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Aktionärsausschuss: Strohfeuer in einer Sackgasse

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69. Deutscher Juristentag 2012 in München: Abteilung Wirtschaftsrecht

Zusammenfassung der Rechtsprechung/Resumé de la jurisprudence*Stefan Oesterhelt*

Steuerrechtliche Entwicklungen (insbesondere im Jahr 2012)

Bemerkungen zur Rechtsprechung

Herausgabepflicht für Bestandespflegekommissionen im Auftragsrecht

Entscheide des Schweizerischen Bundesgerichts 4A_127/2012 und 4A_141/2012
vom 30. Oktober 2012Mit Bemerkungen von *Natalia Neuman* und *Hans Caspar von der Crone***Autorenverzeichnis/Liste des auteurs**

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Cross-Border Tax Administrative Assistance: “For The Times They Are a-Changin’”

By Christian Bovet* and Fabien Liégeois**/***

The past few years have seen some fundamental changes in the exchange of information relating to tax matters. The growing number of Double Taxation Agreements (DTAs) containing new clauses based on Article 26 of the OECD Model Convention as well as new types of mechanisms favoring fiscal data transfers raise issues inducing different approaches for tax practitioners. At the same time, international ad-

ministrative assistance in banking and financial matters has reached a certain maturity. It is therefore worth confronting this rich experience with a few of the legal questions that will undoubtedly arise in the implementation of the Swiss Federal Tax Administrative Assistance Act (TAAA) which entered into force on February 1, 2013.

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Introduction

The following excerpt is drawn from a song that Bob Dylan sang for the first time on the 26th of October 1963 at Carnegie Hall; in fact, it was even the song opening that show:¹

“The line it is drawn
The curse it is cast
The slow one now
Will later be fast
As the present now
Will later be past
The order is rapidly fadin
‘And the first one now will later be last
For the times they are a-changin’.”²

This contribution gives us the opportunity not only to celebrate the anniversary of one of Dylan’s best-known songs, but also and mainly to show how the poet’s words have maintained their acuity almost 50 years later and encapsulate the developments in the Swiss financial sector over the past five years. In this paper, we intend to focus on recent changes or law proposals that will affect the international exchange of information in tax matters.³ We don’t intend to describe in detail the procedure and conditions that apply in these cases; this was done in other

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¹ Available at <<http://www.bobdylan.com/us/tour/1963-10-26-carnegie-hall>>.

² *Bob Dylan*, *The Times They Are A-Changin’* (1963). Full lyrics available at: <<http://www.bobdylan.com/us/songs/times-they-are-changin>>.

³ Various terms have been chosen to describe this mechanism. In this article, expressions such as “mutual assistance in tax matters”, “exchange of information or international tax cooperation mechanisms” will be used as synonymous to the terms we referred to in the above title, which in our opinion reflects best the origin of this system, *i.e.* banking and other financial cross-border activities.

forums.⁴ After a systematic presentation of the main legal sources, we will examine whether and how legal developments in Swiss banking and financial supervision should govern the Swiss Federal Tax Administration’s (FTA) assistance to its foreign counterparts.

I. Sources

1. Overview

While borders have long ceased to impede commercial transactions, they continue to create obstacles to both judicial and administrative authorities.⁵ Especially in the tax sector, sovereignty prevents states from pursuing tax claims beyond the limits of their own territory.⁶ International cooperation is therefore necessary to extend the power of coercion of the tax authorities. During the last decade, influential economic institutions and actors, such as the Organization for Economic Cooperation and Development (OECD),⁷ the United States of America (U.S.) and the European Union (EU), have repeatedly advocated for more international cooperation in tax matters:⁸ in a fully globalized economy, tax authori-

ties need more and more cross-border assistance to combat effectively all kinds of tax evasion.⁹

As a significant result of this joint effort, Article 26 of the OECD Model Tax Convention on Income and on Capital (OECD Model Convention) was amended in July 2005 to include two more paragraphs aimed at increasing the cooperation requirements. According to the current clause on exchange of information, a state cannot refuse a request for information solely because it has no domestic tax interest (§ 4) or because this information is held by a bank or any other similar financial institution (§ 5).¹⁰ These two amendments have represented a substantial enhancement of cross-border tax administrative assistance.

Furthermore, within the last five years, the number of Double Taxation Agreements (DTAs), including the revised relevant clause, has increased dramatically throughout the world.¹¹ In the aftermath of the well-known Swiss Federal Council’s decision,¹²

about Switzerland, see precisely § 13–14; also OECD’s Report dated April 2000 entitled: “Improving Access to Bank Information for Tax Purposes”.

⁹ The acceleration of the “fight against tax evasion” has followed the OECD Report of April 1998 entitled “Harmful Tax Competition – An Emerging Global Issue”, addressing “harmful tax practices” in both member and non-member countries”; regarding the link between globalization and international cooperation needs, see § 2, 8, 21–25 and 37 of this report.

¹⁰ The OECD Model Tax Convention on Income and on Capital has been updated four times since 2000, the latest full version of July 17, 2012; since Article 26 of the United Nations Model Convention (updated in 2008) reproduces the substance of Article 26 of the OECD Model Convention, we shall merely focus on the latter in this paper.

¹¹ According to an information brief of the Global Forum, dated October 29, 2012, more than 800 agreements that provide for the exchange of information in tax matters in line with the OECD standards have been signed since 2008. The brief is available at <<http://www.oecd.org/tax/transparency/>>.

¹² Having adopted a rather restrictive approach for decades, Switzerland withdrew its reservation to Article 26 of the OECD Model Convention on March 13, 2009; see Federal Council press release available at <<http://www.efl.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=25863>>; along with this new policy, the Federal Council announced that it would protect, what were deemed to be six central principles: (i) respect for established administrative assistance procedures, (ii) restriction of administrative assistance to individual cases (no fishing expeditions); (iii) fair transitional solutions; (iv) limitation to taxes covered by the OECD Model Convention; (v) the principle of subsidiarity in accordance with the OECD Model Convention; (vi) willingness to

⁴ E.g. *Fabien Liégeois*, *Secret bancaire et assistance administrative internationale en matière fiscale: les changements apportés par la révision des conventions Suisse–France et Suisse–USA*, RDAF 2011 II 1 (hereinafter *Liégeois*, *Secret bancaire*); *Xavier Oberson*, *La nouvelle politique fiscale de la Suisse en matière d’échange de renseignements fiscaux: Un an après*, in: Luc Thévenoz/Christian Bovet (edit.), *Journée 2009 de droit bancaire et financier*, Geneva/Zurich/Basle 2010, 129–154; *Robert Waldburger*, *Neue Amtshilfebestimmungen in schweizerischen Doppelbesteuerungsabkommen*, IFF 2009, 276.

⁵ Reference is made to the Federal Office of Justice’s (FOJ) introduction to international mutual legal assistance in criminal matters available at <http://www.bj.admin.ch/bj/en/home/themen/sicherheit/internationale_rechtshilfe/rechtshilfe_in_strafsache/beweiserhebung.html>.

⁶ Regarding the delicate balance between international cooperation and autonomy in tax matters, see *Allison Christians*, *Networks, Norms, And National Tax Policy*, 9 Wash. U. Global Stud. L. Rev. 1 (2010), 37.

⁷ The OECD has been particularly active in implementing a Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum). See Global Forum progress reports available at <www.oecd.org/tax/transparency/>.

