Corporate Tax

2019

Seventh Edition

Editor:
Sandy Bhogal

glg global legal group

Switzerland

Susanne Schreiber, Corinna Seiler & Elena Kumashova
Bär & Karrer Ltd.

Overview of corporate tax work over last year

Types of corporate tax work

M&A

The amount of outbound and inbound M&A transactions continued to grow in 2018. The record-breaking 493 transactions involving Swiss companies and investors were reported with a transaction value amounting to USD 132.9bn. 2018 also saw an increasing number of transactions involving private equity funds, with the deal value increasing by 97%. The key transactions include the sale by ABB Ltd of its power grids business to Hitachi for USD 11bn and the acquisition by Worldline SA of SIX Payment Services for USD 2.9bn as part of their cooperation strategy. On the private equity side, the acquisition by Partners Group (Zug) together with Caisse de dépôt et placement du Québec (Quebec City) and Ontario Teachers' Pension Plan (Toronto) of the German Techem for USD 5.4bn stands out.[1] For the current year, it is assumed that M&A activity will remain strong.

Tax litigation

In 2018, a large number of cases regarding international requests for administrative assistance have been judged by the Swiss Federal Supreme Court. The Federal Supreme Court will only hear administrative assistance cases if the legal question to be decided is of fundamental importance. The fact that the Supreme Court decided 10 administrative assistance cases out of 20 in 2018 despite the restricted access shows that there are many outstanding, mostly procedural questions to be clarified in the field of administrative assistance. In September 2018, the Federal Tax Administration (FTA) transmitted bank account details to its Automatic Exchange of Information (AEOI) partner states for the first time. Hence, we expect a considerable amount of tax litigation work regarding AEOI in 2019.

IPOs

During 2018, 12 companies (IGEA Pharma N.V., Fundamenta Real Estate AG, SIG Combibloc Group AG, ObsEva SA, Blackstone Resources AG, Lalique Group SA, Klingelnberg AG, Polyphor AG, CEVA Logistics AG, Medartis Holding AG, Sensirion Holding AG and ASMALLWORLD AG) were listed on the Swiss stock exchange. With a placement volume of CHF 1,708m and an implied total market capitalisation of CHF 3,937m, SIG Combibloc Group AG, a leading company in the packaging industry, was the largest among the 12 companies.[2] It is expected that 2019 will also be an interesting IPO year with three IPOs as of the end of April 2019.[3]

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Significant deals and themes

M&A

The following deals stood out in 2018 and early 2019, all requiring tailored corporate tax advice for the transaction itself, the integration or the debt financing:

- **DSV's merger with Panalpina**: On 1 April 2019, DSV A/S and Panalpina Welttransport (Holding) AG announced that they have reached an agreement on the terms and conditions of a combination by way of a public exchange offer to all Panalpina shareholders. The transaction has an enterprise value of approximately CHF 4.6bn.
- **Liberty Global's sale of UPC Switzerland to Sunrise**: On 27 February 2019, Liberty Global announced that it has reached a binding agreement to sell UPC Switzerland, the largest Swiss cable operator, to Sunrise Communications Group AG. Liberty Global will sell UPC Switzerland for a total enterprise value of CHF 6.3bn. Sunrise will acquire the business inclusive of indebtedness with an aggregate value of approximately CHF 3.7bn as of 31 December 2018.
- **ABB's divestment of its power grids business to Hitachi**: On 17 December 2018, ABB Ltd announced that it entered into an agreement to divest its power grids business to Hitachi. The transaction values the power grids business at an enterprise value of USD 11bn.
- **GETEC's acquisition of Infrapark Baselland**: On 19 November 2018, Clariant announced that it has agreed to sell Infrapark Baselland AG, Muttenz, and its business operations on the Schweizerhalle site near Basel, Switzerland, to GETEC, a Germany-based group of energy service providers and operator of industrial parks. In addition, GETEC is acquiring infrastructure facilities and service operations of Novartis at the same site.
- **Canada Pension Plan Investment Board and TCV's acquisition of Sportradar**: In July 2018, Canada Pension Plan Investment Board and Silicon Valley-based growth equity firm TCV signed an agreement to acquire a stake in Sportradar from private equity firm EQT and certain minority shareholders. Sportradar, valued in this transaction at EUR 2.1bn, is the global leader in the provision of sports data. The company provides leagues, news media, consumer platforms and sports betting operators with sports data.
- **Takeover battle over Sika**: On 11 May 2018, Sika and Saint-Gobain have announced the signing of agreements terminating all disputes around the purchase by Saint-Gobain of a controlling stake in Sika. Sika purchased from Saint-Gobain and Schenker-Winkler Holding AG a 6.97% stake in its own shares for a total consideration of CHF 2.08bn. This amount includes a CHF 795m premium to compensate Saint-Gobain for the loss of control over Sika. Sika will cancel these shares and introduce a one-share, one-vote governance structure. Saint-Gobain will, as a consequence, indirectly hold 10% of the capital and votes in Sika and will become its largest shareholder.

