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The future of the banking secrecy for Swiss taxpayers in the light of the evolution of the international financial standards

Bachelor Project submitted for the obtention of the Bachelor of Science HES in Business Administration with a major in International Management

by

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Declaration

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The student accepts the terms of the confidentiality agreement if one has been signed. The use of any conclusions or recommendations made in the Bachelor Project, with no prejudice to their value, engages neither the responsibility of the author, nor the adviser to the Bachelor Project, nor the jury members nor the HEG.

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Geneva, August 14th, 2016

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Executive summary

Swiss banking secrecy used to be a quirk of Swiss law that went largely untouched until recent times. Recently through high profile, year-long pressure by governments the world over, this secrecy, which had shielded account owners from declaring their financial assets and thus, taxable income, was partly dismantled. This oddity in Swiss law was always a hot button issue for many governments around the world, and lately came to the forefront of discussion for change in front of the Swiss government and the Swiss public.

This paper aims to investigate how Swiss banking secrecy came about, and how it has evolved to its current reduced form thanks to internal and external actors, and the context of an increasingly globalized world. The transformation of attitudes towards privacy, financial responsibility and the external world for the Swiss taxpayer and voter has inevitably changed the Swiss banking secrecy.

The actors involved in enacting any changes, namely the Swiss Parliament, the Federal Council, economic institutions and the Swiss people, all have their own motives, which will be analysed and discussed. It will be shown that cultural shifts and current events which at first glance might seem unconnected may have an impact on precise financial law.

Throughout this paper, the aim is to track the increasing trend of total financial transparency, and to illustrate how a complex web of actors and events led to this and how this relates to Switzerland and the Swiss banking secrecy. It also aims to track the domestic opinion of the Swiss voters who, thanks to the Swiss legislative structure, will have a direct say on changes made regarding Swiss banking secrecy, for example the Initiative Matter.

Switzerland whose shroud of banking secrecy was previously seen as untouchable, now no longer applies for foreign investors, as the automatic exchange of information is due to begin. Now the question remains, what is left of the Swiss banking secrecy for its domestic taxpayers, and what does its future hold?

Finally, the conclusion shall outline the purpose of the banking secrecy in the eyes of the Swiss taxpayers, and in what way it could obstruct their willingness to financially contribute towards the community. In a global trend tending towards transparency, it will be explained that taxation of Swiss wealth and derived income will be achieved either through an extension of the Swiss withholding tax if the banking secrecy was to remain, or through increased tax authority knowledge of the taxpayers' financial private sphere. With these theoretical incomes, the future of the Swiss banking secrecy and on a larger scale, the Swiss financial and fiscal systems are in flux, and it is an exciting time to be watching.

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Introduction

Description of the issue

In recent times, a discreet small country in the heart of Europe has been put in the spotlight of the financial world against its will. This was quite unusual for a reputed financial centre which, concerned with its international reputation, had always taken good care of its neutrality and marketed an image of a peaceful and prosperous small land.

The reason for all this unwelcome attention was a financial practices which has made Switzerland's neighbours frustrated for a long time: the banking secrecy.

In 1934, in a context of upcoming war in Europe, Switzerland enshrined in criminal law a discretion that has been an integral part of Swiss banking for centuries. Comparable to the professional secrecy widely imposed to lawyers or clergy members, this now legally enforced secrecy, deeply ingrained in the Swiss banking tradition, created an investment opportunity for foreign investors seeking to avoid investigation from their respective tax authorities.

But what actually is the Swiss banking secrecy? A confusion must be avoided: in no developed country will a banker disclose private information without governmental intervention. Therefore, in terms of terminology only, "banking secrecy" could apply to any banking institution in the world. What makes the Swiss banking secrecy so special is that it is actually a fiscal secrecy. Indeed, the Art. 47 of the "Loi fédérale sur les banques et les caisses d'épargne" (Appendix 1) forbids any professional related to a bank in possession of information regarding a client to disclose them without the decision of a penal judge, even to the tax authorities.

Recently, the measures taken by external actors against this hallowed financial tradition brought it to an end for foreign investors whom are no longer protected against the investigation of their respective tax authorities. With the last international barrier down, only the internal banking secrecy remains for the Swiss taxpayer, and the external conflict is now beginning within the Swiss borders: what future is there for the banking secrecy for Swiss taxpayers?

The present report aims firstly to bring a comprehensive understanding of this financial practice that is the Swiss banking secrecy by retracing its historical path and legal development until its current status, and analysing why it is where it is today. In the second part, the student will identify the Swiss actors who will play a role towards financial transparency in Switzerland and consider their impact in the current political, cultural, and economic environment.

Brief history

If the legal story of the Swiss banking secrecy as we know it begins legally in 1934, its historical roots can be traced as early as the 17th century with the signature of the Edict of Fontainebleau by French King Louis XIV.

Aiming to unite its people in a single religion, Catholicism, Louis XIV revokes Henri IV's Edict of Nantes in 1685, which granted the Protestants a certain freedom of religion around a century earlier. The religious war that was ended by Henry IV, Protestant himself, begun again and the members of the elite that were the Protestants were persecuted. As a result, around 300'000 Protestants, called Huguenots by the Catholics, began their exodus out of France to reach Protestant neighbours, and left the country with a shortage of skilled labour (VANNEROT, 2009).

Crucially, following the Lutheran reform, Geneva had become Protestant in 1536, the same year that saw the arrival of Jean Calvin, a French reformer who decided to make Geneva his new church's hub. Calvin quickly became an important political figure, notably by accessing the presidency of the influential Company of pastors, by imposing strict laws and legitimised a crucial practice that widely impacted Geneva's financial place: the loan with interest, rigorously condemned by the Catholic church. This made Geneva an attractive place for the Huguenots.

Settling down in Geneva, this flock of rich Huguenots gave a new impetus to the town by accepting contract loans towards the French king despite the persecution inflicted. This rather paradoxical behaviour can be explained by the mutuality of financial interest between the two parties. Nevertheless, it is out of question that the French population discovers that their King is financing the war against heresy with the help of Protestant funds for the sake of the King's credibility. The two parties therefore agree on an absolute confidentiality and begin their financial relationship in the deepest secrecy through the name of Geneva banks (VANNEROT, 2009). The Swiss banking secrecy is born.

Subsequently, from revolutions to wars, Switzerland, neutral since 1815's Vienna Congress, was a place of financial refuge to much of Europe. Switzerland managed to strengthen its financial place thanks to the migration of wealth away from foreign tax policy judged too restrictive, accompanied by progressive reinforcement of the Swiss banking secrecy (GUEX, 1999).

The Swiss banking secrecy's strongest reinforcement and official year of "birth" is 1934 with its anchorage in the new "Loi fédérale sur les banques et les caisses d'épargne". It is from then on legislated by the Art. 47 (Appendix 1).

The Swiss banking secrecy is now matter of public right and, therefore, the prosecution of any related offence falls within the frame of Swiss Penal code and judicial body.

The reasons for this reinforcement are still unclear and subjected to debate, but the result is the same: starting 1934, the violation of the Swiss banking secrecy is a serious felony.

Recent development

Controversial throughout its entire history, Swiss banking secrecy took a hit in the context of the 2008 economic crisis which began with the subprime turmoil in the USA. The Internal Revenue Service (hereafter, IRS), the US tax authority, found that Swiss banks did not comply with the Qualified Intermediary policy, which was a policy put in place in order to ensure a tax withholding from foreign financial agents to US nationals' assets around the world, which Swiss banking secrecy ran contrary to.

March 13th, 2009: first step towards exchange of information

Finding themselves in times of critical need for liquidity, the members of the G20, gathered in November 2008, set as their priority the end of tax evasion and tax competition and went to find money abroad in financially attractive countries such as Switzerland. The OECD, is put in charge by the G20 of listing the non-compliant member states and separate them in three categories from fully compliant to non-compliant according to their tax practice. Switzerland, due to its unwillingness to exchange tax information, found itself listed in the middle zone, along with other countries who did not fully respect the OECD international financial norms (ZAKI, 2010).

Worried about its image and related trade opportunities, Switzerland made a first step in the direction of tax transparency by accepting on March 13th, 2009 the OECD condition to renegotiate a dozen double tax treaties to fully apply the Art. 26 of the OECD model of double tax treaty (Appendix 2) which was slightly different from Switzerland's double tax treaties as it regulates the matter of exchange of information which is at core of the issue.

