Corporate Tax

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Contributing Editor:
Sandy Bhogal

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Switzerland

Susanne Schreiber & Angelica M. Schwarz
Bär & Karrer Ltd.

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M&A

Private equity activities with Swiss involvement reached a record high in 2017. In total, 395 transactions across all sectors and industries have been recorded, which is an increase of 9% compared to the previous year. However, the values of those transactions went down from USD 119.1 billion in 2016 to USD 101.5 billion in 2017. One key transaction was Johnson & Johnson's acquisition of the Swiss biopharmaceutical company Actelion with a value of almost USD 30 billion. This is in addition to the acquisition for USD 2.6 billion of General Electric Industrial Solutions by ABB, which belongs to the top 10 Swiss M&A transactions in 2017.[1] For the current year, it is assumed that the M&A activity will remain strong, partly as a result of the US tax reform.

Tax litigation

A stunning number of cases regarding international requests for administrative assistance have been judged by the Swiss Federal Supreme Court during 2017. Also, various decisions in connection with the refund of Swiss withholding taxes (WHT) in structured transactions have been published.

IPOs

During 2017, six companies (poenina holding ag, Landis+Gyr Group AG, Zur Rose Group AG, Idorsia Ltd., Galenica AG and Rapid Nutrition PLC) were listed on the Swiss stock exchange. With a placement volume of CHF 2,295m and an implied total market capitalisation of CHF 2,317m, Landis+Gyr Group AG, a leading global provider of integrated energy management solutions for the utility sector, was the largest among the six companies. It is expected that 2018 will also be an interesting IPO year with three IPOs in the first quarter already.

Significant deals and themes

M&A

The following deals stood out in 2017 and 2018, all requiring tailored corporate tax advice for the transaction itself, the integration or the debt financing:

- **Johnson & Johnson's $30bn acquisition of Actelion**: On 25 January 2017, Johnson & Johnson launched an all-cash tender offer in Switzerland to acquire all of the outstanding shares of Actelion (see previous edition).
- **HNA's $1.449bn acquisition of Dufry**: On 26 April 2017, Chinese conglomerate HNA Group completed the acquisition of a 16.2% stake in Swiss airport retailer Dufry. With

this transaction, HNA's total stake in the Swiss group rose to 20.9%, which means that the Chinese group became the largest stakeholder after this transaction.

- **CVC Capital Partners' $871m acquisition of Breitling**: On 28 April 2017, CVC Capital Partners Fund VI agreed to acquire a majority stake of 80% in Breitling, a leading, independent, family-owned manufacturer of Swiss luxury watches.
- **Nestlé's $0.5bn acquisition of Blue Bottle Coffee**: On 14 September 2017, the world's largest coffee producer Nestlé announced that it has acquired a majority stake (68%) in Blue Bottle Coffee, a high-end speciality coffee roaster and retailer based in Oakland, California. During 2017, Nestlé also acquired the Canada-based vitamins producer Atrium Innovations ($2.3bn), which shows the existing trend that the food and healthcare sectors are moving closer together.
- **ABB's $2.6bn acquisition of General Electric Industrial Solutions**: On 25 September 2017, ABB announced its acquisition of General Electric Industrial Solutions. With this acquisition, ABB intends to strengthen its number 2 position in electrification globally and to expand its access to the attractive North American market. ABB sees potential for annual cost benefits of $200m.
- **Novartis' $3.696bn acquisition of Advanced Accelerator Application (AAA)**: On 30 October 2017, Novartis announced that it had entered a memorandum of understanding with the radiopharmaceutical French company AAA, under which Novartis intends to commence a tender offer for 100% of the share capital of AAA. The tender offer was completed on 22 January 2018.
- **Bell Food Group's $443.8m acquisition of Hügli Holding**: On 15 January 2018, the Bell Food Group AG announced the launch of a takeover bid for all publicly listed bearer shares of Hügli Holding. Hügli is an internationally operating food manufacturing company producing soups, sauces, bouillons and convenience food. Bell is one of the leading meat processors and convenience food producers in Europe.

