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This article describes the various steps that led towards automatic exchange of information as the global standard and the issues that remain to be solved.

First, the various competing models of exchange information, such as Double Tax Treaty (DTT), TIEA's, FATCA or UE Directives are described with a view to show how they interact between themselves. Second, the so-called Rubik Strategy is summarized and compared with an automatic exchange of information (AEOI). As it will be demonstrated, this Rubik System was an alternative attempt to find a compromise between the privacy of the taxpayer on the one hand, and compliance in the taxpayer's state of residence, on the other hand. This proposal appears not to be a possible long term alternative solution to AEOI. Indeed, in the meantime the wheel has moved towards the AEOI as the future global standard. In this respect, FATCA has emerged as a major driver in this area and the implementation of a inter-governmental agreement (IGA) all over the world can be seen retrospectively as one of the driving forces towards the acceptance of AEOI as the global standard. The third part then describes in details the OECD Model common reporting standard which will become the new standard for automatic exchange of information and its implementation rules in Switzerland. Various instruments such as DTT, TIEA's or the OECD convention on multilateral assistance in tax matters or an UE Swiss bilateral agreement could serve as a legal basis to implement AEOI. The AEOI will then be "materialized" by a competent authority agreement between the participating countries. With the United States, however, the applicable standard is based on FATCA and so far the IGA Model II. Since the Rubik Model is now a strategy of the past we strongly support the move towards an IGA, between the United States and Switzerland, based on a reciprocal Model I. In addition, because of the slow ratification process in the United States of the 2009 protocol, we suggest to analyze further the possibility to negotiate, in a transitory period, a sort of modified TIEA's between Switzerland and the United States in accordance with the OECD Model.

Finally, we focus on two remaining issues. The main one is to solve the past and another issue in the future will be to ensure that rights of taxpayers are properly protected in the exchange of information process. In this respect, we do not share the view of the Swiss Federal Court about the exclusion of article 6 ECHR to the process of international exchange of information in tax matters.

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I. General Introduction

It all started with the 2007 Liechtenstein case of stolen CDs, brought to Germany, which provoked a major political scandal. One year later, the UBS scandal of tax fraud with US clients, parallel to the global financial crisis, continued to raise worldwide attention against offshore tax evasion. International organizations, such as the Unites Nations (UN) or the Organisation for Economic Cooperation and Development (OECD), the European Union (EU) and numerous countries around the world called for global actions in this field, notably within the meetings of the G5, G8 or G20.

The major change, so-called "big bang", took place on 13 March 2009.[1] On that particular day, countries

[1] *Oberson X.*, General Report in: IFA, Exchange of information and cross-border cooperation between tax authorities, Volume 98*b* (Copenhagen Congress), The Hague 2013; see also *Holenstein D.*, in: Zweifel/Beusch/Matteotti (ed.), Kommentar zum Internationalen Steuerrecht, Art. 26 OECD-MA N. 42 ff.

such as Austria, Belgium, Luxembourg and Switzerland, announced a major change of policy: their willingness to apply the standard of article 26 of the OECD Model Double Taxation Convention (DTC) and, more precisely its paragraph 5, so that, in the future, domestic bank secrecy could not anymore be an obstacle to exchange of information. Yet, during the London G20 Summit of 2 April 2009, Switzerland was still on a "grey" list of States that had committed to implementing the international standard without having done so in substance.[2] However, in September 2009, after having signed 12 double tax treaties (DTT), in accordance with the OECD global standard, Switzerland was moved to the "white list" of countries.[3] In a nutshell, the global minimal standard requires the signature of 12 DTTs, or Tax International Exchange Agreements (TIEAs), providing for an exchange of information upon request, without the possibility to deny a request based on bank secrecy or because it relates to the ownership interest in a person.

At that time, many observers were convinced that this major shift would take time to be implemented worldwide and that some adaptation period was required. On the contrary, following additional scandals widely disclosed by the media, such as the "Falciani" list, the "Cahuzac" political scandal in France, the "Hoeness" tax case in Germany, the "offshore leaks" internet revelations, combined with the growing political pressures and no tolerance policy against tax evasion, the change of paradigm of 2009 would very soon be followed by a second wave of changes.

Indeed, the global focus towards transparency developed rapidly and went a step further. Later on, especially as of 2012, the political pressure started to favor automatic exchange of information as becoming the new global standard. However, in the meantime, in order to find an alternative mechanism to the system of automatic exchange of information, Switzerland tried to suggest another system, commonly referred to as "Rubik", consisting of a bilateral model agreement providing for the levying of a withholding tax, to ensure the tax revenue of the contracting State, while preserving the confidentiality of the taxpayer concerned residing in Switzerland.

The pressure towards automatic exchange of information has however continued to grow. Following the introduction of FATCA in the United States, in 2010, and the conclusion all around the world of intergovernmental agreements (IGAs), a new international global standard – taking the form of automatic exchange of information – started to emerge. In parallel, the EU, as of 2011, also started to put in place a Directive on administrative assistance in tax matters, which promotes automatic exchange of information on a list of specific types of income and wealth.

On April 19, 2013, the G20 Finance Ministers and Central Bank Governors endorsed automatic exchange of information as the future new standard. On September 6, 2013, the G20 leaders committed to automatic exchange of information as the new international standard. In February 2014, the G20 Finance Ministers and Central Bank Governors endorsed the Common Reporting Standard for automatic exchange of information. On 21 July 2014, the OECD published the standard for automatic exchange of financial account information in tax matters (AEOI).

Now that the move towards AEOI seems undisputable, we are going to analyze, from a legal perspective, some of the different issues that this major development raises.[4] First, there are various competing models of exchanges of information that have been developed other the years. We will briefly describe them and try to show how they interact between themselves (II). We will then summarize the main elements of the so-called "Rubik" alternative and compare them with AEOI (III). This will lead to a description of the OECD Model Common Reporting Standard (IV). Finally, we will also tackle some ancillary remaining issues, after the passage towards AEOI, namely the problem of solving the past and the necessary emergence of taxpayer's rights in the framework of international exchange of information (V).

2 OECD Global Forum, Progress Report, 2 April 2009.

3 OECD Global Forum, Progress Report, 28 September 2009.

4 For a more global analysis, see *Oberson X.*, Exchange of Information in Tax Matters. Towards global transparency, London 2015 (forthcoming). Edward Elgar Publishing Ltd.

II. Competing instruments of international exchange of information

1. Double Taxation Treaties

Double taxation treaties, based on art. 26 of the OECD Model DTT, or the UN Model, provide notably for three different forms of exchange of information: upon request, spontaneous and automatic. Automatic exchange of information is however an option and is not compulsory.

As of now, Switzerland has entered into more than 45 DTC (out of which 38 have been ratified), following the norm of art. 26 of the OECD Model, which provides for exchange of information upon request, following the OECD standard of foreseeable relevance. In addition, draft legislation on the unilateral application of exchange of information according to the OECD norm is pending.[5] The purpose of this law is to "level up" the existing DTTs of contracting States with Switzerland, which do not, at this stage, correspond to the OECD standard. It appears, as of September 12, 2014, that this law would apply to 69 States or territories.[6] This legislation would be of transitory nature. As soon as the existing DTT with a relevant State would be in conformity with the OECD standard, according to a new DTT or another international instrument, the law would not apply anymore to that State. It appears that similar legislations have been introduced by Belgium and Singapore.

As such, art. 26 of the OECD Model does not include a model of AEOI. It could however serve as a legal basis in order to implement such a system. It follows that, from a bilateral standpoint, countries that are linked by a DTT and wish to implement automatic exchange of information simply would have to introduce a competent authority agreement (CAA), according to the OECD Common Reporting Standard described further[7] in order to implement AEOI.

