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Curbing Illicit Financial Flows in Commodity Trading: Tax Transparency

Irene Musselli and Elisabeth Bürgi Bonanomi

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Corresponding author
irene.musselli@cde.unibe.ch; elisabeth.buergi@cde.unibe.ch

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List of abbreviations and acronyms

AEOI	Automatic exchange of information
APA	Advance pricing agreement
BEPS	Base erosion and profit shifting
CAA	Competent Authority Agreement
CbC	Country-by-Country
CMMAT	Convention on Mutual Administrative Assistance in Tax Matters
CoE	Council of Europe
CRS	Common Reporting Standard
DTA	Double Tax Agreement
EOI	Exchange of information
EOIR	Exchange of information on request
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FTA	Federal Tax Administration
IFFs	Illicit financial flows
LAAF	Loi fédérale du 28 septembre 2012 sur l'assistance administrative internationale en matière fiscale / Bundesgesetz vom 28. September 2012 über die internationale Amtshilfe in Steuersachen
LEAR	Loi fédérale sur l'échange international automatique de renseignements en matière fiscale / Bundesgesetz vom 18. Dezember 2015 über den internationalen automatischen Informationsaustausch in Steuersachen (AIAG)
LEDPP	Loi fédérale du 16 juin 2017 sur l'échange international automatique des déclarations pays par pays des groupes d'entreprises multinationales (Loi sur l'échange des déclarations pays par pays, LEDPP) / Bundesgesetz vom 16. Juni 2017 über den internationalen automatischen Austausch länderbezogener Berichte multinationaler Konzerne (ALBAG)
MCAA CbC	Multilateral Competent Authority Agreement on the Automatic Exchange of Country-by-Country Reports
MCAA CRS	Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information
OAAF	Ordonnance du 23 novembre 2016 sur l'assistance administrative internationale en matière fiscale (Ordonnance sur l'assistance administrative fiscale, OAAF) / Verordnung vom 23. November 2016 über die internationale Amtshilfe in Steuersachen (Steueramtshilfeverordnung, StAhiV)
OEAR	Ordonnance du 23 novembre 2016 sur l'échange international automatique de renseignements en matière fiscale (OEAR) / Verordnung vom 23. November 2016 über den internationalen automatischen Informationsaustausch in Steuersachen (AIAV)
OECD	Organisation for Economic Co-operation and Development
OEDPP	Ordonnance du 29 septembre 2017 sur l'échange international automatique des déclarations pays par pays des groupes d'entreprises multinationales (OEDPP) / Verordnung vom 29. September 2017 über den internationalen automatischen Austausch länderbezogener Berichte multinationaler Konzerne (ALBAV)
SDC	Swiss Agency for Development and Cooperation
PA	Loi fédérale du 20 décembre 1968 sur la procédure administrative (PA) / Bundesgesetz vom 20. Dezember 1968 über das Verwaltungsverfahren (Verwaltungsverfahrensgesz, VwVG)
SECO	State Secretariat for Economic Affairs
SEI	Service for the Exchange of Information
SIF	State Secretariat for International Financial Matters
TIEA	Tax Information Exchange Agreement
UN	United Nations

Executive Summary

Switzerland's central role in commodity trading brings with it leverage and responsibilities. The Swiss commodity trading industry and its regulatory environment have come under increasing scrutiny as a possible conduit for illicit financial flows (IFFs) out of resource-rich developing countries. Key revelations from the so-called Paradise Papers point to the involvement of Swiss-based firms and agents in opaque transactions and potentially corrupt commodity deals. The leaked documents have once again called attention to Switzerland and its responsibility to enhance transparency in commodity trading. Against this background, Switzerland has committed to improving tax and trade transparency and curbing commodity trade-related IFFs. A specific dimension concerns illicit flows associated with false invoicing and manipulative transfer pricing. The broad underlying issue is one of aggressive tax avoidance, if not outright tax evasion, often entangled with money laundering and corruption.

This working paper aims to contribute to the analysis of policy responses to tackle commodity trade-related illicit financial flows by looking at the role of tax transparency in helping uncover mispricing practices. The report addresses this issue with reference to Switzerland's legal framework and practices regarding exchange of information (EOI) between tax authorities. Commodity trade mispricing is used as an umbrella definition that encompasses both trade misinvoicing and transfer mispricing. Trade misinvoicing covers the fraudulent mispricing of goods; it involves exporters and/or importers deliberately misstating the value, quantity, or nature of goods or services in a cross-border trade transaction. Transfer mispricing (also known as abusive transfer pricing or transfer price manipulation) refers to the manipulation of transfer prices within a multinational firm in order to avoid taxes on profits in particular jurisdictions.

Exchange of tax information can shed light on the mechanisms of value manipulation in cross-border transactions. The assessment of trade-mispricing practices is a fact-intensive exercise that rests on transaction-level data. To detect trade misinvoicing, customs and tax administrations must determine the correct description, quantity, quality, grade, and specification of an exported commodity, and the truth or accuracy of the declared customs value for given exported goods. As regards transfer mispricing, under the "canonical" transaction transfer-pricing methods, transfer-pricing risk assessment and audits require data on comparable "uncontrolled" transactions, operating costs, and profit margins. Exchange on request, spontaneous exchange of tax rulings and exchange of country-by-country (CbC) reports can in principle provide tax administrations with focused and useful information to perform this analysis. The automatic exchange of financial account information is not directly relevant, but remains a key tool for detecting undeclared offshore wealth where the proceeds from mispricing can end up.

Yet a host of procedural rules and principles limit the use of exchange-of-information mechanisms for investigating commodity trade mispricing. Among the many hurdles, the information exchanged may only be used for the purpose for which it is intended in the exchange agreement, which is often confined to the assessment of income and capital taxes, not customs duties; stringent rules constrain the flow of information between tax, customs, and other administrative units, which inhibits data matching of tax and customs records; the request letter addressed to Switzerland should specifically identify the taxpayer or group of taxpayers under investigation, a challenging requirement when investigating opaque business transactions; the request can be declined on grounds that the requesting state could obtain the information in its own jurisdiction, given the assumed symmetry between sell and purchase documents in cross-border transactions; and taxpayer's procedural rights – to be notified, to inspect the record, and to appeal – may effectively delay or deter the exchange of information. As regards the exchange of country-by-country reports, they cannot be used to make automatic adjustments to taxpayer's income on the basis of an allocation formula, under the existing standard; nor do they contain detailed transaction-level data. Altogether, these conditions limit the operational significance of tax information exchange procedures in uncovering commodity trade mispricing.

The challenge is compounded by stringent prerequisites that limit the participation of developing countries in exchange procedures. Switzerland exchanges tax information on a reciprocal basis, which means that Switzerland's exchange partners need to have in place adequate laws and regulations in relation to the availability of information, the gathering of information, and the transmission of the information. In addition – and independent of reciprocity – adequate laws, operational procedures, and IT solutions must be in place in the receiving country to protect confidentiality of tax information. To qualify as a potential exchange partner, a country must undergo a preliminary confidentiality and data safeguard assessment

at both the legal and operational level. These requirements pose significant compliance hurdles for many developing countries. As a result, less-developed countries are typically excluded from the exchange of tax information. The Swiss exchange-of-information network is clearly shewed towards higher-income countries: as of October 2018, Switzerland had a legal basis to exchange tax information on request with only two low-income countries and 13 lower-income countries (compared to 97 high- and upper-middle-income countries); low-income countries are completely absent from Switzerland's automatic exchange of information network.

Finally, questions remain as to the ability of countries to use the information exchanged. In particular, if the automatic exchange were activated, a country would only benefit from the exchange if it had the technical capacity to decrypt and process bulk data and match the decoded data against tax returns declared in the country.

How, then, can countries mitigate or overcome these obstacles? There is some room to move forward, pragmatically, through minor changes in administrative practices and the law. We call for a four-pronged approach to improve the effectiveness of exchange mechanisms for tackling commodity trade-related IFFs: (1) more flexibility to use tax information for tracking down trade mispricing; (2) a pragmatic, targeted relaxation of procedural requirements; (3) the establishment of a legal basis to exchange information with lower-income countries; and (4) a transactional, phased-in approach to enhance administrative capacity in poor countries via peer-to-peer knowledge transfer that pools expertise from different institutional stakeholders in Switzerland.

First, Switzerland and its exchange partners could consider adjusting exchange-of-information rules and practices to allow for a broader use of tax information in relation to commodity trade mispricing. For example, Switzerland could proactively favour the flow of information between tax and customs units in the receiving country, by generally endorsing this practice when sending information. This would ease external obstacles to the cross-matching of tax and customs data in the receiving country, a far-reaching technique to track down customs fraud. Furthermore, as part of a concerted international initiative, Switzerland could use the data generated by exchange procedures for measurement and reporting purposes on Sustainable Development Goal (SDG) 16 dealing with IFFs, and set up internal exchange protocols for the flow of information between the AEOI team and economic departments. Finally, when the CbC reporting standard is reviewed in 2020, it is worth considering some flexibility to allow capacity-constrained countries to use income allocation formulas based on the CbC reporting data. In parallel or as an alternative, the CbC reporting template could be amended to include detailed transaction-level data that enable tax authorities to perform in-depth transfer pricing analysis.

Second, Switzerland could possibly ease some procedural requirements that limit the use of EOI mechanisms for tracking down commodity trade mispricing. There is flexibility to move forward, pragmatically, through minor changes to administrative practices in a number of respects. For example, the lifting of the reciprocity requirement would open the possibility to exchange information with countries that do not have the administrative capacity to gather and transmit information on their side. The key challenge is to relax the requirement without upsetting the balance that the Swiss legislature has sought between competing interests. In order words, the balance can be pushed further to accommodate transparency concerns, but it cannot be tilted too far away from concerns about taxpayer rights or regarding fair allocation of responsibilities and costs between requesting and supplying jurisdictions. A targeted loosening of the reciprocity requirement would respect this balance. Switzerland could lift reciprocity requirements with a few select low-income countries during a transitional, phase-in period only, or possibly on a trial basis in the context of technical-assistance projects regarding information mechanisms. Such non-reciprocal exchange could still require developing countries to have adequate safeguards in place to ensure confidentially and data protection. In this respect, a relaxation of reciprocity would not imply any erosion of taxpayers' privacy rights. Note that Switzerland already supplies information on a de facto non-reciprocal basis, as the information requests met by Switzerland far exceed the requests it submits to other countries.

Third, Switzerland could deepen its technical cooperation in this area by volunteering and testing pioneering EOI practices as a partner in pilot projects. The focus here would be on peer-to-peer, transactional knowledge transfer, including by temporarily loaning out staff to tax administrations in developing countries. The approach could be modular and phased-in: it would aim at creation of medium-term, preparatory, and transitional arrangements that might eventually lead to full-fledged EOI mechanisms. In Switzerland, this would involve strengthened interactions and coordination between the Federal Tax Administration, the State Secretariat for Economic Affairs, the State Secretariat for International Financial Matters, and the Swiss Agency for Development and Cooperation.

Finally, in order to create a legal basis to exchange information with low-income countries, Switzerland could reconsider the "unilateral route" to the exchange, whereby exchange would be based on a domestic law provision "operationalized" by Memoranda of Understanding (MoU) rather than bilateral exchange treaties. This already occurs in other areas of administrative assistance. A domestic law provision may provide a legal basis to exchange information with poor countries on a trial basis in the medium term, in the context of pilot technical-assistance projects aimed at establishing a foundation for full-fledged exchange of information. Operationalized by ad hoc MoU, the domestic provision could enable a tailormade approach to implementation that goes beyond the "one size fits all" solutions of existing treaty-based EOI standards.

Still, questions remain as to the cost-effectiveness – and opportunity costs – of exchange of information as a mechanism for countering commodity trade-related IFFs. Exchange of information in tax matters is a complex, indirect tool to tackle commodity trade mispricing, and one that relies heavily on administrative capacity and discretion. It is also a costly endeavour, particularly in terms of the investment needed to set up the needed EOI infrastructure in countries that face structural gaps and hurdles. On the one hand, these interventions may yield lasting results and act as a catalyst or an entry point for far-reaching, incremental reform of the tax system in poor countries – especially if implemented in concert with domestic resource mobilization efforts. On the other, they may be short-lived and doomed to fail, similar to other cases of legal "transplantation". Indeed, costly efforts to set up legal, operational, and IT infrastructures do not necessarily translate into sustained capacity to operate the supplied infrastructure or to use the information shared. Alternative policy options to track down mispricing deserve objective, critical scrutiny. Alternative measures and tools specifically geared to counter value manipulation in cross-border transactions should be considered, including "off-track" solutions that could deescalate international tax competition and cut incentives to shift profits to low-tax jurisdictions. Further research is needed in this regard.

Research Question: Tax Transparency and Commodity Trade Mispricing

In recent years, there has been an accelerating push to expand transparency and exchange of information (EOI) for tax purposes, in an effort to curb cross-border tax evasion and avoidance. Since 2014, more than 100 jurisdictions have committed to the automatic exchange of offshore bank account information, with over 3,200 bilateral exchange relationships established as of August 2018 (OECD 2018e and 2018f).[1] Over 150 jurisdictions have pledged to exchange tax information on request "to the widest possible extent", in line with the OECD-sponsored Global Forum on Transparency and Exchange of Information for Tax Purposes international standard, with 99 jurisdictions assessed "compliant" or "largely compliant" against the standard as of July 2018 (OECD 2018c).[2] Around 60 jurisdictions have established the domestic legal framework for multinational enterprise (MNEs) CbC reporting, with over 1,400 exchange relationships actively ongoing in 2017 (OECD 2018b).[3] Finally, more than 11,000 tax rulings are currently being exchanged (OECD 2018b).[4] Overall, exchange of information in tax matters has reached unprecedented levels, with breakthroughs on multiple fronts – e.g. regarding exchange of information on request, automatic exchange of financial account information, exchange of CbC reports, and spontaneous exchange of tax rulings.

To date, the likely role of these transparency frameworks in curbing commodity trade-related illicit financial flows (IFFs) has not been fully explored. Do these exchange frameworks provide a viable mechanism for detecting commodity trade mispricing? In particular, can tax authorities in resource-rich developing countries rely on exchange of information instruments for the purpose of detecting and ascertaining facts in relation to commodity trade misinvoicing and abusive transfer pricing? If there are limits to this use, can procedural requirements be eased and administrative practices adjusted to allow the use of EOI mechanisms for the purpose of improving transparency in commodity trading?

Box 1: Commodity trade mispricing, trade misinvoicing, and transfer mispricing

Several of the terms used in this report require definition.

Illicit financial flows refer to capital or money that is earned, transferred, or used in contravention of domestic and international laws and standards. In this report, the term "commodity trade-related IFFs" is narrowly used to denote mispricing in commodity-trade transactions.

Commodity trade mispricing is used as an umbrella term that encompasses both trade misinvoicing (or false invoicing) and transfer mispricing (or abusive transfer pricing).

Trade misinvoicing refers to the fraudulent mispricing of goods – for example, to avoid taxes, circumvent exchange controls, or launder money. It involves exporters and/or importers deliberately misstating the value, quantity, or nature of goods or services in a cross-border trade transaction. It may entail under-invoicing, when an invoice states a price as a lower value than is actually paid, or over-invoicing, when the declared price is higher than what was actually paid. This can be accomplished through various means, including false invoicing, double invoicing, and third invoicing; mis-description of quantity, quality, or grade of the traded goods; manipulation of freight and insurance charges; non-declaration of other dutiable charges; artificial splitting of value for part consignments, etc. (chairman, Sewing Machine Rehabilitation, 2007). Trade misinvoicing is usually performed through (formally) unrelated parties. It typically results in discrepancies between recorded exports and import prices, and may lead to capital flight (because the outflow is unrecorded).

Abusive transfer pricing (also known as transfer-price manipulation, or transfer mispricing) refers to the manipulation of transfer prices within a multi-national firm. Integrated companies with a taxable presence in more than one country have an incentive to avoid taxes by manipulating transfer prices (Readhead 2016a, 1016b and 2017b; Guj et al. 2017). For example, by under-pricing mineral sales to an affiliate in a low-tax jurisdiction, multinationals can shift profits to low-tax countries and save taxes. The risk of transfer pricing manipulation is not limited to output prices, i.e. the purchase/sale price of the traded commodity. It also relates to input prices, comprising the provision of goods and services by related entities (IGF 2017). For example, an affiliated marketing hub in a low-tax jurisdiction may charge or receive disproportionate service fees or discounts on the price of commodities purchased or sold, so as to shift profits to the low-tax jurisdiction. In transfer price manipulation, there are generally no discrepancies in bilateral trade data, since the same price is reported on both sides of the transaction. The transferred profit does not technically constitute capital flight, since the outflow is recorded.

Source: Musselli and Bürgi (forthcoming) 2019; United Nations, Committee of Experts on International Cooperation in Tax Matters 2018.

1 On the automatic exchange of financial account information, refer to Chapter 1.3.

2 For an overview of exchange on request, refer to the analysis in Chapter 1.1.

3 Refer to the analysis in Chapter 1.4.

4 On tax rulings, refer to Chapter 1.2.

This report addresses these questions with reference to Switzerland's legal framework and practices in relation to EOI for tax purposes. The present review seeks to take stock of major legal developments regarding EOI in tax matters in Switzerland, while assessing the relevance of these developments in terms of Swiss efforts to curb commodity trade-related IFFs. The analysis is practice oriented. The overarching concern is to assess whether Swiss cooperation in tax matters will help to improve transparency regarding commodity trading.[5]

The analysis proceeds as follows:

- Chapter 1 sets the stage for the core analyses in subsequent chapters. It outlines the main features of the most-relevant EOI procedures and illustrates their implementation in Swiss practice.

- Chapter 2 considers Switzerland's network of EOI arrangements. It specifically considers whether Switzerland's treaty network comprehensively covers developing countries, particularly the most vulnerable and those whose leading exports to Switzerland include commodities.

- The analysis in Chapter 3 further discusses whether the type of information that can be exchanged under different exchange procedures is useful to assess commodity trade mispricing. It singles out exchange on request, spontaneous exchange of tax rulings, and exchange of CbC reports as possibly the most relevant. These procedures can in principle provide tax administrations with focused and useful information for investigating commodity trade mispricing.

- Chapter 4 points to procedural constraints and built-in limits that tend to limit the operational significance of EOI in investigating commodity trade mispricing. This is illustrated by way of case scenarios, using the example of Ghana. The focus is on exchange of information on request, with only limited consideration of other exchange procedures.

- Chapter 5 draws attention to the current rather strict conditions that must be fulfilled before the exchange can be activated. The requirements are tight, particularly in the context of automatic exchange procedures, and tend to inhibit the participation of poor countries in the exchange. This is illustrated with reference to the policy options a country like Laos possesses to access exchange frameworks.

- The analysis concludes by highlighting the potential and limits of information exchange in tax matters to improve transparency in commodity trading. It also points to alternative regulatory approaches that may provide viable means to effectively stem tax avoidance and evasion in relation to commodity trading.

The analysis used a combination of secondary research and semi-structured interviews with key informants. Literature review, data analysis, and other desk-based work was carried out between January and March 2018. This was followed by a second phase of semi-structured interviews with key institutional stakeholders (June–November 2018). Interviews were held with staff of the Swiss State Secretariat for Economic Affairs, the State Secretariat for International Financial Matters, and the Swiss Federal Tax Administration, including the Service for Exchange of Information in Tax Matters and the Collection Division. The interviews aimed at cross-checking the accuracy of the analysis, and gaining insights into how the exchange operates in practice. The report reflects the legal and regulatory framework as of October 2018.

5 For a broader development perspective on Switzerland's administrative assistance tax matters, see Bürgi and Meyer-Nandi 2014, Meyer-Nandi 2018, Matteotti 2018. Civil society organizations (CSOs) have questioned the effectiveness and legitimacy of mainstream forms of tax cooperation. See, in particular, Tax Justice Network (2009 and 2012).

1 Setting the Stage: A Multi-track Framework

Exchange of information between tax authorities, also referred to as administrative assistance in tax matters, is multi-track. It can occur through different exchange channels and procedures, including on request, spontaneous, or automatic. While in substance these procedures may overlap and intersect, they remain formally and legally distinct and need to be tackled separately. The following sections outline the main features of the most-prominent EOI mechanisms as applied in Swiss practice, in order to set the stage for more detailed analyses in the following chapters. The analysis ends with some summary observations that include broad normative considerations. The focus is on administrative assistance in tax matters – i.e. exchange of information between tax authorities. Other exchange of information channels – between judicial authorities (international mutual assistance in criminal tax matters) and to enforce financial market laws (international cooperation by FINMA) – fall outside the scope of this report.

1.1 Exchange of tax information on request (EOIR)

1.1.1 In a nutshell

Exchange of information on request describes a situation in which one country's tax authority asks for particular information from another country's tax authority. Typically, the request relates to an examination, inquiry, or investigation of a taxpayer's tax liability for identified tax years (OECD 2006). The exchange is not confined to tax information narrowly defined (e.g. a tax return filed with the tax authority). As outlined in Chapter 3 and Box 6, it can cover ownership information (e.g. the identity of the shareholders and/or beneficial owners of a company), bank information (e.g. the activity taking place in a bank account and the account balance), or accounting and transaction-level records (e.g. commercial invoices, invoices of forwarding agents, and customs documents, if relevant). The information sought may already be at the disposal of the requested tax authority, or it may be held by a third party, for example a bank or a fiduciary – in which case the requested authority will have to implement specific collection measures in order to obtain the information (OECD 2006).

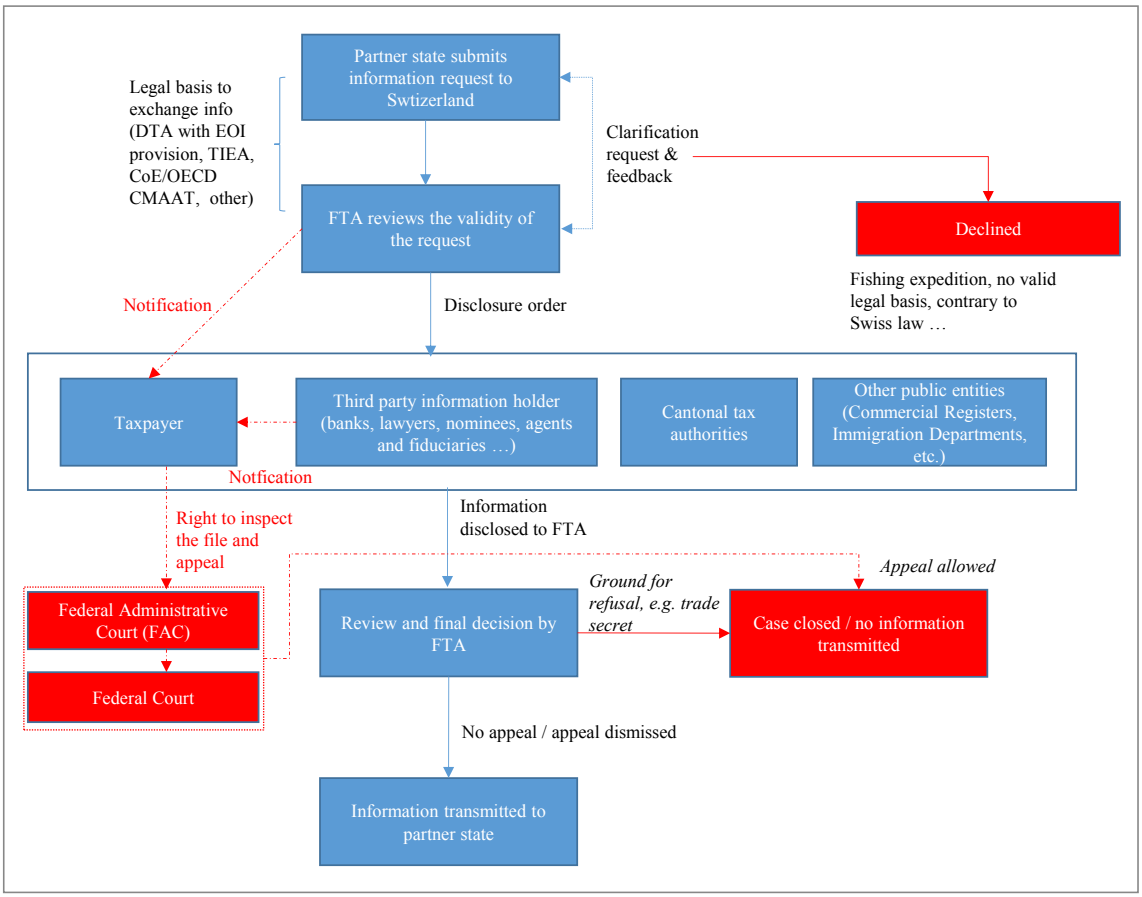
The international standard for transparency and exchange of information on request for tax purposes has been set by the OECD-sponsored Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD 2016a). The standard reflects major developments in tax transparency since the early 2000s. It is aligned with the 2002 OECD Model Tax Information Exchange Agreement (TIEA) and its commentary (OECD 2011b), and reflects Article 26 of the OECD Model Tax Convention and its commentary, as updated in 2017 (OECD 2017g). It also echoes Article 26 of the UN Model Tax Convention (United Nations 2011), which largely reflects the OECD Model Tax Convention.

1.1.2 Implementation in Switzerland

On 13 March 2009, the Federal Council publicly announced that Switzerland would exchange information in tax matters in line with the internationally agreed standard. Under standard compliant EOI clauses, in line with Article 26 of the OECD Model Tax Convention, the Swiss tax authority will exchange information "to the widest possible extent": exchange of information is provided on request for the administration and enforcement of the domestic tax laws of the requesting state (a "major" information clause), without regard to the existence of a domestic tax interest in Switzerland, or the application of a dual criminality standard. The information sought may refer to non-Swiss residents and may relate to the administration or enforcement of taxes beyond those on income and capital (unless otherwise stated in the exchange instrument). The request may refer to a single identified taxpayer, or it may refer to a group of taxpayers identified specifically in connection with similar "patterns of facts" (Oberson, 2015a, 21; OECD Commentary n. 5.2 ad Art. 26 par. 1 OECD Model Tax Convention). Information is not limited to taxpayer-specific information. It can also relate, for example, to risk analysis techniques or tax avoidance or evasion schemes (OECD Commentary 5.4 ad Art. 26 par. 1 OECD Model Tax Convention). However, so-called "fishing expeditions", i.e. "random, speculative requests, with no apparent nexus with an ongoing tax inquiry or investigation" (OECD Commentary 5 ad Art. 26 par. 1) are not authorized. Apart from this limit, all "foreseeably relevant information" – whether bank, ownership, or accounting information – must be provided, and the evalu-

ation of the relevance of the request is a matter for the requesting state. The EOI obligations stipulated in a standard-compliant EOI treaty override domestic bank secrecy rules (Art. 26 para. 5 OECD Model Tax Convention).

