



Tax transparency with group requests

Financial Services

Tax transparency with group requests for administrative assistance

The first exchange of information between Switzerland and all EU member countries, Australia, Canada, Guernsey, Isle of Man, Iceland, Japan, Jersey, Norway and South Korea under the rules of the Automatic Exchange of Information (AEOI) will take place in September 2018. One year later, a reporting between Switzerland and many more countries will take place. However, irrespective of the AEOI, foreign tax authorities may obtain data of (former) clients of Swiss banks, insurance companies or, for example, fiduciary firms by submitting a so-called group request.

Sources of information for foreign tax authorities

In July 2012, the OECD decided that group requests are also possible under Article 26 of the OECD Model Tax Convention, which establishes the international standard for administrative assistance in tax matters. Like all other important financial centers, Switzerland accepted this broadening of the standard on administrative assistance. According to the Swiss Tax Administrative Assistance Ordinance, group requests are permitted for information pertaining to the time from 1 February 2013.

The following requirements must in particular be met for administrative assistance being granted based on a group request:

- A specific request to Switzerland for administrative assistance: For administrative assistance to be provided, the country in question has to contact Switzerland with a specific request for the assistance.
- Double Taxation Agreement (DTA) or Tax Information Exchange Agreement (TIEA) with a clause on administrative assistance in line with the OECD Standard providing for group requests.

Since 2009 Switzerland has signed 68 such DTAs and TIEAs, of which 60 are already in force (see table 1).

Alternatively, a group request can be based on the OECD Convention on Mutual Administrative Assistance in Tax Matters (OECD Convention) which entered into force in Switzerland on 1 January 2017. Currently about 100 jurisdictions participate in the OECD Convention, including all G20 countries, almost all OECD countries, major financial centers and a growing number of developing countries (see table 2). The OECD Convention provides for a retroactive effect back to 1 January 2014 for tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant state. As a result, for example a Swiss bank client resident in South Africa (signatory state of the OECD Convention) who closed the account in 2015 may still be caught by a group request based on the OECD Convention.

- Detailed description of the group of the affected taxpayers with a clear and fact-based justification on the grounds that the taxpayers falling into the group are generally not tax-compliant (e.g., clients, who are closing an account against cash in order to escape the AEOI; clients that have not confirmed their tax compliance to the bank when asked to do so or clients subject to the withholding under the EU Savings Tax Agreement). There is no clear guidance on the difference between lawful group requests and not permissible "fishing expeditions". At least it can be said that a group request may not demand all client names of a bank that are resident in a specific country without giving any additional criteria.

Table 1: DTA/TIEA Partner Countries

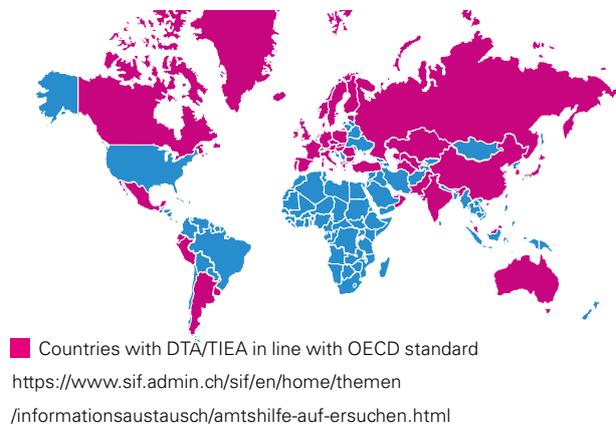
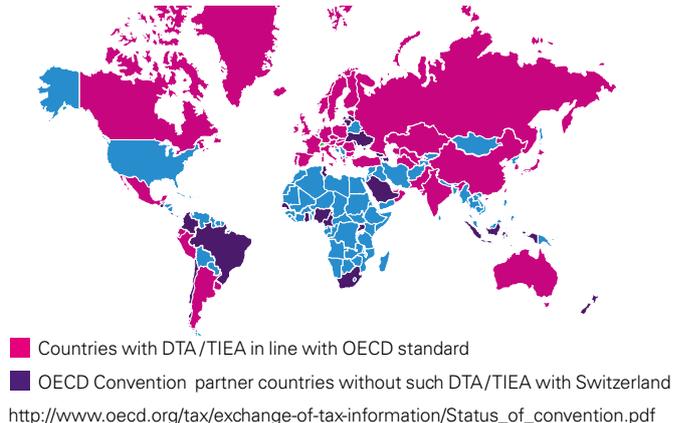


Table 2: OECD Convention Partner Countries





The group request placed by the Netherlands

After the closure of the Dutch voluntary disclosure program, the Dutch tax authorities tried to obtain the names of persons who neither fulfill their tax obligations nor participated in the voluntary disclosure program. In a first step, the Netherlands submitted a group request relating to unnamed UBS clients, to the Swiss Federal Tax Administration in July 2015. In principle, the clients domiciled in the Netherlands, who had held an account with UBS in Switzerland between 1 February 2013 and 31 December 2014 and who had the specific characteristics listed below were affected by this first Dutch group request:

- UBS had sent the client in question a letter where they were told that their account would be closed unless the client could prove his or her tax compliance and;
- the client did not prove his or her tax compliance to UBS.