2. TIEA

TIEAs, either in a bi- or multilateral form, may also serve as a basis for automatic exchange of information. The Model TIEA has been prepared by the Global Forum and published in 2002.[8] This instrument was basically designed for tax haven countries with no DTT, in the form of an OECD or UN Model, because they do not have a comprehensive income tax system. However, according to art. 5 par. 4 of the TIEA Model, these treaties typically provide for exchange of information upon request only. Subject to an agreement between the contracting States, automatic exchange may however also be included under this type of Model.[9]

Switzerland has also started to enter into TIEAs. The first three TIEAs, namely with Jersey, Guernsey and Isle of Man, have entered into force on 1 October 2014, and will be effective as of 1 January 2015. In the first half of 2014, agreements have also been signed with San Marino, Greenland, Andorra and Seychelles. Ratification is under way.

3. The Council of Europe/OECD multilateral convention on international assistance

In 1979, the Council of Europe (CoE) and the OECD issued in Strasbourg a Multilateral Convention on Mutual Administrative Assistance in Tax Matters (CMAATM), which was approved in 1987. It was opened to signature first for OECD Members in 1988 and entered into force on 1 April 1995, after ratification from five States (United States, Denmark, Finland, Sweden and Norway). In 2011, the Joint CoE/OECD CMAATM of 1988 was further amended.[10] It became open to signature to non OECD Member countries. The rules were adapted to the current standard on exchange of information. In particular, similar to art. 26 par. 5 of the OECD Model DTT, information held by banks or relating to the ownership

5 See draft federal law on the unilateral application of exchange of information according to the OECD Norm ("LERN") of 10 October 2014; see also Swiss Confederation, Rapport explicatif of 22 October 2014.

6 Swiss Confederation, Rapport explicatif (n. 5), p. 14.

7 See *infra* IV.

8 See *Barnard J.*, Former Tax Havens Prepared to Lift Bank Secrecy, Bulletin IBFD, January 2003, p. 9; *Oberson X.*, The OECD Model Agreement on Exchange of Information – a Shift to the Applicant State, Bulletin IBFD, January 2003, p. 14.

9 See OECD Commentary to TIEA n. 39.

10 See in particular *Pross A./Russo R.*, The Amended Convention on Mutual Administrative Assistance in Tax Matters: A Powerful Tool To Counter Tax Avoidance and Evasion, Bulletin for International Taxation 2012, p. 361, 381.

must be exchanged. Increasingly, in parallel to the bilateral network of double taxation treaties, a multilateral form of cooperation was fostered. While on 27 May 2010, the new Protocol CMAATM had been signed by 15 countries, it is nowadays signed by more than 65 countries, including Switzerland.

Under art. 6 of the CMAATM, notably, automatic exchange of information is allowed between contracting States in respect of specific cases and in accordance with the procedures *mutually agreed* between the States. It means that AEOI is possible but not compulsory. In order to implement automatic exchange of information, contracting States may do so simply by entering into mutual CAAs. Indeed, automatic exchange of information under the CMAATM is based on a separate agreement between the competent authorities of the contracting States. In this respect, the adoption of a multilateral CAA, in the form developed in the OECD standard of AEOI, may also be facilitated under the CMAATM.

In its recent publication describing the international standard for AEOI, the OECD indicates that the CMAATM is a much more efficient instrument in order to establish a global automatic exchange, notably because of its global reach.[11] The mutual CAA adopted between the contracting parties, based on the legal basis of the CMAATM, will then activate and "operationalize" the automatic exchange between the participants.[12]

On 15 October 2013, Switzerland has been the 58th State to sign the CMAATM. The ratification process started in 2015. Once ratified, the CMAATM could then also serve as an international legal basis to implement AEOI. A specific or multilateral CAA should however be adopted with the countries with which Switzerland would introduce such a system.

4. The European Directives

In the EU, various instruments have been developed as tools against international tax fraud in the area of both direct and indirect taxation.[13] The first instrument was already implemented in 1977, in the form of a Directive concerning mutual assistance by the competent authorities in the field of direct taxation and taxation of insurance premiums, which was later amended.[14] Later on, in particular the Savings Directive (EUSD), adopted in 2004, introduced an automatic exchange of information on savings income paid by an EU paying agent to an individual resident in another EU Member State.[15] A transitional system of withholding tax was allowed for Austria, Belgium and Luxembourg. Equivalent measures have also been adopted with selected third countries.

The EU also introduced the directive on administrative cooperation (DAC),[16] in 2012, which provides for mandatory automatic exchange of information, as of 1 January 2015, on five specific categories of income and wealth, namely income on employment, director's fees, life insurance products, pension and income and wealth from immovable property.

On December 2014, the EU modified the DAC to provide for automatic exchange of information on additional categories of income. Pursuant to the proposal of 14 October 2014, the EU intends to extend automatic exchange of information, no later than end of September 2017, and thus to bring interest, dividends and other income, as well as account balances and sale proceeds from financial assets, within the scope of the automatic exchange.[17] This proposal should entail a repeal of the Savings Directive.

11 OECD, Standard AEOI 2014, n. 11 *ad* Introduction.

12 OECD, Standard AEOI 2014, n. 11 *ad* Introduction.

13 *Terra Ben J.M./Wattel Peter J.*, European Tax Law, 6th edition, Alphen aan den Rijn 2012. *Pross/Russo* (*op.cit.* n. 10), p. 361. *Seer R./Gabert I.*, European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements, Bulletin for International Taxation 2011, p. 88.

14 Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, OJ 1977 L 336 p. 15, as amended by Council Directive 2006/98/EC of 20 November 2006, OJ 2006 L 363 p. 139.

15 Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, OJ L 157 of 26 June 2003, p. 38; see among others *Schröder J.*, Savings Taxation and Banking Secrecy, in: Rust A./Fort E. (ed.), Exchange of Information and Bank Secrecy, Alphen aan den Rijn 2012, p. 59 ff., 62.

16 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, OJ L 64 of 11 March 2011, p. 1; see *Gabert I.*, Council Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation, European Taxation 2011, p. 342.

17 Council of the EU, Press release, Economic and Financial Affairs, Luxembourg 14 October 2014, p. 12 (14218/14) and Council Brussels 9 December 2014 (ST 16644/14).

5. FATCA

5.1 Overview

Congress enacted FATCA on 18 March 2010.[18] The Act introduced Sections 1471 through 1474 in chapter 4 of the Internal Revenue Code (IRC). The IRS also issued the final FATCA regulations in January 2013. The purpose of FATCA is to ensure that all US direct and indirect owners of offshore accounts report annually to the IRS the value and income on those accounts.[19] The system is designed so that offshore income of US persons is reported and that deposits in offshore accounts are after tax income.[20] FATCA applies to both US direct and indirect owners of accounts, i.e. US accounts holders and foreign entities with substantial US owners.

The FATCA mechanism is both innovative and effective.[21] Under the regulations, the foreign entities are divided in two classes:[22] Foreign Financial Institutions (FFI), on the one hand, and Non-Financial Foreign Entities (NFFE), on the other hand. If the FFI, anywhere in the world, refuses to comply with the FATCA rules, it will be subject to a 30% withholding tax on any withholdable payments (including "pass-through" payments), notably dividends, interest, FDAP income and gross proceeds from sale of assets that generate US dividends or interest (Sections 1471(a) and 1473 (1)). To avoid this withholding tax, FFIs must enter into an agreement with the IRS and report information on each US account held by US persons or by a non-US entity with substantial US owners (Section 1471(c) IRC).[23] A NFFE, however, is not required to enter into an agreement with the IRS, but has similar due diligence requirements to identify the substantial US owners.[24]

FATCA, as a unilateral tax enforcement measure with extraterritorial effects, has raised criticism and concerns.[25] By definition, FATCA targets against offshore accounts of US persons (and foreign entities owned by US persons). In order to be implemented, foreign entities, and notably FFIs, which have to comply with FATCA, are usually in other jurisdictions. In order to solve potential conflicts between the various FATCA reporting requirements and domestic privacy rules,[26] intergovernmental agreements (IGA) were developed.[27]

On 7 February 2012, five European countries (France, Germany, Italy, Spain and the United-Kingdom) announced their intention to develop a system of multilateral automatic exchange of information with the United States, in order to implement the FATCA rules. This agreement forms the basis of the so-called Model 1 IGA. In our view, this movement represents a *turning point* towards the emergence of the model of AEOI.[28] This model, in essence, would solve the conflict of law issue by requiring local FFIs to disclose the FATCA required information to their local tax authorities, rather than directly to the IRS.[29] The local tax authorities would then pass on the information to the IRS through automatic exchange of information, under a tax treaty, a TIEA or the CoE/OECD Multilateral convention on Mutual Assistance in Tax Matters.[30] After the announcement of the development of an IGA Model 1 by the G5 and the United States, Japan and Switzerland entered into negotiations, which resulted in the design of a so-called Model 2 IGA.[31] This Model 2 was published on 14 November 2012. Under this Model, local FFIs would be allowed to enter into an agreement with the IRS and report the required information directly on US accounts.

