. They can be reached at sgiroud@lalive.ch and snadelhofer@lalive.ch.



Administrative assistance proceedings are, as a rule, more rapid and less formal than MLA proceedings. Another difference is that evidence collected in Switzerland under MLA proceedings may only be used for the purpose of the criminal investigation for which assistance has been granted (so-called “principle of specialty”). As a consequence, any direct or indirect use of the documents and information obtained for any other purpose (notably taxation) in the requesting State is prohibited and subject to explicit and prior authorisation by the competent Swiss authorities. By contrast, administrative assistance typically contains a much broader definition of the principle of specialty. DTAs usually provide that, in the context of administrative assistance, information may be disclosed to any third party or authority involved in the assessment, collection, administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the DTA.

3. *The UBS Case*

The American endeavours to obtain information about US taxpayers holding bank accounts with UBS have given rise to ground-breaking decisions which were subsequently crystallised in a bilateral instrument.

The original (and still current) legal basis for the exchange of information between the two States lies in the 1996 double taxation treaty (“**DTA 96**”). A new DTA reflecting the full scope of Article 26 of the OECD Model Tax Convention was signed on 23 September 2009 by both the US and Swiss Governments (“**DTA 09**”). While the Swiss parliament approved the new agreement in spring 2011, the US Senate has still to ratify it. Until then, the DTA 96 remains in force.

Whereas the DTA 96 allows for legal assistance in cases of suspected “tax fraud and the like”, the DTA 09 statutorily extends the scope of the exchange of information to cases of “tax evasion”. In practice, however, Switzerland had already relaxed its strict information exchange policy towards the US by agreeing to provide treaty assistance in approximately 4,200 cases of continued and serious “tax evasion” concerning UBS through a separate bilateral treaty dated 19 August 2009 and its amending protocol of 31 March 2010. Switzerland agreed to the deal to put an end to the UBS cross-border tax dispute. While solving the UBS case, this agreement does not, however, settle US claims against other Swiss banks (e.g., Credit Suisse).

As regards the formal requirements, the Swiss government had originally stressed that the exchange of information under the DTA 09 would be limited to individual cases upon a specific and justified request. In particular, an account holder name was to be the key prerequisite for granting legal assistance. However, in a much criticised decision of 5 March 2009, the Swiss Federal Administrative Court (“**SFAC**”) considered that group applications, i.e., administrative assistance requests based on “behavioural patterns” of a group of persons, were admissible under the DTA 96, thus eliminating the need for the investigating tax authorities to name taxpayers who may have committed tax offenses. The SFAC held that the mere reason to suspect tax offenses by third parties based on the description of “a general pattern of facts and circumstances” was sufficient to grant a request for information exchange.²

Considering this interpretation of the DTA 96, it seems unlikely that Switzerland will be able to continue excluding group requests from the scope of the DTA 09, all the more so given the recent threat of new tax probes against ten Swiss banks (among them Credit Suisse) launched by the US tax authorities. In fact, in August 2011, the Swiss government formally asked the parliament to approve extensions to the DTA 09 allowing for administrative

² SFAC decision of March 5, 2009, in: ASA 77 (2009) p. 837 ff.



assistance requests based on behavioural patterns, as admissible under the DTA 96. The Swiss parliament has postponed its decision until December 2011.

4. *Exchange of Information Based on OECD-Friendly Double Taxation Agreements*

a. The OECD Standard on the Exchange of Tax-Related Information

In the wake of the *UBS* case and growing international pressure, Switzerland decided in March 2009 to adopt the OECD standard on the exchange of information, as set out in the OECD Model Tax Convention, and to withdraw its reservation to Article 26.

The OECD Model Tax Convention provides, *inter alia*, for a system of administrative assistance among the tax authorities of the signatory countries. It does not directly apply to individual cases but is merely a model text that can serve as a basis for DTAs. Pursuant to Article 26 of the OECD Model Tax Convention, States shall exchange information that is foreseeably relevant to the correct application of a tax convention as well as for purposes of the administration and enforcement of “domestic tax laws” of the contracting States upon specific request. Switzerland’s former reservation meant that it could ignore other States’ domestic law criminalising “tax evasion” and decline information exchange.

