Exchange of information developments in Switzerland

Switzerland has accepted a greater number of exchange of information (EOI) requests from global actors since 2009, harmonising the otherwise private nation's banking policies with the OECD's more transparent standards. **Lenz & Staehelin**'s Jean-Blaise Eckert and Frédéric Neukomm discuss the changes.

Switzerland has not traditionally agreed to the exchange of information (EOI) with other countries regarding tax matters. Until 2009, there were only a few exceptions to that policy, and they were typically included in bilateral treaties. These included the EOI for the correct application of tax treaties, the EOI in situations such as tax fraud, and with certain countries such as the US and Germany.

However, since 2009, Switzerland has started to change its policy by accepting a much broader EOI in tax matters. First, it accepted to exchange information regarding the correct application of the internal laws of a particular country. To that end, it accepted to update many tax treaties to include an EOI provision following the OECD model.

Switzerland has also agreed to participate in the automatic exchange of information (AEOI), as per the OECD's common reporting standard (CRS), and to exchange information in certain situations regarding tax rulings it has issued around certain countries. The latter follows the recommendations contained in Action 4 of the BEPS Action Plan.

Exchange of information upon request, AEOI, and certain exchanges regarding tax rulings are now all in force in Switzerland. Given that these are all new areas in Switzerland, EOI practices have been developing at a very rapid pace.

Exchange of information requests

Every year, Switzerland receives an unprecedented number of information exchange requests relating to both individuals and corporations. Requests regarding individuals typically relate to cases where the requesting country suspects that a resident maintains an undisclosed Swiss bank account.

Requests aimed at corporations typically relate to transfer pricing (TP) disputes, with the requesting country generally seeking information on the Swiss entity of the group: its substance, functions, and tax regime, among others.

As per Swiss legislation, a targeted person benefits from important procedural rights such as the right to review the file (including the request for information), the right to comment and correct the information to be exchanged, and the right to appeal against a decision to exchange, among others.

Swiss courts have subsequently been handling many appeals lodged by persons targeted by EOI requests. That particular area of law has been very dynamic in recent years. In particular, there are a number of

interesting developments regarding group requests, credit cards, and tax returns, which are discussed below.

Group requests

Requests for EOI are typically aimed towards individual cases. Historically, the US has successfully lodged group requests in tax fraud cases. Such group requests describe patterns of behaviour that corresponded to tax fraud. Switzerland would exchange information on all individuals for which such a pattern could be evidenced.

In the past, the Netherlands has lodged group requests on all Dutch residents holding bank accounts with certain Swiss banks (UBS, Credit Suisse, etc.), unless those individuals had provided to the bank documentary evidence that they were properly reporting their bank account information to the Netherlands.

The Swiss Supreme Court ruled that this group request was acceptable and did not correspond to a fishing expedition, which would otherwise not be permissible.

Several countries such as France, Spain, Italy and Austria, among others, also lodged requests aimed at unidentified groups of persons holding bank accounts at UBS. These requests have been based on information obtained by Germany, who later shared this information with other countries. The information consists of a list of accounts identified by numbers with a specific classification code determining the country of residence of the account holder (or ultimate beneficial owner).

The countries lodging requests based on that information argued that the mere possession of a bank account in Switzerland constitutes sufficient suspicion of non-compliance. In the first instance, the Swiss Supreme Court recently ruled that such a request constituted a fishing expedition, and was thus not permissible. The case is pending in front of the Supreme Court.

Credit cards

Certain countries also conducted local investigations to determine whether credit or debit cards were being used. Indeed, should an individual regularly use a credit or debit card linked to an account outside of their country, this could show that the person is resident in one country and maintains an undisclosed bank account in another, or that they are not registered as a resident of the country (but would qualify as such based on the number of days of presence), for instance.

Certain countries have thus lodged requests aimed at unidentified persons. The only identification available was the credit or debit card number. These requests sought to identify the person using the credit or debit card. Swiss courts ruled that these requests were acceptable (i.e. the identification through a credit card number was sufficient and that the suspicion of non-compliance was sufficiently established through the number of transactions.

Tax returns, tax amount and tax rulings

With respect to requests for EOI aimed at groups of companies, foreign countries have been asking for very detailed information, notably including copies of tax returns of the Swiss companies, information on the exact tax amount paid in Switzerland, and copies of the tax rulings possibly secured in Switzerland.

