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PREFACE

This is the eighth edition of *Global Legal Insights – Corporate Tax*. It represents the views of a group of leading tax practitioners from around the world.

One consistent trend across each jurisdiction is the evolving nature of tax rules which impact cross-border arrangements, and the ongoing uncertainty that this creates. BEPS implementation is now well into the domestic implementation phase and transfer pricing is now a mainstream aspect of tax planning.

We also see renewed effort to reach an international consensus on taxation of the digital economy, with increasing concern that further delay will prompt unilateral domestic action across the OECD. This has prompted reaction from the US government in particular, and it was recently announced that the US would not be taking part in negotiations relating to 'Pillar One' – which broadly proposes changes to traditional nexus rules for allocating taxing rights, enabling a portion of the revenue generated from digital services to be taxed in the jurisdiction in which they are used. The US stated that they were stepping away from talks as the OECD was not making headway on a multilateral deal on digital services taxation. In addition, tax compliance and information reporting are entering a new phase, as DAC 6 will be implemented across the EU.

The impact of COVID-19 will inevitably add to the complex international tax landscape. The long-term impact of the lockdown restrictions and the fiscal measures taken by governments worldwide remains to be seen; however, it is likely that tax policy will play an important role in revitalising the economy.

Authors were invited to offer their own perspective on the tax topics of interest in their own jurisdictions, explaining technical developments as well as any trends in tax policy. The aim is to provide tax directors, advisers and revenue authorities with analysis and comment on the chosen jurisdictions. I would like to thank each of the authors for their excellent contributions.

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Switzerland

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Bär & Karrer Ltd.

Overview of corporate tax work over last year

Types of corporate tax work

M&A

In comparison to the record-breaking year of 2018, M&A activity in 2019 was slightly lower. Four hundred and two deals involving Swiss companies and investors were reported, with a transaction value amounting to USD 127bn. Two-thirds of that amount was attributable to the 10 largest mergers and acquisitions. These were driven primarily by two pharmaceutical groups, Novartis International AG and Roche Holding AG. The spin-off alone of Novartis' eye care division Alcon AG contributed almost a quarter of the total transaction volume in 2019. Furthermore, the industrial sector and the technology, media and telecommunications (TMT) sector were also key driving forces in Swiss M&A business, with a transaction amount of 127 and a transaction volume of USD 23.3bn. Notably, Swiss companies acquired significantly more foreign companies than *vice versa*.

Tax litigation

In addition to traditional tax litigation matters, international requests for exchange of information remain a highly prolific ground for tax litigations in Switzerland. Switzerland continues to receive a large number of requests for assistance under the double tax treaties (DTTs) and agreements on the exchange of information, and the Multilateral Convention on Administrative Assistance. Around 20% of these requests concern corporate entities.

Most of the cases deal with procedural aspects of the administrative assistance requests, such as the possibility to use information in respect of third persons, provision of information in respect of third persons (which is a common concern when, for example, the data in respect of bank account transactions is provided), and the obligation of the Swiss Federal Tax Administration (SFTA) to inform third persons *ex officio* and provide them with a possibility to object to the disclosure of information by way of administrative assistance.

The fact that the decisions of the Swiss Federal Supreme Court often reverse the decisions of the Swiss Federal Administrative Court shows that there are still many aspects of the administrative assistance practice that remain uncertain.

This was also the case with the decision of the Swiss Federal Supreme Court of 26 July 2019, which reversed the decision of the Swiss Federal Administrative Court and allowed the SFTA to provide information on more than 40,000 UBS bank accounts by way of administrative assistance to France.[1] The decision not to qualify France's request for administrative assistance as a "fishing expedition" is likely to lead to an expansion of the administrative assistance practice and a further lowering of the hurdles for granting it.

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Financing transactions and liquidity enhancement measures

With the Swiss economy feeling the impact of the COVID-19 pandemic, the first half of 2020 saw an increase in financing and re-financing transactions, as well as other measures aimed at liquidity management of the balance sheet situation. The types of work range from the issuance of straight bonds and credit facility agreements to equity issuances and issuance of convertible bonds, or a combination of all of the above. For example, in April 2020, Dufry AG placed 5.5m of its shares and CHF 350m of convertible bonds and secured a commitment for a new CHF 425m credit facility.

For liquidity reasons or because of the requirements for emergency loans from the federal government, companies may have to waive the distribution of already declared dividends or change the purpose of the share buybacks, for example, by placing the treasury shares on the market or distributing them as dividend in-kind. All such measures require a careful tax analysis to avoid adverse tax consequences.

IPOs

During 2019, seven companies (Novavest Real Estate AG, Achiko Limited, SoftwareONE Holding AG, Aluflexpack AG, Stadler Rail AG, Alcon AG, and Medacta Group SA) were listed on the Swiss stock exchange. The largest addition was not a classic IPO. The eye care company Alcon was spun off from Novartis. However, the addition of Alcon was the largest entry on the Swiss stock exchange in the last decade. Due to the current COVID-19 pandemic, fewer IPOs than normal are expected in 2020.

Significant deals and themes

M&A

The following deals stood out in 2019 and early 2020, all requiring tailored corporate tax advice for the transaction itself, the integration or the debt financing:

- **Migros-Genossenschafts-Bund sells Globus**: On 5 February 2020, Migros-Genossenschafts-Bund sold Magazine zum Globus AG (Globus) along with eight associated real estate properties to a joint venture of SIGNA Holding GmbH and Central Group. SIGNA and Central jointly own Germany's KaDeWe Group, and Central Group currently owns Italy's Rinascente and Denmark's ILLUM, all leading luxury department stores in Europe.
- **Far Point Acquisition Corporation merges with Global Blue**: In January 2020, Far Point Acquisition Corporation, a special purpose acquisition company (SPAC) co-sponsored by the institutional asset manager Third Point LLC, and Swiss-based Global Blue, a strategic technology and payments partner empowering global merchants to capture the growth of international shoppers, have announced that they will merge, as a result of which Global Blue will become a publicly traded company on the New York Stock Exchange. The deal is structured as a triangular reverse merger. Far Point and new investors, including Ant Financial Services Group, the operator of Alipay, will invest a total of approximately USD 1.0bn reflecting a total enterprise value of Global Blue of EUR 2.3bn.
- **Clariant AG sells global Masterbatches business to PolyOne**: On 19 December 2019, Clariant AG sold its entire Masterbatches business to PolyOne Corporation for a total transaction value of USD 1.56bn. The transaction is expected to close in the third quarter of 2020.
- **Capvis acquires Tertianum Group**: On 13 December 2019, Capvis acquired Tertianum Group from Swiss Prime Site AG. The transaction included over 80 residential and care centres as well as elderly residences distributed throughout Switzerland.

