

Peter V. Kunz

Tax War(s) against Switzerland?

Kürzlich hielt die Swedish Swiss Chamber of Commerce zusammen mit der Schwedischen Botschaft in Zürich eine Konferenz betreffend Rechts- und Steuerfragen, an welcher vier Redner (EU-Botschafter Dr. Michael Reiterer; Prof. Mattias Dahlberg, Universität Uppsala; Herr Claude-Alain Margelisch, stellvertretender Geschäftsführer der Schweizerischen Bankiervereinigung sowie Prof. Peter V. Kunz, Direktor des Instituts für Wirtschaftsrecht an der Universität Bern) auftraten. Im Folgenden findet sich der Text, welcher dem Autor als Grundlage für seine Rede gedient hat. Die erst nachträglich eingefügten Fussnoten sollen dem Leser für ein vertieftes Verständnis dienen.

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I. Preliminary Observations

A. Introduction

[Rz 1] I have *mixed feelings* standing in front of you this evening. On one side, it is a privilege and an honour to be here. 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 Bankers Association or the Swedish Swiss Chamber of Commerce, 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.

[Rz 2] Therefore, you may ask with good reason and without hesitation: «What is this guy doing here»? Honestly, I have no clue myself...

[Rz 3] Originally, I was invited and asked to join this fine panel of expert speakers this evening in order, hopefully, to explain (and maybe to defend) in no uncertain terms 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*.

[Rz 4] 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. You may not share my analysis or my observations, however, you will get at least an *independent view*. Primarily, I will point out *some observations* – how *I* (sic!) see them from my «*Swiss perspective*» (sic again!).

B. The Necessity for State Competition

[Rz 5] 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»!

[Rz 6] We all know that we are not citizens of «Planet Earth» but – for better or for worse – of Sweden, of Switzerland, of Greece or of Austria. Even not being a «market enthusiast», we may state and conclude: 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*.

[Rz 7] 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 states¹.

[Rz 8] Unfortunately, many politicians and some diplomats are short-sighted and focus exclusively on *tax aspects*; the so-called administrative assistance for tax matters («*Amtshilfe*»)² 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.

[Rz 9] Switzerland was *envied by many countries* for many years – and rightfully so! We should not be ashamed because the Swiss status was (and is) primarily the result of hard work.

[Rz 10] 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 with 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)³.

[Rz 11] 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

¹ This is also a legal consequence of the so-called *principle of proportionality* (see, inter alia, article 69 Treaty on the Functioning of the European Union [TFEU]); one example is the *European Company Law* (the undersigned teaches this legal course at the University of Berne Law School in the year 2010).

² See, inter alia, ROBERT WALDBURGER, Aktuelle Entwicklungen in der schweizerischen Amtshilfe im Steuerbereich, SZW 6/09 (2009) p. 480 et seq.; URS BEHNISCH, Amtshilfe der Schweiz in Steuer(straf)sachen, insbesondere an die USA: Durcheinandertal, ASA 77 (2008/09) p. 737 et seq.

³ See below para. II.C.

konkurrierende Steuersysteme, die teilweise wenig gemeinsam haben, und kein einheitliches EU-System bilden. Es geht (...) um die Sicherung des Wettbewerbs mit «clean money» auf der Basis gemeinsamer Spielregeln»⁴. In fact, I could not agree more!

[Rz 12] My *observations*: state competition on taxes or on other aspects *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?*

II. Switzerland and the International Community

A. Sweden

a) Outline

[Rz 13] Switzerland and Sweden may not be neighbours but, nevertheless, we are in some ways «*neighbours in mind*». Even though the political systems are quite different⁵, both states are neutral, their social security systems are in place, the education of their people are fine, and the *business partnerships* were and are flourishing (e.g. ABB, Electrolux, Nobel Biocare), and abroad – apparently – we are often mistaken for each other!

[Rz 14] 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 regard⁶.