Reorganisations

- **Spin-off of the Alcon eye care devices business**: On 9 April 2019, Novartis completed the carve-out and spin-off of Alcon, a global leader in eye care and the largest eye care device company in the world, with complementary businesses in surgical and vision

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care. The Alcon shares were successfully listed on the SIX Swiss Exchange Ltd. and the New York Stock Exchange with Alcon's market capitalisation reaching CHF 28bn at close of trading on SIX Swiss Exchange. They are also included in the Swiss Market Index (SMI), which comprises the 20 largest Swiss listed stocks. The spin-off was structured as a tax-neutral demerger for Swiss tax purposes.

Financing

- **Holcim Finance's issue of EUR 500m subordinated fixed rate resettable notes**: On 5 April 2019, Holcim Finance (Luxembourg) S.A. issued EUR 500m Subordinated Fixed Rate Resettable Notes, guaranteed on a subordinated basis by LafargeHolcim Ltd. The Notes will be listed on the Luxembourg Stock Exchange.
- **Santhera share placement and debt financing**: On 4 April 2019, Santhera Pharmaceuticals Holding AG announced that it had raised new liquid funds of up to CHF 22.1m through a private placement of an aggregate of 500,000 new shares and a syndicated credit line facility in the amount of up to CHF 15m.
- **Listing of Bitcoin (BTC)-linked exchange traded products**: On 26 February 2019, Amun AG (Amun), a Zug-based special purpose issuance vehicle of the fintech group Amun, successfully listed its second series of crypto-linked Exchange Traded Products (ETPs) on the SIX Swiss Exchange. The underlying asset of this second series is Bitcoin (BTC) held by or on behalf of Amun through an independent custodian.
- **ARYZTA rights offering**: On 19 November 2018, ARYZTA, a global food business with a leadership position in speciality bakeries, completed a capital increase by way of a rights offering structured as a volume underwriting in the amount of approximately CHF 900m.
- **Vontobel placement of CHF 450m tier 1 bonds**: On 27 June 2018, Vontobel Holding AG successfully completed the placement of CHF 450m perpetual additional tier 1 subordinated bonds. The additional tier 1 subordinated bonds were issued at 100% of their nominal amount with an interest of 2.625% until 2023. The proceeds of this capital market transaction will be mainly used to finance the acquisition of Notenstein La Roche Private Bank.
- **Swiss Re USD 500m offering of exchangeable notes**: On 20 June 2018, Swiss Re has completed an offering of USD 500m, six-year senior exchangeable notes.
- **USD 1bn bonds for the largest thermoelectric plant in Latin America**: Centrais Elétricas de Sergipe S.A. has successfully issued bonds for approx. USD 1bn equivalent in local currency at a fixed, long-term rate in international capital markets. The innovative bond issue is guaranteed by the Swiss Export Risk Insurance, the export credit agency of Switzerland. The bonds are part of a financial package to finance the development, design, construction, operation and maintenance of a thermoelectric power plant by CELSE in the state of Sergipe in the northeast region of Brazil. Besides the bond issue, the transaction includes a USD 200m loan from the International Finance Corporation and a financial package of the Inter-American Development Bank in the amount of approx. USD 300m.

Key developments affecting corporate tax law and practice

<u>Domestic legislation</u>

The Federal Act on Tax Reform and AHV Financing (TRAF)

Since 2014, Switzerland has been under increasing international pressure to abandon its privileged cantonal/federal tax regimes for corporate taxpayers. It has been looking for a

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solution which would bring the Swiss corporate taxation system in line with international standards, while remaining an attractive business location. The first proposal, 2015 Corporate Tax Reform (CTR III), was rejected in a referendum in February 2017. On 28 September 2018, the Parliament passed, with a number of amendments, a replacement legislative proposal – Tax Proposal 17 – later renamed the Federal Act on Tax Reform and AHV (social security) Financing (TRAF). The TRAF retains most of the provisions previously proposed as part of the CTR III and Tax Proposal 17.[4] The TRAF was recently approved in a referendum on 19 May 2019 and will enter into force on 1 January 2020.

