

LEGAL ANALYSIS

Swiss Financial Centre Strategy is Being Applied—Consultations on Revised Anti-Money Laundering Recommendations and Enhanced Due Diligence Requirements

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Introduction

The Swiss Government recently published a proposal regarding enhanced due diligence requirements as part of its financial centre strategy.¹ It includes two elements: (i) the implementation of the revised international recommendations on combating money laundering and terrorist financing and (ii) extended due diligence requirements for financial intermediaries regarding the

acceptance of potentially untaxed assets. It is the Government's intention to underline the importance of preserving the integrity of the Swiss financial centre.² Two separate consultation procedures have been launched, which will last until June 15, 2013.

These consultations are part of a major revamp of the Swiss financial centre policies, which has been mostly due to international pressure and developments since 2001 and particularly after the outbreak of the financial crisis in 2007.³

Brief review of decisive developments

Influence of 9/11

The terrorist attacks on the United States on September 11, 2001 (9/11) led to an unprecedented global response,⁴ whereby the United Nations (UN) and its Security Council played a decisive role by creating various resolutions in this respect.⁵ The members of the UN Security Council approved the Resolution 1373, which included a particular focus on terrorism financing⁶ merged with anti-money laundering provisions, as promoted by the Financial Action Task Force (FATF) in its 2001 recommendations.⁷

Although Switzerland was not yet a member of the United Nations,⁸ the Swiss Government decided to join the International Convention for the Suppression of the Financing of Terrorism (1999) and the International Convention for the Suppression of Terrorist Bombings (1997).⁹ As a consequence, Switzerland had to introduce new provisions on terrorism financing as required by the International Convention for the Suppression of the Financing of Terrorism.¹⁰ Furthermore, as a founding member of the FATF, Switzerland was committed to implement the 40 recommendations on combating money laundering and terrorist financing, as well as the nine special recommendations relating to the financing of terrorism.¹¹

Influence of the financial crisis

The regulatory response to the financial crisis between 2007 and 2009, which affected the banking sector globally, was different from previous actions mostly taken by central banks in the case of individual bank failures.¹² The emphasis was given to strengthen global regulatory standards, e.g. via the new Basel proposals (Basel III), and to enhance the national and regional regulatory and

¹ Swiss Federal Department of Finance at <http://www.efd.admin.ch/dokumentation/gesetzgebung/00571/02692/index.html?lang=en> [Accessed May 31, 2013].

² State Secretariat for International Financial Matters (SIF) at <http://www.sif.admin.ch/dokumentation/00513/00772/index.html?lang=en&msg-id=47934> [Accessed May 31, 2013].

³ A. S. Goekmen and J. Klement, in: *ASMZ No. 2—February 2013*, Der Finanzplatz Schweiz unter ausländischem Druck (1/2).

⁴ K. Roach, *The 9/11 Effect* (2011), p.1.

⁵ K. Roach, *The 9/11 Effect* (2011), p.14.

⁶ UN-Resolution 1373 (2001).

⁷ FATF IX Special Recommendations, as amended at <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf> [Accessed May 31, 2013].

⁸ Switzerland joined the UN in September 2002 at <http://www.eda.admin.ch/eda/en/home/topics/intorg/un.html> [Accessed May 31, 2013].

⁹ *Lage- und Gefährdungsanalyse Schweiz nach den Terroranschlägen vom 11. September 2001*, Bericht des Bundesrates an das Parlament, p.37, 2002.

¹⁰ *Lage- und Gefährdungsanalyse Schweiz nach den Terroranschlägen vom 11. September 2001*, Bericht des Bundesrates an das Parlament, p.37, 2002.

¹¹ The compliance with the recommendations of the FATF and other international set of rules was also a major objective of transforming the anti-money laundering circular of 1998 into a formal regulation, cf. EBK-Geldwäschereibericht, p.18 ss., 2003.

