

*The Swedish Swiss Chamber of Commerce (SSCC)  
with the Embassy of Sweden*

## ***Legal and Tax Conference***

Zurich, March 17, 2010<sup>1</sup>

### **Observations by an Outsider: “Tax War(s)” against Switzerland?**

Good evening, Ladies and Gentlemen!

I have *mixed feelings* standing in front of you this evening. On one side, it is a privilege and an honour to be here – and I do not just say so but I mean it. But to be truthful, on the other side I feel humbled, a little bit intimidated and somewhat out of place:

In fact, I am *not* an ambassador, I am *not* a representative of an important business association like the Swiss Banking Organisation or the Swedish Swiss Chamber of Commerce (SSCC), I hold *no* position whatsoever with either the Swiss Government or a governmental agency, and finally, I am *not* even a politician of any kind. Therefore, you may ask with good reason and without hesitation: “What is this guy doing here”?

Honestly, I have no clue..!

Originally, I was invited and asked to join this fine panel of expert speakers this evening in order, hopefully, to explain in no uncertain terms (and maybe to defend) the “*Swiss view*” – whatever this may be – in the current tax discussion(s). Since I am representing nobody but myself and my personal opinion, thus, the following will neither be an official nor a semi-official viewpoint, respectively, but my very *private views and observations*.

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The main advantage of being an academic is that *I am free to say* whatever I personally think. Actually, I have no client(s) to please, no mandate(s) to acquire or to defend, and – last but not least – I am not running for any office. I have some sort of a *record for being critical* regarding both the Swiss Government (“Bundesrat”) and some other countries. You may not share my analysis’ or my observations, however, you will get at least an *independent view*.

Finally, we are not in a legal seminar this evening (despite the title: “Legal and Tax Conference”), therefore, I omit a detailed legal analysis and lawyers’ arguments. I hope that non-lawyers will understand as well what I wish to express in the following. Primarily, I will point out *some observations* – how *I* (sic!) see them from *my “Swiss perspective”* (sic again!)..

### **A. The Necessity for State Competition**

I was asked to answer the following question: “Is the *competition between states* necessary or not”? The answer is simple, short and self-evident: “*Yes*”..!

We all know that we are not citizens of the “Planet Earth” but – for better or worse – of Sweden, of Switzerland, of Greece or of Austria. Even not being a “market enthusiast”, we may state: only competition can and will *bring out the best* either in people, in businesses or finally in countries. To make a long story short: competition between states lays the fundamental groundwork for development, progress and the so-called *Race to the Top*.

Even the European Union (EU), with its sometimes doubtful record of state competition, expresses no doubt about these basics. Hence, in various areas of the law, the EU intentionally fosters mere harmonisation but *not unification* of the laws so that state competition lives on, at least to a certain extent, between the EU member states.

Unfortunately, many politicians and some diplomats are short-sighted and focus exclusively on *tax aspects*; the so-called administrative assistance for tax matters (“Amtshilfe”) is major news not only for specialists. *Business people* know that tax issues are important but *other factors* are crucial as well, for instance, peace and prosperity of a country, political stability, access to independent courts and governmental agencies, high education of the workforce.

Switzerland was *envied by many countries* for many years – and rightfully so! We should not be ashamed because it was (and is) the result of hard work...

It goes without saying that *unfair advantages* between states may and should be challenged because a so-called *Race to the Bottom* cannot be (and is not) the goal of Switzerland. Of course, our country is not an island – we and our businesses need good and trusting relations to other states. For good reasons, actually, Switzerland reached out and *adjusted* its legal framework accordingly in the recent past – admittedly, less on a voluntary basis and more *under pressure from abroad* (e.g. by the OECD).

EU Ambassador Dr. *Michael Reiterer* recently said: “Last but not least (...) ist es nicht Ziel der Union, den Steuerwettbewerb abzuschaffen. In der Union gibt es 27 konkurrierende Steu-

ersysteme, die teilweise wenig gemeisnam haben, und kein einheitliches EU-System bilden. Es geht (...) um die Sicherung des Wettbewerbs mit „clean money“ auf der Basis gemeinsamer Spielregeln” – in fact, I could not agree more!

