

Exchange of Tax Information: The End of Banking Secrecy in Switzerland and Singapore?

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Introduction

At their London Summit in April 2009, the G20 Leaders proudly declared: “The era of banking secrecy is over.” The OECD had just published a “grey list” of uncooperative countries, *i.e.*, countries that had not yet adopted the “standard” on exchange of information. The scope of this article is to examine whether this statement is true. Is exchange of information really the panacea against tax evasion? Did it eradicate the banking secrecy cultivated for centuries by Switzerland and later also by Singapore or does the protection of privacy still have a role to play in the new global order?

In the first section, I will depict the origins of the banking secrecy and its development in recent years until the breakthrough of the OECD transparency rules. The second section will deal with legal restrictions and practical difficulties encountered with the implementation of exchange of information mechanisms, by taking the example of Europe. Are they possibly a source of competitive advantages? The third and last section will be devoted to the general assessment and point out the importance of a global governance mechanism.

I. From Privacy to Transparency

1. Banking Secrecy in Switzerland and Singapore

1.1. Banking Secrecy in Switzerland. The Swiss banking secrecy basically acquired its renowned status for two reasons: Switzerland’s legendary neutrality and its stability.¹ The 20th Century has coined the concept of banking secrecy: Due to intensive spying activities



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before World War II, banking secrecy, so far customary law, had to be tightened and enacted² in order to protect the persecuted Jews. In other words, banking secrecy was founded to shield Jewish property from the Nazis. However, recent research has shown that this justification is a myth invented by the banks in 1966.³ Since then, banking secrecy became not only a wonderful business model with allegedly humanitarian goals, but it became so deeply rooted in the Swiss collective conscience that any criticism of the banks and their secrecy was regarded as a critique against the nation as a whole.

While the historical roots of the bank secrecy can be challenged, there is no doubt regarding the second reason for its existence: Switzerland has enjoyed decades of political, social, economic and monetary stability and thus gained the confidence of nations and customers.⁴

These two grounds alone do not explain how Switzerland managed to attract capitals from high-tax neighbouring countries and to uphold strict banking secrecy in spite of ceaseless pressure from outside. Since 1901, and in particular since the First World War, France⁵ had been raising its taxes: income tax rose from two percent in July 1914 to 62.5 percent in 1920 and up to 90 percent in 1924; inheritance tax rose to 38 percent. Monetary and political instability helping, assets worth 6 to 8 billion Swiss Francs were shifted from France to Switzerland. With all these funds, partly in foreign currency, the Swiss financial sector started playing a major role in the capital markets and acquired leverage power by lending money to several governments. Member states of the League of Nations insisted on the conclusion of Double-Taxation Agreements (DTAs) comprising rules against tax evasion already in 1920. But the French Government did not manage to include a clause on exchange of information (EOI) in the DTA of 1937—even though it had officially stated that such a clause would be a *conditio sine qua non*.⁶ Encouraged by the precedent of the United States which imposed its standard exchange of Information clause in its DTA with Switzerland in 1951,⁷ France tried to include such a clause in a re-negotiated DTA, but at the same time, the Government needed a credit of 100 million Francs. Hence France failed again with its DTA

of 1953, but the negotiators managed to keep the face by including a totally ineffective EOI-clause.⁸

As we see, neutrality and stability are by far not the only reasons for the strict Swiss banking secrecy. A further reason explains why Switzerland was not ready to abandon its banking secrecy even in case of tax evasion⁹: The Swiss traditionally felt sympathy for foreigners evading tax from countries where taxes are too high,¹⁰ “as a reflex of defence against the almightiness of the state.”¹¹ However, since tax rates have risen in recent years also in Switzerland, albeit moderately compared to its neighbours, and since Swiss authorities are themselves confronted with illegal avoidance manoeuvres, there has been a certain evolution of mentalities in recent years.¹²

On these grounds, Switzerland never included any exchange of information clause in its double-taxation treaties with other states, with the above men-

tioned exceptions. One of Switzerland’s recurrent argument, since the very beginning, had been that such a clause would not reach its goal as long as there are third-party countries not bound by a similar provision, where the assets could find a shelter. As a consequence,

Switzerland always made express reservations, which would in any case empty EOI-clauses from their very substance.¹³ Along with Austria, Belgium and Luxembourg, Switzerland expressly introduced a reservation on Art. 26 OECD Model Convention.¹⁴

1.2. Banking Secrecy in Singapore. Singapore’s development into an international financial centre that has surpassed Hong Kong and Tokyo is due not only to its “strategic geographical location on traditional international trade routes,”¹⁵ but also thanks to targeted incentives of a government who had rightly “identified financial services as an integral part of the economy.”¹⁶ Without doubt, Singapore’s highly successful private wealth management industry, but also its ability to attract foreign companies, is due to its tradition of strict confidentiality. The roots of Singapore’s banking secrecy are found in the common law¹⁷ and in section 47 of the Banking Act¹⁸ passed in 1970, revised in 1985.

Singapore, as it is well-recognized internationally, is not a tax haven; this is evidenced by the fact that taxes are not excessively low and that “the country

Countries cultivating a tradition of banking secrecy have to live with a new international order since the standards for exchange of information have been imposed on them.

signed comprehensive DTAs with major countries, as opposed to merely Tax Information Exchange Agreements (TIEAs).¹⁹ In these DTAs, Singapore also took care to protect its banking secrecy. However, unlike Switzerland, Singapore did not expressly make a reservation to Art. 26 of the OECD Model Convention²⁰; it introduced a standard “domestic interest” clause in its DTAs,²¹ meaning that Singapore could not exchange information on taxes it does not itself levy or information to which domestic tax authorities do not have access, due, for instance, to laws protecting the banking secrecy. This way too, banking secrecy was adequately preserved.

2. Evolutions in Recent Years and Breakthrough

As evidenced above, the exchange of information between national tax authorities has been on the table of international negotiations since the beginning of the 20th Century. It became a major issue with the construction of the European Union.

In 1977, the Council passed a Directive concerning mutual assistance between the competent authorities of the Member States in the field of direct taxation.²²

In 1988, a joint Council of Europe/OECD Convention on mutual administrative assistance in tax matters was concluded in Strasbourg.²³

One of the biggest steps achieved by the EU at the beginning of the 21st century was its Savings Tax Directive of 2003.²⁴ Its aim is to enable savings income in the form of interest payments to be effectively taxed in the country of residence of the taxpayer. But it also envisages introducing a Europe-wide automatic exchange of information. However, the biggest achievement was certainly to associate third-party countries, including Liechtenstein, Switzerland and the United States but, unfortunately for the EU, not Singapore, Hong Kong, Dutch and English Territories. Switzerland made it clear that it would introduce a 35-percent withholding tax on this savings income—a system already in place for its own citizens—but that it would not participate in the automatic exchange of information. Given Switzerland’s successful negotiation, Austria, Belgium and Luxembourg insisted and achieved as well to levy a withholding tax instead of the automatic exchange of information, during a transitional period.²⁵

The pressure by the OECD increased with its project on harmful tax practices,²⁶ launched in 1996, which resulted in a blacklist of seven non-

cooperative tax havens not willing to put in place effective exchange of information and transparency by January 2006.²⁷ In 2000, the OECD published a report called “Improving Access to Bank Information for Tax Purposes.” According to the ideal standard set out by the report “all Member countries should permit access to bank information (...) so that tax authorities can (...) engage in effective exchange of information with their treaty partners.” Indeed, the OECD sees exchange of information as the perfect tool to fight against tax evasion and tax fraud in an increasing globalized world.