Like the previous packages, the TRAF repeals 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 introduces a mandatory OECD-compliant patent-box regime and an optional super deduction for R&D expenditures. Both instruments will be implemented at cantonal level only. A number of the cantons intend to make use of the maximum allowed deduction of 90% for the qualifying income from patents and similar rights (e.g. Zurich and Zug). Others plan more restricted deductions in the range of 10–50% (e.g. Geneva with a maximum allowed deduction of 10% and Neuchatel with a maximum deduction of 20%).[5] At the same time, most of the cantons will significantly lower corporate tax rates. For example, the effective corporate tax rate (including federal tax rate) in Basel City will decrease from 20.18% to 13% as of 2019 (already enacted) and from 2020 in Geneva from 24.16% to 13.99%, and depending on the cantonal legislative processes, in Zürich from 21.15% to 18.19% and in Zug from 14.62% to 12.03%.[6]

The TRAF re-introduced the notional interest deduction for the so-called "high-tax cantons", i.e. cantons where the main city has an effective cumulative cantonal tax rate of at least 13.5%. As Zurich is the only main city with an effective cumulative tax rate of more than 13.5%, the notional interest deduction will only be available in the canton of Zurich.

Further, the TRAF, similar to the Tax Proposal 17, foresees that individuals will be subject to a higher taxation of dividends from qualifying participations. The dividend inclusion will rise to 70% as opposed to the current 60% at the federal level and to at least 50% at the cantonal level. While the Tax Proposal 17 included the measure to increase the dividend inclusion not only at the federal level, but also to 70% at the cantonal level, this has been reduced to a minimum rate of 50% at the cantonal level in the TRAF. In the area of international taxation, the TRAF kept the provision entitling Swiss permanent establishments of foreign companies to receive foreign tax credits.

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 buy-back on the second trading line where at minimum the same amount of capital contribution reserves and other reserves must be used. Finally, the TRAF was also supplemented with a new CHF 2bn subsidy per annum for the Federal Social Security Scheme to ensure approval in Parliament.

Radio & TV fee

From 1 January 2019, the new device-independent fee will be collected from households and undertakings. It replaces the current device-dependent fee, which was levied until the end of 2018. In Switzerland, undertakings which are subject to VAT (registered office, domicile or

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permanent establishment in Switzerland) and have a global turnover of CHF 500,000 or more are (irrespective of the VAT treatment as exempt or excluded turnover) automatically subject to the radio and television fee. These companies will automatically receive an annual bill from the FTA.[7] Given that foreign companies with a worldwide turnover exceeding CHF 100,000, which provide VAT-able services in Switzerland, have to register for Swiss VAT as of 1 January 2018, foreign companies might also be subject to the newly introduced radio & TV fee.

Automatic Exchange of Information (AEOI)

As previously planned, Switzerland exchanged collected information for the first time in September 2018. The information was exchanged with 36 states, including EU Member States, Australia, Guernsey, Japan, Jersey and South Korea. The FTA exchanged information about roughly 2m financial accounts.[8]

As expected, the first exchange of information in September 2018 led to an increased number of voluntary self-disclosures in the Swiss cantons. The FTA's opinion that the penalty-free voluntary disclosure could only be made prior to the September 2018 (respectively 2019, 2020 and 2021 for new AEOI partners) exchange certainly contributed to the raise in the voluntary self-disclosure numbers before this date. It should be pointed out that this cut-off approach is not shared in all cantons. In Zurich, for example, the penalty-free voluntary disclosure with regard to information covered by the AEOI (i.e. foreign bank accounts) can be filed up to the point when the competent tax authority compares the data received from the foreign tax administration under the AEOI with the tax declaration.

In May 2019, the Federal Council issued a proposal for the introduction of the AOEI with the following 19 states: Albania; Azerbaijan; Brunei; Dominica; Ghana; Kazakhstan; Lebanon; Macao (China); the Maldives; Nigeria; Niue; Oman; Pakistan; Peru; Samoa; Sint Maarten; Trinidad and Tobago; Turkey; and Vanuatu.[9] The proposal is currently under discussion in Swiss Parliament.