My *observations*: state competition *is not war* (on either side), thus, Switzerland did and does what is in its own best interest as a sovereign country – we must finally *stop to apologize* for being who we are; other countries (like the USA, France or Germany) are looking out for themselves, so: *why should Switzerland behave differently?*

## **B. Switzerland and Sweden**

I like Sweden a lot – Switzerland and Sweden may not be neighbours but, nevertheless, we are in some ways “*neighbours in mind*”: even though the political systems are (on their faces) quite different, both states are neutral, their social security systems are in place, the education of their peoples are fine, and the *business partnerships* were and are flourishing (e.g. ABB, Electrolux, Nobel Biocare), and abroad – apparently – we are often confused for each other!

On a *personal note* as an avid (yet: bad) golfer: *I admire Swedish golf* – not only Annika Sörenstam, but more recently, for instance, Henrik Stenson or Robert Karlsson and so on; we Swiss have much to learn in this regard...

Companies as well as people must be free *to do business and to invest wherever* they see fit. Within the *European Union*, the core principles of the so-called primary legislation of the EU (“Primärrecht”) are: free movement of goods, of services, of capital, and of persons; as we all know, Switzerland and the Swiss have no entitlements in this regard.

Yet, in order to ease the transition and the transfer of business relationships between *Sweden and Switzerland* and to safeguard the fairness for states (for example, concerning tax revenues), companies and their shareholders, so-called *double taxation treaties* (“Doppelbesteuerungsabkommen” [DBA]) both for income tax purposes and for wealth tax purposes since June 6, 1966 as well as for inheritance taxes since November 11, 1985.

One year ago, as you well know, the Swiss Government agreed to implement the OECD-standards and is currently in the process of renegotiating various treaties – the *negotiations with Sweden* shall start this year as well and will, in all likelihood, run rather smoothly.

My *observations*: Sweden and Switzerland are, in general, on *friendly terms* and the present double-taxation treaty or treaties, respectively, will be renegotiated for the common good of both states; therefore, *no “Tax War”* seems to loom on the near horizon..!

## **C. Switzerland and the International Community**

### **a) USA**

The USA is not only in a “War against Terrorism” but also – in addition – in “*Wars against Tax Havens*”; however, Switzerland is not specifically targeted. The best example is the so-

called “Foreign Account Tax Compliance Act” which shall come into force in January 2013. This US law shall provide for a *disclosure obligation* of *all foreign* financial intermediaries (e.g. banks) regarding their US resident clients’ data to the US-american tax authorities (I.R.S.) – in case of *non-compliance*, the banks shall face a *withholding tax* of 30%.

Our today’s conference is neither the time nor the place to talk about or to analyze the treatment of Switzerland by the USA over the last two years. Do not get me wrong: the first mistakes, without any doubt, were done on the “Swiss side” (i.e. by its biggest bank), yet, this does not justify all aberrations in the following.

To qualify the present relationship – as many see it – as a “*bullying*” by the USA towards Switzerland does not seem to exaggerate the situation. And why is the USA doing it? “Because *it can..!*” Political and business blackmail by a country, apparently, is not sanctioned.

Interestingly, a never published order dated *February 18, 2009*, by the Supervisory Authority of the financial markets (“FINMA”) opened the floodgates:

In connection with a so-called Deferred Prosecution Agreement between UBS Ltd. and the USA’s Department of Justice, FINMA had the banking information of some *300 UBS customers transferred* to the U.S. Internal Revenue Services – the Federal Administrative Court (“Bundesverwaltungsgericht”) qualified this order with judgment of January 5, 2010, as *illegal* (yet, the decision is not final as of today – *it might* be taken up by the Federal Court in Lausanne [“Bundesgericht”] within the next few months).

