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Rubik Agreement between Switzerland and Germany – Milestone or Selling of Indulgences?

Introduction

On 21 September 2011, Germany and Switzerland finally signed an agreement on the future tax treatment of capital investment income and the treatment of previously undeclared funds ("the Agreement")[2]. The Agreement is the result of prolonged negotiations, including incidents of undignified accusations between the two states. One particularly unforgettable incident involved a threat by the former German Minister of Finance to bring out the Cavalry against the Swiss. This was at a time when CD-ROMs with stolen Swiss banking data were one of the best selling items on the international market. The Agreement meets the desire of Germany and Switzerland to strengthen their fiscal relations and demonstrates their willingness to intensify their cooperation in the area of taxation and financial services. Under the Agreement, Switzerland will levy a final withholding tax on capital investment income comparable to the German final flat income tax on investment income[3] [4]. In this respect, the scope of the Agreement partially overlaps with the agreement between the European Union and Switzerland providing for measures equivalent to those laid down in the EU Savings Directive (Savings Agreement)[5] [6].

There have been various reactions to the signing of the Agreement. Some consider the Agreement a milestone; others see it as a modern way of selling indulgences. As promoted by the governments of both contracting states, the Agreement will settle a long-term dispute between Germany and

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[2] Agreement between Germany and Switzerland on the future tax treatment of capital investment income and the treatment of previously undeclared funds, signed on 21 September 2011 in Berlin.

[3] Art. 18(1) of the Agreement.

[4] Under German domestic law, income from private capital investment is taxed separately by way of a final flat withholding tax at a rate of 25%, increased to 26.38% due to the solidarity surcharge. Expenses economically connected to the investment income are not deductible.

[5] Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48 EC on taxation of savings income in the form of interest payments, OJ L 385, 29 December 2004, p. 30.

[6] Under the Savings Agreement, German resident individuals receiving investment income, as defined in the Savings Agreement, are subject to withholding tax at a rate of 35% on that income. If the amount of withholding tax exceeds the amount of tax due on that income under German domestic law, the taxpayer can get a refund of the excess amount as part of his regular tax assessment. Alternatively, Switzerland provides for a procedure that allows the German taxpayer to avoid the withholding tax by expressly authorizing his paying agent in Switzerland to report the relevant payments to the competent authority of Germany.

Switzerland and will most likely help to strengthen political relations between the two states. However, the author is of the opinion that the Swiss-German Rubik Agreement is not a milestone, but rather a modern way of selling indulgences, as it reminds us to the medieval practice of the church, whereby people could gain forgiveness of their sins against lump sum payments.

The Rubik Agreement

The Agreement consists of three parts: part one provides general definitions, part two relates to the treatment of previously undeclared funds and part three prescribes the future treatment of capital investment income. The Protocol deals with access of Swiss banks to the German market, which shall be facilitated.

Regularization of the past

Regarding the regularization of previously undeclared assets in Switzerland, German resident individuals who held relevant assets with a Swiss paying agent as of 31 December 2010 and are still holding such assets five months after the entry into force of the Agreement have the option of instructing the Swiss paying agent to make a one-off regularization payment in respect of the relevant assets or make a voluntary disclosure on behalf of the individual. Individuals must inform the paying agent in writing which option they choose with respect to each existing account or deposit. Once the respective instruction is given, it is irrevocable[7]. Oddly, the one-off payment is the default option if an individual fails to instruct the Swiss paying agent by the end of the fifth month following the entry into force of the Agreement. Individuals who do not intend to either opt for a one-off payment or a voluntary disclosure must close their accounts or terminate their deposits between the date of signature of the Agreement and 5 months after its entry into force. The Swiss competent authorities must, within 17 months following entry into force of the Agreement, advise the German authorities as to the 10 states or jurisdictions to which such persons have transferred the most relevant assets[8].

The one-off payment may be made anonymously. The tax rate is between 19% and 34% of the value of the assets in question. The formula for calculating the one-off payment is based on a comparison of the initial amount of capital, as per 31 December 2002, and the current amount of the capital in question, taking into account the duration of the relationship between the German resident and the bank[9]. Details of the calculation formula are set out in the very comprehensive annex to the Agreement. The one-off payment results in the clearance of any liability for German individual income tax, VAT, wealth tax, municipal business tax and inheritance and gift tax for the taxable periods in respect of which the one-off payment was made. Alternatively, the taxpayer may choose a voluntary disclosure option regarding

[7] Art. 5(1) of the Agreement

[8] Art. 16 of the Agreement.

[9] Annex to the Agreement.

his funds in Switzerland. In that event, the Swiss paying agent will provide the German authorities with all relevant details (identity, residence, name and address of Swiss paying agent and customer number of the account or deposit number) and the annual account balance as per 31 December of each year between 31 December 2002 and the date of entry into force of the Agreement[10]. The voluntary disclosure is deemed to have the effect of a voluntary disclosure under sec. 371 of the General Tax Code[11] in respect of the deposits and accounts declared[12].