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- **IWG sells Regus Holding GmbH**: On 4 November 2019, IWG plc sold Regus Holding GmbH of Zug, Switzerland and its 38 flexible co-working locations in Switzerland to a joint venture owned by private banking group J. Safra Group and real estate investor P. Peress Group.
- **Nestlé SA sells Nestlé Skin Health**: On 2 October 2019, Nestlé SA sold its Nestlé Skin Health division to a consortium of investors led by EQT, Luxinva SA (a wholly owned subsidiary of the Abu Dhabi Investment Authority) and PSP Investments for a value of CHF 10.2bn.
- **DSV completes public exchange for Panalpina**: On 19 August 2019, DSV A/S of Hedehusene, Denmark, completed its announced public exchange offer for all publicly held shares of Panalpina Welttransport Holding AG of Basel, Switzerland (listed on SIX Swiss Exchange). The total value of the transaction is approximately USD 5.5bn.
- **CRH sells its European distribution business to PE funds managed by Blackstone**: On 16 July 2019, CRH plc sold its European distribution business to private equity funds managed by Blackstone Group Inc. The distribution business supplies building materials through a network of local and regional brands across six countries in Western Europe, including Switzerland. The transaction value amounted to EUR 1.64bn.
- **Pfizer acquires Therachon**: On 8 May 2019, Pfizer Inc. entered into an agreement to acquire all shares in Therachon Holding AG for USD 340m upfront and an additional USD 470m contingent on the achievement of key milestones in the development and commercialisation of TA-46 for the treatment of achondroplasia, a genetic condition and the most common form of short-limbed dwarfism. The acquisition does not cover Therachon's apraglutide development programme, which was spun off into a separate, independent company.
- **Medical Properties Trust acquires a 46% stake in Infracore SA**: On 27 May 2019, Aevis Victoria SA sold a 46% stake in Swiss healthcare real estate company Infracore SA to Medical Properties Trust, Inc. Infracore SA has a value of approximately CHF 1bn and the shares were sold at a price of CHF 51 per share. The Infracore portfolio is comprised of 13 state-of-the-art acute care hospital campuses located throughout Switzerland and operated primarily by Swiss Medical Network, a wholly owned Aevis subsidiary.

Real estate transactions

- **Flughafen Zürich acquires Real Estate Portfolio**: On 13 December 2019, Flughafen Zürich AG acquired 36 properties (buildings and land), located on or directly adjacent to the airport perimeter, from Priora Suisse AG. The properties include, among others, hangars, a catering building including car parking, and multiple buildings for engine maintenance.

Financing

- **Firmenich issues EUR 1.5bn bonds and CHF 425m bonds**: On 30 April 2020, Firmenich Productions Participations SAS issued EUR 750m 1.375%. Series 1 bonds due 2026 and EUR 750m 1.750% Series 2 bonds due 2030. Concurrently, Firmenich placed CHF 425m bonds with a 3.6-year maturity to be listed on SIX Swiss Exchange. The net proceeds of the bonds will be used to finance the acquisition of DRT and for general corporate purposes.
- **Dufry places 5.5m shares and CHF 350m convertible bonds**: On 23 April 2020, Dufry AG completed a private placement of 5.5m newly issued shares and 500,000 treasury shares by way of an accelerated bookkeeping. At the same time, Dufry placed through its subsidiary Dufry One CHF 350m senior bonds due 2023, conditionally convertible into Dufry shares. These measures are designed to help Dufry to weather the COVID-19 pandemic and current economic downturn.

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- **Novartis issues bonds to finance the acquisition of The Medicines Company**: In February 2020, and in connection with the acquisition of NASDAQ-listed biopharmaceutical company The Medicines Company for USD 9.7bn, Novartis International AG and Novartis Finance Corporation entered into a USD 7bn short-term (bridge) credit agreement and completed a USD 5bn four-tranche SEC-registered bond offering.
- **Credit Suisse issued USD 2bn bail-in-able notes**: On 11 September 2019, Credit Suisse Group AG completed the issuance of USD 2bn 2.593% Fixed Rate/Floating Rate Senior Callable Notes due 2025 under its US Senior Debt Program. The Notes are bail-in-able bonds which are eligible to count towards Credit Suisse's Swiss gone concern requirement. For the first time, Swiss law-governed bonds have a floating rate of interest that is determined by reference to the Secured Overnight Financing Rate (instead of USD LIBOR).
- **ADC Therapeutics raises USD 303m in financing round**: On 9 July 2019, ADC Therapeutics SA announced that it had raised an aggregate of USD 103m through a private placement of shares. Its Series E financing round amounts now to USD 303m. The financing was supported by existing and new investors. Thanks to the new funds, the company plans to advance the development of pyrrolobenzodiazepine (PBD)-based ADCs for the treatment of hematological cancer and solid tumours.
- **Cembra Money acquires financing for the acquisition of cashgate**: In order to finance its acquisition of cashgate AG, Cembra Money Bank sold treasury shares (gross proceeds of CHF 112.8m) in an accelerated bookbuilding, placed CHF 150m perpetual additional Tier 1 bonds and CHF 250m net share settled convertible bonds.