In February 2019, following recommendations made by the Global Forum on Transparency and Exchange of Information for Tax Purposes, the Federal Council began consultations on amendments to the Federal Act and Ordinance on AEOI. The material amendments concern non-profit associations and foundations. Non-profit associations and foundations, should they qualify as financial institutions, would need to comply with the reporting requirements. In addition, the previously existing reporting exceptions for non-profit associations' and foundations' accounts and accounts that qualify as excluded accounts under the laws of the account holder's country of tax residence will be removed. The capital contribution accounts remain in the excluded category, provided the incorporation, respectively capital increase, takes place within 90 days of the account opening.

The amended legislation, if approved, should come into force on 1 January 2021.[10]

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 ensure the identification of the owners of bearer shares in all cases.[11] In response to this recommendation, on 21 June 2019, Parliament passed the Federal Act on the implementation of the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes. The Act prohibits the issuance of bearer shares for non-listed companies, unless they are issued as intermediated securities held with a Swiss custodian. Notwithstanding several motions to allow companies which had complied with the previous regime to be grandfathered, Parliament decided to apply the abolition to already existing bearer shares as well. As a

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result, existing bearer shares will need to be converted into registered shares, subject to the two limited exceptions for listed companies and certain intermediated securities. The Act provides for a transitional regime: the companies will have a period of 18 months to amend their articles of association and convert their existing bearer shares into registered shares.

We expect that that Act will enter into force as soon as October 2019 if no referendum is petitioned for.

Spontaneous exchange of tax rulings

See below under the heading BEPS.

International double tax treaties

Switzerland remains active in negotiating new or revising existing double tax treaties (DTTs). As of 1 January 2019, 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 Parliament for approval in March 2018–March 2019 include treaties with Ecuador, Zambia, Saudi Arabia and the UK (additional protocol, in line with Switzerland's position of the provisions under the BEPS multilateral instrument, see under BEPS below).

The legal basis to solve double tax issues between Switzerland and Brazil was significantly improved in 2018. In May 2018, Switzerland and Brazil signed, for the first time, a DTT, which also includes an exchange of information clause according to the OECD standard.[12] Further, on 4 January 2019, the tax information exchange agreement between Switzerland and Brazil came into force and is applicable to information requests as of 1 January 2020.[13]

Partial revision of the Value Added Tax Act

On 1 January 2019, a partial revision of the Value Added Tax Act regarding low-value goods purchases from companies abroad came into force. In Switzerland, no VAT is levied on imported goods if the VAT amount due is CHF 5 or less. Goods with the value of CHF 65 or CHF 200 depending on the applicable tax rate (low-value consignments) benefit from this rule. Before 1 January 2019, foreign companies only had to register and levy Swiss domestic VAT in case their turn-over in Switzerland exceeded CHF 100,000 per calendar year. As a result, such low-value purchases from abroad were not subject to Swiss VAT (neither import nor domestic VAT) and, therefore, domestic retailers were put at a disadvantage compared to the foreign companies sending products to customers in Switzerland.

According to the new legislation, if a foreign company generates at least CHF 100,000 turnover per year from low-value consignments, which it dispatches to Switzerland, it will become subject to Swiss domestic VAT, must be entered into the VAT register and will pay Swiss domestic VAT on its total sales in Switzerland (not only the turnover from low-value consignments).

In addition, in March 2019 Parliament approved a motion requesting the Federal Council to propose further measures ensuring the payment of VAT by foreign online platforms, such as Aliexpress, Wish and JD, selling goods or services to Switzerland.[14]

Amended rules for the refund of Swiss WHT

On 28 September 2018, the Parliament approved the amendments to the rules for the refund of the Swiss withholding taxes (WHTs) for Swiss taxpayers. According to the new rules, a negligent failure to declare the taxable income does not lead to the forfeiture of the entitlement to the refund. In this case, the Swiss taxpayer remains entitled to the refund if the missing declaration is discovered and corrected by the tax inspector before the tax assessment becomes legally binding. Under the previous rules, the right to refund was

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forfeited as soon as the tax inspector discovered the failure to declare, even if the tax assessment was still pending. The new rules came into force on 1 January 2019.[15]

Domestic case law

BGer 2C_557/2017: Participation relief for distributions and capital gains, qualification as a hidden distribution of profits