Reorganisations

- **Shared services transfer from UBS to UBS Business Solutions AG**: Through a series of transactions which were completed for the most part in early June 2017, UBS AG and other UBS group companies transferred group shared services functions, which are mainly based in Switzerland, the UK and the US, to UBS Business Solutions AG and other related service companies. UBS Business Solutions AG now operates as the group service company of UBS and is a wholly owned subsidiary of UBS Group AG. The implementation of UBS Business Solutions AG enables UBS to maintain operational continuity of critical services should a recovery or resolution occur. It represents an important step towards improved resolvability, and is in line with global guidance defined by the Financial Stability Board.

Financing

- On 30 June 2017, Banque Cantonale de Genève successfully completed the placement of CHF 90 million perpetual additional tier 1 subordinated bonds and CHF 110 million tier 2 subordinated bonds, due 2027. Both bonds have been provisionally admitted to trading at the SIX Swiss Exchange and are expected to be listed there as well.
- On 9 March 2018, Orior AG successfully placed 592,499 new shares by way of an accelerated bookbuilding in a private placement with institutional investors. The placed shares are sourced from the company's existing authorised share capital and the pre-emptive rights of the existing shareholders have been excluded.
- On 15 February 2018, Novartis Finance S.A. completed the placement of EUR 750,000,000 Guaranteed Notes due 2023, EUR 750,000,000 Guaranteed Notes due

2030 and EUR 750,000,000 Guaranteed Notes due 2038. The Notes are guaranteed by Novartis AG. They have been provisionally admitted to trading at the SIX Swiss Exchange and are expected to be listed there as well.

Key developments affecting corporate tax law and practice

Domestic legislation

Tax Proposal 17 (TP 17)

In light of international developments and upon pressure from the EU, in July 2014, Switzerland committed to abolishing its cantonal (holding, domicile and mixed companies) as well as federal tax regimes (finance branch and principal companies). Consequently, the Swiss government launched the Corporate Tax Reform (CTR III), which aims to modify the corporate taxation system and to substitute the abolished tax regimes by internationally accepted measures. On 5 June 2015, the Swiss Federal Council published its draft legislative proposal for further parliamentary discussion. On 12 February 2017, however, the CTR III was submitted to a referendum and rejected by a majority of 59.1%. Opponents of the rejected reform proposal were primarily concerned with the potential losses in cantonal tax revenues, and their criticism was broadly aimed at limiting the fiscal effects of the new measures.[2] As a consequence of the rejection, the current corporate tax laws remain in force. This, however, also means that the pressure from the OECD and EU for abolishing the tax-privileged regimes continues.

To avoid unilateral tax repercussions from the EU, the OECD or any other individual countries, the Swiss Federal Department of Finance stated on 2 March 2017 that it is forging ahead with work on a new corporate taxation proposal entitled Tax Proposal 17 (TP 17).[3] Since that time, the project for a new corporate tax reform has progressed considerably. During its meeting on 21 March 2018, the Federal Council adopted the dispatch on TP 17. Not surprisingly, the starting point for the reform is the abolition of the cantonal status companies and federal practice regarding finance branches and principal companies. TP 17 and the cantonal implementation plans shall ensure that Switzerland remains an attractive business location. For that reason, one aim of the new corporate tax reform is to introduce a mandatory patent box for all cantons and additional deductions for R&D expenditure on an optional basis. These measures will be accompanied by a relief restriction, which includes a binding provision for the cantons whereby at least 30% of companies' profits must remain taxable even if these measures are applied. In order to enable the cantons to lower their corporate income tax rates, their share in the federal income tax revenue will be increased. The proposal also foresees that Swiss resident individuals will be subject to a higher taxation of dividends from qualified participations at 70% by the Confederation and at least 70% in the cantons.[4] This measure shall help to finance the reform but also reflects that the taxation on the company level will be reduced upon the reform, mainly because many cantons will lower their corporate income tax rates. As expected, the new proposal is less far-reaching and tries to find a solution without triggering a referendum. In particular, the Notional Interest Deduction is currently not part of the Federal Council's proposal.

