

The Fight Against Tax Havens, Bank Secrecy, and Base Erosion: Adaptation and Evolution of the Swiss System

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INTRODUCTION

For decades, the Swiss international tax policy regarding the exchange of information has been governed by strict rules that uphold banking secrecy. In a nutshell, tax authorities could not have direct access to the bank's figures of account holders unless a criminal tax case was at stake. International exchange of information in tax matters was only possible to claim the benefits of a double taxation convention (DTC)—under the so-called “limited international administrative assistance” rule. Beginning in the 2000s, the situation started to evolve dramatically, so that Switzerland had to drastically modify its policy. Two decades later, it appears that Switzerland has totally adapted its legislation and international tax policy, both in favor of transparency and to address the concerns of “base erosion and profits shifting” (BEPS) of “multi-

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national enterprises” (MNE). Switzerland is nowadays actively participating in all major international forums, such as the OECD, the Inclusive Framework, the United Nations (UN), and the Financial Action Task Force (FATF) to continue adapting its legal system in accordance with accepted standards. Despite this paradigm shift, it seems that this situation has not been fairly appraised everywhere in the world.

The purpose of this article is thus both to respond to some of the criticisms that are often still heard, to try to analyze and describe the evolution of the Swiss system in favor of global tax transparency, and to address BEPS concerns of MNE. We believe that the importance of the efforts, developments, and works accomplished by Switzerland, sometimes in emergency, but always under sound constitutional and democratic processes, deserve a fair and balanced perspective.

THE BIG BANG: TOWARDS EXCHANGE OF TAX INFORMATION UPON REQUEST

In 2007, the “Liechtenstein case” could be regarded as the starting point.¹ At that time, a certain Mr. Heinrich Kiefer, employee of an accounting firm based in Vaduz, transferred a compact disk (CD) of clients’ names of the LGT bank to Germany. The CD contained a list of non-compliant German taxpayers. The disclosure in Germany of the names on the list provoked a major political crisis, resulting in the resignation of a top German politician involved in the fraud. This famous scandal put the issue at the forefront of both the political agenda and the media.

The following year, in 2008, the UBS scandal, including the Birkenfeld whistleblowing, started in the United States. Thousands of undeclared bank accounts of U.S. taxpayers were under investigation. This case led to various requests for information from the Internal Revenue Service (IRS) and the U.S. Department of Justice (DOJ) to obtain names of U.S. taxpayers and Swiss bankers involved in the case. The pressure became very strong in Switzerland, and non-compliant individuals were facing legal claims requesting the supply of relevant information to the United States.

The economic crisis of 2008—although not directly linked with the issue of bank secrecy and offshore accounts—gave a further impetus for global transparency and put more pressure on tax havens. International organizations, such as the UN or the OECD, and G20 countries, called for action in this field. As of 2008, the implementation of global standards of transparency and exchange of information reached the top of the agenda at the G20 meet-

ings in Washington, London, and Pittsburgh.²

The Leader's Statement of the London G20 meeting of 2 April 2009 notably stated: "The era of bank secrecy is over."

The G20 meeting of 2009 introduced the idea of white, grey, or black-listing countries based on their level of implementation of a sufficient network of exchange of information treaties. In order to belong to the whitelist, a jurisdiction had to sign a minimum of 12 DTCs along with an extended exchange of information clause corresponding to the OECD Model, or 12 Tax Information Exchange Agreements (TIEA). The pressure from the world community was so strong that non-compliant jurisdictions had to act. On 13 March 2009, the so-called "big bang" occurred: Austria, Belgium, Luxembourg, and Switzerland, in particular, announced their intention to apply the standard defined in Art. 26 of the OECD Model DTC within the framework of new tax treaties.³ During the London G20 summit on 2 April 2009 those countries were still on the "grey list," which referred to States that had committed to implementing the international standard without having done so in substance.⁴ By September 2009, however, they had all moved to the white list.⁵ March 2009 would further lead to worldwide negotiations of tax treaties, with extended exchange of information clauses, and of additional TIEA, to a degree never before seen, including in notable tax haven countries. Furthermore, the Global Forum started to implement a "peer review" process to verify the level of implementation of the global standard. According to the Global Forum, the international standard,

which was developed by the OECD in co-operation with non-OECD countries and which was endorsed by G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting, requires the exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged.⁶

Major developments also occurred in the United States. In 2001 the "Qualified Intermediary" (QI) agreements were implemented. They allow foreign financial institutions (FFIs) to enter into QI agreements, which provide for the identification of their U.S. clients, and to levy a withholding tax of

30 percent on U.S. source income (dividends, interests, gross proceeds from sale). Under the QI, however, the FFI did not have to disclose the names of their U.S. customers. The outcome of the UBS case with Switzerland demonstrated, however, that the QI regulations were not sufficient in practice. Consequently, the United States introduced the Foreign Account Taxpayer Compliance Act (FATCA) in 2010. Under FATCA, foreign FFIs must identify and report to the IRS U.S. account holders and non-U.S. account holders with substantial U.S. ownership. Participating FFIs are also required to levy a 30 percent withholding tax on certain payments of recalcitrant account holders.