⁸ See in particular OECD’s Report dated July 2007 entitled “Improving Access to Bank Information for Tax Purposes: The 2007 Progress Report”; see also OECD’s Report dated July 2003 entitled “Improving Access to Bank Information for Tax Purposes: The 2003 Progress Report”;

Switzerland has renegotiated more than 40 tax treaties – all of which obey the OECD standards – with its main economic allies in less than three years.¹³

Meanwhile the U.S. enacted the Foreign Account Tax Compliance Act (FATCA) on March 18, 2012 as part of the Hiring Incentives to Restore Employment Act of 2010.¹⁴ FATCA strengthens reporting requirements for foreign financial institutions (FFIs) to reduce the number of U.S. taxpayers hiding income and assets through offshore accounts.¹⁵ In substance, U.S. legislators designed FACTA to: (i) provide an incentive for U.S. taxpayers to participate in an offshore voluntary compliance initiative; (ii) improve the QI reporting system mechanism with respect to U.S. taxpayers; and (iii) develop “an offshore reporting model for other countries to emulate”.¹⁶ While FATCA is in effect for U.S. financial institutions, the earliest possible date to effectuate FFI agreements is postponed to January 1, 2014.¹⁷

Less than a year after FATCA’s enactment, the EU adopted a new directive providing for a “more straightforward” mechanism of tax information ex-

change.¹⁸ Since January 1, 2013, the OECD’s standard clause should be fully applied within the EU so that, in particular, no Member State would be allowed to refuse an information request from another Member State solely on the grounds of banking secrecy.¹⁹ This new directive also plans for the introduction of automatic information exchanges for certain categories of income and capital, such as employment income, director’s fees, pensions, as well as ownership of and income from immovable property as from January 1, 2014.²⁰

2. Types of Cooperation

2.1 Direct Cooperation

2.1.1 Double Taxation Agreements (DTAs)

Up until the UBS case in 2008,²¹ banking secrecy generally prevented the exchange of bank information in fiscal matters to foreign judicial or tax authorities.²² Exchange of information was granted solely for

eliminate discrimination. Since then, two of those six commitments (see (ii) and (iv) above) have already been called into question by subsequent measures.

¹³ More precisely, Switzerland has entered into 42 DTAs containing administrative assistance clauses in accordance with the internationally applicable standard (last update February 6, 2013); for a complete and current list, see the Secretariat for International Financial Matters website: <<http://www.sif.admin.ch/themen/00502/00740/index.html?lang=en>>.

¹⁴ See amended Sections 1471 to 1474 of the Internal Revenue Code (Title 26, Subtitle A, Chapter 4 of the United States Code).

¹⁵ For a detailed presentation of both the overall and specific goals of FATCA, see *J. Richard Dick Harvey*, *Offshore Accounts: Insider’s Summary of FATCA and Its Potential Future*, 57 Vill. L. Rev. 471 (2012).

¹⁶ *Harvey* (n. 15), 488.

¹⁷ This date may still change. Assuming a FFI agreement is effective on January 1, 2014, any account opened prior to the effective date of this agreement will be considered a pre-existing account. January 1, 2014 would then be the decisive date to determine account balances to apply the USD 50,000 *de minimis* rule for individual accounts and USD 250,000 for entity accounts. Meanwhile, FATCA compliant will have to be set up to facilitate compliance, the U.S. Tax authorities will use an online registration system so that FFIs can enter into agreements with the IRS in order to become participating FFIs on due date; for more details about this, see IRS updated information available at <<http://www.irs.gov/Individuals/International-Taxpayers/Details-on-the-FATCA-Registration-Process-for-Foreign-Financial-Institutions>> (FFIs).

¹⁸ Council Directive 2011/16 of February, 15 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (Directive 2011/16/EU), OJ 2011 L 64, p. 1. This Directive covers all taxes except for VAT and excise duties, which are already covered by other EU legislation (Council Regulation 1798/2003 on administrative cooperation in the field of VAT and N° 2073/2004 on administrative cooperation in the field of excise duties, OJ 2004 L 359, p. 1).

¹⁹ Article 18 § 2 of the Directive 2011/16 (n. 18).

²⁰ Article 8 § 1 of the Directive 2011/16 (n. 18).

²¹ For an historic account of this case, see *Harvey* (n. 15), 476; see also Federal Administrative Court (hereinafter “FAC”) Judgment of March 5, 2009, A-7342/2008 and A-7426/2008, RDAF 2009 II 294 (UBS I); January 5, 2010, B-1092/2009, UBS (II); January 21 2010, A-7789/2009, (UBS III); July 15, 2010, A-4013/2010, (UBS IV); July 15, 2010, A-3786/2010, (UBS V); for more about the UBS Judgments, see *Christian Bovet/Fabien Liégeois*, *Répondre à la crise: activité irréprochable, transparence des marchés, entraide internationale et autres développements de la pratique et de la jurisprudence*, in: Luc Thévenoz/Christian Bovet (edit.), *Journée 2010 de droit bancaire et financier*, 2011 Geneva/Zurich/Basle, 143/159–164 (hereinafter *Bovet/Liégeois*).

²² Switzerland had made a reservation to Article 26 § 1 and 5 of the OECD Model Convention to limit its scope to information necessary to carry out the provisions of the Convention; however, banking secrecy has never prevented judicial authorities from obtaining bank information in cases involving criminal investigation under Articles 186 and 187 of the Direct Federal Tax Act (Classified Compilation of Federal Legislation [hereinafter “RS/SR”] 642.11).

carrying out the provisions of a DTA.²³ There were nonetheless two notable exceptions, the 1996 DTA with the U.S. and the 2002 DTA with Germany.²⁴ For several years, Swiss authorities collected and transmitted data to these states on an individual case basis, albeit only in instances relating to tax fraud or conduct deemed equally malicious.²⁵ Following the fundamental change in Swiss international tax policy in March 2009,²⁶ Swiss authorities transmit all “foreseeably relevant” bank-held information on request provided that several conditions specified in the new generation of DTAs are met.²⁷

The standard provided for in the whole new or revised DTAs entered into by Switzerland during the last four years remains exchange of information upon request. Neither *automatic* disclosure, which involves regular (e.g. annual) transmission of volumes of tax-related data about residents of a state party to a tax treaty, nor *spontaneous* transmission of information, are currently on the table. Yet according to recent statements by the Federal Councilor in charge of tax

matters, automatic information exchange might soon be a subject for negotiation.²⁸

2.1.2 EU Agreement on Taxation of Savings

Effective as of July 1, 2005, the Agreement on Taxation of Savings allows citizens in the EU to either opt into a tax retention system or make a spontaneous declaration to tax authorities (a so-called voluntary declaration).²⁹ The retention system applies to interest payments “channeled” by Swiss paying agents to individual EU residents.³⁰ Since July 1, 2011, the withholding tax rate amounts to 35%,³¹ which means it is equal to the anticipatory tax rate on capital (and lottery prizes) income.³² The beneficial owner of interest may nonetheless avoid the withholding tax by authorizing the paying agent to report those interest payments to the FTA, which subsequently communicates the information to the competent authority of the beneficial owner’s country of residence.

To ensure enforcement, the Agreement also includes a mechanism for administrative assistance, which requires disclosure of information upon request, again, in cases involving tax fraud (as defined by Swiss law) or “other equally serious offences”.³³ Thus, an offense in any EU Member-State that reaches the same degree of wrongdoing as tax fraud under Swiss Law is likely to trigger administrative assistance. This concept is often referred to as “tax fraud or the like”.³⁴ Tax evasion (*Steuerhinterziehung, soustraction fiscale*) is *de jure* not sufficient to trigger administrative assistance requests – namely exchanges of bank-held data – under the EU Agreement on Taxation of Savings. Because of the new Swiss

²³ At least not in a traditional fashion (mutual assistance), Switzerland would nonetheless levy a 35% anticipatory tax (RS/SR 642.21, Anticipatory Tax) on Swiss source capital income earned by a foreign citizen or corporation. A beneficiary residing abroad can claim a reimbursement of anticipatory tax within the frame of a DTA only if (i) he proves through official certification given by the tax authorities of his country of residence that he is a resident of a state with which Switzerland has concluded a DTA, (ii) he is the beneficial owner and (iii) the income has been declared to the competent authorities of his residence state.

²⁴ Because the exchange of information clause with France was ineffective, we do not consider it here.

²⁵ Under Article 10 of the Protocol to the DTA between the Swiss Confederation and the United States of America for the Avoidance of Double Taxation with Respect to Taxes on Income of October 2, 1996 (RS/SR 0.672.933.61), the taxpayer intended to use a forged or falsified document, such as a double set of books, a false invoice, an incorrect balance sheet or profit and loss statement, a fictitious order or, in general, a false piece of documentary evidence, and in situations where the taxpayer uses, or has the intention to use, a scheme of lies to deceive the tax authorities (the latter being a simple illustration). For an example, see Swiss Federal Court Judgment of March 12, 2002, case 2A.416/2001, RDAF 2002 II 307.

²⁶ See Federal Council press release of March 13, 2009 (n. 12).

²⁷ See below Sections II and III.