The financial crisis hastened the developments.²⁸ Governments had to bail out their major banks and suffered under recession and huge fiscal deficits. The availability of new funds became urgent. Then the UBS Affair broke out (see sidebar A). On February 18, 2009, the Swiss Financial Market Supervisory Authority FINMA rendered a devastating decision (for the banking secrecy—but hopefully a good one at least for UBS): very comprehensive confidential data regarding 285 bank accounts was handed over to the United States, notwithstanding pending appeals. This decision would be declared unlawful by the Federal Administrative Court of Switzerland on January 5, 2010, but too late. The harm was done. Watching closely how Switzerland dealt with the United States, members of the G20 decided to make the final move and to put an end to banking secrecy for good: exchange of information would become compulsory for all nations. Under this unbearable pressure, the Federal Council of Switzerland declared on March 13, 2009, along with the Governments of Austria, Belgium and Luxembourg, that it would withdraw its reservation under Art. 26 of the OECD Model Convention. These countries were nonetheless put on a “grey” list of countries that are failing to comply with so-called “internationally agreed tax standards.”²⁹ Although placed on this list as well, Singapore had been quicker to react: it had announced its intention to endorse the OECD standard already at the beginning of February.

To date, all countries placed on the grey list have complied with the minimum requirements, *i.e.*, have signed 12 DTAs or protocols to existing DTAs including an EOI clause on the basis of Art. 26. Between the G20 London Summit of April 2, 2009, and April 14, 2010, DTAs/TIEAs signed rose from 65 to the impressive figure of 457.³⁰ The basement for greater fiscal transparency is laid. But does mutual assistance kill banking secrecy?

II. Differentiated Implementation: A Source of Competitive Advantages?

1. Efficiency in Spite of Limitations?

The first paragraph of Art. 26 OECD Model Convention contains the main rule regarding exchange of information, recapitulated by the Commentary as follows³¹: “The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes of every kind and description imposed in these States even if, in the latter case, a particular Article of the Convention need not be applied.” It is under the correct application of domestic provisions that the exchange of information is supposed to be a remedy against tax fraud and tax evasion.³²

Depending on what the parties agree, the exchange of information can proceed through three, possibly combined, forms: (1) on request, (2) automatically, or (3) spontaneously.³³

After examining the limitations named in the Convention³⁴ or likely to be encountered, I will look how efficient exchange of information is in practice considering these limitations and compare the conventional procedure with other existing means of acceding to fiscally relevant information.

1.1. Limitations. The exchange of information is not unlimited. Article 26 Paragraph 3 sets out the limits, under which requested states are not bound to assist the requesting state. These limits are imposed by the axioms of sovereignty and equality of the parties, from which it flows that “it is impossible for one state to be reduced to be merely instrumental to the aims of the other state. Obligations under international law are bound under the domestic political interest of the Convention parties, whose freedom to be able to maintain their tax legislation and practical implementation is what is most essential in this respect.”³⁵

Hence, the Convention recognises the requested state’s *sovereignty*³⁶: The state does not have to (1) carry out administrative measures at variance with its laws and practice (or those of the other party), or (2) supply information which is not obtainable under its laws or normal course of the administration (or those of the other party). However, Paragraph 4 clarifies that the requested state “shall use its information gathering measures to obtain the requested informa-

tion, even though [it] may not need such information for its own tax purposes.”

As explained by the Commentary,³⁷ the concept of sovereignty also implies that the requesting state “cannot take advantage of the information system of the requested state if it is wider than its own system. Thus a state may refuse to provide information where the requesting state would be precluded by law from obtaining or providing the information or where the requesting State’s administrative practices (e.g. failure to provide sufficient administrative resources) result in a lack of reciprocity.” However, the Commentary specifies, the *principle of reciprocity*³⁸ should not be applied too rigorously, as this could otherwise frustrate the effective exchange of information.

The *rights of taxpayers*³⁹ are also a valid reason to limit the exchange of information. Domestic laws can provide for the notification of the taxpayer and for judicial review. Such procedures may on one hand have the disadvantage of slowing down the exchange process, but on the other hand they might enhance the process by helping to prevent mistakes “(e.g. in cases of mistaken identity) and facilitate exchange (by allowing taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting State).”⁴⁰ As a further right, the Commentary mentions a ban of self-incrimination of the taxpayer.⁴¹

Letter (c) of Paragraph 3 states that the requested state is not obliged to supply information “which would disclose any trade, business, industrial, commercial or *professional secret* or trade process, or information, the disclosure of which would be contrary to *public policy* (ordre public).”⁴² The Commentary states that Paragraph 2, requiring the exchanged information to be treated secretly, should be taken into consideration when interpreting this letter (c).⁴³ *Banking secrecy* is expressly excluded from these secrets by Paragraph 5.⁴⁴

Practical limitations come to mind, such as communication defects due to different languages, noncompliance with the Convention, which will be examined below, and, in particular, *costs related to the exchange of information*. Indeed, pursuant to the axiom of equality between treaty partners, it would be unacceptable for a state and its citizens and potential information suppliers such as financial institutions to bear the costs of another state’s fiscal regime. A contracting party cannot be asked to hire dozens of civil servants or judicial clerks just to please the other party. On this point, the Implementation Manual wants to be reassuring.⁴⁵ It remains to be seen

what will happen concretely with the recently signed agreements, where costs were never at issue.

As it follows from the above, states have large discretion in allowing or denying a request, and some proceedings might entail certain delays. However, the Commentary is clear: the limitations contained in the Convention may not unduly delay or even frustrate the exchange of information.

1.2. Efficiency in Practice. In 1990, Gangemi⁴⁶ concluded in his report that “different legal restraints and administrative practices, different appreciation of sensitive issues, bureaucratic hindrances have been reported to be some of the major obstacles to the exchange of information. Based on the above premises, it is not surprising that the amount of information exchanged on request or spontaneously among treaty countries is rather limited.” He speaks of a few hundred transmissions per year. Likewise, Schenk-Geers, citing a 1994 OECD Survey of Current Practices, complains about “the hindering effects which are based on some nationally enshrined ‘taxpayer’s guarantees,’ because they can lead to lengthy procedures.”⁴⁷ Has practice evolved since these reports and did the exchange procedures become efficient?