Similar to most European countries, under Swiss domestic law, dividends paid to corporate shareholders as well as capital gains from the sale of minimum 10% of shares of subsidiaries benefit from the participation relief. Swiss tax law, however, does not treat the participation income as fully tax-exempt. Instead, the Swiss participation relief provides a rebate of the tax payable. The rebate is calculated by reference to the ratio between the net income from qualifying participation and the total taxable income earned within a tax year. In turn, the net income from qualifying participation equals the gross income decreased by the imputed financial expenditures and administration expenses. The imputed financial expenditure amounts to a portion of the total financial expenditure of the corporate shareholder calculated by reference to the ratio between the tax value of the underlying participation rights and total assets of the corporate shareholder.

In this case, the central question was the qualification of income from participation rights as capital gain or dividend income, which ultimately determines the participation to be used to calculate the net participation income and the resulting entitlement to the participation relief.

A Swiss company (Z) held a 28% stake in a Belgian company (B) and was the sole shareholder of another Belgian subsidiary (C). As part of an internal restructuring in 2008, Z sold to C its stake in B at the book value (EUR 88m below the market value). It emerged that in Belgium the difference to the market value was taxable at a rate of 34% with no participation relief. To avoid the negative tax consequences for the group, in 2009 Z and C agreed to retroactively increase the sales price by EUR 88m up to the market value. In its tax return for the year 2009, Z recognised EUR 88m as a capital gain in Switzerland and requested a tax rebate under the participation relief on the capital gain. The tax administration was of the opinion that no participation relief was applicable.

The reason for the difference laid in the qualification of the participation income as a capital gain on the sale of B-shares or a hidden profit distribution from the subsidiary C, respectively, because the subsequent increase of the purchase price payable by C to Z was deemed a commercially unjustified deemed dividend. In the first case, the imputed financial expenditure is calculated based on the tax value of the B-shares, whereas in the second case it is based on the tax value of subsidiary C. The subsidiary C's tax value was significantly higher than the tax value of the B-shares. The imputed financial expenditures based on the tax value of subsidiary C was actually higher than the EUR 88m participation income, resulting in the arithmetical net participation income being zero.

The Federal Supreme Court confirmed the view that the additional amount paid (difference between book value and market value) in the subsequent year (2009) qualifies as a hidden profit distribution by C and not as a capital gain. The Federal Supreme Court argued that the initial sale and the retroactive price increase have to be considered as two separate transactions. The price increase was found to constitute a hidden profit distribution from C to Z and led, due to the rule on the calculation of the imputed financial expenditure, to the forfeiture of the participation relief in respect of the EUR 88m participation income.

A-1951/2017: Withholding tax refund under CH-UK DTT, the concept of beneficial ownership (currently pending at the Federal Supreme Court)

Under Swiss domestic law, dividends are generally subject to a 35% withholding tax. Under

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the Swiss-UK DTT, the withholding tax is limited to 15% provided that the beneficial owner is a resident of the other contracting state. As per Swiss practice, the beneficial ownership is denied if the recipient or payee is under a contractual, legal or factual obligation to pass on the dividends received to another person. The so-called double-interdependency test is used to determine the latter. Under this test, the FTA or the court reviews whether (1) there is a causal relationship between the payment of the dividend income to another person and the receipt of the dividend income by the payee, and (2) the obligation to pass on the dividend income is conditional on the payee actually receiving such income.

In the present case, the Federal Administrative Court further developed the double-interdependency test in the context of the swap transactions. A UK bank entered in a cash-settled over-the-counter equity derivative contract with a group of companies domiciled in the Cayman Islands, BVI and Cyprus. The reference assets included, among others, shares of a listed Swiss company (Z AG). Under the total swap conditions, the UK bank was under an obligation to pass to the counterparties any price increase in the value of Z AG shares and 65% of the gross amount of the dividends. In order to secure itself against the increase in value of the Z AG shares and possible dividends distributions, the UK bank bought 40m of Z AG shares in respect of which it received dividends in the gross amount of around CHF 100m.

For the Federal Administrative Court it was decisive that the purchase of Z AG shares, due to the high value of the transaction, was the most appropriate hedging strategy for the total swap contract. The UK Bank was, therefore, *de facto* compelled to purchase Z AG shares to limit its exposure should Z AG distribute profits or its shares appreciate in value.