²⁸ <http://www.letemps.ch/Page/Uuid/e8638e70-4d01-11e2-9581-d2a505054295/Eveline_Widmer-Schlumpf_accus%C3%A9_de_tirer_dans_le_dos_du_Conseil_f%C3%A9d%C3%A9ral#.UN3EO2_hJ8F>.

²⁹ In its full version, this agreement is titled “Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments” (RS/SR 0.641.926.81, Agreement on Taxation of Savings).

³⁰ For the definition of a paying agent in this context, see Article 6 of the Agreement on Taxation of Savings (n. 29).

³¹ Article 1 § 1 of the EU Agreement on Taxation of Savings (n. 29).

³² See Article 13(1)(a) of the Anticipatory Tax (n. 23).

³³ See Article 10 § 1 of the EU Agreement on Taxation of Savings (n. 29).

³⁴ *Ibid.*

tax cooperation policy, this specific mechanism will certainly be rendered obsolete.

2.1.3 Withholding Tax Agreements (Rubik)

To preserve both privacy and cooperation with other countries, Switzerland signed three withholding tax agreements with the United Kingdom (U.K.),³⁵ Germany,³⁶ and Austria,³⁷ respectively. Each agreement contains a special mechanism to enable the exchange of tax information.³⁸ With the notable exception of Germany,³⁹ these instruments became effective on January 1, 2013, since no referendum was finally triggered against them in Switzerland and no political objection was raised in the U.K. on Austria.⁴⁰ Switzerland is negotiating at least two additional withholding tax agreements based on this model: one with Italy (currently stalled) and another with Greece. The Federal Council expressed its willingness to continue employing this model of agreements.⁴¹

These withholding tax agreements seek to offer a reliable alternative to automatic information exchange. They allow taxpayers to preserve their anonymity, provided that the individuals with Swiss bank accounts pay a withholding tax on future income as well as a levy on previously untaxed income.⁴² These agreements set the price of anonymity, *i.e.* the rates of the abovementioned taxes. Indeed, with Rubik, the choice ultimately pertains to the foreign taxpayer.

- If he/she decides to pay the tax, the paying agent will deduct said amount from the client’s account and transfer it to the FTA. The FTA will, in principle annually, retransfer to the foreign tax authority the sums it collected. This option exempts the Swiss bank from disclosing information relating to its client’s identity, except for the citizenship which is necessary to send the deducted amount to the right authority. To recover the difference between the deducted amount of tax and the amount due in his/her state of residence, the taxpayer will have to report his/her income. The foreign authority will then deduct the overpaid amount of tax from the amount due in the taxpayer’s state of residence.
- In contrast, the client who refuses to pay the withholding tax shall authorize the bank to disclose the details about his/her Swiss assets to the FTA for onward transmission to the competent foreign tax authority.⁴³

This *individual* choice differentiates Rubik from the new U.S. system, based on a delegation mechanism.

2.2 Cooperation upon Delegation

2.2.1 QI Agreement

The qualified intermediary (QI) program became effective on January 1, 2001 and seeks to “encourage” foreign intermediaries to assume withholding and information reporting responsibilities for U.S. withholding agents.⁴⁴ A QI is either a foreign finan-

³⁵ The text of October 6, 2011 Agreement is available in French at FF 2012 4765 (in German, at BBI 2012 5157), and the Protocol of March 20, 2012 at FF 2012 4819 (in French) and BBI 5215 (in German).

³⁶ The text of the September 21, 2011 Agreement is available in French at FF 2012 4649 (in German, at BBI 2012 5039), and the Protocol of April 5, 2012 at FF 2012 4695 (in French) and BBI 2012 5087 (in German).

³⁷ The text of the April 13, 2012 Agreement is available in French at FF 2012 4935 (in German, at BBI 2012 5335).

³⁸ For more details about the system of these withholding tax agreements, see *Fabien Liégeois*, *Accords d'imposition à la source “Rubik”: une double alternative*, RF Nr 9 (2012), 574 (hereinafter *Liégeois*, Rubik).

³⁹ The German parliament did not ratify the withholding tax agreement. See <<http://www.news.admin.ch/message/index.html?lang=en&msg-id=47158>>.

⁴⁰ See Agreement of October 6, 2011 between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on cooperation in the area of taxation including annexes (RS/SS 0.672.936.74) and “Accord du 13 avril 2012 entre la Confédération suisse et la République d’Autriche concernant la coopération en matière de fiscalité et de marchés financiers, avec annexe, acte final et procès-verbal” (RS/SR 0.672.916.33).

⁴¹ See the Federal Department of Finance (hereinafter “FDF”) press release available at <<http://www.news.admin.ch/message/index.html?lang=en&msg-id=46841>>; *Itai Grinberg* (The Battle Over Taxing Offshore Accounts, 60 UCLA L. Rev. 304 [2012], 322) notices that these agreements create a new model for exchanging tax information, which *Grinberg* entitles “the Swiss Anonymous Withholding Model”.

⁴² With respect to this option, *Grinberg* ([n. 41], 347) argues that “cross-border anonymous withholding institutionalizes differentiated treatment of the most sophisticated taxpayers from the rest of society”.

⁴³ For more details, see *Liégeois*, Rubik (n. 38), 582.

⁴⁴ A withholding agent is any U.S. or non-U.S. person (including an individual, corporation, partnership, trust, association, or any other entity) that has control, receipt,

cial institution (FFI) or a foreign branch of a U.S. financial institution, which enters into a specific agreement (QI Agreement) with the IRS to provide the IRS with certain information about its American customers.⁴⁵ In return, the non-U.S. financial institution is permitted to protect its customers’ anonymity from both U.S. financial institutions and the IRS. Non-U.S. financial institutions are further ensured that their customers will receive “accurate and timely treaty benefits”.⁴⁶

The QI Agreement entails a shift of obligations from U.S. withholding agents to foreign entities. The foreign entities are responsible for the collection of information in lieu of the U.S. withholding agents. They are, accordingly, referred to as “Qualified Intermediaries” (QIs). To the extent that QIs are required to perform certain withholding, documentation, and information-reporting tasks, they must divide their customers into two categories: U.S. Persons and Non-U.S. Persons.⁴⁷ While an individual’s “Non-U.S. Person” status could be verified through the W-8BEN form, his or her identity would not be disclosed to the IRS. For this reason, the Federal Council judged the QI Agreement compatible with banking secrecy.⁴⁸ In contrast, U.S. Persons must sign another form, the W-9, and disclose their identity in order to avoid being forced to sell U.S. stock. As *Grinberg* noted:

“The QI system is relevant historically because: (1) it marked the first time financial institutions routinely acted as cross-border tax intermediaries; (2) it provided one of the seeds of the anonymous withholding approach currently being

custody, disposal, or payment of any withholdable payment; for a presentation of the implementation of the QI system, see *Steven Nathaniel Zane*, *Carrot or Stick?: The Balance of Values in Qualified Intermediary Reform*, 33 B.C. Int’l & Comp. L. Rev. 357 (2010), 361.

⁴⁵ See *Grinberg* (n. 41), p. 325, “Under QI, non-U.S. financial institutions agree to collect information from their customers investing in the United States as to whether those customers are U.S. persons or non-U.S. persons, and which of the non-U.S. persons are entitled to reduced rates of withholding tax”.

⁴⁶ *Ibid.*

⁴⁷ See U.S. Treasury Regulations, § 1.1441-1(e)(5).