At best, the Swiss Parliament can adopt TP 17 in the autumn session 2018. If a referendum is not called, the first measures could come into force at the beginning of 2019 and most of them could come into force from 2020.[5]

Automatic Exchange of Information (AEOI)

On 1 January 2017, Swiss AEOI implementation legislation (the Administrative Assistance Convention, the Multilateral Competent Authority Agreement, the Federal Act on the

AEOI, the Ordinance on the International Automatic Exchange of Information in Tax Matters as well as the final version of the AEOI Guideline) entered into force. From this date, the AEOI was activated with 38 states and territories (including the agreement with the EU which applies for all 28 EU Member States). Since then, Swiss financial institutions subject to the reporting duty or persons/entities who are deemed a controlling person of a passive Non-Financial Entity (NFE) (e.g. trust, foundation or domiciliary company) in the form of beneficiary, settlor, protector or similar have been collecting account information concerning persons resident in these partner states for tax purposes. The collected data will be exchanged for the first time in autumn 2018. Parliament adopted the federal decrees concerning the introduction of the AEOI with further partner states from 2018/2019 in December 2017. This means that Swiss financial institutions have been collecting data with a further 40 partner states (including Hong Kong and Singapore) since 1 January 2018. This information will be exchanged for the first time in autumn 2019.[6] As more than 100 states have already committed to implementing AEOI, it is expected that Switzerland's list of partner states will further increase during the coming months.

The AEOI reporting does not require approval from the person who is subject to the reporting. Since tax transparency has reached a new level, it will be risky to try to avoid reporting under the AEOI (especially as such persons may be included in group requests as described in the last edition).[7] Persons who have not yet done so should therefore consider legalising these assets by filing a penalty-free voluntary disclosure. It has to be noted, however, that the key requirements for the exemption from penalty through a voluntary disclosure are (i) that the application is filed for the first time in Switzerland, (ii) it is deemed voluntary, as well as (iii) that the authorities have no knowledge of the undeclared assets. The FTA now presumes that a non-punishable voluntary disclosure will no longer be possible after September 2018, i.e. when the AEOI will be performed. As of this date, data of all tax subjects are automatically provided to the respective tax authorities in the respective countries. This implies that, as of this date, voluntary disclosure is no longer permitted. The FTA's opinion, however, is not undisputed in Switzerland.

Global Forum's recommendations

On 17 January 2018, the Federal Council launched the consultation on the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes. The bill proposes the conversion of bearer shares into registered shares as well as a system of sanctions to be applied should shareholders not comply with their duty to report beneficial owners or if companies breach their obligation to keep a register of shareholders and beneficial owners. In addition, the bill contains provisions on the confidentiality of administrative assistance requests and the capacity to be a party during the administrative assistance proceedings. The consultation will last until 24 April 2018. The dispatch, which will be based on the results of the consultation procedure, will also regulate the handling of stolen data. The proposed text is due to be discussed by Parliament in winter 2018. The next peer review of Switzerland by the Global Forum will start in the second half of 2018.[8]

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. As of 29 January 2018, Switzerland has signed more than 90 double taxation agreements (DTAs), of which 58 contain a provision on the exchange of information according to international standards. Fifty-one of these 58 agreements are in force. In addition, Switzerland has signed 10 tax information exchange agreements, of which nine are in force.

Revised double tax treaties, which entered into force or whose dispatch was submitted to Parliament for approval during March 2017 to March 2018 include treaties with Ecuador, Belgium, Zambia, Pakistan, Latvia and Kosovo.

Partial revision of the Value Added Tax Act

As of 1 January 2018, a partial revision of the Value Added Tax Act came into force. Based on the new provisions, a company's global turnover will now be decisive for mandatory tax liability, and no longer just its turnover in Switzerland. Companies whose global turnover is at least CHF 100,000 are now liable to value-added tax (VAT). Previously, foreign companies could provide their services in Switzerland without VAT up to a turnover level of CHF 100,000.[9] The new provision intends to achieve an equal treatment for foreign and Swiss businesses. The Federal Council estimates that at least 20,000 foreign businesses will have to register for Swiss VAT for the first time during 2018.

In addition, amendments of the VAT rates have been determined. There is a standard tax rate of 7.7%, a special rate of 3.7% (for accommodation services) and a reduced rate of 2.5% (for food, books, newspapers, medicines and other everyday consumer goods).