[Rz 15] 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» or DBA) are in force both for income tax purposes and for wealth tax purposes since June 6, 1966⁷ as well as for inheritance taxes since November 11, 1985⁸.

[Rz 16] One year ago, as you well know, the Swiss Government unilaterally announced to implement the OECD-standards in its double taxation treaties and is currently in the pro-

cess of renegotiating various agreements⁹. The *negotiations with Sweden* will start in April 2010.

b) Observations

[Rz 17] My *observations*: Sweden and Switzerland are, in general, on *very friendly terms* and the present double taxation treaty or treaties, respectively, will be renegotiated for the common good of both states. The negotiations will, in all likelihood, run rather smoothly. Therefore, *no «Tax War»* seems to loom on the near horizon!

B. United States of America

a) Outline

[Rz 18] The USA is not only in a «War against Terrorism» but also – in addition – in «*Wars against Tax Havens*»; most of the times, Switzerland is not specifically targeted. The best example is the so-called «Foreign Account Tax Compliance Act»¹⁰ which shall come into force in January 2013¹¹. This new U.S. law shall provide for a *disclosure obligation* for *all foreign* financial intermediaries (e.g. banks) regarding their US resident clients' data. In case of a *non-compliance*, the banks shall face a *withholding tax* of 30% on U.S. securities.

[Rz 19] 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 doubts, were done and committed on the «Swiss side» (i.e. by its largest bank), yet, this does not justify all aberrations in the following.

[Rz 20] To qualify the present relationship – as many see it – as a «*bullying*» by the USA towards Switzerland does not seem to exaggerate the situation. Political and business blackmail by a country, apparently, is not sanctioned by the international community.

[Rz 21] Interestingly, a never published order dated *February 18, 2009*, by the Swiss Supervisory Authority of the financial markets («FINMA»)¹² opened the floodgates¹³. In my opinion,

⁴ MICHAEL REITERER, Wirtschaftsforum Südostschweiz, Chur, September 11, 2009 («Mehr Staat, mehr Kooperation, mehr EU?»), p. 6.

⁵ While Sweden is a *monarchy*, Switzerland has always been a *republic*.

⁶ See below para. II.D.a.

⁷ SR 0.672.971.41 – see also: SR 0.672.971.411.

⁸ SR 0.672.971.42.

⁹ See below para. II.C.a.

¹⁰ Internet, e.g.: www.financialtaskforce.org/wp-content/uploads/2009/10/20091027-Legislative-Text-of-the-Foreign-Account-Tax-Compliance-Act.pdf.

¹¹ Latest developments: NZZ No. 63 (2010) p. 25 («Die USA packen die Peitsche aus – Ausländische Finanzgesellschaften sollen US-Kontoinhaber der Steuerbehörde melden»); NZZ No. 64 (2010) p. 25 («USA höhlen das Bankgeheimnis aus – Finanzinstitute im Ausland sollen der US-Steuerbehörde Kundendaten liefern»).

¹² FINMA: Finanzmarktaufsichtsbehörde; this (independent) governmental authority was established as of January 1, 2009 – see SR 956.1.

¹³ The FINMA order interpreted a section of the *Federal Banking Act* about the insolvency of banks (i.e. articles 25 et seq. BankG [SR 952.0]).

the coming events after this FINMA order were quite clear from the outset¹⁴:

[Rz 22] In connection with a so-called *Deferred Prosecution Agreement* between UBS Ltd. and the USA's Department of Justice (DoJ), FINMA had the banking information of some *300 UBS customers transferred* to the U.S. Internal Revenue Services (IRS). The Federal Administrative Court («Bundesverwaltungsgericht») qualified this order with judgment of January 5, 2010¹⁵, 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)¹⁶.

[Rz 23] 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 the country under a lot of pressure by announcing that Switzerland might be «*black listed*» or «*grey listed*» as so-called «tax haven» (with unclear legal consequences) – and thus the «Tax War(s)» against Switzerland and against other low-tax countries continued...

b) Observations

[Rz 24] My *observations*: looking back sometimes in the future, in all likelihood, historians will find that the so-called «*global tax haven issue*» was resolved *once and for all* (after decades of unsuccessful pressures) by two Swiss institutions, i.e. by UBS Ltd. and primarily by *FINMA*. The «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.