Figure 1: Exchange of information on request, Switzerland



Source: Authors, based on interviews with Swiss Federal Tax Administration (FTA) as well as on the LAAF (SR 651.1).

While fairly broad on paper, implementation of the EOIR in Swiss practice has some limits.

First, there must be a legal basis to exchange information on request, such as a double tax agreement (DTA) with an EOI provision, a tax information exchange agreement (TIEA), or the joint OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (CMAAT). The EOI instrument must be in force in both Switzerland and the exchange partner.[6] As discussed earlier, the exchange may also be based on a domestic law provision "operationalized" by MoUs, should Switzerland decide to adopt a "unilateral" approach.

Second, the terms of the exchange depend on the exchange of information provision in the applicable tax treaty. The Swiss tax authority will exchange information in line with the global standard if so provided in the EOI provision. Note, in particular, that Switzerland has not lifted its domestic bank secrecy in general. The Loi fédérale du 28 septembre 2012 sur l'assistance administrative internationale en matière fiscale (LAAF),[7] which regulates the exchange on request (and spontaneous), requires that the equivalent to paragraph 5 of Article 26 of the OECD Model Tax Convention be included in a treaty to allow exchange of bank

6 In Switzerland, entry into force takes long. Once agreed and initialled, an EOI agreement – whether a DTC, a TIEA, or a protocol to an existing agreement - is forwarded to the cantons and interested economic circles for consultations. The text of the agreement is then presented to the federal Council for approbation of signature. After the signature, it is sent to Parliament with an explanatory report (message), for final approbation. The approbation by the Parliament is followed by the publication of a federal decree (arrêté fédéral), which can be subject to a referendum if 50,000 citizens ask for such referendum within 100 days from its official publication (OECD, 2016c).

7 *Loi fédérale du 28 septembre 2012 sur l'assistance administrative internationale en matière fiscale* (Loi sur l'assistance administrative fiscale, LAAF), SR 651.1 [herefater, LAAF].

information. Switzerland's treaties concluded since March 2009 include this clause and explicitly provide for the exchange of bank information. However, there remain DTAs concluded prior to March 2009 that do not include such clauses, do not permit exchange of bank information, and include a "minor" information clause only: requests made pursuant to these agreements still do not allow exchange of bank information and are limited to information necessary to carry out the provisions of the DTA.

Switzerland also maintains strong rules and procedures regarding taxpayers' rights, as outlined in Figure 1. Under Swiss law,[8] the person targeted by the information request as well as all persons entitled to appeal are notified in writing of the main points of the information request before it takes place. The person targeted has the right to inspect the file and to appeal, which suspends the notification procedure.

Finally, there are significant constraints in terms of operational principles, as well as stringent requirements before an EOI can take place. In particular, any information exchanged must be treated confidential by both the sending and the receiving tax administration. Confidentiality must be ensured before and during the transmission of the information, and after the information is received.

These limits are discussed in further detail in Chapter 4.

1.2 Spontaneous Exchange of Tax Rulings

1.2.1 In a nutshell

In some jurisdictions, taxpayers are entitled to request a tax ruling from the domestic tax authority, to clarify the tax consequences of a business structure or transaction.[9] Advance pricing agreements (APA) are a special sub-set of tax rulings that specify how transfer pricing rules will apply to specific transactions between related parties.[10] While a tax ruling can be granted on any tax issue, an APA relates only to the application of transfer pricing regulations. In certain countries, tax rulings are legally binding agreements between taxpayers and tax authorities, while in other jurisdictions they consist of more informal arrangements between tax authorities and taxpayers (United Nations 2017, at 391). Tax rulings (and APAs) can be unilateral, when issued by one country, or bi- or multilateral, when agreed between the taxpayer and two or more countries. They can be taxpayer-specific or general: the former are tailored to a specific taxpayer, suitable only for a particular situation, and can also modify the domestic tax legislation of a country through a "special proceeding" (source); the latter can apply to groups or types of taxpayers, or in relation to a defined set of circumstances. While general rulings are often published, taxpayer-specific rulings are typically secretive and confidential.

With a view to finding a balance between the potential downsides[11] and upsides[12] of taxpayer-specific rulings, the OECD/G20 Base Erosion and Profit Shifting Project (BEPS) has set a framework for the compulsory exchange of tax rulings that might raise BEPS concerns. The objective is not to publish or abolish BEPS-prone

8 LAAF, SR 651.1.

9 In Switzerland, the *Ordonnance sur l'assistance administrative fiscale* (OAAF, SR 651.11) defines a tax ruling as advice, confirmation or assurance of a tax administration, in oral or written from, that: (i) is specifically issued to a taxpayer upon request; (ii) concerns the tax consequences of a set of facts described by the taxpayer; (iii) on which the taxpayer can rely (source).

10 APAs are defined in the United Nations Transfer Pricing Manual as "instrument through which countries can pre-determine, in agreement with the taxpayer, the result of the application of the arm's length standard to a particular transaction or sets of transactions, based on certain sets of criteria (transfer pricing methods, comparables and appropriate adjustment thereto, critical assumptions as to future events, etc.)" (United Nations 2017, 391).

11 Unilateral tax rulings – and APAs in particular – raise specific profit shifting concerns, as they may endorse aggressive tax planning schemes with spillover effects across tax jurisdictions (Cobham 2018b, Ryding 2018). They may also give rise to integrity concerns and associated equity issues absent a 'robust' ruling review process (United Nations 2017, 468). According to an investigation by the International Consortium of Investigative Journalists, about 340 companies reportedly secured secret tax deals from the tax authorities in Luxembourg that allowed many of them to significantly reduce their global tax bills (International Consortium of Investigative Journalists n.d.). Since June 2013, the European Commission has been reviewing the tax ruling practices of Member States; several schemes were found illegal under EU State aid rules (European Commission n.d.). For example, the European Commission concluded that Ireland granted undue tax benefits of up to €13 billion to Apple; that Luxembourg granted undue tax benefits to Amazon of around €250 million and allowed two Engie group companies to avoid paying taxes on almost all their profits for about a decade; that Luxembourg and the Netherlands granted selective tax advantages to Fiat Finance and Trade and Starbucks, respectively; that Belgium granted selective tax advantages under its "excess profit" tax scheme to at least 35 multinationals mainly from the EU. These benefits were found illegal under EU state aid rules. The Commission's Decisions were appealed before the International Court of Justice.

12 Particularly in countries with limited fiscal capacity, tax rulings are a useful instruments for tax administrations to gain insights into opaque cross-border activities, to forecast how much tax revenue can be generated, and to save resources employed toward tax auditing (Meyer-Nandi 2018a, at 58-59; Matteotti 2018, at 17; United Nations 2017, at 375, 392, 458). It has also been observed that bilateral APAs between developed and developing countries may be purposively designed with a development policy aim, so as to allocate a bigger share of profits to the developing country (Meyer-Nandi 2018a, at 58-59).

rulings per se, but to improve transparency in relation to those rulings. This objective is attained by obliging the issuing tax administration to exchange certain tax rulings with all the countries where the ruling may give rise to BEPS concerns. The international standard, part of the BEPS Action 5 minimum standard, specifies the information-gathering process, the modalities of the information exchange, and the confidentiality requirements (OECD 2015a). Over 100 jurisdictions – or Inclusive Framework members – have committed to implement the standard and will take part in a peer review to assess its domestic implementation.

1.2.2 Implementation in Switzerland

Switzerland has implemented the OECD standard for the compulsory spontaneous exchange of information in respect of tax rulings. The domestic legal framework entered into force on 1 January 2017 and became operative in 2018 (first exchange of tax rulings). In general, only information on tax rulings issued from 1 January 2010 and still applicable on 1 January 2018 may be exchanged (State Secretariat for International Financial Matters 2018d).

In line with the OECD standard, the exchange obligation covers five categories of rulings that raise specific BEPS concerns (Table 1). General rulings and tax settlements reached as a result of an audit are not covered by the spontaneous exchange framework.

Table 1: Taxpayer-specific rulings subject to "compulsory" spontaneous exchange in Switzerland

Tier	Definition
Preferential regime rulings	Rulings relating to taxation of a holding company, a domicile company, a principal company, or a mixed company
	Rulings relating to the reduced taxation of revenue from intellectual property (Patent Box of the Canton of Nidwalden; Patent Box proposed to be introduced as part of the Corporate Tax Reform)
Transfer pricing rulings	Unilateral tax rulings covering cross-border transfer prices, including cross-border unilateral APAs and any other cross-border unilateral tax rulings
Rulings resulting in downward adjustment of profits	Cross-border rulings providing for a unilateral downward adjustment to the taxpayer's taxable profits that is not directly reflected in the taxpayer's financial/commercial accounts" (e.g. excess profit rulings, informal capital rulings, and other similar rulings)
Permanent establishment (PE) rulings	Rulings concerning the existence or absence of a PE, and the attribution of profits to the PE
Related party conduit rulings	Rulings covering arrangements involving cross-border flows of funds or income through a conduit entity in the country giving the ruling

Source: OECD 2015a; OAAF, SR 651.11.

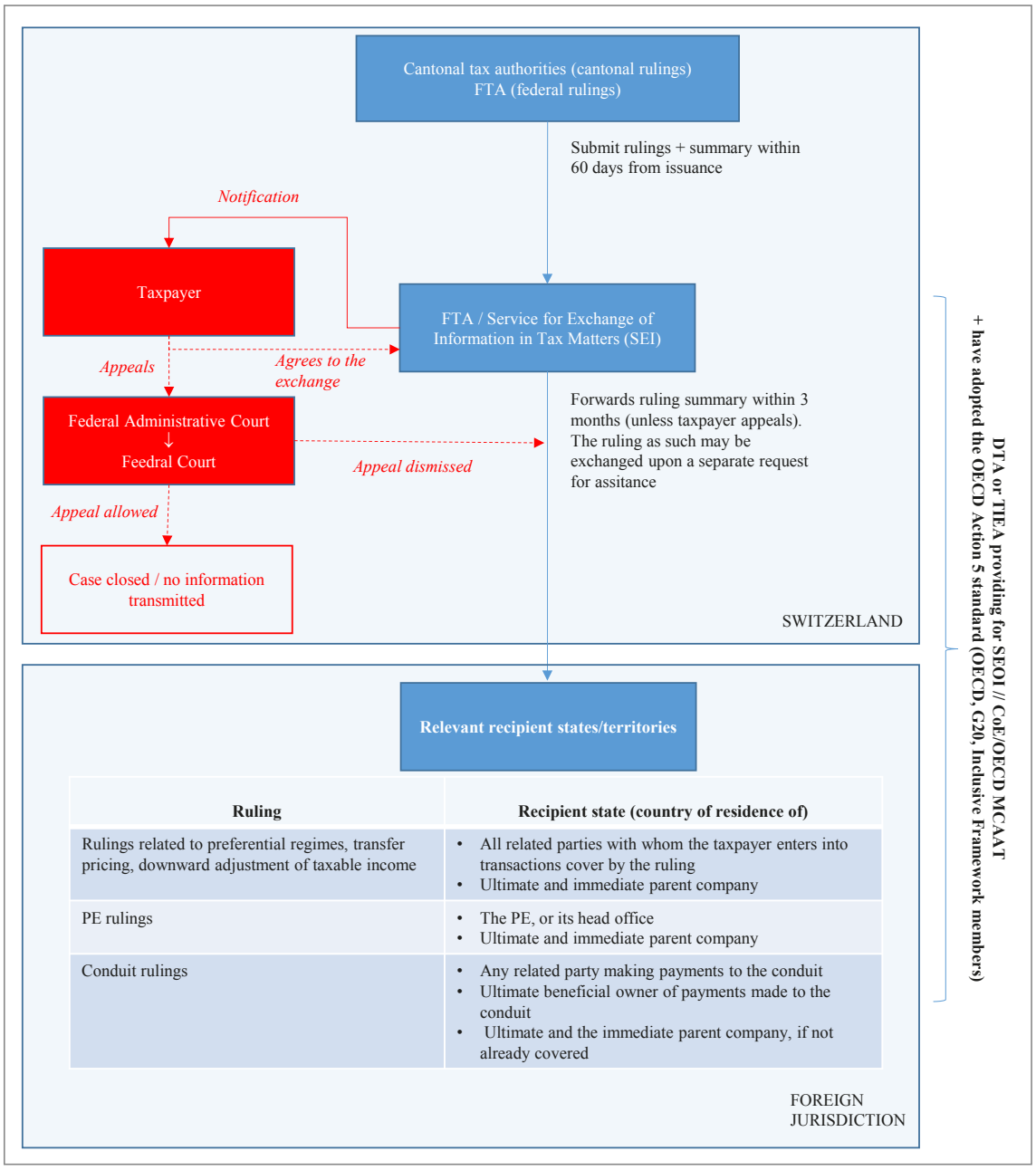
The exchange framework is outlined in Figure 2. The information is exchanged spontaneously in the sense that Switzerland passes on the information to its exchange partners without the latter specifically requesting it. On the other hand, it is compulsory in the sense that the Swiss Federal Tax Administration (FTA) is subject to the obligation to spontaneously transmit the information with its exchange partners – hence the term "compulsory spontaneous exchange".

As under the EOIR procedure, in general[13] the FTA will notify the affected taxpayer before the exchange of information with the recipient state takes place. The taxpayer then has the right to inspect the file and make an appeal – with suspensive effects on the exchange. The information exchanged is treated confidentially, as under the EOIR procedure (refer to Chapter 4).

As a general rule, the information on rulings is exchanged with the country of residence of the topmost responsible entity within the corporate hierarchy (ultimate parent company), as well as the residence country of the company that has a direct controlling interest in the company to which the ruling applies (immediate parent company). Further, the information is dispatched to the countries of residence of all related parties (25% equity interest/vote threshold) that may be affected by the ruling, as detailed in the diagramme below.

13 Apart from exceptional cases where there is a risk of circumvention.

Figure 2: Spontaneous exchange of tax ruling from Switzerland to a foreign jurisdiction



Switzerland will not exchange tax rulings unless a legal basis for the exchange exists – either a DTA or a TIEA explicitly providing for spontaneous exchange of information, or the CoE/OECD MCAAT. The FTA is entitled to limit the exchange to partners that have adopted the OECD standard in respect of the compulsory spontaneous exchange of tax ruling (OECD members, non-OECD G20 countries, and other members of the Inclusive Framework).[14]

14 Ordonnance du 23 novembre 2016 sur l'assistance administrative internationale en matière fiscale [hereafter, *Ordonnance sur l'assistance administrative fiscale*, OAAF] (SR 651.11), Art.10 (4).

1.3 Automatic Exchange of Financial Account Information (AEOI)

1.3.1 In a nutshell

The AEOI standard in tax matters involves the bulk, standardized transmission of non-resident financial account information from the "offshore" (source) country to the country of residence of the account holder. The new standard is a major breakthrough in the fight against offshore tax evasion, particularly in relation to undeclared offshore bank accounts.

Since 2013, the political focus has shifted towards AEOI as the new global paradigm for transparency and exchange of information in tax matters. The EU Savings Directive (2003), the Foreign Account Tax Compliance Act (FATCA) of the United States in 2010, as well as the revised CoE/OECD CMAAT were key drivers of widespread AEOI.[15] In September 2013, the G20 leaders endorsed the OECD proposal as a global model for automatic exchange of information. In June 2014, the global standard for AEOI – the Common Reporting Standard (CRS), commentaries, and technical XLM Schema – was agreed upon the OECD, and subsequently adopted by the G20 in September 2014.

1.3.2 Implementation in Switzerland

As summarized by the Swiss administration, in Switzerland the new standard provides that certain financial institutions, collective investment vehicles, and insurance companies collect financial information for tax purposes on their clients residing abroad. This information covers all types of investment income and account balances. The information is automatically transmitted once a year to the tax authority, which transmits the data for the client to the respective tax authority abroad (Swiss Federal Department of Finance 2016). Key aspects of the standards, as implemented in Switzerland by the Loi fédérale sur l'échange automatique de reinsegnements en matière fiscal (LEAR),[16] are summarized in Box 2.

Box 2: Automatic exchange of tax information in Switzerland

Who reports? Financial institutions (FIs) comprising depository institutions, custodial institutions, investment entities, and insurance companies. This generally includes banks, savings and loan associations and credit unions, brokers and central securities depositories, portfolio managers, asset managers and other entities investing or trading in financial instruments, as well as most life insurance companies (OECD 2017c). The entity must reside in Switzerland. The standard concerns Swiss-based banks, including the Swiss branches of foreign banks. The foreign branches of Swiss banks are excluded from reporting obligations, as well as specific low-risk entities – for example, public entities, diplomatic missions, central banks, and pension funds.

What has to be reported (and exchanged)? FIs disclose data in respect of financial accounts[17] held or controlled by persons/entities that are resident for tax purposes in a jurisdiction with which Switzerland has AEOI agreement in place. Concretely, Switzerland has a published list of jurisdictions with which it has an AEOI in place (reportable jurisdictions). In the first instance, a Swiss bank must check whether the financial account it maintains is held by an individual or entity resident for tax purposes in a listed jurisdiction. It does not matter whether the account holder is a physical person or a legal entity – a company, a trust, or a foundation. Accounts held by publicly listed companies and their related entities, government entities, international organizations, central banks, and other financial institutions are generally excluded, even if the holder resides in a listed jurisdiction. If the account holder is a "passive non-financial entity",[18] the bank will need to look through the entity to identify the controlling person. The information that gets reported and exchanged is quite broad. It identifies the account and the account holder concerned, the account balance, as well as the activity taking place in the account – interest, dividends, account balance or value, income from certain insurance products, sales proceeds from financial assets and other income generated with respect to assets held in the account or payments made in respect of the account.

To whom is the information reported and exchanged? Swiss banks (and other non-bank FIs) will pass the details of foreign clients to the Swiss Federal Tax Administration (FTA), which then passes this data on to countries with which it has signed an AEOI treaty.

15 In particular, with the enactment of FATCA in 2010, the United States unilaterally pushed for automatic, routine exchange of financial account information as the new global standard.

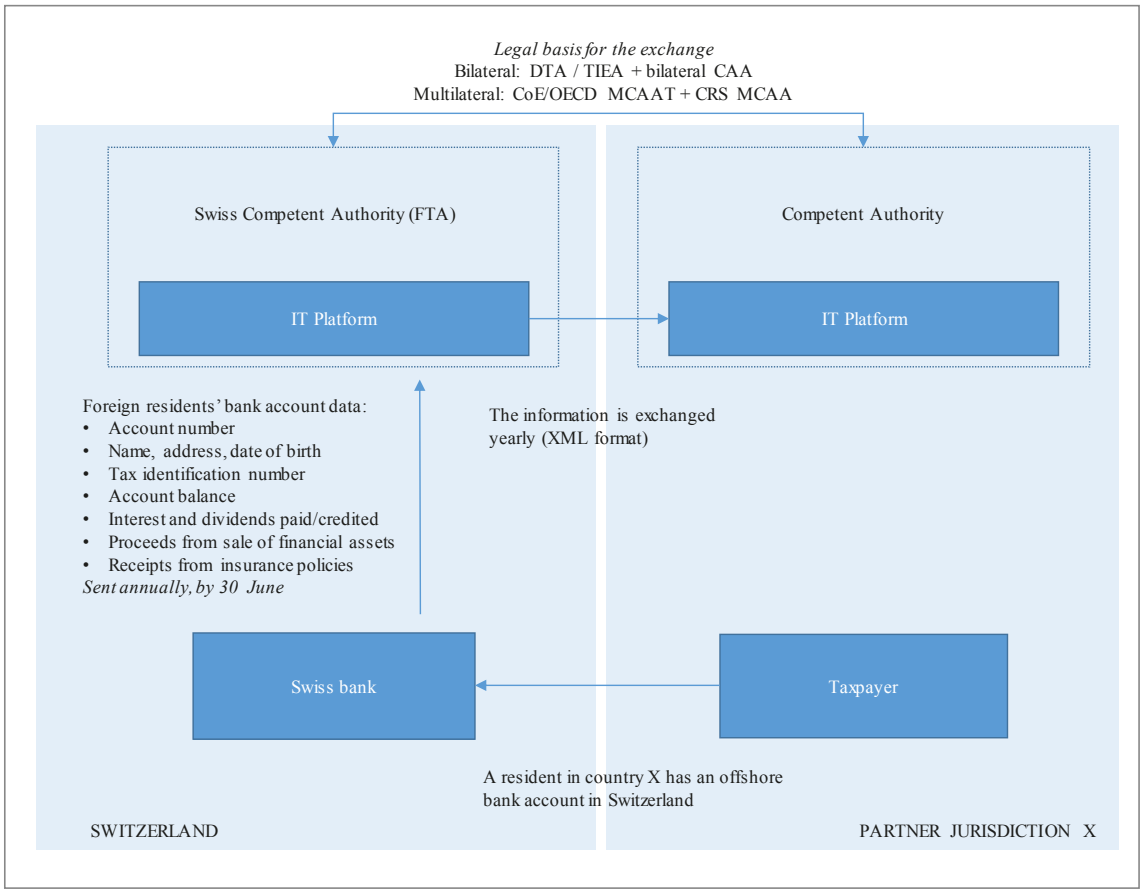
16 *Loi fédérale du 18 décembre 2015 sur l'échange international automatique de renseignements en matière fiscale* (LEAR), SR 653.1.

17 Under the AEOI standard, the term includes Depository Accounts, Custodial Accounts, Equity and debt interests, Cash Value Insurance Contracts and Annuity Contracts; certain low risk accounts are excluded (OECD 2015b, 2017a, 2017c).

18 A "passive non-financial entity" is an entity, other than a financial institution, that has no trading activities and essentially receives or holds passive income, such as dividends, interest, rents etc. The definition excludes entities that are publicly traded (or related to a publicly traded Entity), Governmental Entities, International Organisations, Central Banks, or a holding NFEs of nonfinancial groups (apart from non-financial investment entities). The controlling person, or "beneficial owner", is "the natural person(s) who exercises control over the Entity, generally natural person(s) with a controlling ownership interest in the Entity […] Controlling Persons include any natural person that holds directly or indirectly more than 25 percent of the shares or voting rights of an Entity as a beneficial owner. If no such person exists, then any natural person that otherwise exercises control over the management of the Entity (e.g., the senior managing official of the company)" (OECD 2015b, at 47).

The diagramme below (Figure 3) depicts the flow of information from Switzerland to a "listed" jurisdiction.

Figure 3: AEOI from Switzerland



Source: Swiss Federal Council 2017; Swiss Federal Department of Finance 2018; OECD 2015b

For the AEOI to take place, the account holder must be resident for tax purposes in a jurisdiction with which Switzerland has "activated" the AEOI. Switzerland has committed to implement the AEOI with all interested partners that meet the stringent AEOI requirements (refer to Chapter 2). The "activation" of a bilateral exchange relationship may derive from a bilateral or multilateral instrument (Box 3).

Box 3: AEOI under the CRS MCAA

Bilateral track: Under the bilateral track, the exchange is based on a DTA, a TIEA, or another bilateral treaty that specifically provides for the automatic exchange of tax information. Based on the treaty, the parties enter into a bilateral competent authority agreement (CAA) which sets out the operational details of the exchange. Switzerland has activated the AEOI on a bilateral basis with the EU, Singapore, and Hong Kong.

Multilateral track: Switzerland generally implements the AEOI multilaterally, based on the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (hereafter referred to as the "Common Reporting Standard", or CRS MCAA). The latter is a multilateral "framework" convention: a particular exchange relationship between countries party to the MCAA becomes effective only if it is bilaterally activated. This occurs when Switzerland and its exchange partner: (1) have in force the CoE/OECD MCAAT, which provides the legal basis for the exchange; (2) sign the CRS MCAA, which "operationalizes" the automatic exchange provision of the MCAAT; (3) "list" each other as exchange partners under the CRS MCAA; and (4) file with the CRS MCCA secretariat (the OECD) a set of notifications as regards the needed legal, operational, and IT infrastructure for implementing the AEOI standard. A particular bilateral relationship under the CRS MCAA enters into force only if both jurisdictions have the CoE/OECD MCAAT in effect, have filed all the notifications, and have listed each other. Note also that Switzerland subjects its "listed" exchange partners to a review process before the exchange occurs (refer to Chapter 2 for further details). The exchange is delayed or suspended until all the review requirements are met.

Source: Swiss Federal Council 2017 and 2018; Swiss Federal Department of Finance 2017; OECD 2015b

1.4 Exchange of CbC Reports

1.4.1 In a nutshell

The CbC standard (OECD 2015c) requires parent companies to file in their home country a new CbC reporting template providing a clear overview of where its profits, sales, employees, and assets are located, and where taxes are paid and accrued. The highest-level legal entity of the "MNE Group" (ultimate parent company) must prepare and file its CbC report with the tax administration in its jurisdiction of tax residence. That tax administration must automatically exchange the CbC report with each jurisdiction in which the MNE Group operates. This exchange is based on an International Agreement – e.g. the multilateral Convention on Mutual Administrative Assistance in Tax Matters, a Double Tax Convention, or a Tax Information Exchange Agreement – permitting automatic exchange of information. It is subject to the terms of a Qualifying Competent Authority Agreement (CAA) which sets out the operational details of the exchange of CbC reports. Other filing mechanisms – "surrogate parent filing" and "local filing" – can be used in specific cases as an alternative to the general mechanism (OECD 2015c, at 11).

The standard is set by the OECD/G20 BEPS Action 13, one of the four BEPS minimum standards subject to peer review. Its terms are stringent: CbC reports must be filed in a form identical to and applying the definitions and instructions contained in the standard template set out in Annex III to Chapter V of the 2015 Action 13 Report. An implementation package sets out model legislation and model exchange instruments to facilitate consistent implementation of the standard across countries. All members of the Inclusive Framework on BEPS have committed to implementing the CbC standard and to participating in the peer review process.

1.4.2 Implementation in Switzerland

In Switzerland, the legal bases for the automatic exchange of CbC reports – the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA), the associated law and the related ordinance – entered into force in December 2017. MNEs in Switzerland are required to draw up a CbC report as of the 2018 tax year. Switzerland will exchange CbC reports on a reciprocal basis beginning in 2020 (State Secretariat for International Financial Matters 2018a).