¹² P. Rawlings, M. D'Ingeo, "Yuppies, drugs and Tesco: should the Bank of England blame itself for bank failures?" [1998] *Journal of Money Laundering Control* 39.

supervisory structure, as it is the case with the new supervisory architecture in the European Union.¹³ Also, fiscal reforms were envisaged, such as by the Government of the United Kingdom, which targeted compensation by introducing a one-off 50 per cent tax on bonus pools.¹⁴ Finally, since one of the crisis' effects was a reduction of the expected fiscal income, another focus was laid on raising funds by blaming so-called tax havens, i.e. Switzerland.¹⁵

The criteria to determine whether a jurisdiction is a tax haven were defined by the OECD in 1998 and include the lack of transparency and an effective exchange of information in tax matters.¹⁶ Switzerland was initially part of the "grey list", which included countries not having signed at least 12 bilateral taxation agreements according to OECD standards; this criterion was defined by the leaders of the G20.¹⁷

Finally, the pressure from the United States against Swiss banks, starting in 2007, together with the co-ordinated steps taken by the G20, the OECD and the European Union subsequently lead to a number of measures taken by the Swiss Government in co-operation with the Swiss banks to weaken banking confidentiality in the international context and, consequently, to comply with these international endeavours to constraint its use for tax optimising purposes.¹⁸

Swiss financial centre strategy

As part of the international developments and pressures, the Swiss Government approved in February 2012 a strategy for a tax-compliant and competitive Swiss financial centre, the so-called financial centre strategy.¹⁹ It includes two steps: on the one hand, the assets from existing clients shall be regularised from a tax perspective, on the other hand, the international co-operation and the future taxation of capital gains and investment income shall be adjusted.²⁰ The latter shall be achieved by negotiating international withholding tax treaties, improving the administrative and mutual assistance according to international standards and extending the due diligence requirements of financial service providers and banks.²¹ While a double tax treaty between Switzerland and the United Kingdom has been finally concluded in 2012, and entered into force on January 1, 2013, an analogue double tax treaty with Germany fell through, as it was rejected by the upper house of the German parliament (*Bundesrat*).²²

The Swiss Government further specified the financial centre strategy in December 2012: the competitiveness shall be strengthened, financial crime and investment of untaxed assets shall be combated more intensively, international withholding tax agreements shall be concluded with more countries and standard-compliant administrative and mutual assistance shall be adopted.²³

¹³ R. M. Lastra and G. Wood, "The crisis of 2007–2009: nature, causes and reactions" [2010] *Journal of International Economic Law* 549; T. Tridimas, "EU Financial Regulation: Federalisation, Crisis Management and Law Reform" in P. Craig and G. De Burca, *The Evolution of EU Law* (2011), p.783.

¹⁴ R. M. Lastra and G. Wood, "The crisis of 2007–2009: nature, causes and reactions" [2010] *Journal of International Economic Law* 549; IMF Final Report for the G20, "A Fair and Substantial Contribution by the Financial Sector" (2010), p.31.

¹⁵ P. Bessard, "Individual Rights and the Fight against 'Tax Evasion'" in: LI-Paper, 2011, p.5.

¹⁶ See <http://www.oecd.org/ctp/harmfultaxpractices/taxhavencriteria.htm> [Accessed May 31, 2013].

¹⁷ See http://www.nzz.ch/aktuell/startseite/die_schweiz_auf_grauer_liste_der_steueroasen-1.2318074 [Accessed May 31, 2013].

¹⁸ J. Fleming, "Clearing the clouds of secrecy" [2009] *European Lawyer*, 86, 38, 41–43 at <http://www.bloomberg.com/news/2012-02-06/swiss-must-kill-bank-secrecy-revise-deals-eu-tax-chief-says.html> [Accessed May 31, 2013].