Key developments affecting corporate tax law and practice

Domestic legislation

The Federal Act on Tax Reform and AHV Financing

On 1 January 2020, the Federal Act on Tax Reform and AHV (social security) Financing (TRAF) entered into force. The TRAF repealed the privileged tax regimes, i.e. holding, mixed and domicile companies at the cantonal level, and finance branch and principal companies at the federal level. As compensation, the new legislation introduced a mandatory OECD-compliant patent box regime and an optional super deduction for research and development (R&D) expenditures. Both instruments are implemented at cantonal level only.

Since the TRAF only sets out general parameters of both regimes, the modalities of implementation – such as the qualifying R&D activities, tax charge upon entry into patent box, re-calculation rules for the qualifying income quota in case of the patent box – may differ from one canton to another. Further, the maximum deductions permitted also differ between the cantons. For example, in Zürich, 90% of the qualifying patent income is exempted from the tax base and the total combined tax deduction from different incentives must not exceed 70% of the taxable profit (before deductions). The same limits apply in Aargau, Bern, Jura, Nidwalden, Obwalden, Schwyz, Solothurn, Ticino and Zug. Other cantons have implemented more restricted deductions, e.g. St. Gallen limited the patent box deduction to 50% of the qualifying patent income and the overall deduction to 40% of the taxable income, while Basel abstained from implementing the R&D super deduction.

In addition, in order to counteract the impact of the abolition of the privileged tax regimes, most of the cantons significantly decreased the cantonal corporate tax rates. For example, the effective corporate tax rate (including federal tax rate) in Basel decreased from 20.18% to 13% as of 2019, in Geneva from 24.16% to 13.99% as of 2020, in Zürich from 21.15%

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to 19.7% as of 2021 (with a further decrease in 2023), and in Zug from 14.62% to 11.91%. Most of the cantons also decreased the capital tax either by decreasing the capital tax rate or deducting a percentage of taxable equity attributable to qualifying participations, intercompany loans and patents from the taxable base, or a combination of both measures.

As an important change, the new provisions include a restriction on the capital contribution principle. Under the current rule, dividend distributions out of capital contribution reserves are neither subject to withholding tax nor to Swiss income tax for individuals. The TRAF introduced a 50:50 rule stating that distributions out of capital contribution reserves of companies listed in Switzerland will only benefit from the tax-free regime if the company makes a distribution out of taxable reserves of at least the same amount. A comparable rule applies in case of a share buyback on the second trading line where, at a minimum, the same amount of capital contribution reserves and other reserves must be used. These restrictions for distributions do not apply to distributions from the so-called foreign capital contributions reserves, i.e. capital contribution reserves created through the contribution of participations in foreign companies or capital contribution reserves creates through mergers with foreign companies.

As a result of the adoption of the TRAF, in October 2019, Switzerland was de-listed from the EU grey list of non-cooperative jurisdictions and was found to be fully compliant with EU principles of tax good governance.

Regulation on tax credits for foreign withholding taxes

On 13 November 2019, the Federal Council approved changes to the Regulation on tax credits for foreign withholding taxes. The amended Regulation implements the changes introduced in the TRAF, formally approves certain practices which were already applicable based on the Swiss Federal Supreme Court Decision of 2014, and makes a number of technical changes.

The most important innovations concern the right of Swiss branches of foreign companies to claim tax credits for foreign withholding taxes in Switzerland. Previously, Swiss branches of foreign companies were not entitled to such tax credits. Under the new rules, such Swiss branches are entitled to a tax credit, provided there are three DTTs in place: between Switzerland and the state of the source of income; between the state of the source of income and the state of the foreign company's headquarters; and between Switzerland and the state of the foreign company's headquarters.

Specification of the administrative practice concerning the flow-back of proceeds from domestically guaranteed foreign bonds

Switzerland imposes a 35% withholding tax on interest payment on notes and bonds issued by Swiss borrowers and, under certain circumstances, to notes and bonds issued by foreign group companies guaranteed by Swiss group companies. The regime does not allow for a reduction/exemption of the 35% withholding tax at source. In 2019, the SFTA, based on the amended withholding tax ordinance, relaxed the rules in respect of the withholding tax on foreign bonds guaranteed by Swiss parent companies. Under this new rule, it is permissible to on-lend to Swiss group companies an amount up to (i) the sum of equity of foreign subsidiaries, and/or (ii) the outstanding debt of foreign subsidiaries towards the Swiss group companies. The equity test is rather generous since the foreign subsidiaries' equity amounts are not calculated on a consolidated basis, but on a cumulative basis. Further, this test can be combined with the loan test, that is, the maximum on-lending threshold is increased by the amount of outstanding debt of foreign group entities towards Swiss group entities. Since its introduction, many Swiss groups have made use of the new practice. Whereas in the past, funds received by foreign issuers could generally only be used abroad, e.g. for foreign

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acquisitions, the Swiss group can now – up to the permitted threshold – repatriate the funds and use them for domestic transactions or even funding of dividends/share repurchases.

Amendments to the Withholding Tax Act introducing a paying agent withholding tax regime

In a further, significantly more wide-reaching step than the relaxation of the rules concerning the flow-back of proceeds from domestically guaranteed foreign bonds, in April 2020, the Swiss Federal Council proposed a conceptual reform of the withholding tax on debt instruments, the central element of which is the move from a debt-based system to a paying agent system.

The move to a paying agent withholding tax regime has been discussed already for some time by the Swiss legislators. The new proposal was published and submitted to the legislative consultation procedure by the Swiss Federal Council on 3 April 2020.[2]

The basic principle of the new regime is as follows: a Swiss-based paying agent will be responsible for withholding and transferring to the tax authorities the withholding tax on interest payments made to individuals based in Switzerland. There are no changes in respect of the withholding tax on dividends.