C. Organisation for Economic Co-Operation and Development (OECD)

a) Outline

[Rz 25] The OECD, with its today 30 member states, was established half a century ago, i.e. in the year 1960. Switzerland was one of the founding members¹⁷. In the following years, the OECD made recommendations about double taxation treaties with 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 2008¹⁸.

[Rz 26] 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 was to uphold as thoroughly as possible the (*fiscal*) *banking secrecy for foreign-resident* customers¹⁹.

[Rz 27] 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 way²⁰ ceding to the increasing international pressure after the diplomatic problems with the USA²¹.

[Rz 28] For good and for valid reasons, therefore, Switzerland will adopt in most of its double taxation treaties²² 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 allowed²³. It needs to be emphasized that the OECD-standard is a different standard than the one within – at least most parts of – the EU²⁴, i.e. the so-called *automatic information exchange* («Automatischer

¹⁴ Bloomberg (online)/Bloomberg News, February 19, 2009 («UBS May «Open Floodgates» of Challenges to Swiss Bank Secrecy»).

¹⁵ Internet: http://relevancy.bger.ch/pdf/azabvger/2010/b_01092_2009_2010_01_05_t.pdf.

¹⁶ A *second* decision by the Federal Administrative Court dated January 21, 2010, which is *valid and final*, regarding a recent «tax treaty» between Switzerland and the USA (so-called «UBS-Amtshilfeabkommen») of August 19, 2009 (SR 0.672.933.612) – i.e. an attempted revision of the double taxation treaty of the year 1996 – brought even more *controversy* and represents *the* «hot potato» of today's Swiss politics; Internet: http://relevancy.bger.ch/php/taf/http/index.php?lang=de&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=&query_words=A-7789%2F2009&rank=1&azaclir=aza&highlight_docid=azabvger%3A%2F%2F21-01-2010-A-7789-2009&number_of_ranks=5 – the outcome is still open – the Swiss Parliament will have this particular issue on its agenda probably in the summer 2010; see THOMAS COTTIER/RENÉ MATTEOTTI, Der Grundsatzentscheid des Bundesverwaltungsgerichts zum UBS-Amtshilfeabkommen, Jusletter dated March 8, 2010.

¹⁷ The membership became binding for Switzerland on *September 30, 1961*.

¹⁸ Internet: www.oecd.org/document/50/0,3343,de_34968570_34968855_41206066_1_1_1_1,00.html.

¹⁹ The treatment of *Swiss* clients of banks in Switzerland was and is not an issue for the OECD (or for the EU) – nevertheless, it became under discussion recently: see below para. III.

²⁰ Overview: PETER V. KUNZ, OECD-Musterabkommen und die Schweiz: Wie den Vorbehaltsverzicht umsetzen?, in: Die Volkswirtschaft – Das Magazin für Wirtschaftspolitik, Hrsg. SECO, 6-2009, p. 5 et seq.

²¹ See above para. II.B.

²² Not surprisingly, the EU would have preferred a solution *not in bilateral treaties* but in an *agreement with the EU*: MICHAEL REITERER, Wirtschaftsforum Südostschweiz, Chur, September 11, 2009 («Mehr Staat, mehr Kooperation, mehr EU?»), p. 5.

²³ Thus, the *identities* of foreign bank customers *must be known* for the request – or they must at least be *identifiable* (even without name etc.).

²⁴ The «EU-standard» does *not apply* (yet) to *Luxemburg* and to *Austria*.

Informationsaustausch»²⁵ which is not an internationally-accepted standard.