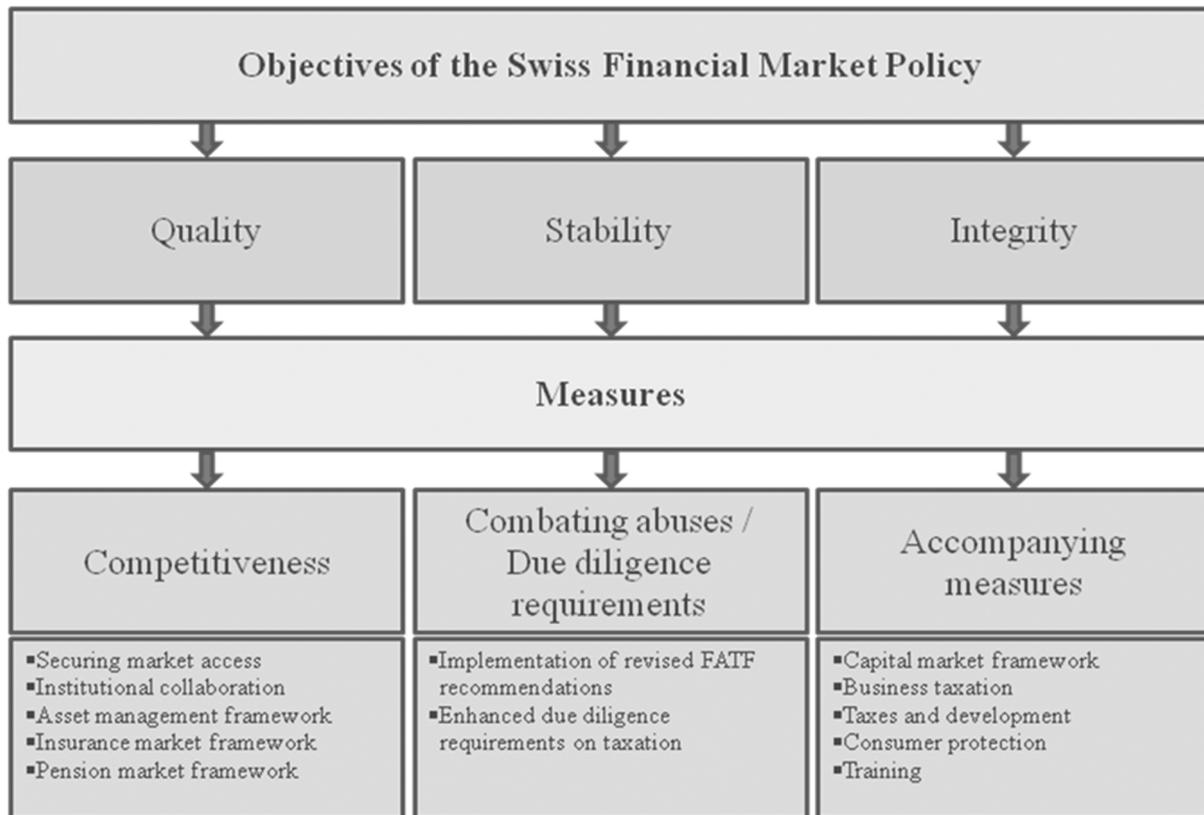
¹⁹ State Secretariat for International Financial Matters (SIF) at http://www.sif.admin.ch/00754/index.html?lang=en&print_style=yes [Accessed May 31, 2013].

²⁰ State Secretariat for International Financial Matters (SIF).

²¹ State Secretariat for International Financial Matters (SIF).

²² See <http://www.nzz.ch/aktuell/wirtschaft/wirtschaftsnachrichten/bundesrat-deutschland-ablehnung-steuerabkommen-reaktionen-1.17839378> [Accessed May 31, 2013].

²³ State Secretariat for International Financial Matters (SIF) at <http://www.sif.admin.ch/themen/00827/index.html?lang=en> [Accessed May 31, 2013].