⁴⁸ See Federal Council, Report of October 10, 2012, “Les autorités sous la pression de la crise financière et de la transmission de données clients d’UBS aux Etats-Unis”, available at <<http://www.efl.admin.ch/dokumentation/zahlen/00578/02638/index.html?lang=fr>>; see p. 7 where the Federal Council states that the QI agreement is compatible with banking secrecy given that Non-U.S. Persons were not forced to reveal their identity while U.S. Persons could opt for identity disclosure or selling U.S. stock.

promoted by Switzerland as a means to address residence country tax concerns.”⁴⁹

2.2.2 FATCA

FATCA is built on the precedent of the QI Agreement. To improve this specific mechanism, the U.S. authorities concluded that QIs should not only report both U.S. and foreign source income for U.S. taxpayers but also be able to determine accurately whether U.S. taxpayers are the beneficial owners of “foreign shell entities” (so-called “*sociétés boîtes aux lettres*”). QIs should also review all customer accounts within the affiliated group to identify U.S. taxpayers.⁵⁰ In other words, to further address the issue of U.S. persons underreporting or failing to report income or assets, FATCA requires FFIs to disclose their U.S. account holders to prevent their clients from receiving a heavy penalty for nondisclosure.⁵¹

In a nutshell, FATCA imposes a withholding “tax” on certain payments from U.S. sources and the proceeds from disposing of certain U.S. investments (withholdable payments) when FFIs do not comply with their obligations and become a “participating foreign financial institution”.⁵² To avoid this penalty, the concerned FFI has to provide the IRS with the identity of the income and assets owner. Furthermore, this regime is applicable notwithstanding the fact that payments are eventually owned by (i) U.S. persons on whom the IRS has a right to reporting; (ii) non-U.S. customers of the institution; or (iii) the institution itself.⁵³ On June 21, 2012, the U.S. and Switzerland signed a “Joint Statement [...] to Facilitate the Implementation of FATCA”.⁵⁴ Through this cooperation agreement, Switzerland committed itself to three measures:

1. Direct all Swiss financial institutions, not otherwise exempt or deemed compliant pursuant to the Cooperation Agreement, to conclude an FFI Agreement with the IRS.
2. Enable these Swiss financial institutions to comply with the obligations prescribed by the FATCA rules and set forth in such FFI Agreements, in particular regarding the reporting of information with respect to U.S. accounts to

⁴⁹ *Grinberg* (n. 41), 323.

⁵⁰ *Harvey* (n. 15), 481.

⁵¹ *Grinberg* (n. 41), 334.

⁵² *Idem*, 335; this withholding tax also applies to certain other payments (“*passthru payments*”).

⁵³ *Ibid.* See also *Harvey* (n. 15), 480.

⁵⁴ See June 21, 2012 U.S. Department of the Treasury report, available at <<http://www.treasury.gov/press-center/press-releases/Pages/tg1619.aspx>>.

the IRS, by granting an exception from Article 271 of the Swiss Criminal Code.

3. Accept and promptly honor, as foreseeably relevant without regard to any other condition, a group request by the U.S. competent authority for additional information about U.S. accounts identified as recalcitrant and reported by Swiss financial institutions on an aggregate basis [...].⁵⁵

The major difference between FATCA and the 2001 QI Agreement is that the former not only covers any U.S. individual account but also targets a larger range of withholding payments. Moreover, FATCA's direct reporting system might encroach on other countries' sovereignty and “violates local financial privacy and data protection law in many jurisdictions”.⁵⁶ In substance, FATCA may be viewed as a unilateral measure which is ultimately implemented through joint agreements, whereas the QI program has been designed as a mutual agreement which would benefit all concerned actors.

3. Implementing Legislation

Radical changes in international tax cooperation compel Switzerland to revise its legal framework and implement at the national level the obligations it undertook under the new DTAs. As of February 1, 2013, the Federal Tax Administrative Assistance Act (TAAA)⁵⁷ replaced the Ordinance on Administrative Assistance according to Double Taxation Conventions (OAADTC).⁵⁸ This ordinance will, however, continue to govern requests filed before TAAA's entry into force.⁵⁹

⁵⁵ See “Joint Statement from the United States and Switzerland Regarding a Framework for Cooperation to Facilitate the Implementation of FATCA”, available at <http://www.treasury.gov/press-center/press-releases/Documents/FATCA%20Joint%20Statement%20US-Switzerland.pdf>, attached to the press release referred to in n. 54.

⁵⁶ *Grinberg* (n. 41), 375; for a short analysis of relations between the Federal Act of 19 June 1992 on Data Protection (FDAP, RS/SR 235.1) and exchange of information clauses in Switzerland, see *Liégeois*, *Secret bancaire* (n. 4), 12 *et seq.*, 23.

⁵⁷ See Federal Tax Administrative Assistance Act of September 28, 2012 (RS/SR 672.5; TAAA); Article 1 al. 1 *cum* 18 OAADTC.

⁵⁸ See OAADTC of September 1, 2010 (RO 2010 4017); for further details, see *Bovet/Liégeois* (n. 21), 164–169.

⁵⁹ Article 24 TAAA. One should therefore not take literally the decree of January 16, 2013 issued by the Swiss government abrogating the OAADTC (RS/SR 672.204).

TAAA defines both procedural⁶⁰ and substantive conditions for cross-border tax information requests.⁶¹ It is supplemented by an Ordinance on Administrative Assistance in the Case of Group Requests According to International Tax Agreements.⁶²

In addition, on June 15, 2012, the Swiss Federal Parliament adopted an Act on International Withholding Tax (IWTA) dealing specifically with issues raised by agreements of the “Rubik” type.⁶³ The IWTA contains provisions on organization, procedure,⁶⁴ and judicial channels, as well as criminal sanctions and domestic procedural rules for the upfront payment. The IWTA entered into force on December 20, 2012, *i.e.* a few days before the Withholding Tax Agreements with the U.K. and Austria.⁶⁵ Two implementing ordinances became effective the same day.⁶⁶

Criminal law provisions presented in the next section should strengthen both nationally and internationally, the revolution initiated by the new DTAs and the implementing rules.

4. Prospective Law

At the end of 2012, the Federal Council announced a draft law, the Federal Act on Money Laundering and the Financing of Terrorism, designed to enhance due diligence duties of financial intermedi-

⁶⁰ According to Article 5(1) TAAA, the Federal Act on Administrative Procedure (APA, RS/SR 172.021) applies subsidiarily, *i.e.* when TAAA does not provide for another solution.

⁶¹ In particular, Article 7 and 8(1)–(2) TAAA.

⁶² RS/SR 672.51 (hereinafter “Ordinance on Group Request”). The English translation of the title of this ordinance is the one proposed by the Federal Council in its press release of January 18, 2013, available at <http://www.news.admin.ch/message/index.html?lang=en&msgid=47479>.

⁶³ Federal Act on International Withholding Tax dated June 15, 2012 (IWTA; RS/SR 672.4).

⁶⁴ Article 35 IWTA (n. 63) provides for an application by analogy of the Federal Act on Administrative Procedure (n. 60), unless the IWTA provides otherwise.

⁶⁵ The reason for this anticipation was to ensure that the upfront payment by Swiss paying agents set out in the agreement with the U.K. could be transferred by the deadline of January 31, 2013.

⁶⁶ Ordinance of November 30, 2012 on the upfront payment to the United Kingdom by Swiss paying agents (RS/SS 672.473.67) and FDF's Ordinance of December 10, 2012 on Late Payment Interest (RS/SR 672.45).

aries.⁶⁷ Earlier in 2012 the government also proposed to lift the current exception to mutual assistance in criminal matters when it is related to tax issues, thus aligning the standards of criminal law with those adopted in fiscal procedures.⁶⁸

The general trends initiated by the new DTAs should have further impacts nationally and internationally:

- To enhance legal certainty and somehow equal treatment, domestic fiscal criminal provisions, which apply solely to Swiss residents, will adapt to the new international tax policy, as the federal government aims to combat “internal” tax evasion by granting authorities access to banking and financial data.⁶⁹
- Following the Global Forum recommendations⁷⁰ to develop cooperation with countries and territories with which no economic interest exists in executing an extensive DTA, the Federal Council indicated that Switzerland will sign bilateral

treaties based on the OECD Model Agreement on Exchange of Information in Tax Matters (often referred to as TIEAs).⁷¹ Regarding exchange of information requirements, DTAs and TIEAs are similar instruments.

II. Formal Conditions

1. Request

The requirement of a formal⁷² request from the contracting party differentiates the system adopted by Switzerland in DTAs from automatic and spontaneous exchanges of data.⁷³ Article 6(2) of TAAA lists the items that should appear in the request, unless the DTA specifies other elements. Two provisions might give rise to procedural objections:

- The requesting state must explain why it believes that the information it seeks is located in the requested state. As is the case in cross-border administrative assistance relating to banking and financial matters, the requesting State need not prove, for instance by producing written evidence, the indices that led it to contact the Swiss authorities. On the other hand, the request should be specific enough to enable Swiss authorities to verify that this condition is satisfied.⁷⁴ Each DTA obliges the requesting party to identify the taxpayer and the holder of information; yet this identification requirement does not necessarily require naming the persons or entities. For example, the DTA with France requests the name and address of the person believed to be in possession of the information (namely the bank) “only to the extent known”.⁷⁵

⁶⁷ In particular, see *Ursula Cassani, L’infraction fiscale comme crime sous-jacent au blanchiment d’argent: considérations de lege ferenda*, see above p. 12 *et seq.* Also Federal Council, Report on Switzerland’s financial market policy, of December 19, 2012, 29–33, available at <http://www.efd.admin.ch/dokumentation/zahlen/00578/02679/index.html?lang=en>; Federal Council press release: “Federal Council wants to prevent the acceptance of untaxed assets with enhanced due diligence requirements”, available at <http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=47203>.