[Rz 29] The fundamental shift of the Swiss Government in its international tax policy bears some political risks. The *major risk* is that the *Swiss people might vote against* double taxation treaties. Initially, it was unclear whether or not such votes are a legal possibility at all. Legal scholars held from the beginning that a referendum by request (so-called «Fakultatives Referendum») is possible²⁶, and the Swiss Government followed this view with some delay.

b) Observations

[Rz 30] My *observations*: the threat(s) from abroad²⁷ of «*grey listing*» or even of «*black listing*» Switzerland as a «tax haven» were *inacceptable*. «Black listing» got a sense of «blackmailing». Yet, giving up the (former «Swiss-finish») distinction between *tax fraud and tax evasion* for *foreign* bank customers is international standard, makes good sense²⁸, and does not undermine Swiss banking secrecy – but the same is not necessarily true for *Swiss* bank customers²⁹. Switzerland could and should not fight any «Tax Wars» against the OECD-standard.

D. European Union (EU)

a) Outline

[Rz 31] Switzerland is *not a member of the EU*. The membership may be the Swiss Government's long-term goal³⁰, yet, it would or will face many political obstacles. Nevertheless, Switzerland has *arrived in «Europe»* (not necessarily in the EU) a long time ago³¹. The *legal connections* of Switzerland with the EU – be they formal or informal – are growing both in legislation³² and in application of the laws by courts or authorities; as overview³³:

[Rz 32] A *contractual network* of some 30 treaties (so-called «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* («Kompatibilitätsprüfung mit EU-Recht»)³⁴. 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»).

[Rz 33] For good reasons, some observers pointedly qualify Switzerland not as a member state but as a *passive member of the EU* («Passivmitglied»)!

[Rz 34] The *many differences* either by history or by mentality ought not to be underestimated. For example, Switzerland – unlike the EU – is rather «legislation-averse»³⁵. 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 Switzerland³⁶.

[Rz 35] Tax collection on one side and Tax laws enforcement on the other side are very important to the EU³⁷. 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 member states.

[Rz 36] 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 made clear in no uncertain terms that it «expects» Switzerland to adopt the *concept of automatic information exchange* when it comes to *cross-border tax crimes*.

[Rz 37] On *February 25, 2010*, the Swiss Government confirmed³⁸ its new policy of 2009 adopting the OECD-standard of *information exchange*³⁹ as quickly as possible through *double taxation treaties* (and not by a respective agreement with the EU)⁴⁰ – thereby reconfirming its «Strategische Stossrichtung

²⁵ This automatic information exchange concept means, in short, that the information holder (i.e. the bank) must transfer said information *without any request* and *without any suspicion* on a regular timely basis to the foreign tax authority of its client's resident state; see, inter alia, JOHANNES J. SCHRANER, Automatischer Informationsaustausch – Ein System mit Mängeln, Schweizer Bank No 4/2010, p. 14 et seq.

²⁶ See, e.g., PETER V. KUNZ, Mitbestimmung des Volkes bei künftigen Doppelbesteuerungsabkommen (DBA)?, Jusletter dated August 10, 2009, notes 54 et seq.

²⁷ For example: OECD, EU, G-20, Germany, and France.

²⁸ PETER V. KUNZ, Mythos schweizerisches «Bankgeheimnis», Jusletter dated November 17, 2008, note 58.

²⁹ See below para. III.

³⁰ Internet: www.admin.ch/ch/d/ff/2006/6815.pdf; Europabericht 2006 (dated June 28, 2006), BBI 2006 p. 6843 et seq.

³¹ See PETER V. KUNZ, «Sonderfall Schweiz»? – die Schweiz ist längst in «Europa» angekommen, EWS Heft 3/2009, Die erste Seite.

³² Inter alia, EMILIE KOHLER, Influences du droit européen sur la législation suisse: analyse des années 2004 à 2007, Jusletter dated August 31, 2009.