18 Hiring Incentives to Restore Employment Act.

19 *Tello C.P.*, FATCA: Catalyst for Global Cooperation on Exchange of Tax Information, Bulletin for international taxation 2014, p. 88, 92, p. 91.

20 *Tello* (*op.cit.* n. 19), p. 91.

21 See references by *Blank J./Mason R.*, Exporting FATCA, Law & Economics Research Paper Series, Working Paper n. 14-05, February 2014, p. 1246.

22 *Tello* (*op.cit.* n. 19), p. 91.

23 *Blank/Mason* (*op.cit.* n. 21), p. 1246.

24 *Tello* (*op.cit.* n. 19), p. 91.

25 See *Blank/Mason* (*op.cit.* n. 21), p. 1246.

26 *Tello* (*op.cit.* n. 19), p. 88, 92.

27 *Tello* (*op.cit.* n. 19), p. 92.

28 In this sense, *Tello C.P./Malherbes J.*, Le Foreign Account Tax Compliance Act (FATCA) américain: un tournant juridique dans la coopération sur l'échange d'informations fiscales, Revue de droit fiscal, Janvier 2014, p. 1.

29 US Treasury, Joint Statement from the United-States, France, Germany, Italy, Spain and the United-Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA (7 February 2012); *Tello* (*op.cit.* n. 19), p. 92.

30 *Tello* (*op.cit.* n. 19), p. 93.

31 *Tello* (op.cit. n. 19), p. 93.

5.2 The IGA (Model 2) between the United States and Switzerland

Under the Model 2, FFIs are authorized to enter into an agreement directly with the IRS and to apply the FATCA implementation rules. In addition, an exchange of information system is put in place between the contracting States, so that eventually recalcitrant account holders are disclosed. The main difference between Model 2 and 1, is that Model 1 gives a legal basis for FFIs in the contracting State to enter into an agreement with the IRS and report directly information about US accounts holders.[32]

According to the US/Swiss IGA, Swiss FFIs are authorized to enter into an agreement with the IRS and to report information about US account holders (art. 3 Agreement). Such a registration and reporting is not regarded as a violation of art. 271 of the Swiss Criminal Code (art. 4 Agreement). According to art. 5, exchange of information about US accounts and on amounts paid to non-participating FFIs will take place following the rules of art. 26 of the 1996 DTT between Switzerland and the United States, as amended under the protocol of 2009. However, request for information exchange cannot be made before the entry into force of that protocol and to information pertaining to the period beginning after the entry into force of the Agreement (art. 5 par. 1 *in fine* Agreement).[33] These requests will take the form of so-called *"group request"*, which are admissible under art. 26 of the revised protocol DTT. This rule takes into account the recent developments in favor of group request, following the July 2012 position of the OECD.[34] The problem is that this amended protocol to the DTT is not yet ratified by the United States, so that in the meantime, the old version with the "tax fraud and the like" standard remains applicable. This is a delicate issue since it appears that the ratification process of the protocol could take some time in the United States. We therefore wonder whether a specific information exchange agreement, taking the form of a modified TIEA, could not be adopted between the two countries, during the transitory period before ratification of the 2009 protocol. This solution could greatly facilitate the exchange of information, in accordance with the OECD standard, and could be implemented more easily, since TIEAs do not require the same ratification process in the United States than an ordinary DTT.

In addition, the Swiss Federal Tax Administration (FTA) is required to respond to a request for information within eight months after the request (art. 5 par. 3 lit. c Agreement). If that deadline is not met, the account is regarded as recalcitrant until the information is provided. Also the withholding tax is due after the eight months period runs (art. 7 par. 2 Agreement).[35] Finally, in according with Swiss law, the amount of tax withheld on payments to financial accounts has to be borne by the account holder (art. 7 par. 2 in fine, Agreement). This rule is important because it allowed the Swiss FFI to pass on the cost of any withholding tax to a recalcitrant account holder.[36]

There is a most-favored nation clause in art. 12 should the United States grant a more favorable regime, for part. C (Obligations of the United-States) and Annex I of the Agreement, to any other jurisdiction.

In our view, the solution of a Model 2 IGA can be understood because at the time of negotiations, the "Rubik" strategy was at the forefront of the Swiss policy. Now that the path has gone towards AEOI, the Model 2 IGA, with its unilateral approach, does not make much sense any more. In addition, even under the US-Swiss IGA, the system of group requests, combined with all the required statistics, corresponds in effect, to a complex automatic exchange of information. In addition, from a reciprocal and equality of treatment standpoint, it is highly questionable that Switzerland should not be in a position to obtain from the United States relevant information about Swiss residents holding bank accounts in the US. Therefore, we are of the opinion that Switzerland should negotiate, as quickly as possible a Model 1 IGA, similar to most European countries, in order to replace its existing Model 2 IGA. Under art. 13, the door remains open to negotiate a Model 1 reciprocal agreement with the United States. It appears that Switzerland, since recently, is willing to enter into such a Model 1 agreement.

32 *Tello* (*op.cit.* n. 19), p. 94.

33 As of today, even though the Protocol has been ratified by Switzerland and signed and transmitted to the US Senate, it has not yet been ratified by the United-States.

34 See also *Oberson X.*, Précis de droit fiscal international, 4th edition, Bern 2014, p.174.

35 *Tello* (*op.cit.* n. 19), p. 94.

36 *Tello* (*op.cit.* n. 19), p. 94.

III. The so-called "Rubik" Alternative

1. In general

In a nutshell, the "Rubik" system can be described as a combination of: (i) a regularization mechanism for the past that preserves confidentiality (solution for the past); and (ii) a withholding tax, collected by a Swiss paying agent, which enables, for the future, tax due on assets to be settled anonymously (solution for the future).[37] Under the philosophy of the system, the rate of the tax should correspond to the tax that the relevant taxpayer should have been required to pay in his or her residence State. The Swiss paying agent withholds the tax on Swiss source investment income (dividends, interest, royalties and capital gains), passes it to the FTA, which then transfers on an anonymous basis the tax to the residence country of the taxpayer.

This system can be seen as a typical "Swiss compromise", which solves two apparently conflicting principles: confidentiality, on the one hand, and compliance with tax obligations in the residence State, on the other. After all, under "Rubik", the taxpayers are deemed compliant in the residence State, while the confidentiality is preserved.

At the beginning of the implementation process, the system seemed to have many allies. Such agreements are now in force, since January 2013, with the United-Kingdom and Austria. However, following the refusal of the German Parliament to ratify the "Rubik" agreement with Switzerland and the recent evolution in favor of AEOI, it seems unlikely that such mechanism could remain a sustainable alternative to AEOI in the long term.