[Overview based on fact sheet “The Confederation’s financial market policy”²⁴]

These measures shall be considered as being part of a consequent and credible implementation of the strategy, but are also meant to reconcile the clients’ privacy rights with the governments’ entitlement to tax their subjects.²⁵ In any case, “clean money” (*Weissgeld*) was declared the new mantra and “dirty money” (*Schwarzgeld*) shall henceforth be a predicate offence for money laundering in accordance with the FATF recommendations.²⁶

While the strengthening of the competitiveness of the Swiss financial market and the accompanying measures are subject to further analysis and deliberations, the Swiss Government instructed the Federal Department of Finance on December 14, 2012, to present a consultation draft as regards measures to combat abuses in the area of money laundering and taxation already at the beginning of 2013.²⁷ On February 27, 2013, two consultations on combating money laundering and on enhanced due diligence requirements in the area of taxation were launched.²⁸ These consultations will end on June 15, 2013 and are meant to underscore the importance of preserving the integrity of the Swiss financial centre.²⁹

Revised anti-money laundering recommendations

In order to implement the revised FATF recommendations of February 2012, the Swiss Government presented various proposals to improve the fight against money laundering. For the past decades, Switzerland has been continuously developing its anti-money laundering instruments. While the current anti-money laundering regulations are mostly in line with the revised FATF standards, some adjustments were still required and furthermore, some remaining shortcomings needed to be remedied, which were identified in 2005 during the FATF country evaluation.³⁰

Disclosure obligation for holders of bearer and registered shares of unlisted companies

The new piece of legislation proposed by the Swiss Government enables companies issuing bearer shares to opt for

²⁴ Swiss Federal Department of Finance, fact sheet on *The Confederation’s financial market policy*, December 2012.

²⁵ Swiss Federal Council, *Strategie für einen steuerlich konformen und wettbewerbsfähigen Finanzplatz*, discussion paper of February 22, 2012.

²⁶ P. Nobel, “Entwicklungen im Bank- und Kapitalmarktrecht” in *Schweizerische Juristen-Zeitung*, SJZ 109 (2013), p.11.

²⁷ State Secretariat for International Financial Matters (SIF)

²⁸ State Secretariat for International Financial Matters (SIF). at http://www.sif.admin.ch/dokumentation/00513/00772/index.html?lang=en&print_style=yes&msg-id=47934 [Accessed May 31, 2013].

²⁹ State Secretariat for International Financial Matters (SIF).

³⁰ State Secretariat for International Financial Matters (SIF).

1. the disclosure of the shareholder, including the identity of the beneficial owners, meaning in this context any individual having a controlling stake in the company of 25 per cent or more of the voting rights or the share capital;
2. an option for the disclosure of the shareholder to be made to a financial intermediary as defined by the Anti-Money Laundering Act (AMLA); or
3. simplified conversion of bearer shares into registered shares.³¹

A grandfathering clause is, however, not foreseen.

These measures shall be included as amendments into the Swiss Code of Obligations (CO) and into the Federal Act on Collective Capital Investment Schemes (CISA). The obligation to disclose the identity of qualified beneficial owners is also foreseen for unlisted companies with registered shares, for partners in limited liability companies and for members of cooperatives. Finally, the obligation to register foundations with the register of commerce has been extended based on the proposed amendment of the Swiss Civil Code (CC). This duty now includes all foundations, including religious and family foundations. Any omission to comply with these provisions will trigger criminal sanctions.³²

Duty to verify identity and risk-based due diligence requirements for PEPs

According to the revised FATF recommendation no.10, the financial intermediary is required to systematically identify the beneficial owner of a business relationship. Although this principle is recognised and already applied in Switzerland, it has not been formally included into AMLA. Therefore, it is suggested to amend AMLA by including a specific obligation to identify the beneficial owners of unlisted companies or of any affiliated company, where the respective (parent) company owns a majority stake³³. It is also foreseen to introduce graduated due diligence obligations regarding the identification of beneficial owners and legal entities.³⁴

