

International exchange of information in tax matters

Oliver Jaeggi and Stephan Pfenninger, of Tax Partner AG – Taxand, review how Switzerland is adapting to the latest international developments in the area of tax information exchange, including spontaneous, on request and automatic.

Extension of tax EoI safeguarding political and fundamental rights as well as market position

In the past few years, Switzerland has shown considerable developments in the field of international exchange of information (EoI) in tax matters. Up to now, Switzerland has signed 50 double tax treaties (DTTs) with an exchange of information clause according to article 26 of the OECD Model Convention (of which 41 have come into force) and seven tax information exchange agreements (TIEAs, of which three have come into force). Further DTTs and TIEAs conforming to OECD standards are on the horizon.

Besides the DTTs and TIEAs Switzerland provides tax information, for example based on the EU-Swiss agreement on the fight against fraud in the area of indirect taxation, the EU-Swiss Savings Agreement, the withholding tax agreements with the UK and Austria and the Foreign Account Tax Compliance Act (FATCA) with the US.

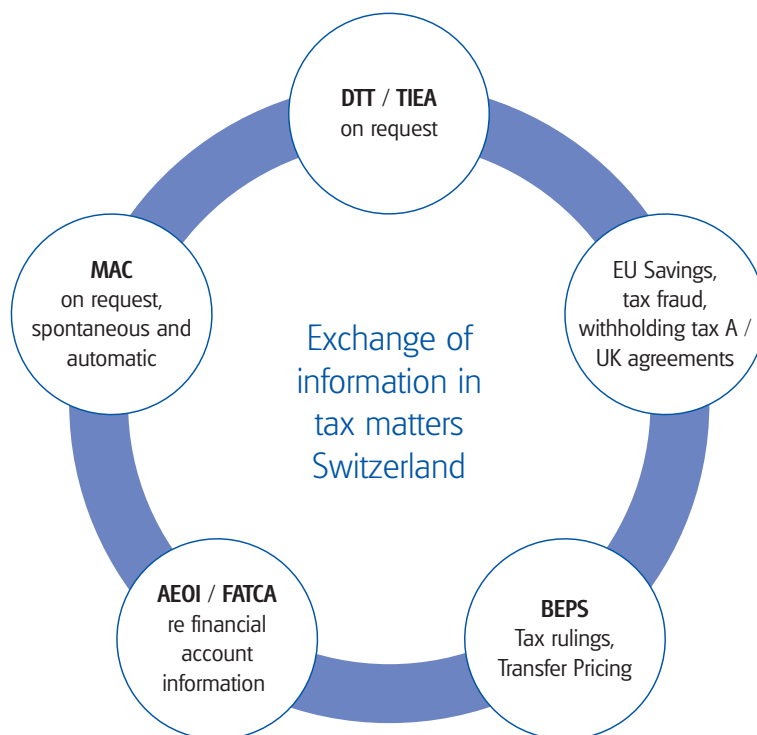
Switzerland's developments in the area of EoI are even more remarkable considering that political rights must be respected when implementing such international standards. In contrast to other countries (including most EU member states) Switzerland's political system is based on direct democracy under which the people have further political rights, for example to vote in referendums regarding legislation and international treaties with respect to exchange of tax information. On the other hand, Switzerland seeks to maintain access to financial markets and avoid a 'grey' or 'black' listing and thus wishes to comply with international standards.

Exchange of information on request

With respect to the EoI on request, Switzerland follows the OECD principles and recommendations based on article 26 of the OECD Model Convention. In particular, Switzerland also grants exchange of information for group requests in line with the OECD standard.

With regard to the fundamental rights of taxpayers, certain limitations must be respected in terms of EoI on request. The information requested must be foreseeably relevant for the tax assessment of the requesting state, and no request is granted in case of fishing expeditions. Principles such as the respect of the *ordre public*, reciprocity and the proportionality principle must be considered. Finally, Switzerland does not grant EoI according to domestic Swiss law if such information was obtained through a criminal offence (for example in case of stolen bank information).

Swiss framework of international exchange of information in tax matters



Moreover, procedural guarantees are granted according to the Swiss Federal Act on International Administrative Assistance in Tax Matters (TAAA), such as the right to be heard and the right to fair treatment in administrative proceedings. The competent authority for administrative assistance is the Swiss Federal Tax Administration (FTA). The taxpayer concerned must be notified by the FTA about the main parts of the information request, may participate in the procedure and inspect the files before the FTA transmits the information requested to the foreign state. The taxpayer is also entitled to appeal against the final decree issued by the FTA stating the transmission of the information. Exceptionally, the FTA notifies the person concerned after the transmission of the information only if the requesting tax authority demonstrates that the purpose of the administrative assistance would be defeated and the success of its investigations would be thwarted by advance notification.