The proposal suggests two essential changes to the scope of the withholding tax. Firstly, only interest income of individuals based in Switzerland is subject to Swiss withholding tax. No withholding tax is due on payments to foreign-based investors (corporate or individual) or Swiss-based corporate investors. Secondly, the Swiss withholding tax will newly apply to domestic and foreign bonds and notes likewise, irrespective of whether such foreign bonds and notes are guaranteed by a Swiss parent or not. Further, the reform also expands the scope of income from investment funds subject to withholding tax. Under the current regime, Swiss withholding tax is due only in respect of certain Swiss investment funds and some foreign-based funds, normally foreign contractual investment funds with fund management in Switzerland. Under the new regime, indirect interest income received through all types of domestic and foreign investment funds will be subject to Swiss withholding tax, provided that such income is paid to an individual based in Switzerland.

The tax is due and must be deducted only by Swiss-based paying agents. The reform proposal explicitly indicates that a trustee would qualify as a paying agent. Interest payments via foreign paying agents will not be subject to Swiss withholding tax.

For Swiss-based issuers of notes and Swiss-based collective investment schemes, the change to the paying agent-based regime will be voluntary. They can choose whether they will switch to the paying agent regime or continue to apply the currently existing debtor-based regime. No such choice is provided to foreign issuers or foreign collective investment schemes; for them, the application of the paying agent regime is mandatory.

The consultations procedure in respect of the reform is open until July 2020. The parliamentary debates are not expected before 2021 and entry into force, if adopted, is not expected before 2022.

Changes to the determination of the beneficiary of a constructed dividend for withholding tax purposes

In general, should a Swiss company provide goods or services to an affiliated company under preferential non-arm's length conditions, Switzerland treats such non-arm's length transactions as constructive dividends, subject to a 35% withholding tax on dividends.

The determination as to which party qualifies as a beneficiary in such transactions is also determinative as to which party, under which DTT and to what extent, can claim the refund of the withholding tax. For the purposes of Swiss withholding tax, Switzerland applies the

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direct beneficiary approach, i.e. in a non-arm's length transaction between related parties other than parent and subsidiary; for example, between sister companies, the sister company is deemed to receive the constructive dividend directly from its sister, not via the joint parent.

As a result, the affiliated sister company is deemed to have the refund right, which is assessed based on the applicable DTT between Switzerland and the country of incorporation of the sister company. The constructive dividend is considered to constitute a "dividend" under the applicable DTT. Since the sister company does not hold any shares in a Swiss company directly or indirectly, the preferential parent subsidiary regime is not triggered and the residual 15% non-refundable withholding tax rate is applicable. Moreover, this approach also bars the application of the notification procedure (reduction at source) and requires the actual cash payment followed by the more burdensome refund procedure.

The approach has long been criticised as having no basis either in the provisions of Swiss domestic legislation nor in the provisions of Swiss DTTs. In December 2019, a motion requesting the amendment to the Swiss Withholding Tax Act and the application of the "three-corner" approach in all cases in respect of the withholding tax was filed with the Swiss Parliament.[3]

Under the three-corner approach, the direct parent company would be deemed to receive the dividend and would also have the right to request a (full) refund of the withholding tax or avoid the withholding tax on such constructive dividends altogether by applying the notification procedure.

The motion to apply the three-corner approach for Swiss withholding tax would result in a long-awaited alignment with the income tax treatment and international practice. Technically rather undisputed, it remains to be seen whether it will find the necessary political support, particularly in these COVID-19 times as tax revenues are expected to decrease anyway.

Global Forum's recommendations

In 2016, the Global Forum issued a recommendation requiring Switzerland to ensure that appropriate reporting mechanisms are in place to effectively secure the identification of the owners of bearer shares in all cases. In response to this recommendation, on 21 June 2019, the Swiss Parliament passed the Federal Act on the implementation of the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes. This Act entered into force in October 2019.

The central aspect of the Act is the abolishment of bearer shares. This general rule does not apply to listed companies or companies that issue bearer shares as book rights. Further, the Act imposes an overall reporting obligation in respect of beneficial owners controlling more than 25% of the shares of a company. The company is obliged to keep the register of the beneficial owners. In order to ensure effective performance of these obligations, the Swiss Criminal Code was supplemented with two provisions imposing financial sanctions in case of violations of the reporting obligations.

Following the adoption of the Act, the SFTA regularly uses its authority to collect information with respect to Swiss withholding tax on dividends to verify whether the companies comply with the reporting obligations.

On 6 April 2020, the Global Forum's second round peer review report in respect of Switzerland was published.[4] As in the first round, Switzerland has been found to be largely compliant. The main recommendations concern the availability of ownership and identity

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information and the confidentially provisions, in particular the obligation of the jurisdiction's information exchange mechanism to make sure that it has adequate provisions to ensure the confidentiality of the received administrative assistance requests. While the first set of recommendations appears to be related to fact that the Federal Act on the implementation of the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes was only adopted recently and its effectiveness has not yet been tested, the recommendations in respect of confidentially may prove problematic. In particular, it is recommended to ensure that the request letter is kept confidential during administrative proceedings, that a rather narrow exception to the right to see the file is expanded and that the information on the received requests (including the bulk requests) is not published in the *Federal Gazette*. As these requirements impinge on the fundamental rights of the parties in administrative proceedings, it remains to be seen whether and how they might be implemented in Switzerland.

Automatic Exchange of Information (AEOI)

The legal foundations for the AEOI have been in force since 1 January 2017. The Swiss Parliament has approved the introduction of the AEOI with 107 partner states. As of 1 January 2020, the AEOI has now been activated with 97 partner states. Switzerland's network of AEOI partner states includes all EU and EFTA Member States, almost all G20 states, and all OECD states. Financial account information was successfully exchanged with a total of 75 partner states at the end of September 2019.[5]

On 20 November 2019, the Federal Council adopted the dispatch on amending the AEOI Act[6] following the consultations procedure commenced in February 2019. Among other things, the Federal Council proposed removing the exception for condominium owners associations. Furthermore, the applicable due diligence obligations will be adapted, the amounts will be shown in US dollars and a document retention obligation for reporting Swiss financial institutions will be introduced. At the same time, contrary to the consultation's proposal, it was decided to maintain the reporting exceptions for non-profit associations' and foundations' accounts.