The current situation within the EU has been assessed during the 2009 Santiago Congress of the European Association of Tax Law Professors (EATLP) on the basis of national reports of 13 EU Member States.⁴⁸ resulting in a highly informative General Report.⁴⁹ It is worth stressing here some of the conclusions, while leaving other ones for the next chapter. Looking at the efficiency of the tax information in relation with the Directives 77/799/EC (direct taxation)⁵⁰ and 2003/48/EC (savings)⁵¹ encountered previously will give us a good idea of the actual efficiency of the less formalized exchange procedure under Art. 26 OECD Model Convention:

- **Allowed activities for the assessment of taxes.** The tax authorities’ activities include “tax audits, examinations and investigation of different kinds and requesting information and documents from the taxpayer” as well as requesting information from third parties, with limitations as regards Austria and Belgium in reason of their banking secrecy.⁵²
- **National structure.** Research of the requested information is obviously easier in small and centralised countries like Luxembourg than in big and federally structured countries like Germany.⁵³
- **Languages.** In its statement of March 2007, the European Economic and Social Committee declared that the language problems are often “a barrier in

the fight against tax fraud between the Member States.”⁵⁴ Languages can be a source of errors and delays. While imposing English as the sole language of communication would be intolerable to some Member States, a compromise within the EU could consist in using English, French and German. Standardised forms, electronic transmission, as well as translation staff within the tax authorities are seen as additional means of relief.⁵⁵

- **A time problem.** The report shows that there are big disparities between the various Member States as regards the time to answer requests.⁵⁶ While the Finnish tax authorities manage to answer within three months in 85 percent of the cases, the Dutch are satisfied with having reduced the answering time from 13.6 months in 1992 to 6.6 months in 1995.⁵⁷ With good reason, the authors of the Report underline that too long delays cause serious problems and render the whole process ineffective.
- **Figures.** The contributors to the Santiago Report managed to obtain valuable information from several countries⁵⁸: From Germany, there have been an average of 400 requests a year between 2002 and 2007; from Italy under 100 requests per year; from the UK 150 requests in 2001 and 325 in 2007; and from Luxembourg between 10 and 15 (but the country received about 800 requests per year, under the Directives and bilateral agreements). Compared to these low figures, Belgium made 3,000 requests a year on average; and the Netherlands 1,553 in 2007. The Report explains that automatic and spontaneous exchanges are used more often. It can also be said that the flow of information is greater between neighbouring countries. On March 12, 2009, the Swiss tax authorities reported a total of 30 incoming requests of mutual assistance regarding “tax fraud and the like” within the last ten years, the collective request by the United States of summer 2008 concerning 285 persons obviously counting as one.⁵⁹ An astonishing figure has been reported by Luxembourg: In 2006, it sent information concerning bank accounts in 2,300,000 cases! This figure “refers to cases where Luxembourg bank clients accepted the communication of information to the revenue authorities of their home country in order to avoid the withholding tax on interest” under the Savings Directive.⁶⁰ This is good news for the principle of the withholding tax, which had been—and still is—very much criticized by EU Members not benefiting from this privilege; it shows how ef-

fective withholding tax can be in practice. It must therefore be acknowledged as a valid alternative to automatic exchange of information.

- **Failure to provide information.** Finally, the report lists several reasons explaining why the exchange of information is not more efficient. There seems to be a general distrust among the exchanging authorities. Interestingly, Luxembourg points out that given the scarce resources of tax authorities, the mutual exchange procedure precludes the state from collecting its own taxes.⁶¹ This contravenes the optimistic views of the OECD reported above.⁶²

All of these elements show that exchange of information within the EU is far from being effective today.⁶³ This lets me conclude that the exchange under the less formalised OECD framework will be even less effective, given the patently bigger disparities between nations of the world.

Another question is whether even a properly functioning exchange of information framework could be regarded as truly effective, as compared to other potentially available means of gathering information. This is the subject of the following subchapter.

1.3. Efficiency Compared to Other Means of Acquisition. Other means of acquisition of fiscally relevant information have made headlines around the world in the last few years.

Firstly, there is the phenomenon of *whistleblowing*, made public by Bradley Birkenfeld, a former UBS employee in the United States, who revealed illegal private banking activities practiced by UBS. This launched the whole UBS scandal. Not very common in Europe, whistleblowing had been encouraged informally by the IRS for years. The process was eventually formalised in 2006, when Congress passed appropriate legislation. Whistleblowing is highly rewarding, as the informant may be granted 15 to 30 percent of the amounts collected, where the amounts involved exceed USD 2 million.⁶⁴ Under these circumstances, there is no need to explain how effective this kind of acquisition of data is in practice, although the whistleblower might have to face a few months of imprisonment. Such a practice is clearly condemned under the criminal provisions of banking secrecy laws of Singapore and Switzerland.

Secondly, *illegal acquisition* of data has been practiced in recent years by several tax authorities. In some cases, stolen data has been seized by the judiciary and then happened to be passed over to the tax authorities (like in the HSBC-Falciani case⁶⁵), in other cases, tax authorities openly bought CDs containing the relevant data from thieves (like in the Credit Suisse/Germany

case⁶⁶), in others—and this constitutes by far the most reprehensible approach—tax authorities, through secret service agents, directly induced bank employees to steal the data, paid them highly and supplied them with false identities to allow them to flee (as in the LGT Treuhand case). This is the kind of “almightiness of the state” over its subjects that must clearly be condemned and fought, with all means. Notably, acquiring and effectively using the data for tax purposes is not necessarily the same. The data might be insufficient to assess someone’s taxes, or the courts could decide that evidence of illegal provenience has to be set aside—both cases hindered the use of the stolen data to a significant extent in the cases of Kredietbank Luxembourg which surfaced in 1994.⁶⁷

Thirdly, and most importantly, “voluntary” disclosure has to be mentioned here: While the UBS Case is about to procure the United States 4,450 names of alleged tax evaders, the fear imposed by the Government on its citizens and taxpayers resulted in about 14,000 UBS clients pleading and negotiating tax-evasion charges.⁶⁸ The general state of fear after the Liechtenstein case brought the German government EUR 626 million, of which 404 million were not related to LGT Treuhand.⁶⁹ Similarly, while 1,100 proceedings have been launched so far by Germany in the Credit Suisse case, no less than 13,000 voluntary disclosures were registered so far.⁷⁰ Given these figures, it appears clearly how little importance of exchange of information becomes, in terms of a system to assess taxes. However, as an additional means to frighten citizens, it is apparently quite useful.

2. Competitive Advantages Thanks to Different Standards?

2.1. Implementation. While it is clear that the implementation of the exchange of information standards may not be used to impair the efficiency of the process (by artificially creating too many limitations or by unduly delaying the mutual assistance) I will compare the methods of implementation chosen Switzerland and Singapore in order to see whether there are comparative advantages in terms of protection of the banking secrecy.⁷¹

When the Swiss Government announced it would adopt the standard on administrative assistance in fiscal matters, it acknowledged that “the wish of the people of Switzerland for appropriate protection of personal privacy is still firmly entrenched.”⁷² It fully endorsed banking secrecy.⁷³ So did Singapore’s Government.⁷⁴

Switzerland was removed from the OECD grey list in September 2009, when it had signed 12 DTAs.⁷⁵

To date, 10 revised DTAs have been approved by parliament (but are not yet in force),⁷⁶ six others have been signed, and 10 initialled.⁷⁷ Others are to follow, in priority with fellow OECD members.

In order to implement the DTAs, an ordinance on executing administrative assistance has been drafted, which entered into force on October 1, 2010.⁷⁸ A proper framework law will follow as soon as possible.

