Swiss implementation of the spontaneous exchange of information on tax rulings

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Switzerland has implemented the spontaneous exchange of information in tax matters in its domestic legislation with effect as from 1 January 2017. The regulations on the spontaneous exchange of tax rulings are included in a recently published ordinance and are closely based on the guidelines in the BEPS action 5 report. The exchange covers Swiss tax rulings which have been granted after 1 January 2010 and are still in force at 1 January 2018, i.e. the time when the actual exchange of tax rulings will start.

La Suisse a mis en œuvre l'échange spontané de renseignements en matière fiscale dans sa législation interne avec effet à partir du 1er janvier 2017. Les dispositions régissant l'échange spontané de renseignements sur les décisions anticipées (« rulings ») sont inclues dans une ordonnance récemment publiée et sont basées sur les recommandations du rapport BEPS de l'action 5. L'échange couvre les rulings suisses qui ont été octroyés après le 1er janvier 2010 et qui sont toujours en force au 1er janvier 2018, à savoir à la date à laquelle l'échange effectif de renseignements sur les rulings débutera.

Introduction

As from 1 January 2017, Switzerland introduced the spontaneous exchange of information in tax matters based on the OECD Convention on Mutual Administrative Assistance in Tax Matters by revising the Swiss Federal Act on International Administrative Assistance in Tax Matters (TAAA).[1] This implementation also covers the spontaneous international exchange of information on certain tax rulings, as stipulated in BEPS action 5, starting from 1 January 2018. The following sections provide an overview of the international development and the legal basis of this exchange of information as well as its implementation in Switzerland.[2]

In view of Switzerland's long standing history of providing legal certainty on tax matters for taxpayers by granting advance tax rulings, the new rules are of high practical importance for Swiss taxpayers and their foreign related parties as well as the Swiss tax administration handling the collection and exchange of information on tax rulings.

1. Spontaneous exchange of information on tax matters

Exchange of information on tax matters can take different forms. Information can be exchanged on request, spontaneously or automatically. These three different forms are allowed by art. 26 para. 1 OECD Model Tax Convention on Income and on Capital (OECD MC).[3] The bilateral tax treaties concluded

* The author contributed to this article in her personal capacity. The views expressed are her own and do not necessarily represent the views of the Swiss administration or its government.

1. RS 651.1.

2. On the Swiss implementation of other BEPS results, see N. BURKHALTER, "Assessing BEPS: origins, standards and responses", Swiss national report, *IFA cahier 2017* (forthcoming).

3. OECD Tax Convention on Income and on Capital, condensed version 2014, 15 July 2014.

on this basis are the general legal foundation of the international exchange of information on tax matters. This article focuses on the spontaneous exchange of information, in particular of tax rulings.

Generally, spontaneous exchange of information does not require a request from the party receiving the information, and it is based on the assumption that the information provided is foreseeably relevant to that party.[4] As stated by the OECD, the spontaneous exchange of information relies on the active participation and co-operation of local tax officials; thus, its effectiveness and efficiency depends on their motivation.[5] The OECD standard on spontaneous exchange of information on tax rulings will increase the number of exchanges as it will provide a legal framework in a distinct area: the information on tax rulings. However, the spontaneous exchange of information is not limited to information related to tax rulings.

2. The OECD Convention on Mutual Administrative Assistance in Tax Matters

The spontaneous exchange of information can also be based on the OECD Convention on Mutual Administrative Assistance in Tax Matters[6] (CMAAT, hereinafter: the "Convention"). In contrast to art. 26 OECD MC, which provides an exchange of information on a bilateral basis, the Convention takes a multilateral approach.

Historically, the first Nordic Multilateral Treaty on Mutual Assistance in Tax Matters signed by Denmark, Finland, Norway, Sweden and Iceland in 1972 served as a model for the Convention.[7] Following the joint initiative of the OECD and the Council of Europe on the development of a multilateral convention to facilitate administrative co-operation, the Convention entered into force on 1 April 1995 after having been ratified by five member states (United States, Finland, Sweden, Norway and Denmark). It was opened for signature by the member states of the Council of Europe and the OECD in January 1998.[8] In the early years, the Convention did not have a significant impact in terms of signatories. In 2010, the Convention was amended mainly to be aligned with the international standard on exchange of information and to extend its scope to countries that had not been members of the OECD/Council of Europe.[9] After the Protocol entered into force in June 2011,[10] the Convention became an important instrument for international cooperation in tax matters. Currently, 107 jurisdictions are parties to the Convention,[11] with Panama being the last signatory to have joined.