As a preliminary remark, the reader is reminded that a double tax treaty's primary purpose is to avoid any double taxation of any taxpayer (both individual or company) in two contracting States. Even though countries are free to define the legal provisions addressed by their double tax treaties, these are usually inspired and very similar to the Model Convention issued by the OECD (hereafter: MC OECD). Therefore, whenever a doubt remains concerning the taxation dispositions of a taxpayer's income or wealth on the basis of both their domestic laws (e.g. if an asset is considered taxable in two countries according to their respective law and both countries wish to levy the related taxes), the applicable double tax treaty would act as a superior authority above the countries' internal legislation to ensure that the tax is levied in only one state.

Two aspects of the legal definition of tax infraction under Swiss law as well as the types of mutual aid require particular analysis to understand the impact of the Art. 26 and its contradiction with the Swiss double tax treaties and financial practice.

I: Swiss qualification of tax infractions

The qualification of tax infraction varies widely between Switzerland and most of the other OECD members. The term "tax evasion", which has been particularly heard during the OECD campaign for tax fairness, qualifies two completely different things depending on the side of the border. Indeed, according to the OECD's definition, tax evasion refers to *"illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities"*[1]. Switzerland, for its part, distinguishes the terms of tax subtraction (in French, soustraction d'impôt) and tax fraud (fraude fiscale) which are not considered as crimes of equal level and, as such, are not prosecuted by the same legal entities. According to Swiss tax law, a tax subtraction crime refers to a simple infraction (e.g. a bank account is not reported in the tax return therefore not taxed) prosecuted by the Cantonal tax authorities and reprimanded only by a fine, whereas tax fraud refers to the avoidance of tax through the usage of falsified documents and is considered a penal crime punishable by imprisonment.

Those two legal notions find their roots in the Swiss Federal tax law (Loi sur l'Impôt Federal Direct), and their distinction is made at the articles 175 for tax subtraction and 186 for tax fraud (Appendix 3).

The term tax evasion also exists in Swiss tax procedure (évasion fiscale). In the view of the Swiss tax administration, it is not a violation nor a crime, but it refers to a jurisprudential principle through which the authorities invokes an abuse of rights in order to nullify tax savings made if the taxpayer clearly uses an economic vehicle and misappropriates its initial purpose with the aim to save a significant amount of tax if the operation were accepted by the tax authorities[2]. The Swiss notion of tax evasion is therefore similar to the OECD's notion of tax avoidance, which describes *"the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow"*[3].

As outlined above, neither tax subtraction nor tax evasion are prosecuted by Swiss penal law, as opposed to tax fraud. Yet, only a penal judge has the authority to lift the banking secrecy and force a bank to deliver financial information about its client. It is this distinction that allowed foreign taxpayers to deposit assets in Swiss banks and omit to declare these in their country of tax residency while being protected by the banking secrecy against any exchange of information on this matter as this omission, seen as a penal crime in their country, was not a fraud pursuant to Swiss tax law.

Therefore, no exchange of financial information was feasible according to the second paragraph of the Art. 26 MC OECD as it was not obtainable by Swiss tax authorities in accordance with Swiss tax law.

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[1] OECD's Glossary of tax terms: http://www.oecd.org/ctp/glossaryoftaxterms.htm (Accessed on August 7th, 2016)
[2] cf. OBERSON p. 56 and ATF 107 Ib 322
[3] OECD's Glossary of tax terms: http://www.oecd.org/ctp/glossaryoftaxterms.htm (Accessed on August 7th, 2016)

II: Types of mutual aid

Secondly, in the context of international exchange of information, two types of mutual aids are distinguished: the so-called "small mutual aid" (petite entraide) and "great mutual aid" (entraide au sens large)[4]. The small mutual aid qualifies the fact of exchanging information in order to carry out the provisions of the double tax treaty and therefore avoiding any double taxation between two countries, whereas the great mutual aid consists of information exchanged in order to apply another states' domestic law, involving demands from a State towards another not only in case of risk of double taxation but also if there is a doubt that an asset is not being taxed within its border.

If Switzerland had already exchanged information with other States in the past on the basis of the small mutual aid, the acceptance of the Art. 26 MC OECD as imposed by the G20 and the OECD clearly implied that, upon renegotiation of its double tax treaties, Switzerland would be required to share information on the basis of the great mutual aid, therefore providing financial information to other states, contrary to its internal law on banking secrecy.

On March 13th, 2009, succumbing to the increased pressure from the G20 and the OECD, the Federal Council accepted the conditions applied under Art. 26 MC OECD and marked the first breach in the Swiss banking secrecy history.

Although this event represented an important step towards tax transparency, the giant step would be taken only five years later.

Automatic exchange of information

On May 6th, 2014, the new global standard concerning the automatic exchange of tax information (hereafter, EAR) on an international level was approved by the OECD Council[5]. So far, nothing surprising since the organisation has been seeking international financial transparency to fight tax evasion for the past decades with the active support of the G7/G8/G20. What came as a surprise to the Swiss financial sector was the Federal Council's approval on October 8th, 2014 to negotiate the terms of an automatic exchange of information[6], to which it was strongly opposed in the past, as outlined above.

Only three weeks later, at the plenary session of the Global Forum on Transparency and Exchange of Information for Tax Purposes, Switzerland, along with around hundred States including all the important financial centres pledged to introduce the so-called Common Reporting Standard (CRS) to aim for a first exchange of information in 2018 (SCHELLENBERG WITTMER SA, 2015).

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[4] In accordance with the definition of the Guidelines of the Federal Office of Justice in matter of International Mutual Legal Assistance in Criminal Matters: http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0086.File.tmp/wegl-str-f-2009.pdf (Accessed on August 7th, 2016

[5] Declaration on Automatic Exchange of Information in Tax Matters : http://www.oecd.org/tax/MCM-2014-Declaration-Tax.pdf (Accessed on August 7th, 2016)

[6] Federal Council's communication dated January 20th, 2016 : https://www.admin.ch/gov/fr/accueil/documentation/communiques/communiques-conseil-federal.msg-id-60367.html (Accessed on August 7th, 2016)

The EAR, once entered in force, will replace the withholding tax requested within the Bilateral Agreements with the EU on the taxation of savings income[7] and will render the Rubik agreement contracted with Austria and the United-Kingdom redundant (The taxation of savings income and Rubik agreements were anonymous withholding tax systems aiming to ensure a fair allocation of the tax levied by Swiss banks between Switzerland and the contracting states whilst keeping the anonymity of the Swiss banks' clients). It will be applied separately from the FATCA agreement (system put in place by the IRS to ensure the appropriate taxation of US citizens or green card holders in the USA on their assets abroad) (HILDEBRANDT & SCHAER, 2016).

Where does Switzerland stand?

In summary, the Swiss banking secrecy that played an important role in the development of Switzerland as a strong financial hub will come to an end for foreign taxpayers with the first automatic exchange of information in 2018. The Federal Council's intention to comply with international tax standards already sent a strong message to foreign investors who, from then on, lose the tax incentive linked to the discretion offered by Swiss banks a short while ago. If the birth of the Swiss banking secrecy was narrated earlier in the present report, it seems that the story is approaching its end.

The recent developments have shown a clear trend evolving towards international financial transparency. However, the international pressure has not brought the banking secrecy to its end for Swiss taxpayers whom still have the opportunity to benefit the banks' discretion. Now that the G20 and OECD reached their objective, the banking secrecy for Swiss taxpayers is creating the debate amongst Swiss actors who will define the future of this Swiss practice.

The second part of this report aims to identify the principal actors who will play a role in the internal confrontation which will set the stage of the future marketplace, and to evaluate their influence based on the context in which they operate.

[7] Taxation of savings / AEI official statement : https://www.eda.admin.ch/dea/fr/home/bilaterale-abkommen/ueberblick/bilaterale-abkommen-2/zinsbesteuerung.html (Accessed on August 7th, 2016)

Analysis

If the detractors of the Swiss banking secrecy were mostly based in the EU, the matter is also controversial within Switzerland and some Swiss actors also demonstrated a favourable view towards the achievement of financial transparency. Now that Switzerland conceded the exchange of information according to the OECD's transparency policy, the next developments are going to take place where the last bastions of the banking secrecy remain, thus internally.

The upcoming debates take place in the context of a complex economic and political environment. The Swiss Confederation is a Federal State as per the adoption of the first Federal Constitution in 1848, composed of twenty-six Cantons which are sovereigns of their very own legal systems for any matter that does not fall within the frame of the Constitution. In this system, a wide range of economic and politic actors are asked to take side and play a crucial role in the evolution of the Swiss legal framework in many domains.

The study of the actors described below does not purport to be exhaustive, but aims at interpreting the role that will be endorsed by the principal players from a political and economic point of view.