THE SWISS RESPONSE

Switzerland, in a famous press conference on 13 March 2009, announced that it was willing to renegotiate DTC with its partners to implement the OECD standard of Art. 26 of the OECD Model. In June 2009, negotiations began with the United States to adapt the 1996 DTC, which was regarded as too restrictive in this area. Indeed, the DTC already provided for an exchange of information clause in tax matters, which remained too restrictive, in the sense that it applied only in cases of “tax fraud and the like.”⁷ This rather vague concept was further defined, following Swiss case law, as tax evasion involving astute behaviors from the relevant taxpayers, such as the use of false documents or “schemes of lies.” Negotiations between the United States and Switzerland led to a revised version of Art. 26 of the DTC, aligning it with the OECD global standard. The DTC was signed on 23 September 2009. Paradoxically, this treaty entered into force only ten years later due to the complex DTC ratification process in the United States. However, under the standard of Art. 26 of this new treaty, exchange of information requests could be made retroactively on the time of signature of the treaty.

As of 2009, Swiss DTC began adapting to the standard, with European countries and other jurisdictions worldwide. To prepare for this development, the Federal Secretariat of State (“Secrétariat des Affaires Financières Internationales,” SFI) was created in 2009. This led to thousands of requests for information from various jurisdictions—notably, the United States, France, Germany, Netherlands, Norway, and India. These requests raised new and challenging legal questions. We may describe Switzerland as acting like a sort of “laboratorium” in this field.⁸ Indeed, apart from the United States, which also applies procedural taxpayer’s protection rules, Switzerland is one of the few jurisdictions to have introduced some basic procedural rules in this field. In particular,

the Swiss jurisprudence confirmed that, based on provisions similar to Art. 26, para. 5 of the OECD Model, Swiss bank secrecy was not an obstacle for an exchange of information based on a DTC.

**THE DEPARTMENT OF
JUSTICE PROGRAM FOR
SWISS BANKS**

As a consequence of the UBS case and based on information gathered during the process and from other sources, such as domestic voluntary disclosure programs, whistleblowers, or other investigations

within financial institutions, the U.S. Department of Justice (DOJ) opened criminal and administrative procedures against various Swiss banks.⁹ These procedures were very broad and targeted many Swiss banks or financial institutions, including bankers or financial intermediaries, who could have been involved in assisting fraudulent U.S. taxpayers. In order to avoid a lengthy and undetermined outcome of these investigations, the DOJ announced, on 29 August 2013, a program which offered Swiss banks suspected of having participated in potential tax evasion schemes the opportunity to collaborate with the DOJ and establish a settlement on the issue.¹⁰ In a nutshell, the program allows eligible Swiss banks to avoid criminal prosecution in the United States, in exchange for extensive disclosure of information and, in some cases, accept alternative penalties.¹¹

The participating banks were divided into four categories. The first pertains to Swiss banks which were already being investigated by the DOJ (at that time numbering 14) and therefore could not participate. For these banks, the fine would be fixed on an individual basis. The negotiations in this category were generally designed to be able to obtain a Deferred Prosecution Agreement (DPA), like UBS did in 2010, combined with a fine of \$780 million. Later, however, on 19 May 2014, Credit Suisse did not obtain a DPA and had to pay a fine of \$2.6 billion for helping U.S. tax evaders.

The second category, and the most important in practice, was designed

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for Swiss banks that had reason to believe that they had U.S. non-declared customers. These banks could request a Non-Prosecution Agreement (NPA). For this category, the amount of fine corresponding to the penalty increased depending on the date of the opening of the account. Penalties could, however, still be reduced if the bank could demonstrate that the account was not an undeclared account, was disclosed by the Swiss bank to the IRS, or was disclosed to the IRS through an announced offshore voluntary disclosure program or initiative following notification by the Swiss bank of such a program or initiative prior to the execution of the NPA.¹² Swiss banks that believed they had nothing to worry about were part of the third category. Finally, the fourth category corresponded to banks that are deemed compliant under the FATCA regulations. Categories three and four could request a Non-Target Letter. No penalties were due for categories three or four.