The recent developments and legislation introduced show that Switzerland has been in a position to extend its international EoI standards and at the same time keep its principles as a democratic and constitutional state.

Further important developments

In the coming months and years, further important develop-

ments in the area of EoI in tax matters are to be expected in Switzerland.

In January 2015, the Federal Council initiated two consultations in the field of the international EoI in tax matters, the first regarding the OECD / Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (MAC) and the second regarding the automatic exchange of information (AEOI). The Swiss Federal Council will presumably present its reports in the summer of 2015 so that the Parliament may discuss the draft legislation as of the 2015 autumn session.

The Federal Council's decision to sign the MAC and implement the global AEOI standard is in line with the strategy for a competitive Swiss financial centre, which includes aligning with international standards in the tax area and particularly those concerning transparency and EoI. In addition, on a political level Switzerland's implementation of the AEOI will have a positive knock-on effect on other proposals, for example in terms of international acceptance on the current Corporate Tax Reform III in Switzerland.

Furthermore, in October 2014, the Federal Council launched the consultation procedure on the Federal Act on the Unilateral Application of the OECD standard on the exchange of information (GASI). The new law provides the unilateral application of the OECD EoI standard to all DTTs

if the counterparty grants reciprocity. The amendment of each bilateral DTT would be very time-consuming. Under the GASI, Switzerland plans to extend the exchange of information in particular with non-European countries, which are not party to the MAC. However, it is not certain whether the parliament will pass this legislation. Some political parties criticise such unilateral application of exchange of information.

New spontaneous EoI based on the MAC as of 2018

The MAC has been signed by 69 states and implemented by 43 and is part of the standard for international cooperation in tax matters. The MAC provides three forms of information exchange in tax matters: exchange of information on request, spontaneous exchange of information and automatic exchange of information.

Besides the DTTs with OECD standard, the TIEAs and possibly the new unilateral GASI legislation, the MAC will be the legal basis for EoI on request.

In addition, the MAC will introduce the spontaneous exchange of information as a new form for Switzerland. Spontaneous EoI is the provision of information that is foreseeably tax relevant to another state and which has not been previously requested by such state. The wording of article 7 of the MAC provides spontaneous EoI under the following circumstances:

- Grounds for suspecting that there may be a significant loss of tax in another country;
- A person liable to tax obtains a reduction in, or an exemption from, tax in one country which could give rise to an increase in tax liability in another country;
- Business dealings between a person liable to tax in a country and a person liable to tax in another country are conducted through one or more countries in such a way that a saving in tax may result in one of the other countries or in both;
- A country has grounds for suspecting that a tax saving may result from artificial transfers of profits within groups of enterprises; and
- Information forwarded to a country by another country has enabled information to be obtained which may be relevant in assessing liability to tax in another country.

The Federal Council will settle the conditions for the spontaneous exchange of information in an ordinance in accordance with the international standard and practice in other states. For drafting the corresponding ordinance, the Federal Council has set up a task group. The 2006 OECD manual on information exchange (module 2 on spontaneous EoI) provides technical and practical guidance in this regard and mentions scenarios where a spontaneous EoI may be useful.

Finally, the MAC will also be the basis for the introduction of the AEOI.

As expressly stated in the preamble to the MAC, fundamental principles entitling every person with a proper legal procedure shall be recognised and the states should endeavor

to protect the legitimate interests of taxpayers. As mentioned above, the Swiss legislation TAAA grants procedural guarantees such as, for example, the previous notification of the person concerned, the right to participate and to inspect files and the possibility to appeal against final decrees of the FTA. These principles will be applicable in the exchange of information on request as well as in the spontaneous exchange of information (but not in the case of the automatic exchange of information).

Furthermore, the MAC provides rules to protect the confidentiality of the information exchanged. If personal data is provided, the state receiving it shall treat it in compliance not only with its own domestic law, but also with the safeguards that may be required to ensure data protection under the domestic law of the supplying state. In this regard, the Federal Council will be entitled to conclude respective agreements. The minimal standard shall correspond to the Federal Act on Data Protection.

Under the conditions of the MAC states may make reservations regarding the taxes covered and the type of assistance. The Swiss Federal Council proposes excluding social security contributions and taxes other than income tax and net wealth tax (for example, inheritance and gift tax, taxes on immovable property, VAT). In addition, certain administrative assistance shall be excluded, for example with respect to the execution and enforcement of tax claims of a foreign state in Switzerland and for the service of documents. Only direct postal delivery of documents will be possible between the foreign state and Switzerland. Finally, Switzerland should not allow foreign authorities to be present at tax audits in Switzerland.