The amended legislation, if approved, should come into force on 1 January 2021.

Tax policy in the response to the COVID-19 pandemic

With respect to the COVID-19 pandemic, in its report "Tax and Fiscal Policy in Response to the COVID-19 pandemic: Strengthening Confidence and Resilience", the OECD pointed out that recovery after containment and mitigation may require fiscal stimulus and tax support. However, the support must be carefully timed and well-targeted. According to the OECD, tax support should be directed to limiting adverse impacts and aggregate demand, especially for the most vulnerable households and businesses.

Switzerland has implemented several fiscal support measures. For instance, the eligibility for unemployment benefits has been extended, short-time working has been extended and simplified loans have been made available for all types of businesses by providing government securities and low interest rates (limited to five years). A number of tax measures have also been implemented: companies are given the possibility to temporarily defer payment of social security contributions; and interest-free and tax payment periods can be extended without interest on arrears. For this reason, the interest rate for value-added tax (VAT) has been reduced to 0.0% (from 21 March to 31 December 2020). The same regulation applies to direct federal (personal and corporate income) tax (from 1 March to 31 December 2020). All of these measures are temporary.

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International DTTs

Switzerland remains active in negotiating new or revising existing DTTs. As of 1 January 2020, Switzerland has signed more than 100 DTTs, of which 62 contain a provision on the exchange of information according to international standards. In addition, Switzerland has signed 10 tax information exchange agreements, all of which are in force.

Revised DTTs, which entered into force or whose dispatch was submitted to the Swiss Parliament for approval between March 2019 and March 2020, include treaties with Ukraine, South Korea, Iran, the Netherlands, New Zealand, Norway, Sweden and Ireland. The revision of these DTTs implements the base erosion and profit shifting (BEPS) minimum standards and some of them include an arbitration clause.

Furthermore, both of the protocols to the DTT with the UK and the USA entered into force in 2019. The 2017 Protocol to the DTT with the UK substituted the previous anti-abuse provisions with an overarching principal purpose test anti-abuse norm. The 2009 Protocol to the DTT with the USA introduced a mechanism for the exchange of information upon request in tax matters between Switzerland and the USA, which is in line with international standards, and allows the USA to make group requests under the Foreign Account Tax Compliance Act concerning non-consenting US accounts and non-consenting, non-participating foreign financial institutions.

Domestic cases

BGer 2C_34/2018: Split-up of holding companies

In this case, the Swiss Federal Supreme Court overturned certain practice of the SFTA and cantonal tax authorities in respect of the tax-neutral split-up of holding companies.

In addition to overall requirements for tax-neutral restructurings (such as transfer at balance sheet value and the continuing tax residency in Switzerland), as per the SFTA practice, a tax neutral split-up of holding companies is possible only if both of the following conditions are met:

- the participations held by a holding company consist predominantly (by value) of significant (at least 20% of capital or which otherwise allow control over such subsidiary companies) participations in active companies; and
- the holding companies which will exist after the split-up must carry out holding functions with its own personnel in respect of multiple subsidiary companies.

The requirement in respect of the holding of participations in multiple subsidiaries was particularly controversial. The tax authorities require that after the split-up, each newly established holding company holds participations in at least two subsidiaries.

In this case, holding company Holding C AG incorporated in the canton of Geneva, which was held by two natural persons also resident in Geneva, was split up into two holding companies, Holding C AG and Holding E AG. Initially, Holding C AG held participations in four subsidiary companies, and only the participation in one subsidiary (an operative company) – Holding F AG – was transferred to Holding E AG. Consequently, following the split-up, Holding C AG held participations in three operating companies and Holding E AG held 100% participation in one operating company. Geneva tax authorities refused to treat the split-up as a tax-neutral restructuring, since the requirement mentioned above – that both holding companies after the split-up hold participations in multiple subsidiaries – was not complied with.

The Swiss Federal Supreme Court overruled this practice and clarified that in case of the split-up of holding companies, the newly established holding companies must indeed continue

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to carry out business activities. However, for holding companies, this requirement does not necessarily need to be satisfied through participation of the holding company in at least two subsidiaries. Instead, the operative/business activities of the subsidiary may be attributed to the holding company. In other words, provided that the newly established holding companies each hold, following the split-up, a (significant) participation in at least one active company, the requirement of the continuation of business activities is considered to be met.

The decision of the Swiss Federal Supreme Court was a welcome development which put a halt to a controversial practice of the tax authorities and discussions in the academic literature and added flexibility to restructuring options of holding companies.

BGer 2C_119/2008: Deduction of the value of treasury shares from taxable capital

According to the revised Swiss accounting principles, treasury shares bought back by a company must be shown as a minus position in the total shareholders' funds of a company (valued in the amount of the acquisition costs). The tax basis for the cantonal capital tax builds the total amount of the shareholders' funds (e.g. nominal share capital and reserves) and any taxed hidden reserves (e.g. write-offs and allowances not recognised by tax authorities).

As per the previously existing practice of the tax authorities, also confirmed in the report of the Swiss Tax Conference, despite the fact that the treasury shares are accounted for as minus positions in the shareholders' funds, treasury shares qualify as assets belonging to the company that have a certain financial value. Consequently, for tax purposes (as under the previous accounting rules), the value of treasury shares cannot be deducted from the taxable capital for the purpose of the cantonal capital tax.[7] This practice was also followed in the cantons.

In this case, holding company A AG incorporated in Zürich held treasury shares with a balance sheet value of approximately CHF 468m. In Switzerland, the buyback of own shares is generally treated as a partial liquidation subject to withholding tax on dividends and income tax for individuals. However, for tax purposes, such partial liquidation is deemed to exist only if the company decreases its share capital in connection with the buyback of shares, the nominal value of the bought-back shares exceeds certain thresholds (e.g. generally 10% of the nominal share capital), or the bought-back shares are not sold by the company within the next six years. Per 31 December 2014, none of the above scenarios was applicable to A AG and it was not yet obliged to pay the withholding tax in respect of its treasury shares.