Participating banks had to obtain from the Swiss Government Federal Council an authorization to cooperate with the U.S. DOJ, consisting of a derogation to Art. 271 of the Swiss Criminal Code (right to disclose information to a foreign State). The information that Swiss banks should provide in the program also includes the names of bank employees or third parties (financial intermediaries) who have participated in the tax evasion. This particular requirement, based on a rather vague concept such as “participating,” was one of the most criticized parts of the program and has been subject to much controversy in Switzerland.

A first deadline of 31 December 2013 had expired for Swiss banks wishing to obtain a NPA and therefore participate in the second category. In practice, a surprisingly high number of banking institutions (106) accepted to participate in the program. Banks wishing to participate in categories three and four, requesting a Non-Target Letter, could submit letters of intent no earlier than 1 July 2014 and no later than 31 October 2014.¹³

The names of U.S. account holders were further obtained by requests for information (including “group requests”) under the applicable DTC between the United States and Switzerland of 1996, and the Protocol amending it as of 23 September 2009, based on the standard of Art. 26 OECD Model DTC of foreseeable relevance.¹⁴ Until the Protocol of 2009 was ratified by the United States, the standard applicable to the exchange of information remained, however, the concept of “tax fraud and the like.” As described above, this Protocol was finally ratified on the United States side, but only in September 2019.

In retrospect, it can be said that the DOJ Program has been quite suc-

cessful. For category one, three banks have obtained a plea/deferred prosecution or non-prosecution agreement with the DOJ. In category two, 106 banks announced their participation to the program, but only 80 stayed until the end. On 27 January 2016, the 80th and final NPA was reached with a Swiss bank. Around 1.36 billion USD in penalties have been collected from banks in category two. Finally, five banks have opted for category 3. In addition, the DOJ has obtained significant information on so-called “leaver accounts,” which would allow tracing the movement of these accounts to other jurisdictions or institutions. On that basis, the DOJ could investigate further and enforce its rules against offshore tax evasion towards other jurisdictions.

Looking backwards, this program also raised many legal controversies. Lengthy and costly negotiations took place, notably to establish the level of the fines that the bank should pay. The requirement and method of computation of such fines were not always clear and evolved during the process. The amount of data and compliance research has also sometimes been regarded as disproportionate. Issues of data protection or procedural rules of the persons involved in the process, notably bank employees, lawyers, accountants, and fiduciary companies also have been challenged in courts.¹⁵

THE EU SAVING DIRECTIVE

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Extended rules of exchange of information were developed at the European Union (EU) level, already as of 1977. Indeed, a first Directive on mutual assistance in direct tax matters was already introduced in December 1977. More importantly, from the Swiss perspective, a major development occurred on 1 July 2005 with the entry into force of the EU Directive on the taxation of savings.

In a nutshell, the Savings Directive represents a compromise between the need to ensure a minimum level of taxation on interest income within the EU, while preserving the domestic bank secrecy rules in some EU States and maintaining a level playing field with third countries.¹⁶ Because of the unanimous decision requirement under EU law, the adoption of the EU Savings Directive was a lengthy process. Following an informal Economic and Financial Affairs Council (ECOFIN) meeting on 13 April 1996 in Verona, the Commission presented a plan to the Council as “a package to tackle harmful tax competition in the European Union.” This new proposal introduced the famous “coexistence model,” according to which Member States will either implement an exchange of information on interest from savings received by

individual residents in another Member State or apply a 20 percent withholding tax on such interest.¹⁷ A withholding tax is a levied tax at source by the paying agent of the interest on savings within the scope. This new model would open the door to potential compromises.¹⁸ In addition, in the draft

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Savings Directive, the new system would focus instead on the *paying agent*, i.e., the last financial intermediary resident in the EU, which pays the interest to the individual resident in another Member State. Unanimity on this new proposal

was still difficult to reach, due to the issue of the proper tax treatment of the Eurobond market, in the London financial center.

A compromise was reached at the meeting of the European Council in Santa Maria da Feira, on 19 and 20 June 2000.¹⁹ As a main principle, exchange of information, on as wide a basis as possible, should be the ultimate objective of the EU; however, under a transitional period, Austria, Belgium, and Luxembourg were authorized to levy a withholding tax. In addition, in order to preserve the competitiveness of the European financial market, specific third countries (United States, Switzerland, Liechtenstein, Monaco, Andorra, and San Marino) and Member States' dependent and associated territories (the Netherlands Antilles, Aruba, Jersey, Guernsey, Isle of Man, Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos) were to discuss implementation of equivalent measures with those countries.