Singapore was removed from the OECD grey list in November 2009, after having signed a protocol implementing the standards with France. On May 1, 2010, 18 treaties with the new EOI provision were already in force.⁷⁹ It was much quicker than Switzerland in implementing the standard into its national order.⁸⁰ Indeed, its Exchange of Information Act⁸¹ came into force already on February 9, 2010.

2.2. Exchange of Information: On Request vs. Automatic. Switzerland and Singapore have made clear from the beginning that they would only accept exchange of information upon request. Although a combination of all three methods of exchange of information is likely to be more effective,⁸² automatic and spontaneous exchange methods will not become standard on a global level.⁸³ Automatic exchange is more likely to be imposed one day on Switzerland, already closely bound to the EU through a variety of bilateral treaties and the special agreement on Savings Income, than on extra-European countries like Singapore. This is why Switzerland fights against such additional pressure and insists on the use of withholding taxes,⁸⁴ which have proven to be truly effective. This endeavour seems to bear its fruits, as the system of withholding taxes (informally known as “Rubik”) is expected to be negotiated with Germany and the U.K. as of the beginning of 2001.⁸⁵ If this is the case, it would set an example on all other European countries and the EU as a whole, and automatic exchange of information with Switzerland would be swiped off the table for years to come.

2.3. Exclusion of Fishing Expeditions, Subsidiarity, Clarity of the Request. Both Switzerland and Singapore insisted on the prohibition of fishing expeditions. The requests have to be restricted to specific, individual cases. The adequate criteria to avoid fishing expeditions have been listed under Art. 5 Paragraph 5 of the OECD Model Agreement on Exchange of Information on Tax Matters adopted in 2002.⁸⁶ These criteria are reproduced in Art. 5(3)(b) of the Swiss OACDI (see endnote 78) and Article 1 to 6 of Singapore’s Eighth Schedule.

Furthermore, both countries require that the requesting state has exhausted its own domestic pos-

sibilities to acquire the information (exhaustion rule/subsidiarity principle).

Additionally Switzerland made it clear during the negotiations that in order to establish a banking relation between a taxpayer and a certain bank, the latter has to be expressly named, or alternatively the international banking number (*IBAN*) has to be provided.⁸⁷

In practice, the competent authorities and, lastly, the courts will circumscribe the proper standard for incoming requests; there might well be more diverging practices between states in future.

2.4. Procedure and Taxpayer’s Rights. Both Switzerland and Singapore endorse the taxpayer’s rights in a way or another.⁸⁸ In Switzerland, the request for mutual assistance opens a full administrative procedure, beginning with the examination of the request, and if compliant with the DTA and the domestic rules, with the notification of the concerned person, and ending with a final decision⁸⁹ subject to appeal.⁹⁰ The concerned person may participate in the proceedings⁹¹ and have access to the files. The Federal Tax Administration may require information from cantonal tax authorities and from the persons detaining the information, such as banks.⁹² The person detaining the information has to submit it within the set deadline⁹³ and means of constraint may be ordered.⁹⁴ The appeal is open only against the final decision,⁹⁵ this means that the data has to be sent to the administration before the concerned person can object to it. The procedure is simplified if the concerned person consents to the exchange of information with the foreign authority.⁹⁶

In Singapore, the Comptroller begins with serving notice of the request to the persons identified in the request as the concerned person and as the person believed to be in possession of the information. He has the power to obtain information according to the usual provisions of the Income Tax Act.⁹⁷ Where he requires information and believes that the information is protected from unauthorised disclosure,⁹⁸ he may apply to the High Court, which, in turn can lift the banking secrecy, where justified in the circumstances of the case and not contrary to public interest.⁹⁹ The order of the High Court can be challenged by the person against whom the order is made or the person in relation to whom the information is sought.

The procedure in Singapore focuses on the protection of the banking secrecy. Although the Swiss Federal Tax Administration is not authorised to use the confidential information in case the final decision is turned down after judicial review, there is no possibility to prevent the transmission of such infor-

mation beforehand; hence there is a risk that sensitive information gets out of its protected sphere. From this perspective, the Singaporean procedure creates a safer environment for the bank customer. It is worth noting that the judicial review might take some time, but none of these procedures are intended to unduly block the exchange of information.

The right of the concerned person to have access to her files and to participate in the procedure or to be notified of the request of information can be restricted in both legal orders, for example due to pending investigations.¹⁰⁰ In such a case, an obligation of silence will be imposed on third parties, such as banks. This is problematic insofar as the taxpayer cannot defend himself and where the bank is not entitled or capable of defending its customer's interests. The restriction should therefore be circumscribed to the most severe crimes (such as organised criminality, drug trafficking, abduction *etc.*), only where there is a risk of collusion or escape, and limited in time.¹⁰¹

2.5. The Rule of Law. Both Switzerland and Singapore emphasised the importance of the rule of law, which, together with political stability, is the foundation of bank customers' confidence.¹⁰²

The very short period of time Singapore took to enact exchange of information provisions shows Singapore's commitment to giving as soon as possible solid legal grounds to the new procedures. Another matter of time however has harshly breached the taxpayers' trust: While Singapore announced it would accept the new standards in February 2009 and accordingly signed a protocol with France in November 2009, this protocol will be applicable retroactively already as of January 1, 2009.¹⁰³ The other protocols signed will fortunately have effect beginning only on January 1, 2010. Retroactivity is always a delicate question and opposed to legal certainty.¹⁰⁴ It can be accepted, with precaution, where the concerned subjects knew that a policy change would occur (but this was not the case before 2009) or where there is a "risk of extensive improper use or misuse of an existing law"¹⁰⁵ (which cannot be said here).

Major problems in Switzerland concerning the rule of law were actions taken by the authorities without or against legal grounds, such as the data handed over to the United States in the UBS case or the agreement signed by the Government with the U.S. Government on August 19, 2009, enabling the transmission of additional 4,450 names in the UBS case. Both actions were eventually held unlawful but caused negative headlines around the globe and panic among customers of Swiss banks.

Finally, the confidence in a state depends on his reaction regarding stolen data. A credible state does not on one hand claim to enforce the rule of law and, on the other, act as a buyer of stolen goods or outright as a thief. The recent affairs between France, respectively Germany, and Switzerland halted the negotiation processes, until a solution was found: Switzerland is not going to provide assistance where the requesting state got the information from illegal provenience. This principle was included in the Swiss OACDI,¹⁰⁶ but could arguably be derived directly from the principle of good-faith applicable between two treaty partners.¹⁰⁷ In this sense, in case Singapore was to be concerned in turn, it could refuse assistance as well. However, given the alleged accuracy of the data, mutual assistance might not be necessary at all.