³³ For details, see, inter alia, PETER V. KUNZ, Instrumente der Rechtsvergleichung

in der Schweiz bei der Rechtssetzung und bei der Rechtsanwendung, ZVglRWiss 108 (2009) p. 49 et seq., p. 53 et seq. and p. 72 et seq.; THOMAS COTTIER/DANIEL DZAMKO/ERIK EVTIMOV, Die europakompatible Auslegung des schweizerischen Rechts, in: Schweizerisches Jahrbuch für Europarecht 2003 (Zurich 2004) p. 357 et seq.

³⁴ The Legislature is nevertheless *free in its legislation*, thus, the check shall only safeguard *transparency not conformity*.

³⁵ E.g. the *concept of self-regulation*, which is crucial for Swiss financial markets laws, plays only a marginal role in the EU: Interview with ELEMÉR TERTAK, in: denaris 02/2010, p. 21 et seq.

³⁶ See below para. III.

³⁷ KERN ALEXANDER, The Efficacy of Extra-territorial Jurisdiction and US and EU Tax Regulation, SZW 6/09, p. 479 et seq.

³⁸ Medienmitteilung: «Finanzmarktstrategie».

³⁹ See above para. II.C.a.

⁴⁰ Negotiations of such treaties are based, of course, on the principle of

für die Finanzmarktpolitik der Schweiz» of December 16, 2009⁴¹.

[Rz 38] 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». It remains to be seen how long this viewpoint will be valid.

[Rz 39] The Swiss Government as well as various banking organizations in Switzerland are in favour of a so-called *Withholding Tax Concept* («Abgeltungssteuer») on foreign money 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.

[Rz 40] For the relationship between the EU and Switzerland, though, the main *questions remaining* as of today are: who – if anyone – will move, and in which direction? EU Ambassador Dr. *Michael Reiterer* recently concluded:

[Rz 41] «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»⁴² – this is true as well, in my view, but sometimes I get the impression that the EU and Switzerland are sitting and rowing *face to face* in this boat!

b) Observations

[Rz 42] My *observations*: I see *no real «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. Therefore, the Swiss Government in this regard should: «*Just say No*»..!

E. Other «War Zones»

a) Outline

[Rz 43] Switzerland was and still is under a lot of political and diplomatic pressure *from abroad* regarding its tax policy.

«*give and take*», thus, Switzerland does not only «give» (i.e. accepting the OECD-standard) but should also «take» from the other treaty party (e.g. amnesty for «black money» or access to foreign markets for its own financial intermediaries).

⁴¹ Internet: www.efd.admin.ch/dokumentation/zahlen/00578/01622/index.html?lang=de; Bericht in Beantwortung des Postulats Graber (09.3209).

⁴² MICHAEL REITERER, Wirtschaftsforum Südostschweiz, Chur, September 11, 2009 («Mehr Staat, mehr Kooperation, mehr EU?»), p. 5.

Hence, implementing the OECD-standard⁴³ makes not only good sense but seems inevitable; this is not true for the «EU-standard»⁴⁴ 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 Germany⁴⁵).

[Rz 44] 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».

[Rz 45] There are *not 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»).

[Rz 46] Therefore, the Swiss Government tries to remedy this maybe «forgotten» aspect by enacting a so-called Ordinance on the Administrative Assistance on Double Taxation Treaties («Verordnung über die Amtshilfe nach Doppelbesteuerungsabkommen» [ADV])⁴⁶ on coming *October 1, 2010*. The detailed report to the draft ADV («Erläuternder Bericht ADV») of January 20, 2010, specifically pointed out that any foreign authorities' request *based on stolen information* will be *rejected* by Swiss authorities⁴⁷.

b) Observations

[Rz 47] My *observations*: these latest «war zones» do not represent «Tax Wars» but have the potential of «*guerrilla warfare*». Therefore, Switzerland should not take such threats lightly. In my view, it would be understandable and sound policy *to freeze negotiations* on double taxation treaties (for

⁴³ See above II.C.a.

⁴⁴ See above II.D.a.

⁴⁵ This seems surprising, in particular, taking into account that Germany does not even fulfill the OECD-standard relating to Switzerland: PASCAL HINNY, Deutschland verstösst gegen OECD-Standard, NZZ No. 59 (2010) p. 28.