The Commission then issued a new proposal for the Savings Directive in July 2001.²⁰ It followed the principles agreed upon at the Santa Maria da Feira Council, but with additional rules. In particular, the rate of the withholding tax during the transitory period for the three Member States concerned was fixed at 15 percent for the first three years, and 20 percent thereafter. In addition, 75 percent of the tax revenue of the withholding tax had to be transferred to the resident Member State of the individual receiving interest payments. A grandfather clause was introduced for bonds and debt securities issued before 1 March 2001. In addition, during the ECOFIN meeting of 21

January 2003, a third withholding tax rate of 35 percent, as of January 2010, was introduced to increase the step up of the rate.²¹ This 35 percent withholding tax rate corresponds to the rate of the Swiss federal withholding tax levied on income from capital assets of Swiss debtors.

The Council Directive on the taxation of savings was finally adopted on 3 June 2003,²² and entered into force on 1 July 2005.²³ Member States introduced an automatic exchange of information on interest payments paid by agents established within their territory to individuals (beneficial owners) resident in other Member States, who receive that payment.²⁴ During the transitory period, Austria, Belgium, and Luxembourg did not apply the automatic exchange of information system, and levied a withholding tax on interest paid by a paying agent resident in those three Member States. It should be noted that in March 2009, Belgium decided to introduce automatic exchange of information by 1 January 2010.²⁵

It is interesting to point out that, on 1 January 2003, the ECOFIN considered that equivalent measures were already in place in the United States. Therefore, the United States was dropped from the list of third states under Art. 17, para. 2 (i), contrary to the proposal of 2001, even though it appears that at this stage no significant equivalent measures had been adopted.²⁶ The ten new Member States that joined the EU in 2004 and the additional two Member States that joined in 2007 must apply the automatic exchange system and are not in the transitional withholding period.²⁷

As a consequence, Switzerland entered into a non-reciprocal bilateral agreement with the EU in order to implement “equivalent measures” within the meaning of Art. 17, para. 2 (i) of the Savings Directive. The agreement entered into force on 1 July 2005, in parallel with the Savings Directive. Switzerland has agreed to implement a retention (withholding tax) on interest from Swiss paying agents to individual residents in the EU—beneficial owner of the interest.

FURTHER DEVELOPMENTS

In 2011, the Joint Council of Europe/OECD multilateral convention on administrative assistance in tax matters, of 1988 (CoE/OECD CMAAT), was amended.²⁸ It was opened for signature by non-OECD Member countries. The rules were adapted to the current standard on exchange of information. In particular, similar to Art. 26, para. 5 of the OECD Model DTC, information held by banks or relating to the ownership must be exchanged. Increas-

ingly, in parallel to the bilateral network of double taxation treaties, a multilateral form of cooperation was fostered. While on 27 May 2010 the new Protocol CMAAT had been signed by 15 countries, to date it has now been signed by more than 65 countries.

The same year, at the EU level, Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC 1), replacing Directive 771/799/EEC, was adopted.²⁹ It provides for the exchange of information upon request or spontaneously, and for an automatic exchange of information, as from 1 January 2015, that is available on specific categories of income and capital. With the rapid development, at the OECD level, of automatic exchange of information as a global standard and also as a consequence of the BEPS initiative, the DAC was later modified several times and its scope broadened notably.

An additional development took place in 2012. On 17 July 2012, the OECD updated its Commentary on the OECD Model and confirmed the admissibility of so-called “group requests” in the context of exchange of information.³⁰ It means that a request may not only refer to a single identified taxpayer but also pertain to a specific group of taxpayers who are in a similar situation. The prohibition of fishing expeditions still applies under the standard, so that the group must be sufficiently related to a specific and joint “pattern of facts.”

We tend to believe that the concept of “group request” could be a direct consequence of Swiss case law on the UBS case. Indeed, in 2009, in one of the first cases of a request from the United States pertaining to a group of a few hundred taxpayers, the Federal Administrative Court admitted such a request based on the ruling that this “group” of U.S. taxpayers could be sufficiently identified by a similar pattern of facts with the collaboration of the bank and repetitive actions, such as tax avoidance with the use of offshore entities.³¹

THE IMPACT OF THE AML RULES

In the same year, on 2012, the FATF adopted a revision of its guidelines. According to the FATF Recommendation No. 3 of February 2012, serious tax crimes (direct or indirect), a concept to be defined under domestic tax law, become a predicate offense for criminal money laundering prosecution. This rule—which had already been implemented by many States, namely in Europe—thus became a global standard.