The facts that the UK Bank was not contractually obliged to purchase Z AG shares and that the income contractually had to be paid to the contracting parties, even if no dividends were received, were not considered decisive.

BGer 2C_1000/2015, BGer 2C_648/2017, BGer 2C_819/2017: Request for administrative assistance under DTTs; use of stolen data

In these three cases dealing with administrative assistance requests in tax matters by France and India, the Federal Supreme Court laid down general principles for dealing with requests stemming from illegally obtained data.

In all three cases, the requests for administrative assistance presumably originated from data about a number of accounts opened with Swiss banks stolen from a Geneva branch office of an international bank, a criminal offence under Swiss domestic law. The treaties with India and France do not specifically deal with the issue of the origin of data laying the basis for a request for administrative assistance in tax matters. Under Article 7(c) of the Federal Act on International Administrative Assistance in Tax Matters (TAAA), the request for administrative assistance in tax matters shall not be granted if it violates the principle of good faith, particularly if it is based on information obtained through a criminal offence under Swiss law.

The Federal Supreme Court held that, unless otherwise agreed between the contracting parties, a request for administrative assistance can only be denied if the conduct of the requesting state violates the principle of good faith.

According to the Court, Article 7(c) TAAA codifies the internationally recognised principle of good faith. The use of information obtained through a criminal offence under Swiss law does not necessarily constitute a violation of the internationally recognised principle of good faith.

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Whether the use of stolen data is incompatible with this principle is to be determined based on circumstances of individual cases. For example, the *purchase* of the stolen data by the state seeking administrative assistance in tax matters would violate the principle of good faith. In addition, any future use by other states of such tainted data would likewise violate the principle of good faith.

In the three cases, there was no evidence that France or India bought the stolen data. However, in the first case dealing with the French request, the French authorities publicly undertook not to use the data stolen in Geneva for the purposes of requesting assistance in tax matters. The subsequent request for administrative assistance based on this very data was, therefore, found to violate the principle of good faith and was rejected. Unlike France, India did not make similar guarantees towards Switzerland. Consequently, there was no violation of the principle of good faith and the requests for administrative assistance were granted.

In the aftermath of these decisions and in order to follow the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes, the Federal Council issued a proposal amending the wording of Article 7(c) TAAA. The second part of this Article specifying that the use of the illegally obtained data as a foundation for an administrative assistance request was in breach of the principle of good faith was proposed to be deleted. However, the proposal was rejected by Parliament.

BGer 2C_102/2018: Tax deductible provision for confiscated proceeds of criminal activities

In this case, the Federal Supreme Court clarified its practice regarding the deductibility of confiscated proceeds from criminal activities. In 2012, a CEO of a Swiss company (Z AG) was convicted of bribery. He was accused of bribing an official of a pension fund of state employees in Zurich in 2009 in order to secure contracts for Z AG. As a result, the criminal court ordered confiscation of the proceeds of the corruptly acquired contracts under Article 71 (1) of the Swiss Criminal Code in 2012.

The Federal Supreme Court confirmed that a taxpayer could generally make a tax deduction in the amount of the proceeds of criminal activities confiscated under Article 71(1) of the Swiss Criminal Code. Although set forth in the Criminal Code, the confiscation is not a criminal penalty and, instead, represents a disgorgement of profits. For the Court, it was relevant that the same confiscated proceeds had been previously taxed.

The Court also ruled that the provision for the confiscation should have been built in the accounting period when the illegal activities took place; i.e. in the 2009 financial statements. The illegal acts were performed by the CEO of Z AG, who was simultaneously the Chairman of the Board and the founder of Z AG. Hence, Z AG could have recognised the possibility of the confiscation of the proceeds of criminal activities already in 2009–2010. The fact that the criminal proceedings were opened after the date of the financial statements (but before the date of the approval of the financial statements by Z AG) was, therefore, irrelevant.

Finally, the Court found that in such situation the mandatory provisions of the Swiss accounting rules required the recording of the provision in 2009. Consequently, the failure to record the provision in the financial statements could be corrected retroactively at any time before the Z AG 2009 tax assessment became final.

