

Bilateral DE – CH Agreement



Background

- In 1974 Ernő Rubik invented so called Rubik's Cube



- In 2009 Swiss Banking Federation invented Rubik Agreements



Background

- DE-CH Agreement signed 21st September 2011
- UK-CH Agreement signed 6th October 2011
- DE/UK- CH agreement likely to come into force from 1st January 2013
- UK-CH Protocol of Amendment signed 20th March 2012
- DE-CH Protocol of Amendment signed 5th April 2012
- AT-CH Agreement signed 13th April 2012
- EL already in contact with CH, but aware of potential problems
- ES allegedly interested



Background

■ Main features:

- Future investment income and capital gains directly covered by a final withholding tax;
- Provision of information on request based on *plausible* grounds by CH (Standard OECD+, however number of request limited);
- Back taxation: an anonymous lump-sum tax payment; tax burden vary from between 19% to 34% [Protocol: 21% - 41%] of the assets in question and determined by the duration of the client relationship and final amount of the capital; or
- Possibility of disclosing banking relationship in CH to the DE/UK authorities;
- Facilitation of mutual market access for financial institutions [DG TRADE].



Commission's position

- Violation of EU exclusive competence [Article 3(2) of the TFEU];
- Breach of Duty of cooperation [Article 4(3) of the EU Treaty];
- Technical areas of infringement in direct taxation area;
- Clearing past situations: VAT issue;
- Market access issue.



Violation of EU exclusive competence

■ Treaty on the Functioning of the European Union (TFEU)

Article 3(2)

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

■ Savings Taxation Directive (2003/48/EC)

Article 17(2)

Member States shall apply these provisions from 1 July 2005 provided that:

- (i) the Swiss Confederation, (...) apply from that same date measures equivalent to those contained in this Directive, in accordance with agreements entered into by them with the European Community, following unanimous decisions of the Council.



Violation of EU exclusive competence

- where common rules have been adopted, the Member States no longer have the right, acting individually or even collectively, to reach agreements which affect those rules;
- the EU has exclusive competence to conclude international agreements in areas where the conclusion of such an agreement is provided for in a legislative act of the Union;
- this is the case for the EU Savings Directive which already provided for an EU agreement as it has been actually signed in 2004 between the EC and Switzerland;
- DE/UK agreements covered aspects already covered by the EU-Swiss agreement;
- the Commissioner declared being prepared to take corrective steps against DE and UK, while answering an oral question from the EP and giving interviews to press;
- Amicable way to address the issue vs. Court action



Breach of Duty of cooperation

■ Treaty on European Union (TEU)

Article 4(3)

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.



Breach of Duty of cooperation

Breach as regards:

- The Savings Taxation Directive;
- 13 November 2008: the proposal for a modification of Savings Taxation Directive;
- 9 June 2009: Ecofin Council Conclusions called on the Com to open consultations with CH on revising the EU-CH Agreement in line with international standards and improvements agreed at EU level;
- 17 June 2011: the Commission recommended to the Council the adoption of a decision authorising it to negotiate on behalf of the Union an amendment to the agreements concluded in accordance with Article 17(2)(i) of the Directive (the "Recommendation"). The overall aim is to ensure *"the continuing equivalence of the agreements with the Directive as amended"*.



Breach of Duty of cooperation

- Member States have to take into account not only the current state of EU law in the area in question but also its future development, insofar as that is foreseeable;
- Existing jurisprudence: Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent a point of departure for concerted EU action[C 804/79 Com v. UK; C-246/07 Com v. SE; C-266/03 Com v. LU];
- DE/UK agreements with CH may jeopardise the further evolution of savings taxation measures, as reflected in the Amending Proposal and Recommendation to enter into negotiations with CH (and LI, AD, MC and SM) to amend the existing saving taxation agreement.



Technical areas of infringement in direct taxation area

- more evident in the DE agreement than in the UK one
- Equivalence: DE/UK – CH stated that the bilateral measures are equal to automatic exchange of information in the area of income from capital;
- Rates and final character of the withholding tax;
- No encouragement to voluntary disclosure procedure;
- Artificial refund mechanism [DE-CH];
- Look through approach: may hamper potential progress on future developments of the EU-CH Agreement.



Protocol of Amendment

- Satisfactory solutions addressing Commission concerns included in respective Protocols of Amendment;
- Full carve – out of income covered by current EU savings taxation agreement + dynamic reference to possible changes thereto;
- Preserving EU own resources [VAT issue while clearing the past];
- DE and UK promised to use their political leverage on LU and AT in order to facilitate adoption of the negotiating mandate for revising EU – CH Agreement.