The development of money laundering rules in the tax area has a direct impact on the exchange of information. Indeed, coordination between criminal and tax rules will foster such exchanges. In addition, anti-money laundering regulations requiring the identification of beneficial owners of complex structures

serve as valuable tools in the tax sector, aiding the identification of controlling persons or beneficial owners for tax enforcement purposes. Switzerland thus modified its tax criminal rules, and as of 1 January 2016, introduced specific criminal tax offenses as a predicate for money laundering rules.³²

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More globally, according to a follow-up report of 19 October 2023 on the measures taken by Switzerland to tackle money laundering and terrorist financing, the FATF has recognized the progress made by Switzerland in addressing some technical deficiencies.³³ This was the fourth follow-up report, following the mutual evaluation of the AML rules of Switzerland in 2016. The FATF has notably recognized the progress that the revision of the Federal law on anti-money laundering of March 2021 entails.³⁴

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THE SWISS ALTERNATIVE RUBIK PROPOSAL (2013-2017)

Under the influence of the Saving Directive and following the increasing pressures toward more extended form of exchange of information, Switzerland tried, as of 2012, to find an alternative solution to a potential automatic exchange of information system. At that time indeed, the Swiss policy makers were against a system of automatic exchange of information. Thus, Switzerland tried to defend the idea that an effective mechanism of withholding tax, broader than the EU Saving Directive, could represent a long-term alternative to such a system. In essence, this idea would become what was later called the Rubik proposal. The model is based on a withholding tax on Swiss source income to foreign residents in Contracting States, which is then transferred to that State, while preserving the anonymity of the taxpayer. The rate corresponds to the State of residence. This system can be seen as a typical “Swiss compromise,” which tries to solve two apparently conflicting principles:

confidentiality, on the one hand, and tax compliance in the residence state, on the other hand. After all, under Rubik, the taxpayer involved, having paid his due under the withholding, is deemed compliant in the State of residence, while confidentiality is preserved.³⁵ From a policy standpoint, confidentiality has indeed always been part of the Swiss tradition. Withholding tax agreements have been signed by Switzerland in 2012 with the United Kingdom, Austria, and Germany (though the latter was, in the end, not ratified).

At the beginning of the implementation process, the system seemed to have some allies. In the first stage, agreements of this type had been reached with Germany (signed on 21 September 2011, then modified on 5 April 2012), the United Kingdom (signed on 6 October 2011, then modified on 20 March 2012), and Austria (signed on 13 April 2012), all ratified by the Swiss Federal Parliament in May 2012.^{36 37 38} The initial versions of the agreements with Germany and United Kingdom were amended by a Protocol in order to make them compatible with the EU Savings Directive, especially regarding the tax treatment of interest and the problem of succession.^{39 40}

In a second stage, however, following the refusal by the German Parliament to ratify the agreement in December 2012, the Rubik Agreement with Germany remained ineffective. The Agreements with the United Kingdom and Austria, however, entered into force on 1 January 2013. Negotiations with other States, notably Greece, Italy, and Spain, were still ongoing but it appears that, following the negative vote of the German Parliament, a halt in the development of the “Rubik” model occurred. The move towards automatic information exchange as a global standard, which had already started in 2012 but became effective in 2013, has also modified the focus. Rubik appears to remain an interesting but probably a more transitory model.

TOWARD AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION

While most observers were thinking that giant steps had already been achieved in terms of exchange of information, another major development, somewhat comparable to the “big bang” of 2009, took place in 2013: the move towards automatic exchange of information.

The movement can be traced back to 2012. In February of that year, five European countries (France, Germany, Italy, Spain, and the United Kingdom) announced their intention to develop a system of multilateral automatic exchange of information with the United States, in order to implement the FATCA rules. This agreement formed the basis of the so-called Model 1

IGA. This development can be described as a “turning point” in the efforts to reach a global standard of automatic exchange of information.⁴¹ Indeed, the FATCA system of global reporting was implemented globally and endorsed as a potentially reciprocal standard under the Model 1 IGA.

On 19 April 2013 a meeting of G20 Finance Ministers and Central Bank Governors announced that automatic exchange of information would be the expected new standard. Later, in February 2014, Common Reporting Standard (CRS) for automatic exchange of information was endorsed.⁴² Finally, on 29 October 2014, during the meeting of the Global Forum in Berlin, 49 countries, the “early adopters,” agreed to sign a multilateral competent authority agreement implementing the global standard. By October 2017, 102 jurisdictions had committed to automatic exchange of information. The first automatic exchanges took place in September 2017, involving 49 jurisdictions; 53 additional jurisdictions announced that they would start exchanges as of 2018. Since then, every year, the network of jurisdictions committed to automatic exchange of information has continued to grow. As of June 2022, information was automatically exchanged with more than 120 jurisdictions.

In a nutshell, automatic exchange of information, under the CRS, requires the “reportable financial institutions” to identify and declare to the competent authority’s financial information on reportable accounts, in accordance with the due diligence rules of the CRS. This system is governed by detailed and complex definitions, identification, and reporting rules, which have been described and developed in further OECD regulations.