As regards politically exposed persons (PEPs), the amendment of the FATF recommendations in 2012 introduced a duty to also identify national PEPs and persons exercising (or previously exercising) an important function with or on behalf of an international organisation.³⁵ It further extends the due diligence obligations according to the principle of risk-based assessment. These duties, which are applicable to all kind of PEPs, should also apply to their members of the family and to close persons.³⁶ The proposed legislation provides for amendments regarding two different categories: It is foreseen to add a definition of national PEPs having senior public positions at the federal level and of PEPs in international organisations. Moreover, the due diligence measures applicable to the newly created PEP categories shall be amended.³⁷ Financial intermediaries may extend the application of these definitions to PEPs at lower political levels (cantonal and communal), while still applying the general principle of risk-based assessment. Interestingly, the Swiss Government points out in its explanatory report that Swiss PEPs, unlike their international colleagues, are not per se considered as business relationships with a higher risk.³⁸

Qualified tax fraud as predicate offence to money laundering and extension of existing predicate offences

FATF has introduced in its glossary so-called punishable tax offences (in connection with direct and indirect taxes) to the list of offences, which automatically constitute a predicate offence to money laundering. However, they have not been further defined. Therefore, it is a matter of domestic law, to implement these provisions into domestic law and the legislator may restrict the predicate nature of these punishable tax offences to offences already classed as serious under domestic law. Serious crimes are defined in art.10 para.2 of the Swiss Criminal Code (SCC).

As regards indirect taxation, the proposed legislation envisages extending art.14 para.4 of the Federal Administrative Criminal Law beyond cross-border goods traffic in order to cover other taxes levied at the federal level, particularly the value added tax (VAT) on internal transactions and services, or the withholding tax.³⁹ As far

³¹ Swiss Federal Department of Finance (FDF), *Initiation of consultation on the bill for implementing the revised recommendations of the international Financial Action Task Force of 2012*, Basic information, February 27, 2013, p.1.

³² Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.11/12.

³³ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.13.

³⁴ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013.

³⁵ Swiss Federal Department of Finance (FDF), *Initiation of consultation on the bill for implementing the revised recommendations of the international Financial Action Task Force of 2012*, Basic information, February 27, 2013, p.3.

³⁶ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013.

³⁷ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.15.

³⁸ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.16.

³⁹ Swiss Federal Department of Finance (FDF), *Initiation of consultation on the bill for implementing the revised recommendations of the international Financial Action Task Force of 2012*, Basic information, February 27, 2013, p.2.

as direct taxes are concerned, a new offence shall be introduced into the Federal Act on Direct Federal Taxation (DFTA) and the Federal Act on the Harmonisation of Direct Taxation at Cantonal and Communal Levels (DTHA) covering qualified tax fraud.⁴⁰ It includes a qualified form of tax evasion committed either by making use of forged documents or through deliberate deception of the tax authorities. It shall replace the current arts 186 DFTA and 59 DTHA regarding tax fraud, which includes the use of forged documents. In cases of undeclared taxable elements in the amount of at least CHF 600,000, the offence constitutes a crime and is therefore classed as a predicate offence to money laundering (while lower amounts still qualify as misdemeanour). The prosecution of tax evasion, which is not considered a serious crime in Switzerland, will, therefore, still be within the competence of the cantonal fiscal authorities, while the new offence of tax fraud (misdemeanour and crime) will be subject to the cantonal criminal authorities, as it is currently the case for tax offences.⁴¹