The obligation to prepare CbC reports concerns Swiss-resident (ultimate) parent companies, i.e. companies that: (1) have their registered office or place of effective management in Switzerland; (ii) are required to prepare consolidated annual accounts under Swiss law;[19] and (iii) are not themselves controlled by an entity whose consolidated accounts are prepared and audited in accordance with Swiss or equivalent foreign regulations.[20] Only Swiss-resident parent companies with annual consolidated group revenue equal to or exceeding CHF 900 million are subject to the CbC reporting requirement.

The Swiss-resident parent company must prepare and file with the Federal Tax Administration a CbC report containing the following information: aggregate figures of the MNE Group's revenue, gross profit or loss, income tax, stated capital, accumulated earnings, number of employees, and tangible assets, broken down by tax jurisdiction; a list of all entities included in the consolidated financial statement of the Group, setting out the jurisdiction of tax residence, and where different, the jurisdiction under the laws of which the entity is organized, and the nature of its main business activity or activities; all other relevant information.
The Swiss Federal Tax Administration must automatically transmit the CbC report on a regular (quarterly) basis to the tax authorities of the countries where the MNE operates – i.e. the tax jurisdictions listed in the CbC report.

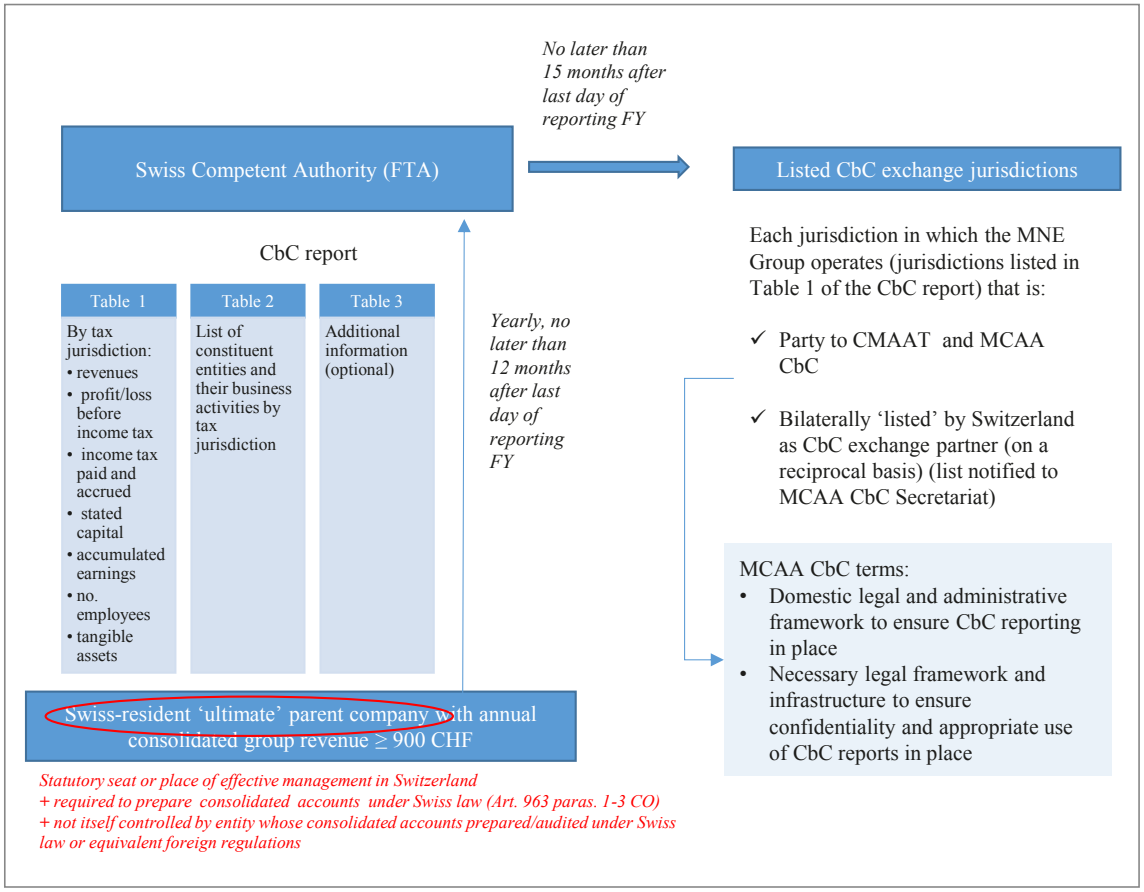
19 Pursuant to Article 963 paragraphs 1–3 CO (RO 27 321).

20 Pursuant to Article Art. 963 (1) CO (RO 27 321), "Where a legal entity that is required to file financial reports controls one or more undertakings that are required to file financial reports, the entity must prepare consolidated annual accounts (consolidated accounts) in the annual report for all the undertakings controlled". Under Art 963 (2), "A legal entity controls another undertaking if it: 1. directly or indirectly holds a majority of votes in the highest management body; 2. directly or indirectly has the right to appoint or remove a majority of the members of the supreme management or administrative body; or 3. it is able to exercise a controlling influence based on the articles of association, the foundation deed, a contract or comparable instruments".

The report is exchanged as long as a bilateral legal foundation for exchange is maintained, that is, only with countries that are party to the CbC MCAA (and the MCAAT) and are bilaterally "listed" by Switzerland as CbC exchange partners.

The recipient jurisdiction must keep in place and enforce the necessary laws, operational procedures, and infrastructure to ensure confidentiality, data protection, and proper use of the information contained in the CbC reports.

Figure 4: Exchange of CbC reports



1.5 Summary observations

A few observations emerge from this basic outline of EOI mechanisms. In particular, two aspects concerning the technical aspects of the information exchange and its implementation in practice merit discussion. Further, the benchmarks against which EOI laws and practices are assessed and the balance of interests that EOI instruments conceal are worthy of analysis. These points are introduced below.

A patchwork of procedures

As noted at the beginning of this chapter, there are several, compartmentalized exchange-of-information procedures in tax matters. These procedures partly overlap with respect to the exchanged information, but they are separate and distinct in terms of legal bases, procedural requirements, and responsible units (see Table 2 and Box 4). Note in particular that the procedural requirements differ regarding information exchange on request or spontaneously, on the one hand, and regarding automatic exchange, on the other. First, automatic exchange mechanisms (in relation to both financial account information and CbC reports) have more lenient "client procedures" than exchange-on-request procedures: the taxpayer concerned is

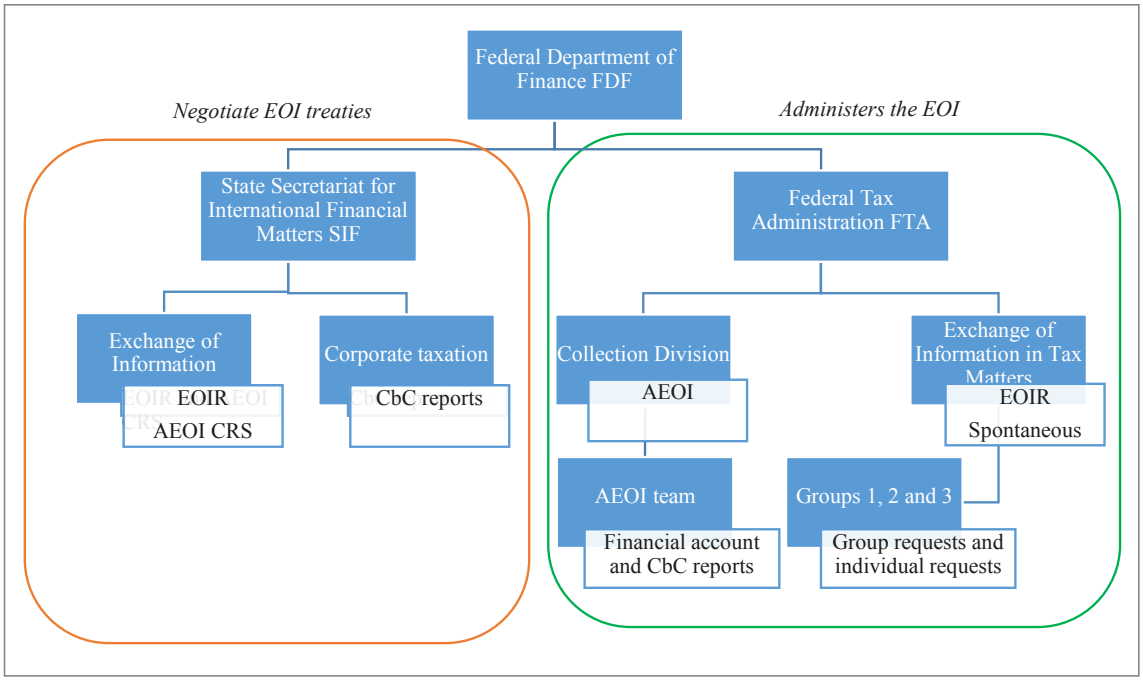
notified once, before the first exchange takes place, and may consult a civil court to assess its rights.[21] Second, given the bulk nature of the exchange, AEOI requires specific transmission channels and protocols, alongside appropriate operational security measures – well beyond what is required under the EOIR procedure. Specifically, the AEOI team must have the capacity to encrypt and securely send encoded (XML) bundles of information to the resident-country tax authorities; the receiving administration must be able to decrypt and process bulk data and automatically match the decoded data against tax returns declared in the country. This requires specialized skill sets, sophisticated IT infrastructure and services, and operational procedures that do not apply to EOIR or spontaneous exchange.

Box 4: EOI in Switzerland: Administrative division of labour

In Switzerland, EOI in tax matters is administered by the Federal Tax Administration (FTA). Within the FTA (Main Division for Federal Direct Tax, Anticipatory Tax and Stamp Duty), the Collection Division administers the automatic procedures (automatic exchange of financial account information and CbC reports); the Service for Exchange of Information in Tax Matters (SEI) is in charge of procedures of exchange on request and spontaneous exchange of information. The FTA administers the exchange procedures; it does not negotiate the legal bases for the exchange. The negotiation of EOI instruments (DTAs, TIEAs, multilateral arrangements) is entrusted to the State Secretariat for International Finance (SIF), which represents Switzerland's interests in financial, monetary, and tax matters vis-à-vis partner countries and in the competent international bodies. The administrative workload has grown dramatically, as reflected in the rapid expansion of the EOI teams. SEI was staffed with four employees when established in 2011; it now has 70 staff. The recently established AEOI team is staffed by six employees (five full-time equivalent).

Source: Desk research and interviews with FTA/SEI, the FTA/AEOI team, and SIF.

Figure 5: EOI in Switzerland



Source: Interviews with FTA/SEI, FTA/AEOI team, SIF and desk research. Note: This is not an official organization chart: the authors made this chart based on the information from different sources.

21 Pursuant to Article 14 of the LEAR (SR 653.1), the reporting FI shall notify the person concerned by the 31st of January of the year when the first exchange of information occurs. The person concerned has five months to request the rectification of inaccurate data, or a suspension of the exchange if such exchange risks causing particularly serious and disproportionate harm, particularly where the guarantees for the rule of law are absent in the receiving state (Art. 19 of the LEAR (SR 653.1); Art. 5 and 6 *Loi fédérale du 19 juin 1992 sur la protection des données (LPD)* (SR 235.1); Art. 25a *Loi fédérale du 20 décembre 1968 sur la procédure administrative (PA)* (SR 172.021). In case of disagreement with the tax administration, the person concerned can appeal in court, in civil proceedings.

Legal foundations of exchange

The preconditions for exchange of information on tax matters are stringent, particularly with regard to automatic exchange procedures, as highlighted in this initial overview and discussed further in Chapter 5. Information exchange is only possible where adequate laws and regulations are in place regarding the availability, gathering, and transmission of tax information (OECD 2016). Further, jurisdictions must have in place and enforce particular standards of confidentiality, data safeguarding, and proper use of information. The first set of conditions – i.e. that the information exists and the administrative authority can gather it from the information holder and transmit it abroad – is necessary for countries to collect and supply the requested information. These conditions concern the "supply side" of the exchange, and are only relevant when the exchange is fully reciprocal. This is an area very demanding in terms of domestic law requirements; an area where poor countries face hurdles due to gaps in their domestic laws and practices, which are often rudimentary. Requirements on confidentiality, data safeguard and proper use of the information are relevant whatever the nature of the exchange – reciprocal or non-reciprocal. Note in this respect that even if a country does not reciprocate the exchange, it shall nonetheless treat the information received as secret and apply the needed safeguards with regard to confidentiality, data protection, and proper use of the information. Setting up these safeguards at the legal and operational level may entail high costs for poor countries. It also raises sustainability issues, in contexts of low connectivity, absence of IT support services and infrastructure, and power shortages.

Table 2: Switzerland's administrative assistance in tax matters: Legal bases and underpinnings

	International standard	Legal framework in Switzerland	Legal bases for the exchange	Domestic law requirements in the receiving State
EOIR	OECD-sponsored Global Forum on Transparency and Exchange of Information for Tax Purposes	Federal Act of 28 September 2012 on Internal Administrative Assistance in Tax Matters (SR 651.1) and related Ordinance (SR 651.11)	DTC, TIEA, CoE/OECD CMAAT, FATCA, EU-Swiss exchange arrangements	Confidentiality and data protection safeguards: As specified in the applicable convention (DTA, TIEA, CoE/OECD CMAAT).
Spontaneous exchange of tax rulings	OECD/G20 BEPS Project (Action 5)	As above	DTC, TIEA, CoE/OECD CMAAT	As specified in the applicable convention (DTA, TIEA, CoE/OECD CMAAT). Under the OECD standard (Action 5), domestic laws must be in place in the receiving country to protect confidentiality of the information exchanged, and effective penalties must apply for unauthorized disclosures; the information exchanged may be used only for the purposes permitted by the information exchange instrument, which prevails over domestic law as regards the use of the information.
AEOI CRS	OECD/G20 AEOI CRS	Federal Act on the Automatic Exchange of Information (SR 653.1) and related AEOI Ordinance (SR 653.11) and Guidelines	Multilateral: CoE/OECD MCAAT + CRS MCAA Bilateral: DTC or TIEA covering automatic exchange + Bilateral CAA	Under the AEOI CRS, the exchange jurisdictions will have in place: ✓ Domestic CRS laws and regulations; ✓ Standardized methods for electronic data transmission including encryption, as per AEOI standard; ✓ Laws, operational procedures, and IT infrastructure to ensure confidentiality, data protection, and proper use of the information, as per AEOI CRS (Article 22 of the CoE/OECD MCAAT, OECD CRS (2017c), section 5 and annex 4 (example questionnaire)).
Exchange of CbC reports	OECD/G20 BEPS Project (Action 13)	Federal Act of 16 June 2017 on the International Automatic Exchange of CbC reports (SR 654.1) and the related Ordinance (SR 654.11).	Multilateral: CoE/OECD MCAAT + CbC MCAA Bilateral: DTC/TIEA covering automatic exchange + DTC CAA or TIEA CAA	CbC MCAA, section 8, and Action 13 Final Report: The exchange jurisdictions will have in place: ✓ Domestic laws and regulations to require the filing of CbC Reports; ✓ tandardized methods for electronic data transmission including encryption; ✓ Laws, operational procedures and IT infrastructure to ensure confidentiality, data protection and proper use of the information, as per Article 22 of the CoE/OECD MCAAT and paragraph 1 and Section 5 of the CbC MCAA (a confidentiality and data safeguard questionnaire is attached as Annex to the CbC MCAA).

Source: OECD 2015a, 2015b, 2015c, 2016a, 2017d, 2017h; LAAF (SR 651.1), OAAF (SR 651.11), LEAR (SR 653.1), OEAR (SR 653.11), LEDPP (SR 654.1), OEDPP (SR 654.11). Also Refer to Annex 4 (EOI laws and regulations).

The norm-setting role of the OECD

The reviewed developments in tax transparency highlight the standard-setting and law-making role of the OECD. The OECD-sponsored EOIR standard, and nowadays the AEOI benchmark, represent the yardstick of countries' performance in terms of transparency and exchange of information in tax matters. Within the OECD framework, the Global Forum on Transparency and Exchange of Information for Tax Purposes – essentially a "soft law" framework – has efficiently spearheaded the uptake of EOI and transparency measures by monitoring compliance with the new standards. CbC reporting and the spontaneous exchange of information on advance tax rulings are minimum standards under the OECD/G20 BEPS Project, subject to monitoring and peer review by the OECD Inclusive Framework on BEPS. A de facto implementation duty exists concerning these transparency standards, since non-compliance carries the risk of being placed on "black" or "grey" tax haven list. What is at stake here is the "hardening" of soft law initiatives in the context of peer-review processes and auditing procedures that put significant standard-compliance pressure on countries. In such cases, the traditional distinction between hard and soft law approaches to international governance may begin to blur. Questions remain as to the democratic legitimacy of such processes. Some observers suggest that the OECD has effectively expanded to include non-OECD countries and turned into a quasi-universal body, for example, through the Global Forum and the Inclusive Framework. Others suggest that these OECD initiatives represent an effort by the OECD to expand its influence globally, without broadening its membership or losing control of the decision-making process. This debate raises political economy issues that have been tackled in-depth by Brugger, Engebretsen, and Waldmeier (forthcoming 2019) to which the reader is referred.

A complex normative balance

Finally, the specific content of the various EOI standards reflects an effort to weigh and balance competing normative interests, including tax administration information needs, concerns about taxpayer rights, the compliance costs and burdens imposed on business, and fair allocation of responsibilities (and costs) between requesting and supplying jurisdictions. The various standards strike that balance in different ways. For example, EOIR is wide in scope, requiring that all "foreseeably relevant information" should be exchanged. However, this wide scope is balanced by stringent procedures regarding taxpayers' procedural rights, namely prior notification as well as the right to inspect the file and to make an appeal. Compared with EOIR, AEOI significantly erodes taxpayers' rights.[22] Nevertheless, this erosion is balanced by tightened requirements regarding confidentiality, data safeguarding, and proper use of information exchanged. The stipulated content of CbC reports also strives for a balance: transactional data regarding related-party interest payments, royalty payments, and service fees are not covered by CbC reports. These transaction-level data may be reported in optional "Local Files" filed with the local jurisdiction, but are not part of the minimum standard. These are just some examples of how different transparency frameworks have been designed with a view to finding a balance between equally legitimate, but competing normative interests. Other examples are discussed below. Notably, the need to balance different interests constitutionally limits the reach of the transparency agenda. Trade-offs are necessary. For example, developing countries would certainly benefit from a loosening of confidentiality and data safeguarding requirements under the AEOI standard. However, tightened confidentiality safeguards are necessary balance the erosion of taxpayers' privacy rights. It is not possible to ease these safeguards without undermining the whole normative balance. An important overarching consideration is that of cost effectiveness. As discussed earlier, implementation of EOI in tax matters can be very costly, particularly for poor countries. Tax administrations should strive to balance the potential usefulness of EOI frameworks against the expected cost and administrative burden of such frameworks. This assessment should also consider whether the relevant administration has the capacity to use the information exchanged. These considerations are of paramount importance in the context of the present research. They guide the following analysis and frame its final conclusions.

22 Personal tax information is transmitted in bulk information and regularly. The taxpayer concerned is notified once, before the first exchange takes place, and shall seize a civil court to assess its rights.

2 Switzerland's Exchange of Tax Information Framework: Does It Cover Poor Countries That Trade Commodities to or through Switzerland?

This chapter considers Switzerland's network of EOI arrangements under various procedures, namely exchange on request, spontaneous exchange of tax rulings, automatic exchange of financial account information, and automatic exchange of CbC reports. It breaks down partner countries by development status and income group in order to assess the extent to which the Swiss treaty network is skewed towards higher-income actors. It further considers whether Switzerland's treaty network comprehensively covers developing countries whose goods are traded through the Swiss commodity hub, including the least developed among them. The analysis concludes with some summary observations.

2.1 Exchange on Request

As of 1 October 2018, Switzerland had EOIR mechanisms in place with 142 jurisdictions (states and territories), based on DTAs, TIEAs, and the amended CoE/OECD CMAAT (for details, see Annex 1). Of these exchange procedures, 112 were "standard-compliant" (see Chapter 1.1). Switzerland still had 30 exchange arrangements not in line with the international standard,[23] but has taken significant steps to upgrade these remaining non-compliant instruments, and to expand its network of EOI arrangements.[24] The Global Forum rated the country "largely compliant" in relation to element C.1 of the OECD standard ("Exchange of information mechanisms should provide for effective exchange of information"). Element C.2 ("The jurisdiction's network of information exchange mechanisms should cover all relevant partners") was rated "compliant" (OECD 2016c).[25]

Is Switzerland's EOIR network broad enough to cover low-income countries, particularly the most vulnerable?

In terms of the development status of its treaty partners, Switzerland has a sufficiently wide network of EOI mechanisms in place. Of Switzerland's 112 standard-compliant exchange relationships, 46 were with "developed" countries/areas, 57 with "developing" ones, and nine with "transition" economies (Annex 1).[26] Switzerland's treaty network was varied in terms of geography: standard-compliant EOI arrangements were set up with countries and territories in Europe and Central Asia (49), Latin America and the Caribbean (26), East Asia and the Pacific (16), the Middle East and North Africa (9), Sub-Saharan Africa (8), North America (2), and South Asia (2).

Looking closer, however, it becomes evident that the Swiss treaty network is skewed towards higher-income states/territories:

- 97 of the 112 standard-compliant EOI arrangements (87 percent of all standard-compliant treaties) were concluded with countries or territories ranked in the high-income and upper middle-income groups;
- Only 15 standard-compliant EOI arrangements (13 percent of all standard-compliant treaties) were with low-/lower-middle-income countries and territories.

Figure 6 shows the breakdown by income status of the jurisdictions with whom Switzerland has concluded standard-compliant EOI arrangements.

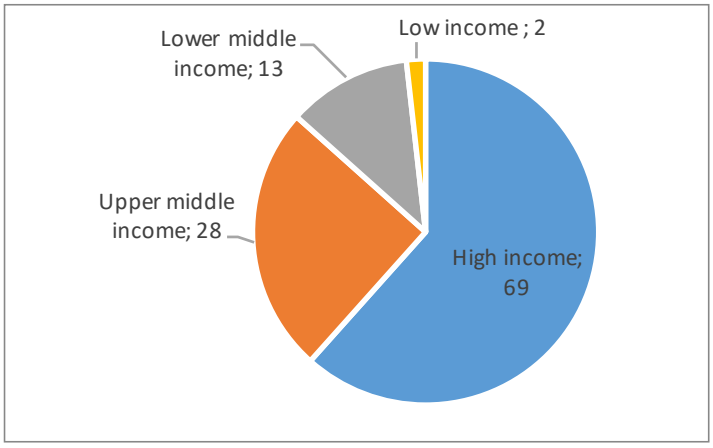
23 As of 1 September 2018, non-standard compliant instruments were those with Algeria, Antigua and Barbuda, Armenia, Bangladesh, Belarus, Côte d'Ivoire, Dominica, Ecuador, Egypt, Gambia, Iran, Jamaica, Kosovo, Kuwait, Kyrgyzstan, Macedonia, Malawi, Mongolia, Montenegro, Morocco, the Philippines, Serbia, Sri Lanka, Tajikistan, Thailand, Trinidad and Tobago, the United States, Venezuela, Vietnam, and Zambia.

24 Switzerland has signed new DTAs with Kosovo, Kuwait and the USA (not yet in force); a standard-compliant agreement with Ecuador has been initialled; negotiations or contacts aimed at updating the existing EOI agreement are ongoing with most of the remaining countries. A few countries may become party to the CoE/OECD CMAAT in the near future, which will provide a legal basis for standard-compliant EOIR even absent a bilateral treaty. It was not possible to establish contact with the competent authorities of Gambia and Malawi, not members of the Global Forum. Finally, Mongolia had informed Switzerland that it was not in a position to exchange information in line with the standard owing to limitations in its domestic law (OECD 2016c, 113-14).

25 The assessment reflected the situation of Switzerland as at 17 May 2016.

26 Development status as per UNCTADStat (http://unctadstat.unctad.org/EN/Classifications/DimCountries_DevelopmentStatus_Hierarchy.pdf).

Figure 6: Breakdown of Switzerland's exchange partners by income, EOIR



Data sources and notes: Refer to Annex 1.

As detailed in Annex 1, Switzerland's obligations to provide information are mainly directed towards advanced market economies, large developing or transition economies, and low-tax jurisdictions (including a few former tax havens). In other words, agreements have mainly been concluded with counterparties with economic significance and leverage.

Does Switzerland's treaty network comprehensively cover developing countries whose commodities are traded through the Swiss hub, including the least-developed among them?

The following analysis matches information on standard-compliant EOI with trade data.[27] The results are presented below.

The analysis considers a sample of 57 developing countries whose three leading merchandise exports to Switzerland include one or more of the main primary commodities traded through the Swiss hub (refer to footnote 26). The sample is for illustrative purposes only.

Of these 57 countries, 24 (42 percent) have a tax treaty with Switzerland including a standard-compliant EOI provision. The majority of them (18) are high-income/upper-middle-income countries from Latin America, East Asia, the Middle East and Central Asia;[28] only two are low-income countries[29].

The remaining countries (33 countries, or 58 percent of the sample) do not have a standard-compliant EOI mechanism with Switzerland; of these, 28 do not have any legal basis – whether bilateral or multilateral – to obtain tax information on request from Switzerland. By income group, the majority (23 out of 33) are low-/lower-middle-income countries; nine are in the upper-middle-income group; only one is a high-income country.[30] The most represented countries with no legal basis for exchange of information were low-income countries from Sub-Saharan Africa.[31]

27 The analysis proceeded in four stages. It first identified major commodities traded through the Swiss hub: zinc, copper, and aluminum (base metals), gold (precious metal), crude oil (energy), cereals, coffee, sugar, cotton, and cocoa (soft commodities). This review was based on existing analyses (Swiss Academies of Arts and Sciences 2016; Swiss Federal Department of Foreign Affairs et al. 2013). Trade data were downloaded from UnctadStat to analyze developing countries' export flows to Switzerland over the last three years (2014-16), disaggregated by country and by product (Statistics on merchandise trade by trading partner and product based on the three-digit level of the SITC commodity classification, Revision 3, downloaded 27/01/2018). These export trade flows also covered, to varying extent, transit trade (i.e. shipments bought by Swiss-based traders and sold on to buyers abroad, without entering Switzerland's customs). For each country, exports by product (SITC Rev 3., 3-digit level, sum over the three years) were ranked by value in descending order; a formula extracted countries whose three leading merchandise exports to Switzerland included one or more of the main primary commodities traded through the Swiss hub. The list was matched with the updated list of countries that can request tax information to Switzerland pursuant to an EOI arrangement in line with the OECD standard (Annex 1).