In fact, under the traditional Swiss concept, “tax evasion” included cases where a taxpayer had intentionally or negligently failed to pay taxes, whereas “tax fraud” implied an additional fraudulent element such as the use of forged or falsified documents (e.g., balance sheets, accounts, income statements and other statements of third parties) by the tax fraudster. By withdrawing its reservation to Article 26, Switzerland has now waived this distinction and will therefore grant request of information exchange in cases of assistance sought for alleged cases of “tax evasion” where DTAs have been renegotiated accordingly. The greater scope for exchange of information only comes into effect when the renegotiated agreements enter into force. To date, Switzerland has adopted or renegotiated over 35 Article 26-friendly DTAs.³

However, the Swiss government has made clear that it would enforce strict requirements for granting assistance to avoid “fishing expeditions”, i.e., random and indiscriminate searches. Accordingly, information shall only be provided upon receipt of a substantiated written request from a foreign State, with an adequate description of the incriminated facts including the name of the taxable person and that of the bank or its branch. Yet, under renewed threats of black- or grey-listing by the OECD, Switzerland has already relaxed its policy to allow requests to be based solely on the indication of a bank account number.⁴

³ Such DTAs have been signed with: Austria, Canada, Colombia, Denmark, Finland, France, Germany, Greece, Hong Kong, India, Ireland, Japan, Kazakhstan, Luxembourg, Malta, Mexico, the Netherlands, Norway, Oman, Peru, Poland, Portugal, Qatar, the Republic of Korea, Romania, Russia, Singapore, Slovakia, Spain, Sweden, Turkey, the United Arab Emirates, the United Kingdom, and the United States.

⁴ See the news release available at: <http://www.efd.admin.ch/aktuell/medieninformation/00462/index.html?lang=en&msgid=37645%3C/p%3E> (11 November 2011).



b. The Tax Administrative Assistance Act

The implementation of the OECD compliant administrative assistance procedure is subject to national law. To this end, Switzerland will introduce a new Tax Administrative Assistance Act (“TAAC”) governing the terms and conditions for the execution of administrative assistance in accordance with the OECD standard.⁵

The draft TAAC presented by the Swiss government in early July 2011 confirms the general principle that administrative assistance will be provided exclusively upon request in individual cases, ruling out group applications. It provides that a request should contain the name and address of not only the taxpayer but also the holder of the information (e.g., a bank). However, as noted, concessions have already been made to allow other means of identification, such as the identification via a bank account.

Furthermore, a request will not be considered if it is based on information that was obtained by acts that are punishable under Swiss law, such as the illegal acquisition of data (“*fruit of the poisonous tree*” doctrine). The question of stolen bank data has been very sensitive in Switzerland since a former employee of HSBC Geneva handed over stolen client data to the French authorities in 2009 and other stolen data contained on several CDs were purchased by the German authorities. In reaction, Switzerland has decided that no exchange of information would be granted in case of stolen bank data.⁶

The draft TAAC further sets out from whom and how the requested information is to be obtained, who is to be informed of the pending request, and who has a right of participation and appeal. It is noteworthy that Swiss tax authorities may request the owner of the information (typically the bank) to invite the person investigated who is domiciled abroad to designate an authorised recipient in Switzerland. Subject to the requesting State’s permission, the Swiss tax authority may also inform the person domiciled abroad directly.

After having collected the information requested by the foreign State, the Federal Tax Administration will issue a formal decision, subject to appeal to the SFTA within 10 days.⁷ As a rule, the appeal has suspensive effect, meaning that no information will be handed over to the requesting State before the final decision comes into force. Grounds for an appeal could be the lack of specification of the request and its “fishing expedition” nature, the lack of relevancy of the information requested, the existence of obvious errors, contradictions or omissions in the request, or the illegality of the way by which the data were obtained. Client data information will only be transmitted to the requesting State if the taxpayer has exhausted all administrative procedural rules, in particular the appeal procedure. Moreover, bank information transmitted abroad may only be used to the extent that it could have been obtained in accordance with Swiss law.

The draft TAAC will not only cover administrative assistance in the framework of DTAs but will also govern administrative assistance based on other agreements that provide for the exchange of tax-related information (e.g., the agreement on the taxation of savings income with the EU).