BEPS

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

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Action	Topic	Method of implementation in Switzerland
5	Abolition of harmful tax regimes.	The TRAF abolishes favourable cantonal and federal tax regimes.
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 abuse clauses in DTTs regarding treaty shopping.
13	Automatic exchange of country-by-country reports (CbCR; 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 FTA which, in turn, will exchange these with the foreign states. In May 2018, the FTA 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.[16]

BEPS Action No. 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 country-by-country reports with quantitative as 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 country-by-country reports entered into force on 1 December 2017. This includes the Multilateral Competent Authority Agreement on the Exchange of Country-by-

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Country Reports (MCAA-CbCR), and the associated law (ALBA Act) including the ordinance (ALBA Ordinance). MNEs in Switzerland have been obliged to start drawing up a country-by-country report since the fiscal year 2018. In 2020, Switzerland will exchange country-by-country reports with 55 partner states (status as at 28 January 2019).[17] Prior exchanges for the period 2016 and 2017 are possible on a voluntary basis. In June 2018, the FTA sent, for the first time, 109 reports on the year 2016 to a total of 35 partner states.[18]

BEPS Action No. 14: making the dispute resolution mechanism more effective

Following the generally positive peer review report 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.

The mutual agreement procedure 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 2017, altogether 264 mutual agreement procedures were initiated and 257 cases were closed. The average time taken to complete the mutual agreement procedure in Switzerland was 18 months and 24 months for transfer pricing cases.[19]

In addition, Switzerland strives to include the arbitration clause in its DTTs whenever possible. For example, the arbitration clause was incorporated into the new DTTs with Kosovo, Zambia and Pakistan, and the amending protocols to the DTTs with Ukraine and Latvia.

BEPS Action No. 15: developing a multilateral instrument (MLI) to modify tax treaties

On 22 March 2019, Parliament approved the Federal Decree approving the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS. The Federal Decree is subject to an optional referendum.

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. The Swiss DTTs with the following countries will be modified by way of the MLI: Argentina; Austria; Chile; Czech Republic; Iceland; Italy; Lithuania; Luxembourg; Mexico; Portugal; South Africa; and Turkey. The Swiss Parliament approved this list in the 2019 spring session. Since Switzerland applies the so-called amending view – i.e., requires that new agreements reflecting the amended wording are concluded – modifications under the MLI require that the counterparties also accept this view.

In other cases, DTTs with other jurisdictions may be amended through bilateral negotiations.

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On 22 March 2019, the Parliament approved the respective changes to the DTT with the UK, which also implement the BEPS minimum standard.[20] The new protocol to the DTT with Ukraine similarly implements the BEPS minimum standard.[21]

The anti-abuse provisions also now form a part of the Swiss standard DTT. For instance, the new DTT with Latvia includes a principal purpose test anti-abuse rule.[22]

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

TRAF

The reform of the current corporate tax system remains an important and urgent issue for both taxpayers and tax authorities. The pressure from the EU as well as the OECD to change the Swiss "harmful" tax practices has increased over time. The abolishment of the preferential regimes is an important part of the TRAF. At the same time, the reforms aim to find solutions to maintain Switzerland's fiscal attractiveness as a business location, with attractive tax rates, in particular in view of the current tax environment of globally declining tax rates (e.g. in the UK, the US, France) and to guarantee sufficient tax revenues, i.e. to find a balanced proposal.

Developments affecting attractiveness of Switzerland for holding companies

Currently, holding companies are exempt from cantonal and communal profit tax and pay only reduced capital tax at the cantonal/communal level, as well as a 7.8% profit tax (effective tax rate) at federal level. Such exemption will be abolished with the TRAF, at the earliest from 2020. The attractive participation deduction provisions for dividends and capital gains will remain unchanged. Switzerland currently has no intention to introduce controlled foreign corporations rules and generally remains, with its extensive DTT network, a beneficial holding location.

Industry sector focus

Technology industry/fintech

In December 2018, the Federal Council published its report on the legal basis, risks and challenged of the blockchain technology in Switzerland. The report shows that the Federal Council aims to create and develop Switzerland as a leading, innovative and sustainable location for fintech and blockchain companies.

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The tax treatment of ICOs with respect to income tax on the corporate and individual level, stamp duties and VAT is being developed in close exchange between tax authorities, taxpayers and tax advisors, and certain tax authorities have already issued guidelines on several aspects of taxation.

The year ahead

With the approval of the TRAF in a popular vote on 19 May 2019, planning measures reflecting the reform of the corporate tax regime will be at the centre of attention during the year ahead. In addition to the TRAF, the cantonal implementation legislation and decisions on lowering cantonal corporate tax rates will be key. A few of the 26 cantons have already decided on significant tax rate reductions (Vaud, Basel, Geneva). The next global challenge, in particular for Switzerland as a small, export-oriented country, will be the new international developments addressing the taxation of the digital economy.