Future treatment of capital investment income

Under the Agreement, Switzerland will levy a final withholding tax on capital investment income comparable to the German final flat income tax on investment income. The withholding tax rate is 25%, which is equal to the German domestic rate[13]. Swiss paying agents will also levy an additional amount, equal to the German solidarity surcharge, at a rate of 5.5% of the amount of withholding tax due[14]. Consequently, investment income will be subject to tax at a rate of 26.375%. The taxes withheld by Swiss paying agents will satisfy any German tax obligations in regard to the funds in question[15]. The taxpayer will receive a tax certificate issued by the paying agent in order to provide evidence of proper taxation[16]. No further tax obligations apply. In particular, no declaration on the taxpayer's personal income tax return will be necessary. Again, the levying of a withholding tax, enabling the German resident to remain anonymous, is the default option. In this regard, Art. 20 of the Agreement stipulates that the special withholding tax under the Savings Agreement, which is currently 35%, remains unaffected[17]. The tax withheld under the Savings Agreement is deemed final up to the amount of 26.375% as set out in Art. 18(1) to (3). While, under the Savings Agreement, the excess amount is

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[10] Art. 9(1) of the Agreement.

[11] General Tax Code (Abgabenordnung, GTC) (1 October 2002 version), BGBl I 2002, at 3866 and BGBl I 2003, at 61, last amended 28 April 2011, BGBl I 2011, at p. 676.

[12] According to sec. 371 GTC, taxpayers may avoid legal proceedings if they correct or supplement incorrect or incomplete data filed or furnish previously omitted data in respect of such incorrect, incomplete or omitted data. In order to successfully avoid any legal consequences, taxpayers must initiate a voluntary disclosure before a public official of the tax authority has already appeared at the taxpayer's premises for the purpose of carrying out a tax audit or of investigating a tax crime or a tax offence. Legal consequences cannot be avoided if the act had been already fully or partially detected at the time of the correction, supplementation or subsequent furnishing of omitted particulars and the perpetrator was aware of this or should have expected this upon due consideration of the facts of the case.

[13] Art. 18(2) of the Agreement.

[14] Art. 18(3) of the Agreement.

[15] Art. 18(4) of the Agreement.

[16] Art. 29 of the Agreement.

[17] With effect from 1 July 2011, the withholding tax rate under the Savings Agreement and the Savings Directive is 35%. Therefore, income that falls within the scope of both, the Savings Agreement and the Agreement, for example, interest, will remain subject to the withholding tax of 35% under the Savings Agreement.

refunded by the German tax authorities[18], which presupposes a declaration by the taxpayer, under the Agreement, the excess amount is refunded by the Swiss paying agent on behalf of the German authorities[19], which allows the taxpayer to remain anonymous. Alternatively, the German recipient of the income from capital may agree to a notification procedure, i.e. the Swiss bank would inform the German tax authorities of the capital income. The German taxpayer would then have to declare the income and be taxed by way of a personal assessment[20].

Regarding the future treatment of capital investment income, the Agreement, notably, provides for a broader scope than the existing Savings Agreement. The Agreement extends the scope of the withholding tax and provides for a look-through approach regarding the beneficial owner of receipts. Compared to the Savings Agreement, the Agreement defines a beneficial owner as any individual resident in Germany who, as a contractual partner of a Swiss paying agent, is the account holder or deposit holder and beneficial owner of assets or is the beneficial owner of assets held by (1) a domiciliary company (i.e. legal entities, companies, institutions, foundations, trusts, fiduciary companies and other establishments not exercising a trading or manufacturing activity or another form of commercial operations)[21]; (2) an insurance company in an insurance wrapper[22]; or (3) another individual by means of an account or a deposit with a Swiss paying agent. However, an individual resident in Germany is not considered to be the beneficial owner with regard to assets of associations of persons, asset structures, trusts, or foundations, if it is not possible to ascertain the beneficial ownership of such assets[23]. Under the Agreement, withholding tax is due on interest income, dividends, capital gains and other income derived that is either directly or indirectly distributed by (1) undertakings for collective investment domiciled in a Member State; (2) entities domiciled in a Member State that exercise the option under Art. 4(3) of the EU Savings Directive to be treated as a UCITS, provided they inform the paying agent of this fact; (3) undertakings for collective investment established outside the territory of the contracting parties; and (4) Swiss investment funds. Other income in this respect is defined as

[18] Art. 9 of the Savings Agreement in connection with sec. 14 of the German regulation implementing the Savings Directive (Zinsinformationsverordnung of 26 January 2004, BGBl. I 2004, at 128 and BGBl. I 2005, at 1695, last amended on 5 November 2007, BGBl. I 2007, at 2562.

[19] Art. 20(1) of the Agreement.

[20] Art. 21 of the Agreement.

[21] A domiciliary company is considered to be the beneficial owner in exceptional cases if proof is provided that it is itself subject to effective taxation under the general rules for direct taxation applicable under the law of its place of establishment or its place of effective management, or that it is treated as non-transparent with reference to its income under German law.

