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Editorial

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The OECD's BEPS project has created myriad questions for companies and countries alike. Switzerland has had its fair share of controversy in balancing its commitment to the BEPS project and remaining attractive to foreign investors. Nevertheless, the alpine state manages to cooperate multilaterally on international tax initiatives while being able to provide a range of benefits to companies.

Under the BEPS project, Switzerland has committed to transpose the minimum standards of BEPS Action Points 5, 6, 13 and 14 into its domestic laws. However, some of Switzerland's tax laws are already closely aligned with the BEPS minimum standard. For example, dispute resolution methods are part of the negotiations for bilateral double tax treaties. The principal purpose test (PPT), meanwhile, is causing less unrest in Switzerland than it is elsewhere as many of the PPT's provisions already exist in the Swiss general anti-avoidance rule.

Many changes are still necessary, however. Our first article (overleaf) examines what further actions Switzerland will have to take to ensure its tax system is BEPS-ready.

Internally, Switzerland has been trying to reform its corporate tax system for several years now. After Corporate Tax Reform III was rejected by the public under Switzerland's rare direct democracy system, the government put forward Swiss Corporate Tax Reform 17 (STR 17). For a run-through of what the new provisions could mean for companies turn to page 8.

Another set of changes to Switzerland's traditionally secretive way of doing business are country-by-country reporting, the automatic exchange of information and FATCA. The implications of these changes, as well as a range of other new reporting obligations, are explored in detail in two articles on pages 13 and 23.

Switzerland's VAT system has also undergone changes in the past few years. While it is similar to the EU's harmonised VAT system, there are a few pertinent differences – not least that the destination principle for VAT has not yet been implemented, despite several attempts. The article on page 18 examines the challenges and opportunities arising from these differences.

I would like to thank all of our contributors this year, and I hope you thoroughly enjoy this edition of the Swiss Focus.

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OECD BEPS – the Swiss position

Switzerland is one of the founding members of the OECD and actively contributes towards the attainment of the organisation's goals, explain Christoph Suter and Susanne Schreiber of **Bär & Karrer**. In continuation of this commitment, the country pledged its full support to the OECD/G20 BEPS project and actively contributed to the 15-point plan to address base erosion and profit shifting.

In line with its historical inclination to favour multilateral initiatives over isolated unilateral activism, Switzerland has committed to adopt the measures defined as 'minimum standard' contained in BEPS Actions 5, 6, 13 and 14, trusting that these widely recognised measures will establish a fair and equal base in the tax regulation landscape among the OECD and G20 members and beyond.

In this context, it may be surprising for many to learn that a number of the measures proclaimed as minimum standard are already part of Switzerland's policy for negotiating double taxation agreements (DTAs) – for example the dispute resolution measures in BEPS Action 14, or the so-called principal purpose test in BEPS Action 6 which widely corresponds to Switzerland's existing general anti-avoidance rule. As to the rest of the measures which are part of the minimum standard, certain were implemented in 2017 and the rest will be completed by Switzerland over the next few years. The reason that Switzerland is not among the early adopters of BEPS measures results from the rather complex domestic legislative procedure for implementation and approval of the new rules. This article aims at providing an overview on the BEPS measures adopted by Switzerland so far.

The multilateral instrument to implement tax treaty-related measures

The implementation of the various BEPS actions requires adjustments to existing DTAs. Since bilateral amendments of the existing 3,000-plus treaties worldwide would take a long time, the OECD decided to develop a multilateral instrument for implementing tax treaty-related measures under the BEPS action plan in a cost-effective and efficient manner.

In November 2016, the OECD presented the final text of the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (MLI), which was officially signed on June 7 2017 by 68 jurisdictions, among them Switzerland. Under the MLI, countries have a choice with respect to which DTAs they want to modify. The MLI also offers alternative ways to meet the minimum standard under BEPS, and allows for alternatives or complete opting out of some of its clauses. A DTA will only be modified by the MLI if both counterparties have provided a notification for the amendment of the DTA, and in most cases only if they have both selected the same amendments to apply.

So far, Switzerland has selected merely 14 treaties from its network of over 90 treaties for modification under the MLI. This is because under

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Christoph is a frequent lecturer at national and international tax conferences and publishes articles on relevant taxation topics.