III. Assessment and the Role of Peer Review

1. The End of Tax Evasion but Long Live the Banking Secrecy!

Within one year, the banking secrecy tolerating tax evasion has come to an end. In this respect, the declaration of the G20 was correct. But this was less due to the newly adopted standards of exchange of information than through a campaign of fear launched by dominant states against their own citizens, without hesitating to use illegal means to achieve their ends. Indeed, there are too many obstacles between nations to make the mutual assistance effective. The exchange of information will be allowed only on a case-by-case basis, only where there is a strong suspicion of fraud or evasion. Although there are differences regarding the enactment of the new standards, not these differences or the concrete limitations but the reliability of the legal framework, the fairness towards taxpayers and adequate judicial review will be determinant in offering more security for privacy as a whole. The efforts undertaken by the Singaporean and Swiss Governments seem to bear their fruits. If the private banking sector in Singapore and Switzerland has been successful in 2009¹⁰⁸ in spite of the crisis, it is due to competence, a strong regulatory framework and discretion. The banks continue to protect the private sphere of their customers, while elsewhere the latter are crushed by almighty governments.¹⁰⁹ In such a world, privacy is a precious good and insofar the banking secrecy remains a competitive asset.

Switzerland being progressively associated to the EU and holding large assets belonging to European

citizens will be more under pressure than Singapore in the years to come. This is why it has to be very vigilant and must safeguard the principle of the rule of law. In this sense, it is positive that it firmly rejects cooperation in relation with stolen data. Moreover, a transparent system of withholding taxes instead of a broad automatic exchange of information would be another clincher.

Finally, it must be noted that according to various sources¹¹⁰ the whole raid against the banking secrecy was not at all based on moral principles but solely to steal an economic competitive advantage.¹¹¹ Therefore, the countries that agreed to participate in a more transparent and fiscally just world by lifting their reservations to Art. 26 should make sure that these standards are respected in every jurisdiction. The peer-review mechanism proposed by the OECD should play the role of a global supervisor.

2. Peer Review As a Global Governance Mechanism

Singapore is a member of the steering group in the Global Forum on Transparency and Exchange of Information for Tax Purposes and is playing an active role in the launch of the peer review mechanism. It just hosted the first meeting of this Forum as a distinct body from September 30 to October 1, 2010. Thanks to this proactive conduct, Singapore can show the path to more equality among the nations and against the hypocrisy of some of them. The Forum will aim at ensuring that no jurisdiction or its subdivisions avoids the practical implementation of the standard. This is clearly Switzerland's endeavour as well.

Peer review will work thanks to the collaboration of all concerned parties. Two countries will assess

a third one, assisted by the OECD Secretariat, in order to make sure that it not only agreed to the standard, but that it actually complies with it and makes progress. It is a soft-law mechanism, resulting in consensual reports, as opposed to a judicial enforcement mechanism. But this does not mean that it will not be effective.¹¹² On the contrary, peer pressure and name-and-shame can be just as effective as recent history has shown. If Switzerland and Singapore want to remain competitive and reinforce their banking secrecy in a changed world, they have to put all their efforts into the effectiveness of the peer-review mechanism. Who knows, the Global Forum could even become "an embryonic world tax authority!"¹¹³

Conclusion

Countries cultivating a tradition of banking secrecy have to live with a new international order since the standards for exchange of information have been imposed on them. Not the exchange of information mechanism itself, which is not particularly effective and limited to defined requests excluding fishing expeditions, but the fear and insecurity that accompanied the change of paradigm, affected the taxpayers' trust. However, the banking secrecy has good reasons to survive, to continue to offer a safe haven to citizens of states invading their private sphere. Countries respecting this privacy and offering a solid legal framework will be winners in the long term, especially if the peer-review mechanism of the Global Forum bans cheaters. This is why both Singapore and Switzerland are rightly confident in their banking secrecy's future.

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* The contents of this article are based on a supervised research paper submitted in part fulfillment of the International Tax Law module conducted by Associate Professor Stephen Phua, Faculty of Law, National University of Singapore in 2010. I am grateful for his guidance, but all errors remain mine.

¹ Dennis Campbell, *International Bank Secrecy* (1992), at 663 *et seq.* He traces the tradition back to the 17th Century and the arrival of French Protestants in Geneva, who had fled Catholic France.

² Art. 47 of the Bank and Savings Bank Federal Act of 8 June 1934, still valid as amended. See also Art. 13 of the Swiss Federal Constitution of 1999, giving to every person "the right to receive respect for his private and family life," which includes privacy in relation to financial income and assets.

³ Publication of the essay "Über das schweizerische Bankgeheimnis" by the Credit Suisse; see *Tages Anzeiger*, *Mit einer gewieften PR-Kampagne zum Mythos*, Feb. 22, 2010, Olivia Kühni, with references to recent publications: Peter Hug, *Steuerflucht und die Legende vom antinazistischen Ursprung des Bankgeheimnisses*, in *Gedächtnis, Geld und Gesetz* (2002) von Jakob Tanner und Sigrid Weigel; Robert Vogler, *Das Schweizer Bankgeheimnis: Entstehung, Bedeutung, Mythos* (2005).

⁴ Campbell, *supra* note 1, at 664.

⁵ France as an example among others. The source of this paragraph is found in: *Le Temps*, "Banques suisses: 'La fin de longues angoisses'", Feb. 13, 2010, Joëlle Kuntz, with reference to a recent publication: Janick Marina Schaufelbuehl, "La France et la Suisse ou la force du petit, Evasion fiscale, relations

commerciales et financières (1940-1954)," Presses de Sciences Po, Nov. 2009.

⁶ Economic sanctions proposed by the Ministry of Finance to put pressure on Switzerland would have been against the very profitable trade of goods, under the umbrella of the Ministry of Commerce.

⁷ The only effective exchange of information clause agreed on by Switzerland until 2009, but limited to tax fraud and the like, hence not concerning tax evasion.

⁸ See Art. 12 of the DTA of 1953 on inheritance tax; the mirror DTA on income and capital tax was superseded by the DTA of 1966 and supplementary agreement of 1997, valid until the entry into force of the DTA negotiated in 2009. Para. 2 contains a classical "domestic tax interest" clause, i.e. the contracting parties do not have to supply information

The UBS Case in a Nutshell

On May 7, 2008, former UBS banker and whistleblower Bradley Birkenfeld was arrested and pleaded guilty in federal court to conspiracy.¹ On February 18, 2009, UBS, Switzerland's biggest bank, entered into a deferred prosecution agreement with the U.S. Department of Justice (DOJ).² It admitted that it had illegally helped U.S. citizens evade their income taxes. UBS had to pay \$780 million and agreed to hand over the names and account information of 285 U.S. account holders who were presumably not reporting the existence of their foreign financial accounts nor the income from the assets held in such accounts. The handing over of privileged information was made possible through an order of the Swiss Financial Market Supervisory Authority, FINMA, of the same day.³ This order was eventually declared unlawful by the Swiss Federal Administrative Court on January 5, 2010,⁴ but obviously too late.