⁶⁸ An explicit link is made between DTAs and mutual assistance in criminal matters in Article 3(4)(c)(2) of the draft law amending the Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (RS/SS 351.1, IMAC), available at <http://www.bj.admin.ch/content/dam/data/sicherheit/gesetzgebung/fiskalrechtshilfe/vorentw-irsg-f.pdf>. According to this draft rule, judicial assistance will be granted in tax matters, provided that a DTA containing a specific provision on exchange of information has been enacted with the state having filed the request for assistance. Also Explanatory Report of June 2012 available at <http://www.bj.admin.ch/content/dam/data/sicherheit/gesetzgebung/fiskalrechtshilfe/vn-ber-f.pdf>; Federal Department of Justice and Police press release of June 15, 2012, available at http://www.bj.admin.ch/content/bj/fr/home/dokumentation/medieninformationen/2012/ref_2012-06-151.html.

⁶⁹ See FTA press release dated September 21, 2012 available at <http://www.news.admin.ch/message/index.html?lang=fr&msg-id=46074>. The consultation process will last from March 2013 until June 2013.

⁷⁰ See, OECD, Peer Review Report dated 2011 – Phase 1: Legal and Regulatory Framework – Switzerland, 8 § 7 and 86 § 283 *et seq.*

⁷¹ See Federal Council press release dated April 23, 2012 available at <http://www.news.admin.ch/message/index.html?lang=en&msg-id=44245>.

⁷² Article 6(1) TAAA requires a request in writing, in one of Switzerland’s official languages or in English.

⁷³ See above section I.2.1.

⁷⁴ See in this respect FINMA’s practice as described in its report of August 2009: “L’entraide administrative boursoière internationale”, p. 13–15 (available at <http://www.finma.ch/fi/aktuell/Pages/aktuell-amtshilfebericht-20090916.aspx>).

⁷⁵ See Article 28 of the amended Agreement between Switzerland and France for the Avoidance of Double Taxation with Respect to Taxes on Income, Wealth, and to Prevent Tax Fraud and Tax Evasion dated September 9, 1996 *cum*

- The request must also contain a statement that the requesting state used all means under its national regulations to obtain the requested information.⁷⁶ The principles of good faith and comity apply in this case: unless there are concrete reasons to doubt the veracity of the requesting state’s statement,⁷⁷ there is a *de facto* presumption of trust towards the latter.

2. Competent Authorities

The FTA is the authority charged with receiving requests from abroad.⁷⁸ It must take all necessary steps to collect relevant data directly from the taxpayer under investigation,⁷⁹ or from banks and other information holders,⁸⁰ cantonal tax authorities,⁸¹ or all other authorities.⁸² The FTA may also file requests with foreign authorities.

The competent foreign authority should generally be identified in the DTA itself, a protocol or another international instrument. For instance, the DTAs with the Netherlands and Hong Kong designate respectively the Dutch Minister of Finance⁸³ or his/her delegate and the Hong Kong Board of Review.⁸⁴

Article XI(e) of the Protocol to the Agreement (RS/SS 0.672.934.91).

⁷⁶ This requirement also derives from Article 26(1) of the OECD Model Convention; see OECD, Update to Article 26 of the OECD Model Tax Convention and Its Commentary, as approved by the OECD Council on July 17, 2012 (hereinafter “OECD 26 Updated Commentary”), ad § 9(a).

⁷⁷ See by analogy the reasoning of the Swiss Federal Court in relation to judicial assistance in criminal matters (ATF/BGE 130 II 217 *Wang*, § 8.1) or administrative assistance in banking and financial matters (Federal Court Judgment of March 15, 2002, case 2A.486/2001, § 3.3; more references in *Christian Bovet*, *L’entraide administrative dans le domaine financier*, in: François Bellanger/Thierry Tanquerel [edit.], *L’entraide administrative*, Geneva/Zurich/Basle 2005, 176 note 133).

⁷⁸ Article 2 TAAA.

⁷⁹ Articles 2 *cum* 9 TAAA.

⁸⁰ Articles 2 *cum* 10 TAAA.

⁸¹ Articles 2 *cum* 11 TAAA.

⁸² Articles 2 *cum* 12 TAAA.

⁸³ Article 3(1)(h)(i) of the DTA of February 26, 2010 between Switzerland and the Netherlands (RS/SR 0.672.963.61).

⁸⁴ See § 8(g) of the Protocol, forming an integral part of the DTA between Switzerland and Hong Kong of October 4, 2011 (RS/SR 0.672.941.61). Interestingly, this provision is drafted in a rather broad way: “the persons or authorities to whom the information may be disclosed under para-

graph 2 of Article 25 include the Board of Review” (emphasis added).

3. Decisions

Unless the taxpayer explicitly consents to the disclosure of his/her data, the FTA *must* render one or several decisions before transmitting data abroad.⁸⁶ The decision notifying a taxpayer of a pending investigation will be more detailed than, for instance, the one to a financial intermediary holding information.⁸⁷ Since the taxpayer will usually be a foreign resident, the decision may have to be delivered to his/her representative in Switzerland; lacking one, the decision will be published in the Swiss federal official gazette.⁸⁸

The notification of the final decision is of utmost importance, since Article 19 of TAAA restricts appeals to this type of decision: all preceding decisions, including those relating to measures of execution such as a search or seizure,⁸⁹ may be contested only at this final stage. Data are transferred to the requesting State when the appeal deadlines have elapsed and/or a final judgment on appeal has been rendered.⁹⁰

The FTA will also inform the relevant cantonal tax authorities involved in the process of the decision and its content.⁹¹ On the other hand, no formal decision will be sent to the requesting state in case of

⁸⁵ *Bovet* (n. 77), 169–171 (with other references).

⁸⁶ Article 17 and 20 TAAA. In its report of July 6, 2011 on TAAA, The Federal Council explicitly rejected the possibility of transmitting information abroad without a formal decision or the taxpayer’s consent, even in cases of special emergency or other exceptional circumstances (hereinafter “Federal Council, Report on TAAA”), see p. 5794 *et seq.*

⁸⁷ See Federal Council, Report on TAAA (n. 86), 5795.

⁸⁸ “*Feuille fédérale/Bundesblatt*” (Article 17 [3] TAAA).

⁸⁹ Article 13 TAAA.

⁹⁰ Article 20(1) TAAA.

⁹¹ Article 17 (4) TAAA. Neither this provision nor the Federal Council’s Report on TAAA (n. 86) defines the way this information should be transmitted to the cantonal tax authorities. It seems that the best manner would be simply to send a copy to these authorities, since they are bound by a professional secrecy duty.

Table I: Taxes covered by various DTAs with Switzerland

Exchange of Information Clauses		
Taxes of Every Kind	Only Taxes Covered by the DTA	Taxes Covered by the DTA + VAT
DTA Switzerland –	DTA Switzerland –	DTA Switzerland –
Bulgaria; Czech-Republic; France; Germany; Japan; Netherlands; Poland; Spain; Slovenia; UK; U.S.	Austria; Canada; Denmark; Finland; Greece; Hong Kong; India; Kazakhstan; Luxembourg; Malta; Mexico; Norway; Peru; Qatar; Rep. of Korea; Romania; Singapore; Slovakia; Turkey	Russia

a preliminary refusal by Switzerland to execute the request.⁹²

III. Material Conditions

One must first determine the extent of information exchange in tax matters (1) before examining the limitations thereof (2).