Until recently, it was the practice of Swiss tax administrations to refuse providing copies of tax returns. Tax returns were considered internal documents that were not likely to be relevant for foreign countries. Furthermore, Swiss tax authorities typically refused to provide full copies of tax rulings and were simply summarising the content of these rulings.

However, Swiss tax authorities have since changed their practice and now provide full copies of tax returns, tax rulings, and details on the exact amount of taxes settled by the Swiss company of the group.

Swiss courts have ruled that the requesting country (France, in this particular case) had successfully shown that the amount of tax settled was likely to be relevant in France, and thus allowed the provision of that information.

It is expected that Swiss courts will also consider it acceptable to provide full copies of tax returns and full copies of tax rulings.

Automatic exchange of information

The OECD developed the standard for automatic exchange of financial account information in tax matters (standard), which aims to prevent individuals and entities from evading tax through the use of financial accounts and investment vehicles outside their jurisdiction of tax residence. It is commonly known as the CRS.

According to the standard, a financial institution is required to collect information on its account holders and report certain information to its local authority. The local tax authority then automatically exchanges that information with the tax authority where the account holder is a tax resident (on an annual basis).

In 2013, the Swiss Federal Council declared that it would contribute actively in the development of the CRS. Switzerland therefore introduced legal and statutory frameworks to implement the CRS in Swiss law. In October 2013, Switzerland adopted the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (CMAAT), and on December 18 2015 implemented the Multilateral Competent Authority Agreement (MCAA) along with the Swiss Automatic Exchange of Information Act (AEOI Act). In 2016, the Swiss Automatic Exchange of Information Ordinance (AEOI Ordinance) was adopted. All the above entered into force on January 1 2017.

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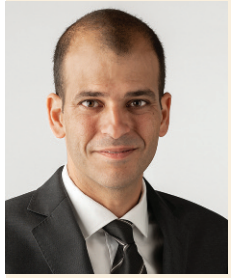

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Common reporting standard

Switzerland has agreed to implement the CRS with several countries, and with all European countries. It developed detailed guidance on its implementation in Switzerland, and exchanged information in 2018 for the first time with countries with which it had agreed to implement the standard (it provided information relating to calendar year 2017). This related to approximately 2 million accounts.

Switzerland continues to agree to implement the standard with more and more countries. The standard is thus in force for many other countries as of January 1 2018, and with even more countries as of January 1 2019. Expansion of the list continues, with the standard expected to be effective with more countries from January 1 2020.

With respect to the inbound transfer of information (Switzerland receiving automatically information from foreign countries), the Swiss authorities have published guidance relating to the internal voluntary disclosure regime. Swiss legislation contains provisions pursuant to which a Swiss resident announcing spontaneously undisclosed items of income and wealth would not suffer penalties.

The core requirement is that the announcement be spontaneous. For instance, the authorities must not already have the information available to them. Swiss authorities indicated that any announcement of income and assets subject to the AEOI would no longer be considered as spontaneous as of September of the year when Switzerland is to receive the said information. This triggered an unprecedented number of spontaneous announcements by Swiss residents.

Spontaneous exchange of information

In order to comply with Action 5 of the OECD's BEPS initiative, Switzerland has since decided to spontaneously exchange information on Swiss tax rulings with countries for which that information was likely relevant.

In order to implement this exchange, Switzerland relied on section 7 of the CMAAT, which is a broad provision on spontaneous exchange of information. Switzerland subsequently exchanges information with all countries that are members of the CMAAT.

Historically, Switzerland started to exchange information relating to tax rulings in 2018. As a result, it started collecting information in 2017. In case the taxpayers did not want information to be exchanged, they had the possibility to withdraw the rulings. Many Swiss companies subsequently decided to withdraw rulings that were in force. This did not necessarily change the tax regime applicable to them.

However, instead of having the benefit of a signed and approved ruling, they now simply take a position in the tax return. The main disadvantage of this is the absence of

certainty to effectively obtain the tax treatment sought in the ruling.

Exchange of information outlook

Switzerland's practice in exchanging information regarding tax matters has been developing at an incredibly fast pace in recent years. This is very likely to continue in the coming years. Conversely, it is very likely that the number of tax authority officers dedicated to these questions will continue to rise. In turn, so too will the number of court cases.

As a general trend, Swiss courts and tax authorities typically rule in favour of a broad EOI. Certain types of EOI in tax matters were initially thought to be rather narrow in their scope of application, and have been broadened in the practice of the tax authorities, which are often vetted by the Swiss courts.