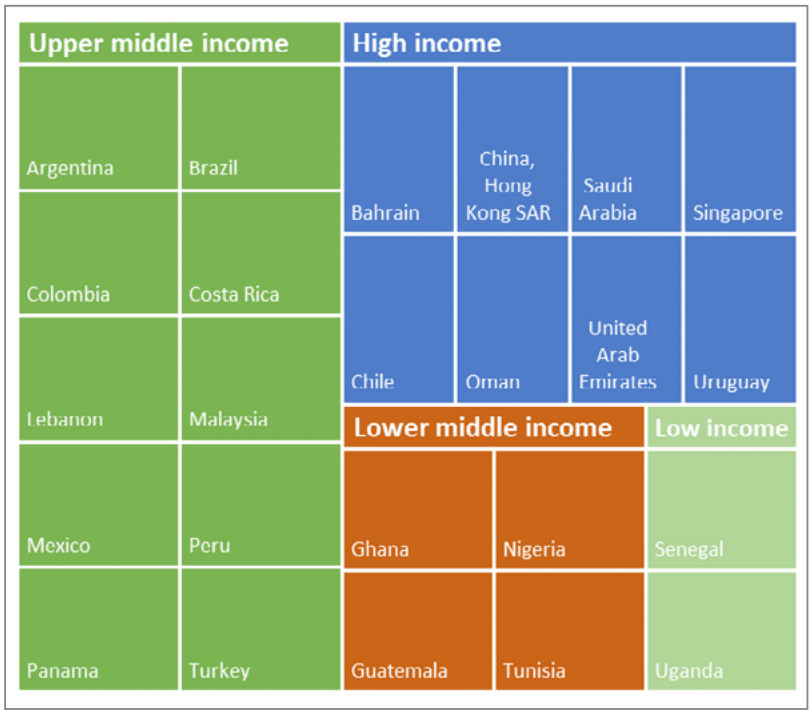
28 Argentina, Brazil, Chile, Hong Kong SAR, Colombia, Costa Rica, Mexico, Oman, Peru, Saudi Arabia, Singapore, Turkey, Uruguay.

29 Senegal and Uganda.

30 Kuwait, for which the MCAAT will enter into force on 01/12/2018, thus providing a legal baiss for a broad exchange of tax information with Switzerland.

31 Benin, Burkina Faso, Burundi, Ethiopia, Guinea, Mali, Mozambique, Niger, Rwanda, Togo, Tanzania.

Figure 7: Sample of commodity exporters to Switzerland with standard-compliant EOI mechanisms, breakdown by income status



Data sources and notes: Refer to footnote 27.

2.2 Spontaneous Exchange of Tax Rulings

For a spontaneous exchange to take place, there must be a valid legal basis in force in both Switzerland and the recipient jurisdiction. To date, the DTAs and TIEAs signed by Switzerland do not explicitly provide for spontaneous exchange of information. The only valid legal basis is the CoE/OECD MCAAT. Switzerland exchanges tax rulings with parties to the MCAAT that have adopted the OECD standard with respect to spontaneous exchange of tax rulings: G20 countries, OECD members, and other members of the Inclusive Framework on BEPS.

Cross-checking the list of Inclusive Framework Members[32] with the list of countries for which the MCAAT is in force reveals that few countries in low- and lower-middle-income groups have a legal basis to receive tax rulings from Switzerland. The only low-income country is Senegal. The other eight lower-middle-income countries are Cameroon, Georgia, India, Indonesia, Nigeria, Pakistan, Tunisia, and Ukraine. Developing countries exporting commodities to Switzerland are not well represented: among the sample of 57 countries whose three leading exports to Switzerland include main commodities traded through the Swiss hub, only three – Senegal, Nigeria and Tunisia – are covered. Laos and Ghana, for example, are excluded.[33]

32 Members of the Inclusive Framework on BEPS (Updated: October 2018 https://www.oecd.org/ctp/beps/inclusive-framework-on-beps-composition.pdf, accessed 8 November 2018.

33 Ghana has the MCAAT in force but is not a member of the Inclusive Framework on BEPS, which is possibly explained by the important role played by Ghana in the content of the UN Tax Committee. Laos has signed the MCAAT, but is not a member of the Inclusive Framework.

2.3 Automatic Exchange of Financial Account Information

As of September 2018, Switzerland had arrangements in place to automatically exchange financial account information with 81 jurisdictions[34]: 50 based on the MCAA, the remainder 31[35] under bilateral treaties. Thirty-seven exchanges were operational. The Federal Council is proposing to activate the AEOI with eight further jurisdictions on a multilateral basis beginning in 2019, and has initiated internal consultation on the introduction of the automatic exchange with 18 further states and territories beginning in 2020.

Outwardly, Swiss policy in implementing the AEOI appears to have evolved from restrictive to relatively open. As detailed in Box 5, Switzerland launched the AEOI process with 38 states and jurisdictions with close economic and political ties to Switzerland – all EU members and other "traditional" partners (first round of AEOI deals, 2017/18). It then fast-tracked agreements with Hong Kong and Singapore and 41 further jurisdictions – large developing and transition economies, other significant commercial partners, and important sectoral or regional financial centres (second round, 2018/19). In addition, it selectively opened to non-reciprocal jurisdictions, also filling specific territorial gaps in its exchange network (third round, 2019/20). Most recently, Switzerland has in principle opened to all states and territories that are committed to implementing the AEOI and meeting the requirements of the OECD standard (fourth batch, 2020/21).

However, the expanded scope of Switzerland's AEOI network does not mean that Switzerland will exchange data with all interested partners. Transmission of information to newly (post-2017) "listed" partners depends on the outcome of a review process: before an initial exchange of data, the Federal Council will once again review whether the listed country meets the requirements of the AEOI standard, based on the federal decree of 6 December 2017,[36] emphasizing data security and confidentiality. The exchange of data will only be implemented if the review conditions are met.[37]

As detailed in Box 5 and Annex 2, Switzerland's AEOI network currently favours high- or upper-middle-income countries with significant economic or political leverage. Low-income and lower-middle-income countries – including those whose commodities are traded via the Swiss hub – are missing from Switzerland's AEOI network. Things may change in the near future, if the Swiss exchange network is "operationalized" with the "fourth batch" countries, which also include lower-middle-income countries – namely, Ghana, Pakistan, Nigeria, and Vanuatu.

Box 5: Switzerland's AEOI relationships

A first round of AEOI deals (2017/18) was approved with 38 states and jurisdictions – all EU members[38] and other "traditional" partners (Australia, Canada, Iceland, Japan, Norway, South Korea, the British crown dependencies of Jersey, Guernsey, and the Isle of Man). This first batch of exchange deals is fully "active": Swiss banks started collecting account data concerning tax residents in the 38 jurisdictions beginning 1 January 2017, with the data exchanged for the first time with the respective partner jurisdiction in 2018.

A second batch of deals (2018/19) was finalized with 41 additional jurisdictions. The listed jurisdictions were: G20 countries (South Africa, Saudi Arabia, Argentina, Brazil, China, India, Indonesia, Mexico, Russia), and OECD countries (Chile, Israel, New-Zealand); other significant trading and economic partners of Switzerland (Colombia, United Arab Emirates, Liechtenstein, Malaysia); European states and territories with close ties to the EU (Andorra, Greenland, Faroe Islands, Monaco, San Marino);

34 The list does not include the United Sates. Through the introduction of FATCA, the United States requires offshore banks to send US citizens' tax data to US officials.

35 Including with the 28 EU member countries and, transitionally, Singapore and Hong Kong.

36 *Arrêté fédéral concernant le mécanisme de contrôle permettant de garantir la mise en oeuvre conforme à la norme de l'échange automatique de renseignements relatifs aux comptes financiers avec les Etats partenaires à partir de 2018/2019 du 6 décembre 2017* (BBI 2018 39). Among other requirements, the review criteria included: having an appropriate network of AEOI partners, including the relevant competing financial centres; the implementation of standard-compliant confidentiality, data security and data protection arrangements; and safeguards against human rights abuses involving the taxpayers under investigation. According to interviews held with key stakeholders, the first requirement has become outdated, as all the major financial centres are bound to list all interested countries, in order not to end up on a list of non-cooperative jurisdictions. If a country meets the AEOI requirements but still does not have an extended AEOI network, it should be considered as a potential exchange partner by Switzerland.

37 In other words, Switzerland exchanges data following completion of a two-step process. First, following a consultation process, the Federal Council submits the dispatch on the introduction of the AEOI with the new state(s); the Parliament approves the new exchange deal by federal decree; the Federal Council notifies the country to the OECD secretariat. The exchange partner is then "listed" and the AEOI arrangement becomes "active", which means that Swiss institutions will start collecting account details as regards Swiss accounts held by the partner state's residents. Second, before an initial exchange of data, the Federal Council will once again review whether the listed country meets the requirements of the AEOI standard, based on the federal decree of 6 December 2017, with a focus on data security and confidentiality.

38 Also applicable for the Åland Islands, the Azores, French Guiana, Guadeloupe, the Canary Islands, Madeira, Martinique, Mayotte, Réunion, and Saint Martin.

and significant regional and sectoral financial centres, including a few former tax havens (Antigua and Barbuda, Aruba, Barbados, Belize, Bermuda, Costa Rica, Curaçao, Grenada, Cayman Islands, Cook Islands, Marshall Islands, Turks and Caicos Islands, British Virgin Islands, Mauritius, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadine, Seychelles, Uruguay). Six exchange partners[39] are non-reciprocal jurisdictions, in the sense that they will supply account information to Switzerland but will not receive such data. This second round of exchange deals was internally "activated" on 1 January 2018: Swiss institutions have started collecting account details, but the exchange will only take place in 2019, subject to certain conditions. The operationalization of the AEOI with the additional 41 jurisdictions is not automatic: it depends on the successful outcome of country reviews carried out in advance of the initial exchange, to assess whether the country meets the requirements of the AEOI standard on the basis of the federal decree of 6 December 2017. The focus will be on data security and confidentiality.

In parallel, Switzerland bilaterally activated exchange relationships with two major competing financial centres, namely, Hong Kong and Singapore. The two jurisdictions have been assessed standard-compliant. Account information, collected from 1 January 2018, will be exchanged in 2019. The exchange is transitionally based on bilateral treaties; it will be grounded in the MCAA, once the Convention is in force in both countries.

The Federal Council is proposing to activate the AEOI with eight further jurisdictions on a multilateral basis from 2019 (first exchange in 2020; third batch). The new exchange partners are Antigua, Bahamas, Bahrein, Qatar, Kuwait, Nauru, the overseas municipalities of The Netherlands (Bonaire, Saint Eustatius, Saba), and Panama. They are all significant financial centres and low tax jurisdictions. Six of these prospective AEOI partners exchange information on a non-reciprocal basis (i.e. they will supply, but not receive, financial account information). The addition of the overseas municipalities of The Netherlands was intended to fill a gap left in the territorial application of the AEOI agreement between Switzerland and the EU. The countries will be listed in 2019, once the consultation and approbation process is complete in Switzerland; the first exchange of data should take place in 2020 with those countries that meet the review criteria.

Finally, in December 2018, the Federal Council initiated the consultation on the introduction of the AEOI with 18 further states and territories (fourth batch): Albania, Azerbaijan, Brunei, Dominica, Ghana, Kazakhstan, Lebanon, Macao (China), the Maldives, Nigeria, Niue, Pakistan, Peru, Samoa, Sint Maarten, Trinidad and Tobago, Turkey and Vanuatu. These are the 18 partner states that are still missing from the 107 states and territories that are currently committed to implementing the AEOI. The implementation of the AEOI is planned for 1 January 2020, and the first exchange of data should take place in 2021. Once the legal bases for the exchange are set, the exchange will not be automatic: The Federal Council will review whether the newly listed countries meet the requirements of the AEOI standard, on the basis of the federal decree of 6 December 2017.

Source: Swiss Federal Council 2017 and 2018; OECD 2018e; Swiss Government, Press release, Bern, 07.12.2018 (https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-73307.html).

2.4 Automatic Exchange of CbC Reports

Switzerland will exchange CbC reports with 57 jurisdictions beginning in 2020 (State Secretariat for International Financial Matters 2018a, status as of 21 September 2018). Six of Switzerland's CbC exchange partners will *transmit* but not *receive* CbC reports (non-reciprocal exchange partners).[40] The vast majority of Switzerland's CbC exchange partners (40 of 57, or 70% of all exchange partners) are developed economies, mostly European states and territories. The 17 developing states and territories with whom Switzerland has activated the exchange are relatively advanced economies mostly in the high-income and upper middle-income groups. The only lower-middle-income partners are India, Pakistan, and Indonesia – large economies with significant political leverage. No low-income country appears on Switzerland's list (Annex 3).

2.5 Summary observations

At present, Switzerland's EOI network does not comprehensively cover less-developed countries, including those whose leading exports to Switzerland include main primary commodities traded via the Swiss hub. [41] The most vulnerable among them (low-income countries) barely have any legal basis for exchanging information with Switzerland in tax matters. They are shut out of the exchange of information. This applies, in particular, to the exchange of CbC reports, which could be of particular interest to low-income countries when assessing tax risks in commodity trading. The same is observed with regard to the automatic exchange of offshore bank account information.

39 Bermuda, British Virgin Islands, Cayman Islands, Marshall Islands, Turks and Caicos Islands.

40 Non-reciprocal partners are Bermuda, Cayman Islands, Costa Rica, Curacao, Cyprus, and Romania (status as at 21 September 2018).

41 Including zinc, copper, and aluminum (base metals), gold (precious metal), crude oil (energy), cereals, coffee, sugar, cotton, and cocoa (soft commodities).

Table 3: Switzerland's EOI network: Breakdown of exchange partners by income group (October 2018)

		Breakdown of exchange partners by income group			
Exchange procedure	**Standard-compliant exchange relationships (no.)**	**High-income**	**Upper-middle-income**	**Lower-middle-income**	**Low-income**
EOIR	112	69 (62%)	28 (25%)	13 (12%)	2 (2%)
AEOI CRS	81	61 (75%)	18 (22%)	2 (2%)	0
AEOI CbC	57	42 (74%)	12 (21%)	3 (5%)	0

Source: Annexes 1, 2, and 3. Note: The table only covers standard-compliant EOIR arrangements and CRS AEOI instruments approved by Parliament (activated and not yet activated).

This gap cannot be fully explained by lack of political will or interest-driven politics in Switzerland, as discussed below.

Regarding exchange on request, Switzerland has formally committed to negotiate standard-compliant EOIR agreements with all jurisdictions that have expressed interest in it. In this way, Switzerland has taken proactive steps to upgrade its remaining noncompliant EOIR instruments, and to expand its network of EOIR arrangements (OECD 2016c, 113-14). Further, by ratifying the CoE/OECD CMAAT, Switzerland has assumed the obligation to exchange information on request with all present or future CMAAT members. However, not all countries were ready or willing to integrate into Switzerland's exchange network. For example, Mongolia informed Switzerland that it was not in a position to exchange information in line with the standard, due to limitations in its domestic law; diplomatic contacts could not be established with the competent authorities of Gambia and Malawi (OECD 2016c, 113-14).[42] The reasons for exclusion – or reluctance to join – may have much to do with capacity constraints among potential exchange partners, in light of the mutual, reciprocal nature of the EOIR procedure in Swiss and international practice. Switzerland's EOIR treaties (DTAs, TIEAs, or the MCAAT) are mutual and reciprocal in nature, such that exchange partners must have the capacity to collect information for reciprocal exchange. This is only possible if adequate laws and regulations are in place regarding the availability, gathering, and transmission of tax information. The costs and difficulties of making legislative changes, alongside other pressing reform needs, act as a disincentive and deterrent to engagement in tax matters for many capacity-constrained countries.

Similar considerations arise with respect to automatic exchange procedures, including financial account information and CbC reports. As discussed, Switzerland's AEOI network so far covers significant commercial partners, their dependent territories, and important sectoral or regional financial centres. At the same time, Switzerland is gradually opening to "outer circle" countries. Indeed, there is little room for political discretion in selecting AEOI partners. The G-20 and OECD have increased political pressure on participating jurisdictions to implement the AEOI with all interested appropriate partners: jurisdictions that unnecessarily delay implementing the AEOI risk being listed as uncooperative. The Federal Council has thus opened the consultation procedure on the remaining states and territories that have committed to the AEOI-standard and provided a timeframe for its implementation. This does not mean that Switzerland will "list" all interested countries: its political commitment is towards countries that meet the AEOI standard requirements. This limitation is further strengthened by its review mechanism put in place to assess whether "listed" countries meet the AEOI requirements, before any exchange may take place (see Box 5). Likewise, Switzerland's commitments to expand its AEOI network to developing countries still allows it to exclude automatic exchange with countries that do to meet the standard requirements. The only commitment taken by Switzerland in this area is to support developing countries in making progress towards implementing the AEOI standard. Again, not all developing countries are ready or willing to commit to the automatic exchange, whether for political reasons or due to capacity gaps. Some developing countries bilaterally approached by Swiss officials have highlighted their inability to meet the automatic exchange standard. They countries have expressed the need for technical assistance to securely receive, process, and use tax data, before initiating any exchange whatsoever.

42 The AEOI with these partners is expected to be activated on 1 January 2020. In order to prevent circumventions of the global AEOI-standard, the OECD requires that all participating jurisdictions comply with the international rules on the AEOI.

Nevertheless, there are viable options to overcome the remaining tax-exchange "impasse" confronting many poor countries, as shall be discussed below in the concluding chapter. The "mainstream" policy response in this regard is to assist developing countries in setting up the needed legal, administrative, and technical infrastructure to exchange such information. Significant support has been mobilized in this direction, both at the programmatic and operational level. At the programmatic level, the OECD has developed a high-level roadmap towards the inclusion of developing countries in the AEOI network (Global Forum on Transparency and Exchange of Information for Tax Purposes 2014).[43] At the operational level, technical assistance to implement this roadmap is being delivered via multilateral, regional, and bilateral channels (refer to chapter 5). Unlike the AEOI, there is no specific action plan for supporting the integration of developing countries in the automatic exchange of CbC reports. However, there are synergies in the two work streams (automatic exchange of financial account information and of CbC reports), so that the two can be carried out in parallel (Matteotti 2018, 19).

Questions remain as to the cost-effectiveness – and opportunity costs – of dedicated technical assistance efforts to set up the needed AEOI infrastructure in countries that face structural gaps and hurdles. These interventions are extremely costly. They may yield lasting results and act as a catalyst, the entry point for a far-reaching and sequenced reform of the tax system in poor countries, if implemented in synergy with domestic resource mobilization efforts. Or they may be short-lived, suffering the same fate as many other forms of legal "transplant". Indeed, costly efforts to set up legal, operational, and IT infrastructure may not result in sustained capacity to operate the exchange infrastructure or to take advantage of the information exchanged. Thus, alternative policy options deserve objective, critical scrutiny. These include non-reciprocity, publication of aggregate data, and more transactional forms of assistance, in addition to other policy means besides exchange of tax information. These shall be discussed in the concluding chapter.

43 On 5 August 2014, the Global Forum issued its report to the G20 Development Working Group, outlining a "roadmap" for developing country participation in the AEOI (Global Forum 2014). The roadmap proposes a stepped approach to help developing countries integrate into the AEOI system. It provides four key principles to assist in the implementation of the common reporting standard for AEOI: a tailor-made approach for each jurisdiction; the achievement of domestic synergies with domestic resource mobilization and capacity building; sufficient phase-in time; the prioritization of developing countries that are also financial centres.

3 The Information Exchanged: Can It Help Detect Mispricing in Commodity Trading?

What is the likely role of EOI mechanisms in curbing commodity trade-related IFFs? In particular, do these mechanisms provide tax administrators with targeted, useful information for investigation of possible mispricing in commodity trading? Two questions arise: first, what information is relevant to detection of individual instances or patterns of mispricing? Second, is such information supplied under current EOI procedures?

3.1 What information is most relevant?

Assessment of commodity trade-related misinvoicing or transfer mispricing is a fact-intensive, circumstantial exercise that rests on transaction data and reliable "comparables".

To detect misinvoicing, customs and tax administrations must check the accuracy of the declared value. They must determine the correct description, quantity, quality, grade, and specification of the exported commodity, and the truth or accuracy of the declared customs value for the exported goods.[44] Two sources of data and techniques are particularly relevant to investigate false invoicing. First, a valuation database may help in testing the accuracy of the declared values, without the need to reassess the actual value of each export or import shipment. For comparability analysis, the valuation database may include past data of identical or similar exports or imports, transaction data from different ports, airports, and land-route customs stations, as well as published commodity price information from authoritative sources (Sewing Machine Rehabilitation 2007). Second, data matching – or tracking mismatches in trade documents and between trade documents and income tax declarations – may help in establishing cases of value manipulation in cross-border trade. For example, export (sale) documents may be compared with import (purchase) documents to investigate mismatches in export and import values. Likewise, customs declarations may be cross-checked with commercial, payment, and transport documents (Figure 8), to identify mismatches pointing to value manipulation. Finally, customs declarations may be cross-checked with the income tax return filed by the buyer in the importing country, in an effort to find discrepancies in values set for customs and tax purposes. Indeed, when the purchased inputs are deductible costs in the importing country, the purchaser has an incentive to undervalue the transaction with respect to custom duties, value-added taxes, and excise taxes, while stating the correct price for income tax purposes. This analysis requires analysis of trade documents and the transaction data contained therein, cross-checked with income tax statements. It implies rules and procedures for the flow of information between tax and customs units.

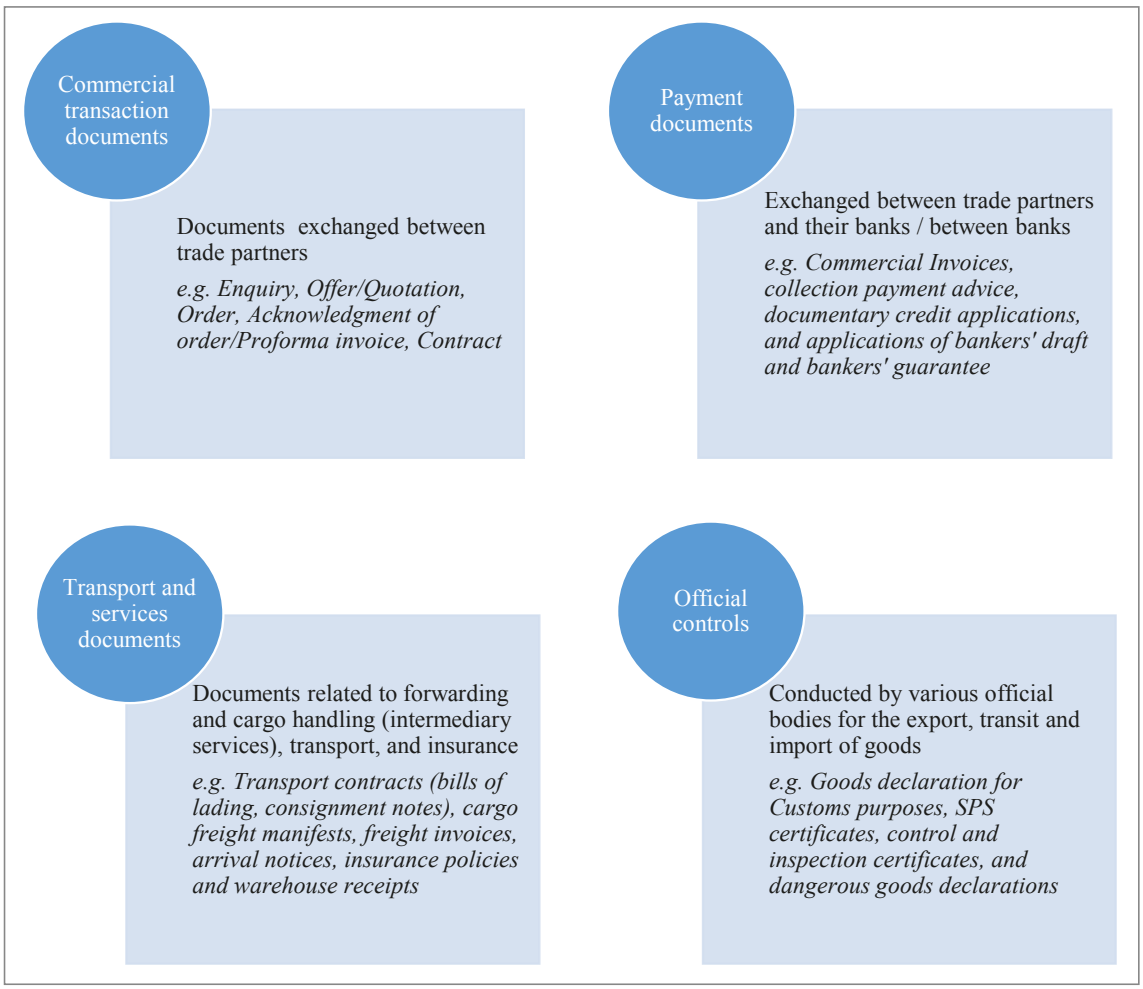
Under the traditional transaction methods,[45] transfer-pricing risk assessment and audits require data on comparable "uncontrolled" transactions, operating costs, and profit margins (Guj et al. 2017; Platform for Collaboration on Tax 2017; Readhead 2016a, 1016b and 2017b; United Nations 2017). With specific reference to commodity trading as detailed in transfer pricing handbooks (Readhead 2016a, 1016b and 2017b), relevant information would include the following:

- Key terms of the sale agreement being investigated, including details on price, volume, payment terms, quotation period, quality;
- Information that helps to identify the trading hub organizational structure and functions, including numbers of employees, business lines, allocation of risk, etc.;
- Details on the hub operating costs and profit margins, including copies of balance sheets and detailed income statements;
- Information about transactions between the hub and unrelated parties, including pricing policy for different minerals and third-party supply contracts held offshore by a related-party marketing hub;
- Publicly quoted price benchmarks and other reference prices that offer a basis for price comparability.