2.1. Scope of the Convention

The Convention has a broad application. It is not restricted to residents or nationals of a contracting State (art. 1 para. 3) and covers all types of taxes (art. 2), thereby having a wider material scope than the OECD MC. It provides for a spontaneous (art. 7) and automatic (art. 6) exchange of information as well as on request (art. 5). It further includes provisions on simultaneous tax examination (art. 8) and tax examination abroad (art. 9). Although the Convention is broad, it also sets some limits in art. 21, in particular with the so-called "principle of subsidiarity" according to which a state should have pursued all reasonable measures under its domestic laws or administrative practice except where this would give rise to disproportionate difficulty.[12] In addition, confidentiality and protection of personal data are ensured by art. 22. These restrictions are essentially the same as those provided by the OECD standard of art. 26 OECD MC.

2.2. Art. 7 of the Convention on the spontaneous exchange of information

Article 7 of the Convention is the legal basis for the spontaneous exchange of information. It is drafted in a general way and describes the five cases in which information should be provided to another party without request. These cases are:

4. OECD (2006), *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, Module 2 on Spontaneous Exchange of Information*, p. 3. In Switzerland, the notion of "foreseeably relevant" has been interpreted in a broad way by the Federal Supreme Court (see decisions 2C_1174/2014 dated 29 April 2014, recital 2.1 and decision 2C_963/2014 dated 24 September 2015, recital 4.4.3) and the Federal Administrative Court (see decision A-6547/2013 dated 11 February 2014, recital 5.2 and 5.3).
5. OECD (2006), *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes, Module 2 on Spontaneous Exchange of Information*, p. 3.
6. OECD and the Council of Europe (2011), *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, amended by the 2010 Protocol.
7. X. OBERSON, *International exchange of information in tax matters*, Cheltenham, 2015, p. 67.
8. CMAAT, preface.
9. A. PROSS, R. RUSSO, "The Amended Convention on Mutual Administrative Assistance in Tax Matters: A Powerful Tool to Counter Tax Avoidance and Evasion", *Bulletin for international taxation*, July 2012, pp. 361-365, p. 361. At the G20 meeting on 4 November 2011, all remaining G20 countries committed to signing the Convention.
10. www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm.
11. *Ibid.*
12. Art. 21 para. 2, let. g CMAAT.

a) when a party has grounds for supposing that there may be a loss of tax in the other party;
b) when a person liable to tax obtains a reduction in or an exemption from tax in a party which would give rise to an increase in tax or to liability to tax in the other party;
c) when business dealings between a person liable to tax in a party and a person liable to tax in another party are conducted through one or more countries in such a way that a saving in tax may result in one or the other party or in both;
d) when a party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises; and
e) when information forwarded to a party by the other party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter party.[13]

Art. 7 of the Convention does not require an additional agreement as would be the case for automatic exchange of information based on art. 6.[14] Therefore, spontaneous exchange of information is directly applicable after the Convention has entered into force. According to art. 28 para. 6, the provisions of the Convention shall apply with effect on or after 1 January following the year of the entering into force of the Convention.

3. BEPS action 5

3.1. BEPS Action Plan

On 19 July 2014, the OECD published an Action Plan[15] including 15 actions to fight base erosion and profit shifting in a holistic manner. These 15 actions were regrouped under three main pillars, i.e. establishing international coherence of corporate income taxation, restoring the full effects and benefits of international standards, and ensuring transparency while promoting increased certainty and predictability. Finally, two overarching actions were also launched, with the first one focusing on the digital economy and how to address the challenges it raises, and the second one aiming to develop a multilateral instrument to implement the results of the other action items.

The objective of action 5 is to "counter harmful tax practices more effectively, taking into account transparency and substance".[16] The OECD expressed its intention to "revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes […]".[17]

Following two years of intensive work on each of the fifteen action points, the BEPS final reports were published by the OECD on 5 October 2015.[18]

3.2. Background of BEPS action 5

The origins of the BEPS action 5 can be found in the work of the Forum on Harmful Tax Practices (FHTP), a subsidiary body of the Committee on Fiscal Affairs created at the end of the 1990s. The work on harmful tax practices started in 1998 when the OECD published its first report on Harmful Tax Competition.[19] At that time, the objective of the OECD was to better determine how harmful preferential tax regimes could affect the tax bases of other countries and how OECD members could solve the problem of these regimes in a multilateral way.[20] The FHTP was created at that time to continue discussing and to assess the recommendations of the report.