Dividend withholding tax – changes to the notification procedure

In 2011, the Swiss Federal Supreme Court held that the 30-day filing deadline for the notification of the dividend withholding tax (instead of payment based on a reduction at source with respect to corporate shareholders) is a forfeiture and not a pure administrative deadline. Consequently, missing the deadline resulted in withholding tax payments of 35% (temporary cash out due to the refund possibility) and 5% p.a. late payment interest. In the 2016 fall session of the Swiss Parliament, the Council of States and the National Council reconciled their differences and agreed on an amendment to the Swiss Withholding Tax Ordinance in connection with the application of the dividend notification procedure. Under the revised Swiss Withholding Tax Ordinance, which came into force on 15 February 2017, the 30-day filing period constitutes a mere administrative deadline and, thus, the dividend notification procedure is applicable even if the 30-day filing period has been missed as long as the substantive requirements for the notification procedure are met. Thus, late filing of forms does not result in withholding tax payment and late interest consequences, but can be sanctioned by means of an administrative fine of up to CHF 5,000. According to these rules, late interest can also be reclaimed for past cases, provided they are not time-barred or finally assessed before 1 January 2011. On 18 August 2017, the Swiss Federal Supreme Court published seven cases in which the new legal rules have been applied and confirmed the repayment claim of the taxpayer for the late interest.

Amended rules for the refund of Swiss WHT

Based on Swiss domestic law, a Swiss resident taxpayer may only request the full refund of withholding taxes if the declaration duties have been fulfilled. According to circular letter no 40, published by the FTA on 11 March 2014, a negligent failure of the declaration duties leads to the rejection of the refund claim.

In a dispatch to the Swiss Parliament, the Federal Council proposed amended rules for the refund of Swiss withholding taxes on 28 March 2018. According to the Federal Council, the Federal Act on Withholding Tax is to be amended in such a way that a declaration which has been negligently omitted in the tax return shall not generally lead to a forfeiture of the refund claim. Therefore, the taxpayer shall be entitled to subsequently declare the relevant income until the appeal period of the tax assessment ends. The purpose of the bill is to limit a double burden of withholding and income tax to cases where there is an attempted

tax evasion. With the bill, the Federal Council wants to respond to the criticism on the reimbursement practice based on circular letter no 40.[10]

Domestic case law

BGer 2C_69/2017: Capital contribution principle

Based on Swiss domestic law, the repayment of (qualifying) capital contributions is generally exempt from Swiss income tax for Swiss resident individuals holding the shares as private assets and exempt from Swiss withholding tax. Only capital contributions by the direct shareholder which have been made after 31 December 1996 qualify for the above tax exemption. With respect to capital contributions into Swiss entities, such contributions are assessed and confirmed by the Swiss Federal Tax Administration (FTA) and strict *forma* rules apply, e.g. the booking into a separate account in the statutory balance sheet (so-called capital contribution reserves or "*Reserven aus Kapitaleinlagen*") and the notification of all changes to the tax authorities. In the present case, from 17 July 2017 the Swiss Federal Supreme Court had to assess distributions made by a German company to its Swiss shareholder with respect to the income tax exemption. First it decided that, in general, the capital contribution principle is also applicable to foreign companies. However, the application of the capital contribution principle must be proved by the Swiss taxpayer. In the present case, the distributions were made from a tax-specific capital contribution account (so-called "*steuerliches Einlagekonto*"). The court held that, since the German tax-specific capital contribution account as well as the Swiss capital contributions reserves account pursue different objectives, both accounts are not comparable to each other. From a Swiss law perspective, the capital contributions principle is only applicable if the contributions, premiums and subsidies are openly declared in the balance sheet. In contrast to the German law, the repayment of hidden capital contributions are not exempt from taxation. As a result, the payments were qualified as taxable dividends.

BGer 2C_1168/2016: Qualification of accruals

Based on Swiss tax law, provisions shall be released and added to taxable income to the extent that such provisions are no longer justified. In this recent decision (1 March 2017), the Federal Supreme Court decided that there is no right to retain a provision even if the tax authorities did not undertake any profit adjustments during the previous years. In particular, there is no breach of the principle of trust when the tax authority proceeds to examine whether the provisions are still justified. This applies even if the tax authority decided to forego any profit adjustments, although the possibility of such a procedure already existed at that time.