2. Short Analysis

The solution for the past may be characterized as a sort of tax amnesty, with a lump-sum anonymous withholding tax to clear up undeclared taxable periods before the relevant period defined under the agreement. The solution for the future corresponds to the anonymous withholding system described above. The tax rate varies between 27% and 48%, according to the type of investment income, under the UK treaty, and corresponds to 25%, under the Austrian treaty. The rate is also coordinated with the applicable rate under the Swiss bilateral agreement with the EU, on the taxation on savings. Alternatively, taxpayers may voluntarily authorize their banks to disclose the information, instead of having the income subject to the withholding tax. The tax is levied on investment income received by *individuals,* resident in the treaty partner States (UK or Austria), but only includes entities, such as trusts, fiduciary accounts and domiciliary companies that can be attributed to the individual.[38]

The Swiss system is based on the paying agent principle, according to which, the Swiss financial intermediary has to determine and levy the applicable withholding tax on investment income. It also offers an interesting compromise between effective taxation in the country of residence while preserving confidentiality. Contrary to the EU transitional system, the scope of the withholding tax is much broader since it covers fundamentally most types of investment income. In addition, the withholding tax also includes entities that have been interposed in order to circumvent the duty of the individual beneficial owner. Finally, from a financial standpoint, it offers direct flows of tax to the residence country, which could be welcome by some countries in a difficult financial position.

The Swiss "Rubik" agreements have however been controversial. Even in Switzerland, commentators have criticized its complexities combined with high implementation costs for the paying agents. Indeed, in order to be effective, the withholding tax rate has to correspond, for each different category of investment income, to the rate of the residence country. The Swiss paying agent must then correctly characterize each type of investment income and then apply the relevant withholding tax. Commentators abroad have compared the system with a kind of "indulgence", pointed out to potential loopholes in the

[37] See, among others, *Lissi A./Bukara D.,* Abkommen mit Deutschland und Grossbritannien über die Zusammenarbeit im Steuerbereich (part. 1 and 2), FStR 2012, p. 42 ff., 103.

[38] See also *Cavelti L.,* Automatic Information Exchange versus the Withholding Tax Regime Globalization and Increasing Sovereignty Conflicts in International Taxation, World Tax Journal 2013, and p. 172 ff., 199. Discretionary trusts are however excluded from the scope of the agreement.

system,[39] while by contrast some voice has been more positive.[40]

3. Automatic exchange vs. withholding models

3.1 Similarities

Despite their differences, both systems of automatic exchange and final withholding are designed to fight against international tax avoidance. In addition, they both rely mostly on financial intermediaries as agents to implement the rules of international assistance in tax matters. While it is common that financial intermediaries serve as auxiliaries for domestic tax authorities, it is a profound change in the system that financial intermediaries serve as agents for foreign tax authorities.[41] It should however be mentioned here that, under the DTT between the United States and Switzerland, there was already an embryonic form of cooperation from the Swiss financial institutions in favor of the United States, under the so-called, additional withholding tax.[42] This system was of limited application and not as far reaching as the new international development towards the financial institutions acting as an agent for a foreign tax administration, such as the EUSD, FATCA or the Swiss "Rubik" models.

In both systems, the financial intermediaries (or paying agents) must: (i) identify the relevant taxpayers; (ii) determine the tax liability and (iii) apply the implementation rules. The level of due diligence rules and know your customer principles (KYC) may however differ, depending on the model applicable, but this as such is not a difference between the two systems.[43]

3.2 Differences

There are however major differences between the two systems. Perhaps the most important one is a matter of principle: the withholding tax mechanism preserves the *privacy* of the taxpayer and thus does not disclose its identity to the tax administration of residence. By contrast, in a system of automatic exchange, the identity, residence, income and other information are routinely transferred to the residence tax authorities. In other words, the withholding system assists the residence country in the collection of tax and, in a way, levies it for the account of the tax administration, while the automatic exchange assists the residence country in the relevant information required to later correctly tax residents taxpayers. As *Cavelti* has demonstrated, finally, the issue at stake fundamentally refers to questions of tax morale, and differences of perception toward the weight of privacy, one the one hand, and the power of the government, on the other hand.[44]

Another major difference, sometimes described as the main advantage of the automatic system, is the limited scope of the withholding tax on investment income, and notably its inability to cover changes in *principal*.[45] In addition, business or income from enterprises, including fraudulent deductions, or fictitious intercompany loans, is not covered by the withholding tax.

Finally, even if the rate of the withholding tax is designed to correspond to the domestic residence rate, the withholding tax fails to take into consideration the global economic capacity of the resident taxpayer. As long as the domestic rate is not proportional, this is not a major issue, but if the rate on investment income in the country of residence is proportional, the withholding tax does not match the real economic capacity of the taxpayer. This could lead to the consequence that taxpayers who are not taxed at the maximum rate in their country of residence will most likely move into voluntary disclosure.[46] In this case, the withholding tax does not replace automatic exchange.

39 See *Pistone P.*, Exchange of Information and Rubik Agreements: the Perspective of an EU Academic, Bulletin for International Taxation, Volume 67, 2013, p. 216 ff.; *Perdelwitz A.*, The new tax agreement between Germany and Switzerland – Milestone or selling of indulgences? European Taxation 2011, p. 496.

40 *Rivolta A.*, New Switzerland-Germany and Switzerland-United Kingdom Agreements: Does anyone offer more than Switzerland?, Bulletin for International Taxation, Volume 66, 2012, p. 3.

41 *Cavelti* (*op.cit.* n. 38), p. 200; *Grinberg I.*, The Battle Over Taxing Offshore Accounts, 60 UCLA Law Review 2012, p. 304, 322.

42 *Oberson* (*op.cit.* n. 34), p. 174.

43 *Cavelti* (*op.cit.* n. 38), p. 206.

44 *Cavelti* (*op.cit.* n. 38), p. 201 ff.; 210 ff.

45 *Cavelti* (*op.cit.* n. 38), p. 201; *Grinberg* (*op.cit.* n. 41), p. 348 ff.

46 *Cavelti* (*op.cit.* n. 38), p. 207.

3.3 Overall assessment

The main advantage of the withholding tax system is that the tax is immediately transferred to the residence State, under the intermediation of the paying agent in the source State. For some policy makers, the respect of privacy also is an important advantage of this system, while others takes the opposite view.

However, the withholding taxes present major disadvantages. First, its scope of application (investment income) is too narrow and neither covers increase of principal nor takes into account the economic capacity of the taxpayer. As a matter of comparison, automatic exchange does not discriminate among various sources of income. Second, the implementation of the withholding tax is quite complex and difficult to secure with many treaty partners. By contrast, the automatic exchange of information system, provided its design is clear and based on suitable standards, can be put in place as an efficient system, using electronic databases and matching possibilities in the country of residence.[47]

Third, as a global standard, the system of automatic exchange is clearly more suitable.[48] The recent development, notably in the EU, USA and OECD, has in fact showed that the path has gone towards automatic exchange of information as the new global standard. In order to be recognized globally as a fair international standard, it should apply to all important financial centers, according to equivalent principles of reciprocity and in respect of a level playing field.

IV. The OECD Model CRS

1. In general

The OECD Model Common Reporting Standard (CRS), published in July 2014 is not intended to restrict existing or different types of automatic exchange systems but sets out a *minimum standard.*[49]

The CRS draws extensively from the intergovernmental agreement implementing FATCA, taking into account however the multilateral nature of the CRS system and deviating from specific US aspects, such as the taxation based on citizenship and the presence of a comprehensive withholding tax.[50]

The global standard is the result of a combination between: (i) a model competent authority agreement (Model CAA) and (ii) the CRS on reporting and due diligence for financial account information. In order to implement the standard, participating countries are required to follow the respective steps.[51] First, the CRS has to be implemented into domestic law. It means that financial institutions have to apply the due diligence and reporting rules in order to identify and report to their domestic competent authority. Second, the participating State has to enter into a competent authority agreement (CAA) in order to activate the automatic exchange of information with another State. Such a CAA must be based on an international instrument, such as a DTT, or a multilateral convention, such as the OECD CMAATM.

These two steps could also be achieved through a multilateral competent authority agreement, based on the OECD CMAATM, or a multilateral IGA covering the CRS and reporting obligations.[52] For EU Member States, EU legislation could also form the legal basis of the CRS among Member States.