In February 2016, the Dutch tax authorities submitted a practically identical group request for Credit Suisse clients.

The Swiss Federal Administrative Court's decision

After the Swiss Federal Tax Administration approved the group request from the Netherlands, a banking client concerned filed an appeal with the Swiss Federal Administrative Court. With its decision of 21 March 2016, the Swiss Federal Administrative Court approved this appeal mainly because of the following reason: The protocol on the double taxation treaty signed between Switzerland and the Netherlands (DTT NL) explicitly states that the taxable person must be mentioned by name in order for the requesting country to receive administrative assistance. Therefore, no administrative assistance may be provided for a group request as this alternative does not (could not) list the name of the taxable persons concerned.

The Swiss Federal Supreme Court's decision

Contrary to the Swiss Federal Administrative Court, the Swiss Federal Supreme Court now concluded that no client names needed to be given in order to be able to provide the administrative assistance as per the DTT NL.

According to the Swiss Federal Supreme Court's interpretation of the DTT NL, it is sufficient if the group request contains sufficient information that will allow an identification of the person in question to be able to provide administrative assistance. That specifically naming a client is not mandatory is due to the purpose of the DTT NL, which according to the relevant protocol consists of, "an exchange of tax information to the maximum extent without allowing the states partial to the agreement to go on "fishing expeditions".

Finally, the Swiss Federal Supreme Court also checked whether this could be considered a legitimate group request or indeed a fishing expedition, which would not have been permitted. Despite the fact that the definition of group in the present request for administrative assistance goes quite far, the Swiss Federal Supreme Court judged that it is not an inadmissible fishing expedition. The consequence of the Swiss Federal Supreme Court's approval of the administrative assistance request is that the similar administrative assistance procedures applicable to Credit Suisse clients can now be taken up again.

Impact of this decision

Switzerland has already concluded more than 60 double taxation treaties and tax information agreements, which permit administrative assistance based on group requests. Moreover, under the OECD administrative assistance convention concerning Switzerland, group requests will be possible in any case as of 2017. The administrative assistance convention foresees retroactive effect to 1 January 2014.

We expect a number of other states to follow the example set by the Netherlands and to address Switzerland with similar group requests. At this time, it remains to be seen which countries will place a similar request. >

Automatic Exchange of Information (AEol)

Contrary to the mentioned (group) requests for administrative assistance, the AEol provides for an automatic transmission of information of a taxpayer's assets and income held in a country to the taxpayer's country of domicile. To date, about 100 countries, including all major financial centres, have declared their intention to adopt the standard. The USA does, however, not implement the AEol, but does provide limited information under FATCA to foreign countries, if the respective Intergovernmental Agreement (IGA) provides for this.

Swiss AEol partner states

However, the mere fact of a country's commitment to the AEol does not yet allow to draw conclusions as to with which countries it will in the end indeed exchange information. The AEol's introduction requires a bilateral or multilateral activation thereof by the treaty states concerned. In Switzerland, such agreements with individual partner states must be submitted to Parliament separately for ratification. Switzerland introduced the AEol as of 2017 with all EU member countries, Australia, Canada, Guernsey, Isle of Man, Iceland, Japan, Jersey, Norway and South Korea with a first exchange of information in September 2018 regarding 2017 data.

2019, Switzerland will exchange information with many more countries, including for example Brazil, Argentina,

Russia or India. Please see www.kpmg.ch/aeoi for an updated list of the AEol partner jurisdictions of Switzerland.

Wealth management structures are affected by the AEol as well

The AEol affects all Controlling Persons of wealth management structures, such as trusts, foundations and domiciliary companies, not only the beneficial owners. Because the reporting regime is cast so wide, it is hard to circumvent the AEol using structures. Even persons that may not be liable to pay taxes in that relevant domicile jurisdiction may have to be reported. This is especially true for discretionary beneficiaries who do not receive any distributions. It is therefore even more important that all of the persons involved in structures (for instance, the account-keeping bank, an asset manager or a foundation board member) grapple with the details of who needs to be reported under the AEol regime. Specifically, it must also be clarified whether it might not be better if the wealth management structure itself reports under the AEol regime instead of the account-keeping bank (or vice versa). Further information on how wealth management structures and the respective individuals involved are affected by the AEol can be found here:

<https://assets.kpmg.com/content/dam/kpmg/ch/pdf/who-is-in-scope-of-the-aeoi.pdf>

Conclusion

Running away from the AEol is not an option, as in particular such persons could be caught by a group request. Furthermore, the recent events in Panama have proven that there is a risk of exposure due to data thefts.

This means that persons who still hold undeclared assets should disclose these as soon as possible, especially in view that some countries are offering rather attractive voluntary disclosure programs at the moment. Further information on disclosure programs can be found here: www.kpmg.ch/voluntarydisclosures.

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