Twelve factors forming a common framework were set out by the OECD in order to identify harmful tax practices.[21] Four key factors were established in identifying harmful preferential tax regimes: 1) no or low effective tax rates; 2) "ring fencing" of regimes; 3) lack of transparency; and 4) lack of effective exchange of information. These four factors were supplemented by eight other factors established in order to assist in identifying harmful preferential tax regimes.[22]

Based on the principles and factors set out in the 1998 Report, the OECD started to review the regimes of the OECD member states. The follow-up

13. Art. 7 para. 1 CMAAT.
14. According to this article, the Contracting States should determine by mutual agreement the categories of cases in which they shall automatically exchange information.
15. OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (hereinafter: BEPS Action Plan).
16. OECD (2013), BEPS Action Plan, p. 18.
17. OECD (2013), BEPS Action Plan, p. 18.
18. OECD (2015), *BEPS Final Reports*; On consequences caused by this ambitious timeline, see C. SCHELLING, J. SALOM, N. BURKHALTER, "Overview of the base erosion and profit shifting project", in DANON (ed.), *Base erosion and profit shifting (BEPS): impact for OECD and EU tax policy*, Zurich, 2016, pp. 1-19, in particular p. 15f.
19. OECD (1998), *Harmful tax practice – An emerging global issue* (hereinafter: 1998 Report).
20. OECD, 1998 Report, para. 4.
21. OECD, 1998 Report, para. 52 *et seq.*
22. (i) An artificial definition of the tax base, (ii) failure to adhere to international transfer pricing principles, (iii) foreign source income exempt form residence country tax, (iv) negotiable tax rate or tax base, (v) existence of secrecy provisions, (vi) access to a wide network of tax treaties, (vii) regimes which are promoted as tax minimisation vehicles, and (viii) the regime encourages purely tax-driven operations or arrangements.

to this work was then included in the BEPS Project through its action 5. However, the objective of action 5 is also to improve transparency. It is interesting to note that the 1998 Report had already identified the lack of transparency and the lack of exchange of information as factors suggesting that a preferential tax regime constitutes harmful tax competition.[23] However, the OECD was first focused on the exchange of information upon request as the spontaneous exchange of information was not covered by the 2002 Model Agreement on Exchange of Information on Tax Matters.[24]

3.3. Spontaneous exchange of information on rulings: a new OECD framework

The framework on spontaneous exchange of information on rulings was set up by the OECD through different steps. The transparency aspect was first clearly expressed in the BEPS Action Plan in 2013: it already mentioned a compulsory spontaneous exchange on tax rulings which was at that time focused on preferential tax regimes.

In September 2014, the OECD published an intermediary report on action 5, which set out the premises of the framework for improving transparency in relation to tax rulings.[25] Filters were established to identify which kind of rulings should be exchanged. The objective was to limit the obligation to rulings, including transfer pricing rulings, related to (i) preferential regimes that (ii) are within the scope of the work of the FHTP and that (iii) meet the "no or low effective tax rate" factor.[26] For rulings, other than those regarding transfer pricing rules, the report stated that the deciding factor would be to determine whether or not they would have a direct effect on the tax base of other countries. If the answer is positive, they should also be covered by the spontaneous exchange of information on rulings.[27] In addition, the intermediary report also described who would receive the information and what information would have to be exchanged. Yet it was not envisaged that the ruling itself be exchanged, but rather detailed information thereon.[28] The legal basis and the deadlines for exchanging information were also addressed.[29]

Between September 2014 and October 2015, the framework was modified and finalised so as to be published in the final report on BEPS action 5. In addition to the framework for mandatory spontaneous exchange of information in respect to specific categories of rulings, the final report on action 5[30] also provides for new minimum standards in the area of harmful tax practices. It sets out detailed rules on how to ensure that economic substance is linked to tax privileges granted through patent boxes and similar regimes. Furthermore, the report contains best practices in the area of tax rulings. Finally, it concludes the review of 39 tax regimes of OECD Member countries and BEPS associates and outlines steps for further work to be undertaken by the FHTP.

3.3.1. Principal features of the OECD framework

The OECD framework starts by defining the term "ruling", namely "any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and upon which they are entitled to rely".[31] This definition can include general rulings as well as taxpayer-specific rulings, yet only the latter group is covered by the framework on spontaneous exchange of information set up by the OECD.[32]

The spontaneous exchange of information is foreseen only for a limited number of categories of rulings, which are:

— taxpayer-specific rulings related to preferential regimes;
— cross-border unilateral advance pricing agreements (APAs) and any other cross-border unilateral tax rulings covering transfer pricing or the application of transfer pricing principles;
— cross-border rulings providing for a unilateral downward adjustment to the taxpayer's taxable profits that is not directly reflected in the taxpayer's financial/commercial accounts;
— permanent establishment rulings, i.e. rulings concerning the existence or absence of, and/or the attribution of profits to, a permanent establishment by the country giving the ruling;

23. J. ENGLISCH, A. YEVGENYEVA, "The 'upgraded' strategy against harmful tax practices under the BEPS Action Plan", *British tax review* 2013, p. 632.
24. 2002 Model Agreement on Exchange of Information on Tax Matters, art. 5. The commentary, no. 39, states that it is up to the contracting states to extend the scope of the agreement in order to include also automatic and spontaneous exchange of information.
25. OECD (2014), *Action 5 Intermediary report*.
26. *Ibid.*, p. 39.
27. *Ibid.*, p. 44.
28. *Ibid.*, p. 46.
29. *Ibid.*, p. 47.
30. OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, Paris (hereafter: BEPS Action 5 – Final Report).
31. *Ibid.*, para. 95.
32. *Ibid.*, para. 96.