⁵ The new Act shall replace the current Ordinance on the Provision of Administrative Assistance in Accordance with DTAs which was adopted on 1 October 2010.

⁶ Paradoxically, several Swiss cantons have relied in the past on illegally obtained data from the German criminal authorities to prosecute Swiss tax fraudsters, a practice protected by the Swiss Federal Supreme Court in a judgment of 2 October 2007, ATF 2C_514/2007 of 2 October 2007 (*Ballliner* case).

⁷ The decision of the SFTA may be further appealed to the SFSC on a question of principle.



5. *The Final Withholding Tax Model and its German and UK Implementation*

a. The Final Withholding Tax Model

With the implementation of a OECD-compliant model, Switzerland has promptly reacted to outstanding foreign tax claims on an *ad hoc* basis. Yet, in order to act preventively and regulate these issues in a more general and consistent manner, Switzerland has been working on a new model of information exchange in tax matters: the Final Withholding Tax (“**FWT**”) model. This model aims at regularising previously undisclosed investment incomes and at properly taxing future income of foreign holders of funds with Swiss banks, while preserving anonymity and discouraging the use of illegally acquired tax data.

The new model works on the basis of a FWT levied by a Swiss Paying Agent (e.g., banks, securities dealers and other persons) that is transferred anonymously to the tax authorities which, in turn, transfer it to the competent foreign authorities. The FWT is calculated at a flat rate and applies, *inter alia*, to interests, dividends and other investment income. The FWT is levied on natural persons and any constructs associated with these persons (e.g., domiciliary companies, foundations, or trusts).

The FWT needs to be negotiated with each State and anchored in bilateral agreements. The implementation and specification of each of these agreements will be further set out in the Federal Act on International Withholding Tax (“**IWTA**”). Currently at draft stage, the IWTA contains provisions on the organisation, procedure, judicial channels and criminal sanctions which are provided under the tax agreements based on the FWT system. In particular, the draft IWTA sets out the enhanced system of information exchange provided by these agreements.

b. The German and UK Agreements: Key Points

Based on the FWT model, Switzerland signed bilateral tax agreements with Germany on 21 September 2011 and with the UK on 6 October 2011. These agreements still need to be approved by each country’s parliament and their entry into force is foreseen for early 2013. The two agreements address the following key points.

Identification: The agreements will apply to all “relevant persons” and “relevant assets”.

“Relevant persons” are any individual resident in Germany or the UK,⁸ who as a contractual partner of a Swiss Paying Agent, is the account holder or deposit holder and beneficial owner of assets. Also a “relevant person” is a beneficial owner, as so determined by the Swiss Paying Agent, who holds assets through various legal vehicles (e.g., legal entities, companies, institutions, foundations, trusts, fiduciary companies and other establishments not exercising a trading or manufacturing activity or another form of commercial operations).

However, a German or UK resident is not considered to be a “relevant person” with regard to assets of associations of persons, asset structures, trusts or foundations, if it is not possible to ascertain the beneficial ownership of such assets (e.g., due to the discretionary nature of the arrangement). The existing margin of appreciation surrounding these criteria opens the door for future legal battles.

“Relevant assets” comprise all forms of bankable assets booked or deposited with a Swiss Paying Agent (e.g., cash accounts, precious metals accounts, stocks, shares, securities, structured products), but not the content of safe deposit boxes, real estate, chattels or insurance contracts.

⁸ Non-UK domiciled individuals are also covered by the Swiss/UK agreement unless they can prove by way of certification by a lawyer or tax agent that they have complied with certain conditions.



Regularisation of the Past: German and UK resident taxpayers with undeclared Swiss funds have three options.

- **Anonymous one-off payment and clearance of tax liabilities:** Taxpayers will accordingly pay a one-off flat tax ranging between 19% and 34% depending on the duration of the client relationship as well as the initial and final amount of the capital. The rate will be inversely proportional to the time during which the assets remained in Switzerland. The one-off payment will be determined on the basis of a complex formula set out in each respective agreement and will satisfy interests and penalties with respect to the covered tax liabilities.
- **Voluntary disclosure:** Alternatively, taxpayers can disclose their banking relationship in Switzerland to their respective tax authorities with the consequence of being subject to retrospective taxation on an individual basis.
- **Closing of Swiss account:** Finally, taxpayers who are unwilling to resort to any of the preceding options must close their accounts in Switzerland within 5 months following the entry into force of the relevant agreement, failing which the one-off tax will be automatically deducted from their assets.