On March 3, 2009, i.e. two weeks after said FINMA-order, I heard EU Ambassador Dr. *Michael Reiterer* at a Rotary Lunch (RC Bern) leaving no doubts whatsoever: “The European Union expects equal treatment by Switzerland” ..! Within days, actually, both the EU and the Organisation for Economic Co-Operation and Development (OECD) had put under severe pressure by announcing that Switzerland ought to be “*black listed*” or “*grey listed*” as so-called “tax haven” – and the “Tax War(s)” not only against Switzerland continued...

Today, it may not be the “end”, not even the “beginning of the end” but only the “end of the beginning” (W. Churchill)!

My *observations*: looking back in the future, in all likelihood, historians will find that the so-called “*global tax haven issue*” was *resolved* once and for all (after many decades of unsuccessful pressure from abroad) by two Swiss institutions, i.e. by UBS Ltd. and primarily by *FINMA*. Not surprisingly, the internationally coordinated “Tax War(s)” being wagged (e.g. by the G-20 forum) against alleged “tax havens” are popular abroad – but they do not solve the *global financial crisis* of the years 2008/2009.

## **b) Organisation for Economic Co-Operation and Development (OECD)**

The OECD – with today 30 member states – was established half a century ago, i.e. in the year 1960, and Switzerland was one of the founding members. In the following years, the OECD

made recommendations about double taxation treaties in the legally non-binding so-called *Model Tax Convention on Income and on Capital* (“OECD-Musterabkommen”) which is revised from time to time, for instance in the year 2008.

By long tradition, Switzerland did not wish to grant administrative assistance for tax matters to foreign tax authorities in case of so-called *tax evasion* (“Steuerhinterziehung”) but only in case of so-called *tax fraud* (“Steuerbetrug”); this distinction represented a typical “Swiss finish” which never was truly understood or accepted abroad – its primary goal, of course, was to uphold as thoroughly as possible the (*fiscal*) *banking secrecy* for *foreign* banks’ customers.

Consequently, Switzerland made *formal reservations* for many years within the OECD against the Model Tax Convention – and faced strong criticism from abroad. But on *March 13, 2009*, the Swiss Government changed course in a fundamental way ceding to the increasing international pressure after the diplomatic “hick-ups” with the USA.

Therefore (for good and for valid reasons), Switzerland will adopt in most of its double taxation treaties the *OECD-standard* of tax information exchange which provides for, among others, a formal request by a foreign authority as well as a specific suspicion of a tax crime; in particular, so-called *fishing expeditions* are not allowed. It needs to be emphasized that the OECD-standard is a different standard than the one within – most parts of – the EU, i.e. the so-called *automatic information exchange* (“Automatischer Informationsaustausch”).

The fundamental shift of the Swiss Government in its international tax policy bears some risks. The *major legal risk* is that the *Swiss people might vote against* double taxation treaties – commentaries held from the beginning that a referendum by request (so-called “Fakultatives Referendum”) is possible, and the Swiss Government followed this view with some delay.

My *observations*: the threat(s) from abroad of “*grey listing*” or even of “*black listing*” Switzerland as a “tax haven” were *inacceptable* – “black listing” got a sense of “blackmailing”. However, giving up the (former “Swiss-finish”) distinction between *tax fraud and tax evasion* for *foreign* bank customers is international standard, makes good sense, and does not undermine Swiss banking secrecy – yet, the same is not necessarily true for *Swiss* bank customers. Switzerland could (and should) not fight any “Tax Wars” against the OECD-standard.