44 It is not the aim here to discuss technical requirements in relation to sampling, analytical testing, and export valuation (on this issue, Readhead 2018a). The focus here is on the tax-relevant information that can be used to detect mis-declaration leading to export value manipulation.

45 The traditional transaction methods – "comparable uncontrolled price" (CUP) method, "resale minus", and "cost plus" – are outlined in Chapter II of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2017). The CUP method requires transactions between related parties to be priced by reference to comparable transactions between unrelated parties; the resale price and cost-plus methods focus on the profit margin of the related entity, compared to those of comparable independent businesses. For a critical overview, see Picciotto (2018).

Figure 8: Relevant trade documents to identify value manipulation



Source: Taxonomy of trade documents of the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT 2002).

As discussed in Readhead (2016a, 1016b and 2017b), the gathered information may help to assess whether the sale price between the mine and the trader, as well as potential discounts and mark-ups, obey the "arm's length principle", which requires that transactions between related parties are priced as if the parties where unrelated.

3.2 Is the Necessary Information Provided by EOI Mechanisms?

Can EOI mechanisms shed light on export misinvoicing and abusive transfer pricing? Do they provide tax administrations with targeted, useful information for investigation of mispricing in commodity trading? The answer is mixed. As discussed below, exchange of information on request, exchange of transfer pricing rulings, and exchange of CbC reports can provide transaction data and ownership information that is highly relevant to mispricing investigation. However, automatic exchange of financial account information, a key instrument to tackle undeclared personal offshore wealth, does not deliver the type of data – transactional – that matters most when investigating such mispricing. Note also that various operational rules and prerequisites preclude the use of EOI mechanisms to tackle mispricing in commodity trading, as discussed in chapters 4 and 5.

Box 6: Ownership, bank, and accounting information in tax proceedings

For ease of understanding, it helps to distinguish three types of information that can be exchanged via administrative assistance in tax matters: ownership, bank, and accounting information (OECD 2016a and 2016c). These types of information are all relevant to ascertaining and detecting possible instances and patterns of IFFs in the commodity sector. In practice, they intertwine in a complex manner, though they may be discussed separately as follows.

Ownership and identity information involves disclosure requirements to assess chains of ownership and ultimate (beneficial) ownership. It uncovers what lies beneath the surface: internal ownership structures of MNEs (parent, subsidiaries, and affiliates); and ultimate beneficial owners (individuals, financial institutions, or higher-level funds "above" the parent entity). This type of information makes it possible to identify shell companies, trusts, and other similar arrangements with which actors seek to circumvent tax obligations based on interposed legal entities. It is a critical component of all anti-money laundering (AML) regimes, and an essential ingredient to uncover and expose complex and multi-layered trade fraud schemes.

Bank information is information held by banks, private bankers, and savings institutions (in Switzerland, the only entities authorized to accept deposits from the public on a professional basis, under the supervision of FINMA). Bank/financial account information discloses the account holder (and beneficial owner), account balance, interest, and dividends paid or credited to the account, and all other income generated with respect to the assets held in the account. It essentially entails two sets of record keeping and reporting obligations on banks: customer identity information and transaction information. With respect to ***customer identity*** information, banks must verify the client's identity and, for legal persons, the identity of the person establishing the account and, in some instances, the beneficial owner of the bank account. Bank and ownership information here overlap. ***Transaction information*** essentially concerns a client's transaction documents and records. The exchange of non-resident financial account information, particularly when automatic, has a strong potential to deter (and detect) unrecorded offshore accounts and stem tax evasion in the account holders' country of residence.

The third type of information concerns ***accounting information*** that provides more details on transactions. It concerns the obligation to keep and maintain accounting records, including underlying documents (e.g. commercial invoices, delivery notes, bank statements, contracts). These "paper trails" are critical to monitor and help tax compliance. In some instances, a double-accounting paper trail between firms can counteract incentives to misreport. Take the example of value-added taxes, which are paid on the value added (sales minus input costs), at each stage. The downstream actor has an incentive to ask for purchase receipt, as he/she requires a receipt to deduct input costs from his/her sales receipts. The government could infer from this chain of deductions how much the upstream firms earned (Pomeranz 2017). Where this incentive (ask for a receipt) breaks down is with regard to the final consumer. Accounting information is also critical, as discussed, to ascertain instances of abusive transfer pricing and misinvoicing in commodities trading. Note also that detailed transaction-level data furnish the raw data for the compilation of trade statistics: commercial invoices are used by customs authorities for inspection purposes, to assess customs duties, and to compile trade statistics. Some countries, however, require the filing of specific customs invoices for these purposes.

3.2.1 Exchange on Request

EOIR matters to open the black box of commodity merchanting via trading hubs, including in the specific case of related-party transactions. Take the example of a coffee shipment from Laos that is contractually sold to a related party in Switzerland, but physically exported elsewhere (transit trade through a related party). A broad, standard-compliant EOI mechanism between Laos and Switzerland (currently inexistent) could enable Laos authorities to monitor the structure and activities of a Swiss-based trading company that buys and resells Laotian coffee. The exchange, as discussed, would in principle cover all "foreseeably relevant" information for tax purposes. It could possibly include key terms of the sale agreement being investigated, information on the Swiss trader's resale prices and arrangements, information on transactions between the Swiss company and unrelated suppliers, as well as information that could help to identify the trading hub organizational structure and functions, including the company's accounting records/financial statements. The gathered information could help to assess whether the trading company performed substantive, value-adding functions that justify mark-ups, or if it is just a shell company. It would enable comparison of the price charged in the controlled transaction with the price charged in comparable transactions between unrelated parties, after making proper adjustments for quality and contractual terms. The exchanged documents could also help to identify the price at which the coffee was resold by the Swiss trader. Reduced by an appropriate gross margin and after adjustment for other costs, this price might provide an "arm's length" price for the original transaction between the Laotian company and the Swiss trader. These are only general possibilities – in practice, specific constraints may arise from treaty, statutory, and procedural limitations (see below and Chapter 4).

Exchange on request could also provide information to investigate trade misinvoicing between officially unrelated parties. Take the example of a gold shipment from Ghana to Switzerland: pursuant to a standard-compliant EOI clause, Ghana's tax authority could request from the Swiss tax administration relevant documents relating to the purchase, importation, or subsequent sale of the gold (subject to the limits discussed in Chapter 4). Relevant documents might include commercial transaction documents, payment and trade documents, as well as official control documents issued by the Swiss authorities. Export (sale) documents could then be compared with import (purchase) documents to identify mismatches between export and import values. If so provided under the EOI clause, the Ghanaian authorities might also request information on all bank accounts

in Switzerland that could be traced back to the gold exporter: bank accounts opened in the exporter's name, or in the beneficial interest of the exporter. The purpose would be to assess whether the parties under investigation deposited the difference between the invoiced and the real price in a bank account to be managed according to the exporter's instructions. However, the information request would only be useful if the beneficial owner (i.e. the exporter) were properly identified at the moment of opening the bank account in Switzerland, highlighting the importance of customer due diligence requirements by banks in the offshore jurisdiction.

In this way, exchange of information under a standard-compliant EOI clause could be far-reaching and highly relevant to a mispricing investigation. However, as discussed in Chapter 4, the admissibility of the information request in the buyer's home state would depend on a number of factors. In particular, the Swiss authorities would have to assess whether a valid EOI mechanism is in place; whether the information request concerns taxes and persons covered by the EOI clause; whether the request letter is specific enough to identify the taxpayer and the information holder; and whether the requested information involves commercial information constituting a trade secret, in which case the requested authority would decline to supply the information. These limitations, discussed at length in Chapter 4, significantly reduce the practical significance of the EOI reporting procedure for the purpose of assessing commodity trade mispricing.

3.2.2 Exchange of Tax Rulings and Exchange of CbC Reports

The information contained in CbC reports and transfer pricing rulings can be highly relevant to a transfer pricing risk assessment or audit. CbC reports provide tax administrators with insights into the location of an MNE's income, taxes, and business activities by tax jurisdiction. This overview helps to understand whether profits are allocated to the places and economic activities that generate them or whether they are artificially shifted to low-tax jurisdictions, pointing to possible misalignments between value creation and taxation. As discussed, unilateral cross-border transfer pricing rulings raise specific profit-shifting concerns, as they may have spillover effects across tax jurisdictions. By acceding to them, the concerned tax administrations may identify related cross-border tax risks and assess taxpayer compliance with local transfer-pricing legislation. Exchange of CbC reports and transfer-pricing rulings has potential benefits for developing countries especially. It can equip tax administrations in developing countries with vital information on the global operations of an MNE group headquartered elsewhere (Meyer-Nandi 2018a, 61-62).

However, there are limits to the use of these instruments to investigate specific instances and patterns of cross-border transfer mispricing. In particular, there are a few built-in limits to the use of CbC reports in transfer pricing investigations and audits.

First, CbC reports only provide aggregate figures on an MNE's income, taxes, and business activities by tax jurisdiction.[46] They do not equip tax administrations with information relating to specific intra-MNE transactions. Under the OECD/BEPS Project, detailed transactional transfer-pricing documentation regarding intra-company deals is not recorded in the CbC Report, but provided in the "Local File" that is specific to each country.[47] This means that if, for example, Ghana, wished to have detailed transfer-pricing documentation for transactions of entities operating in its jurisdictions, it would need to do so via domestic legislation or administrative procedures. Relevant reports would be filed directly with Ghana's tax administration. The OECD/BEPS Project provides a template for the Local File (Annex II to Chapter V), but does not mandate its use – i.e. countries are free to implement or reject use of the Local File when adopting CbC reporting. Switzerland, for example, did not introduce the proposed Local File, arguing that the cost of introducing such transfer-pricing documentation requirements would be disproportionate to the benefits (Meyer-Nandi 2018a, at 239). Note that even if Switzerland were to introduce the Local File, the information recorded would be intended exclusively for domestic assessment of the transactions of entities operating in Switzerland, and would not be subject to exchange.

Second, CbC reports can only be used for risk-assessment purposes. In particular, "the information [may] not be used as a substitute for a detailed transfer pricing analysis of individual transactions" or as "conclusive evidence" of transfer mispricing (OECD 2015c, 49). Nor can local tax administrations propose automatic adjust-

46 Information received by means of the CbC Report can also be used, where appropriate, for economic and statistical analysis (OECD 2015c).

47 The Local File will identify "material related party transactions, the amounts involved in those transactions, and the company's analysis of the transfer pricing determinations they have made with regard to those transactions" (BEPS Action 13 Final Report, at 9).

ments of the taxable income based on the CbC reported allocation of income, taxes, and business activities by tax jurisdiction. These are deemed "inappropriate adjustments" in contravention of the OECD/BEPS standard (OECD 2015c, 49). This does not mean, however, that tax administrations would be prevented from using the CbC Report data as a basis for a tax audit of an MNE's transfer-pricing arrangements, possibly resulting in appropriate adjustments to the taxable income of related entities operating in the relevant jurisdiction (OECD 2015c, 49).

Third, CbC reports only concern related companies and transfer-pricing risks. Independent traders are not concerned by the CbC reporting obligations, and CbC reports would not be of assistance in trade misinvoicing, which is usually performed through (officially) unrelated parties.

Finally, as further discussed in Chapter 5, the recipient country must set up the required legal, administrative, and technical framework to protect confidential CbC reports before the exchange can take place. These requirements are highly standardized and stringent, and pose compliance challenges for many developing countries.

Altogether, these conditions limit the operational significance of the automatic exchange of CbC reports for the purpose of investigating commodity trade mispricing. As discussed, these built-in limits reflect a carefully negotiated balance between transparency concerns, on the one hand, and concerns about taxpayers' privacy rights and the compliance costs for business, on the other hand. These built-in limits will be re-assessed in 2020, when countries participating in the BEPS project will review the implementation of the CbC reporting standard.

3.2.3 Automatic Exchange of Financial Account Information

The automatic exchange of financial account information is a key instrument to identify undeclared offshore income. The bulk, standardized exchange of non-resident account information is an effective and cost-efficient way to uncover undeclared offshore bank accounts, conceivably on a global scale, with a strong deterrent potential. At the same time, the reach of this EOI mechanism is limited in terms of its possible use to identify value manipulation in cross-border commodity trading.

Nevertheless, AEOI between resource-rich developing countries and trading hubs like Switzerland could help to identify or deter instances of trade mispricing in a specific type of case: when the proceeds from false invoicing are hidden in undeclared offshore bank accounts in the hub jurisdiction. This may occur when the exporter and the importer collusively under-invoice the export sale and deposit the difference between the invoiced price and the real price into a bank account in Switzerland, to be disbursed according to the exporter's instructions. It may also occur when the difference between the discounted price and the market price serves to pay commissions to public officials and the commission is deposited in a bank account opened in Switzerland in the beneficial interest of the corrupted official. In such cases, AEOI could uncover these deals, but only if the reporting bank could correctly identify the ultimate beneficial owner of the bank account.

Beyond these instances, automatic exchange of financial account information as currently structured does not appear to be a breakthrough in terms of improving transparency in commodity trading. There are several reasons for this. As mentioned, the AEOI standard essentially covers standardized bank information concerning the offshore accounts of taxpayers resident in another jurisdiction. It does not specifically concern the type of transactional/accounting information that is needed to uncover facts regarding possible instances of trade mispricing and abusive transfer pricing in commodity trading. Further, as discussed, stringent technical standards and safeguards must be in place before an AEOI relationship is established. This raises implementation challenges for most commodity-dependent developing countries, many of whom are low- or lower-middle-income countries with limited administrative capacity, rudimentary data protection laws, and severe digital gaps.

3.3 Summary observations

Exchange of information for tax purpose sheds light on the mechanisms of export under-invoicing and abusive transfer pricing. Exchange on request, spontaneous exchange of tax rulings, and exchange of CbC reports can in principle provide tax administrations with targeted, useful information for investigating mispricing in commodity trading. The automatic exchange of financial account information is not directly relevant, but remains a key tool for detecting undeclared offshore accounts where the proceeds from misinvoicing could be hidden. There are, however, a few procedural constraints and built-in limits that can diminish the operational significance of EOI mechanisms for the purpose of investigating commodity trade-related IFFs. The reader is referred to the next chapter for a more thorough assessment of these limits.

4 Built-in Limits on Use of Tax Information to Investigate Mispricing: The Example of Ghana

Exchange of information in tax matters may provide tax administrations with relevant information to investigate commodity trade-related mispricing (see Chapter 3). However, to assess whether or not possible benefits are likely to be realized in practice, it is important to assess a few constraints and "built-in limits" that could significantly reduce the operational significance of EOI in investigating commodity trade-related mispricing. This is illustrated by way of case scenarios, using the example of Ghana. In May 2014, Switzerland and Ghana signed a protocol amending the Switzerland–Ghana DTA (hereafter, DTA Protocol), to harmonize the clause on exchange of information with the OECD standard.[48] Once in force, the Protocol should enable major information exchange between the two countries in relation to taxes on income and capital. In addition, Ghana signed the MCAAT in July 2012, which entered into force for Ghana in September 2013. Under the amended DTA and the MCAAT, tax authorities in Ghana might in principle access taxpayer-specific information in Switzerland for the purpose of investigating commodity trade-related mispricing. Yet there are several procedural requirements that in practice limit this possibility. Key aspects are discussed below. The focus is on exchange of information on request, with only limited consideration of other exchange procedures.

4.1 Specialty Principle

Under the speciality principle, the information exchanged may only be used for the purpose for which it is intended in the exchange agreement. Under the DTA Protocol and the MCAAT, the tax administration in Ghana can only seek and use the exchanged information for tax purposes– i.e. to determine, assess, or collect taxes on capital; to recover and enforce tax claims; and to investigate or prosecute criminal tax matters. Further, the information request should relate to capital and income taxes only (DTA Protocol); the legal bases for exchange do not cover customs duties.[49]

The tax purpose requirement does not appear to be an obstacle to the use of exchange mechanisms for the investigation of transfer mispricing: the request would likely be linked to an income tax investigation. Trade misinvoicing, as a form of customs fraud, is a "borderline" case in this respect. As mentioned, the information request should relate to capital and income taxes. It cannot directly concern customs duties, or their assessment and collection. This means that a request connected with a misinvoicing investigation is acceptable only if firmly grounded in income tax laws. If, instead, the stated purpose of the request is the enforcement of customs duties, it would likely be rejected.

Can the information transmitted to Ghana be used for additional (non-tax) purposes, for example, to combat corruption and trade-based money laundering related to commodity transactions? Since 2012, the OECD Model Tax Convention provides for such use, under relatively stringent conditions.[50] In practical terms, in both Ghana and Switzerland, there should be laws and procedures in place that provide for such use. This also includes internal procedures for the exchange of information between tax authorities and other official domestic agencies (customs agencies, law enforcement agencies, financial intelligence units, etc). Further, under the standard, the Swiss unit in charge with the exchange (FTA/SEI) should authorize the use (OECD Commentary n. 12.3 to Art. 26 par. 2; Swiss-Ghana amended DTA, Art. 27 par. 2).[51]

48 The agreement between Switzerland and Ghana for the prevention of double taxation of income, wealth, and capital gains (hereafter, the Swiss–Ghana DTA) was signed on 23 July 2008 in Accra and entered into force on 4 January 2010. In line with the Swiss practice at that time, the DTA included a minor information clause, not in line with the OECD standard: Ghana and Switzerland would only exchange the information necessary to carry out the provisions of the DTA, strictly in relation to the taxes and persons covered by the DTA.

49 Under the DTA Protocol, the exchange can only concern taxes covered by the Ghana–Switzerland DTA, i.e. taxes on capital and income (personal and corporate); the MCAAT excepts customs duties from its material scope.

50 Under the standard, the information received may be used for non-tax purposes if so provided in the domestic laws of both parties to the EOI instrument and the tax authority of the requested (supplying) state authorizes such use (OECD Commentary n. 12.3 to Art. 26 par. 2).

51 In its relevant part, the Switzerland–Ghana amended DTA, Art. 27 par. 2 text reads: "Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use".

4.2 Prohibition of Fishing Expeditions

The requesting authority from Ghana would be subject to stringent requirements as regards the content of the request letter, which should be as detailed as possible regarding several issues. So-called fishing expeditions, defined as "random, speculative requests, with no apparent nexus with an on-going tax inquiry or investigation" (OECD Commentary 5 ad Art. 26 par. 1 OECD Model Tax Convention), are prohibited. The rationale for this prohibition is to "avoid extensive and sometimes unnecessary investigations by the requested State", that would burden the latter with investigation costs (Oberson 2015, 19 and 20).

How specific should an EOI request be? What should be included in the request letter? As specified in the DTA Protocol between Ghana and Switzerland (Art. 27 par. 5 subparagraph b. DTA Protocol), and according to Swiss practice, the request should specifically identify:
- The person or entity under examination or investigation;
- The identity of the information holder, "to the extent known";
- The taxes concerned;
- The tax purpose and the domestic grounds for the request;
- The tax period under examination;
- The type of information requested.

In practice, it could be very difficult to meet these identifying requirements in the context of an examination of trade mispricing. Indeed, trade misinvoicing and abusive transfer pricing schemes are typically shrouded in secrecy, operational opacity, and anonymity. For example, it would scarcely be possible for the tax authority in Ghana to know details such as the bank account number of an exporter's offshore account. Yet, according to the rules, authorities must have prior knowledge of the person involved and the tax evasion scheme before submitting the information request. In this way, the identifying requirements of the EOIR standard are "similar to asking that a fisherman know the name of the fish before catching it" (McIntyre, 2009, in Oberson 2015a). Further, it may be difficult to identify the specific legal provisions and taxes at stake in relation to commodity trade-related tax avoidance and evasion, owing to limitations in domestic tax laws. This limits the practical relevance of EOI mechanisms to detect or ascertain facts regarding trade mispricing and abusive transfer pricing. At the same time, there has been some easing of Swiss practices in terms of the identification requirements. In February 2011, Switzerland's Federal Department of Finance publicly declared that Switzerland would interpret all treaties which included a new EOI provision in line with the international standard such that the information would also be provided when the taxpayer being investigated was identified by other means than name and address, or when the requesting state did not know the name and address of the holder of the information (OECD, 2016). In line with this commitment, the amended EOI clause in the DTA between Ghana and Switzerland requires the name and address of the information holder "to the extent known" and specifies that the procedural requirement laid down with regard to the specificity of the request letter "are not to be interpreted in a way to frustrate effective exchange of information" (Art. 27 par. 5 subparagraph c DTA Protocol). Nevertheless, it remains to be seen to what extent the identification requirements will be eased in practice.

4.3 Reciprocity

As discussed, Switzerland exchanges information on request on a reciprocal basis, meaning that Ghana would need to be prepared to reciprocate the exchange.

Narrowly interpreted, reciprocity means that Switzerland would not be obliged to provide information that Ghana itself could not obtain and exchange with Switzerland under its laws and administrative practices (OECD, 2102). This reciprocity requirement has been inferred from the language of Art. 26, para. 3(d) of the OECD Model Tax Convention (Art. 26) and from the Model TIEA (Art. 7). It reflects in Art. 27 par. 3 subparagraph (a) and (b) of the DTA Protocol between Ghana and Switzerland. The requirement could pose significant challenges for developing countries that usually lack the tax administrative capacity of developed countries.
Reciprocity poses fewer challenges if interpreted in a broad and flexible manner. It has been observed in this respect that "[a]lthough Article 26 imposes reciprocal obligations on the Contracting States, it does not allow a developed country to refuse to provide information to a developing country on the ground that the developing country does not have an administrative capacity comparable to the developed country" (UN Model, Commentary n. 1.3 ad Art. 26 UN Model Convention). It has been authoritatively commented that "too rigor-

ous an application of the principle of reciprocity could frustrate effective exchange of information and that reciprocity should be interpreted in a broad and pragmatic manner. Different countries will necessarily have different mechanisms for obtaining and providing information. Variations in practices and procedures should not be used as a basis for denying a request" (OECD Commentary n. 15 ad Art. 26 OECD Model Tax Convention). Further, "the principle of reciprocity has no application where the legal system or administrative practice of only one country provides for a specific procedure. For instance, a country requested to provide information could not point to the absence of a ruling regime in the country requesting information and decline to provide information on a ruling it has granted, based on a reciprocity argument" (OECD Commentary n. 15.1 ad Art. 26 OECD Model Tax Convention).

4.4 Subsidiarity and Proportionality

Under the principle of subsidiarity, the requesting state must first exhaust procedures available under its domestic law before submitting a request to the other state (OECD Commentary, n. 9(a) ad Art. 26 OECD Model Tax Convention). It means that the tax authority in Ghana should first seek the information at the most immediate (local) level, before requesting administrative assistance from Switzerland. The prohibition of any "fishing expedition" (Art. 26 par. 1 OECD Model Tax Convention) is also grounded in the principle of subsidiarity (OECD Commentary 5 ad Art. 26 par. 1 OECD Model Tax Convention, Oberson 2015a, 19).

The principle of subsidiarity has specific relevance to the investigation of commodity trade mispricing. Note in this respect that the information that is most relevant in the context of a mispricing investigation is often domestically available in the requesting state. For example, a few trade documents originate from the seller, rather than the buyer, and should be sought domestically – e.g. quotations, proforma invoices, and possibly transport and insurance documents, depending on the terms of the trade. Other commercial documents (e.g. contracts) are common to both the buyer and the seller. Thus, Ghana would be required to pursue all means available to obtain desired information in its own territory before approaching the Swiss tax authority. Note, however, that the subsidiarity requirement has been applied quite flexibly in Swiss practice. For example, the Swiss administration may consider a request concerning trade documents that could be sought locally by the requesting party, if the objective is to cross-check the accuracy of the information collected locally. The assessment is often on a case-by-case basis, with due regard for the circumstances of the case (interview reports).

4.5 Internal Laws and Administrative Practices

As mentioned above, the tax authority in Switzerland will not carry out administrative measures at odds with Swiss laws or administrative practice (Art. 27 par. 3 subparagraph a. of the Swiss-Ghana DTA Protocol), nor will it supply information that is not obtainable under its laws or in the normal course of its administration (Art. 27 par. 3 subparagraph a. DTA Protocol). However, the information need not already be in the possession of, or readily available to, the tax administration. As detailed in the OECD Model Convention, "[i]nformation is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examinations for their own purposes" (OECD Commentary n. 14 ad Art. 26 par. 3 OECD Model Tax Convention)

Note that the internal laws and administrative practices of Ghana (the hypothetical requesting state) would also be relevant (Art. 27 par. 3 b. DTA Protocol). The OECD Commentary reads in this respect: "the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State" (OECD Commentary n. 15 ad Art. 26 OECD Model Tax Convention). If this language is interpreted narrowly, Ghana could not take advantage of the information system of Switzerland if it were wider than its own system – once again highlighting the question of "reciprocity", as discussed in the same-named section above.

4.6 Trade Secrets

The Swiss tax authority may refuse to supply information "which would disclose any trade, business, industrial, commercial or professional secret or trade process" (Art. 27 par. 3 subparagraph c. of the DTA Protocol), in line with the international standard (OECD Model TIEA, Art. 7, CoE/OECD CMAAT, Art. 21, Art. 26 pr. 3 of the OECD and UN Model Tax Conventions, OECD 2012).

Trade secrets should be interpreted narrowly, so as to focus on information that might reveal a trade, business, or similar secret. For example, they should cover purchase records that reveal the proprietary formula used in the manufacture of a product, but not generally a company's books and transaction records.[52] Too broad an interpretation would render ineffective the EOI regarding instances of possible trade mispricing or abusive transfer pricing. A transfer pricing or misinvoicing risk assessment or audit is a fact-finding exercise that builds on commercially sensitive information. A company's accounting records or trade documents – commercial, payment, and transport documents – are indeed commercially sensitive. If they are deemed to be coved by trade secrets, there would be no EOI for the purpose of assessing tax risks in relation to commodity transactions.

Notably, to date, there have been no cases in Swiss practice of requests rejected on grounds of trade secrets. Trade secrets have been interpreted narrowly so that only sensitive information that might reveal proprietary formulas or other protected know-how is covered (interview reports).