Consequently, the Zürich tax authority did not agree with the deduction of the value of the treasury shares from the taxable capital, arguing, among other things, that such shares represent an asset and that there has been no partial liquidation of the company from a tax standpoint.

The Swiss Federal Supreme Court disagreed with these arguments. In its decision, the following two factors were decisive. First of all, from an economic perspective, the buyback of shares leads to the cash outflow by the company, whereas the company does not receive anything in return which did not belong to it before (at least not before the treasury shares are re-sold). Secondly, Switzerland applies the principle that tax accounting should be based on statutory accounting, unless tax legislation contains specific correction norms. As per the statutory accounting rules, treasury shares are deduced from the shareholders' funds. As the Zürich tax authority could not identify explicit tax norms allowing the add-up of treasury shares for tax purposes, it was not possible to disregard the statutory accounting in this case.

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Consequently, the value of the treasury shares must be deducted from the taxable capital, irrespective of whether, from a tax perspective, a partial liquidation is deemed to have occurred or not.

Although the economic analysis of the Swiss Federal Supreme Court is controversial, the arguments in respect of the binding effect of the commercial accounting rules are convincing, in particular when taking into account that the same argument is used regularly by tax authorities to the disadvantage of the taxable persons.

BGer 2C_592/2018: Tax residence of legal persons in inter-cantonal relations

This Swiss Federal Supreme Court decision deals with the determination of the primary tax residence of a legal person in inter-cantonal relations, i.e. in a situation when two or more cantons claim to have the primary taxing rights.

In international constellations, Article 50 of the Act on Direct Federal Taxes provides that a legal person is a tax resident in Switzerland provided it is incorporated in Switzerland or its actual management is carried out in Switzerland. The statutory seat abroad is, therefore, not decisive.

In inter-cantonal relations, the determination of the primary taxing jurisdiction was assessed differently. The canton, where the statutory seat was located, was deemed to be the primary taxing jurisdiction, unless such seat was nothing more than a letter box and a different canton could provide evidence that the actual management of the company was carried out from its territory. The attributes of a "letter box" seat were, e.g., lack of office space, no personnel working at the statutory seat, no phone connections, no documents stored. Normally, such a letter box seat was a registered seat at the premises of a law firm or an asset management company.

In the present case, A AG was initially incorporated in the canton of Zürich, thereafter its statutory seat was moved to the canton of Obwalden. In Obwalden, A AG rented office premises which were used spontaneously by the staff (there were no permanent staff in these premises), all board of directors and general shareholders' meetings took place in Obwalden, and some administrative functions were also performed from these premises. On the other hand, A AG still rented larger premises in Zürich, from which all of its employees performed their daily functions. Still, the infrastructure in Obwalden far exceeded that of a mere letter box seat.

The Swiss Federal Supreme Court acknowledged this fact. However, it ruled that in inter-cantonal relations, similarly to international relations, the primary tax residence lies at the place where the actual management takes place. The Swiss Federal Supreme Court justified its decision by noting that in all previous cases, at least in respect of cantonal taxes, it dealt exclusively with the situations where the statutory seat was a letter box office. Therefore, its previous statements suggesting that it may only be possible to disregard the statutory seat if such seat is merely a letter box were *obiter dicta*.

Although this decision of the Swiss Federal Supreme Court deals with the primary taxing jurisdiction with respect to cantonal taxes, it is to be expected that the same approach would be applied in cases of federal direct taxes.

Overall in 2019, the Swiss Federal Supreme Court dealt with an unprecedented number of cases dealing with the primary taxing rights in inter-cantonal relations. In 2019 alone, the Swiss Federal Supreme Court issued nine such decisions in comparison to four decisions overall in the preceding decade.

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With increased tax competition between cantons and advances in information technology, it is to be expected that litigations in respect of primary tax residences will increase further.

BEPS

Switzerland has actively participated in the OECD's BEPS initiative and will implement, or has implemented, the BEPS minimum standards, as follows:

Action	Topic	Method of implementation in Switzerland
5	Abolition of harmful tax regimes.	The TRAF abolishes favourable cantonal and federal tax regimes as of 2020.
5	Requiring substantial activity for preferential regimes.	The patent box regime under the TRAF will follow the OECD standard.
5	Improving transparency, including the compulsory spontaneous exchange of information on certain rulings.	Agreement on OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters and revision of Swiss Federal Act on International Administrative Assistance in Tax Matters (see below).
6	Prevention of treaty abuse.	Inclusion of new anti-abuse clauses in DTTs (principal purpose test).
13	Automatic exchange of country-by-country reports (CbCRs; without Master and Local File).	Agreement on the multilateral CbCR convention and enactment of law regarding CbCR (see below).
14	Making the dispute resolution mechanism more effective.	Switzerland already offers access to the required dispute resolution mechanism; all new DTTs are in line with the OECD minimum standard (see below).
15	Multilateral instrument.	Switzerland signed the BEPS Convention and announced the adjustment of a number of DTTs by way of the MLI (see below).

BEPS Action 5: Implementation of the spontaneous exchange of information on tax rulings

With regard to BEPS Action 5, Switzerland has implemented the spontaneous exchange of information in tax matters in its domestic legislation with effect from 1 January 2017.