In case 2C_1082/2014, dated 29 September 2016, the Swiss Federal Supreme Court already decided that the tax authorities' task in the assessment procedure is limited to adding back value adjustments to the taxable profit, in case the respective value adjustment is either qualified as contrary to Swiss commercial law or not commercially justified. The tax authorities, however, are not obliged to review whether a commercially justified value adjustment is final or provisional at the time of the assessment (as this question has no influence on the tax factors of the respective assessment). The Swiss Federal Supreme Court stated that the determination of whether a value adjustment has final or provisional character (qualification as depreciation or provision from a tax point of view) can only be made in the tax period, in which the qualification impacts the taxable factors.

BGE 142 II 283: Tax neutral restructuring and the requirement of the existence of a business or part of a business

The present case concerns the restructuring of a partnership into a legal entity. Based on domestic law, a transfer of a business or part of a business to a legal entity is tax neutral,

insofar as the tax liability in Switzerland continues, the transfer happens at tax book value and the shares are not sold at a price above the transferred taxable equity within five years following the restructuring. The term "business" is characterised by a high degree of independence and represents an organisation which can independently exist. According to the court, no self-employed activity can be regarded as a business in that sense, since the term "self-employment" has a broader meaning than the term "business". Moreover, it is justified that the requirements for a tax neutral restructuring of a partnership into a legal entity should be interpreted strictly because such transactions are regularly accompanied by the transfer of business assets (membership in the partnership) into private assets (shares in the legal entity). This is important because gains from the sale of private assets are not taxable (in contrast to the gains from sale of business assets).

The court came to the conclusion that the management of real estate fulfils only under exceptional circumstances the requirements of a business. For the case at hand it stated that the general partnership did not own a large number of properties. The management activity was limited to administrative functions without further services. Therefore, the requirement of a business or part of a business for a tax neutral restructuring was not met.

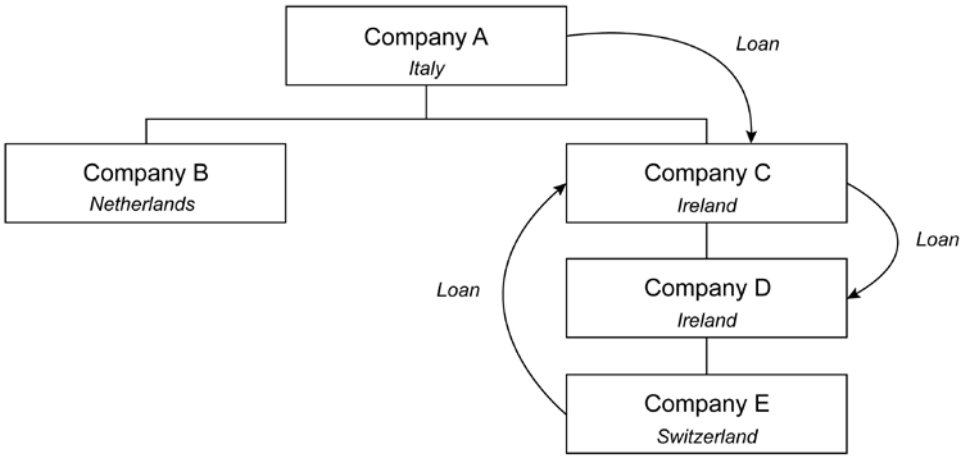
BGE 143 II 185: Exchange of information in the area of transfer pricing

This case from 13 February 2017 concerned a change made by a multinational group to its transfer pricing policy, notably an alleged transfer of functions and risks into Switzerland. Following this restructuring process, French tax authorities sent a request for information to the FTA on the basis of the information exchange procedure foreseen in the applicable double tax treaty. The French tax authorities were asking for various documents to assess the transfer prices between Swiss and French group entities. The requested information referred, *inter alia*, to the nature of the activities, substance in Switzerland, tax charge and tax status including the tax rulings of the Swiss taxpayer. The taxpayer argued that the information requested was not foreseeably relevant, as a transfer pricing study had already been provided to the French tax authorities. Despite the objections of the taxpayer, the Swiss Supreme Court considered the majority of the information to be (i) foreseeably relevant, (ii) well founded and in line with the principle of good faith, as well as (iii) not constituting a fishing expedition. The court discussed the criteria of "foreseeable relevance" in detail, referring to the OECD Model Tax Convention and its commentaries. It ruled that "foreseeably relevant" requires presence of a reasonable possibility that the requested information is relevant at the time of the request.