4.7 Stolen Data

Is an information request based on leaked or stolen data acceptable in Switzerland? In the past, Switzerland has rejected information requests based on stolen data. This was according to strict interpretation of Art. 7 of the LAAF,[53] which provides that a request will not be considered if founded on information obtained through acts punishable under Swiss law. More recently, Switzerland has eased and partly reversed this practice. On 10 June 2016, the Swiss government adopted the dispatch on amending the LAAF for the attention of Parliament. The amendment aims to enable Switzerland to meet information requests based on stolen data when the information was received by the requesting jurisdictions via normal administrative channels, for example pursuant to an exchange of information from another EOI partner jurisdiction, or from public sources ("leaked" data). In July 2018, Switzerland's highest court authorized information-sharing between Switzerland and India as part of a tax evasion investigation, even though the Indian request was based on data stolen by a whistle-blower (decision 2C_648/2017 of 17 July 2018). The Federal Court argued that, in general, there was no legal issue with use of "leaked" stolen data as the basis for a request, as long as the requesting country did not purchase the data. Notably, the information-sharing agreement between India and Switzerland did not obligate the requesting party to reveal how it had obtained the information on which its request was based.

4.8 Confidentiality and Data Safeguards

Any information received by Ghana's tax authority in a relevant case would need to be kept confidential (Art 27 par. 2 Swiss-Ghana DTA Protocol and Art. 22 MCAAT),[54] in line with the standard (Art. 8, Model TIEA; Art. 22, CoE/OECD CMAAT; Art. 26 par. 2, OECD and UN Model Tax Conventions). Confidentiality must be ensured before and during the transmission, and after the information is received (OECD, 2012).

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52 This flexible approach to trade secrets in the context of EOI for tax purposes is expressed in the Commentary to the OECD Model Tax Convention, which reads: "[T]rade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorised use of which may lead to serious damage (e.g. may lead to severe financial hardship)... Financial information, including books and records, does not by its nature constitute a trade, business or other secret. In certain limited cases, however, the disclosure of financial information might reveal a trade, business or other secret. For instance, a request for information on certain purchase records may raise such an issue if the disclosure of such information revealed the proprietary formula used in the manufacture of a product […]" (Commentary n. 19.2 ad Art. 26 par. 3 (c), OECD Model Tax Convention).

53 LAAF, SR 651.1.

54 The relevant text of Art. 27, par. 2 of the Swiss-Ghana DTA Protocol reads: "Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State […]".

In principle, what is required in the context of exchange-on-request procedures (Model Tax Convention) is a "relative secrecy protection" rule, or "equal treatment obligation" (Oberson 2015, 24): information received under the provisions of a tax treaty shall be treated as secret in the same manner as information obtained under the domestic laws of the receiving state (OECD 2012; see also Art. 27 par. 2 DTA Protocol and Art. 22 of the MCAAT). The secrecy standard refers to the internal legislation of the receiving state (Ghana, if a request were to stem from Ghana); the standard in the supplying state (e.g. Switzerland) would no longer be relevant. This implies that a lighter standard of protection in Ghana relative to Swiss standards would not be grounds for Switzerland to refuse furnishing the requested information. Note in this respect that there is no uniformity in confidentiality laws and practices across countries: some countries apply stringent confidentiality standards, while others have a more open approach based on the principle that the public interest takes precedence (Rocha 2016).

In practice, however, EOI between tax authorities "requires that each competent authority be assured that the other will treat with proper confidence the information which it obtains in the course of their co-operation […]" (OECD 2012b, 7). Supply of information can be refused, if an "acceptable" level of protection is not guaranteed in the requesting state. Reflecting this practice, the MCAAT leaves all doors open: confidentiality is based on the domestic law of the receiving state (relative standard), but "in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law" (absolute standard) (MCAAT, Art. 22). Switzerland could suspend the exchange of information if appropriate safeguards were not in place or if there were a breach in confidentiality.

Confidentiality requirements also apply to Switzerland as the state supplying tax information in response to a request. In Switzerland, administrative personnel fulfilling EOI functions are bound to confidentiality. Accordingly, very little information is published regarding requests received. The Federal Tax Administration publishes aggregate statistics on the overall number of requests submitted and received (Swiss Federal Tax Administration 2018); other information is publicly released within the framework of the Global Forum's peer review. No one is entitled to access further data, beyond this information (LAAF art. 22i).[55] Confidentiality is also maintained towards other official bodies, with the exception of judicial and administrative bodies authorized by the Federal Tax Administration, or when disclosure is authorized under Swiss law or an applicable tax treaty (LAAF, art. 22).[56] These secrecy provisions – as *lex specialis* – prevail over the general requirement for openness and transparency enshrined in the Federal Act on Transparency and Access to Public Government Information, which states that all government information is public, subject to the exceptions provided for by law.

More complex data protection and confidentiality requirements apply in the context of the automatic exchange of financial account information and CbC reports, as discussed in Chapter 5.

4.9 Taxpayer's Procedural Rights

As emphasized in Chapter 1, Switzerland has strong rules and procedures regarding taxpayers' rights in the context of exchange on request and spontaneous exchange of tax information. Under Swiss law (LAAF),[57] the person targeted by the information request as well as all persons entitled to appeal[58] must be notified in writing, prior to exchange, regarding the nature and extent of information to be transmitted to the requesting state. The person in question has the right to inspect the file (in full, including disclosure of details about the requesting authority)[59] and to appeal (the latter suspending the exchange).[60]

55 Loi sur l'assistance administrative fiscale, LAAF, SR 651.1.

56 LAAF, SR 651.1.

57 LAAF, SR 651.1.

58 Persons entitled to appeal are defined in article 48 of Federal Act of 20 December 1968 on Administrative Procedure (SR 172.021) and include persons specifically affected by the decision concerned.

59 The LAAF provides for a right to inspect the file, including the request letter, to the persons entitled to appeal, which includes the person concerned by the request (article 15(1) of the LAAF (SR 651.1)).

60 Under Swiss law, the persons concerned by the information request, as well as all other persons with an interest in the EOI have a right to appeal. The information will not be exchanged pending resolution of the appeal by the federal Administrative Court (article 19(3) of the LAAF (SR 651.1); OECD 2016c, para. 312). The appeal procedure could suspend the information exchange for more than one year. The Swiss authorities reviewed appeals during the period under peer review and indicated that a judgment was rendered in the first instance (by the federal Administrative Tribunal) in 213 days on average; the appeal in the second instance (by the federal tribunal) took 100 days on average, in addition to the 213 days of the first instance judgment (OECD 2016c, para. 258).

These procedural rights are deeply anchored in Swiss law and practice, and may delay the information exchange (in case of suspensive appeal), hinder its effectiveness (when the informed taxpayer conceals the evidence), and deter requests. Notably, any person with a right to appeal can exercise his/her right to see the file, including the request letter itself. This letter displays details about the requesting authority and staff, and its disclosure could raise the prospect of political pressures and threats of retaliation in fragile countries.

It is important to stress that Switzerland has made exceptions and pragmatically relaxed some of these procedural safeguards for certain cases. The LAAF[61] has been amended to include an exception to prior notification in cases where the information request is very urgent in nature or notification is likely to undermine the chance of successful investigation by the requesting jurisdiction (Art. 21a of the LAAF).[62] The amended LAAF also provides for exceptions to the right to inspect the files, if this would impede the ongoing investigation of the person's tax affairs.[63] The exceptions can be more or less broadly applied, and provide a way to introduce flexibility in exchange procedures without upsetting the original balance between transparency concerns and taxpayer rights.

4.10 Summary observations

To sum up, there is leeway to use EOIR mechanisms for the purpose of identifying and assessing price manipulation in relation to commodity transactions. Nevertheless, the operational principles and procedural requirements of EOIR can, in practice, frustrate effective exchange of information for such purposes. There is a need to flexibly adjust procedures and ease some requirements in order to accommodate developing countries. Key issues include:

- Easing of the identification requirements in the request letter;
- Flexible interpretation of trade secrets;
- Relaxing the requirement that the requesting party be capable of obtaining the same type of information under its own laws in similar circumstances (reciprocity);
- Flexible, broad interpretation of information deemed obtainable in the normal course of administration;
- Pragmatic interpretation of the specialty principle;
- Admissibility of requests based on "leaked" data;
- Relaxing of taxpayer rights via broad application of exceptions to prior-notification rights and the right to inspect the file; and ensuring that the details of the requesting unit/person are kept confidential in cases of appeal.

In recent years, there has been some relaxation of Switzerland's procedural requirements regarding EOIR. Under peer review pressure from the Global Forum (OECD 2011a, 2015b and 2016c), Switzerland took active steps to ease some constraints and hurdles limiting the effectiveness of its EOI on request mechanism. As discussed in above, important reforms included the introduction of exceptions to prior notification rules and inspection rights, the admissibility of "group requests", an easing of Swiss practice with regard to stolen data, and relaxing of identification requirements in the information request, e.g. the need to specifically identify the taxpayer and the information holder. These reforms point to efforts by the Swiss administration to advance the transparency agenda while maintaining a balance with competing interests and concerns.[64]

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61 *Loi sur l'assistance administrative fiscale*, LAAF (SR 651.1).

62 Art. 21a of the LAAF (SR 651.1) reads as follows: *Exceptionnellement, l'AFC n'informe d'une demande les personnes habilitées à recourir par une décision qu'après la transmission des renseignements, lorsque l'autorité requérante établit de manière vraisemblable que l'information préalable des personnes habilitées à recourir compromettrait le but de l'assistance administrative et l'aboutissement de son enquête.* As reviewed in the course of the Peer Review process 2nd phase, "The explanatory note of 16 October 2013 on the modification (message du 16 octobre 2013 sur la modification de la loi sur l'assistance administrative en matière fiscale) explains that the first condition ("the administrative assistance would be defeated") can include cases where the prior notification could encourage the person concerned to destroy evidence, and that the second condition ("the success of its investigation would be thwarted") can include cases of an urgent nature. When the exception applies, the notification is made after the exchange of information, but the law does not set any deadlines to do so" (OECD 2016c, para. 318-19).

63 Under article 15(2) of the LAAF (SR 651.1), this right can be dispensed "where the requesting party demonstrates grounds for secrecy (des motifs vraisemblables) for maintaining the confidentiality of the process or with respect to certain contents of the file" (OECD 2016c, para. 331). The explanatory note to the LAAF states: *Conformément à l'art. 27 PA, qui s'applique également en l'espèce (cf. art. 5, al. 1), l'AFC peut refuser la consultation des pièces si des intérêts publics importants de la Confédération ou des cantons, des intérêts privés importants ou l'intérêt d'une enquête non encore close exigent que le secret soit gardé)"* (OECD 2016c, para. 331). In the context of the peer-review process, Switzerland has clarified that the exception would cover cases "where its EOI partner would not permit the release of the request because, for example, it may impede the ongoing investigation of the person's tax affairs" (OECD 2016c, para. 331).

64 With regard to the need to weigh and balance competing interests, the reader is referred to the concluding observations found in Chapter 1.

5 Preconditions for Exchange: The Example of Laos

A few developing countries that export primary commodities to or through Switzerland do not have any legal basis at all for exchange of tax-relevant information with Switzerland. This is the case with the Lao People's Democratic Republic. Laos has significant commodity exports to Switzerland. In particular, precious stones, gold, and copper are its top three exports to Switzerland. The country may have an interest to seek taxpayer-specific information from the Swiss tax authority to identify specific tax risks associated with these commodity transactions. Laos may also wish to seek non-taxpayer specific information, including regarding risk-analysis techniques or tax avoidance or evasion schemes, enabling its authorities to gain a better understanding of potential tax evasion and avoidance in the sectors concerned.

What options does Laos have to gain access to tax-relevant information for the purpose of improving transparency in commodity trading? Through diplomatic channels, Laos may express an interest in concluding an EOIR agreement with Switzerland that respects the international transparency standard (bilateral channel). It may submit a request to be invited to sign and ratify the MCAAT, on the basis of which information exchange can occur on request, spontaneously, or automatically (multilateral channel). Or it may join the Global Forum and publicly declare its political commitment to implementing the AEOI standard. In all cases, there are several preconditions to fulfil.

5.1 Bilateral EOIR Negotiations

As discussed, the exchange-on-request procedure is less stringent than the automatic-exchange procedures in terms of foundational blocks and underpinnings. Note, however, that Switzerland's EOIR practice is reciprocal, which means that Laos should have the domestic capacity to collect equivalent information for reciprocal exchange. If the reciprocity requirement were interpreted narrowly, Laos would need to put rules in place – namely, reporting and due-diligence requirements on companies and financial institutions – to ensure that: ownership and identity information, including on beneficial owners, is available for all entities and arrangements; that reliable accounting records are kept by all relevant entities; and that banking information is available for all account holders (OECD 2016a, ToR A.1, A.2, A.3). The tax authority in Laos should have the authority to gather and compel the necessary information from information holders. At the same time, even if the reciprocity requirement were relaxed, other hurdles would remain. In the event of non-reciprocal exchange, Switzerland would still examine Laos's confidentiality rules and practices as regards tax information. If a narrow approach were to prevail, it might require that Laos grant a level of secrecy protection comparable to the one conferred under Swiss laws and practices, before any exchange would occur (see also Chapter 4).

5.2 Joining MCAAT

On the other hand, adoption of a multilateral approach would not be entirely straightforward either. Laos is not a Member of the OECD or the Council of Europe and can become party to the Convention upon invitation only. It could send a request to be invited to the Depository of the Convention – either to the OECD or the Council of Europe secretariats. The Depository would then forward Laos's request to the Parties to the Convention. The decision to invite Laos would be made by consensus among the Parties through the Coordinating Body. When making their decision, the Parties would consider, among other things, Laos's confidentiality rules and practices and whether the country is already a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes (OECD and the Council of Europe). Ensuring confidentiality would be "a matter of both the legal framework as well as having systems and procedures in place to ensure that the legal framework is respected in practice" (OECD and the Council of Europe n.a.).

5.3 Activating Automatic Exchange Procedures

Laos has not committed to participate in the automatic exchange of financial account information. If it were to consider this route, Laos would need to implement the "foundational steps" to implement the AEOI standard (Global Forum on Transparency and Exchange of Information for Tax Purposes 2014, 7-8).

First, Laos would be required to translate a host of reporting and due diligence requirements into domestic law. As regards the exchange of financial account information, domestic legislation must be in place specifying "the financial institutions that need to report; the accounts they need to report on; the due diligence procedures to determine which accounts they need to report; and the information to be reported" (OECD 2015 b, 10). In particular, there must be in place laws and regulations obliging financial institutions to identify non-resident accounts, based on documentary evidence of residence (past accounts) or self-certification (new accounts); to trace the ultimate beneficial owner, when the account is held by a "passive entity" (pass-through approach); and to report a broad range of financial information to the local tax authority. Further, there must be in place laws and administrative or judicial procedures that enable the tax authority to obtain and provide the requested information. These "information-gathering measures" should allow tax authorities to seek and eventually compel information from the person targeted by the request, that is, the taxpayer being investigated, as well as from third parties that hold the information, including banks. Furthermore, internal administrative assistance and coordination procedures must be in place to enable exchange of information between the central tax authorities and other governmental entities, at the national and subnational level.

Second, Laos would need to set up administrative procedures and IT infrastructure to safely collect, report, process and store the information. The requirement includes "secure transmission channels and protocols, through encryption or physical measures or a combination of both", alongside appropriate operational security measures (OECD 2015 b, 28). These requirements are highly standardized and cannot be flexibly adjusted to suit local conditions.

Third, the country would undergo a preliminary confidentiality and data safeguard assessment, at both the legal and operational level. To be standard-compliant, it should have in place the laws, operational procedures, and IT infrastructure as laid down in the AEOI standard. As already discussed (see Chapter 1 and Chapter 4), the standard is "absolute": the AEOI standard (OECD 2017a and 2017c) specifies the data protection laws, operational procedures, and IT infrastructure that countries are expected to have in place before the first exchange. A Global Forum panel of experts, which includes an expert from Switzerland, will assess whether standard-compliant confidentiality and data safeguards are in place, give recommendations, and eventually define an action plan for implementation. Switzerland is entitled to delay, suspend, or limit the scope of the exchange with a "listed" jurisdiction until such time as the action plan is successfully implemented.

Finally, there should be a legal basis (a treaty) for the exchange (a DTC/TIEA in place that permits automatic exchange under the standard, or the MCAAT) and, at the administrative level, separate agreements between competent authorities of participating jurisdictions to activate and "operationalize" the automatic exchange.

If such exchange were activated, Laos could only benefit from the exchange if it had the technical capacity to analyze and use large volumes of taxpayer-specific information exchanged in a standardized matter. It would need to decrypt and process bulk data and match the decoded data against tax returns declared in the country. This requires specialized skill sets, sophisticated IT infrastructure and services, and operational procedures.

5.4 Summary Observations

Stringent requirements – and a host of operational constraints, as discussed in Chapter 4 – limit the participation of poor countries in exchange procedures. As discussed, a reciprocal exchange is possible only if adequate laws and regulations are in place regarding the availability, gathering, and transmission of information. In particular, in order to engage in automatic exchange of information, countries must set up the needed legal, administrative, and technical framework for confidentiality, data protection, and proper use of information. These requirements are stringent and, in the context of automatic exchange procedures, non-negotiable. They pose compliance challenges for many developing countries. A key challenge ahead is how to move beyond a "one-size-fits-all" approach and establish operationally relevant EOI mechanisms with capacity-constrained countries. Questions also arise about the opportunity costs and cost effectiveness of setting up exchange-of-information mechanisms in comparison with alternative policy options.

6 Conclusions and Recommendations

Transparency and exchange of information in tax matters is high on the political agenda, but some major challenges must be addressed for the potential benefits to be realized in practice. As discussed, exchange-of-information mechanisms can provide useful information to investigate trade mispricing, but there are significant operational hurdles that tend to inhibit their use for this purpose. Further, reciprocal, automatic exchanges are extremely costly, and complex to set up. Countries need to have in place the needed laws, procedures, and IT infrastructure to ensure that "as a sending country material can be collected and as a receiving country material can be used effectively" (Sadiq and Sawyer 2016, 114). This places an onerous administrative burden on developing countries that generally do not have the same level of administrative resources, IT infrastructure, or intellectual capital as more advanced economies (Sadiq and Sawyer 2016; Monkam, Ibrahim and von Haldenwang 2018). Questions remain as to the cost effectiveness of EOI mechanisms as a means to tackle commodity trade mispricing, when compared with alternative regulatory options. In Forstater's words, "transparency as a means to an end suggests that we should consider how best to achieve particular objectives, and assess possible approaches" (Forstater 2017, at 5).

How then to move forward on this agenda item? Some options for action are outlined below. A four-pronged approach is recommended to improve the effectiveness of exchange mechanisms for tackling commodity trade-related IFFs. The recommended approach encompasses: (1) greater flexibility in the use of tax information to track down and report on mispricing related to commodity trading; (2) pragmatic, targeted relaxation of non-essential procedural requirements; (3) establishment of a legal basis to exchange information with lower-income countries; and (4) transactional, phased-in creation of EOI capacity in poor countries via peer-to-peer knowledge transfer that pools expertise from different institutional stakeholders in Switzerland. These four areas of intervention are interlocking and should be pursued in parallel. At the same time, it is important to explore alternative or complementary approaches that may provide more cost-effective means to tackle tax risks associated with commodity trading. In particular, more attention is needed to measures and tools specifically geared to counter price manipulation in cross-border transactions. Related analysis and efforts should focus on contract transparency and contract allocation procedures, valuation rules and techniques, customs cooperation and enforcement, traceability systems, and company obligations regarding due diligence. It is also important to consider off-track alternatives, such as simplified transfer pricing methods, which deserve further analysis as potential options to counter mispricing.

The present analysis is informed by and builds on previous reports on Swiss policy coherence for development in international taxation (Meyer-Nandi 2018a, Matteotti 2018).

6.1 Enabling broader use of tax information

As discussed earlier (Chapter 4), existing rules sometimes allow receiving states to use tax information received for non-tax purposes, for example, to track down trade-based money laundering – but only under strict conditions. In principle, information transmitted and received may only be used for the purpose for which it is intended under the particular exchange agreement (specialty principle); and it shall not be further disclosed beyond the tax administration (secrecy rules).

Narrow application of these rules could prevent use of EOI mechanisms to investigate commodity trade mispricing. For example, under standard exchange clauses, information received by tax administrations could not be disclosed further to customs units or other official bodies in the receiving country, if not specifically consented to by the sending state (refer to Chapter 4). A narrow interpretation of this rule could prevent the flow of information between tax and customs units in the receiving state, ruling out cross-checking of tax and customs data – a far-reaching technique used to track down discrepancies in tax and customs declarations, as discussed in Chapter 3. A narrow interpretation could also prevent the use of the new data generated by EOI procedures for statistical and reporting purposes, beyond those specifically provided for in domestic law. Issues of disclosure and proper use of the information, for example, may prevent the tax unit in charge of the exchange from passing on the information to statistical and economic units for data processing, within and outside the tax administration. Finally, stringent conditions on "appropriate use" currently effectively preclude the use of CbC reports to implement simplified transfer-pricing schemes: CbC reports are not to be used to make automatic adjustments of taxpayer's income on the basis of an allocation formula (refer to Chapter 4).

However, there is room to move forward, pragmatically, through minor changes in administrative practices and the law. The following aspects are key:

First, the specialty principle should be interpreted in a broad and pragmatic manner. For example, an information request by Ghana connected with an investigation of trade misinvoicing should be acceptable if grounded in income tax laws (covered by the EOI clause in the Swiss–Ghana DTA), even if the ultimate purpose is the enforcement of customs duties or exchange controls (beyond the scope of the exchange). The Swiss administration could view favourably flows of information between tax and customs units in receiving partner countries, for purposes of data matching, and generally endorse it as a matter of practice. Greater cooperation between tax and customs administrations is indeed critical to track down mispricing, particularly in countries that have separate administrations for customs duties and income taxes.

Second, as part of a concerted international initiative, Switzerland could make use of the newly generated data for measurement and reporting purposes on behalf of the Sustainable Development Goals (SDGs) that deal with IFFs. The corresponding multilateral framework provides some openings for such use, by allowing the application of information received by means of the CbC Report for economic and statistical analysis "where appropriate" (OECD 2015c, section 5, para. 2). Note in this respect that the information generated by the exchange procedures can help measure specific dimensions of IFFs. For example, non-resident financial account data can be used to construct a specific "undeclared offshore assets indicator" (Cobham and Janský 2018).[65] Likewise, the OECD CbC reporting data may be used to construct an indicator of misaligned profits (Cobham and Janský 2018).[66] These indicators would not breach any confidentiality requirement, since only the aggregate, de-identified information would be released to the public, with the raw data kept confidential. There would be no costs beyond those associated with the processing of readily available information, since the indicators would leverage the existing exchange procedures. However, there may be transaction costs associated with setting up new operational procedures and legal bases: countries may need to adopt internal procedures for the transmission of information to statistical departments within and outside the tax administration, and may need to agree on confidentiality protocols regarding raw data. They may also need to adopt a domestic rule allowing for the use of information for country reporting on the SDGs.

Finally, countries could also consider relaxing the "appropriate use" condition of CbC reporting information when the CbC reporting standard is reviewed in 2020. As discussed earlier (see Chapter 3), countries can only use CbC reporting information to perform high-level transfer-pricing risk assessment and economic and statistical analysis. It is worth considering introducing some flexibility to allow capacity-constrained countries to use the data from the CbC reports when making adjustments to taxpayer income on the basis of income allocation formulas. This could be part of a strategic shift towards the implementation of simplified transfer-pricing methods in poor countries that lack the fiscal capacity for sophisticated transfer-pricing risk assessments and audits. In parallel or as an alternative, the CbC reporting template could be amended to include detailed transaction-level data that enable tax authorities to perform detailed transfer-pricing analysis.

6.2 Loosening unnecessary constraints

As discussed in Chapter 4, significant operational constraints preclude the use of EOI mechanisms for the purpose of tackling commodity trade mispricing. Should Switzerland unilaterally relax the requirements for such information exchange, so as to enable more flexible use of exchange instruments when investigating commodity trade related IFFs? This might mean cutting back on some operational principles that currently "frame" Swiss administrative practice regarding exchange of tax information. Note in this respect that Switzerland has already taken active steps to ease some constraints and hurdles that limited the effectiveness of its exchange-of-information on request mechanism (see Chapter 4). It is also important to consider the political commitments that Switzerland has taken towards curbing commodity trade-related IFFs and enhancing domestic resource mobilization in poor countries (Addis Tax Initiative Declaration). These commitments can build momentum towards loosening unnecessary requirements. They further emphasize transparency aims and enlarge the scope of manoeuvre for future reforms. The key challenge is to relax

65 Defined as "the excess of the value of citizens" assets declared by participating jurisdictions under the OECD Common Reporting Standard (CRS), over the value declared by citizens themselves for tax purposes to their tax authorities" (Cobham and Janský 2018).

66 Calculated as "the total excess profits declared in jurisdictions with a greater share of profits than would be aligned with their share of economic activity" (Cobham and Janský 2018).

these requirements without upsetting the balance between competing interests that Swiss legislation has striven for. In order words, the balance can be pushed further towards transparency concerns, but it cannot be tilted too far away from concerns about taxpayer rights or about a fair allocation of responsibilities and costs between requesting and supplying jurisdictions. The proposed changes described below chart a possible path forward.

Targeted easing of reciprocity

One suggestion is that Switzerland supply information – automatically or on request – to poor countries on a non-reciprocal basis (cf. Meyer-Nandi 2018a and Matteotti 2018). Officially lifting the reciprocity requirement would enable information exchange with countries that do not (yet) have the administrative capacity to gather and transmit equivalent information on their side. "Targeted" loosening of the reciprocity requirement would not be too costly for Switzerland, for several reasons. First, with reference to current practices of exchange on request, Switzerland is already supplying information on a de facto non-reciprocal basis: in 2017, it received 18,164 requests, compared with 18 requests submitted from the Swiss side (Swiss Federal Tax Administration 2018). Note also that – even regarding procedures of automatic exchange – the reciprocity requirement is not written into the law: a change in administrative practice could suffice to loosen it enough to accommodate poor countries. It may not even be necessary to eliminate the requirement entirely: it could be enough to interpret it pragmatically, for example, taking it as a future-oriented commitment by Switzerland's exchange partner to engage reciprocally in supplying information when it finally has the needed legal, operational, and IT infrastructure in place. Second, a non-reciprocal exchange could still require developing countries to have adequate safeguards to ensure confidentially and data protection. In this respect, a relaxation of reciprocity need not further erode taxpayers' privacy rights. Finally, Switzerland could opt to lift reciprocity requirements only with a few specific countries, and only for a transitional, phase-in period, possibly on a trial basis in the context of technical assistance projects (Meyer-Nandi 2018a). It could keep the reciprocity requirements in place for countries of interest to Switzerland as suppliers of information, including all treaty hub countries, preferential regime countries, or headquarter countries, whatever their development status or income level.