2. The Common reporting standard in general

The CRS entails rules that require financial institutions to report information on reportable accounts and to follow due diligence procedure. *Financial institutions* covered are banks and custodial institutions, depositary institutions, investment entities and specified insurance companies, unless they present a low risk of tax evasion.[53] *Information* to be reported is financial information with respect to reportable accounts, which includes interest, dividends, account balance or value, income from certain insurance products, sale proceeds from financial assets and other income generated with respect to assets held in the account or payments made with respect to the ac-

47 *See Parida S.*, Automatic Exchange of Information, in: Günther O.-C./Tüchler N. (ed.), Exchange of Information for Tax Purposes, Vienna Linde 2013, p. 421 ff., 432.

48 Same opinion *Cavelti* (*op.cit.* n. 38), p. 209, with the precision that technically the automatic exchange is superior provided the information that is exchanged is not overly broad.

49 OECD, Standard for Automatic Exchange of Financial Account Information in Tax Matters (Standard AEOI), 2014, n. 5 *ad* Introduction.

50 OECD, Standard AEOI (n. 49), n. 5 *ad* Introduction.

51 OECD, Standard AEOI (n. 49), n. 16 *ad* Introduction.

52 OECD, Standard AEOI (n. 49), n. 16 *ad* Introduction.

53 OECD, Standard AEOI (n. 49), n. 20 *ad* Introduction.

count.[54] *Reportable accounts* are accounts not only held by individuals, but also entities (which include trusts and foundations) with a requirement to look-through passive entities to report on controlling persons.[55] There is however already an exception for the United States, based on the FATCA regime.[56] For entities, the financial institution must determine whether the entity itself is a *reportable* person. The analysis can be done on available information based on anti-money laundering (AML) and/or KYC procedures. *Due diligence procedure* to be performed by reporting financial institutions are described in Sections II to VII of the CRS.

3. Implementation of AEOI in Switzerland

3.1 The basic requirements

After having tried the so-called "Rubik" strategy, the Swiss Government started to follow the international development and clearly shifted towards AEOI.[57] On 14 June 2013, the Federal Council started to express the willingness to collaborate to the development of a global AEOI standard, following certain basis requirements. These requirements are the following: (i) there is to be only one global standard (principle of unity), (ii) the exchanged information should be used solely for the agreed purpose (principle of speciality), (iii) the information should be reciprocal, i.e. should flow in both directions, (iv) data protection must be ensured and the beneficial owners of trusts and other financial constructs should also be identified. Moreover, the Federal Council stated in June 2013 that, where appropriate, the issues of regularization of the past and market access are to be incorporated into negotiations on the automatic exchange of information.

Following that, on 21 May 2014, the Federal Council adopted draft negotiation mandates for introducing the new global standard for the automatic exchange of information in tax matters with partner States. After having consulted the relevant parliamentary committees and cantons, the Federal Council has adopted the negotiation mandates on 10 October 2014. According to the Federal Council, it is essential that the requirements which it adopted in June 2013 are contained in the new standard. In general terms, the introduction of the automatic exchange of information should create a level playing field and Switzerland's reputation and that of its financial center in the area of taxation and thereby overall competitiveness should be improved.

The main aspects of the future negotiation on automatic exchange of information (AEOI), following the decision of 8 October 2014, are:

- Negotiation of AEOI with the EU;
- Change of FATCA Model 2 to FATCA Model 1 IGA;
- Possible negotiations of AEOI with other countries, but in a first phase, with countries that have close economic and political ties with Switzerland and, to the extent possible, offer sufficient possibilities of regularization of the past;
- Implementation of AEOI with specific agreements with partner's States, and with federal implementation legislation.

In our view, this framework of negotiation makes sense. First, the introduction of AEOI with the EU would be a good opportunity to simplify the existing network of agreements and notably to repeal the EU-Swiss Saving agreements, and replace it with a more comprehensive, modern and global system, which should correspond to the OECD standard. It remains however crucial that this negotiation be combined with joint efforts by both parties and include market access for Swiss entities, and when needed, possible regularization of the past. It is also essential that the framework of art. 15 of the EU/Swiss Savings agreement remain applicable. The equivalent access to the EU Parent-Subsidiary and EU interest and royalty Directive, granted by art. 15 of this agreement, is indeed an essential pillar of the Swiss and EU relationships.

Second, as already discussed above, we particularly welcome the move of FATCA Model 2 to a Model 1 IGA which, as described above corresponded to a unilateral strategy, which has been superseded worldwide in the meantime.

54 OECD, Standard AEOI (n. 49), n. 20 *ad* Introduction.
55 OECD, Standard AEOI (n. 49), n. 20 *ad* Introduction.
56 OECD, Standard AEOI (n. 49), n. 5 *ad* Introduction.
57 For a summary and description of the Swiss position, see, among others, Federal Council, Rapport explicatif sur l'accord multilatéral entre autorités compétentes concernant l'échange automatique de renseignements relatifs aux comptes financiers et sur la loi fédérale sur l'échange international automatique de renseignements en matière fiscale, 14 January 2015, p. 7 ff.

3.2 Implementation

In order to be implemented in Switzerland, AEOI requires three conditions: (i) an international legal basis; (ii) the adoption of a CAA materializing the standard between the relevant States and (iii) the introduction of domestic legal basis providing for the OECD CRS in Swiss domestic law.

First, as described above various international instruments, such as a DTT in conformity with the OECD norm, a TIEA, or more globally the CMAATM, could serve as a legal basis to implement AEOI. We could also imagine a bilateral Swiss-EU treaty, replacing the Swiss-EU Savings agreements, as a new legal framework for such implementation.

Second, a CAA is required between the relevant partners, in order to materialize the AEOI. Consistent with its new strategy, the Federal Council, on 19 November 2014, has approved a declaration on the signature by Switzerland of a multilateral CAA on automatic exchange of information. The multilateral CAA, based on the OECD standard published in July 2014, provides for the condition of mutual AEOI according to the OECD norm. This CAA would be based on art. 6 CMAATM, as a multilateral treaty providing for exchange of information, once ratified by Switzerland. In other words, the multilateral CAA appears to be the "mutual agreement" implementing AEOI with the relevant participating States, under the umbrella of the CMAATM. The choice of States with which AEOI will be introduced would still remain opened at this stage because the approval of the Federal Parliament will be required.[58] In addition to the multilateral CAA, a bilateral CAA is also possible with countries which have ratified the CMAATM, based on an existing treaty or a TIEA.

Third, a legislation implementing the OECD CRS under Swiss law is required. Indeed, the various legal instruments providing for the possibility of AEOI refer to the OECD CRS, which should then be transcribed under Swiss domestic law.

Consistent with this approach, in order to implement AEOI in Switzerland, the Federal Council has just started, on 14 January 2015, two consultation processes:[59] (i) the approval of the CMAATM, signed in 2013, which would then serve as the international legal basis for AEOI; and (ii) the approval of the multilateral competent authority agreement (MCAA), signed on 19 November 2014. Since the MCAA is as such not self-executing, a federal domestic law implementing the OECD CRS norm is also included in the consultation. The consultation process will end on 21 April 2015. It is to be expected that the draft legislations should be ready to be discussed in the Federal Parliament in fall 2015.

Finally, two additional issues still remain to be included in the negotiations, notably with third States. First, with the move to AEOI, a proper solution for the past needs to be implemented. Second, we are of the opinion that the rights of the taxpayers, data protection and tax secrecy, are of foremost importance for the future of AEOI, not only in the requested State, but particularly in the requesting State. These rights will only benefit from adequate protection if procedural rights are granted to the persons involved in the process. It is therefore essential that, as part of the negotiation requirements, the effectiveness of the protection of the rights of the taxpayers by the requesting State be properly balanced and analyzed.