— related party conduit rulings; and
— any other type of ruling that in the absence of spontaneous information exchange gives rise to BEPS concerns.

For each category of ruling, the report indicates which state is entitled to receive it.[33] In essence, for most rulings, the residence countries of all related parties with which a company enters into a transaction for which a ruling is granted, or which gives rise to income from related parties benefiting from preferential treatment and the residence country or countries of both the ultimate parent company and the immediate parent company are entitled to receive the information. In line with the intermediary report, the ruling itself does not have to be exchanged but it is required to file a template set out by the OECD and contained in annex C of the final report.[34]

3.3.2. Periods covered by the spontaneous exchange of information on rulings

According to the OECD framework, the information that is exchanged is not only related to future rulings but also to past rulings. Information on rulings issued on or after 1 January 2010 that are still in effect as of 1 January 2014 must be exchanged.[35] However, when countries do not have the necessary legal framework in place for a spontaneous exchange of information on rulings, the timelines for the introduction are subject to the country's own legal framework, i.e. the entry into force and the effective date of application provisions of the relevant exchange of information instruments.[36]

With regards to future rulings, it is expected that countries will take the necessary measures to be able to collect information on future rulings, considering that future rulings are those issued on or after 1 April 2016.[37]

3.3.3. Review of exchange of information on rulings

The transparency framework for mandatory spontaneous exchange of information in respect to specific categories of rulings is part of the BEPS action 5 minimum standard. All jurisdictions, including Switzerland, that are members of the Inclusive Framework on BEPS have committed to implement the four BEPS minimum standards.[38] The OECD published the terms of reference for the conduct of the peer reviews of the transparency framework in February 2017.[39] The review will be based on four elements: the information gathering process, the exchange of information, confidentiality of information received and statistics.[40] All members of the Inclusive Framework will be assessed on an annual basis. The review will be based on a self-assessment and on peer reviews. The results of the review will be consolidated in an annual report that will be submitted to the Inclusive Framework.[41] This annual report may contain recommendations to the reviewed jurisdiction.[42] A progress report may then be published by the Inclusive Framework.[43]

4. Swiss implementation of spontaneous exchange of information on tax rulings

4.1. Ruling practice in Switzerland

Except for VAT, Swiss tax law does not include an explicit basis for the issuance of tax rulings.[44] The binding effect of tax rulings is based on constitutional law:[45] the protection of good faith or legitimate expectations. The following requirements have been established according to consistent case law:[46] for the taxpayers to rely on a ruling[47] a) the author-

33. *Ibid.*, para. 125.
34. *Ibid.*, annex C, pp. 74-79.
35. *Ibid.*, para. 126.
36. *Ibid.*, para. 126 that has to be read in conjunction with footnote 11.
37. *Ibid.*, para. 129.
38. Countries have committed to implement four BEPS minimum standards in the field of harmful tax practices, treaty abuse, country-by-country reporting and dispute resolution mechanisms.
39. OECD (2017), *BEPS Action 5 on harmful tax practices: transparency framework – Peer review documents*, Paris (hereafter: BEPS Action 5 – Peer review).
40. BEPS Action 5 – Peer review, p. 11, para. 3.
41. BEPS Action 5 – Peer review, p. 20, para. 12.
42. BEPS Action 5 – Peer review, p. 19, para. 11.
43. BEPS Action 5 – Peer review, p. 20, para. 13.
44. For more details on the Swiss tax ruling procedure see T. OBRIST, P. HONGLER, "The Swiss Tax Ruling Procedure: Conceptual Background and Concrete Application", *European Taxation*, September 2012, pp. 463-470.
45. Art. 9 Federal Constitution (RS 101).
46. Federal Supreme Court decisions 2C_807/2014 dated 24 August 2015, recital 3.1 and 2C_529/2014 dated 24 August 2015, recital 3.1 *et seq.* See further also S. OESTERHELT, "Bindungswirkung kantonaler Steuerrulings gegenüber ESTV", *SteuerRevue* 2013, p. 190; S. OESTERHELT, "Wann wird ein Ruling zum Steuerabkommen?", *Der Schweizer Treuhänder* 2013/11, p. 846 *et seq.*; J. BÜRGISSER, "Du ruling fiscal", *RDAF* 2014 II, 401 *et seq.*, p. 402; R. GANI, "Ruling fiscal: un contrat de confiance?", in P. MEIER, A. PAPAUX (eds), *Risque(s) et droit*, Zürich, 2010, p. 123 *et seq.*, p. 125; C. MORF, A. MÜLLER, T. AMSTUTZ, "Schweizer Steuerruling – Erfolgsmodell und Werthaltigkeit", *Der Schweizer Treuhänder* 2008, p. 814 *et seq.*
47. It must be noted that the protection of legitimate expectations is only relevant in case of an incorrect statement by the authorities; in case the statement is in line with tax law, there will be no dispute about the binding effect of the ruling. In practice, tax rulings are requested in case of uncertainty about the interpretation of certain tax regulations, the application of regulations on the specific case

ities' information has been granted without reservation and refers to a specific request which is relevant for the applicant; b) the information is given by the competent tax authority or the applicant could have relied on it being competent; c) the applicant could not immediately recognise that the information by the authority is not correct; d) the applicant has made dispositions on the basis of the received information which cannot be reversed without detriment; and e) the law has not changed between the granting of the information and the implementation.

