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The Unilateral Application of the OECD Standard on the Exchange of Information on Request: A Line that Should not be Crossed

On 19 February 2014, the Federal Council decided to apply the OECD standard on the exchange of information on request to all states with an existing double taxation agreement (DTA) that does not include said standard. The consultation on the draft law to implement this decision will extend until 5 February 2015. The ASBP views this project as unnecessary and contrary to the interests of Switzerland.

First, it is important to remember that Switzerland has already adapted over half of its network of DTAs (49 out of 85) to comply with the OECD standard for the exchange of information on request, by renegotiating them one by one. The Federal Act on the Unilateral Application of the OECD Standard on the Exchange of Information (GASI) would modify all the remaining DTAs, without negotiating them with the countries in question.

This change in strategy can be explained by the desire to appear in a positive light in the peer review conducted by the Global Forum on Transparency and Exchange of Information for Tax Purposes (an organisation close to the OECD). That is understandable, but it must be noted that Switzerland has a good chance of being admitted to phase 2 of the review in February 2015, on the basis of a supplementary report that details progress in other areas (i.e. disclosure requirements for bearer shares and the exception to the notification of persons affected by administrative assistance measures). Hence, the GASI is not indispensable, and would anyway come into effect too late to be taken into account.

Phase 2 of the above-mentioned peer review considers the effectiveness of administrative assistance rather than the legal framework supporting it. The number of DTAs complying with the OECD standard is therefore irrelevant. Moreover, Switzerland has no reason to feel ashamed of its network of DTAs, which will be further extended by the ratification of the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters, about which consultation has just begun. This convention will add around thirty names to the list of countries to which Switzerland will provide information exchange on request. That should meet OECD requirements; the GASI would thus apply only to three dozen countries with minor economic ties to Switzerland, such as Ivory Coast, Iran, Pakistan and Venezuela. It is not certain whether these countries would want to obtain information from Switzerland, nor whether they would put it to good use.

Furthermore, the GASI is not in Switzerland's interest for the three following reasons:

- Failing to renegotiate the remaining DTAs, which include clauses that differ from the OECD's current DTA model, would be a mistake. Previous negotiations have often allowed Switzerland to obtain additional advantages, such as lower foreign withholding taxes, tax exemptions for pension funds, or an arbitration clause. These are not insignificant gains; the remaining DTAs should benefit similarly from being updated.
- If Switzerland adopts the GASI, what incentive will countries that have just negotiated a DTA with Switzerland have to ratify it? Their main demand will have been met without any counterpart. By opting for the multilateral convention instead of a DTA, they will at least have to commit to reciprocity with Switzerland, as well as with the other signatories of the multilateral convention.
- Finally, and most importantly, the GASI would extend the OECD standard to the United States, although for the last five years they have refused to ratify the DTA protocol they signed on 23 September 2009. This protocol is essential for the US to be able to address group requests to Switzerland under the Intergovernmental Agreement (IGA), within the framework of the implementation of FATCA. Now that Switzerland would like to move towards a model 1 IGA, the fact that, through the fault of the US, the model 2 currently in place is not fully functional is a major advantage that should not be squandered. However, this is exactly the unfortunate outcome that would result from the adoption of the GASI.