1. Extent

The core objective of *tax treaties* is to prevent negative effects of taxation on international trade, cross-border investments, and technology transfers. The historical function of DTAs has been to prevent or eliminate international double taxation (direct or indirect).⁹³ Yet, Article 26 of the OECD Model Convention, which sets forth the information exchange procedure, operates as both *a sword and a shield*: while it enables states to cooperate in their efforts to prevent tax evasion, it has traditionally been used to facilitate the execution of DTAs (*e.g.* by ensuring effective distribution of taxation rights between the source state and the residence state regarding different classes of income, such as interest, dividend, or

royalties).⁹⁴ This *exchange of information clause* seeks to ensure that tax authorities have all relevant information to determine accurately the amount of their claim.

States adopting the Model Convention may adapt the Article 26 clause to apply either to taxes of every kind (*e.g.* income and capital taxes as well as gift and estate taxes) or only to certain kinds (see *Table I*).

2. Limitations

According to the Model Convention, states can decline to share information for a number of reasons, which fall into two broad categories: (A) instances where the request falls beyond the scope of the Convention and (B) circumstances that violate the principle of proportionality.

2.1 Information-Related Objections (Article 7[b] TAAA)

Switzerland will refuse to transmit (*i*) information beyond the scope of the relevant DTA,⁹⁵ and (*ii*) information which by its content or use is not consistent with its objectives. Additionally, clauses based on Article 26 of the Model Convention contain three alternative grounds to refuse an information request by a contracting state:

1. The requested state cannot be required “to carry out administrative measures at variance with the laws and administrative practice of that or of the [requesting] state”.⁹⁶ In other words, the requested state cannot be asked to design a unique procedure to provide the requested information.
2. The requested state cannot be required “to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting state”.⁹⁷
3. Nor can the requested state be required “to supply information which would disclose any trade, business,

⁹² “Non-entrée en matière/Nichteintreten” (Article 7 TAAA). See Federal Council, Report on TAAA (n. 86), 5785.

⁹³ The double taxation is generally described as the imposition of similar taxes in two or more states on the same taxpayer in respect of the same base.

⁹⁴ For a list of examples, see OECD 26 Updated Commentary (n. 76), ad § 6 and 7.

⁹⁵ See above Section III.1.

⁹⁶ Article 26 (3)(a) of the OECD Model Convention.

⁹⁷ Article 26 (3)(b) of the OECD Model Convention.

industrial, commercial or *professional secret* or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).⁹⁸ Despite this provision, banking secrecy – viewed in Switzerland as a form of *professional secret* – no longer provides a valid basis to deny information requests.⁹⁹ Article 26(5) of the OECD Model Convention states that requests may not be denied “solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person”.

Further, Article 26 provides no equivalent to the judicial assistance “dual criminality standard”. The requested State thus cannot refuse an information request on the grounds that the suspect behavior would not constitute a crime under its own laws.

2.2 Proportionality (Article 7[a] TAAA)

The proportionality principle, as applied by Swiss courts in banking and financial matters, may reconcile an apparent dilemma with cross-border tax administrative assistance:

- The Commentary to the Model Convention leaves no doubt about the level of cooperation expected from states: it emphasizes twice that, under Article 26, information must be exchanged “to the widest possible extent”.¹⁰⁰
- On the other hand, Article 26 also limits cooperation to the exchange of “foreseeably relevant” (“*vraisemblablement pertinentes*”; “*voraussichtlich erheblich*”)¹⁰¹ information for the administration or enforcement of the tax laws of the requesting state.

Hence, foreign tax authorities should not engage in “fishing expeditions”, namely random or speculative requests that have no apparent nexus to an open inquiry or investigation.¹⁰² In particular, Switzerland

shall reject requests that are not supported by concrete facts,¹⁰³ do not sufficiently identify the taxpayers subject to the investigation (or information holder)¹⁰⁴ or relate to documents without a sufficient nexus to the existing investigation.¹⁰⁵ In this context, two issues deserve special attention:

- Swiss courts and authorities apply the principle of *potential relevance* both in cases of judicial assistance in criminal matters and of administrative assistance in banking and financial matters.¹⁰⁶ This principle holds that information pertaining to a request may be transmitted to a foreign authority insofar as it *might* aid the investigation moving forward.¹⁰⁷ Although some documents may not bring definitive answers to the pending issues,¹⁰⁸ only obviously (“*manifestement*”) irrelevant documents should be excluded.¹⁰⁹ In other

¹⁰³ See *Liégeois*, Secret bancaire (n. 4), 5 *et seq.*

¹⁰⁴ Article 6(2)(a) TAAA provides for some flexibility in this respect, since it allows states to file requests even when they cannot identify taxpayers using their names and addresses.

¹⁰⁵ See OECD 26 Updated Commentary (n. 76), ad § 5: “[T]he standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial.”

¹⁰⁶ Recently ATF/BGE 136 IV 82, § 4.4 p. 86 *et seq.* Interestingly, the U.S. Supreme Court developed a similar concept while U.S. regulations (26 USC § 7602[a][1]), stating that: “The language ‘may be’ reflects Congress’ express intention to allow the IRS to obtain items of even potential relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will, in fact, be relevant until they are procured and scrutinized” (*United States v. Arthur Young & Co.*, 465 U.S. 805, 814 [1984]). However, the US government agrees that the language “may be” means that a contracting State’s request for information regarding all bank accounts maintained by residents of that State in another contracting State would not be supported (Department of the Treasury, Technical Explanation of the Protocol Signed at Washington on September 23, 2009 Amending the Convention Between the U.S. of America and the Swiss Confederation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Signed at Washington on October 2, 1996, as Amended by the Protocol Signed on October 2, 1996, Comments ad Article 3 of this Protocol, p. 6).

¹⁰⁷ ATF/BGE 136 IV 82, § 4.4 p. 86.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* In an unpublished case dealing with international mutual assistance in criminal matters (Judgment of December 17, 2012, case 1C_625/2012, § 2.2), the Swiss Federal Court ruled, under the same principle, that disclo-

⁹⁸ Article 26(3)(c) of the OECD Model Convention.

⁹⁹ For examples of application of Article 26(3), see OECD 26 Updated Commentary (n. 76), ad § 8.

¹⁰⁰ OECD 26 Updated Commentary (n. 76), ad § 2 and 5.

¹⁰¹ See OECD 26 Updated Commentary (n. 76), ad § 4.1: “Many of the changes that were then made to the Article were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation. For instance, the change from ‘necessary’ to ‘foreseeably relevant’”.

¹⁰² OECD 26 Updated Commentary (n. 76), ad § 5. The French language provides the most accurate way of describing the disallowed behavior of the tax authorities: “*aller à la pêche aux renseignements*”.

words, the FTA must transmit information even though the documents may not ultimately be useful for the requesting party.¹¹⁰ Thus, the Swiss authority puts itself “in the shoes” of its foreign counterpart by using its own experience with this type of investigation to determine whether the data may be useful. Transposing these principles into the context of international tax cooperation would be consistent with both Swiss practice in other fields of law and the text of Article 26 of the Model Convention (“foreseeably relevant”). The Commentary invites the parties to grant each other the widest assistance possible.¹¹¹ While the potential relevance principle can be viewed as favoring administrative efficiency, one might object to the relatively strict (and sometimes largely detailed) framework set forth by DTAs and the TAAA.¹¹² Yet, the FTA enjoys a real power of discretion regarding the request’s admissibility. For instance, Article 6(3) TAAA entitles the FTA to ask for additional information, in spite of denying the request, when all the conditions set forth in Article 6(2) TAAA are not met.

- Along with the TAAA, the Federal Council enacted a special Ordinance on *group requests*.¹¹³ This significant opening is the result of the par-

sure of the entire documentation may be justified even though some of transmitted documents exceed the [relevant] criminal period or the framework of the investigation (“*cadre de l’enquête*”).