One day later, on February 19, 2009, the DOJ filed a civil suit seeking to force UBS to disclose as many as 52,000 accounts.⁵ Through a settlement agreement of August 19, 2009, this number was reduced to 4,450. A parallel agreement was signed the same day between the U.S. and Swiss Governments, to enable administrative assistance, supposedly based on the existing U.S.-Switzerland Double Taxation Treaty. However, since this inter-governmental agreement went beyond the then-existing treaty (by authorising assistance in cases not only of tax fraud but also of continued and serious tax evasion), it was declared unlawful by the Swiss Federal Administrative Court on January 21, 2010.⁶ In order not to jeopardise the agreement, which saved UBS from a potentially catastrophic lawsuit, the inter-governmental agreement had to be approved by parliament, hence turning it into

a formal treaty.⁷ This was achieved, after endless debates and a first rejection, on June 17, 2010. A first appeal against the hand-over of account details was rejected in a pilot verdict of July 15, 2010.⁸ On August 26, 2010, within the given deadline, the Swiss Federal Tax Administration announced that it had concluded the administrative assistance process.⁹ At the beginning of October 2010, about 166 appeals were still pending, in which clients argued, amongst others, that they are not beneficiaries of the accounts or that there were procedural deficiencies. In its filing of October 22, 2010, the DOJ agreed to dismiss the criminal prosecution against UBS. It said that "UBS has fully complied with all its obligations." Likewise, the IRS has announced that it would withdraw the John Doe Summons this autumn, but has not yet done so.

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- ¹ *Birkenfeld and Staggli*, S.D. Fla., No. 08-60099.
- ² *UBS AG*, S.D. Fla., No. 09-60033.
- ³ FINMA, press release of Feb. 18, 2009, FINMA makes possible settlement between UBS and the US authorities and announces the results of its own investigation.
- ⁴ Federal Administrative Court, Decision of Jan. 5, 2010, B-1092/2009.
- ⁵ *UBS AG*, S.D. Fla., No. 09-20423.
- ⁶ Federal Administrative Court, Decision of Jan. 21, 2010, A-7789/2009.
- ⁷ RS 0.672.933.612; not to be confused with the amended comprehensive U.S.-Swiss DTA, ratified by the Swiss parliament on June 18, 2010, RS 0.672.933.61 (amendment not yet in force).
- ⁸ Federal Administrative Court, Decision of July 15, 2010, A4013/2010, concerning a taxpayer whose account realised no net gains during the period in question. For a critical review, see B. Lötscher and A. Buhr, *Kann ein fingierter Verdacht auf "Betrugsdelikte und dergleichen" Amtshilfegrundlage in Steuersachen sein?* in Jusletter Oct. 18, 2010.
- ⁹ SFTA press release of Aug. 26, 2010, *UBS - Switzerland* has examined 4,450 administrative assistance cases.

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which is not obtainable under the laws or the normal course of the administration of that or of the other contracting party. But furthermore, information will be exchanged only in order to achieve the goal of the convention, *i.e.*, exclude double-taxation, and not to combat evasion. Regarding the history of the negotiations, see Minutes of the Federal Council of Mar. 27, 1953, Documents Diplomatiques Suisses 9365 (dodis.ch/9365, last accessed on Oct. 3, 2010). See also Mes-

sage du Conseil Fédéral of Feb. 19, 1954, FF 1954 I 336. See also Peter R. Altenburger in Barcelona Report, at 620 *et seq.*

⁹ But tax fraud, which involves the commission of fraudulent acts such as forgery of documents, is considered as a felony, and opens the way to mutual assistance in criminal matters.

¹⁰ The following article explains well why and how German self-employed people evade their money to Switzerland: Tages Anzeiger,

Feb. 15, 2010, "So hinterzieht der Deutsche Steuern," Claude Chatelain.

¹¹ Lionel Frei, "Die Rechtshilfe bei Abgabebetrug," cited by Reich, at 290.

¹² Markus Reich, *Internationale Rechtshilfe der Schweiz in Fiskalstrafsachen*, in *Strafrecht, Strafprozessrecht und Menschenrechte* (2002), at 291 *et seq.*

¹³ See Minutes of the Federal Council of Mar. 27, 1953, under note 8.

¹⁴ OECD Commentary, Para. 23 to 26. Para.