### c) **European Union (EU)**

Switzerland is *not a member of the EU* – the membership may be the Swiss Government’s long-term goal, yet, it would or will face many political obstacles. Nevertheless, Switzerland has *arrived in “Europe”* (not necessarily in the EU) a long time ago. The *legal connections* of Switzerland with the EU – be they formal or informal – are growing both in legislation and in application of the laws by courts or authorities; as overview:

A *contractual network* of some 30 treaties (sc. “Bilaterale I” and “Bilaterale II”) is the main cornerstone of the relationship between the EU and Switzerland. In addition, each Swiss legislation must face a *check on its conformity with EU laws* (“EU-Kompatibilitätsprüfung”). In

certain areas of the law, however, Switzerland attempts in rather rare cases to *implement EU laws in Swiss laws* without any obligation (so-called “autonomer Nachvollzug von EU-Recht”) – this particular legislation concept results in an obligation *to apply the laws in conformity with EU laws* (so-called “europarechtskonforme Auslegung”).

For good reasons, some observers pointedly qualify Switzerland not as a member state but as a *passive member of the EU* (“Passivmitglied”)..!

The *many differences* either by history or by mentality ought not to be underestimated. For example, Switzerland – unlike the EU – is rather “legislation-averse”; moreover, the relationship between state and citizens is based on *mutual trust* – this explains today’s different treatment of tax evasion and tax fraud within Switzerland.

Tax collection on one side and Tax laws enforcement on the other side are very important to the EU. Today, the EU has the competence to regulate the tax laws enforcement by criminal law measures. EU Directive 77/799 was the first legislation establishing a framework for *information exchange in tax matters* between EU states.

There never was a “Tax War” between the EU and Switzerland. However, the EU expressed (and expresses) its displeasure with various “Swiss finishes”. Lately, representatives of the EU make clear in no uncertain terms that it “expects” Switzerland to adopt the *concept of automatic information exchange* when it come to *cross-border tax crimes*.

On *February 25, 2010*, the Swiss Government confirmed its new policy of 2009 adopting the OECD-standard of information exchange as quickly as possible through *double taxation treaties* (and not by a respective agreement with the EU) – thereby reconfirming its “Strategische Stossrichtung für die Finanzmarktpolitik der Schweiz” of December 16, 2009. The most important political aspect was that the Swiss Government *rejected the EU’s “request”* for an *automatic information exchange* – once again – in this very “Finanzmarktstrategie”.

The Swiss Government as well as various banking organizations in Switzerland are in favour of a so-called *Withholding Tax Concept* (“Abgeltungssteuer”) on foreign moneys in Swiss banks. However, it seems at the present time that the *EU is not interested* – for whatever reasons; it is not unlikely, in my view, that the EU pushes for an automatic information exchange in order to “convince” its own members (i.e. Luxemburg and Austria) to adopt this standard.

For the relationship between the EU and Switzerland, though, the *questions remaining* as of today are: who – if anyone – will move, and in which direction?

EU Ambassador Dr. *Michael Reiterer* recently concluded: “Die Schweiz sitzt auf Grund ihrer Verflechtungen mit der Union im gleichen Boot, Ruderboot wenn Sie mir das Bild erlauben: Ein kräftiger Schlag bringt das Boot rascher weiter, als nur das Eintauchen des Ruders. Teamgeist ist bei der Krisenbekämpfung hilfreich, trotz Interessensgegensätzen und Konkurrenzsituationen. Einen „Wirtschaftskrieg“ kann ich nicht erkennen” – this is true as well, in my

view, but sometimes we get the impression that the EU and Switzerland are sitting and rowing *in this boat face to face...*

My *observations*: I see *no* “Tax War” in the near future between the EU and Switzerland – fortunately, the EU has too many smart and sensible diplomats; moreover, our country did what the EU and other countries expected, i.e. accepting the OECD-standard. The automatic information exchange concept does not represent an internationally-accepted standard; the best advice for the Swiss Government in this regard must be: “*Just say No*”..!

#### **d) Other “War Zones”**

Switzerland was (and still is) under a lot of political and diplomatic pressure *from abroad* regarding its tax policy – therefore, implementing the OECD-standard makes not only good sense but seems inevitable; this is not true for the “EU-standard” which goes farther and too far. An additional and more recent “war zone” is the fact that some foreign states seem to be more and more willing *to buy stolen banking data* and use them against their own citizens in investigations and proceedings (e.g. France and Germany).

