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AUTOMATIC EXCHANGE OF INFORMATION - NOW ENACTED

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1. Introduction

As of 1 January 2017 the Federal Act on the International Automatic Exchange of Information in Tax Matters (AEOI Act) entered into force, which will result in an extensive collection of information and automatic disclosure to foreign tax authorities. This landmark in fighting tax evasion comes along with limitations to current data protection rights and essentially abandoning the famous Swiss banking secrecy.

2. Background

Starting off in 2014, the OECD delivered a new single global standard on automatic exchange of information to fight tax evasion and tax fraud. This was followed by the Declaration on Automatic Exchange of Information in tax Matters endorsed by all 34 OECD members, including Switzerland. In October 2014 the Swiss Federal Council decided on a negotiation mandate with other countries in this matter.

In November 2016, the bilateral agreements on taxation at source with Austria and the United Kingdom were terminated as a consequence of the introduction of the automatic exchange of information. An additional consultation was held on introducing the AEOI with a series of additional countries.

Finally, on 1 January 2017 the Federal Act on the International Automatic Exchange of Information in Tax Matters (AEOI Act) and the complementing documents entered into force since when the relevant financial institutions are collecting the respective information. We will give an overview of the newly existing legal framework.

3. Overview

3.1 Scope of the AEOI Act

Where - Geographically, the AEOIA applies between Switzerland and its partner countries, which are either signatories to the multilateral agreement of 29 October 2014 or which are defined in

another international agreement. Currently, Switzerland has 58 partner states including the 28 European Union member states. However, the US does not participate in the OECD standard as it implements its own standards based on FATCA[1].

When - With 37 states (incl. the EU members) Switzerland will exchange information from 2018 on, whereby the collection of information for these countries started on 1 January 2017 (status as of 10 January 2017)[2]. For the remaining 21 states exchange is scheduled for 2019. Other countries, the so-called "early adopters" did however already collect information in 2016 and are beginning to exchange it from 2017 on. Amongst these are the EU countries, Argentina, Uruguay, Guernsey and Isle of Man as well as Cayman Islands, Bermuda and Barbados.

How - The process of collection of information starts at the level of financial institutions subject to such obligation. It encompasses any institution administering, depositing or investing assets and certain insurances, which are not excluded from the scope. The relevant reference then is article 3 AEOIA, which lists institutions excluded from the reporting obligation (e.g. public institutions like the Swiss Confederation and Cantons, institutions related to pension funds, international organisations, national banks, certain collective investment schemes and - if the trustee is a reporting entity - trusts). After registering themselves as reporting institution with the Federal Tax Authority (FTA), the respective financial institutions will collect a defined set of information and deliver this information to the FTA, which will then forward this information to foreign tax authorities.

What - The information collected and disclosed is defined in section I of the annex to the multilateral agreement and can be categorised into (i) identification information (name, address, date of birth and tax identification number), (ii) account information (name of the financial institution and account number) and (iii) financial information such as interest, dividends, receipts of specific insurance policies, credit balances on account and proceeds from the sale of financial assets.

Further - Besides this general scope of application, the following aspects are worth pointing out:

- Certain accounts are excluded from the AEOIA, if they concern pension funds or similar or accounts with a low tax evasion risk (such as accounts of an excluded institution or rental deposits);
- The financial institution has to inform the taxpayer in detail about the collection of information. This provision is essential to comply with the Data Protection Act;
- Taxpayers have the possibility to voluntary disclosure of undeclared assets;
- Violations of the notification obligations can lead to fines amounting to CHF 250'000;
- The AEOIA allows for certain simplifications in the collection process, such as the use of third party services supporting the notification and duty of care obligations or refraining from

[1] http://www.swissbanking.org/en/topics/current-issues/the-automatic-exchange-of-information/aeoi?set_language=en

[2] https://www.sif.admin.ch/sif/en/home/themen/internationale-steuerpolitik/automatischer-informationsaustausch.html

collecting the relevant data in case of accounts showing a total balance of maximum CHF 250'000.

3.2 Complementing Legal Documents

The AEOI Act is complemented by essentially three documents, which all entered into force on 1 January 2017 as well:

(i) The Multilateral Agreement of 29 October 2014: This agreement specifies the information to be collected and also the duty of care in respect of the various accounts (new/existing, of natural persons or legal entities); (ii) The Convention on Legal Assistance in Tax Matters of 25 January 1988 as amended on 27 May 2010; and (iii) The Ordinance on the international automatic exchange of information in tax matter, which further details the AEOIA especially the financial institutions excluded from the AEOIA's scope, the excluded accounts, the general notification duties, duties of care, and registration duty. It also elaborates on the treatment of information received from foreign authorities and provides for alternative provisions to the OECD Commentaries.

4. Conclusion

For Switzerland as the administrator of substantial global assets, an easy implementation of the automatic exchange of information is crucial. Therefore, the harmonisation through a global standard and reciprocity as well as compliance with legal and technical data protection were factors substantially contributing to the acceptance of the OECD standard and the AEOIA[3].

Even though, this development was probably inevitable to revise Switzerland's reputation as a top tier financial market, it cannot be ignored that many foreign taxpayers withdrew their assets from Swiss bank accounts, in view of the upcoming introduction of the automatic exchange of information[4].

And last, the Data Protection Act will experience a limitation to its applicability despite remaining fully in force in its current form. This limitation derives from the fact that towards the Federal Tax Authority taxpayers can only request information about the data disclosure to foreign tax authorities and claim correction of wrong data based on technical defaults. The taxpayer has no right to inspection of the files stored by the Federal Tax Authority; also it has neither a remedy to have the delivery be checked upon legal compliance nor the right to blockage or deletion of data[5]. Towards the financial institution the taxpayer can rely upon the existing rights under the Data Protection Act.

[3] http://www.swissbanking.org/en/topics/current-issues/the-automatic-exchange-of-information/aeoi?set_language=en

[4] www.nzz.ch/automatischer-informationsaustausch-auslaendische-steuerpflichtige-legen-vermehrt-ihre-konten-offen-ld.107265

[5] https://www.postfinance.ch/en/about/company/management/leadership/compliance/info.html

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