The competent authorities with respect to rulings on income and capital tax are in general the cantonal tax authorities.[48]

4.2. Legal basis for the spontaneous exchange of information on Swiss tax rulings

The current Swiss double tax treaty network and tax information exchange agreements do not provide a basis for a spontaneous exchange of information.[49] Thus, the basis was only established upon the agreement to the Convention. Switzerland had signed the Convention on 15 October 2013 and both Swiss councils approved the implementation of the Convention on 18 December 2015.[50] It enters into force with effect from 1 January 2017. Switzerland has made certain reservations to the Convention, in particular that the taxes covered are limited to taxes on income and profits levied by the federal, cantonal and communal tax authorities and capital/net wealth taxes levied by the cantonal and communal tax authorities.[51]

4.3. Federal Act on International Administrative Assistance in Tax Matters

In connection with the approval of the Convention, the TAAA was amended[52] and in particular new provisions covering the spontaneous exchange of information were included (art. 22a *et seq.*).

According to art. 22a para. 1 TAAA, the details of the spontaneous exchange of information are regulated by the Federal Council, reflecting international standards and the practice of other states (see also 0 below).

According to art. 22b TAAA, the persons concerned by the spontaneous exchange of information will be informed about the intended exchange in advance, except in cases where the purposes of the administrative assistance would be defeated and the success of the investigation would be thwarted by a prior notification. They have participations rights and rights to appeal, similar to other cases of exchange of information.[53]

Art. 22e TAAA contains provisions regarding the exchange of information received from other states, i.e. the transfer to the interested tax authorities by the Federal Tax Administration.

4.4. Ordinance on International Administrative Assistance in Tax Matters

On the basis of art. 22a para. 1 TAAA, the Ordinance on International Administrative Assistance in Tax Matters (TAAO)[54] was amended and, after a consultation process in summer 2016,[55] adopted on 23 November 2016.[56]

The general basis for the obligation regarding the spontaneous exchange of information is art. 7 of the Convention, with the areas mentioned in 0. With respect to tax rulings, the standard developed under BEPS action 5 can be seen as a specification of this obligation.[57] According to art. 22 para. 1 TAAA,

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and areas of a certain discretion, e.g. regarding appropriate transfer prices. Further, ruling requests are a way of a collaborative co-operation between taxpayers and tax authorities and are used to inform tax authorities about and to obtain their view on the tax implications of significant transactions. See IFF-Seminar Internationales Steuerrecht November 2014, P. UEBELHART, S. SCHREIBER, Horizontal Monitoring – Kooperationen zwischen Steuerpflichtigen und Steuerbehörden.

48. Certain rulings, e.g. on the international allocation of principal companies, have to be approved by the Federal Tax Administration. Rulings with respect to arm's length prices or confirmation on (no) hidden dividend distributions are often not only submitted to the cantonal tax authorities for income tax, but also to the Federal Tax Administration with respect to withholding tax consequences.

49. D. Holenstein, in ZWEIFEL/BEUSCH/MATTEOTTI (eds), *Kommentar zum internationalen Steuerrecht*, Art. 26 OECD-MA N 92; Federal Department of Finance, Explanations to the revision of the Ordinance on International Administrative Assistance in Tax Matters, p. 4, 14.

50. Federal Resolution on the Approval and Implementation of the Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters, 18 December 2015, AS 2016, 5059.

51. Article 3 of the Federal Resolution, footnote 46.

52. *Ibid.*

53. See art. 15*et seq.*, art. 22c and art. 22d TAAA.

54. RS 651.11.

55. See S. SCHREIBER, O. EICHENBERGER, "Spontaner Informationsaustausch gemäss Entwurf StAhiV", *Expert Focus* 2016, p. 45 *et seq.*; Report of the Federal Department of Finance on the consultation results regarding the revision of the TAAO, November 2016.