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Endnotes

1. *See* https://home.kpmg/ch/en/home/insights/2019/01/clarity-on-mergers-and-acquisitions.html (last visited 30 April 2019).
2. *See* https://www.six-group.com/exchanges/shares/companies/ipo/2018/overview_de.html (last visited 24 April 2019).
3. *See* https://www.six-group.com/exchanges/shares/companies/ipo/2019/overview_de.html (last visited 24 April 2019).
4. *See* https://www.efd.admin.ch/efd/en/home/dokumentation/legislation/abstimmungen/staf.html (last visited 24 April 2019).
5. *See* https://www.bdo.ch/de-ch/microsites-de/staf/staf-uberblick/kantonale-umsetzung (last visited 24 April 2019).
6. *See* https://www.zg.ch/behoerden/finanzdirektion/steuerverwaltung/STAF%20vormals%20Steuervorlage%2017/unterlagen-vernehmlassung-zur-aenderung-steuergesetzes (last visited 25 April 2019).
7. *See* https://www.estv.admin.ch/estv/en/home/mehrwertsteuer/rtvua.html (last visited 24 April 2019).
8. *See* https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-72420.html (last visited 24 April 2019).
9. *See* https://www.sif.admin.ch/sif/de/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-73307.html (last visited 24 April 2019).
10. *See* https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-74136.html (last visited 24 April 2019).
11. *See* Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Switzerland 2016, p. 143.
12. *See* https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-70663.html (last visited 24 April 2019).
13. *See* https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-73648.html (last visited 24 April 2019).

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14. *See* https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20183540 (last visited 24 April 2019).
15. *See* https://www.estv.admin.ch/estv/de/home/die-estv/medien/nsb-news_list.msg-id-70256.html (last visited 24 April 2019).
16. *See* https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-70686.html (last visited 24 April 2019).
17. *See* https://www.sif.admin.ch/sif/en/home/multilateral/steuer_informationsaust/automatischer-informationsaustausch/cbcr.html (last visited 24 April 2019).
18. *See* https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-71140.html (last visited 24 April 2019).
19. *See* https://www.sif.admin.ch/dam/sif/en/home/bilateral/verstaendigungsverf.html (last visited 2 May 2019).
20. *See* https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=45877 (last visited 24 April 2019).
21. *See* https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-73754.html (last visited 24 April 2019).
22. *See* https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-72383.html (last visited 24 April 2019).

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Susanne Schreiber
Tel: +41 58 261 52 12 / Email: susanne.schreiber@baerkarrer.ch
Susanne Schreiber comprehensively advises corporate clients on domestic and international tax matters.
She advises listed or privately held groups on tax-related questions, in particular regarding restructurings, cross-border and domestic M&A transactions (sell- and buy-side, pre-deal carve outs, post-merger integration) and financing. She supports institutional investors and private equity companies throughout the investment cycle with tax advice.
Susanne Schreiber is a frequent speaker at national and international tax seminars. She regularly publishes on tax topics, mainly in the area of international corporate tax, mergers & acquisitions and restructurings.
She is a qualified Swiss tax expert, German tax advisor and German attorney-at-law. She joined Bär & Karrer as a partner and co-head of the tax team in 2015 after having led the Swiss M&A tax department of a Big Four firm.
Susanne Schreiber won the category "Rising star: Tax" at the *IFLR* Europe Women in Business Law Awards 2016 and is listed as a Woman-in-Tax Leader in the *International Tax Review*.

Corinna Seiler
Tel: +41 58 261 52 48 / Email: corinna.seiler@baerkarrer.ch
Corinna Seiler's practice focuses on all aspects of national and international corporate tax law and tax planning for Swiss and foreign private clients. She is a Swiss attorney-at-law and joined Bär & Karrer AG in 2016.

Elena Kumashova
Tel: +41 58 261 53 20 / Email: elena.kumashova@baerkarrer.ch
Elena Kumashova's practice focuses on all aspects of national and international corporate tax law and tax planning for Swiss and foreign private clients.

Bär & Karrer Ltd.

Brandschenkestrasse 90, 8027 Zurich, Switzerland
Tel: +41 58 261 50 00 / Fax: +41 58 261 50 01 / URL: www.baerkarrer.ch

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