Swiss banking secrecy: the actors

Parliament

In Switzerland, the Federal Assembly or Parliament embodies the Supreme Authority (subjected to the constitutional rights of citizens) and the Legislative power. It is comprised of two chambers with equal power, the National Council and the Council of States, respectively composed of two hundred members representing the citizens and forty-six members representing the cantons elected every four years. The number of National Council's seats is distributed according to each Canton's population and therefore vary with Switzerland's demographics, whereas the Council of States' seats are fixed at two by Canton (one for each of the six half-Cantons). The Parliament deliberates concerning any modifications of the Federal Constitution and Federal laws, the use of the Federal budget, and elects and monitors the Federal Council's activities (Conseil fédéral, 2016). Among the Parliament's instruments, it has the power to direct the Federal Council to propose a project of law or take legal measures through a so-called parliamentary motion. For a motion to be binding, it needs to be adopted by both chambers (ARBEX & BOILLAT, 2015).

Throughout the years, motions arose both from the right and the left parties in the Parliament with the defence or the abolition of the banking secrecy as their primary purpose for various reasons that will be expanded upon.

Parliamentary motions

On June 26th, 1998, Christian Grobet, left-wing member of the National Council introduces a parliamentary motion aiming at complementing the Swiss Penal Code, proposing to consider

direct tax subtraction as a justifying motive to lift the banking secrecy[8]. This political manoeuvre, ambitious for its time, yet only aimed at making the subtraction of an income of CHF 10'000 and above a penal crime, which seems like a rather generous margin of freedom for what could reasonably assimilated to a simple omission. The motion argued that a subtraction of an income higher than CHF 10'000 was a clear attempt to avoid direct tax, and that the banking secrecy allowed an inequality of the taxpayers before the law, especially in times of economic downturn where dishonest taxpayers should not be given the possibility to not contribute towards the community while using its benefits (public services). It also invoked the fact that most of the EU, Switzerland's first business partner, already assimilated tax subtraction with tax fraud, and that Switzerland could not afford to lose credibility on this matter, knowing that the applicable law prevented any exchange of banking information of this kind which was already a source of dispute.

In response, the Federal Council, although agreeing with the principle, noted that setting a certain amount could not sufficiently assess the taxpayer's intent and/or guilt for what could lead to imprisonment, which makes the motion difficult to carry containing a specific amount since it reduced the tribunal's flexibility. Keen to empower the tax administrations to lift the banking secrecy to apply the tax law but reluctant to integrate a specific amount in the penal code, the Federal Council proposed to transform the motion into a postulate[9].

On September 23rd, 1999, State Councillor Willy Loretan, along with right-wing parties, presented a motion whose goal was to reduce the power of action of the Federal tax authority's Division Penal Affairs and Investigation which is in charge of investigating serious tax crimes and proceeding with appropriate legal actions according to the art. 190 to 195 of the Federal law on the Federal direct tax[10]. This motion argued that the powers allocated to this division were overreaching and not precise enough, as tax officers were given the right to search taxpayers' domicile in case of doubt of tax fraud[11].

In its response, the Federal Council denied Mr. Loretan's assumption, reminding him of the efficiency with which the division, between 1989 and 1999 had successfully intervened to recover 80.5 million CHF of tax income distributed between the Confederation and the Cantons, showing how significant the tax amounts at stake were and supporting the idea that only serious crimes were prosecuted. In the light of these facts, the Federal Council proposed to reject the motion and was followed by the Council of States.

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[8] Motion n°98.3352 : Pénalisation de la soustraction d'impôt : https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=19983352 (Accessed on August 7th, 2016)

[9] A postulate mandates the Federal Council to examine and report on whether to submit a bill to the Federal Assembly or to take a measure

[10] LIFD RS 642.11 : https://www.admin.ch/opc/fr/classified-compilation/19900329/index.html (Accessed on August 7th, 2016)

[11] Motion n°99.3476 : Mesures spéciales d'enquête (LIFD). Garanties de l'Etat de droit : https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=19993476 (Accessed on August 7th, 2016)

On November 28th, 2002, Pierre Tillsmanns, left-wing National Councillor, proposed a motion targeting the abolition of the Swiss banking secrecy[12]. The ratification of the motion would fundamentally alter the Swiss law and allow the tax administration to systematically prosecute violations of the Swiss tax law. Mr. Tillsmanns noted that if Switzerland had developed a massive set of weapons against money laundering, its system presents significant deficiencies, as he claims that the banking secrecy allows substantial amounts of dirty money to be peacefully hidden not only from the Financial Action Task Force (FATF), but also to the world's tax authorities, therefore depriving many countries of legitimate tax revenues, including Switzerland. Mr. Tillsmanns takes offence of his country which, invoking the private sphere, disadvantages its honest taxpayers in favour of the banking industry. He foresaw that if Switzerland did not dismantle it itself and start cooperating towards an automatic exchange of information, EU countries would eventually impose it.

The Federal Council proposed to the Parliament to reject the motion, stating that the current law already allowed the tracing of the source of funds placed in Swiss banks preventing money derived from illegal activities to be accepted within the border. Furthermore, it stated that the Swiss withholding tax was applied to all Swiss-sourced interest/dividends, and that in order to get it refunded, Swiss or foreign citizens had to prove that the income had been declared to their respective tax authorities for taxation, hence motivating tax honesty. It is important to note that the Federal Council had no interest for this motion to carry. Indeed, on June 2002, it had opened with the EU the negotiation of the Bilateral II which contained, among others, the agreement on the taxation of savings income which would provide the terms for an anonymous transfer of the withholding tax withheld by Swiss banks to the tax authorities of their clients' country of residency, enabling the rightful taxation while the banking secrecy remained, and the legal provisions of the motion would obstruct the procedure of negotiation with the EU.

On March 21st, 2003, left-wing National Councillor Franziska Teuscher proposed to expand the power of the Division Penal Affairs and Investigation and to create an independent Division that would not need the approval of the Chief of the Federal Department of Finance (therefore, the Federal Councilor) to launch an investigation, so that Switzerland may be able to prosecute tax offenses in all domains (indirect and direct tax)[13]. Mrs. Teuscher, while highlighting the importance of the Division, was concerned that the Cantonal tax authorities did not make use of it in case of doubt of serious tax fraud, as an investigation from the Division requires, as mentioned, the express agreement of the Chief of the competent Department, which renders the administration quite heavy. Also, she stated that the power to prosecute tax fraud should fall within the responsibility of the Confederation and not the Cantonal tax authorities given their proximity to their taxpayers.

The Federal Council answered that having the Confederation in charge of levying direct taxes would require a deep change in the constitutional law in place and a complete

[12] Motion n°02.3662 : Le secret bancaire : un obstacle : https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20023662 (Accessed on August 7th, 2016)

[13] Motion n°03.3169 : Lutter efficacement contre la fraude fiscale : https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20033169 (Accessed on August 7th, 2016)

rearrangement of the current political system. Therefore, it did not agree with the reallocation of this power, but did recommend to transform the motion into a postulate to assess ways to improve the perception of direct taxes and prosecution of fraud.

On March 18th, 2009, in response to the Federal Council's decision dated March 13th, 2009 to accept the art. 26 of the MC OCDE, right-wing National Councillor Pirmin Bischof proposed a motion to enable Switzerland to negotiate the terms of the exchange of financial information with USA and UK[14] since these countries (or parts of them) pushed against Switzerland's banking secrecy while protecting their own similar practice[15]. The Federal Council, whilst aware of the developments in this field, considered that legal basis on this matter were unnecessary at this stage, and proposed to reject the motion.

On September 24th, 2009, States Councillor Simonetta Sommaruga (who joined the Federal Council in September 2010 where she still sits as of today) introduced a motion in order for Cantonal tax authorities to be given the same right to receive financial information from third parties since this right was conceded on March 13th the same year to Foreign tax administrations. She recalled that this right was never given to Cantonal tax authorities in the past as it was considered that the financial benefit obtained by attracting foreign investors in Swiss banks was more favourable than the related tax revenues, which she argued was no longer applicable given the recent changes[16].

The Federal Council acknowledged the fact that the motions aims to change the element of tax secrecy and not the general banking secrecy. However, it considered that the elements in place to fight tax fraud were sufficient and proposed to reject the motion, stating that a good relationship between the taxpayers and the tax authorities was more important to ensure tax honesty than having access to their financial information. The Federal Council's decision can be explained by the fact that, when accepting to deliver financial information to foreign tax authorities, it clearly stated that the banking secrecy would remain unchanged for Swiss taxpayers[17]. Therefore, the rejection of the motion proposed was a political decision to avoid losing credibility in the eyes of the taxpayers.