56. Ordinance on International Administrative Assistance in Tax Matters, AS 2016 4877.

57. See R. STOCKER, A. FROSS, S. FUCHS, "Spontaner Austausch von Steuerrulings – Auswirkungen auf Schweizer Unternehmen", *Expert Focus* 2016, p. 251 *et seq.*; L. SCHNEIDER, D. SCHÖNENBERGER, S. HEINRICH, "Spontaner Austausch von Steuerrulings", *Expert Focus* 2016, p. 258 *et seq.*; O. JÄGGI, J. MALLA, "Informationsaustausch von Steuerrulings", *Expert Focus* 2016, p. 266 *et seq.*; S. OESTERHELT, "Spontaner Austausch von Steuerrulings", *Steuer-*

Switzerland will implement the information exchange in accordance with international standards, here BEPS action 5. Thus, the TAAO is closely linked to this standard.

The TAAO covers not only the spontaneous exchange of information on tax rulings but also the exchange of information on request[58] and the general basis for the spontaneous exchange of information, as art. 7 of the Convention is not restricted to the exchange of information on tax rulings. For the latter, the TAAO does not yet contain specific cases as the practice still needs to be developed in congruence with international standards and practice applied by other countries.[59] Additional regulations or clarifications may be adopted at a later stage, if necessary.[60] The State Secretariat for International Financial Matters (SIF), the Federal Tax Administration (FTA) and the cantonal tax authorities shall co-operate in order to develop a consistent and coherent practice in Switzerland.[61]

4.5. Spontaneous exchange of information on tax rulings according to the TAAO

4.5.1. Overview

The TAAO contains a definition of the term tax ruling,[62] the cases in which tax rulings shall be exchanged,[63] the recipient states for the information in the different cases,[64] as well as the information to be provided.[65] Lastly, the periods for the submission and exchange of information[66] and transitional rules are also included.

4.5.2. Exceptions

The general provisions contain a *de minimis* clause as exception to the obligation to exchange information spontaneously, in case the tax relevant amounts for the recipient state are obviously disproportionate to the administrative efforts.[67] The efforts for both states, i.e. to collect and deliver, but also to process and analyse the information shall be considered in this respect. In case of doubt, however, the information shall be exchanged.[68]

4.5.3. Competent authorities

The information on tax ruling are available with the competent authorities, i.e. the cantonal or federal tax authorities[69] (see 0). They have to submit the relevant information to the competent department of the FTA, which will be in charge to actually exchange the information cross-border.[70]

4.5.4. Tax ruling

Art. 8 TAAO contains an own definition of tax ruling for purposes of the spontaneous exchange of information. It is similar, but not identical to the general term of a tax ruling described in 0 above. A tax ruling is any information, confirmation or assurance by a tax authority to a) a taxable person, b) regarding the tax implications of facts specified by the taxable person and c) on which the taxable person can rely upon.

The reliance on the information refers to the principle of legitimate expectations (see above 4.1).[71] However, the obligation to exchange the information is irrespective of whether or not the transaction covered by the ruling has been implemented.[72] According to the principle of legitimate expectations, the implementation, i.e. a disposition that cannot be reversed without detriment, is a requirement for a ruling to be binding. Thus, because from a practical perspective information on certain rulings must be exchanged after the granting of the ruling, the exchange may happen even if the transaction has ultimately not been implemented. As the concerned taxpayer will generally be informed prior to the exchange of information,[73] (0 above), he may still cancel the ruling prior to the exchange of information if the implementation is no longer intended. Confirmations by tax authorities after the implementation of a transaction are generally not protected by the principle of legitimate expectations and are therefore not covered by art. 8 TAAO. The same applies

Revue 2016, p. 276 *et seq.*; A. OPEL, "Spontane Amtshilfe unter der Lupe", *SteuerRevue* 2016, p. 380 *et seq.*; R. STOCKER, A. FROSS, S. FUCHS, "Spontaner Austausch von Rulinginformationen: Entwicklungen innerhalb der OECD und EU", *FStR* 2016, p. 66 *et seq.*; S. VORPE, "Spontaner Informationsaustausch über Steuerrulings", *AJP* 2016, p. 1229 *et seq.*; X. OBERSON, "International Exchange of Information on Rulings", in DANON (ed.), *Base erosion and profit shifting (BEPS): impact for OECD and EU tax policy*, Zurich, 2016, pp. 510-534.

58. See art. 2 *et seq.* TAAO.
59. Federal Department of Finance, Explanations to the revision of the TAAO, 23 November 2016, p. 6, hereafter "Explanations TAAO".
60. Art. 22a para. 1 TAAA, Explanations TAAO, p. 5 f.
61. Art. 6 TAAO.
62. Art. 8 TAAO.
63. Art. 9 TAAO.
64. Art. 10 TAAO.
65. Art. 11 TAAO.
66. Art. 12f. TAAO.
67. Art. 5 TAAO.
68. Explanations TAAO, p. 9.
69. Art. 3 lit. d TAAA.
70. Art. 7 para. 2 TAAO.
71. Art. 9 Federal Constitution.
72. Art. 9 para. 3 TAAO.
73. Art. 22b TAAA.

to confirmations in the course of the tax assessment for the respective (past) period.[74]