Spontaneous sharing (or publication) of non-sensitive, de-identified information

Further, Switzerland could consider spontaneously sharing aggregate, de-identified information with its developing-country partners, as stated in the Global Forum roadmap (Global Forum on Transparency and Exchange of Information for Tax Purposes 2014, at 20). Switzerland could spontaneously inform Ghana, for example, that there are x number of depository accounts held in Switzerland by Ghanaian residents, and their overall amount. Given that only anonymous totals would be revealed, no confidentiality rules would be breached; and Ghana would not need to have specific domestic confidentiality and data protection standards in place for the exchange to occur. At the same time, there are two possible hurdles to such a course of action. First, Switzerland would still require legal authority to spontaneously share the data. In the case of Ghana, the Multilateral Convention on Administrative Assistance in Tax Matters (ratified by both Switzerland and Ghana) could provide sufficient legal bases. However, in other cases (e.g. Laos), there would be no legal basis at all to spontaneously share the information. Second, this type of information is not already held by the Swiss tax administration: the information must first be collected by financial institutions and then furnished to the Swiss tax authority. This would involve costs for both the financial institutions providing the information and for the Swiss tax administration that verifies and transmits the data to other countries. Concerns about competitive costs might also arise if other significant financial centres were to forgo such procedures. The core question is whether Switzerland is willing to assume such costs of its own accord, particularly in light of its international commitments to enhance domestic resource mobilization in poor countries (Addis Ababa Action Agenda, Addis Tax Initiative). In order to limit costs, Switzerland might decide to spontaneously share aggregate data with a specific list of developing countries, on a trial basis, in the context of targeted technical assistance projects eventually linked to the objective of curbing commodity trade-related IFFs. The list might include Switzerland's focus countries (SDC and SECO lists) that have committed to implement the AEOI, but still lack the capacity to meet the AEOI confidentiality and data-protection standards.

Another key question is whether Switzerland should consider publishing aggregate, de-identified information about accounts held in Switzerland, as piloted by Australia (Meyer-Nandi 2018a). According to some views, such a measure would increase pressure on politicians in countries where political or economic elites oppose the introduction of AEOI due to their own exposure to undeclared offshore money (Meyer-Nandi 2018a). Others question the utility of such public release, as it might threaten the growing policy consensus

in favour of AEOI (interview reports). A particularly thorny issue is the publication of CbC reports. These documents provide insights into companies' production and sales structure, and may reveal commercially sensitive information. Eventually, the question is whether publication efficiently serves the objective of combating tax evasion. The issue has already been brought before the French Constitutional Court, which declared the CbC publication requirement unconstitutional because it was disproportionate means to the ends, i.e. tracking down tax evasion.[67] To some extent, there is an unavoidable trade-off involved in greater tax transparency and public disclosure: the broader and deeper the administrative exchange of commercially sensitive information, the greater the risk for business and the stronger the need for safeguards against abuse.

A pragmatic interpretation of client procedures
With regard to taxpayers' rights and safeguards (refer to Chapter 4), the Global Forum has recommended that Switzerland endorse broad application of exceptions to prior notification, so as to ensure that rights and safeguards enshrined in "client procedures" do not unduly prevent or delay effective exchange of information (OECD 2016c, 98-106). As regards EOI requests based on stolen data (Chapter 4), Switzerland has been advised to exercise flexibility when considering how requesting jurisdictions came to possess particular information (ibid.). These are two areas where the balance could be pushed further towards transparency by means of moderate changes in administrative practice, without encroaching on key safeguards. As discussed in Chapter 4, Switzerland is moving in this direction.

Cutting back on other requirements?
It may be difficult to reduce other requirements, particularly as regards confidentiality and data protection. As discussed throughout this report, the confidentiality and data-protection safeguards that are built into exchange procedures are key to the normative balance behind the relevant agreements. For example, with regard to automatic exchange, erosion of taxpayers' procedural rights is balanced by stringent confidentiality safeguards – laws, operational procedures, and IT infrastructure. If confidentiality and data-protection safeguards were eased too much, it could erode and tilt the normative balance too far away from protection of taxpayers' rights – an option not acceptable under Swiss law. The same would be true if changes in law and practice enabled more far-reaching use of tax information to track down mispricing, including through enhanced cooperation between tax and customs units. Confidentiality and data-protection rules would still hold, and possibly even require strengthening. This points to the importance of technical cooperation to assist developing countries in meeting confidentiality and data-protection requirements. Some additional options for action are outlined below.

6.3 Grassroots Technical Assistance

Developing countries, and low-income countries in particular, require practical capacity building and transfer of know-how and technology to implement EOI standards. Switzerland currently supports and contributes to related capacity-building efforts by providing tax-related development co-operation to developing countries on a bilateral, regional[68], and multilateral[69] basis. In line with the Global Forum Roadmap, Switzerland could "deepen" its cooperation in this issue area by volunteering and testing pioneering EOI practices as a partner in a pilot project within the Global Forum, or outside of it in an independent capacity (Global Forum on Transparency and Exchange of Information for Tax Purposes 2014, 22-23; Meyer-Nandi 2018a). The focus would be on peer-to-peer, transactional knowledge transfer, including by temporarily sending support staff to tax administrations in developing countries. The proposed approach would be modular and phased-in: it would aim to assist with medium-term preparative and transitional arrangements that might eventually lead to full-fledged EOI mechanisms. Exchange of tax information could be implemented as part of training and technical assistance programmes, through operational synergies between cooperation and development units and tax authorities. In Switzerland, this would involve strengthened interactions and coordination between the Federal Tax Administration (FTA), the State Secretariat for Economic Affairs (SECO),

67 Décision n° 2016-741 DC du 8 décembre 2016, para. 103. See on this point Matteotti 2018.

68 Swiss-sponsored regional instruments and initiatives include the African Tax Administration Forum (ATAF), the *Centro Inter-Americano de Administraciones Tributarias* (CIAT); the IMF Regional Technical Assistance Centres; and the UNODC Mentor Programme against Money Laundering, Proceeds of Crime and Financing of Terrorism.

69 Switzerland supports a few multi-donor programmes providing technical assistance and capacity development in tax matters. These include the IMF Revenue Mobilization Trust Fund (RMTF), the IMF Topical Trust Fund on Managing Natural Resource Wealth (TTF MNRW), the IMF Topical Trust Fund on Anti-Money Laundering/Combating the Financing of Terrorism (TFF AML/CFT), the World Bank Global Tax Programme (GTP), the Extractive Industries Transparency Initiative (EITI), and Tax Administration Diagnostic and Assessment Tools.

the State Secretariat for International Financial Matters (SIF) and the Swiss Agency for Development and Cooperation (SDC). A pragmatic approach would involve:

- Establishment of a framework for operational cooperation between the relevant institutions. This could take the form of a Memorandum of Understanding (MoU) entered into between key Swiss agencies (FTA, SECO, SIF, SDC) and the competent tax authority in the targeted country, for the purpose of rendering customized development assistance in fiscal matters;
- Promotion of knowledge-sharing regarding the procedural requirements and operational principles that underpin and frame EOI in tax matters. This requires an interactive framework, for example, a shared knowledge platform, and iterative processes of coaching and practice through regular exchanges and the secondment of staff to a developing country tax administration;
- Rendering of targeted technical assistance to conduct transfer-pricing risk assessment[70] in relation to commodity transactions, emphasizing hands-on training and capacity building within the tax authority in the beneficiary country;
- Deployment of technology packages and training to securely transmit data and decode and match received data.

The aim would be to satisfy the minimum technical requirements for establishment of functioning EOI, and enabling increasing capacity in this highly technical field via a progressive process of coaching and practice. In the medium term, this type of intervention could yield more concrete and lasting results than the negotiation of EOI treaties that are likely to remain on paper, leading to little or no implementation in practice.

In fact, Switzerland is moving in this direction. In particular, the Framework Agreement between the Swiss FTA and SECO could provide the "foundation" for Swiss pilot projects on EOI (Meyer-Nandi 2018a). However, the initiative is still relatively small. The Framework Agreement allows SECO to involve some staff from FTA in its development projects in tax matters – something that has occurred in Burkina Faso, for example.[71] The FTA is under significant administrative burden and resource strain to implement the automatic exchange procedures. The associated workload inevitably affects the level of engagement that the FTA can offer in other areas. Still, the Framework represents a "milestone" that points in the right direction (Mayer 2018), favouring institutional convergence and synergies – SECO would draw specific tax expertise from the FTA, while the FTA would gain exposure to development issues in tax matters.

Nevertheless, resource constraints and the need to allocate resources effectively and efficiently – also considering opportunity costs – require careful examination. Many developing countries remain incapable of benefitting from EOI, particularly regarding exchange of bulk data. As discussed in Chapter 5, implementing the automatic exchange standard in these countries requires long-term, sequenced reform of their tax systems. This explains some reluctance on the part of the Swiss administration to allocate scarce resources to setting up EOI frameworks where the foundations for exchange are missing. A proper sequenced approach would require first establishing the administrative and information technology infrastructure of a modern tax administration, then negotiating the prospects and terms of information exchange. And, as discussed, the level of engagement that the FTA can offer is limited, especially in light of the heavy burden that current automatic exchange procedures put on FTA staff.

Alignment of resources, enhanced cooperation, and rational use of available mechanisms are key to overcome resource constraints. If a particular government submits a request for support with its EOI system, all concerned Swiss actors could meet together in order to align and coordinate their possible efforts in this area. Depending on the requesting administration's needs, different options could be discussed, e.g. the possibility of launching a new "deep" programme working with ministries and local agencies[72] on supporting capacity regarding EOI matters, or the use of multilateral or regional funding.

70 This is the direction in which SECO is moving. It has moved from general support on transfer-pricing issues to targeted support geared to assess transfer-pricing risks in specific industries that raise specific transfer-pricing concerns, including the extractive, telecom, and banking sectors.

71 SECO also has a technical support agreement with Ghana. No activity has taken place yet, due to multiple concurrent donor activities that put strain on Ghana's absorptive capacity.

72 This could be the case for priority or focus countries for either the SDC (e.g. Laos) or SECO (e.g. Ghana).

6.4 Integrate Poor Countries

As discussed in Chapter 2, Switzerland's EOI network does not comprehensively cover developing countries whose leading exports to Switzerland include the main primary commodities traded through the Swiss hub. The most vulnerable among them (low-income countries) barely have any legal basis for exchange of (tax) information with Switzerland. A key challenge ahead is to establish operationally relevant EOI mechanisms with these countries. The foundational step is establishing a legal basis for the exchange of information with these counties. So far, this has been done by means of treaties, by signing standard-compliant DTAs, and by establishing TIEAs. In addition, the MCAAT – applicable with respect to Switzerland since 1 January 2017 – has increased the number of partner countries with which Switzerland can exchange information upon request in a standard-compliant manner. Automatic exchanges require separate competent authority agreements to activate and "operationalize" the automatic exchange.

There are a number of options available to Switzerland for integration of poor, capacity-constrained countries in its exchange network.

First, Switzerland could favour standalone tax information-exchange arrangements, independent of the negotiation of DTAs. Capacity-constrained countries could then exchange information with Switzerland based primarily on a TIEA, or by acceding to the MCAAT. Unlike DTAs, TIEAs and the MCAAT establish EOI mechanisms without the risk of lock-in of "fiscal policy space" in the source country (e.g. caps on withholding taxes or other limits on taxation of capital gains). Under DTAs, poor countries are typically caught in a "do-ut-des" situation, whereby they receive limited benefits (information access) in exchange for costly concessions like reduced taxation rights over Swiss investments. Thus, by acceding to the MCAAT, Switzerland is moving in the right direction from the perspective of low-income countries.

Second, Switzerland could refrain from introducing excessively restrictive review criteria, beyond standard requirements, in its exchange arrangements (Meyer-Nandi 2018a). Worthy of note here is the requirement that Switzerland's exchange partners have an extensive AEOI network in place, including relevant competing financial centres.[73] This requirement has been judged "highly incoherent with Switzerland's development policy" (Meyer-Nandi 2018a, at 68): if other major financial centres opt for a similar restriction, it could result in the exclusion of some developing countries (Meyer-Nandi 2018a, 29). By contrast, others see the requirement as serving to "counteract a possible circumvention of an AEOI activated with Switzerland": according to this view, it "incentivizes" global uptake of the AEOI standard and contributes to establishing a level playing field – a shared concern among the G20 (Matteotti 2018, at 7; OECD 2018b; SIF interview). Some interviewees for the present study suggested that the requirement is no longer valid, since Switzerland has committed to extending its AEOI network to all interested countries that meet the AEOI standards (refer to Chapter 3). Further, in order to prevent circumvention of the global AEOI-standard, the OECD requires that all participating jurisdictions implement the AEOI with all interested countries: by default, most countries will have an extensive AEOI network in place. Further, Switzerland is advised not to link exchange-of-information deals with market-access concessions or other political considerations, as previously raised in some dispatches of the Federal Council, since this would not be a standard-compliant practice (cf. Art. 39 of Act Automatic Exchange).[74]

Finally, Switzerland could actively reconsider taking the "unilateral route" to information exchange. In this approach, information exchange would be based on a domestic-law provision "operationalized" by MoUs, rather than by bilateral exchange treaties. This already occurs in other areas of administrative assistance. For example, as discussed in Bürgi and Meyer (2014), FINMA is entitled to transmit non-public information and case-related documents to foreign financial market supervisory authorities based on Art. 42 of the Federal Law of 22 June 2007 on the Swiss Financial Market Supervisory Authority[75] and/or Art. 38 of the Federal Law of 24 March 1995 via the Stock Exchanges and Securities trading.[76] Switzerland extends administrative assistance under these channels if the requesting state promises reciprocal action and confidential

73 This is one of the review criteria listed in the federal decree of 6 December 2017 (BBI 2018 39), which sets out the review criteria that the federal Council should follow before the AEOI can take place (refer to chapter 3).

74 The listing of AEOI exchange partners and access treaties for Swiss financial services to their markets both require approbation by Parliament, as jointly regulated under Art. 39 of the Federal Act on the Automatic Exchange of Information (LEAR, SR 653.11).

75 Swiss Financial Market Supervision Act, FINMAG; SR 956.1

76 Stock Exchange Act, SESTA; SR 954.1

treatment of the data. To operationalize the mutual "commitment", FINMA has entered into MoUs with many countries. According to Bürgi and Meyer, this procedure has operated effectively and could serve as an example of simple and reciprocal administrative assistance in tax matters. In October 2014, the Federal Council launched the consultation procedure on the Federal Act on the Unilateral Application of the OECD Standard on the Exchange of Information (EoISA). Eventually, the Federal Council decided not to pursue the project, based on the fact that Switzerland had in the meantime updated and expanded its EOIR treaty network, and acceded to the MAACT. Is the unilateral route sought by the EoISA now redundant? In the view of the present authors, a domestic law provision may still be relevant, in particular because lower-income countries still have scarcely any legal basis for exchange of information with Switzerland in tax matters. A domestic law provision could provide a legal basis for exchange of information with poor countries on a trial basis, in the medium-term, in the context of pilot technical assistance projects aimed at building the foundational blocks for full-fledged exchange of information. Operationalized using ad hoc MoUs, a domestic provision could enable a tailor-made approach to implementation, beyond the "one size fits all" solutions of the existing treaty-based EOI standards. A domestic law provision could also enable broader use of the information than the applicable exchange instrument, for example on behalf of reporting for the SDGs. However, in cases of conflict, international instruments and provisions could take precedence under Swiss law.

6.5 Beyond transparency in tax matters?

The analysis above has raised questions as to the cost effectiveness and opportunity costs of EOI as a mechanism for countering commodity trade-related IFFs. Indeed, exchange of information in tax matters is a complex, indirect tool for tackling commodity trade mispricing, and one that is heavily reliant on administrative capacity and discretion. It is also a costly endeavour. As discussed earlier (Chapter 5), setting up the legal, operational, and IT infrastructure underpinning automatic exchange procedures has significant cost implications for low-income countries. Further, these costly efforts may not translate into sustained capacity to operate exchange structures or to use the information exchanged. In poor countries, the cost assessment should take into account "the urgency of other basic domestic reforms; high costs of information technology infrastructure; human resources needs for analysing and using received data efficiently; difficulty of making legislative changes; and limited awareness of exchange of information practices" (Global Forum 2014, at 12). Exchange-on-request (and spontaneous) procedures are less demanding in terms of requirements in comparison with automatic-exchange procedures. However, significant operational constraints inhibit their use in investigating commodity trade mispricing (Chapter 4). Ultimately, capacity-constrained countries require simple, straightforward solutions that minimize administrative discretion and costs to operate.

With specific reference to tackling commodity trade mispricing, a number of policy options deserve further analysis to understand their legal and technical viability to identify or prevent mispricing. Policy areas that deserve further research include the following: "smart" use of benchmark prices for customs valuation and other tax purposes; simplified transfer-pricing methods that could reduce the administrative burden of detailed transactional analysis; greater use of withholding taxes as a simplified measure to discourage base erosion; "smart", hybrid public–private approaches to improve governments' oversight of the grade and quality of commodity exports; contract transparency, contract allocation procedures, and the possible role of blockchain technology in tendering; mixed soft/hard law approaches to "incentivize" and "deepen" supply-chain due diligence and reporting by traders and refiners, including by leveraging trade facilitation; and new approaches to deescalate international tax competition, with reference to overall low tax rates and excessive tax holidays. As discussed in Brugger, Engebretsen, and Waldmeier (forthcoming 2019), some of these alternatives – in particular, simplified transfer-pricing methods – have received only scant attention in the literature, and hardly meet with international acceptance.[77] The strong political momentum toward transparency and exchange of information in tax matters has to some extent pushed further to the margin these "off-track" solutions that deviate from "mainstream" (OECD-sponsored) approaches. Further research is needed to objectively assess their possible role as interim or systemic measures to counter commodity trade mispricing in capacity-constrained countries.

77 The OECD – the most authoritative standard-setter in international tax matters – does not endorse simplified transfer-pricing methods. Note however some attention to alternative methods drawn in other institutional fora (European Commission 2006; IMF 2018; United Nations 2017). Refer also to Avi-Yonah 2007; Cobham 2018a and 2018b; Gomes 2018; Grondona 2018; Baistrocchi 2006; BEPS Monitoring Group 2018; Durst 2010; Langbein 1986; Meyer 2018; Picciotto, 2012 and 2018; Readhead 2017a and 2018; Sheppard 2012 and 2013; Spencer 2012 and 2014.

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Annex

Annex 1: Exchange of Information on Request: Switzerland's Exchange Partners (cut-of date 2 October 2018)

Jurisdiction	Standard-compliant EOI with Switzerland	Region	Income group	Development status	LDC
Albania	Yes	Europe & Central Asia	Upper middle income	Transition	–
Algeria	No	Middle East & North Africa	Upper middle income	Developing	–
Andorra	Yes	Europe & Central Asia	High income	Developed	–
Anguilla (BOT)	Yes	Latin America & Caribbean	High income	Developing	–
Antigua and Barbuda (BOT)	No	Latin America & Caribbean	High income	Developing	–
Argentina	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Armenia	No	Europe & Central Asia	Lower middle income	Transition	–
Aruba (the Netherlands)	Yes	Latin America & Caribbean	High income	Developing	–
Australia	Yes	East Asia & Pacific	High income	Developed	–
Austria	Yes	Europe & Central Asia	High income	Developed	–
Azerbaijan	Yes	Europe & Central Asia	Upper middle income	Transition	–
Bahamas	Yes	Latin America & Caribbean	High income	Developing	–
Bahrain	Yes	Middle East & North Africa	High income	Developing	–
Bangladesh	No	South Asia	Lower middle income	Developing	x
Barbados	Yes	Latin America & Caribbean	High income	Developing	–
Belarus	No	Europe & Central Asia	Upper middle income	Transition	–
Belgium	Yes	Europe & Central Asia	High income	Developed	–
Belize	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Bermuda	Yes	North America	High income	Developed	–
Brazil	Yes	Latin America & Caribbean	Upper middle income	Developing	–
British Virgin Islands	Yes	Latin America & Caribbean	High income	Developing	–
Bulgaria	Yes	Europe & Central Asia	Upper middle income	Developed	–
Cameroon	Yes	Sub-Saharan Africa	Lower middle income	Developing	–
Canada	Yes	North America	High income	Developed	–
Cayman Islands	Yes	Latin America & Caribbean	High income	Developing	–
Chile	Yes	Latin America & Caribbean	High income	Developing	–
China	Yes	East Asia & Pacific	Upper middle income	Developing	–
Chinese Taipei	Yes	East Asia & Pacific	High income	Developing	–
Colombia	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Cook Islands	Yes	East Asia & Pacific	High income	Developing	–
Costa Rica	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Côte d'Ivoire	No	Sub-Saharan Africa	Lower middle income	Developing	–
Croatia	Yes	Europe & Central Asia	Upper middle income	Developed	–
Curaçao	Yes	Latin America & Caribbean	High income	Developing	–
Cyprus	Yes	Europe & Central Asia	High income	Developed	–
Czech Republic	Yes	Europe & Central Asia	High income	Developed	–
Denmark	Yes	Europe & Central Asia	High income	Developed	–
Dominica	No	Latin America & Caribbean	Upper middle income	Developing	–
Ecuador	No	Latin America & Caribbean	Upper middle income	Developing	–
Egypt	No	Middle East & North Africa	Lower middle income	Developing	–
El Salvador	Yes	Latin America & Caribbean	Lower middle income	Developing	–
Estonia	Yes	Europe & Central Asia	High income	Developed	–
Faroe Islands	Yes	Europe & Central Asia	High income	Developed	–
Finland	Yes	Europe & Central Asia	High income	Developed	–
France	Yes	Europe & Central Asia	High income	Developed	–
Gambia	No	Sub-Saharan Africa	Low income	Developing	x
Georgia	Yes	Europe & Central Asia	Lower middle income	Transition	–
Germany	Yes	Europe & Central Asia	High income	Developed	–
Ghana	Yes	Sub-Saharan Africa	Lower middle income	Developing	–
Gibraltar	Yes	Europe & Central Asia	High income	Developed	–
Greece	Yes	Europe & Central Asia	High income	Developed	–
Greenland	Yes	Europe & Central Asia	High income	Developed	–

Grenada	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Guatemala	Yes	Latin America & Caribbean	Lower middle income	Developing	–
Guernsey	Yes	Europe & Central Asia	High income	Developed	–
Hong Kong, China	Yes	East Asia & Pacific	High income	Developing	–
Hungary	Yes	Europe & Central Asia	High income	Developed	–
Iceland	Yes	Europe & Central Asia	High income	Developed	–
India	Yes	South Asia	Lower middle income	Developing	–
Indonesia	Yes	East Asia & Pacific	Lower middle income	Developing	–
Iran	No	Middle East & North Africa	Upper middle income	Developing	–
Ireland	Yes	Europe & Central Asia	High income	Developed	–
Isle of Man	Yes	Europe & Central Asia	High income	Developed	–
Israel	Yes	Middle East & North Africa	High income	Developed	–
Italy	Yes	Europe & Central Asia	High income	Developed	–
Jamaica	No	Latin America & Caribbean	Upper middle income	Developing	–
Japan	Yes	East Asia & Pacific	High income	Developed	–
Jersey	Yes	Europe & Central Asia	High income	Developed	–
Kazakhstan	Yes	Europe & Central Asia	Upper middle income	Transition	–
Korea (South)	Yes	East Asia & Pacific	High income	Developing	–
Kosovo	No	Europe & Central Asia	Lower middle income	Transition	–
Kuwait	No	Middle East & North Africa	High income	Developing	–
Kyrgyzstan	No	Europe & Central Asia	Lower middle income	Transition	–
Latvia	Yes	Europe & Central Asia	High income	Developed	–
Lebanon	Yes	Middle East & North Africa	Upper middle income	Developing	–
Liechtenstein	Yes	Europe & Central Asia	High income	Developed	–
Lithuania	Yes	Europe & Central Asia	High income	Developed	–
Luxembourg	Yes	Europe & Central Asia	High income	Developed	–
Macedonia	No	Europe & Central Asia	Upper middle income	Transition	–
Macau	Yes	East Asia & Pacific	High income	Developing	–
Malaysia	Yes	East Asia & Pacific	Upper middle income	Developing	–
Malawi	No	Sub-Saharan Africa	Low income	Developing	x
Malta	Yes	Middle East & North Africa	High income	Developed	–
Marshall Islands	Yes	East Asia & Pacific	Upper middle income	Developing	–
Mauritius	Yes	Sub-Saharan Africa	Upper middle income	Developing	–
Mexico	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Moldova	Yes	Europe & Central Asia	Lower middle income	Transition	–
Monaco	Yes	Europe & Central Asia	High income	Developed	–
Mongolia	No	East Asia & Pacific	Lower middle income	Developing	–
Montenegro	No	Europe & Central Asia	Upper middle income	Transition	–
Montserrat	Yes	Latin America & Caribbean	High income	Developing	–
Morocco	No	Middle East & North Africa	Lower middle income	Developing	–
Nauru	Yes	East Asia & Pacific	Upper middle income	Developing	–
Netherlands	Yes	Europe & Central Asia	High income	Developed	–
New Zealand	Yes	East Asia & Pacific	High income	Developed	–
Nigeria	Yes	Sub-Saharan Africa	Lower middle income	Developing	–
Niue	Yes	East Asia & Pacific	High income	Developing	–
Norway	Yes	Europe & Central Asia	High income	Developed	–
Oman	Yes	Middle East & North Africa	High income	Developing	–
Pakistan	Yes	South Asia	Lower middle income	Developing	–
Panama	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Peru	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Philippines	No	East Asia & Pacific	Lower middle income	Developing	–
Poland	Yes	Europe & Central Asia	High income	Developed	–
Portugal	Yes	Europe & Central Asia	High income	Developed	–
Qatar	Yes	Middle East & North Africa	High income	Developing	–
Romania	Yes	Europe & Central Asia	Upper middle income	Developed	–
Russia	Yes	Europe & Central Asia	Upper middle income	Transition	–
Saint Kitts and Nevis	Yes	Latin America & Caribbean	High income	Developing	–
Saint Lucia	Yes	Latin America & Caribbean	Upper middle income	Developing	–
Saint Vincent and the Grenadines	Yes	Latin America & Caribbean	Upper middle income	Developing	–

Samoa	Yes	East Asia & Pacific	Upper middle income	Developing	–
San Marino	Yes	Europe & Central Asia	High income	Developed	–
Saudi Arabia	Yes	Middle East & North Africa	High income	Developing	–
Senegal	Yes	Sub-Saharan Africa	Low income	Developing	x
Serbia	No	Europe & Central Asia	Upper middle income	Transition	–
Seychelles	Yes	Sub-Saharan Africa	High income	Developing	–
Singapore	Yes	East Asia & Pacific	High income	Developing	–
Sint Maarten	Yes	Latin America & Caribbean	High income	Developing	–
Slovak Republic	Yes	Europe & Central Asia	High income	Developed	–
Slovenia	Yes	Europe & Central Asia	High income	Developed	–
South Africa	Yes	Sub-Saharan Africa	Upper middle income	Developing	–
Spain	Yes	Europe & Central Asia	High income	Developed	–
Sri Lanka	No	South Asia	Lower middle income	Developing	–
Sweden	Yes	Europe & Central Asia	High income	Developed	–
Tajikistan	No	Europe & Central Asia	Lower middle income	Transition	–
Thailand	No	East Asia & Pacific	Upper middle income	Developing	–
Trinidad and Tobago	No	Latin America & Caribbean	High income	Developing	–
Tunisia	Yes	Middle East & North Africa	Lower middle income	Developing	–
Turkey	Yes	Europe & Central Asia	Upper middle income	Developing	–
Turkmenistan	Yes	Europe & Central Asia	Upper middle income	Transition	–
Turks and Caicos Islands	Yes	Latin America & Caribbean	High income	Developing	–
Uganda	Yes	Sub-Saharan Africa	Low income	Developing	x
Ukraine	Yes	Europe & Central Asia	Lower middle income	Transition	–
United Arab Emirates	Yes	Middle East & North Africa	High income	Developing	–
United Kingdom	Yes	Europe & Central Asia	High income	Developed	–
United States	No	North America	High income	Developed	–
Uruguay	Yes	Latin America & Caribbean	High income	Developing	–
Uzbekistan	Yes	Europe & Central Asia	Lower middle income	Transition	–
Venezuela	No	Latin America & Caribbean	Upper middle income	Developing	–
Viet Nam	No	East Asia & Pacific	Lower middle income	Developing	–
Zambia	No	Sub-Saharan Africa	Lower middle income	Developing	x

Sources and metadata:

The list of standard compliant exchange of information mechanisms was based on the Annex 2 list to Switzerland's peer review report - phase 2 (OECD 2016c). The list was updated based on the SIF list of Switzerland's DTA/TIEA (State Secretariat for International Financial Matters 2018b, retrieved on 02/10/2018, status as of 20 August 2018) and the list of jurisdictions for which the MCAAT is in force (MCAAT 2018, retrieved on 2 October 2018, status as of 24 September 2018). The information was cross-checked with the OECD EOIR database (OECD 2018g).