The decision follows the trend with regard to increasing transparency both at international and national levels.

A-7299/2016: Beneficial ownership (subject to appeal to the Federal Supreme Court)

On 28 February 2018, the Federal Administrative Court denied for withholding tax purposes the beneficial ownership of a parent company based in Ireland which received dividends from its Swiss subsidiary. The Irish company (hereinafter referred to as company D) is the sole shareholder of the Swiss subsidiary (hereinafter referred to as company E). The shares have been acquired from the sister company (hereinafter referred to as company B) and the purchase price was financed by a loan granted by the grandparent company also based in Ireland (hereinafter referred to as company C). For its part, the grandparent company was largely financed by loans granted by its parent company based in Italy (hereinafter referred to as company A). The structure can be depicted as follows:



In 2007, a dividend distribution from company E to company D was decided and (after the notification procedure was rejected[11]) 35% withholding tax was paid by company E and company D applied for the refund of the withholding taxes based on the (then applicable) Interest Savings Agreement with the EU.

According to the Federal Administrative Court, the beneficial owner of a dividend is the person who is entitled to dispose of the dividend. Thus, the recipient of a dividend must have the right to use it without being restricted by any legal or contractual obligations. Ownership structures within a group may lead to a factual obligation to pass the income. In such a case, the right to use may be denied, where there is evidence that the (indirect) shareholders have the sole power to decide on the use of the income without taking the interest of the controlled company (direct shareholder) into account. However, not every obligation to pass the income leads to the denial of the right to use. The denial of the beneficial ownership provides that there is a close connection or interdependency between the income and the obligation to pass it on.

For the present case, the Federal Administrative Court took into account that, at the time the dividend distribution was decided, company C and company D had an identical board of directors. Therefore, company D was *de facto* under the control of company C. The court adopted an economic perspective and argued that, because of the existence of the loan agreements between the group companies, the shares in company E had not been acquired by company D but rather by company C. The position of company C as lender was reinforced by the fact that it was the legal owner of the borrower. Based on this, the Federal Administrative Court qualified company D as a dependent intermediate company only and denied the beneficial ownership and thus, the refund of the withholding taxes. Not part of the decision was the question whether, e.g. company C as the beneficial owner would be entitled to a full (or partial) withholding tax refund.

BEPS

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

Action	Topic	Method of Implementation in Switzerland
5	Abolition of harmful tax regimes.	The new bill of the TP 17 will implement appropriate measures to replace favourable cantonal and federal tax regimes.

Action	Topic	Method of Implementation in Switzerland
5	Requiring substantial activity for preferential regimes.	A patent box, if implemented in the TP 17, 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 double tax treaties 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 double tax treaties are in line with the OECD minimum standard (see below).
15	Multilateral instrument.	Switzerland signed the BEPS convention and announced the adjustment of its double tax treaties according to 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 (see also above). The regulations on the spontaneous exchange of tax rulings are included in the revised 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 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 in Switzerland. In line with BEPS Action 5, only a summary, but not the whole ruling, will be spontaneously exchanged. The spontaneous exchange is *per se* not restricted to rulings; any information which might be of importance for the other state can be subject to a spontaneous exchange of information. However, for the latter the Ordinance 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. As regards the procedural rights, the person 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 endangered by a prior notification. The persons concerned have participation rights and rights to appeal, similar to other cases of exchange of information. The new transparency should not change the Swiss ruling practice *per se,* except that in cases subject to exchange, the tax authorities now request that the template for the exchange is completed and submitted in addition to 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. According to the State Secretariat for International Finance (SIF), the SIF, the FTA and the cantons are working together to ensure the uniform implementation of spontaneous administrative assistance throughout Switzerland.[12] During the course of 2017, the cantonal and federal tax authorities examined which existing tax rulings fall under the spontaneous exchange of information and contacted the taxpayer in order to verify whether the tax ruling shall be applicable after the end of December 2017, and if so, request that the BEPS template is completed electronically and forwarded to the FTA.