Generally, it is *none of Switzerland’s business* how good (or how bad) other states treat their own citizens. However, implicitly supporting people, who intentionally violate Swiss laws by stealing protected banking information, undermines *Switzerland’s sovereignty* and is an embarrassment between more or less “friendly neighbours”.

There are not too many legal tools to defend against such a behaviour. Furthermore, the new Swiss double taxation treaties adopting the OECD-standard, unfortunately, do *not explicitly* provide that administrative assistance for tax matters will *not be granted* to foreign authorities if the requests are *based on “criminal (stolen) information”*. However, such requests would in any case contradict good faith (“Treu und Glauben”):

Therefore, the Swiss Government tries to remedy this maybe overlooked or underestimated or forgotten aspect by enacting a so-called Ordinance on the Administrative Assistance on Double Taxation Treaties (“Verordnung über die Amtshilfe nach Doppelbesteuerungsabkommen” [ADV]) on coming *October 1, 2010*; the detailed report to the draft ADV (“Erläuternder Bericht ADV”) of January 20, 2010, pointed out that any foreign authorities’ request based on stolen information will be *rejected* by Swiss authorities.

My *observations*: these latest “war zones” do not represent “Tax Wars” but have the potential of “*guerrilla warfare*”. Therefore, Switzerland should not take lightly such threats; in my view, it would be understandable and sound policy *to freeze negotiations* on double taxation treaties (for a certain time) with states buying stolen banking information. Our country must be careful to not become a *laughing stock* of the international community..!

#### **D. Switzerland and the Swiss**

The *different legal treatment* of tax fraud on one side and of tax evasion on the other side in Swiss tax laws is rooted in the traditional concept of *trust between state and citizens* in Switzerland. Criminal investigations in case of a “minor illegality” like tax evasion (unlike tax fraud) seem not to be warranted – but let me be clear: *tax evasion is illegal* in Switzerland..!

The adoption of the OECD-standard for *foreign resident* clients of banks in Switzerland leads to the follow-up question whether or not this (new) tax policy shall also apply to *Swiss resident* clients of banks – neither the OECD nor the EU made any requests in this regards because this is internal discussion for Switzerland. The Swiss Government officially stated recently, i.e. on *January 20, 2010*: “Der Bundesrat sicherte gleichzeitig zu, dass sich hinsichtlich des steuerlichen Bankheimnisses für *inländische* Steuerpflichtige *nichts ändern* wird”.

But who cares what he or she said yesterday (or some weeks ago)? Apparently, the discussion about this distinction between tax fraud and tax evasion will start rather sooner than later in Swiss politics – one member of the Swiss Government already put a question-mark to the justification, and a conservative political party seems to shift into this direction as well. And, for once, there is *not even international pressure* on Switzerland...

My *observations*: there will be *no “Civil War”* within Switzerland on the legal and political issues of tax evasion and tax fraud. In my view, the traditional “Swiss finish” with said distinction proved fine but the discussion about a change in the future may be useful; but we need to be aware that changing the tax laws in this regard has *certain consequences* (e.g. on the regulatory basis and on an administrative level because the tax authorities would desperately need *new personnel* in order to fulfil the new tasks).

## **E. Final Observations**

- \* The so-called “*Swiss bashing*” seems to be the new pastime abroad – but we Swiss tend to overestimate our relevance, be it good or bad; probably, most states and foreign citizen like our country. There are *no “Tax (or other) Wars”* against Switzerland.
- \* Switzerland ought to feel and to show *more self-confidence*, in particular, in talks and in negotiations with foreign states or organizations.
- \* If Switzerland is confronted with *requests from abroad*, of course, we have to take them seriously. We should accept requests which make good sense (e.g. the OECD-standard), yet *we have to reject* other proposals (e.g. the automatic information exchange). As an alternative, the withholding tax concept seems a sensible “middle ground” – and if the EU does not want it: so be it...

Ladies and Gentlemen – *I thank you for your attention..!*

Peter V. Kunz