⁴⁶ Internet: www.efd.admin.ch/dokumentation/gesetzgebung/00571/01637/index.html?lang=de.

⁴⁷ P. 2/14 and p. 4/14 et seq. and p. 8/14; article 5 al. 2 AVD shall read as follows: «Das Ersuchen [sc. um Amtshilfe] muss dem Grundsatz von Treu und Glauben entsprechen. Es muss unter Hinweis auf die öffentliche Ordnung abgelehnt werden, wenn die Erteilung der Amtshilfe mit den grundlegenden Wertungen des schweizerischen Rechts nicht vereinbar wäre oder gegen wesentliche Interessen der Schweiz verstossen würde. Das Ersuchen ist insbesondere abzuweisen, wenn es auf Informationen beruht, die unter Verletzung von schweizerischem Strafrecht beschafft worden sind».

a certain time) with states buying stolen banking information. Our country must be careful to not become a *laughing stock* of the international community!

III. Switzerland and the Swiss

[Rz 48] 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!

[Rz 49] The adoption of the OECD-standard for *foreign resident* clients⁴⁸ 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. From a legal viewpoint, there is no necessity, and neither the OECD nor the EU made any requests in this regards because this is internal discussion.

[Rz 50] The *Swiss Government* officially stated recently, i.e. on *January 20, 2010*: «Der Bundesrat sicherte gleichzeitig zu, dass sich hinsichtlich des steuerlichen Bankgeheimnisses für *inländische* Steuerpflichtige *nichts ändern* wird»⁴⁹. 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 («Weissgeldstrategie»)⁵⁰. And, for once, there is *not even international pressure* on Switzerland.

[Rz 51] My *observations*: there will be *no «Civil War»* within Switzerland on the legal and political issues of tax evasion and of tax fraud. In my opinion, the traditional «Swiss finish» with said distinction proved fine but the discussion about a change in the future may be useful. Nevertheless, 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).

IV. Concluding Observations

- The so-called «*Swiss bashing*» seems to be the new pasttime 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 abroad.
- 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 of the EU). 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 – *Tack så mycket, adjö och på återseende!*

Prof. Dr. Peter V. Kunz, Rechtsanwalt, LL.M. (Georgetown) ist ordentlicher Professor für Wirtschaftsrecht und für Rechtsvergleichung an der Universität Bern, geschäftsführender Direktor des Instituts für Wirtschaftsrecht (www.iwr.unibe.ch) sowie Leiter des Departements für Wirtschaftsrecht; ein Forschungsschwerpunkt liegt im schweizerischen und internationalen Finanzmarktrecht. Er betreut für Jusletter die Redaktion «Wirtschaftsrecht». Ich bedanke mich bei Frau MLaw Rachel Reimann, Assistentin an meinem Lehrstuhl, für ihre grosse Unterstützung sowohl beim Referat als auch beim Aufsatz.

Prof. Dr. Peter V. Kunz, Attorney-at-Law, LL.M. (Georgetown) is full-tenure professor for business law and for comparative law at the University of Berne Law School, executive director of the Institute of Business Law (www.iwr.unibe.ch) and head of the Departement of Business Law; he is specialized in national and international financial markets laws. Moreover, he is in charge for this magazine Jusletter for «Business Law». I would like to thank Mrs. MLaw Rachel Reimann, research and teaching assistant at my Institute, for her assistance with my speech and with this publication (and for the Swedish sentence...).

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⁴⁸ See above para. II.C.a.

⁴⁹ Erläuternder Bericht ADV, p. 4/14 (emphasis added).

⁵⁰ It seems to be part of the broader so-called «*Weissgeldstrategie*» (white money strategy) which will become a *major issue of political discussion* in the near future; see, JOHANNES J. SCHRANER, Finanzplatz Schweiz und Weissgeldstrategie – Der lange Weg zur Klarheit, Schweizer Bank No 4/2010, p. 10 et seq.