On June 18th, 2010, following the announcement in March 2010 that FATCA would oblige non-US banks to closely work with the IRS and provide financial information regarding their US clients, right-wing National Councillor Hans Kaufmann proposed a motion asking the Federal Council to deliver an official declaration to the US government stating that Swiss banks would not provide any financial information outside the frame of the mutual assistance

[14] Motion n°09.3147 : Secret bancaire. Lutter à armes égales : https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20093147 (Accessed on August 7th, 2016)
[15] The Delaware, Nevada and Montana in the USA, and The British Virgin Islands, British overseas territory, maintain a similar banking secrecy towards the world's tax authorities
[16] Motion n°09.3897 : Compétences identiques pour les autorités fiscales cantonales et étrangères : https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20093897 (Accessed on August 7th, 2016)
[17] Federal Department of Finance's communication dated September 24th, 2009 : https://www.efd.admin.ch/efd/fr/home/dokumentation/nsb-news_list.msg-id-29205.html (Accessed on August 11th, 2016)

legal procedures in place[18]. Since FATCA would be put in place with the express agreement of the client, The Federal Council did not consider that the banking secrecy was lifted and proposed to reject the motion.

On September 27th, 2013, socialist National Councillor Margret Kiener Nellen introduced a motion proposing to set up a legal precedent to enable the Federal tax authority to establish statistics regarding the direct tax infractions in Switzerland, which in practice would be difficult to investigate due to the obvious reasons related to the banking secrecy, and the liberty of the Cantonal tax authorities to inform, or not, the Federal tax authorities about their administrative decisions[19]. She argued that transparency is a key element of democracy. The Federal Council, without comment, proposed to accept it.

Identifiable trends

The analysis of the motions proposed by the Parliament since 1998 demonstrates that political trends remain constant:

I. The Federal Department of Finance is, as could be expected, systematically the competent department to study the motions and advise the Federal Council;
II. The Federal Council's balance, following the Federal Department of Finance's positions, is generally in favour of the reduction of tax secrecy;
III. International cooperation and credibility in the eyes of the economic partners (notably the EU) has always been a serious topic;
IV. The fight consists of two sides, right-wing parties willing to maintain and/or reinforce the banking secrecy invoking the private sphere and left-wing parties willing to reduce it and/or suppress it invoking the equality of the taxpayers and the potential tax revenues.

With regards to this last point, an indication of the future direction that might be followed during the next Parliamentary mandate can be derived by having a look at the last election results, during which the right-wing parties strengthened their position at the expense of the left-wing parties, notably the green parties (DUC-QUANG, 2015). It can be expected that the amount of motions arising in favour of the reinforcement of the banking secrecy will increase, and that it will be more difficult for left-wing parties to pass motions on this matter with the opposition of the majority.

[18] Motion n°10.3560: Suppression du secret bancaire suisse par la loi américaine : https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20103560 (Accessed on August 7th, 2016)
[19] Motion n°13.3959: La Suisse doit enfin disposer d'une statistique des infractions fiscales : https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20133959 (Accessed on August 7th, 2016)

Federal Council

The Federal Council is Switzerland's Executive organ. It represents Switzerland internationally. Each of its seven members is head of a Federal Department. In the legislative process, it is responsible for drafting laws and reviewing projects and popular initiatives to be submitted to the Legislative power.

Beyond its regular standpoints on parliamentary motions as studied above and its fundamental decisions dated March 13th, 2009 and October 8th, 2014 going in the direction of the reduction of the banking secrecy, two major decisions of the Federal Council show its general opinion on the matter:

As far back as 1981, the Federal Council signed the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters as proposed by the Council of Europe. This protocol had the purpose of extending mutual assistance between signatory members, notably in matter of tax infractions. The Federal Council however signed it with a comment similar to that present in Switzerland's double tax treaties on the Art. 26 MC OCDE article before March 13th, 2009, in the sense that tax information would be exchanged only if the infraction constituted a fraud as provided by Swiss tax law[20]. In its message dated August 31st, 1983[21], the Federal Council invited the Parliament to ratify the protocol with this provision. However, both Chambers categorically refused to ratify the protocol without eliminating any provision of mutual aid in case of any tax matter. Meanwhile, 43 countries (members or non-members of the Council of Europe) ratified the protocol, whereas Switzerland is the only country that has signed it without ratifying it, and still hasn't as of today[22]. This example shows an early case of disagreement between the Federal Council and the Parliament on the subject of international assistance in tax matters.

In 2013, the Federal Council proposed a revision of the penal law in tax matters which would unify the process in place for direct tax (income and wealth tax) and indirect tax (value added tax, withholding tax, and stamp duty) and therefore revolutionise the Swiss qualification of tax infractions, extending the possibility of Cantonal tax administrations to access Swiss taxpayers banking data in case of direct tax subtraction[23].

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[20] Reservation made [by Switzerland] at the time of signature, on 17 November 1981 - Or. Fr. : *"In accordance with the provisions of Article 8.2a, Switzerland reserves the right to accept Chapter I of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters only to the extent that the fiscal offence constitutes a fraud with regard to taxes."* http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/099/declarations?p_auth=S1L8nFNc&desktop=false (Accessed on August 7th, 2016)

[21] FF 1983 IV 129: http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10103867 (Accessed on August 7th, 2016)

[22] Chart of signatures and ratifications of Treaty 099, status as of July 23th, 2016: http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/099/signatures?p_auth=itDlkL1N (Accessed on August 7th, 2016)

[23] Standpoint on the revision of the penal law in tax matters: https://www.efd.admin.ch/efd/fr/home/themen/impots/steuern-national/revision-du-droit-penal-fiscal/fb-revision_steuerstrafrecht.html (Accessed on August 7th, 2016)

As seen previously, tax subtraction regarding direct taxes is not regarded as a constituent part of a fraud, therefore prosecuted only by the Cantonal tax administrations which do not have the necessary means to investigate penal infractions. Their power is, as such, limited to the taxpayer's obligation to collaborate with them, and they cannot request information directly from the bank. Ironically, the same cannot be said for indirect tax, since a subtraction doubt is a sufficient motive to open a penal procedure and request the lifting of the banking secrecy, therefore offering a total transparency to the tax administrations and allowing them to perceive the duty as defined by the law in force.

By suggesting that the Legislative power should review the penal law in tax matters to allow direct taxation to be applied consistently between direct and indirect taxes, the Federal Council has taken a clear position with regards to the bank opacity granted to Swiss taxpayers in case of simple tax infractions and wishes to give the Cantonal tax administrations the right to lift the banking secrecy not only in case of serious direct tax infractions but also in case of doubt of subtraction.

In this context, facing the controversial feedback received during the consultation procedure which indicated that it had few chances to pass, the Federal Council decided in November 2015 to postpone the project of revision. It is important to note that the word postpone ("reporter" in French) is specifically used by the Federal Council[24], implying that it intends to put the matter back on the table as soon as it considers that its chance of success are stronger (more favourable political environment).

In addition to the revision of the penal law in tax matters to unify the direct and indirect taxes' procedure, the Federal Council has another project: the redesign of the withholding tax law[25]. Indeed, it intends to balance the fundamental principle of the debtor agent (i.e. the source of the income) to the paying agent (i.e. the bank), implying that the 35% withholding tax would no longer only be withheld from Swiss-sourced investment income but to any other type of investment income received through banks, significantly extending the scope of it while maintaining the banking secrecy in its actual form.

[24] Communication dated November 4th, 2015: Le Conseil fédéral reporte la révision du droit pénal en matière fiscale : https://www.admin.ch/gov/fr/start/dokumentation/medienmitteilungen.msg-id-59336.html (Accessed on August 7th, 2016)

[25] Comunication dated December 17th, 2014 : Impôt anticipé: le Conseil fédéral lance une réforme visant à renforcer le marché des capitaux : https://www.admin.ch/gov/fr/start/dokumentation/medienmitteilungen.msg-id-55731.html (Accessed on August 11th, 2016)

People

A particularity of the democratic system in Switzerland lies in the fact that the people hold both semi-direct and direct democratic power. Indeed, they have both the power to elect the Parliament, and the ability to propose changes in the Constitution through popular initiatives, and to invalidate Federal laws through referendums.