Cash payment limitations

During the last country evaluation of Switzerland in 2005, FAFT identified deficiencies regarding the requirements for certain professions outside the financial sector to comply with anti-money laundering regulations.⁴² The real estate sector has been one of these deficiencies. Furthermore, parliamentary initiatives have been calling for AMLA regulations to be extended to real estate agents and notaries as well.⁴³ Instead of extending the current regulations to these two further professions, the proposed legislation provides to introduce a new provision in AMLA requiring all payments in excess of CHF 100,000 regarding real estate transactions to be made through a financial intermediary subject to AMLA.⁴⁴ This procedure needs to be mentioned in the purchase agreement. Failure to do so results in the notary refusing to certify the respective transaction and the transfer of property may not be registered with the land registry.⁴⁵ A similar obligation is foreseen for transactions involving movables as well, even though this has been heavily criticised by

watch industry organisations.⁴⁶ Criminal sanctions shall be included into AMLA for failure to comply with these duties. Moreover, a similar provision shall be introduced concerning auctions in the Swiss Debt Collection and Bankruptcy Act (SDCBA).⁴⁷ Consequently, cash payments will henceforth only be possible up to an amount of CHF 100,000 in Switzerland.

Increased effectiveness of reporting system and simplifying procedures for financial intermediaries

The Money Laundering Reporting Office Switzerland (MROS) already was granted in 2012 with new powers allowing the office to obtain additional information from financial intermediaries.⁴⁸ MROS was further empowered to exchange financial information with comparable international bodies. The current legislative proposal provides for additional measures with respect to MROS investigations, which shall make the reporting system for suspicious activities more effective.

According to the FATF standards (FATF recommendations 29 and 40), any investigation conducted by the financial reporting office needs to increase the information level it already has. Therefore, MROS needs to get access to the widest possible range of financial and administrative information material from the criminal prosecution authorities. Consequently, the Swiss Government proposed to allow MROS to obtain all the information it deems necessary for its investigation of suspicious activities from other federal, cantonal and communal authorities.⁴⁹

Moreover, MROS shall be granted sufficient time to conduct a detailed investigation. The procedure for freezing assets as provided for in the AMLA shall be eased. Freezing of assets shall no longer be triggered upon reporting of any suspicion, but shall only take place once the MRSO contacts the competent criminal authority after a more in-depth investigation of the case.⁵⁰ Also, a mechanism has been introduced in order to prevent the funds under suspicion from leaving Switzerland during the MROS investigation. It is now foreseen, that the

⁴⁰ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.18.

⁴¹ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.21.

⁴² Cf. see above.

⁴³ Swiss Federal Department of Finance (FDF), *Initiation of consultation on the bill for implementing the revised recommendations of the international Financial Action Task Force of 2012*, Basic information, February 27, 2013, p.3.

⁴⁴ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.27.

⁴⁵ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013.

⁴⁶ See <http://www.tagesanzeiger.ch/wirtschaft/geld/Uhrenhaendler-wollen-keine-Bargeldlimite/story/27489006> [Accessed May 31, 2013].

⁴⁷ Swiss Federal Department of Finance (FDF), *Initiation of consultation on the bill for implementing the revised recommendations of the international Financial Action Task Force of 2012*, Basic information, February 27, 2013, p.2.

⁴⁸ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.3.

⁴⁹ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013, p.29.

⁵⁰ Swiss Federal Department of Finance (FDF), *Initiation of consultation on the bill for implementing the revised recommendations of the international Financial Action Task Force of 2012*, Basic information, February 27, 2013, p.2.

financial intermediary is obliged to alert MROS and delay the execution of the transaction order for five working days.⁵¹

Enhanced due diligence requirements

According to the Swiss financial centre strategy, enhanced due diligence requirements for financial intermediaries in the AMLA shall be introduced in order to strengthen the credibility of the financial industry.⁵² The government proposal shall codify the respective due diligence requirements into AMLA in its amended art 6a ss. They call for a risk-based assessment, which should prevent the acceptance of untaxed assets.⁵³

The most important indicators of increased risk shall also be introduced into AMLA. Risks may, thus, arise from a client's wish for greater discretion or for investments to be carried out within a complex international structure without any reasonable case.⁵⁴ The legislative proposal also sets out indicators according to which financial intermediaries may assume a reduced risk, e.g. if a double taxation treaty between is in force between the client's country of domicile and Switzerland.⁵⁵ Also, a credible self-declaration may constitute a strong indicator of a tax-compliant behaviour of the client.