The form of the ruling is not relevant for the spontaneous exchange, it can be written, as usual, but also orally and could also be an administrative act.[75] The discussion about the binding effect of oral rulings must be distinguished from the question of how to prove it. If the oral statement by the tax authority fulfils the criteria mentioned in 0 above, it is binding irrespective of whether and, if so, how this will be documented (e.g. internal file note by the tax authorities or the tax payer/witnesses). If it shall not be binding, this can also be stated in writing since such non-binding statement does not fulfil the requirements of a ruling according to art. 8 TAAO. The taxpayer has to decide whether he wants certainty from the tax authorities – for the price of transparency in the cases covered by art. 9 TAAO – or whether he is fine to rely on his own/the professional judgment by his advisors, and (potentially) avoids queries by foreign tax authorities.

4.5.5. Tax rulings in scope

Art. 9 TAAO contains the list of tax rulings mentioned in BEPS action 5, see 0 above, with specification for Switzerland.

BEPS Action 5	Art. 9 TAAO: rulings with respect to
taxpayer-specific rulings related to preferential regimes	cantonal preferential regimes according to art. 28 Tax Harmonisation Act. i.e. holding, auxiliary/mixed company and domiciliary company regimes, the license/patent box of the canton of Nidwalden and subsequent IP regimes as well as the international allocation of principal companies The preferential regimes according to art. 28 Tax Harmonisation Act as well as the rules on the principal company allocation and finance branches/companies shall be abolished upon the implementation of the corporate tax reform III[(a)]
cross-border unilateral APAs and any other cross-border unilateral tax rulings covering transfer pricing or the application of transfer pricing principles	cross border transfer prices between related parties or a transfer pricing method, which the Swiss tax authority has determined without involvement of the tax authorities of other states It is not relevant that the ruling meets the OECD requirements for a transfer pricing agreement as long as the content is comparable[(b)]
cross-border rulings providing for a unilateral downward adjustment to the taxpayer's taxable profits that is not directly reflected in the taxpayer's financial/commercial accounts According to BEPS Action 5, no specific tax ruling is required for the spontaneous exchange on information in this respect[(c)]	a reduction of the taxable profit in Switzerland in a cross-border context, which is not evident from the annual financial statements and the consolidated financial statements
permanent establishment rulings, i.e. rulings concerning the existence or absence of, and/or the attribution of profits to, a permanent establishment by the country giving the ruling	the existence of a permanent establishment in Switzerland or abroad or the allocation of profits to a permanent establishment This applies to the extent not covered by the previous cases[(d)]
related party conduit rulings	circumstances relating to cross-border financing streams or income to related parties in other states via one or more Swiss persons This applies to the extent not covered by the previous cases[(e)] and circumstances leading to a non-taxation / under-taxation of a state
any other type of ruling that in the absence of spontaneous exchange of information gives rise to BEPS concerns	Not included; the TAAO may be revised in case of a respective future decision of the OECD[(f)]
Rulings covered	Rulings covered
1 January 2010, still in force on 1 January 2014	1 January 2010, still in force on 1 January 2018 Rulings that have no effect after 31 December 2017 or which are terminated by 31 December 2017 will not be exchanged

(a) Draft Federal law on the fiscal measures to improve the competitiveness of the location Switzerland for enterprises – Corporate Tax Reform Law III, Federal Council topic 15.049, final text 17 June 2016, which will be subject to a public referendum on 12 February 2017.
(b) Explanations TAAO, p. 12.
(c) OECD (2015), BEPS Action 5 – Final Report, p. 51, para. 115.
(d) Explanations TAAO, p. 12.
(e) Explanations TAAO, p. 12.
(f) Explanations TAAO, p. 12.

Art. 9 para 2 TAAO defines the above used term "related party", i.e. cases where one person holds at least a 25% investment in the other party or a third party hold at least 25% in both parties. In line with BEPS action 5,[76] an investment is defined as holding directly or indirectly voting rights or capital in the

74. See explanation TAAO, p. 11. The definition of the "advance cross-border ruling" in article 3 no. 14 e) of the EU council directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards to mandatory automatic exchange of information in the field of taxation is even a bit broader, as the scope also covers rulings issued after the implementation of a transaction, but before filing of the tax return.

75. Explanations TAAO, p. 10. For a different view regarding administrative acts see S. SCHREIBER, O. EICHENBERGER, "Spontaner Informationsaustausch gemäss Entwurf StAhiV", *Expert Focus* 2016, footnote 55.