Initiative Matter

In June 2013, in quick response to the Federal Council's project in May 2013 to revise the penal law in tax matters to unify the process in place for direct and indirect taxes and, therefore, extend the power of the tax administrations vis-à-vis the taxpayers' financial assets, the initiative "Oui à la protection de la sphère privée" was launched by right-wing parties[26], aiming to reduce the obligation of third parties to comply with the tax authorities and to anchor the banking secrecy in the Federal Constitution. The so-called "Initiative Matter" (by the name of its instigator) is not the first of its kind: two initiatives already tried to amend the Constitution on this matter:

Indeed, on May 20th, 1984, the people were asked to go to the polls to vote on an initiative against the banking secrecy launched by the socialist party[27], and rejected it by 73%[28], showing the importance given by the population to the banking secrecy back then.

On March 31st, 2009, the far right party Lega dei Ticinesi launched an initiative contradicting the Federal Council's decision dated March 13th, 2009 in order to anchor the banking secrecy in the Constitution and therefore prevent any exchange of information on the basis of a tax subtraction[29]. The people did not have the opportunity of expressing themselves as the instigators failed to gather the required number of signatures within the legal deadline (i.e. 100'000 signatures within 18 months)[30].

In the specific case of the Initiative Matter, the initiators succeeded to gather and deliver 117'531 valid signatures to the Federal Chancellery on October 23rd, 2014[31]. The Federal Department of Finance, competent organ for the analysis of the initiative's content, prepared the Federal Council's message to the Parliament, in which it recommended to reject the initiative without opposing a counter-project[32].

Indeed, the Federal Council considers that the initiative's content goes largely beyond a simple inscription of the banking secrecy in the Constitution which could harm the application of taxation, and that the protection of the private sphere granted to the citizen by the current

[26] Complete text : https://www.admin.ch/ch/f/pore/vi/vis445t.html (Accessed on August 7th, 2016)
[27] In French : « Contre l'abus du secret bancaire et de la puissance des banques »
[28] FF 1984 II 1019 : https://www.admin.ch/ch/f/pore/va/19840520/index.html (Accessed on August 7th, 2016)
[29] In French : « Défendons la Suisse, inscrivons le secret bancaire dans la Constitution fédérale
[30] FF 2010 6051 : https://www.admin.ch/opc/fr/federal-gazette/2010/6051.pdf (Accessed on August 7th, 2016)
[31] FF 2014 8473 : https://www.admin.ch/opc/fr/federal-gazette/2014/8473.pdf (Accessed on August 7th, 2016)
[32] FF 2015 6429 : https://www.admin.ch/opc/fr/federal-gazette/2015/6429.pdf (Accessed on August 7th, 2016)

legal basis was sufficient. Also, the initiative goes against the current international political impetus which goes in the direction of transparency.

The Parliament's recommendation is not yet known as the project is currently being discussed between the two Chambers. According to the deadline provided by the law, it has until March 25th, 2017 to adopt a recommendation, and until March 25th, 2018 if it decides to oppose a counter-project. Based on experience, it is standard procedure that the people are asked to vote around six months following the adoption of the Parliament's recommendation.

Since the Parliament's negotiations are still in progress, it is difficult to assess the chance of the initiative to reach a successful conclusion. The initiative is rejected by the interested parties such as the Cantonal finance directors even if they are not willing to establish a systematic exchange of information between financial institution and tax authorities[33], or the association Swissbanking which, in its standpoint with regards to the initiative[34], considers that the application of the initiative would make it too easy to subtract taxable revenues.

From a statistical point of view only, considering that 146 initiatives have been launched since September 22nd, 2002, that 49 of them made it to the voting process, and that 8 were accepted by the people, it can be estimated from a statistical perspective that any initiative only has a 5.47% rate of success in the polls. Indeed, only 22 initiatives were accepted by the people since the Constitution of 1848[35].

Should the Initiative Matter be accepted, it would fundamentally anchor the banking secrecy in the Constitution making it very difficult for tax administrations to prosecute simple tax infractions. In case it is refused however, it would certainly not represent the Swiss banking secrecy's end in the short term, but would give an idea about its support from the voters.

Economic institutions

In Switzerland, many lobbies, active in many areas, abound the market place. Beyond promoting and defending their group's interest, they are part of the legislative process in Switzerland as there are invited to provide advices in times of consultation procedure (MOMBELLI, 2013).

During the consultation procedure of the Federal Council's project to revise the penal law in tax matters, many participants, notably Switzerland's biggest lobbies Swissbanking and economiesuisse, rejected the revision project and proposed instead to wait for the establishment of the EAR to reopen the discussion on the Swiss banking secrecy. They

[33] Communication dated September 28th, 2015: http://www.fdk-cdf.ch/-/media/FDK_CDF/Dokumente/Allgemein/150928_vi_ps_mm_fdk_def_f.pdf?la=fr-CH (Accessed on July 13th, 2016)
[34] SwissBanking standpoint dated September 25th, 2014 : http://www.swissbanking.org/en/stellungnahme-20140925.htm (Accessed on August 7th, 2016)
[35] Cf : https://www.admin.ch/ch/f/pore/vi/vis_2_2_5_8.html (Accessed on August 10th, 2016)

supported the idea of the introduction of a similar system within the border[36] which indicates the most influential economic actors' position on this matter.

Beyond their opinion in consultation procedures, it is known that lobbies financially contribute towards certain members of the Parliament's Chambers. The Parliamentarians being only part-time politicians, they maintain a professional activity independent from their government obligations. They therefore derive their compensation mainly from their professional activity, and from the contributions received from lobbies if they are willing to defend their cause (BUCHS, 2011). This practice, legal in Switzerland, influences the political direction taken by the Parliament based on the interest of the lobbies (MOMBELLI, 2013). In this context, it is feasible, knowing the standpoint of Swissbanking and economiesuisse with regards to the banking secrecy, that some parliamentarians, even from right-wing parties, might be interested to support the reduction of the banking secrecy depending on their relationship with the interested actors.

[36] Communication dated June 24th, 2015 : Le Conseil fédéral reporte la refonte de l'impôt anticipé : https://www.admin.ch/gov/fr/start/dokumentation/medienmitteilungen.msg-id-57815.html (Accessed on August 7th, 2016)

International and National environment

The role that each actor will play in future developments to come is yet to be established, as their impact will closely depend on the general context in which the action is taken. Factors such as political reasoning, financial interests, cultural aspects and others may come into play, and could tilt the balance either way. The following part aims to place the above-studied actors in perspective of the global context in which they act in order to weight to what extend each one might influence the decision process.

General political context

A major turning point for the European Union was decided by the British people via popular referendum on June 23rd, 2016. Better known as the BREXIT, this historical referendum marks the first time a member state ever chose to leave the EU, and sends a strong message of change in the political climate in Europe which had a resonating effect on pro-Europe groups who fear an upcoming chain reaction of departures from the member states (SCHRIEBERG, 2016).

This development, whose pro-campaign was led by conservative parties, is the result of a radical right-wing rise not only in the UK but among the European countries for these last 30 years. This was a reflection of a primarily lower-middle class electorate, but included a growing part of the middle class, due in part to a growing alienation with an increasingly global economy and society. In addition, the perceived undemocratic nature of the European Union and wishes of a more sovereign nation informed their decision, as well as heightened fear amid increased immigration and an increased awareness of recent international developments. This was successfully levied by populist/radical parties to develop what is now known as “Europhobia” or “Euroscepticism” (CAMUS, 2014).

In this context, taking the case of Austria, the Euro-separatist candidate of the Freedom Party of Austria (FPÖ) Norbert Hofer might be elected, and would almost certainly demand an Austrian referendum similar to that of the UK. Austria is just an example among many political parties which gain popularity and pledge for separation (either for their country from the EU, or for a region from a country), such as the Alternative for Germany (Alternative für Deutschland) in Germany, the National Front (Front national) in France, the North League (Lega Nord) in Italy, the Progress Party (Fremskrittspartiet) in Norway, the Party for Freedom (Partij voor de Vrijheid) in the Netherlands or the Danish People’s Party (Dansk Folkeparti) in Denmark (MEUNIER, 2016). Switzerland too has seen growth in popularity of right-wing parties, which advocate for Switzerland not to enter the EU but to maintain close economic relationship with its neighbours via the negotiation of Bilateral Agreements.

The above-mentioned populist/radical parties active in European governmental processes or influencing it share specific aspects of their speeches. Indeed, the current geo-political context changed the fundamental arguments of most of the right-wing parties from their perception of the failure of the traditional economical institutions, to the fear of terrorism and migration issues, as these fields appeared amongst the five most prioritized subjects by EU

citizens in terms of perceived needed supplementary interventions of the EU, as outlined by the European Parliament's last survey in July 2016[37]:

- Fight against terrorism (82% of respondents);
- Issue of migration (74% of respondents); and
- Protection of external borders (71% of respondents).