V. Remaining Issues

1. Solving the past

1.1 Introduction

In the move towards AEOI, a crucial issue will be to find an appropriate solution for the past. Many countries around the world have introduced tax amnesties, in various different forms, to try to give a chance to tax evaders to solve their tax liabilities before entering in the world of transparency. In this respect, "Rubik", at least its "solution for the past", can also be seen as a system, which tries to find an appropriate rate of tax, in the form of a withholding payment,

[58] Federal Council, press release of 19 November 2014.

[59] These documents were released after the writing of this contribution, so that the author did not analyze them in details at this stage. See Federal Council, Approbation et mise en œuvre de la Convention du Conseil de l'Europe et de l'OCDE concernant l'assistance administrative mutuelle en matière fiscal, 14 January 2015; rapport explicatif relatif à la CMAATM et la LAAF (n. 57); rapport explicatif relatif sur l'accord multilatéral entre autorités compétentes concernant l'échange automatique de renseignements relatifs aux comptes financiers et sur la loi fédérale sur l'échange international automatique de renseignements en matière fiscale, 14 January 2015.

which should approximate the tax that should have been paid in the relevant pas years.

Another interesting example of the issues linked with a "solution for the past" can be found in the controversy between the United States and many Swiss banks, following the UBS scandal, which also are potentially involved with helping US taxpayers to evade US taxes. We will just simply describe here, in summary the content of the Department of Justice (DoJ) Program, which was developed in 2013 in order to try to find a solution for the past.

1.2 The DOJ Program for Swiss banks involved in tax fraud issues with US customers

Following the UBS case, and based on information stemming from various sources, such as domestic voluntary disclosure programs, whistleblowers or other investigations within financial institutions, the DoJ started criminal and administrative procedures against various Swiss banks, including bankers or financial intermediaries, who were involved in assisting fraudulent US taxpayers.

With a view to finding a global solution to this problematic situation, the DoJ announced, on 29 August 2013, a program which offered to Swiss banks suspecting of having participated in some tax evasion schemes, to collaborate with the DoJ and implement a settlement on the issue.[60] In a nutshell, the program allows eligible Swiss banks to avoid criminal prosecution in the US, in exchange for extensive disclosure of information and, in some cases, penalties.[61]

The participating banks are divided into 4 categories. The *first* pertains to Swiss banks (at that time 14), which are already under investigation by the DoJ and cannot as such participate in the program. For banks of category 1, the fine is fixed on an individual basis. Indeed, an investigation was already under way before the program was established. The negotiations are in general targeted towards obtaining a Deferred Prosecution Agreement. The *second,* and in fact the most important category in practice, is designed for Swiss banks that have reasons to believe that they had US non-declared customers. These banks may request a Non Prosecuting Agreement (NPA). For this category, the amount of fine corresponding to the penalty increases depending on the date of the opening of the account. The fine is levied according to the amount of undeclared US accounts, according to a range varying from 20% to 50%. Penalties may still be reduced if the bank demonstrates that the undeclared account was disclosed by the Swiss bank to the IRS, or was disclosed to the IRS through and announced offshore voluntary disclosure program or initiative following notification by the Swiss bank of such a program or initiative prior to the execution of the NPA.[62]

Swiss banks that believe to have nothing to worry about are part of the *third* category. Finally the *fourth* category corresponds to banks that are deemed compliant under the FATCA regulations. Category 3 and 4 may request a Non-Target Letter. No penalties are due for category 3 or 4.

Participating banks must obtain from the Swiss Government an authorization to cooperate with the DoJ of the United States, consisting in derogation to art. 271 of the Swiss Criminal Code (right to disclose information to a foreign State). A model decision has been prepared by the Federal Council in order to grant authorization to cooperate, under specific conditions. The information that Swiss banks must provide in the Program also entails names of bank employees or third parties (financial intermediaries) who have participated in the tax evasion. This particular requirement is one of the most critical parts of the program and has been subject to much controversy in Switzerland.

The names of US account holders will further be obtained by request for information (including "group requests") under the applicable DTT between the United States and Switzerland of 1996, and the Protocol amending it as of 23 September 2009, based on the standard of art. 26 OECD Model DTT of foreseeable relevance.[63] Until the protocol of 2009 is ratified by the United States, the standard applicable to

60 Joint Statement between the U.S. Department of Justice and the Swiss Federal Department of Finance, 29 August 2013.

61 See in particular *Du Pasquier Sh./Oberson X./Fischer Ph.,* Transmission d'informations à l'étranger, Basle 2014, p. 55 ff.; *Michel D. S./Matthews M.,* The Justice Department and Swiss Banks: Understanding the Special Disclosure Program, Bloomberg BNA's Banking Report, 101 BBR 489, 24 September 2013, p. 1.

62 See Program For Non Prosecution Agreements or Non Target Letter for Swiss Banks, 29 August 2013, II (category 2) par. H.

63 Joint Statement (n. 60), n. 4; *Michel/Matthews* (*op.cit.* n. 61), p. 4.

the exchange of information remains however the concept of "tax fraud and the like".

As already mentioned, in order to solve this delicate, but transitory issue, a solution could be to enter into a modified TIEA with the United States.[64]

1.3 Other systems

The "Rubik" system described above offers a "solution for the past". In the perspective of a future move to AEOI, this system however shows some limits. Indeed, confidentiality preserved under "Rubik" would then disappear with the entry into force of the AEOI. An interesting alternative to the "Rubik" agreement for solving the past is represented by the Liechtenstein-United-Kingdom, LDF.[65] According to the LDF system, the name of the taxpayer is disclosed to the HMRC and the taxpayer involved avoids any criminal penalties by paying the estimated lump-sum amount of undeclared taxes. This, in our view, represents a major difference with the "Rubik" system and facilitates the move towards AEOI.[66] Now that the path have gone towards AEOI, we tend to believe that a system to solve the past, which includes the disclosure of the name of the taxpayer involved has more chances to succeed and to guaranty any adverse future criminal penalties. The trend and legal controversies around the use of stolen bank data's represent a blatant example of the issues a solution for the past may imply.[67]

2. Rights of taxpayers

2.1 In general

Commentators tend to distinguish between substantive rights and procedural rights. A general analysis of those rights would go beyond the scope of this article.[68] We would like just to refer to the procedural rights, which according to the OECD, may be divided in three categories:[69] (i) right to be informed of an information request and of its essential content (notification); (ii) right to participate in the process of gathering information (consultation); (iii) right to appeal and to control the legitimacy of the request (intervention). We are going to briefly analyze how these rights can be protected in practice during the various phases of the exchange of information process.

2.2 Art. 6 ECHR

The European Court of Human Rights (ECHR) protects various rights, which are of relevance in the context of exchange of information, namely the right of possession, art. 8 ECHR (respect of private life), or art. 6 ECHR. The analysis of these rights goes beyond the scope of our presentation.[70] We would just like to stress the importance of art. 6 ECHR, which guaranties the right to a fair trial. As a rule, tax issues are outside the scope of this provision, to the extent that they cannot be characterized as "civil rights" or "criminal charges". Since the *Ferrazini* case, the ECHR confirmed the exclusion of taxes from the meaning of "civil rights", because "tax matters still form part of the hard core of public authority prerogatives with the public nature of the relationship between the taxpayer and the community remaining predominant".[71]

64 See *supra* II.5.2.

65 The Liechtenstein Disclosure Facility (LDF) is an agreement reached between the Government of Liechtenstein and the United-Kingdom (HMRC) on 11 August 2009, valid from September 1st 2006 to April 5, 2015, which consists of three parts: a joint declaration, a memorandum of understanding and a TIEA; see *Langer M.*, Liechtenstein Report, in: IFA, Exchange of information and cross-border cooperation between tax authorities, Volume 98*b* (Copenhagen Congress), The Hague 2013, p. 449.

66 *Oberson* (*op.cit.* n. 42), p. 367.