According to the OECD's annual review report relating to compliance with the minimum standards on Action 5, Switzerland has undertaken administrative and organisational preparations to be ready to exchange information pursuant to the new legal framework. Therefore, no recommendations on the implementation of the transparency framework have been made in the report.[13]

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-Country Reports (MCAA-CbCR), and the associated law (ALBA Act) including the ordinance (ALBA Ordinance). Therefore, MNEs in Switzerland are obliged to start drawing up a country-by-country report from fiscal year 2018 onwards. Switzerland will thus exchange country-by-country reports with 52 partner states from 2020 (status as at 21 December 2017).[14] Non-compliance with the country-by-country reporting obligation may be subject to a penalty of up to CHF 100,000. In case of non-cooperation with the FTA, additional penalties up to CHF 10,000 could be due during an examination process. The CbCR obligations already applied in many OECD states for fiscal year 2016 with the first filing obligations per end of 2017. Due to the implementation of the ALBA Act in December 2017, Swiss multinationals had the possibility to file these CbCRs via the parent surrogate filing procedure in Switzerland with the FTA.

BEPS Action No. 14: Making Dispute Resolution Mechanism More Effective

On 26 September 2017, the OECD released Switzerland's peer review report on the implementation of the BEPS Action 14 minimum standard. The report concludes that Switzerland meets most of the elements of the Action 14 minimum standard; more specifically, the prevention of disputes by allowing taxpayers to request bilateral Advance Pricing Agreement (APAs), granting access to the mutual agreement procedure (MAP) in all eligible cases, and using a pragmatic approach to resolve MAP cases in an efficient manner with sufficient resources for an effective MAP function. The peer review report shows that Switzerland has an extensive treaty network, with all treaties including a provision relating to MAP.[15]

BEPS Action No. 15: Developing a Multilateral Instrument (MLI) to Modify Tax Treaties

Switzerland has played an active role in the development of the MLI. Therefore, when the first signing ceremony took place on 7 June 2017 in Paris, Switzerland was one of the 68 states and territories which signed the BEPS convention. At the time of signing, Switzerland initially announced the adjustment of the double tax treaties with Argentina, Austria, Chile, the Czech Republic, India, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, South Africa and Turkey. These states are prepared to agree with Switzerland on the precise wording of the double tax agreements to be adapted via the BEPS convention, which is a formal requirement from the Swiss legal perspective.

Switzerland has decided on the following adoptions:

- Adoption of the new preamble on treaty abuse.
- Adoption of the mandatory provisions related to treaty abuse.
- Opting in for the mandatory and binding arbitration clause.

- Opting out of all other options.
- Adoption of the Principal Purpose Test (PPT) and not the simplified limitation of benefits clause.[16]

On 20 December 2017, the Federal Council initiated the consultation on the MLI agreement. Since the BEPS minimum standards can also be agreed through bilateral amendments to double tax treaties, the consultation proposal also covers, in addition to the MLI, respective changes to the double tax treaty between Switzerland and the UK. The consultation process lasted until 9 April 2018.[17] The proposal has to be approved by the Federal Assembly and is subject to an optional referendum.

Tax climate in Switzerland

Increasing tax transparency

Increasing tax transparency, which especially results from the implementation of the automatic exchange of information, has led to a flood of non-punishable voluntary disclosures during the last few months. 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.

TP 17

Despite the rejection of CTR III by the Swiss voting population, the reform of the current corporate tax system remains an important and urgent issue for both taxpayers and tax authorities. Switzerland is under increasing pressure from the EU as well as the OECD to change its "harmful" tax practices. Instead of only abolishing these regimes, the reforms aim to find solutions to maintain the fiscal attractiveness of Switzerland 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 would be abolished with the TP 17, at the earliest from 2020. The attractive participation deduction provisions for dividends and capital gains will remain unchanged. Switzerland currently has no plan to introduce CFC rules and generally remains a beneficial holding location.