Swiss voters have shown similar trends when asked about their principal concerns, as the increased immigration, and the influx of refugees came respectively first and fourth of their main worries for the future[38].

Understanding to what extent these themes were sensitive in the eyes of the voters, right-wing parties addressed the related issues in their political speeches and initiated their rapid rise to EU member states' governments which was correspondingly reflected in Switzerland's Parliament as seen previously (DUC-QUANG, 2015).

Such a political context, along with rising military instability in the Middle-East and around Europe (especially in relation with the annexation of Crimea by the Russian Federation in March 2014 or the attempt of coup d'état in Turkey in July 2016) gives strength to radical/populist parties which underline the views as stated in the above-mentioned survey that not enough was being done in the fight against terrorism, and advocate in favour of strict border controls.

In light of the above, it seems unlikely that the crisis currently affecting the political directions taken by the EU and Switzerland will be settled in the near future, and it is not outside the realms of possibility that the Swiss Parliament's structure will once again shift in favour of the right-wing parties in the 2019 elections. If Swiss citizens vote in their direction in the hope of addressing a migration problem, for example, by voting for specific right-wing parties, they would give strength to a platform of political programs involving, among others, the Swiss banking secrecy. Thus, they might determine the future position of the Swiss Parliament until 2023 (the next election) regarding the banking secrecy's protection or reduction, even if their vote was cast with different intent, with no interest or knowledge of this issue in the first place. This outlines that, in the current political system, a vote against increased immigration may transform and determine the future of the Swiss financial sector, and have impact on the banking secrecy.

[37] Eurobarometer of the European Parliament, 85.1: http://www.europarl.europa.eu/atyourservice/en/20160623PVL00111/Europeans-in-2016-Perceptions-and-expectations-fight-against-terrorism-and-radicalisation (Accessed on August 7th, 2016)
[38] Credit Suisse – Worry Barometer 2015: http://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=9F4940A3-FB35-F300-FC08DE83EB1895AF (Accessed on August 7th, 2016)

Transparency

Origin of consumer products, usage of funds, friends' locations and habits, celebrities' private lives, the list goes on. On all levels, and not only in the financial industry, from individuals to states and including companies, transparency is becoming increasingly more prevalent, and the access to information only increases with the increasing rise of data harvesting practiced by technological companies and world governments (REY, 2012). In a context of international cooperation and trade, all players are requested to display increasing information about their internal and external activities Following this trend, the Swiss tax system is slowly but surely evolving towards a criminalisation of the tax subtraction which was, not long ago, considered as a socially accepted "gentleman" crime, as outlined by Xavier Oberson, Professor of tax law in the Geneva Faculty of Law (GARESSUS, 2015).

What is transparency? With regards to business conduct, the origin of this term which has been widely used during the course of this report dates back as far as the creation of the rule of law, which brings a right to the citizen to place responsibility upon political leaders, which is not feasible in absence of transparency, allowing one to be aware of the other party's actions. Delegating responsibility implies the need for an access to information and a right to control. Thereupon, it is both these rights which represent the crucial pillars to transparency. In this respect, the term transparency was mainly referring to the obligation that the State had towards the citizen, rather than the opposite (BAUME, 2011).

At present times, the need for transparency is experienced as an increasing information sharing, which can be harmful if not controlled. On the company level for example, any increasing number of businesses have their employees share common areas in which no walls may interfere in the business conduct. Open space offices are known to foster communication and promote collaboration to achieve efficiency and innovation. However, their performance is insured provided that they are accompanied with boundaries (BELANGER, 2014). Indeed, in a scenario where information circulates without rules, where anything is observable by anyone, one might only communicate secondary importance information. This phenomenon is referred to as the "transparency trap" (BERNSTEIN, 2014).

The willingness of the European people to move towards a transparent financial culture was already clearly highlighted in 2010 by an European Parliament's survey[39] which set as the highest importance to reform the global financial market by implementing tougher rules on tax havens (88% of respondents) and increase transparency of financial markets (87% of respondents). These figures show how much importance EU citizens place on transparency and tax fairness. With regards to the eagerness for tougher rules on tax havens, it is worth noting that, at this time, Switzerland was still assimilated as a tax haven as per the OECD's grey list (ZAKI, 2010). In this respect, the EU citizens showed that their opinion had not changed in the latest European Parliament's survey as the fight against tax fraud comes third

[39] Eurobarometer of the European Parliament, 74 : (http://ec.europa.eu/public_opinion/archives/eb/eb74/eb74_publ_en.pdf)

in their priorities after terrorism and unemployment issues (75% of respondents overall)[40]. This willingness for transparency or fight against tax fraud did not seem to be as important for Swiss people, as it did not appear among the concerns of the surveyed sample[41].

Fortunately for Switzerland, the mainstream media's attention has been focused on other countries recently. Indeed, the secret arrangements between multinationals and the Luxembourg tax authorities (LuxLeaks) and the Panama Papers scandals (BARRINGTON, 2016) directed the focus onto other territories considered as tax havens, and highlighted a serious lack of transparency in important financial markets despite many entities' efforts, such as the FATF, the OECD and its Global Forum on Transparency and Exchange of Information for Tax Purposes, which are actively seeking to impose transparency.

As studied previously in the report, the Federal Council has long expressed to the Parliament and to the people its keenness to comply with international standards notably in tax matters and, thanks to this attitude, has made Switzerland an example in terms of corruption and money laundering in the eyes of the FATF's recommendations that it has been applying scrupulously[42].

In addition to this "good student" image, needed in times of scandal linked to financial matters, Switzerland was granted the mention "Largely compliant" from the Global Forum on Transparency and Exchange of Information for Tax Purposes on July 26, 2016 (Appendix 4), which is a tribute to Switzerland's recent internal development to comply with its business partners to ensure financial fairness as outlined by the Federal Department of Finance led by Minister Ueli Maurer[43].

Despite the debates within Switzerland when it comes to international tax matters, the Federal Council continually shows its readiness to comply and innovate with international standards. It can be assumed that the experts which are part of the Federal Department of Finance are, like their European counterparts, willing to follow the transparency trend and sacrifice part of what used to be a Swiss privilege of discretion in order to avoid repercussions of disputes with its business partners which would surely have a dramatic impact on the Swiss market.

[40] Eurobarometer of the European Parliament, 85.1: (http://www.europarl.europa.eu/atyourservice/en/20160623PVL00111/Europeans-in-2016-Perceptions-and-expectations-fight-against-terrorism-and-radicalisation)
[41] Credit Suisse – Worry Barometer 2015: http://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=9F4940A3-FB35-F300-FC08DE83EB1895AF (Accessed on August 7th, 2016)
[42] FF 2014 585: https://www.admin.ch/opc/fr/federal-gazette/2014/585.pdf (Accessed on August 7th, 2016 and FF 2014 685: https://www.admin.ch/opc/fr/federal-gazette/2014/685.pdf (Accessed on August 7th, 2016)
[43] Communication dated July 26th, 2016 : https://www.efd.admin.ch/efd/fr/home/dokumentation/nsb-news_list.msg-id-62879.html (Accessed on August 7th, 2016)

The Swiss and their private sphere

The protection of privacy finds its international legal roots in the Art. 12 of the Universal Declaration of Human Rights (Appendix 5). In Switzerland, where the private sphere is held in very high esteem, it is guaranteed by the Art. 13 of the Federal Constitution (Appendix 6).

Privacy is a very important part of the Swiss culture as outlined by Fons Trompenaars, consultant and reference in the field of cross-cultural communication, who identified the Swiss as very formal people with whom personal contact was lengthy to establish due to the difficulty to enter the private sphere (HAMPDEN-TURNER & TROMPENAARS, 2004). This need of the Swiss for their privacy is also characterised by the importance they grant to their financial private sphere. As mentioned earlier, the Swiss law extends the professional secrecy traditionally given to medical workers and attorneys-at-law to Swiss bankers through the Art. 47 of the Federal law on Banks (Appendix 1).

Every two years, the association Swissbanking mandates the company M.I.S. Trend to survey the Swiss population about financial matters, including the importance placed on the financial private sphere. Among Swiss people surveyed in 2015[44], 85% expressed their wish for their financial privacy to be protected by the banks against third parties. Although showing that almost nine out of ten Swiss people are attached to their financial private sphere, this figure also illustrates a slight trend of decrease when compared to the two previous surveys. Indeed, in 2013[45], 86% of the surveyed Swiss people expressed the same wish, against 91% in 2011[46]. This decrease outlines that, while being still very important to the absolute majority of Swiss people, they slowly begrudgingly accept less privacy, as demonstrated by the 72% of people surveyed who responded that they were expecting it to deteriorate in the future.