The one-off payment is, however, not applicable in cases where, *inter alia*, the tax affairs of a “relevant person” with “relevant assets” are under investigation, where a person was contacted personally to participate in a disclosure facility, or where the assets are derived from the proceeds of crime.

Although nothing can prevent taxpayers from closing their account before the entry into force of the agreements, Switzerland has agreed to provide German and UK authorities with statistical information concerning the 10 most important destination countries where funds of such account holders have been transferred.

Swiss financial institutions are also committed to make an upfront payment of CHF 2 billion to the German tax authorities and CHF 500 million to their UK counterparts within a month after the entry into force of the respective agreements. These amounts will later be offset by the one-off payments and thereby reimbursed to the banks.

Withholding Tax for Future Taxation: After the entry into force of the agreements, German or UK holders of a Swiss account will have two options in order to remain tax-compliant.

- **Anonymous payment of a withholding tax:** A taxpayer can submit to an anonymous withholding tax payment levied on capital income and gains. The uniform tax rate will be of 26.375% for German taxpayers and between 27% and 48% for UK taxpayers, depending on the category of income.
- **Voluntary reporting:** Alternatively, a taxpayer can make a voluntary report to his respective tax authorities.

c. Enhanced System of Information Exchange

The FWT system provides for an enhanced system of information exchange which is regulated differently from the draft TAAC. In practice, the FWT will have a long-term impact that is equivalent to the automatic exchange of information in the area of capital income and resolves the issue of illegally acquired tax data.

Moreover, to prevent the deposit of new untaxed assets by taxpayers who have regularised their situation under the FWT mechanism, German and UK authorities are allowed, under certain conditions, to request information as to whether the taxpayer concerned held or holds an account or a safekeeping account with a Swiss Paying Agent, without specifying the name of the Agent. Such request is only allowed on plausible grounds for verifying the accuracy and completeness of the information regarding the taxpayer in question. Such grounds exist where the foreign tax authority has identified on a case-by-case basis a tax risk in relation to one of its taxpayers and



sees plausible, non-arbitrary grounds for checking his tax position (e.g., previous tax returns, level of income, third party information and knowledge of the persons who were involved in completing a tax return). However, fishing expeditions remain prohibited.

Following a foreign request, the Swiss authorities will investigate the existence of accounts and deposits through a general request to Swiss banks which will be obliged to disclose the existence of accounts and deposits of the named individual. The Swiss authorities shall inform the foreign taxpayer before the information is transmitted about the intended exchange of information with the possibility to appeal to the extent provided by Swiss law.

Such information requests are limited in number. German authorities are allowed to make between 750 and 990 requests during an initial period of 2 years, while UK authorities are allowed to 500 per year between 2013 and 2016. These numbers are thereafter subject to amendments.

6. Conclusion

The *UBS* case and the OECD pressure have reshaped the Swiss standard for the exchange of tax-related information and Switzerland is now taking active steps to set the basis for a long-term settlement of the issue of undeclared tax assets.

This implied the adoption of the OECD standard on the exchange of information and its incorporation in renegotiated DTAs. Moving one step further, Switzerland is now establishing a FWT model based on a withholding tax levied at source at a flat rate and transferred to the tax authorities of the requesting States. While allowing to preserve the anonymity of holders of Swiss bank accounts and avoiding the use of illegally acquired data, this new system ensures the settlement of legitimate foreign tax claims and a quasi-automatic exchange of tax-related information.

The new legal regime applicable to the exchange of information in tax matters depends largely on the content and outcome of bilateral negotiations. The best option available to each taxpayer will essentially depend on individual circumstances, in particular the period during which the bank account has been open, the origin of the funds and the fluctuation of the funds since their deposit.

These developments will enhance legal certainty and should strengthen the reputation of Switzerland as a financial centre. Yet, numerous uncertainties remain as the margin of interpretation of the new rules regarding *inter alia* identification and beneficial ownership remains quite large. Legal guidance will be crucial to navigate in such uncharted waters.



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