Nevertheless, the details of these risk assessment indicators shall be set out in self-regulation provisions, which need to be recognised as a minimum standard by the supervisory authority.⁵⁶ The Swiss Government still wants to refrain from introducing a widespread self-declaration obligation and, thus, suggests to proceed as foreseen in the consultation documents.⁵⁷

In case the risk-based assessment reveals suspicions regarding the client's tax compliance, the financial intermediary will be obliged to refuse further assets. If a change in the client's behaviour is observed, the financial intermediary will have to ask the client to provide evidence of his or her tax compliance within a reasonable timeframe. Should the client not be in a position to provide further evidence, the business relationship shall be ultimately terminated.⁵⁸

Outlook

Foreign Account Tax Compliance Act

The US Foreign Account Tax Compliance Act (FATCA), which was enacted in March 2010, will have a major impact on the global financial industry. It significantly changes the US withholding tax system, particularly due to the fact, that it will be applicable to non-US banks, which may have US customers.⁵⁹ Switzerland and the United States signed the bilateral agreement regarding FATCA on February 14, 2013. It allows Swiss financial institutions to exchange information with the IRS and provides for simplifications in implementing FATCA.

This agreement provides for some simplifications for large sectors of the Swiss financial industry, such as social security pension funds, or collective investment vehicles and financial institutions with a predominantly local clientele. The agreement ensures that the accounts held by US persons with Swiss financial institutions are disclosed to the US tax authorities either with the consent of the account holder or by means of group requests within the scope of administrative assistance. Information will not be transferred automatically in the absence of consent, and instead will be exchanged only on the basis of the administrative assistance clause in the double taxation agreement.⁶⁰

Group requests

Since all OECD member states, including the United Kingdom and Switzerland, agreed to the OECD's intention to amend art.26 of the Model Tax Convention by allowing henceforth group requests, it may be a question of time until the compliance with this new standard will be postulated by the G20 and the OECD itself, just as it was the case with the former provision. Furthermore, since Switzerland is willing to allow group request in the case of the United States as part of the bilateral FATCA implementation agreement⁶¹, further tax negotiations are only a matter of time.⁶²

⁵¹ Swiss Federal Department of Finance (FDF), *Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière, Erläuternder Bericht zur Vernehmlassungsvorlage*, February 27, 2013.

⁵² Cf. see above.

⁵³ Swiss Federal Department of Finance (FDF), *Finanzplatzstrategie—Erweiterte Sorgfaltspflichten zur Verhinderung der Annahme unversteuerter Vermögenswerte*, Erläuternder Bericht zur Vernehmlassungsvorlage, February 27, 2013, p.2.

⁵⁴ Swiss Federal Department of Finance (FDF), *Finanzplatzstrategie—Erweiterte Sorgfaltspflichten zur Verhinderung der Annahme unversteuerter Vermögenswerte*, Erläuternder Bericht zur Vernehmlassungsvorlage, February 27, 2013.

⁵⁵ Swiss Federal Department of Finance (FDF), *Finanzplatzstrategie—Erweiterte Sorgfaltspflichten zur Verhinderung der Annahme unversteuerter Vermögenswerte*, Erläuternder Bericht zur Vernehmlassungsvorlage, February 27, 2013, p.6.

⁵⁶ State Secretariat for International Financial Matters (SIF) at http://www.sif.admin.ch/dokumentation/00513/00772/index.html?lang=en&print_style=yes&msg-id=47934 [Accessed May 31, 2013].

⁵⁷ State Secretariat for International Financial Matters (SIF).