Swiss doctrine, contrary to the majority of signatory states to the MLI, the amendments agreed upon in the MLI must be embedded in the text of the Swiss DTA in order to become valid. This approach aims at avoiding the issue that the text of the MLI and the DTA need to be read in parallel, and equally aims to enhance legal certainty, clarity and the readability of the DTAs. Faithful to this position, the DTAs selected by Switzerland for amendment under the MLI are those with contracting jurisdictions that share Switzerland's understanding of the application mechanism of the MLI, and that are willing to agree on the wording of amendments. With respect to other jurisdictions, Switzerland is prepared to negotiate the incorporation of the MLI provisions bilaterally, as was recently done with the UK.

The MLI-based amendments of Swiss DTAs are unlikely to come into effect before 2019. The Swiss government opened the public consultation process on the MLI at the end of 2017, and its ratification is subject to both parliamentary approval and facultative referendum. In addition, in order for the amendments to come into force, both contracting states to a DTA need to first agree on the precise wording of the amendments.

Subject to confirmation upon ratification, Switzerland has made a number of reservations in relation to MLI provisions, thereby essentially limiting itself to the adoption of the minimum standard. The amendments Switzerland is willing to implement can be summarised as follows:

Amendment of the preamble: In fulfilment of BEPS Action 6 (treaty abuse), the preamble of DTAs will be modified to include a statement that no contracting jurisdiction intends to provide opportunities for (double) non-taxation or reduced taxation through tax avoidance or evasion, including by way of treaty-shopping arrangements (Article 6 MLI).

Principle purpose test (PPT): BEPS Action 6 also requires the introduction of a PPT (Article 7 MLI). Under this test, a treaty benefit is denied if it is reasonable to conclude that obtaining that benefit was one of the principal purposes of any transaction or arrangement that resulted in that benefit, unless it can be established that granting that benefit would be in accordance with the object and purpose of the relevant treaty provision. The concept of PPT is not new to the Swiss tax system and has been around for some time in the form of an unwritten general anti-avoidance rule. In an important decision from 2005, the Swiss Federal Supreme Court recognised that an unwritten general anti-avoidance rule (similar to a PPT) is implicitly contained in every Swiss DTA. Furthermore, since September 2015, Switzerland has followed the policy of adding explicit PPT provisions in DTA negotiations, e.g. in its DTA with Latvia. The PPTs in older DTAs, e.g. the one with Liechtenstein, need to be slightly amended to comply with the BEPS PPT since they refer to 'the' principal purpose, whereas the MLI now only requires 'one' principal purpose.

Hybrid mismatches and double non-taxation: Article 5 MLI provides for three different options among which a country can choose to prevent double non-taxation in cases of hybrid mismatches (BEPS Action 2). Switzerland has decided to adopt Option A, which is a switch-over clause applicable to Swiss residents. Under this clause, provisions of a DTA that would otherwise exempt income derived or capital owned by a resident of a contracting jurisdiction do not apply where the other contracting jurisdiction applies the provisions of the DTA to exempt such income or capital from tax or to limit the rates at which such income or capital may be taxed. Interestingly, Article 5 MLI allows an asymmetrical applicability of the three options, meaning that the contracting states do not necessarily need to agree on the option to be adopted. Switzerland has, however, made a reservation in case the other state adopts Option C.

Improving dispute resolution: As detailed in Article 16 MLI, the minimum standard of BEPS Action 14 requires the introduction of a mutual agreement procedure (MAP), that is, the introduction of a mechanism – independent from the ordinary legal remedies available under domestic law – through which contracting states may resolve disputes regarding the interpretation or application of DTA provisions on a mutually-agreed basis. This amendment will have limited impact on Swiss DTAs, however, as all Swiss DTAs already include MAP provisions, and Switzerland largely meets the elements of the minimum standard (as was confirmed in the first OECD peer review report on the implementation of Action 14). On another note, in relation to

corresponding adjustments (Article 17 MLI), it is worth mentioning that Switzerland traditionally upheld a reservation against Article 9(2) OECD Model Tax Convention, which stipulates an obligation of a contracting jurisdiction to undertake 'automatic' corresponding adjustments. Switzerland was of the view that corresponding adjustments should only be made on the basis of a mutual agreement between the competent authorities. Nevertheless, Switzerland withdrew its reservation in 2005 and is thus willing to accept automatic corresponding adjustments in compliance with the obligation under Article 17 MLI.

Mandatory binding arbitration: Finally, Switzerland is willing to include mandatory binding arbitration (Part IV of the MLI) in its DTAs, thereby going beyond the minimum standard. According to Article 23 MLI, there is a choice between two types of arbitration procedure. Firstly, there is the 'final offer' approach (so-called baseball arbitration), under which the competent authority of each contracting jurisdiction submits a final proposition to the arbitration panel; the arbitration panel then decides between one of the proposals, which will become binding for both parties. Secondly, there is the 'independent opinion' approach, under which it is up to the arbitration panel to present a decision on the basis of the information submitted by the parties. Switzerland has declared a preference for the final offer procedure; however, it is ready to adopt the independent opinion procedure where a contracting jurisdiction would prefer that.