- ¹¹⁰ In this respect, see 26 Updated Commentary (n. 76), ad § 5: “In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial.”
- ¹¹¹ When a specific DTA’s provision is identical to the OECD Model Convention, the Swiss Federal Court recognizes the OECD Commentary as a valuable means of interpretation (Judgment of October 8, 2007, case 2C_265/2007, § 2.3). See also *Robert Waldburger*, Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung des Schweizerischen Bundesgerichts, in: Michael Lang (edit.), Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Deutschlands, der Schweiz und Österreichs, Wien 1998, 59–62.
- ¹¹² See Article 6 TAAA, which defines the content of the request.
- ¹¹³ Ordinance on Group Request (n. 62). This regulation does not refer explicitly in its main text (only in the title) to “groups” of taxpayers; it rather defines “group requests” as those relating to taxpayers having adopted the same type of behaviour or a similar pattern (“*Verhaltensmuster*”; “*modèle de comportement*”).

liamentary debates.¹¹⁴ While it may be difficult to distinguish legitimate group requests from fishing expeditions,¹¹⁵ the 2012 update of Article 26 of the OECD Model Convention and its commentary provide some useful guidance: a request for information relating to a group of unidentified taxpayers should be accepted if the requesting state can furnish the requested state with: (1) a detailed description of the group; (2) the specific facts and circumstances underlying the request; (3) an explanation of the applicable law, and (4) “why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law supported by a clear factual basis”.¹¹⁶ Furthermore, the requesting State must show that the information “would assist” its determination of whether the taxpayers in the group complied with tax laws.¹¹⁷ Further, the Ordinance on group requests adds a temporal condition: unless the DTA provides for another regime, Ordinance admits only those group requests that relate to facts (“*Sachverhalte*”) occurring after the TAAA is become effective.¹¹⁸

2.3 Good Faith (Article 7[c] TAAA)

Article 7(c) of the TAAA merges the two causes of exclusion previously outlined by Article 5(2) OAADTC, *i.e.* a request based on elements obtained against the good faith principle¹¹⁹ (including stolen data).¹²⁰ This formal change does not impact the exceptions that may be invoked by the Swiss authorities

¹¹⁴ For a detailed account of the evolution of the provisions governing this issue, see *Dina Beti*, La nouvelle loi sur l’assistance administrative internationale en matière fiscale – une vue d’ensemble, Archives (ASA) 81 181.

¹¹⁵ See OECD 26 Updated Commentary (n. 76), ad § 5.2.

¹¹⁶ As emphasized at the end of § 5.2 of OECD 26 Updated Commentary (n. 76): “a group request that merely describes the provision of financial services to non-residents and mentions the possibility of non-compliance by the non-resident customers does not meet the standard of foreseeable relevance.”

¹¹⁷ See OECD 26 Updated Commentary (n. 76), ad § 5.2.

¹¹⁸ Article 1 of the Ordinance on Group Requests (n. 62). The second provision of this ordinance merely refers to the effective date of February 1, 2013.

¹¹⁹ Article 5(2)(b) OAADTC.

¹²⁰ Article 5(2)(c) OAADTC. On stolen data, see *François-Roger Micheli/Christian-Nils Robert*, Documents volés et dénonciations fiscales, Jusletter of November 19, 2012.

responding to requests from states that buy data stolen from banks or other financial intermediaries. This objection applies to both requests filed by the state having first acquired stolen data and to states that receive information from the initial infringer. This rule would also provide grounds for refusal if foreign states were to use espionage to glean data from Swiss banks about taxpayers.

Courts will interpret the principle of good faith in accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties,¹²¹ which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. In its report, the Federal Council links Article 7(c) TAAA to this provision of the Vienna Convention.¹²² However, other paragraphs of the latter rule emphasize that instruments or practices used to interpret a treaty must be accepted, respectively recognized by all parties, or be based on “relevant rules of international law applicable in the relations between the parties”.¹²³ A protocol, a memorandum of understanding or an exchange of diplomatic letters would certainly be a good manner of establishing this consensus. On the other hand, Swiss authorities have publicly signalled that Switzerland disapproves any kind of use of stolen data.

2.4 Temporal Issues

As a general rule, tax provisions cannot be applied retroactively. This principle prevents application of a new tax provision to past events at the time it comes into effect.¹²⁴ Unless specific conditions are met, explicitly retroactive laws (*rétroactivité proprement dite*) are indeed forbidden. Thus, a new law that would change the legal status of prior actions would violate the non-retroactivity principle. However, a law modifying the tax treatment of the *lasting effects* of prior actions, so-called inexplicit retroactivity (*rétroactivité improprement dite*), would not violate the principle.¹²⁵ Beyond these definition issues, it is clear under Swiss law that procedural provisions are ap-

plicable once they are enacted.¹²⁶ Because exchange of information clauses are procedural in nature, Federal Courts apply them – absent any transitional provision – immediately after their entry into force. This solution is consistent with the Commentary of the Model Convention, which indicates that Article 26 may apply to information that existed before the effective date of the DTA, provided that assistance is requested after that time and the specific provision has become effective.¹²⁷ Each State is nonetheless free to clarify the extent to which the new provision of a revised DTA is applicable in adopting transitional solutions;¹²⁸ this is contrary neither to Article 28 of the Vienna Convention nor to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹²⁹ Political authorities are therefore left to determine, within the framework of bilateral or multilateral negotiations, the extent to which they will allow information exchanges of older documents. Whether the Federal Council has achieved its initial objective of reaching fair transitional solutions¹³⁰ is a political (and even personal) question that exceeds the scope of this paper.

IV. Procedural Aspects

1. Article 6 of the European Convention on Human Rights?

Swiss federal courts have consistently declined to apply the procedural guarantees of Article 6 of the ECHR to international judicial and administrative assistance procedures¹³¹ since in particular this transfer of information aims to perform obligations assumed in international agreements.¹³² Regarding DTA’s ex-

¹²¹ RS/SS 0.111 (“Vienna Convention”).

¹²² Federal Council, Report on TAAA (n. 86), p. 5786.

¹²³ Article 31(3)(c) of the Vienna Convention.

¹²⁴ See ATF/BGE 104 Ib 205 § 6 p. 219; 102 Ia 31 § 3a, 32 s.

¹²⁵ ATF/BGE 122 II 113 § 3b, 124.

¹²⁶ See in particular Swiss Federal Court Judgments of February 6, 2002, case 2A.250/2001, § 3 (with references), and of December 22, 2003, case 2A.233/2003, § 1.

¹²⁷ OECD 26 Updated Commentary (n. 76), ad § 10.3.

¹²⁸ *Ibid.*

¹²⁹ RS/SR 0.101 (ECHR). See Federal Administrative Court Judgment of July 15, 2010, case 4013/2010, § 4.4.

¹³⁰ See Federal Council press release of March 13, 2009 (n. 12).

¹³¹ ATF/BGE 123 II 175 § e, 185; 118 Ib 436 § 4a, 440; Federal Administrative Court Judgment of July 15, 2010, case 4013/2010, § 5.4.2.

¹³² “Die Entscheidung, Daten auszuliefern, betreffe ausschließlich die Durchführung von Verpflichtungen, die im Rahmen von internationalen Vereinbarungen eingegangen

ecution the importance of this legal question should not be overestimated: the TAAA includes several – if not all – of the procedural guarantees required by the ECHR; moreover, as the OECD explains:

“The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. The overwhelming majority of information requests seek to obtain information from third parties such as banks, intermediaries or the other party to a contract and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.”¹³³

In contrast to cross-border assistance, a domestic tax evasion procedure falls within the scope of Article 6 of the ECHR in its “criminal” aspect, within the autonomous meaning of this provision.¹³⁴ With respect to internal tax evasion procedures, the privilege against self-incrimination is therefore applicable.