⁵⁸ Swiss Federal Department of Finance (FDF), *Finanzplatzstrategie—Erweiterte Sorgfaltspflichten zur Verhinderung der Annahme unversteuerter Vermögenswerte*, Erläuternder Bericht zur Vernehmlassungsvorlage, February 27, 2013, p.2.

⁵⁹ See <http://www.nzz.ch/aktuell/wirtschaft/uebersicht/weltweite-kritik-an-fatca-1.16932387> [Accessed May 31, 2013].

⁶⁰ The Federal Authorities of the Swiss Government at <http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=47779> [Accessed May 31, 2013].

⁶¹ Swiss Secretariat for International Financial Matters at <http://www.sif.admin.ch/00488/index.html?lang=en&msg-id=45046> [Accessed May 31, 2013].

⁶² See http://www.swissinfo.ch/eng/business/European_Fatca_deal_threat_to_Swiss_secretcy.html?cid=32103052 [Accessed May 31, 2013].

OECD report addressing base erosion and profit shifting

The OECD issued a report in February 2013 on “Addressing Base Erosion and Profit Shifting”.⁶³ It analysed whether, and if so why, multinational enterprises’ (MNE’s) taxable profits are being allocated to locations different from those where the actual business activity takes place. The OECD plans to implement a so-called integrated and holistic approach to improve the concrete tools it has to address base erosion and profit shifting. The G20 welcomed the work that the OECD has been undertaking in this area and was the origin of the elaborated report.⁶⁴

The OECD concludes in said report that, in addition to a need for increased transparency on effective tax rates of MNEs, key pressure areas include those related to

1. international mismatches in entity and instrument characterisation including, hybrid mismatch arrangements and arbitrage,
2. application of treaty concepts of profits derived from the delivery of digital goods and services,
3. tax treatment of related party debt-financing, captive insurance and other intra-group financial transactions,
4. transfer pricing, also in relation to the shifting of risks and intangibles, the artificial splitting of ownership of assets between legal entities within a group, and

transactions between such entities that would rarely take place between independents

5. the effectiveness of anti-avoidance measures, in particular GAARs, CFC regimes, thin capitalisation rules and rules to prevent tax treaty abuse and (vi) the availability of harmful preferential regimes.⁶⁵

Concluding observations

The Swiss financial industry has been under considerable pressure for many years, increasingly since the terrorist attacks in 2001 and notably since the financial crisis in 2007. While the Swiss Government was caught on the wrong foot in 2007, it tries to anticipate any possible future conflict by anticipatory obedience. The recent changes have massively unsettled the Swiss self-conception of its financial industry. And it may also massively unsettle the foreign bank clients’ trust in the Swiss financial centre as rock-solid financial haven with a long-lasting tradition of privacy. A true Swiss financial centre strategy should henceforth focus on growth and new markets with a special focus on the long-lasting Swiss tradition of privacy, e.g. by introducing trusts into Swiss law.

First newspaper articles already report that assets may be transferred from Switzerland to other offshore destinations, interestingly into countries, which were at the forefront of the attacks against Swiss banks, like the United States.⁶⁶ Bank clients may, in the absence of a forward-looking financial centre strategy, get more accustomed to “Welcome to Miami” instead of “Willkommen in Zürich” or “Bienvenue à Genève”!

⁶³ See <http://www.oecd.org/ctp/BEPSENG.pdf> [Accessed May 31, 2013].

⁶⁴ See <http://www.zeit.de/wirtschaft/2012-11/unternehmenssteuern/seite-2> [Accessed May 31, 2013].

⁶⁵ Wording according to the OECD report, p.6, cf. at <http://www.oecd.org/ctp/BEPSENG.pdf> [Accessed May 31, 2013].

⁶⁶ See <http://www.spiegel.de/wirtschaft/soziales/florida-steuerfluechtlinge-aus-der-schweiz-fliehen-in-die-usa-a-887381.html> [Accessed May 31, 2013].