67 On this aspect, a draft legislation is also pending in the Swiss Federal Parliament in order to criminalize transfer of bank datas to third parties. In this context, it is worth mentioning that a request of information based on stolen bank data's raise the issue of potential conflicts with art. 26 par. 3, notably the limits of *"ordre public"* and/or good faith; see *Holenstein* (*op.cit.* n. 1), n. 299 *ad* art. 26; *Oberson X.*, in: Danon/Gutmann/Oberson/Pistone (ed.), Modèle de Convention fiscale OCDE concernant le revenu et la fortune, Commentaire, Basle 2014, n. 119 ad art. 26; *Steichen A.*, in: Rust A./Fort E. (ed.), Exchange of Information and Bank Secrecy, Alphen aan den Rijn 2012, p. 25. In the author's view, a request of information based on stolen data, violates the good faith principle granted in art. 26 of the Vienna Convention.

68 For a global analysis, see *Oberson* (*op.cit.* n. 4, forthcoming 2015).

69 Tax Information exchange between OECD Member countries, Paris 1994, par. 65 ff.

70 See *Oberson* (*op.cit.* n. 4, forthcoming 2015).

71 Ferrazzini v. Italy, No. 44759/98, ECHR 2001 VII, 12 July 2001; *Maisto G.*, The Impact of the European Convention on Human Rights on Tax Procedures and Sanctions with Special Reference to Tax Treaties and the EU Arbitration Convention, in: Kofler G./Poiares Maduro M./Pistone P.

Despite numerous critics, notably form *Baker,*[72] the ECHR has confirmed its position in later judgments.[73] The concept of criminal controversies, however, may fall within the competence of the EHCR provided they include a criminal tax charge. For instance, the ECHR considers that the determination of a liability to penalties of incomplete tax return is a determination of a "criminal charge" within the meaning of art. 6 ECHR.[74] As a result, all the legal and procedural guaranties provided by criminal law, namely the right to a fair trial, apply to that determination. The extent to which this right applies in in the process of international exchange of information is however a matter of controversy. The Swiss Federal Supreme Court, in a rather old case, took the position that international assistance between States, does not fall into the scope of art. 6 ECHR.[75] In notably the context of the "UBS saga", the Federal Administrative Court has taken the same position.[76] Under the reasoning of the Court, the rules of international exchange of information are similar to a gathering of facts, which is part of international assistance between States.

We do not share this view.[77] First, in the context of international assistance in criminal tax matters, art. 6 ECHR should be applicable. Criminal tax matters, in the framework of art. 6 ECHR, includes notably tax evasion cases and penalties. Second, in the more general context of international assistance, and following *Maisto,* information exchange under either the EU Directive or a bilateral treaty may fall under the scope of art. 6(1) ECHR because the gathering of information is by itself "part of the investigation process that is functional to the issue of the act of assessment"[78]. We believe that an adequate protection should be offered to the taxpayers involved. In order to be in a position to defend his or her case, the taxpayer should therefore at least be aware of the process, i.e. to be notified of the exchange of information procedure, and have the right to be heard and appeal to an independent court.

2.3 Developments at the EU level

In the interesting *Sabou* case, the European Court of Justice (ECJ) hade to examine the extent of the right to be informed and the right to be heard within the framework of an exchange of information under the Council Directive 77/799 of 19 December 1977.[79]

In a nutshell, the ECJ, in its answer to the request for a preliminary ruling, found that European law, as it results in particular from Directive 77/799 and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State to another Member State, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organized by the requested Member State. However, the Court mentioned that nothing prevents a Member State to extend the right to be heard on other parts of the investigative State, by involving the taxpayer in various stages of the gathering of information.

It is interesting to mention that, in its reasoning, following observations from all of the member States which submitted them, the Court mentions that, "in tax inspection procedures, the investigation stage, during which the information is collected and which includes the request for information by one tax authority to another, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment". In this respect, the Court seems to follow the view that exchange of information remains a "fact gathering" process and that right of taxpayers should be granted only at the later stage, after the decision in the requesting State is taken.

It appears that the ECJ took a rather restrictive approach on the potential application of taxpayers' right to exchange of information under EU law. Some commentators have already expressed dissenting

(ed.), Human Rights and Taxation in Europe and the World, IBFD, Amsterdam 2011, p. 373.

72 *Baker Ph.,* Should Article 6 ECHR (Civil) Apply to Tax Proceeding?, Intertax 2001, p. 205; see also *Maisto* (*op.cit.* n. 71), p. 373.

73 *Maisto* (*op.cit.* n. 71), p. 372 with various references.

74 See in this respect *Baker* (*op.cit.* n. 72), p. 205 ff.

75 ATF 118 Ib 436, consid. 4a.

76 See Federal Administrative Court (FAC), 15 July 2010, A-4013/2011, consid. 6.4.

77 See also *Oberson* (*op.cit.* n. 67), n. 198 *ad* art. 26 OCDE; *Bonnard Y./Grisel G.,* L'Accord UBS: spécificités, validité, conformité aux droits de l'homme, RDAF 2010 II, p. 361, 398 ss.

78 *Maisto* (*op.cit.* n. 71), p. 386.

79 Although Directive 77/799 has been repealed by the DAC (2011/16) of 15 February 2011, proceedings were still governed by Directive 77/799, due to the date of the facts.

views.[80] At least, it can be inferred from that judgment that the EU general principle of the right of defense is applicable but only when the *decision* affecting the taxpayer is taken, namely at the end of the administrative process. The Court also ruled that the Member States are free to extend the rights to be heard to other parts of the investigation stages. It means at least that EU law does not preclude the developments of participation rights at domestic level in other stages of the international exchange of information.[81]

2.4 Critical analysis

As already described, we have identified two different schools of thought pertaining to the application of procedural rights to the taxpayers within the framework of international administrative assistance.[82]

On the one hand, some States consider that administrative assistance is in fact similar to a fact-gathering process. Under this line of reasoning, assistance in tax matters belongs to the usual cooperation or assistance between two States and no specific procedural rights should be granted at this level.

On the other hand, many States tend to view the assistance process as an independent administrative procedure, under which the person involved is granted all the relevant procedural rights during the procedure. In our view, this second approach should prevail. It is more consistent with the modern process of international assistance in tax matters. Indeed, as the secrecy rules and the limits to the exchange of information granted under international instruments are also in the interest of the taxpayer.[83] When the requested State is in the process of an information exchange it also has to balance the interests of the proper conduct of the administrative assistance process, and to make *substantive choice* about the content and the extent of the exchange (for instance in order to analyze potential secrecy, data protection or procedural issues). This decision, in other words, like any administrative decision with substance, may affect the rights of the taxpayer involved.

The independent administrative nature of the exchange of information process in the requested State is reflected both on the substantive and procedural side. On the *substantive* side, the requested State has to exercise its power of discretion in the exchange, to observe and preserve secrecy and confidentiality rules and to decide the extent to which ground for refusals (and other limitations) to the exchange have to be observed, such as business secrecy, reciprocity, or public order. On the *procedural* side, the gathering of information may involve auditions of witnesses, analysis of reports, documents or other information, which should occur under due process rules. The authenticity and "probative value"[84] of those documents should be checked and challenged by an independent Court, following the respect of the right of defense.

It follows that the exchange of information is much more than a simple "fact gathering" process and that the taxpayer should be in a position to defend his or her interests already at this stage.

2.5 Implementation under Swiss Law

In order to implement the rules of exchange of information in tax treaties, Switzerland, in a first stage, issued an application ordinance, which entered into force on 1 October 2010.[85] Following this, in a second stage, the Federal Act on international administrative assistance in tax matters of 28 September 2012 (IAAT) was adopted.[86] The IAAT entered into force on 1 February 2013 and replaced the Ordinance.

80 *Calderón Carreo J./Quintas Seara A.,* The Taxpayer's Right of Defense in Cross-Border Exchange-of-Information Procedures, Bulletin for International Taxation 2014, p. 498.

81 *Calderón Carrero/Quintas Seara* (*op.cit.* n. 80), p. 501.

82 *Oberson* (*op.cit.* n. 1), p. 57 ff.