The regulations on the spontaneous exchange of tax rulings are included in the Tax Administrative Assistance Ordinance. The Ordinance provisions are closely based on the guidelines in the BEPS Action 5 report. The exchange covers Swiss tax rulings, which were granted after 1 January 2010 and are still in force as of 1 January 2018; i.e. the time when the actual exchange of tax rulings started in Switzerland. The new transparency should not change the Swiss ruling practice *per se*, except that in cases subject to exchange, the tax authorities now generally request that the template for the exchange is completed and submitted together with the tax ruling request. The information on relevant tax rulings will be submitted in electronic form (so-called "BEPS templates") to the SFTA which, in turn, will exchange these with the foreign states. In May 2018, the SFTA has, for the first time, transmitted information on advance tax rulings to spontaneous exchange of information partner states. Information was sent to 41 states, including France, Germany, the United Kingdom, the Netherlands and Russia. In the second OECD peer review report, Switzerland was ranked as compliant with the international standard in respect of the exchange of information mechanism.[8]

BEPS Action 13: Country-by-country reporting

Switzerland adopted the global minimum standard included in Action 13 of the OECD BEPS Project for the international automatic exchange of CbCRs with quantitative as

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well as qualitative data of multinational enterprises (MNEs), with an annual consolidated turnover of the equivalent of CHF 900m. The relevant legal framework for the exchange of CbCRs entered into force on 1 December 2017. This includes the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (MCAA-CbCR), and the associated law (ALBA Act) including the ordinance (ALBA Ordinance). MNEs in Switzerland have been obliged to draw up CbCRs since the fiscal year 2018. In 2020, Switzerland will exchange CbCRs with 72 partner states (status as of 14 May 2020).[9] Prior exchanges for the period 2016 and 2017 are possible on a voluntary basis.

BEPS Action 14: Making the dispute resolution mechanism more effective

The mutual agreement procedure (MAP) in Switzerland covers both the situations dealing with the elimination of double taxation as such and transfer pricing cases. The first category of cases deals mostly with the issues of residency of individuals, the right of taxation for dependent personal services, differentiation between employment and self-employment, and income from government services. The second category covers transfer pricing attribution/allocation cases and advance pricing agreements. The detailed guidelines governing the procedure as well as the necessary forms are publicly available and published on the homepage of the State Secretariat for International Finance (SIF). In 2018, 257 MAPs were initiated and 220 cases were closed. The average time taken to complete the MAPs in Switzerland was 22 months, and 31.3 months for transfer pricing cases.[10]

In addition, Switzerland strives to include the arbitration clause in its DTTs whenever possible. For example, the arbitration clause was incorporated into the amending protocols to the DTTs with Ireland, Ukraine and New Zealand.

Following the generally positive peer review report (Stage 1) on the implementation of the BEPS Action 14 minimum standard, Switzerland committed to further improve the access to, and speediness of, the mutual agreement procedures. It attributed more resources to SIF (the competent authority for the handling of MAP cases). Furthermore, it updated MAP guidance and introduced a system that monitors the timeliness of different steps in the process. This was recognised in the MAP peer review report (Stage 2) made in August 2019. The peer review report stated that Switzerland met all of the other requirements under Action 14.

In respect of the implementation of MAP agreements, Switzerland almost meets the minimum standard of Action 14. In particular, Switzerland does not monitor the implementation of such agreements. Further, formally the MAP procedure does not interrupt or suspend the running of the national statutes of limitations. Consequently, there is a risk that such agreements cannot be implemented where the applicable tax treaty does not contain the equivalent of Article 25(2) of the OECD Model Tax Convention. However, in practice, this risk is minimised through the possibility of opening a tax revision process following the closing of the MAP procedure.

In any event, despite these risks, according to the peer review report, no problems have surfaced regarding the implementation throughout the peer review process.

In December 2019, the Federal Council published a proposal and opened the consultation process for the total revision of the Federal Act on Implementation of International Tax Agreements. The proposed legislation sets forth the national rules for mutual agreement procedures and largely follows current practice. The Act would apply to the extent that the relevant DTT does not contain any deviating provisions. The Act regulates, among other aspects, the implementation of MAP agreements. The implementation of a MAP agreement would require the consent of the affected taxpayer, and by giving its consent for

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the implementation, such affected person will waive their rights in respect of the national appeal procedures; this waiver does not cover appeals in respect of the implementation of the MAP agreement itself. The MAP agreement must be implemented by the relevant tax authority, independent of the status of the domestic tax assessment procedure, i.e. also in cases where the tax assessment for the relevant period is already in force and may no longer be appealed under the domestic rules. The proposal also lays down the new limitation period: the relevant tax authority is obliged to implement a MAP agreement if the MAP procedure was requested within 10 years of the notification of the relevant tax assessment decision. The proposal was generally welcomed albeit with some reservations, particularly in respect of the long limitation period. The proposal has not yet been debated in the Swiss Parliament.

BEPS Action 15: Developing a multilateral instrument to modify tax treaties

On 1 December 2019, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, also known as the Multilateral Instrument (MLI), entered into force in Switzerland. This allows existing DTTs, covered by the MLI, to be swiftly adjusted to the recommendations of the OECD/G20 BEPS Project.

Switzerland has taken the approach to generally cover only the mandatory minimum BEPS standards when implementing the BEPS Convention, including:

- modification of the preamble text to include an express statement condemning tax treaty abuse through double non-taxation, tax evasion or avoidance;
- anti-abuse provision in the form of principal purpose test provisions;
- provision preventing double non-taxation upon a conflict of qualifications; and
- dispute resolution understandings pursuant to Articles 16 and 17 of the BEPS Convention.

In addition, Switzerland undertook to include the arbitration clause in its DTTs.

Switzerland's DTTs will be directly amended by the MLI if the parties to the treaty in question (i) both share the view that the MLI has the same effect as an amendment protocol, and (ii) agree to confirm the exact wording of the DTT as amended by the MLI. Out of its 100 DTTs, only those with countries that agree on points (i) and (ii) mentioned above are covered by the MLI. Currently, the following 12 of Switzerland's DTTs are covered by the MLI: Argentina; Austria; Chile; the Czech Republic; Iceland; Italy; Lithuania; Luxembourg; Mexico; Portugal; South Africa; and Turkey. The MLI has no direct effect on other DTTs. However, Switzerland is willing to negotiate the BEPS minimum standard bilaterally. In this case, a parliamentary approval process is required.