When specifically asked about their thoughts on banking secrecy, an abrupt decrease in popularity is noticed: in 2011, 73% of the sample wished to maintain it, and 72% in 2013. In 2015 however, only 41% expressed their support. The reasons for this sudden drop in popularity remains unclear, as the question in the survey was formulated differently. Nevertheless, if it keeps on going in this direction, this trend gives an idea about the expected chance of success of the Initiative Matter.

According to 38% of the sample, the banking secrecy's primary purpose is to protect the clients of the bank against third parties. Only 21% of them stated that it was supposed to protect them against the State. Considering this factor, it can be said that the trust of the Swiss citizens towards the State is not at stakes. Beyond, merely 8% thought that the banking secrecy was helping the Swiss taxpayer avoid tax. This implies that most of those surveyed did not find that the banking secrecy was a way for the Swiss taxpayers to hide assets from the tax authorities, but rather to protect privacy against unnecessary intrusion from third parties into their financial sphere.

[44] M.I.S Trend : Les questions bancaires actuelles : http://www.swissbanking.org/fr/asb2015_d_ext_final.pdf (Accessed on August 7th, 2016)
[45] M.I.S Trend : Les questions bancaires actuelles : http://www.swissbanking.org/fr/20130307-5740-all-schlussbericht-nko.pdf (Accessed on August 7th, 2016)
[46] M.I.S Trend : Les questions bancaires actuelles : http://www.swissbanking.org/fr/20110325-5740-all-meinungsumfrage_schlussbericht-cmo.pdf (Accessed on August 7th, 2016)

Taking into account the above, it seems that Swiss people overall are expecting their financial privacy to decrease, while still holding it in very high esteem. In parallel, their views towards privacy do not extend towards the maintenance of the banking secrecy, which is losing popularity. In addition, considering that most of the surveyed people did not see the professional secrecy of the banker as an opportunity to hide funds, it can be statistically assessed that the banking secrecy is not a sine qua non condition to guarantee the financial private sphere, which would still be assured without protection of the data against the State.

Tax amnesty and tax ethics

In order to recover hidden funds, the tax authorities, unable to request information from the banks, may have recourse to what is referred to as a tax amnesty. Its goal is to offer an incentive to taxpayers to bring hidden funds back to the surface and ensure their taxation for the future.

A tax amnesty concerns the three levels of taxation (Federal, Cantonal, and Communal). It implies that taxpayers whom come clean do not suffer any fine for tax subtraction nor tax arrears. Its application is however limited in time, and its application must be voted upon by the people and the Canton[47]. The debate around the possibility for a new general tax amnesty is currently being held in the Parliament[48].

Since the changes brought to the Federal Law on Direct Federal Tax in 2010, a taxpayer can voluntary disclose financial assets previously hidden without being fined. Indeed, the taxpayer will only be requested to pay the tax arrears on the three last years in the case of an inheritance on the basis of the Art. 153a (Appendix 7) and on the last ten years in a case of a simple voluntary disclosure on the basis of the Art. 175 al. 3 (Appendix 8), if the three following conditions are met:

1. No tax authority is aware of the tax subtraction;
2. The taxpayer collaborates fully with the tax authority to determinate the taxable elements;
3. The taxpayer endeavours to settle the related amount of tax due.

Ever since this opportunity has been granted to Swiss taxpayers, Cantonal tax authorities have been swamped with voluntary disclosure requests, and almost twenty billion Swiss francs have emerged to the surface (BAILAT, 2015).

Such results bring up the debate of the tax ethics: is the Swiss taxpayer dishonest? Is not declaring the funds in the first place a way to admit that one has been deliberately avoiding due taxes? For the Federal Council, certainly not in the case of inheritance. Indeed, it is not

[47] Federal tax authorities' history : http://www.estv2.admin.ch/jubi/steuermoral-f.htm (Accessed on August 12th, 2016

[48] Motion n°16.3621 : « Donner aux cantons une autonomie de procéder à une régularisation fiscale unique du passé : « https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20163621 (Accessed on August 12th, 2016)

unusual that, without being dishonest, an heir becomes the owner of assets dissimulated generations ago[49].

Concerning the simple voluntary disclosure, how does one measures tax ethics and compliance? Economic Policy Professor at the University of Freiburg Lars Feld, determined that rather than weighing the complexity of a tax system and the power of its tax administration or the taxpayer behaviour, one can measure the taxpayer's willingness to contribute towards the community's finance by identifying the level of trust/respect a citizen has towards its government[50]. Therefore, the willingness to pay taxes expressed by a taxpayer in a country with high tax rates will be higher than a similar taxpayer in a country with lower tax rates, if the taxpayer perceives that his contributions are being reinvested for his and his community's well-being. Confidence between the taxpayer and the State is consequently a key element to determinate tax ethics and willingness to pay tax, according to Lars Feld.

When it comes to Switzerland and the question of Swiss taxpayers' willingness to pay taxes, by looking only at the isolated figure of twenty billion Swiss francs recovered, one might conclude that Swiss people have been deliberately hiding their assets. However, one needs to consider the factor of Swiss taxpayer's trust towards their government to fully address the question. It appears, based on the OECD's most survey on social indicators[51] that Swiss citizens demonstrated the highest level of trust towards their government, more than any other country OECD. Therefore, it can be computed that the Swiss taxpayers are the most willing to pay taxes in their country among all the OECD countries.

Having that in mind, it seems that the significant amount of voluntary disclosures and the amount of funds recovered are not a result of a will to hide funds or to avoid tax, as Swiss people are keen to contribute towards a system they trust. These are the vestiges of a traditional financial practice that is the banking secrecy, whose purpose has been wrongly used in the past to secure assets in fear of political instability around Switzerland. As the State had and, as of today, still has no possibility to assess or track the wealth at stake, it remains under the discretion of the Swiss banks until the citizen is offered the chance to bring his assets into broad daylight.

[49] FF 2006 8347 : https://www.admin.ch/opc/fr/federal-gazette/2006/8347.pdf (Accessed on August 11th, 2016)
[50] Deterrence and Tax Morale : http://www.oecd.org/tax/administration/2789923.pdf (Accessed on August 6th, 2016)
[51] OECD social indicators - Society at a glance 2014: http://www.oecd.org/els/soc/OECD2014-SocietyAtAGlance2014.pdf (Accessed on August 8th, 2016)

Conclusion

The Swiss banking secrecy, originally created to facilitate trade between two parties for which discretion towards third parties was a key element for business conduct, was subsequently misused as a way for foreign wealth to escape their tax authorities' increasing need for tax revenues.

Following the transparency trend in international finance and the increasing pressure from its economical partners, Switzerland has adapted its legislation to comply with the OECD standards, preventing foreign taxpayers from benefitting from the Swiss banks' discretion vis-à-vis their respective tax authorities.

Currently, the debate about the banking secrecy is taking place in Switzerland where Cantonal tax authorities are still unable to access Swiss taxpayers' banking information, giving them the possibility to hide funds and subtract related taxes.

In this debate, mainly the opposing right-wing and left-wing political parties, the Swiss Parliament, and the Federal Council, along with the Swiss population and the influential economic institutions, will have a crucial role in the determination of the future of the banking secrecy for Swiss taxpayers.

In a context of political uncertainty where global transparency comes at a certain cost to privacy, which is dear to the Swiss citizens' heart, the future of the banking secrecy for Swiss taxpayers remains unclear. This professional secrecy granted to the banker in order to protect his clients' financial private sphere against third parties and, consequently, against the State, is to evolve either by decreasing to let the tax authorities access banking information, or by being inscribed in the Federal Constitution.

At a time where voluntary disclosures increase in popularity, the question of the Swiss taxpayer's honesty arises. The fact that, by offering the taxpayer the chance to bring hidden funds to broad daylight without facing legal repercussions, the State recovers billions of Swiss francs that stayed for years in the shadow of the banking secrecy might direct one to thinking that Swiss taxpayers are deliberately subtracting due taxes, and that they only trust their banker to protect their private sphere.

As outlined by Lars Feld, the taxpayers' willingness to pay taxes and financially contribute towards their community is less reliant on the importance of the tax burden, than on the trust a citizen has towards his State. Therefore, the higher the taxpayers' trust that their contribution is being fairly used, the higher their willingness to pay taxes.

On this matter, it has been highlighted by the OECD that Switzerland benefits the highest level of trust from its citizens of the whole OECD members. Therefore, their willingness to pay taxes should reflect this level of trust.