The implementation of an automatic exchange of information, in accordance with the OECD standard, is based on three pillars. First, an international legal basis (bilateral or multilateral agreement) is required to authorize the States to mutually exchange this information between competent authorities. Second, a competent authority agreement between these authorities is necessary. Third, a domestic legal framework should be introduced to anchor the CRS into domestic law. In general, the international legal basis of the automatic exchange will be the CoE/OECD CMAAT, which includes legal rules for main types of international exchange: upon request, spontaneous, and automatic. The second pillar is in general based on an OECD Model Competent Authority Agreement, either multilateral or bilateral, that has also been published in 2014.⁴³

The acceleration of the development of the rules of international exchange of information in tax matters is quite impressive. In less than five years, the standard, applied globally, has evolved from exchange of informa-

tion upon request (2009), to group requests (2012), and further automatic exchanges (2013). Such acceleration towards a global consensus may be explained, notably, by the fact that some scandals contributed to growing media and public attention. In addition, rules of automatic exchange of information started to be discussed already at the level of the EU, according to the Savings Directive, providing as of 1 July 2005, for automatic exchange of information on savings interest (subject to the transitory regime), followed by the EU Directive on Administrative collaboration of 2011. The impact of FATCA, in this ongoing process, should, however, not be underestimated. Indeed, the unilateral features of the domestic FATCA regime, adopted in 2010, led many countries to develop more balanced and reciprocal forms of cooperation, notably under IGAs.⁴⁴ The development of the Council of Europe/OECD multilateral convention on administrative assistance (CoE/OECD CMAAT) may also retrospectively be regarded as a key factor.

The CRS standard for the automatic exchange of information is now, widely accepted, and implemented worldwide, with the notable exception of the United States, which consider the FTCA regime as equivalent to this regime. In essence, the rules of the CRS have been widely influenced by the FATCA and some of the concepts, such as financial entities subject to reporting, are similar. The main difference relies, however, on the unilateral nature of FATCA and the scope of information under bilateral IGAs that can be exchanged, notably on beneficial owners of entities in the scope (so-called controlling persons).

SWISS IMPLEMENTATION OF AUTOMATIC EXCHANGE OF INFORMATION

Automatic exchange of information in financial matters, according to the OECD CRS, was accepted by Switzerland and entered into force on 1 January 2017. To implement the three pillars of the systems, Switzerland followed two different models. Model 1 was applied for automatic exchange with the EU. Under this model, a bilateral agreement was ratified with EU. It replaced, as of 1 January 2017, the bilateral agreement on the taxation of savings. It serves both as an international legal basis for the reciprocal automatic exchange between Switzerland and the EU States and as implementation rules of exchange between competent authorities, in accordance with the CRS. Model 2, by contrast, was applied with all other States belonging to the network of automatic exchange. For these jurisdictions, exchange is based on the CoE/CMATT, as the international legal basis, combined with a competent

authority agreement, based on the OECD Model, between the relevant States and Switzerland. Finally, Switzerland introduced the domestic legal basis, namely the federal law on automatic exchange of information, which covers both automatic exchanges under model one and two.⁴⁵

It is interesting to note that these rules, which represent a major change of policy from the Swiss standpoint, were not subject to any referendum and could enter into force on 1 January 2017, which shows the global consensus that had occurred by that time. Since then, the network of jurisdictions party to automatic exchange

has continued to grow.

By the time of the writing of this contribution, Switzerland is currently exchanging information with more than 100 jurisdictions.

The system seems to

work efficiently and with accuracy. As of 2024, to our knowledge, there is only one Supreme Court judgment, which pertains only to domestic procedural issue of the system.⁴⁶ If we compare with the hundred cases rendered by Swiss Courts in the area of exchange of information upon request, the system of automatic exchange seems to apply satisfactorily.

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THE IMPACT OF THE BEPS INITIATIVE

So far, we have focused on the development of tax transparency rules, particularly the exchange of information in tax matters, which started to be effective as of 2009, with the standard of exchange upon request, to the new standard of automatic exchange of information, which became global as of 2017.

Starting in 2013, however, a new initiative focused on the taxation of multinational companies (MNEs), and the use of aggressive tax planning techniques. This development also led Switzerland to implement major changes in its international and domestic tax law rules. We will, in summary, describe some of the major developments targeting MNEs' tax avoidance and aggressive tax planning schemes, and show how Switzerland reacted to them.