Spontaneous exchange of information on tax rulings

The spontaneous exchange of information on tax rulings is part of the minimum standard of BEPS Action 5. This measure aims at enhancing international transparency by requiring national tax authorities to share relevant details on tax rulings that, without such an exchange, could give rise to BEPS concerns.

In Switzerland, the international and domestic legal framework for the spontaneous exchange of tax information came into force on January 1 2017 and became applicable on January 1 2018. Based on the domestic legislation, only rulings issued after January 1 2010 and still in force on January 1 2018 are within the scope of the exchange.

The submission of pre-transaction tax ruling requests has a long tradition in Switzerland of obtaining advance certainty on the tax consequences for taxpayers and the tax authorities. This approach is in line with the 'co-operative compliance' framework of the OECD, published in 2013, to enhance the relationships between taxpayers, tax administrations and intermediaries and to increase the efficiency of taxation. Thus, the quantity of tax rulings to be analysed in Switzerland in order to assess the relevance for exchange is, in comparison to what we see in other countries, rather high. In order to handle the information-gathering process as efficiently as possible, and to avoid its administration being overwhelmed, Switzerland decided to have its taxpayers fill out the template provided by the OECD with which ruling information is exchanged. The tax authorities then review the information provided by the taxpayer before submission. Although the first exchange of information is only to be made in 2018, taxpayers were requested to fill in the templates as early as the second half of 2016 in certain Swiss cantons. In addition, during 2017, most Swiss tax authorities refused to issue new rulings without the template being filled in by the taxpayer.

The need to fill in the template and the upcoming exchange of the ruling information have provided an opportunity to many taxpayers to critically analyse their rulings and to cancel the ones no longer needed or no longer valid because the underlying facts had changed. Also, where traditionally a wide range of matters would have been dealt with in one single tax ruling, separate matters are now more often formally divided into separate rulings, e.g. into one with pure domestic content which is generally not covered by the ruling exchange, and one with international content.

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Given that Switzerland has just begun spontaneously exchanging ruling-related information, it is difficult, at this stage, to properly assess the effectiveness of its processes. It is, however, noteworthy that Switzerland has established an online database where taxpayers must upload the respective templates for review by the respective Swiss tax authority and that the peer review report on the exchange of information on tax rulings, published by OECD on December 4 2017, highly praised Switzerland's implementation of this minimum standard and, for the time being, has not provided the Swiss authorities with any recommendation for improvement.

Exchange of CbC reports

Country-by-country reports (CbC reports) are one of the three types of documents – together with so-called 'master files' and 'local files' – which, under BEPS Action 13, taxpayers should be required to submit to tax administrations in order to simplify the identification of transfer pricing or other practices leading to critical base erosion and profit shifting effects. Generally speaking, CbC reporting (CbCR) aims at giving an overview of the global allocation of income and taxes paid by multinational enterprises (MNEs) as well as of the types of business activities carried out locally. CbCR is part of the BEPS minimum standard.

Switzerland, fearing an excessive administrative burden for MNEs could result from implementing domestic transfer pricing documentation regulations, chose to limit the implementation of BEPS Action 13 to CbCR, and has not adopted an obligation to prepare formal master and local files (although, in tax audits, Swiss MNEs are expected to be able to justify their transfer prices). The development of the CbCR-related domestic legal framework took almost two years and ended on December 1 2017, when the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports as well as the domestic legislation came into force.

Based thereupon, MNEs headquartered in Switzerland with a group revenue equal to or exceeding CHF900 million ($970 million) are obliged to file an annual CbC report with the Federal Tax Administration.

The first tax year for which a CbC report must be submitted is 2018, which is two years later than the early adopting countries. In order to avoid Swiss MNEs having to do proxy filings in foreign jurisdictions requiring a filing for 2016 and 2017, Swiss legislation allows for voluntary filing in Switzerland for these years.

Outlook

The recent Swiss policy in international taxation strongly favours multilateralism. As an open economy, Switzerland welcomes the creation of a fair and equal base for all, which the OECD BEPS initiative brings about. Switzerland therefore fully adheres to the minimum standard, and is open to agreeing on further measures with its contracting jurisdictions where both parties consider such measures appropriate. Peer reviews conducted so far by the OECD's global forum give proof of a diligent implementation of the BEPS measures in Swiss tax law.

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