2. Appeals

Appeals of decisions regarding mutual assistance in tax matters (e.g. exchange of information based on DTAs or the EU Agreement on Taxation of Savings) are restricted by a number of conditions designed to maximize efficiency:

- First, only final decisions are appealable. Appellants may state their objections solely before the Federal Administrative Court (“*Tribunal administratif fédéral*”, “*Bundesverwaltungsgericht*”), including those pertaining to coercive measures.¹³⁵

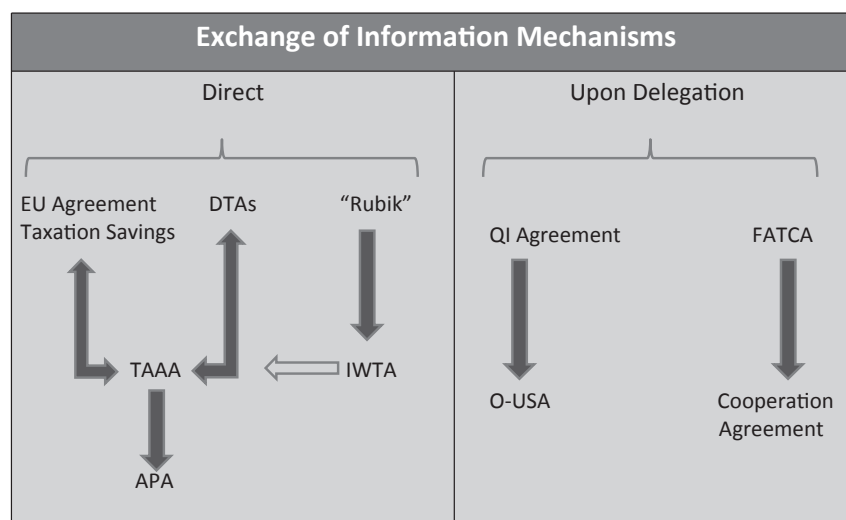
worden seien. Deshalb gelangten die Verfahrensgarantien von Art. 6 EMRK nicht zur Anwendung.” (Federal Administrative Court Judgment of July 15, 2010, case 4013/2010, § 5.4.2).

¹³³ OECD 26 Updated Commentary (n. 76), ad § 15.2.

¹³⁴ See ECHR Judgment of April 5, 2012, *Chambaz c. Suisse*, case 11663/04, § 39; see also, *Liègeois*, *Secret bancaire* (n. 4), 11.

¹³⁵ Article 19(1) TAAA.

Table II: Types of Cooperation



TAAA: Tax Administrative Assistance Act

IWTA: International Withholding Tax Act

APA: Administrative Procedure Act

As a rule, parties may submit only one round of briefs.¹³⁶

- The Swiss Federal Court (“*Tribunal fédéral*”, “*Bundesgericht*”) will review appeals if the case raises a legal question of principle (“*une question juridique de principe*”/“*eine Rechtsfrage von grundsätzlicher Bedeutung*”) or if the case is deemed particularly important per Article 84(2) of [Swiss] Federal Court Act.¹³⁷
- Appeals must be filed within ten days.¹³⁸ Should the Federal Court refuse to take the case, it must render its judgment within 15 days of the parties’ last exchange of briefs, if any.¹³⁹

¹³⁶ Article 19(4) TAAA.

¹³⁷ Federal Court Act of June 17, 2005 (RS/SS 173.110, FCA). See Article 84a FTA. In its Report on TAAA (n. 86), 5801, the Federal Council indicates that what constitutes a case of “particular importance” is left to the judgment of the Federal Court.

¹³⁸ Article 100(2)(b) FTA.

¹³⁹ Article 107(3) FTA.

Conclusion

To conclude, we summarize the main developments of information exchange mechanisms in Switzerland with a table (See *Table II*).

The remarkable progress of technology over the last decade has greatly affected, among many things, capital mobility. Countries with higher taxation rates have thus been inclined to increase international cooperation to keep records of asset relocations and track “non-compliant” taxpayers.¹⁴⁰ In this respect, financial institutions have been increasingly asked to act as “cross-border tax intermediaries”.¹⁴¹ As we

have seen, Swiss withholding tax agreements reflect this phenomenon while offering an alternative to foreign taxpayers.¹⁴² From the OECD standpoint, international tax competition is to be encouraged insofar as it stimulates revenue. Competition can be truncated (so-called “harmful” competition), due in particular to a lack of transparency or ineffective exchange of information.¹⁴³ Responding to OECD’s recommendations, Switzerland has seen a wave of legal changes to comply with new international engagements while also trying to preserve the fundamental rights of taxpayers. The proper balance of these two objectives is now a matter left to the Federal Courts.¹⁴⁴

¹⁴⁰ See above section I.1.

¹⁴¹ See *Grinberg* (n. 41), 345 *et seq.*, 382.

¹⁴² See above section I.2.

¹⁴³ OECD, “Harmful Tax Competition” (n. 9), p. 28–30.

¹⁴⁴ The Federal Court may have to examine in particular the applicability of the potential relevance principle (see above section III.2).

La communication aux autorités américaines, par des banques, de données personnelles sur leurs employés : aspects de droit du travail

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I. Une vaine résistance¹

1. – En 2011, le Département fédéral de la Justice des Etats-Unis d'Amérique sollicita de certaines banques suisses des informations sur l'activité d'employés qui étaient en contact avec la clientèle américaine, car certains d'entre eux, aux yeux de ce Département, auraient aidé des contribuables à violer les lois fiscales de leur pays.

Les banques suisses résistèrent à cette demande, pour protéger non seulement leurs clients, mais aussi leurs employés. Dans un premier temps, elles étaient prêtes à fournir des indications sur les activités des salariés en contact avec la clientèle américaine, mais en cachant le nom des employés (et, bien sûr, des clients); elles envisageaient, cependant, de désigner par un pseudonyme (gérant¹, conseiller²) ceux qui avaient joué un rôle important, afin de faciliter la reconstitution de leurs interventions dans la durée. Sur cette base, l'autorité américaine aurait pu décrire des situations particulières et, pour obtenir des informations supplémentaires, agir par la voie de l'entraide administrative. Les informations auraient été communiquées au Département américain de la Justice par les autorités suisses, en application de notre loi fédérale sur l'entraide et non pas selon les canaux de l'entraide en matière fiscale; elles se seraient rapportées aux activités des employés et non pas à celles des clients, couvertes par le secret bancaire. Dans le cadre de l'entraide, les banques auraient échappé aux contraintes résultant de la loi fédérale sur la protection des données (art. 2 al. 2 let. c LPD).

Toutefois, le 9 novembre 2011, le Département américain de la justice fit savoir que ce mode de faire ne lui convenait pas. Paraissant ne pas comprendre que les autorités américaines exigeaient la livraison

de noms, les banques se sont préparées à fournir des documents anonymisés, en attendant que les autorités américaines ouvrent une procédure d'entraide. Le 17 novembre 2011, la FINMA approuva cette procédure. Le 16 décembre 2011, le directeur de l'Office fédéral de la Justice, à Berne, accordait également son approbation. Toutefois, il accompagnait cette autorisation d'une restriction: les banques devaient obtenir des autorités américaines l'assurance «*dass das DOJ die übermittelten Unterlagen nicht für individuelle Strafverfahren gegen Mitarbeiter verwendet, sondern ausschliesslich für die Untersuchungen gegen die Finanzinstitute*».

Les autorités américaines refusèrent cette condition. Le 18 janvier 2012, le Conseil fédéral décida d'accorder l'entraide administrative aux autorités américaines. Ces dernières ayant refusé de garantir l'impunité des employés, le Conseil fédéral précisa que, même dans la procédure d'entraide, les noms seraient anonymisés et non pas codés. De son point de vue, des noms codés ne devaient être livrés que dans le cadre d'une solution globale à négocier avec les Etats-Unis.

Ainsi, pendant de nombreux mois, les banques et les autorités fédérales se sont souciées de la protection des employés: les données devaient être anonymisées; dans le cadre d'une procédure d'entraide administrative, les Etats-Unis devaient s'interdire de poursuivre les employés des banques sur la base des données à recevoir.

2. – Toutefois, Washington, écartant ce souci de protection, exigeait la livraison de noms, visiblement pour approfondir ses enquêtes, le cas échéant, en interrogeant les employés selon les règles de la procédure américaine.

Déjà le 9 novembre 2011, le Département fédéral de la justice avait fait savoir qu'il ne se contenterait pas de la livraison de données anonymisées. Il impartissait aux banques un délai au 31 décembre 2011 pour communiquer les informations sur leurs activités «*offshore*», y compris les noms des employés impliqués. La lettre menaçait les banques d'une inculpation: «*If your institution wishes to reach an agreement with us you can avoid a indictment if you deliver all.*»

Décues de ne pas recevoir satisfaction, les autorités américaines manifestèrent la fermeté de leurs intentions en procédant à l'inculpation de la banque Wegelin au début de février 2012. Cette décision causa de vives inquiétudes dans les banques visées

¹ Les développements qui suivent se fondent sur une enquête de Zoé Baches, Neue Zürcher Zeitung, parue le 22 août 2012; cf. NZZ: <<http://www.nzz.ch/aktuell/schweiz/zwischen-stuhl-und-bank-gefallen-1.17506463>>.