As of 2013, scandals have appeared in the media, notably pertaining to the overall very low effective tax rate of some multinational entities. In his famous quote "wake up and smell the coffee," during the G20 meeting

of February 2013, David Cameron gave a warning to global firms toward more stringent rules against aggressive tax planning.⁴⁷ As such, tax planning, i.e. the litigation of tax through an appropriate behavior, is not against the law. However, aggressive tax planning, namely the use of artificial structure or strategy to minimize tax obligation, is not admissible. Indeed, the G20 granted a mandate to the OECD to come up with proposals to develop new rules aimed at addressing tax avoidance or aggressive tax planning schemes of multinational entities, including fighting against double non-taxation. The BEPS Program developed 15 actions, among which two new models of information exchange are especially relevant: country-by-country (CbC) reporting and spontaneous exchange of rulings. More than 40 jurisdictions have committed to CbC by October 2017, with exchanges to start as of 2018. As of 2017, automatic exchanges of ruling have also started within the EU. In this context, the OECD also emphasized, in action 12, the need for mandatory disclosure rules to offer comprehensive information on potentially aggressive tax planning strategies.

In order to implement the changes to the numerous DTC around the world, as required by some of the action plans of the BEPS Program, a Multilateral Convention (so-called MLI) has been signed by 68 jurisdictions, including Switzerland.⁴⁸ The MLI includes international rules that are designed to modify the DTC covered by the agreement in notably four action plans of the BEPS program and provide for an extensive arbitration mechanism. The MLI has further been ratified by Switzerland and has entered into force on 1 July 2018 and covers 12 DTC with treaty partners. As of today, more than 100 jurisdictions, but not the United States, have signed the MLI.

Apart from ratifying the MLI and adapting its DTC treaty policy to comply with the BEPS program, Switzerland has also modified its domestic tax laws. Therefore, a new federal law on a reform of tax law and social insurance for elderly and disabled persons (RFFA) was adopted, accepted by the Swiss people after a referendum, and entered into force on 1 January 2020.⁴⁹ Among other aspects, the RFFA abolished disputed cantonal tax regimes. To comply with another recommendation of Action 6 of the BEPS program, Switzerland introduced a spontaneous exchange of ruling in accordance with the OECD standard, in effect since 1 January 2017.⁵⁰

THE OECD TWO PILLARS SOLUTION

In July and again in October 2021, an international tax revolution took

place. Nearly 140 jurisdictions, members of the OECD's Inclusive Framework, including Switzerland, have accepted the main principles of a general overhaul of the taxation of large multinational companies.⁵¹ The major development of the digital economy has revealed the shortcomings of an obsolete tax system, based on century-old principles, requiring some forms of physical presence on a territory to carry out a commercial activity. To attract the tax base part of the profits linked with the digital economy, some States, including many EU States, but not Switzerland, have introduced so-called digital service taxes. As a result, to avoid what has been described as potential international tax chaos and to adapt the international tax regime to these new business models, the OECD proposed a compromise solution

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based on a two-pillar system in 2019, which was accepted in 2021.

This highly ambitious project was initially supposed to come into force in the various States on 1 January 2023. In the meantime, the situation has evolved considerably. The initial enthusiasm is much more measured, and the evolution of the project is now uncertain. In particular, in February 2025, the United States have announced their decision to withdraw from this project.

The first pillar consists of modifying the rules for the international attribution of profits in favor of the States where the consumers and/or users are located. It gives greater taxing rights to market jurisdictions. This new allocation method, initially targeting specifically the digital economy, would finally apply in principle to all large multinational companies, based on a turnover threshold, regardless of the sector of activity concerned. Regulated financial services and extraction activities would remain, however, outside the scope. Since 2022, internal political obstacles of various States have delayed the implementation of Pillar One. The recent withdrawal from the United States also has rendered uncertain the implementation of this project.

The second pillar sets a minimum effective tax rate of 15 percent of profit taxes, to combat the erosion of the tax base of large multinational companies.⁵² Unlike Pillar One, this rule applies to all companies with annual sales in excess of €750 million. As such, the sovereignty of States is not

affected since they are not obliged to introduce such a rate in domestic law. However, by failing to do so, the other States, according to a complex set of recapture rules, where multinational group's subsidiaries or parent entities are located would be entitled to make up the difference between the effective rate applied by these recalcitrant States and the minimum rate of 15 percent accepted, in accordance with the standards laid down by the OECD.

Contrary to Pillar One, Pillar Two has been rather successful and has been implemented already in various States, and notably in the EU, as of January 2024. So far, the United States, India, and China have, however, not implemented it.

Switzerland has been in the forefront in this area and has introduced Pillar 2 in its legislation, which entered into force on 1 January 2024. A new provision of the Swiss Federal Constitution empowers the Federal Council to adopt an ordinance, incorporating the OECD rules into Swiss law, and implement the new federal "top up tax." Given that this requires an amendment to the Constitution, a mandatory referendum was held and the people and the Cantons approved, by a large majority of 78.5 percent, this reform on 18 June 2023. A federal law should subsequently replace the implementing ordinance.