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- 24 states: “Switzerland reserves its position on paragraphs 1 and 5. It will propose to limit the scope of this Article to information necessary for carrying out the provisions of the Convention. This reservation shall not apply in cases involving acts of fraud subject to imprisonment according to the laws of both Contracting States.”
- ¹⁵ Campbell, *supra* note 1, at 577.
- ¹⁶ Alvin Yeo and Joy Tan, *Banking Secrecy—The Singapore Position*, ASIA BUSINESS LAW REVIEW, Oct. 1997, at 25-34.
- ¹⁷ *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461.
- ¹⁸ Section 47 of the Banking Act (Cap 19, 2003 Rev. Ed.) See also www.singaporelaw.sg/content/BankingandFinance.html#section3, last accessed on Oct. 3, 2010.
- ¹⁹ See Singapore Parliamentary debates, second reading of the Exchange of Information Bill, Oct. 19, 2009. “And we would not be able to do so with major economies if we were regarded as a tax haven. They regard us as a substantive and well-diversified economy, not a name-plate jurisdiction.”
- ²⁰ Singapore not being a member of the OECD, this is logical. Furthermore, the DTAs concluded by Singapore often refer not only to avoidance of double taxation, but expressly to prevention of fiscal evasion.
- ²¹ For example, DTA with Germany of Feb. 19, 1972, Art. 26 Para. 2:
 “In no case shall the provisions of paragraph 1 be construed so as to impose on one of the Contracting States the obligation:
 (a) to carry out administrative measures at variance with the laws, or the administrative practice of that or of the other Contracting State;
 (b) to supply particulars which are not obtainable under the laws, or in the normal course of the administration of that or of the other Contracting State;
 (c) [omitted].”
- ²² Directive 77/799/EEC of Dec. 19, 1977, which was extended to VAT in 1979 and to excises in 1992. It was further amended in 2003 to cover taxes on insurance premiums. All EU Member States have transposed the directive in their domestic legislation. Luxembourg made use of Art. 8, the “domestic legislation” clause, protecting indirectly the banking secrecy; and the exchange results only upon request (see Stockholm Report, *infra* note 32, at 388). Austria, upon joining the EU, implemented Art. 8 with three additional restrictions (see Markus Achatz and Heinz Jiuorsek, Answers to the Questionnaire on Mutual Assistance in Tax Affairs (European Association of Tax Law Professors 2009)). Belgium accepts automatic and spontaneous exchange of information (see Stockholm Report, at 231 *et seq.*).
- ²³ It has been signed and ratified, among others, by Belgium, but not by Austria, Luxembourg and Switzerland. A protocol, supposed to “boost multilateral cooperation” was opened for signature on the occasion of the OECD’s annual Ministerial Meeting of May 27-28, 2010 in Paris.
- ²⁴ Council Directive 2003/48/EC of June 3, 2003, on taxation of savings income in form of interest payments.
- ²⁵ This period, defined in Art. 10, is dependent on negotiations between the EU and third countries, either European countries or the United States, on exchange of information. See M. Keen and J.E. Lighthart, Information Sharing and International Taxation, Tilburg University, CentER No 2004-117, November 2004, at 20-22; see also www.abbl.lu/articles/update-eu-savings-directive, last accessed on Oct. 3, 2010.
- ²⁶ See Keen and Lighthart, at 22-24. Belgium implemented the automatic exchange of information.
- ²⁷ Andorra, Liechtenstein, Marshall Islands, Monaco, Liberia, Nauru and Vanuatu. It is surprising to see Liechtenstein on this list, although it had entered the Savings Tax Agreement with the EU.
- ²⁸ See C. Winzeler, Rechtsentwicklungen um das Bankkundengeheimnis – Standortbestimmung 2009, AJP/PJA 2, 2010, at 162.
- ²⁹ Technically, they could not be defined as standards, because a standard needs unanimity among OECD members. This was not the case though with the four existing reservations.
- ³⁰ OECD Background Information Brief of 14 April 2010, “Promoting Transparency and Exchange of Information for Tax Purposes”
- ³¹ Commentary, para. 5 ad Art. 26.
- ³² B. Gangemi, General Report, in *Cahiers de Droit fiscal international*, Vol. LXXVb, “International mutual assistance through exchange of information,” Stockholm 1990 (Stockholm Report), at 26.
- ³³ Commentary, para. 9 ad Art. 26.
- ³⁴ See also OECD Manual on the implementation of exchange of information provisions for tax purposes, 2006, p. 13 (Implementation Manual).
- ³⁵ T. Schenk-Geers, International Exchange of Information and the Protection of Taxpayers, Alphen aan den Rijn, 2009, at 101 and 160.
- ³⁶ For details, see Schenk-Geers, *supra* note 35, at 165.
- ³⁷ Commentary, para. 15 ad Art. 26.
- ³⁸ For details, see Schenk-Geers, *supra* note 35, at 178.
- ³⁹ For details, see Schenk-Geers, *supra* note 35, at 169.
- ⁴⁰ Commentary, para. 14.1 ad Art. 26.
- ⁴¹ Commentary, para. 15.2 ad Art. 26.
- ⁴² For details, see Schenk-Geers, *supra* note 35, at 185.
- ⁴³ Commentary, para. 19.1 ad Art. 26.
- ⁴⁴ Commentary, para. 19.10 ad Art. 26.
- ⁴⁵ See para. 65 and 66. It distinguishes between ordinary costs, which are borne by each party respectively, and extraordinary costs, which ought to be borne by the requesting party. The latter “are meant to cover, for instance, cost incurred when a particular form of procedure has been used at the request of the applicant party, cost incurred by third parties from which the requested party has obtained the information (for example bank information), or supplementary costs of experts, interpreters” *etc.* The Manual states that where costs are high, the parties usually find a practical solution. But this problem should be addressed at an early stage.
- ⁴⁶ Gangemi, *supra* note 32, at 52 *et seq.*
- ⁴⁷ Schenk-Geers, *supra* note 35, at 171 and note 48.
- ⁴⁸ Austria, Belgium, Finland, Germany, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Sweden and the United Kingdom. Reports available under the EATLP website, www.eatlp.org.
- ⁴⁹ Roman Seer and Isabel Gabert, General report “Mutual assistance and information exchange,” EATLP, Santiago 2009 (Santiago Report). Available under the EATLP website. This report is divided into five topics “Implementation,” “Use,” “Efficiency,” “Burden of Proof” and “Legal protection” of the mutual assistance in tax affairs.
- ⁵⁰ See in particular Santiago Report, at 23.
- ⁵¹ See in particular Santiago Report, at 25.
- ⁵² Santiago Report, at 11-15.
- ⁵³ Santiago Report, at 17.
- ⁵⁴ COM(2006) 254, 2007/C 161/02, para. 2.6.1.1.
- ⁵⁵ Santiago Report, at 26 *et seq.*, 29.
- ⁵⁶ Santiago Report, at 29.
- ⁵⁷ *Id.* They estimate that this time is “not too long for foreign tax authorities so that they would loose the right to assess the tax liability under domestic law.”
- ⁵⁸ Santiago Report, at 21.
- ⁵⁹ P. Weissenberger, Grenzüberschreitende Amtshilfe auf dem Prüfstand – Wege zu mehr Rechtssicherheit, Rechtsschutz und Effizienz, ASA 77 (2009) 825, at 827.
- ⁶⁰ Santiago Report, at 22.
- ⁶¹ Santiago Report, at 28.
- ⁶² *Supra* note 45.
- ⁶³ This was duly acknowledged by the European Commission, which came up in February 2009 with two proposals for Directives to allow better cooperation between tax authorities: COM(2009)28: proposal to improve mutual assistance in the recovery of taxes; COM(2009)29: proposal on improved administrative cooperation in the assessment of taxes. See press release of Feb. 2, 2009 (IP/09/201).
- ⁶⁴ H.D. Rosenbloom and S.D. Michel, The IRS and Americans With Foreign Accounts: Looming Tax and Enforcement Issues, 2010, at 5.
- ⁶⁵ The HSBC list stolen in Geneva allegedly contains data on 127,000 accounts concerning 24,000 or 79,000 clients (depending on the sources) from 180 countries; the French