Should the MAC enter into force as per January 1 2017 or later in 2017, the exchange of information under the MAC will be possible for tax periods beginning on January 1 2018. In the case of tax offences committed deliberately and subject to criminal sanctions, retroactive application of the MAC should be restricted to three years before the MAC will enter into force (that is, limited to tax periods beginning on January 1 2014).

AEOI as of 2018

Switzerland signed the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (MCAA) on November 19 2014. The MCAA is based on the MAC and aims to achieve the uniform implementation of the OECD's AEOI standard (common standard on reporting and due diligence for financial account information). The automatic exchange of information involves the systematic and periodic transmission of financial account information. It allows for a level playing field in the competition between financial centres. The exchanged information should be used solely for the agreed purpose (principle of speciality), the information should be reciprocal and data protection must be ensured. The scope of the AEOI in terms of the reportable accounts is very wide and also includes trusts and foundations.



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Oliver Jäggi is an attorney and a certified Swiss tax expert. His career started in the corporate tax department of KPMG in Zurich in 2000, where he worked as a tax manager on national and international projects until 2007. Following this, he joined Tax Partner and is now a senior adviser.

Oliver has more than 13 years' experience of local and international tax. He is mainly involved in tax planning, restructuring and transactions of national and international corporations and entrepreneurs. He also works on real estate planning, tax litigations and for private clients. Oliver has published various articles in the field of tax and speaks fluent German, French, English and Spanish.

Tax Partner is one of the leading tax firms in Switzerland. Now with 34 professionals, the firm has been advising multinational and national corporate clients as well as individuals. Tax Partner co-founded Taxand in 2005 – the first global network of more than 2,000 tax advisers and more than 400 partners from independent member firms in nearly 50 countries.



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Besides national and international corporate tax law, Stephan's activities are mainly focused on real estate tax mandates. He is a tax adviser for listed and non-listed Swiss and foreign institutional real estate investors (for example, investment companies, pension funds, insurance companies, banks) as well as for individual investors in the area of tax efficient structuring of real estate transactions, current tax optimisation of real estate portfolios and the creation of tax efficient real estate investment products, among others. He is a speaker and lecturer at significant tax seminars, and has published various articles on international and national real estate tax.

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The countries with which Switzerland should establish the AEOI will be determined separately at a later stage. The primary focus will be on the EU member states, the US and other selected countries.

Should the legislation be approved by the Parliament and in the public vote in case of a referendum, the first automatic exchange of information between Switzerland and a foreign country will take place from 2018.

Further EoI in the frame of the BEPS Project

EoI is also an important measure in the frame of the OECD's project on base erosion and profit shifting (BEPS). Switzerland is represented in the different working parties of the BEPS Project and will put into practice the measures recommended according to the BEPS Action Plan.

In the BEPS report to action 5 published in September 2014 regarding the countering of harmful tax practices, the OECD intends to introduce a compulsory spontaneous EoI

on tax rulings relating to preferential tax regimes. The exchange of rulings shall take place with any affected country (including the source country, the country of the direct parent company and of the ultimate parent company and in case of transactions the country in which the other party is resident). The legal framework will be the bilateral DTTs, TIEAs or the MAC. The Forum on Harmful Tax Practices (FHTP) intends to issue a progress report on the status of the implementation in 2015.

Furthermore, in February 2015, the OECD and G20 agreed to increase transparency through transfer pricing documentation standards – including the use of a country-by-country reporting (CbCR). The new guidelines to action 13 of the BEPS Project require multinationals generating turnover above €750 million (\$825 million) in their countries of residence to provide tax administrations with CbCR (on revenues, taxes accrued and paid). The exchange of country-by-country reports will be made through automatic exchange



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of information based on the bilateral DTTs, TIEAs or the MAC.

Future challenges

The international exchange of information in tax matters is, and will continue to be, based on a complex legal framework of bilateral and multilateral agreements, domestic legislation, international standards and court decisions. Due to the broad exchange of information and in particular to the

AEoI, taxpayers and countries will be much more transparent. Millions of tax notifications will be exchanged between countries. For the countries involved, including Switzerland, the challenges of this important flow of information will be the efficient set-up and correct processing of this information as well as the granting of data protection and fundamental rights to the taxpayers. In addition, by fully complying with these standards, Switzerland will save its strong position in the financial markets.