Industry sector focus

Technology industry

Switzerland sees enormous innovative potential in blockchain technology. On 18 January 2018, the SIF announced that it has established a blockchain/initial coin offering (ICO) working group, which will review the legal framework and identify any need for action with

the involvement of the Federal Office of Justice, the Swiss Financial Market Supervisory Authority (FINMA) and in close consultation with the sector. The aim of this work is to increase legal certainty, maintain the integrity of the financial centre and ensure technology-neutral regulation. This clarification of the regulatory framework should help to ensure that Switzerland remains an attractive location in this area. The working group will report to the Federal Council by the end of 2018.[18]

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

The reform of the corporate tax regime, especially the TP 17, will continue to be at the centre of attention during the year ahead. The challenge for Switzerland will be to bring its tax regime into conformity with the international standards and still offer an attractive tax environment. The political consensus for a balanced proposal will be essential.

Furthermore, Switzerland actively took a position on the issue of taxation of the digital economy. According to a press release, Switzerland takes the view that the digital economy should be appropriately taxed. The existing taxation rules and possible new options should be discussed. To guarantee legal certainty, avoid over- and double taxation and combat the high administrative burden, especially in the case of start-ups and smaller companies, short-term measures should not be introduced.[19] It remains to be seen which concrete long-term measures will be proposed and implemented.

* * *

Endnotes

1. *See* KPMG, Clarity on Mergers & Acquisitions, The growing appetite of Swiss dealmakers, January 2018, https://home.kpmg.com/ch/en/home/insights/2018/01/clarity-on-mergers-and-acquisitions.html (last visited on 15 April 2018).
2. *See* Susanne Schreiber / Cyrill Diefenbacher, tax bill rejected, in: *IFLR International Briefings*, March 2017; http://www.baerkarrer.ch/publications/BK_Briefing_Corporate_Tax_Reform_III_rejected_by_referendum.pdf (last visited on 11 April 2018).
3. *See* https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-65885.html (last visited on 11 April 2018).
4. *See* https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-70181.html (last visited on 11 April 2018).
5. *See* https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-70181.html (last visited on 11 April 2018).
6. *See* http://de.baerkarrer.ch/publications/BK_Briefing_Automatic_Exchange_of_Information.pdf (last visited on 11 April 2018).
7. *See* Susanne Schreiber / Corinna Seiler, *Global Legal Insights – Corporate Tax 2017, 5th ed.,* p. 171 *et seqq*.
8. *See* https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-69518.html (last visited on 11 April 2018).
9. *See* https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-66940.html (last visited on 11 April 2018).

10. *See* https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-70256.html (last visited on 11 April 2018).
11. Decision of the Swiss Federal Supreme Court 2C_756/2010 from 19 January 2011.
12. *See* https://www.sif.admin.ch/sif/en/home/themen/informationsaustausch/spontane-amtshilfe.html (last visited on 11 April 2018).
13. *See OECD/G20 Base Erosion and Profit Shifting Project, Harmful Tax Practices – Peer Review Reports on the Exchange of Information on Tax Rulings*, p. 273 *et seqq*.
14. *See* https://www.sif.admin.ch/sif/en/home/themen/informationsaustausch/automatischer-informationsaustausch/cbcr.html (last visited on 11 April 2018).
15. *See OECD/G20 Base Erosion and Profit Shifting Project, Making Dispute Resolution More Effective – MAP Peer Review Report, Switzerland (Stage 1)*, p. 9 *et seqq.* and 53 *et seqq*.
16. *See* https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-66981.html (last visited on 11 April 2018).
17. *See* https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-69304.html (last visited on 11 April 2018).
18. *See* https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-69539.html (last visited on 11 April 2018).
19. *See* https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-70165.html (last visited on 11 April 2018).

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 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*.

Angelica M. Schwarz
Tel: +41 58 261 53 87 / Email: angelica.schwarz@baerkarrer.ch

Angelica M. Schwarz'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 Ph.D. candidate at the University of Zurich and joined Bär & Karrer in 2015.

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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