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- and Italian Governments are the most interested so far (with 8,000 and 7,000 taxpayers concerned respectively). *Tribune de Genève*, Apr. 13, 2010, "HSBC: l'Italie pourra voir la liste volée par Falciani", and Apr. 14, 2010, "Affaire HSBC: la France a identifié 8000 Français, fraudeurs présumés."
- ⁶⁶ In the *Credit Suisse/Germany* case, the CD of stolen data contains around 1,500 names of the bank's clients.
- ⁶⁷ See T.A. Van Kampen and L.J. Rijke, *The Kredietbank Luxembourg and the Liechtenstein tax affairs: Notes on the balance between the exchange of information between states and the protection of fundamental rights*, *EC Tax Review*, 2008-5, at 226. As opposed to the Dutch and Belgian courts, the German courts do not seem to have had any scruples when using LGT Treuhand data: All five taxpayers who appealed to them and did not settle have been condemned. For the German Government, the LGT case generated EUR 184 million. See *NZZ Online*, Apr. 7, 2010, "Ueber 13,000 Selbstanzeigen in Deutschland."
- ⁶⁸ *The Financial Post* (Canada), Jan. 6, 2010, "Taxmen wield powerful tools in arsenal; whistleblower laws, exchange of information rules."
- ⁶⁹ *NZZ Online*, Apr. 7, 2010.
- ⁷⁰ *Id.*
- ⁷¹ It would be interesting to make punctual references to Austria, Belgium and Luxemburg, who abandoned their reservation to Art. 26 OECD Model Convention at the same time, but the extent of this article is too limited.
- ⁷² Federal Council, press release of Mar. 13, 2009.
- ⁷³ *Id.*, "The privacy of customers will continue to be protected from unauthorised access to information concerning private assets."
- ⁷⁴ Ministry of Finance, press release of Mar. 6, 2009. Singapore's Ministry of Finance stated in Parliament on Feb. 10, 2009, that "the decision to endorse the OECD Standard is keeping with Singapore's role as a trusted centre for finance and a responsible jurisdiction, with strong and consistent regulatory policies and a firm commitment to the rule of law. The Standard is consistent with Singapore's system of banking confidentiality."
- ⁷⁵ For the evolution, see M.F. Huber, et al., *Entwicklungen im internationalen Steuerrecht*, STR 2009 at 860.
- ⁷⁶ The optional referendum expires on Oct. 7, 2010, but has found no support.
- ⁷⁷ See www.efd.admin.ch/dokumentation/zahlen/00579/00608/00642/index.html, last accessed on Oct. 3, 2010. The DTAs with the following countries have been approved by parliament on June 18, 2010: Denmark, France, Luxembourg, Mexico, Austria, the United States, Finland, the United Kingdom, Qatar and Norway.
- ⁷⁸ Ordonnance du 1er septembre 2010 relative à l'assistance administrative d'après les conventions contre les doubles impositions (OACDI; RS 672.204). See Federal Department of Finance, press release of Oct. 1, 2010. See also Report of the Federal Department of Finance ("Audition sur l'ordonnance relative à l'assistance administrative d'après les conventions contre les doubles impositions, rapport explicatif").
- ⁷⁹ For updates, see http://app.mof.gov.sg/tax_treaties.aspx.
- ⁸⁰ See *The Business Times Singapore*, Mar. 17, 2009; and June 30, 2009.
- ⁸¹ Income Tax (Amendment) (Exchange of Information) Act 2009 (No. 24 of 2009). It inserts additional sections after s. 105 and an Eighth Schedule "Information to be included in a request for information."
- ⁸² See Santiago Report, at 23.
- ⁸³ These methods need high "technological and organisational adjustments in the separate states." See Schenk-Geers, *supra* note 35, at 116.
- ⁸⁴ Federal Department of Finance, Report of Dec. 16, 2009, "Axes stratégiques de la politique suisse en matière de place financière", at 56; confirmed by the Federal Council, press release of Feb 25, 2010.
- ⁸⁵ The German Minister of Finance, Wolfgang Schäuble, recently acknowledged that withholding taxes and the automatic exchange of information are financially equivalent systems. See *Le Temps*, Sept. 24, 2010, "L'UE attend pour riposter au prélèvement libératoire proposé par la Suisse," Richard Werly.
- ⁸⁶ The requesting authority has to provide (1) the identity of the person under examination, (2) a statement of the information sought, (3) the tax purpose, (4) grounds for believing that the information is held by the taxpayer or a third party in the requested country and (5) name and address of the person supposed to have the information.
- ⁸⁷ The identification of the data owner gave rise to difficulties during the negotiations between Switzerland and France. They were eventually settled in a Memorandum of Understanding as follows: "If, exceptionally, the requesting authority presumes that the taxpayer holds a bank account in the country to which the request is made, but does not, however, have information allowing it to identify without doubt the bank concerned, it shall supply all information in its possession to enable the bank to be identified. The country to which the request is made will respond to such a request provided that it is in line with the principle of proportionality and does not constitute a fishing expedition." See press release of Feb. 12, 2010, "Switzerland and France have clarified unresolved tax issues". The other issue concerned the stolen data of HSBC Geneva.
- ⁸⁸ Several countries do not protect the taxpayer's rights in relation with exchange of information. And in general, international instruments for exchange of information tend to forget the taxpayers' rights. See Schenk-Geers, in particular at 169. See also Jacques Malherbe, General Report, in *Cahiers de Droit Fiscal International*, Vol. LXXVlb, Protection of Confidential Information in Tax Matters (1991). This article does not discuss the precautions taken to avoid provision of commercial, industrial, business or professional secrets (Art. 26 Paragraph 3(c) OECD Model Convention). Refer instead to Schenk-Geers, *supra* note 35, at 222. For the question of human rights in case of proceedings against a taxpayer on the base of stolen data, see Van Kampen and Rijke, *supra* note 67.
- ⁸⁹ Art. 12 OACDI.
- ⁹⁰ Art. 13 OACDI, appeal to the Federal Administrative Court.
- ⁹¹ Art. 10 OACDI.
- ⁹² For the delicate situation in which the mutual assistance put banks, see P. Honegger, *Amts- und Rechtshilfe: 10 Aktuelle Fragen*, ASA 77 (2009), at 804. The bank should be sure that the customer has been duly informed before it hands over the data to the administration. Furthermore, it should not hand out just any information, but the one explicitly listed in the request.
- ⁹³ Art. 6 OACDI.
- ⁹⁴ Art. 9 OACDI.
- ⁹⁵ For grounds of appeal against the decision, see Honegger, *supra* note 92, at 810. Examples are: mistakes, contradictions, and presence of a fishing expedition.
- ⁹⁶ Art. 11 OACDI.
- ⁹⁷ S. 105F (2)(a) in relation with S. 65.
- ⁹⁸ Under Section 47 of the Banking Act or Section 49 of the Trust Companies Act.
- ⁹⁹ S. 105 J (1).
- ¹⁰⁰ Art. 10 al. 4 OACDI, in relation with Art. 27 PA (Loi fédérale du 20 décembre 1968 sur la procédure administrative; RS 172.021) if required by public interest or in case of pending investigations; S. 105E (4)(iii) "if the Comptroller is of the opinion that this is likely to prejudice any investigation."
- ¹⁰¹ On this interesting topic, under Swiss law, see Honegger, *supra* note 92, at 806, with references to doctrine and jurisprudence (namely the case ATF 131 I 425). A breach of the obligation of secrecy (by the administration or third parties such as bankers) should be seen as a breach of the tax secrecy, which is part of the official secrecy (Art. 320 Swiss Penal Code; S. 6 Income Tax Act), and be punished accordingly (see M. Zweifel and H. Casanova, *Schweizerisches Steuerverfahrensrecht*, §10 Das Steuergeheimnis, Zurich 2008).
- ¹⁰² "Trust, openness and the rule of law are the foundations upon which we have built up our financial centre, and indeed our broader economy as a whole. These principles and practices have served us well and will continue to support our efforts to further grow and develop our financial sector." (MP Tharman

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Shanmugaratnam, from the parliamentary debates in Singapore of Oct. 19, 2009).

¹⁰³ Protocol of November 13, 2009, Art. 2 (2)(a).

¹⁰⁴ On this topic, see Schenk-Geers, *supra* note 35, at 90.

¹⁰⁵ See ECJ Apr. 26, 2005, C-376/02, *Stichting Goed Wonen v. State Secretary of Finance*.

¹⁰⁶ Art. 5 al. 2 lit. c OACDI.

¹⁰⁷ See Van Kampen and Rijke, *supra* note 67, at 226, note 33.

¹⁰⁸ The Business Times Singapore, Dec. 21,

2009.

¹⁰⁹ See T. Dwyer and D. Dwyer, Transparency versus Privacy: Reflections on OECD Concepts of Harmful Tax Competition, in *International Tax Competition, Globalisation and Fiscal Sovereignty*, United Kingdom 2002, at 259.

¹¹⁰ Le Temps, Feb. 11, 2010, "Secret bancaire: La victoire des trusts," François Pilet, with references; The Economist, Mar. 28, 2009, "Finance and Economics: Haven hypocrisy; The G20 and Tax."

¹¹¹ An Australian political scientist managed to open bank accounts in the US, in violation of the most basic know-your-customer or even money-laundering rules. The UK also takes advantage of lax trust regulations in their offshore territories.

¹¹² EuroPolitics, Mar. 17, 2010; OECD Observer No. 235, December 2002.

¹¹³ The Globe and Mail (Canada), Aug. 14, 2009, quoting Richard Murphy, director of Tax Research LLP, a consulting firm outside London.

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