76. OECD (2015), BEPS Action 5 – Final Report, p. 52, para. 122.

other person. Since Swiss tax law does not generally include a definition of the term "related party" for income tax purposes and double tax treaty provisions may include different thresholds, this definition only applies in the context of the exchange of information.[77]

4.5.6. Recipients of the information

Art. 10 TAAO lists the recipient states in the different cases of art. 9 TAAO. In line with BEPS action 5, it refers to the state of residence (seat) of the respective person rather than tax residency in the sense of the OECD MC. The recipients of the information are in any case the direct controlling company and the group top company, art. 10 para. 1 TAAO.[78] As additional clarification to the draft TAAO, art. 10 para. 3 TAAO now states that in case a permanent establishment is involved the information will not only be exchanged to the state of the permanent establishment but also the state of the head office owning the permanent establishment.[79]

The exchange of information requires that the recipient state has a legal basis for the information exchange, see art. 7 of the Convention which refers to exchange between "contract parties". Thus, art. 10 para. 3 TAAO includes the right of the competent department of the FTA to restrict the exchange to states which commit themselves to the OECD standard regarding the spontaneous exchange of tax rulings (BEPS Action 5).[80] These are currently the member states of the OECD, the G20, and the inclusive framework on BEPS.[81] It is currently unclear to which extent the FTA will make use of this restriction for reciprocity – in this respect it will take into account the practice of the other countries.[82]

4.5.7. Information to be submitted to the FTA and the other countries

The information that the cantonal or federal tax authorities have to submit to the competent department of the FTA is broader than the information that will actually be exchanged with the other countries.[83] Art. 11 para. 1 lit. a, m, n TAAO include, for example, also a copy of the tax ruling or additional information. The reason is to enable the competent department of the FTA to perform certain formal checks and to have a copy of the ruling in case the other state asks for this additional information on request.[84]

Although the tax ruling itself will not be exchanged spontaneously, but only a template summarizing the key information, it should be noted that BEPS Action 13 mentions that the local file for transfer pricing documentation purposes shall include "a copy of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the local tax jurisdiction is not a party and which are related to controlled transactions described above". This obligation is not adopted in Switzerland though and is not a BEPS minimum standard, but just a recommendation.

4.5.8. Timeline for exchange of information

Art. 12 and Art. 13 TAAO include the timeline for the submission of the information to the competent department of the FTA, i.e. 60 days after the tax ruling has been granted, and the exchange with the other states by the FTA, i.e. 3 months after the receipt of the information. This timeline will be extended if the concerned person makes use of its participation rights or rights to appeal (see 0 above).

Date of grant of tax ruling	Information covered	Timeline for submission to FTA	Timeline for exchange with other states
By 31 Dec 2009	No exchange		
Between 1 Jan 2010 to 31 Dec 2016	Available information	30 Sept 2018 (nine months after 1 Jan 2018)	31 Dec 2018 (twelve months after 1 Jan 2018)
Between 1 Jan 2017 to 31 Dec 2017	All information according to art. 11 para. 1-3 TAAO	2 March 2018 (60 days after 1 Jan 2018)	2 June 2018 (three months after receipt)
After 1 Jan 2018	All information according to art. 11 para. 1-3 TAAO	60 days after grant	Three months after receipt

77. Explanations TAAO, p. 12.
78. Controlling is defined in line with the Swiss law on obligations for stock corporations and in the same sense of other forms of companies, Explanations TAAO, p. 13. In any case, due to the explicit wording, the shareholder in the state receiving the information must be a company or at least a partnership, not an individual (even if the individual would have a business activity).
79. Explanations TAAO, enclosure example 6.
80. Explanations TAAO, p. 14.
81. For a list of countries, visit www.oecd.org/ctp/beps-about.htm#membership.
82. Explanations TAAO, p. 14.
83. Art. 13 TAAO.
84. Art. 16 TAAO; Explanations TAAO, p. 14.

Transitional rules exist with respect to the collection and exchange of tax rulings as well as the requirement to collect additional information.[85]

Conclusion

With the new TAAA and TAAO, the legal basis for the spontaneous exchange of information on tax rulings have been put in place in Switzerland. The first exchanges will take place from 1 January 2018. It remains to be seen how the collection by the different Swiss tax authorities, the compilation of the required templates and the exchange by the FTA will be implemented in practice[86] and what information the FTA will receive from other states. The new transparency should not change the Swiss ruling practice *per se* – with a full disclosure of the relevant underlying facts and a solid tax analysis on the basis of applicable law. The exchange of information on such rulings (which should be the vast majority of existing rulings) is nothing to be afraid of. Rulings which may not uphold to these standards should be re-assessed and either amended or terminated.

85. Explanations TAAO, p. 17. Art. 16 para. 4 TAAO has been added in the consultation process and refers to the shorter timeline of art. 12 TAAO already for rulings issued after 1 January 2017.

86. See for example presentation by the Geneva tax administration of March 2016, https://demain.ge.ch/document/echange-spontane-informations-portant-rulings; G. JUD (Zug tax administration), "Spontaner Informationsaustausch von steuerlichen Vorbescheiden (Rulings): Eine erste Auslegeordnung aus praktischer Sicht", *Zuger Steuerpraxis* 2015/60, p. 50 *et seq.*