83 *Schenk-Geers T.,* International Exchange of Information and the Protection of Taxpayers, the Netherlands 2009, *passim,* p. 109.

84 See, in this respect, the interesting comments of *Calderón Carrero/Quintas Seara* (*op.cit.* n. 80), p. 502 (defending a "principle of probative value").

85 Ordinance on administrative assistance according to tax treaties (OAAT) of 1 September 2010; s. on this topic, *Untersander O.,* The exchange of Information Procedure According to Double Tax Conventions: The Swiss Approach or How Taxpayers Rights Are Protected under Swiss Procedural Rules, in: Rust A./Fort E. (ed.), Exchange of Information and Bank Secrecy, Alphen aan den Rijn 2012, p. 197 ff.; with an English translation of the OAAT in appendix 2, p. 214 ff.

86 RS 672.5 ; see, on this subject, *Beti D.,* La nouvelle loi sur l'assistance administrative internationale en matière fiscale – une vue d'ensemble, Archives 81 (2012/13), p. 181 ; *Rappo A./Tille A.,* Les conditions d'assistance administrative internationale en matière fiscale selon la

The IAAT is applicable on administrative assistance based on (a) DTT and (b) other international conventions, which provide for exchange of information in tax matters (art. 1 par. 1 IAAT). It also applies to the rules of exchange of information in the Swiss-EU agreement on the taxation of savings. In our view, it also covers the implementation rules for the recent TIEA's concluded by Switzerland. The IAAT entails procedural rules and in particular provides rights to the persons involved in the exchange of information process, namely the right to be heard, the right to be notified and the right to appeal.

However, following the international standard of the OECD, the IAAT has already been subject to a partial revision, which entered into force on 1 August 2014.[87] First, new rules of information have been introduced in the case of group requests (art. 14*a* IAAT). Second, a specific deferred notification to persons entitled to appeal, have been adopted (art. 21*a* IAAT). Switzerland should thereby comply with the applicable international standard for administrative assistance in tax matters as well as an additional recommendation of the Global Forum on Tax Transparency.[88]

Under the new law, the person subject to a request of information and entitled to appeal, could be notified only after the transfer of information to the requesting State. This restriction may occur only to the extent that the requesting authority demonstrates in a plausible manner that the notification *ex ante* would compromise the goal of the administrative assistance and the success of the enquiry (art. 21*a* al. 1 IAAT). In such case, the appeal may only conclude *ex post* to the recognition of the illegality ("non conformité au droit") of the decision (art. 21*a* al. 2 IAAT). This restriction of the right of notification, in exceptional circumstances, has already raised constitutional justified critics.[89] It is true that it corresponds to a serious limitation of the constitutional principle of the right to be heard under Swiss law.[90] At least, due to the fact that the IAAT, as a federal act, may not be constitutionally challenged by the Swiss Supreme Court, and in accordance with the principle of proportionality, a very restrictive interpretation of such disposition is required. Only in exceptional circumstances, as provided by the wording of art. 21*a* IAAT, may the deferred notification procedure take place.

VI. Conclusion

The "Rubik" system was an interesting attempt to find a compromise between the privacy of the taxpayer, on the one hand, and the tax compliance in the residence State of the taxpayer, on the other hand. This proposal, which at first seems to have found many allies, was designed to find a long-term alternative solution to automatic exchange of information.

The wheel, in the meantime, has clearly moved towards AEOI as the future global standard. It appears that FATCA has emerged as a major driver in this area and the implementation of intergovernmental agreements (IGAs) all over the world can be seen retrospectively as one of the driving forces towards the acceptance of AEOI as the global standard. Indeed, the OECD Common Reporting Standard, published on 24 July 2014 is strongly influenced by the FATCA rules.

This does not mean that the withholding tax is bound to disappear. It can already serve as a transitory system towards automatic exchange and act as a limited alternative for countries not ready to apply complex automatic exchange. In this respect an alternative could be to implement a flat withholding tax, independent to the residence of the taxpayer.

Moving towards AEOI requires first a proper international legal basis and to make a choice between various competing international instruments. Various instruments, such as DTT, TIEAs, the CMAATM or an EU-Swiss bilateral agreement could serve for that purpose. The AEOI will then be "materialized" by a CAA between the participating countries, in a bi- or multilateral form.

With the United States, the applicable standard is based on FATCA and, so far, the Model 2 IGA. Since the "Rubik" Model is now a strategy of the past, we

LAAF, RDAF 2013 II, p. 1 ; *Beusch M./Spörri U.*, in: Zweifel/Beusch/Matteotti (ed.), Kommentar zum Internationalen Steuerrecht, Art. 26 OECD-MA n. 320 ff.

87 S. *Opel A.*, Amtshilfe ohne Information der Betroffenen – eine rechtstaatlich bedenkliche Neuerung, Archives 87 (2014/15), p. 265.

88 S. Federal Council, Rapport explicatif sur la modification de la loi sur l'assistance administrative fiscale, du 14 août 2013, ad. 1.1.

89 *Opel* (*op.cit.* n. 87), p. 277 ff.; *Naef F.*, Verfassungswidrige Amtshilfe in Steuersachen, Jusletter, 2 December 2013.

90 See *Opel* (*op.cit.* n. 87), p. 283.

strongly support the move towards an IGA, between the United States and Switzerland, based on a reciprocal Model 1. In addition, because of the slow ratification process in the United States of the 2009 protocol of the DTT of 1996, we suggest to analyze further the possibility to negotiate, in a transitory period corresponding to the agreed upon protocol of 2009, a sort of modified TIEA between Switzerland and the United States to allow exchange of information, in accordance with the OECD model. Such an agreement could also help solving the past in the framework of the DoJ program against some Swiss bankers.

Should the AEOI become a fair and globally accepted standard of AEOI, some basic fundamental conditions would have to be met. First, the standard should also be unique and avoid conflicts of different overlapping exchange rules. Second, the standard should apply to all important financial centers, according to equivalent principles of reciprocity and in respect of a level playing field. In particular, existing gaps must be closed in the identification of beneficial owners in the case of legal entities and trusts. The CRS notably refers to the rules of AML in this respect. The effective implementation of such rules in all the participating countries will be a crucial issue in the future to ensure the "level playing field". In this context, the recent requirements published in October 2014 by the Federal Council in line with the future negotiations towards AEOI go in the right direction.

Moving towards AEOI also requires finding a suitable solution for the past. The "Rubik" model tends to provide for such a solution, in the form of a lump-sum system of withholding tax. In the author's view, an interesting alternative to the "Rubik" agreement for solving the past is represented by the Liechtenstein-United-Kingdom, Disclosure Facility (LDF). Contrary to "Rubik, the LDF has the major advantage of disclosing the name of the relevant taxpayer. In the context of a future AEOI, this is indeed an important difference.

Finally the rights of taxpayers and persons affected by the exchange of information should be protected. The exchange of information is much more than a "fact gathering process" and should be characterized as an independent administrative procedure. It follows that all the main procedural rights, at least the right to be notified, to participate and to appeal to an independent court, should be covered. In this context, we do not share the view of the Swiss Supreme Court about the exclusion of art. 6 ECHR to the process of international exchange of information in tax matters. These exchanges include information about tax evasion, which are characterized as criminal offenses, and the exchange process involves *substantive* decisions by the requested and requesting States that may affect the taxpayer and the persons involved in the procedure. The recent changes of the IAAT, with the so-called deferred notification rules, in exceptional circumstances, is a step back in this respect and should be interpreted restrictively, in accordance with the principle of proportionality. In the future, a crucial issue will be the respect of data protection rules in both the requesting and requested States to make sure of the proper use of information obtained locally.

In the upcoming negotiations towards the implementation of AOEI, in addition to the requirements mentioned above, we therefore believe that Switzerland should, to the extent possible, make sure that appropriate counterparts are obtained, namely, where appropriate, an equivalent access to the market. Last but not least, Switzerland should stay at the forefront of the advocate of the protection of taxpayers' human, constitutional and procedural rights.