If it can be presumed that the Swiss taxpayers willingness to pay taxes is the highest of all the OECD members, one may ask what the purpose of the banking secrecy is. Since, as outlined by Swissbanking's studies, almost nine out of ten Swiss taxpayers hold their financial sphere in a very high esteem, but merely 8% see it as a way for Swiss taxpayers to hide funds from their tax authority, this demonstrates that a majority of the surveyed Swiss citizens trust the Swiss government when it comes to their financial private sphere and are not reluctant to pay their fair share of taxes. In their eyes, the banking secrecy helps protect their privacy vis-à-vis third parties and not vis-à-vis the State. Therefore, in the populations' view, the professional secrecy of the banker to protect the financial private sphere can coexist with fair access granted to the tax authorities to taxpayers' banking information.

Having said that, the question remains, why are funds hidden in the first place and what should be done?

If 8% of surveyed people are deliberately subtracting taxes from their tax authorities, they will permanently find ways and structures internationally to keep doing so in any tax haven that remains, as evidenced by the recent Panama Papers scandal.

The remaining taxpayers, therefore around 92%, while being eager to be protected by the banker and the State against any intrusion in their privacy and notably the financial private sphere, are willing to contribute for a system in which they place trust. Although being easy for them to hide taxable income and wealth, any non-declared financial asset could be assimilated to a lack of understanding of the financial consequence that a simple omission can have on the whole system.

In any case, one will need to wait the result of the Initiative Matter before speculating about the future of the banking secrecy for Swiss taxpayers. Whatever the decision of the Swiss voters, it seems however obvious that the Federal Council and the Federal Department of Finance carefully prepared two distinct strategies to address this issue and ensure fair taxation of the Swiss taxpayers' banking assets. Either they will put back on the table the project of revision of the penal law in tax matters and unify the process in place for direct and indirect tax to access Swiss taxpayers' financial information even in case of doubt of a simple subtraction, or, if the Initiative Matter is accepted by the voters, will extend the frame of the Swiss withholding tax to be applied to all income derived from Swiss banks' activities.

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Appendix

Appendix 1: Art. 47 Loi fédérale du 8 novembre 1934 sur les banques et les caisses d'épargne

Art. 47[153] *(état le 1er janvier 2016)*

1 Est puni d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire celui qui, intentionnellement:

a. en sa qualité d'organe, d'employé, de mandataire ou de liquidateur d'une banque, ou encore d'organe ou d'employé d'une société d'audit, révèle un secret à lui confié ou dont il a eu connaissance en raison de sa charge ou de son emploi;

b. incite autrui à violer le secret professionnel;

c.[154] *révèle un secret qui lui a été confié au sens de la let. a ou exploite ce secret à son profit ou au profit d'un tiers.*

1bis Est puni d'une peine privative de liberté de cinq ans au plus ou d'une peine pécuniaire celui qui obtient pour lui-même ou pour un tiers un avantage pécuniaire en agissant selon l'al. 1, let. a ou c.[155]

2 Si l'auteur agit par négligence, il est puni d'une amende de 250 000 francs au plus.

3 …[156]

4 La violation du secret professionnel demeure punissable alors même que la charge, l'emploi ou l'exercice de la profession a pris fin.

5 Les dispositions de la législation fédérale et cantonale sur l'obligation de renseigner l'autorité et de témoigner en justice sont réservées.

6 La poursuite et le jugement des infractions réprimées par la présente disposition incombent aux cantons. Les dispositions générales du ***code pénal***[157] *sont applicables.*

Appendix 2: Art. 26 OECD Model Convention

Art. 26 Exchange of information

1. *The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.*

The exchange of information is not restricted by Articles 1 and 2. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in the first sentence. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. *In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:*
    a. *to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;*
    b. *to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;*
    c. *to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).*

Appendix 3: Art. 175 and Art 186 Loi fédérale du 14 décembre 1990 sur l'impôt fédéral direct

Art. 175 Soustraction consommée

1. *Le contribuable qui, intentionnellement ou par négligence, fait en sorte qu'une taxation ne soit pas effectuée alors qu'elle devrait l'être, ou qu'une taxation entrée en force soit incomplète,*
   celui qui, tenu de percevoir un impôt à la source, ne le retient pas ou ne retient qu'un montant insuffisant, que ce soit intentionnellement ou par négligence,
   celui qui, intentionnellement ou par négligence, obtient une restitution d'impôt illégale ou une remise d'impôt injustifiée,
   est puni d'une amende.

Art. 186 Usage de faux

1. *Celui qui, dans le but de commettre une soustraction d'impôt au sens des art. 175 à 177, fait usage de titres faux, falsifiés ou inexacts quant à leur contenu, tels que des livres comptables, des bilans, des comptes de résultat ou des certificats de salaire et autres attestations de tiers dans le dessein de tromper l'autorité fiscale,*
   sera puni de l'emprisonnement ou de l'amende jusqu'à 30 000 francs.

Appendix 4 : Jurisdiction ratings following a Phase 2 review

Jurisdiction ratings following a Phase 2 review	
Australia, Belgium, Canada, China (People's Republic of), Colombia, Denmark, Finland, France, Iceland, India, Ireland, Isle of Man, Japan, Korea, Lithuania, Mexico, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden	**Compliant**
Albania, Argentina, Aruba, Austria, Bahamas, Bahrain, Belize, Bermuda, Botswana, Brazil, British Virgin Islands, Cameroon, Cayman Islands, Chile, Cook Islands, Cyprus, Czech Republic, El Salvador, Estonia, Former Yugoslav Republic of Macedonia, Gabon, Georgia, Germany, Ghana, Gibraltar, Greece, Grenada, Guernsey, Hong Kong (China), Hungary, Italy, Jamaica, Jersey, Kenya, Latvia, Liechtenstein, Luxembourg, Macao (China), Malaysia, Malta, Mauritania, Mauritius, Monaco, Montserrat, Netherlands, Nigeria, Niue, Pakistan, Philippines, Poland, Portugal, Qatar, Russia, San Marino, Senegal, Singapore, Slovak Republic, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Seychelles, **Switzerland**, Turks and Caicos Islands, United Kingdom, United States, Uruguay	**Largely Compliant**
Andorra, Anguilla, Antigua and Barbuda, Barbados*, Costa Rica Curaçao, Indonesia, Israel*, Samoa, Sint Maarten, Turkey, United Arab Emirates	**Partially Compliant**

Source : https://www.oecd.org/tax/transparency/exchange-of-information-on-request/ratings/#d.en.342263

Appendix 5 : Art. 12 of the Universal Declaration of Human Rights

***Art. 12**:*

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Appendix 6 : Art. 13 of the Federal Constitution of the Swiss Confederation

Art. 13 *Right to privacy*

1. *Every person has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications.*
2. *Every person has the right to be protected against the misuse of their personal data.*

Appendix 7 : Art. 153a of the Loi fédérale du 14 décembre 1990 sur l'impôt fédéral direct

Art. 153a *Rappel d'impôt simplifié pour les héritiers*

1. *Chacun des héritiers a droit, indépendamment des autres, au rappel d'impôt simplifié sur les éléments de la fortune et du revenu soustraits par le défunt, à condition:*
    a. *qu'aucune autorité fiscale n'ait connaissance de la soustraction d'impôt;*
    b. *qu'il collabore sans réserve avec l'administration pour déterminer les éléments de la fortune et du revenu soustraits;*
    c. *qu'il s'efforce d'acquitter le rappel d'impôt dû.*
2. *Le rappel d'impôt est calculé sur les trois périodes fiscales précédant l'année du décès conformément aux dispositions sur la taxation ordinaire et perçu avec les intérêts moratoires.*
3. *Le rappel d'impôt simplifié est exclu en cas de liquidation officielle de la succession ou de liquidation de la succession selon les règles de la faillite.*
4. *L'exécuteur testamentaire ou l'administrateur de la succession peuvent également demander le rappel d'impôt simplifié.*

Appendix 8 : Art. 175 al. 3 of the Loi fédérale du 14 décembre 1990 sur l'impôt fédéral direct

3. *Lorsque le contribuable dénonce spontanément et pour la première fois une soustraction d'impôt, il est renoncé à la poursuite pénale (dénonciation spontanée non punissable), à condition:*
    a. *qu'aucune autorité fiscale n'en ait connaissance;*
    b. *qu'il collabore sans réserve avec l'administration pour déterminer le montant du rappel d'impôt;*
    c. *qu'il s'efforce d'acquitter le rappel d'impôt dû.1*