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Switzerland has introduced, in particular, a "qualified domestic minimum top up tax" (QDMTT) on multinationals falling within the scope of this regime, i.e. those exceeding a turnover threshold of €750,000,000.⁵³ Thus, a new federal tax, levied by the cantons, will be due on the difference between the domestic effective rate of profit tax on EMNs within the scope, and the 15 percent effective tax rate calculated in accordance with the OECD standard. Following highly controversial debates, it is planned that the sums raised by this complementary national tax will be shared by 75 percent in favor of the cantons and 25 percent in favor of the Confederation. Aside the so-called QDMTT, which entered into force on 2024, the income inclusion rules, which would allow Switzerland to tax profits of related entities in another State, which is not subject to an effective tax rate of 15 percent, has entered into force one year later, namely on 1 January 2025.

For the time being, only the essential elements of Pillar Two have been implemented in Swiss law. The constitutional amendment, accepted on 18 June 2025, does not, however, rule out the possibility of the Swiss Government to introduce Pillar One later, insofar as it were to start being implemented by numerous States, which is far from being the case today.

NEW FORMS OF INFORMATION EXCHANGE

The digital economy has also developed new business models, which take advantage of the global access through digital platforms, the cloud, or the sharing economy. This recently growing area of exchange of information will then require platforms users to provide more information about users of the platforms. In parallel, the growing use of crypto-assets, including crypto-money, have also raised new challenges to ensure tax compliance by people who may take advantage of the complex technological possibilities offered in crypto environments.

Consequently, the OECD has proposed new models of reporting to the competent authorities, which should be followed by an automatic exchange of information between participating States to address potential tax avoidance risks in this growing economic area. First, the OECD has published a model reporting rules for platforms operators.⁵⁴ This prompted the EU to adopt a new amendment of the DAC on 22 March 2021, known as DAC 7.⁵⁵ Second, on 8 June 2023, the OECD adopted a revised recommendation to amend the CRS Standard for financial accounts and added a new Crypto-Asset Reporting Framework (CARF).⁵⁶ In a joint statement of 10 November 2023, about 50 jurisdictions, including the United States and Switzerland, have agreed to implement this expanded international automatic exchange of information in tax matters, which concerns crypto-assets, and accepted to introduce it by 1 January 2026. Switzerland intends to implement this expanded automatic exchange and is preparing a consultation draft.

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CONCLUSION

Our contribution has sought to highlight the vast and sometimes rapid changes that Switzerland has undertaken over the last two decades in the global fight against tax havens and tax evasions, as well as base erosion and profit shifting from MNEs. Switzerland has been able to implement delicate policy changes in accordance with its constitutional and democratic rules. Looking backward, the result appears rather impressive. In March 2009, a very important change of paradigm took place with the disappearance of the Swiss bank secrecy, as an obstacle to foreign exchange of information in tax matters. This opened the gate to numerous requests for information, which were handled in accordance with treaty rules. A subsequent major change took place only five years later, with the emergence of the automatic exchange

of financial information, which became the new global standard, and entered into force in Switzerland in 2017.

Switzerland now actively participates in all forums on international tax issues, such as the OECD, the UN, and the FATF, and has further developed its tax rules in accordance with the constantly evolving standard. This also includes the famous BEPS Initiative, which started in 2014, and targeted aggressive tax planning and harmful tax competition regimes of various countries and led to many tax reforms under Swiss law. In particular, a new federal law on the tax reform and reform of the social insurance for elderly and disabled people, was accepted in a referendum by a large majority of the Swiss people in 2019. Finally, Switzerland has implemented Pillar Two of the OECD Inclusive Framework, targeting large MNEs, as of 1 January 2024. This implementation required a change of the Swiss Federal Constitution, which was also accepted by a double majority of the cantons and the population. Other changes also are on the way, such as new rules for international exchange of information on crypto assets, following the OECD recent standard in this area.

It is interesting to note that, despite the rapid changes required, their complexities, and technicalities, Switzerland was able to follow its constitutional and democratic rules. These developments were adopted after consultation, discussion with experts, and introduction of domestic laws accepted by the Parliament. Two of the most important changes in international policies of the last two decades in Switzerland, namely the repeal of bank secrecy for international tax matters, and automatic exchange of financial information, were adopted on time but without any request for a referendum. This demonstrated that a wide consensus has been reached in these sensitive issues. By contrast, new rules adapting the regime of corporation taxation on MNEs—in order to abolish specific regimes of potential harmful tax competition and the OECD Pillar Two proposal—were subject to a referendum and, finally, accepted by the Swiss people. To our knowledge, Switzerland remains the only country where such important new tax rules have been accepted under such a wide democratic process, including, sometimes, the approval of the Swiss people. 

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