Tax climate in Switzerland

Increasing tax transparency/transfer pricing disputes

Increasing tax transparency, which especially results from the implementation of the AEOI, has led to a flood of non-punishable voluntary disclosures during the last two years. The implementation of the mandatory disclosure requirements introduced in Directive 2011/16/EU on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6), although not directly applicable to Switzerland, would undoubtedly add to tax transparency.

In the corporate tax field, both the spontaneous exchange on tax rulings as well as the CbCR may increase the number of follow-up information requests from foreign tax authorities in the future. The Swiss tax authorities will also receive information from foreign tax authorities and will need to find a way to digest such information (on foreign tax rulings and

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CbCR). We do not expect a significant reduction of tax ruling requests in Switzerland due to the spontaneous exchange on tax rulings, since tax rulings are still a valid and useful tool to obtain upfront certainty on the application of the tax law to a specific case. Such certainty is a valuable asset for Swiss taxpayers in a complex tax environment.

As a result of increased transparency, we expect that the amount of tax litigation and also tax arbitration in the field of transfer pricing are going to increase in the next few years.

Tax reform

Various measures at the cantonal and federal levels ensured a relatively smooth implementation of the TRAF and the abolishment of privileged tax regimes.

In 2019 and 2020, many companies are still assessing the impact of the new rules and any tax restructuring measures that may need to be implemented. The local tax authorities are generally cooperative and search for business-friendly compromises to settle the most pressing issues, such as, for example, the taxation of hidden reserves accumulated in the period when a company was subject to a privileged tax regime.

Although there are still some uncertainties as to how the patent box regime and the R&D super deduction will be implemented, both instruments should also raise the attractiveness of Switzerland.

Developments affecting attractiveness of Switzerland for holding companies

Following the entry into force of the TRAF, holding companies are no longer exempt from cantonal and communal profit tax. Still, the attractive participation deduction provisions for dividends and capital gains will remain unchanged. The availability of the participation deduction in combination with the decrease of cantonal taxes in almost all of the cantons should ensure that Switzerland remains an attractive location for holding companies.

Further, Switzerland currently has no intention of introducing controlled foreign corporations rules and generally remains, with its extensive DTT network, a beneficial location for holding companies.

Industry sector focus

Technology industry/fintech

On 27 November 2019, the Swiss Federal Council published the draft bill for a new Federal Act regarding the Adaptation of Federal Law to Developments in the Technology of Distributed Electronic Registers. The proposed new law is a framework act intended to introduce pinpoint amendments to Swiss law in order to provide more legal certainty to business applications of distributed ledger technology (DLT).

The Swiss Federal Council aims to create the best possible conditions for Switzerland to evolve as a leading, innovative and sustainable location for fintech and DLT companies while at the same time taking a firm stance against any potential abuse of the new technologies. The Federal Council considers that specific amendments to the legal framework in key areas are sufficient to achieve these goals and has decided against a full codification in a technology-specific act.

The Swiss Parliament is expected to start deliberations on the draft in 2020.

In parallel, the SFTA is also carrying out work aiming to lay down the basics of the taxation of initial coin offerings (ICOs) in respect of income tax on the corporate and individual

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level, stamp duties and VAT. In August 2019, the SFTA published a work paper which outlines various aspects of taxation of various types of ICOs and cryptocurrencies.

Debt markets

The reform of the Withholding Tax Act in respect of interest income has potential to boost the Swiss debt markets. It is hoped that the reform will lead to the decrease of financing costs and an increased competitiveness of the Swiss debt capital market. Due to the abolition of the withholding tax on interest paid to Swiss corporate and all foreign investors, it should be more attractive for Swiss companies to issue bonds and notes and carry out group financing activities (e.g. treasury and cash pooling functions) out of Switzerland. On the other hand, the technical implementation would require significant resources on the part of Swiss banks. It is planned that at least the initial implementation costs will be financed through the partial allocation of withholding tax to banks.

The year ahead

The COVID-19 pandemic tax relief measures will remain the centre of attention in the year ahead. In March 2020, the Swiss Federal Council approved a temporary waiver of default interest for late payment of certain taxes at federal level. Most cantons have introduced tax relief measures with regard to the cantonal and communal taxes, such as deadline extensions for filing 2019 tax returns and for payment of cantonal and communal taxes, and a waiver of default interest for cantonal and communal tax claims. In addition, Switzerland is in the process of concluding binding agreements with its neighbouring countries (Germany, France and Austria, but not yet Italy) regarding cross-border commuters and similar employees who are temporarily not working in Switzerland but rather from their home countries due to the pandemic. It remains to be seen whether additional measures would follow, for example, in respect of the thin capitalisation rules.

In addition to the impact of COVID-19, the next global challenge, in particular for Switzerland, will be the new international developments addressing the taxation of the digital economy such as OECD's Pillar 1 solution. As per the proposed solution, a higher share of consolidated profits should be allocated to market jurisdictions for taxation. Switzerland stands in favour of a long-term, consensus-based multilateral solution. Switzerland's position is that taxation should continue to apply at the place of performance-related value creation and that the share of profit to be allocated to market jurisdictions remains in proportion with their share of added value, and hence moderate. Should the new rules as proposed within Pillars 1 and 2 be implemented, Switzerland as a smaller, innovative and export-based economy will likely see its tax receipts decreased.

* * *

Endnotes

1. See https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?lang =de&type =show_document&highlight_docid=aza://26-07-2019-2C_653-2018&print=yes (last visited 15 May 2020).
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4. See https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-78708.html (last visited 15 May 2020).
5. See https://www.efd.admin.ch/efd/de/home/themen/wirtschaft--waehrung--finanzplatz/finanzmarktpolitik/automatischer-informationsaustausch--aia-.html (last visited 15 May 2020).
6. See https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-77158.html (last visited 15 May 2020).
7. For the updated analysis on this issue, following the decision of the Swiss Federal Supreme Court, see https://www.steuerkonferenz.ch/index.php?Dokumente:Analysen (last visited 15 May 2020).
8. See https://www.sif.admin.ch/sif/de/home/multilateral/gremien/global_forum.html (last visited 15 May 2020).
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