Income status according to World Bank Country and Lending Groups, current classification by income for the 2017 fiscal year.

Economic indicators for non-state jurisdictions from UNData, http://data.un.org/Default.aspx. Geographical groups and composition according to World Bank list of economies (June 2017). LDC status according to the official UN list of LDCs, as of 31 October 2018.

Development status as per UNCTADStat (http://unctadstat.unctad.org/EN/Classifications/DimCountries_DevelopmentStatus_Hierarchy.pdf).

Annex 2: AEOI relationships (financial account) approved by the Swiss Parliament (cut-of date 2 October 2018)

Partner state	Note	Entry into force	First exchange)	Legal basis	Region	Income group	Development statuts
Andorra		01.01.2018		CRS MCAA	Europe & Central Asia	High income	Developed
Antigua and Barbuda	1	-	-	CRS MCAA	Latin America & Caribbean	High income	Developing
Argentina		01.01.2018		CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Aruba	1	-	-	CRS MCAA	Latin America & Caribbean	High income	Developing
Australia		01.01.2017	01.01.2018	CRS MCAA	East Asia & Pacific	High income	Developed
Austria		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Barbados		01.01.2018		CRS MCAA	Latin America & Caribbean	High income	Developing
Belgium		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Belize	1	01.01.2018	-	CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Bermuda	2	01.01.2018		CRS MCAA	North America	High income	Developed
Brazil		01.01.2018		CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
British Virgin Islands	2	01.01.2018		CRS MCAA	Latin America & Caribbean	High income	Developing
Bulgaria		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	Upper middle income	Developed
Canada		01.01.2017	01.01.2018	CRS MCAA	North America	High income	Developed
Cayman Islands	2	01.01.2018		CRS MCAA	Latin America & Caribbean	High income	Developing
Chile		01.01.2018		CRS MCAA	Latin America & Caribbean	High income	Developing
China		01.01.2018		CRS MCAA	East Asia & Pacific	Upper middle income	Developing
Colombia		01.01.2018		CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Cook Islands	1	01.01.2018	-	CRS MCAA	East Asia & Pacific	High income	Developing
Costa Rica	1	01.01.2018	-	CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Croatia		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	Upper middle income	Developed
Curaçao	1	01.01.2018	–	CRS MCAA	Latin America & Caribbean	High income	Developing
Cyprus		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Czech Republic		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Denmark		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Estonia		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Faroe Islands		01.01.2018		CRS MCAA	Europe & Central Asia	High income	Developed
Finland		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
France		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Germany		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Gibraltar		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Greece		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed

Greenland		01.01.2018		CRS MCAA	Europe & Central Asia	High income	Developed
Grenada	1	–	–	CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Guernsey		01.01.2017	01.01.2018	CRS MCAA	Europe & Central Asia	High income	Developed
Hong Kong		01.01.2018		Bilateral Treaty	East Asia & Pacific	High income	Developing
Hungary		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Iceland		01.01.2017	01.01.2018	CRS MCAA	Europe & Central Asia	High income	Developed
India		01.01.2018		CRS MCAA	South Asia	Lower middle income	Developing
Indonesia		01.01.2018		CRS MCAA	East Asia & Pacific	Lower middle income	Developing
Ireland		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Isle of Man		01.01.2017	01.01.2018	CRS MCAA	Europe & Central Asia	High income	Developed
Israel		01.01.2018		CRS MCAA	Middle East & North Africa	High income	Developed
Italy		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Japan		01.01.2017	01.01.2018	CRS MCAA	East Asia & Pacific	High income	Developed
Jersey		01.01.2017	01.01.2018	CRS MCAA	Europe & Central Asia	High income	Developed
Latvia		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Liechtenstein		01.01.2018		CRS MCAA	Europe & Central Asia	High income	Developed
Lithuania		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Luxembourg		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Malaysia		01.01.2018		CRS MCAA	East Asia & Pacific	Upper middle income	Developing
Malta		01.01.2017	01.01.2018	EU Agreement	Middle East & North Africa	High income	Developed
Marshall Islands	1; 2	–	–	CRS MCAA	East Asia & Pacific	Upper middle income	Developing
Mauritius		01.01.2018		CRS MCAA	Sub-Saharan Africa	Upper middle income	Developing
Mexico		01.01.2018		CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Monaco		01.01.2018		CRS MCAA	Europe & Central Asia	High income	Developed
Montserrat	1	01.01.2018	–	CRS MCAA	Latin America & Caribbean	High income	Developing
Netherlands		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
New Zealand		01.01.2018		CRS MCAA	East Asia & Pacific	High income	Developed
Norway		01.01.2017	01.01.2018	CRS MCAA	Europe & Central Asia	High income	Developed
Poland		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Portugal		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Romania		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	Upper middle income	Developed
Russia		01.01.2018		CRS MCAA	Europe & Central Asia	Upper middle income	Developed
Saint Kitts and Nevis	1	01.01.2018	–	CRS MCAA	Latin America & Caribbean	High income	Developing

Saint Lucia	1	01.01.2018	–	CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Saint Vincent and the Grenadines	1	01.01.2018	–	CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
San Marino		01.01.2018		CRS MCAA	Europe & Central Asia	High income	Developed
Saudi Arabia		01.01.2018		CRS MCAA	Middle East & North Africa	High income	Developing
Seychelles		01.01.2018		CRS MCAA	Sub-Saharan Africa	High income	Developing
Singapore		01.01.2018		Bilateral Treaty	East Asia & Pacific	High income	Developing
Slovak Republic		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Slovenia		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
South Africa		01.01.2018		CRS MCAA	Sub-Saharan Africa	Upper middle income	Developing
South Korea		01.01.2017	01.01.2018	CRS MCAA	East Asia & Pacific	High income	Developing
Spain		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Sweden		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Turks and Caicos Islands	2	01.01.2018		CRS MCAA	Latin America & Caribbean	High income	Developing
United Arab Emirates	2	01.01.2019		CRS MCAA	Middle East & North Africa	High income	Developing
United Kingdom		01.01.2017	01.01.2018	EU Agreement	Europe & Central Asia	High income	Developed
Uruguay		01.01.2018		CRS MCAA	Latin America & Caribbean	High income	Developing

Sources and metadata:

Swiss Federal Council 2016, 2017 and 2018; State Secretariat for International Financial Matters 2018c (List of bilateral AEOI relationships), retrieved on 2 October 2018, updated to 11 September 2018.

Income status according to World Bank Country and Lending Groups, current classification by income for the 2017 fiscal year.

Economic indicators for non-state jurisdictions from UNData, http://data.un.org/Default.aspx. Geographical groups and composition according to World Bank list of economies (June 2017).

Development status as per UNCTADStat (http://unctadstat.unctad.org/EN/Classifications/DimCountries_DevelopmentStatus_Hierarchy.pdf).

Notes: The list only includes exchange relationships approved by Parliament as of 2 October 2018. Entry into force on 1 January 2017 means that financial institutions started collecting data on 1 January 2017 and to exchange data in 2018; entry into force on 1 January 2018 means that FIs started collecting data in 2018 for exchange in 2019. Note 1: Implementation postponed (the country must implement a Global Forum action plan on confidentiality and data security). Note 2: The exchange partner supplies but does not receive information (non-reciprocal jurisdiction).

Annex 3: Exchange of Cbc reports: Switzerland's partner states

Partner	Note	Legal basis	Region	Income group	Development status
Argentina		CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Australia		CRS MCAA	East Asia & Pacific	High income	Developed
Austria		EU Agreement	Europe & Central Asia	High income	Developed
Belgium		EU Agreement	Europe & Central Asia	High income	Developed
Bermuda	1	CRS MCAA	North America	High income	Developed
Brazil		CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Bulgaria		EU Agreement	Europe & Central Asia	Upper middle income	Developed
Canada		CRS MCAA	North America	High income	Developed
Cayman Islands	1	CRS MCAA	Latin America & Caribbean	High income	Developing
Chile		CRS MCAA	Latin America & Caribbean	High income	Developing
Colombia		CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Costa Rica	1	CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Croatia		EU Agreement	Europe & Central Asia	Upper middle income	Developed
Curaçao	1	CRS MCAA	Latin America & Caribbean	High income	Developing
Cyprus	1	EU Agreement	Europe & Central Asia	High income	Developed
Czech Republic		EU Agreement	Europe & Central Asia	High income	Developed
Denmark		EU Agreement	Europe & Central Asia	High income	Developed
Estonia		EU Agreement	Europe & Central Asia	High income	Developed
Finland		EU Agreement	Europe & Central Asia	High income	Developed
France		EU Agreement	Europe & Central Asia	High income	Developed
Germany		EU Agreement	Europe & Central Asia	High income	Developed
Greece		EU Agreement	Europe & Central Asia	High income	Developed
Guernsey		CRS MCAA	Europe & Central Asia	High income	Developed
Hungary		EU Agreement	Europe & Central Asia	High income	Developed
Iceland		CRS MCAA	Europe & Central Asia	High income	Developed
India		CRS MCAA	South Asia	Lower middle income	Developing
Indonesia		CRS MCAA	East Asia & Pacific	Lower middle income	Developing
Ireland		EU Agreement	Europe & Central Asia	High income	Developed
Isle of Man		CRS MCAA	Europe & Central Asia	High income	Developed
Italy		EU Agreement	Europe & Central Asia	High income	Developed
Japan		CRS MCAA	East Asia & Pacific	High income	Developed
Jersey		CRS MCAA	Europe & Central Asia	High income	Developed
Korea (South)			East Asia & Pacific	High income	Developing
Latvia		EU Agreement	Europe & Central Asia	High income	Developed
Liechtenstein		CRS MCAA	Europe & Central Asia	High income	Developed
Lithuania		EU Agreement	Europe & Central Asia	High income	Developed
Luxembourg		EU Agreement	Europe & Central Asia	High income	Developed
Malaysia		CRS MCAA	East Asia & Pacific	Upper middle income	Developing
Malta		EU Agreement	Middle East & North Africa	High income	Developed
Mauritius		CRS MCAA	Sub-Saharan Africa	Upper middle income	Developing
Mexico		CRS MCAA	Latin America & Caribbean	Upper middle income	Developing
Netherlands		EU Agreement	Europe & Central Asia	High income	Developed
New Zealand		CRS MCAA	East Asia & Pacific	High income	Developed
Norway		CRS MCAA	Europe & Central Asia	High income	Developed
Pakistan			South Asia	Lower middle income	Developing
Poland		EU Agreement	Europe & Central Asia	High income	Developed
Portugal		EU Agreement	Europe & Central Asia	High income	Developed
Romania	1	EU Agreement	Europe & Central Asia	Upper middle income	Developed
Russia		CRS MCAA	Europe & Central Asia	Upper middle income	Developed
Singapore		Bilateral Treaty	East Asia & Pacific	High income	Developing
Slovak Republic		EU Agreement	Europe & Central Asia	High income	Developed
Slovenia		EU Agreement	Europe & Central Asia	High income	Developed
South Africa		CRS MCAA	Sub-Saharan Africa	Upper middle income	Developing

Spain		EU Agreement	Europe & Central Asia	High income	Developed
Sweden		EU Agreement	Europe & Central Asia	High income	Developed
United Kingdom		EU Agreement	Europe & Central Asia	High income	Developed
Uruguay		CRS MCAA	Latin America & Caribbean	High income	Developing

Sources and metadata:

State Secretariat for International Financial Matters 2018a (list of Switzerland's CbCR exchange relationships, status as at 21 September 2018), OECD 2018g ("Country-by-Country Exchange Relationships Database", September 2018) and MCAAT 2018.

Income status according to World Bank Country and Lending Groups, current classification by income for the 2017 fiscal year.

Economic indicators for non-state jurisdictions from UNData, http://data.un.org/Default.aspx. Geographical groups and composition according to World Bank list of economies (June 2017).

Development status as per UNCTADStat (http://unctadstat.unctad.org/EN/Classifications/DimCountries_DevelopmentStatus_Hierarchy.pdf).

Notes: 1: Non-reciprocal partners (will only transmit but not receive CbC reports).

Annex 4: EOI: Switzerland's laws, regulations, and guidelines

	Dt	Fr	It	En (non official language)	SR/BBI no.
EOIR and spontaneous exchange	Bundesgesetz vom 28. September 2012 über die internationale Amtshilfe in Steuersachen (Steueramtshilfegesetz, StAhiG)	Loi fédérale du 28 septembre 2012 sur l'assistance administrative internationale en matière fiscale (Loi sur l'assistance administrative fiscale, LAAF)	Legge federale del 28 settembre 2012 sull'assistenza amministrativa internazionale in materia fiscale (Legge sull'assistenza amministrativa fiscale, LAAF)	Federal Act of 28 September 2012 on Internal Administrative Assistance in Tax Matters	SR 651.1
EOIR and spontaneous exchange	Verordnung vom 23. November 2016 über die internationale Amtshilfe in Steuersachen (Steueramtshilfeverordnung, StAhiV)	Ordonnance du 23 novembre 2016 sur l'assistance administrative internationale en matière fiscale (Ordonnance sur l'assistance administrative fiscale, OAAF)	Ordinanza del 23 novembre 2016 sull'assistenza amministrativa internazionale in materia fiscale (Ordinanza sull'assistenza amministrativa fiscale, OAAF)	Ordinance of 23 November 2016 on Internal Administrative Assistance in Tax Matters	SR 651.11
AEOI CRS	Bundesgesetz vom 18. Dezember 2015 über den internationalen automatischen Informationsaustausch in Steuersachen (AIAG)	Loi fédérale du 18 décembre 2015 sur l'échange international automatique de renseignements en matière fiscale (LEAR)	Legge federale del 18 dicembre 2015 sullo scambio automatico internazionale di informazioni a fini fiscali (LSAI)	Federal Act on the Automatic Exchange of Information (AEOI Act)	SR 653.1
AEOI CRS	Verordnung vom 23. November 2016 über den internationalen automatischen Informationsaustausch in Steuersachen (AIAV)	Ordonnance du 23 novembre 2016 sur l'échange international automatique de renseignements en matière fiscale (OEAR)	Ordinanza del 23 novembre 2016 sullo scambio automatico internazionale di informazioni a fini fiscali (OSAIn)	Automatic Exchange of Information Ordinance (AEOI Ordinance)	SR 653.11
AEOI CRS	Wegleitung: Standard für den automatischen Infor-mationsaustausch über Finanzkonten Gemeinsamer Meldestandard (Bern, 17. Januar 2017)	Directive : Norme d'échange automatique de renseignements relatifs aux comptes financiers Norme commune de déclaration (Berne, 17 janvier 2017)	Direttiva Standard per lo scambio automatico di informazioni relative a conti finanziari Standard comune di comunicazione di informazioni (Berna, 17 gennaio 2017)	AEOI Guidelines	
AEOI CRS	Technische Wegleitung: Standard für den automatischen Informationsaustausch über Finanzkonten (Bern, September 2017)	Directive technique : Norme d'échange automatique de renseignements relatifs aux comptes financiers (Berne, septembre 2017)	Direttiva tecnica: Standard per lo scambio automatico di informazioni relative a conti finanziari (Berna, settembre 2017)	AEOI Technical Guidelines	
AEOI CRS	Bundesbeschluss über den Prüfmechanismus zur Sicherstellung der standardkonformen Umsetzung des automatischen Informationsaustauschs über Finanzkonten mit Partnerstaaten ab 2018/2019 (BBI 2018 39)	Arrêté fédéral concernant le mécanisme de contrôle permettant de garantir la mise en oeuvre conforme à la norme de l'échange automatique de renseignements relatifs aux comptes financiers avec les Etats partenaires à partir de 2018/2019 du 6 décembre 2017 (FF 2018 39)	Decreto federale concernente il meccanismo di verifica che garantisce un'attuazione conforme allo standard dello scambio automatico di informazioni relative a conti finanziari con gli Stati partner dal 2018/2019 del 6 dicembre 2017 (FF 2018 41)		BBI 2018 39

AEOI CRS	Botschaft zur Genehmigung der multilateralen Vereinbarung der zuständigen Behörden über den automatischen Informationsaustausch über Finanzkonten und zu ihrer Umsetzung (Bundesgesetz über den internationalen automatischen Informationsaustausch in Steuersachen) vom 5. Juni 2015 (BBI 2015 5437)	Message relatif à l'approbation de l'accord multilatéral entre autorités compétentes concernant l'échange automatique de renseignements relatifs aux comptes financiers et à sa mise en oeuvre (Loi fédérale sur l'échange international automatique de renseignements en matière fiscale, loi EAR) du 5 juin 2015 Messieurs (FF 2015 4975)	Messaggio relativo all'approvazione dell'Accordo multilaterale tra Autorità Competenti concernente lo scambio automatico di informazioni relative a Conti Finanziari e alla sua attuazione (Legge federale sullo scambio automatico internazionale di informazioni a fini fiscali) del 5 giugno 2015 (FF 2015 4467)		BBI 2015 5437
AEOI CRS	Botschaft über die Einführung des automatischen Informationsaustauschs über Finanzkonten mit 41 Partnerstaaten ab 2018/2019 vom 16. Juni 2017 (BBI 2015 5436)	Message du Conseil fédéral du 16 juin 2017 (Message concernant l'introduction de l'échange automatique de renseignements relatifs aux comptes financiers avec 41 États partenaires à partir de 2018/2019 du 16 juin 2017 (FF 2015 4975)	Messaggio concernente l'introduzione dello scambio automatico di informazioni relative a conti finanziari con 41 Stati partner dal 2018/2019 del 16 giugno 2017 (FF 2015 4467)		BBI 2017 5436
AEOI CbC	Bundesgesetz vom 16. Juni 2017 über den internationalen automatischen Austausch länderbezogener Berichte multinationaler Konzerne (ALBAG)	Loi fédérale du 16 juin 2017 sur l'échange international automatique des déclarations pays par pays des groupes d'entreprises multinationales (Loi sur l'échange des déclarations pays par pays, LEDPP)	Legge federale del 16 giugno 2017 sullo scambio automatico internazionale delle rendicontazioni Paese per Paese di gruppi di imprese multinazionali (LSRPP)	Federal Act of 16 June 2017 on the International Automatic Exchange of CbC reports	SR 654.1
AEOI CbC	Verordnung vom 29. September 2017 über den internationalen automatischen Austausch länderbezogener Berichte multinationaler Konzerne (ALBAV)	Ordonnance du 29 septembre 2017 sur l'échange international automatique des déclarations pays par pays des groupes d'entreprises multinationales (OEDPP)	Ordinanza del 29 settembre 2017 sullo scambio automatico internazionale delle rendicontazioni Paese per Paese di gruppi di imprese multinazionali (OSRPP)	Ordinance of 29 September 2017 on the International Automatic Exchange of CbC reports	SR 654.11
Data protection	Bundesgesetz vom 19. Juni 1992 über den Datenschutz (DSG)	Loi fédérale du 19 juin 1992 sur la protection des données (LPD)	Legge Federale del 19 giugno 1992 sulla protezione dei dati (LPD)		SR 235.1
	Bundesgesetz vom 20. Dezember 1968 über das Verwaltungsverfahren (Verwaltungsverfahrensgesz, VwVG)	Loi fédérale du 20 décembre 1968 sur la procédure administrative (PA)	Legge federale del 20 dicembre 1968 sulla procedura amministrativa (PA)	Federal Act of 20 December 1968 on Administrative Procedure, PA	SR 172.021

Sources:

Systematische Sammlung des Bundesrechts (SR) (https://www.admin.ch/gov/de/start/bundesrecht/systematische-sammlung.html); Bundesblatt (BBl) (https://www.admin.ch/gov/de/start/bundesrecht/bundesblatt.html).

About the Authors

Irene Musselli is a senior researcher at the Centre for Development and Environment (CDE) of the University of Bern. Her main research interests lie in trade regulation and natural resource governance. She is currently conducting research on regulatory tools and approaches to curb commodity trade-related illicit financial flows. Previously, Irene worked for more than ten years with the United Nations Conference on Trade and Development, where she was engaged in policy analysis, consensus building, and technical cooperation on a wide range of topics in trade and development. Irene holds a PhD in law from the World Trade Institute/University of Bern, a Master of Laws from the London School of Economics and Political Science, and a Master in Cooperation and Development from the University of Pavia.

irene.musselli@cde.unibe.ch

Elisabeth Bürgi Bonanomi, Dr. iur., Attorney at Law, is a senior lecturer in sustainability and law and a senior researcher/policy advisor at the Centre for Development and Environment (CDE) and the law faculty of the University of Bern. She is also affiliated with the World Trade Institute. Her research focuses on sustainability governance, policy coherence for sustainable development theory, commodity trade-related illicit financial flows, trade and sustainable development, as well as CSR and business. Elisabeth is coordinating the legal work package of the research project "Curbing Illicit Financial Flows (IFFs) from Resource-rich Developing Countries: Improving Natural Resource Governance to Finance

elisabeth.buergi@cde.unibe.ch

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1 *EU Trade Agreements and Their Impacts on Human Rights. Study Commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ).* Elisabeth Bürgi Bonanomi. 2014.

2 *Mit Eco-Drive gegen Strassenlärm. Evaluation eines Interventionsprogramms zur Förderung eines leisen Fahrstils.* Stephanie Moser, Maja Fischer, Elisabeth Lauper, Thomas Hammer, Ruth Kaufmann-Hayoz. 2015.

3 *Challenges and Opportunities in Assessing Sustainable Mountain Development Using the UN Sustainable Development Goals.* Christoph Bracher, Susanne Wymann von Dach, Carolina Adler. 2018.

4 *Curbing Illicit Financial Flows in Commodity Trading: Tax Transparency.* Irene Musselli, Elisabeth Bürgi Bonanomi. 2018.

CDE Working Papers present reflections on sustainable development issues of concern to researchers, development experts, and policymakers around the world.

Switzerland's central role in commodity trading brings with it leverage and responsibilities. The Swiss commodity trading industry – and its regulatory environment – has come under increasing scrutiny as a possible conduit for illicit financial flows (IFFs) out of resource-rich developing countries. Against this background, Switzerland has committed to improving tax and trade transparency and curbing commodity trade-related IFFs. One specific dimension of this concerns illicit flows associated with false invoicing and manipulative transfer pricing. The broad underlying issue is aggressive tax avoidance, if not outright tax evasion, often entangled with money laundering and corruption.

Exchange of tax information can shed light on illicit financial flows associated with trade misinvoicing and abusive transfer pricing. Exchange on request, spontaneous exchange of tax rulings, and exchange of country-by-country reports can in principle provide tax administrators with useful information for investigation of possible mispricing practices. The automatic exchange of financial account information (AEOI) is not directly relevant, but remains a key tool for detecting undeclared offshore wealth where the proceeds from mispricing may end up. There are, however, a few procedural constraints and built-in limits that constrain the use of exchange-of-information mechanisms for investigating commodity trade mispricing. This report addresses these questions with reference to Switzerland's legal framework and practice in relation to exchange of information for tax purposes.

The report calls for a four-pronged approach to improve the effectiveness of exchange mechanisms to tackle commodity trade-related illicit financial flows, encompassing: (1) more flexibility to use tax information for tracking down trade mispricing; (2) a pragmatic, targeted relaxation of procedural requirements; (3) the establishment of a legal basis to exchange information with lower-income countries; (4) a transactional, phased-in approach to enhance administrative capacity in poor countries via peer-to-peer knowledge transfer that pools expertise from different institutional stakeholders in Switzerland. The report also raises questions as to the cost-effectiveness of exchange of information in tax matters as a means to tackle commodity trade mispricing, Attention is directed to alternative measures and tools specifically geared to counter value manipulation in cross-border transactions, including "off-track" solutions that may cut incentives to shift profits to low-tax jurisdictions.