[22] The beneficial owner of an insurance wrapper is not considered the beneficial owner within the scope of the agreement where the insurance company confirms to the Swiss paying agent that it will deliver the appropriate certification to the competent authority of Germany.

[23] Art. 2(h) of the Agreement.

income from structured financial instruments, securities lending, repo-transactions, swaps and similar transactions in respect of which payments, other than interest or dividend payments, are derived[24].

Other measures

In order to safeguard the Agreement's purpose, the competent authority of Switzerland shall, on request, provide information to the competent authority of Germany if the identity of a German taxpayer and plausible grounds are provided. The request does not have to include the name of the Swiss paying agent[25]. However, there is a limitation on the number of information requests that can be made. A joint commission, after the entry into force of the Agreement, will determine, by mutual consent, the maximum number of admissible requests per calendar year. For the first two years, the maximum number shall be between 750 and 999[26]. Further to this, the Agreement also includes a declaration by Germany, according to which Germany will refrain from the active purchase of stolen data on Swiss bank clients in the future.

A Milestone?

For Switzerland, the Agreement definitely represents a milestone in regard to keeping its financial market alive and retaining its banking privilege. In addition to the positive effect on the image of the country, the Agreement is part of the Swiss strategy to secure the Swiss banking privilege and to gather support for future negotiations with the European Union on envisaged amendments to the Savings Agreement. It has been reported that, besides Germany and the United Kingdom, other Member States, such as Greece and Italy, consider starting negotiations to enter into similar agreements with Switzerland.

The Swiss banking sector proclaims that the Rubik Agreements are part of the Swiss financial centre strategy 2015[27]. Core elements of the strategy are regularizing previously undeclared funds situated in Switzerland and focusing in the future only on the acquisition and administration of taxed funds ("white money"). Before the Rubik Agreements, in March 2009, the Swiss Federal Council took the decision to adopt the international standards set out in article 26 of the OECD Model Convention with respect to administrative assistance in tax matters. Since then, revised or renegotiated treaties with the new administrative assistance provisions have been signed with numerous countries. Subsequently, Switzerland enacted a Federal Act on International Administrative Assistance in Tax Matters.

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[24] Art. 26 of the Agreement.

[25] Art. 31(1) of the Agreement.

[26] Art. 31(9) of the Agreement.

[27] Swiss Banking, "Informationen zum Abkommen zwischen D und CH zur Lösung von bilateralen Steuerfragen", 10. August 2011, available at http://www.swissbanking.org/20110808-5000-masterdoku-einigung_deutschland_d_final-rga.pdf.

Another core element of the strategy is however, the protection of privacy of Swiss bank clients. Thus, Switzerland objects to an automatic exchange of information, but considers a system of levying an anonymous final withholding tax as an equal solution. In return for levying a final withholding tax, Swiss banks hope for an easier market access for Swiss financial institutions in EU Member States. The Rubik Agreements, as part of this strategy, entail all these core elements[28].

From a Swiss perspective, the Agreement provides for a "win-win" situation for both contracting states. The Swiss financial sector is improving its image by moving towards a "white money" strategy and its market access to Germany is facilitated. Germany will refrain from the active purchase of stolen data on Swiss bank clients in the future, which will avoid the criminalization of Swiss bank employees. By regularizing the past undeclared assets, Germany will receive important tax revenues and German clients of Swiss banks will be able to regularize their assets without disclosing their identity. For the future, the envisaged system of levying an anonymous final withholding tax will effectively secure tax revenues for Germany and preserve the anonymity of German clients of Swiss banks. The broadened scope of the Agreement compared to the existing Savings Agreement will result in a comprehensive taxation of capital investment income derived by German residents. Overall, the Agreement will serve to provide legal certainty regarding the past and the future and provide for a constructive way forward for the fiscal and political relations between Germany and Switzerland.

Modern way of selling indulgences

Admittedly, for the sake of a constructive way forward for the future and to settle a long-term dispute between Germany and Switzerland, the past must be settled and a new start be made. However, a new start should be made on a solid basis. In the author’s view, the Rubik Agreement cannot provide such basis. The Agreement provides for too many technical loopholes and appears incomplete. In addition, the compatibility of the Agreement with German Constitutional law and EU law is questionable.

Technical loopholes and other issues

At first sight, the proposed system of levying an anonymous final withholding tax on investment income of private individuals appears to guarantee an effective taxation of such income, in particular in view of the broader scope of investment income covered and the introduced look-through approach compared to the Savings Agreement. The Agreement, however, does not provide for comprehensive coverage.

Even though the scope of investment income covered is broadened, the new look-through approach still provides for loopholes, as it provides an exception for structures where it is not possible to ascertain the beneficial ownership of the relevant assets due to the discretionary nature of the agreement. Thus,

[28] The Protocol to the Agreement stipulates that Switzerland and Germany have decided to facilitate mutual market access for financial institutions. In particular, the implementation of the exemption procedure for Swiss banks in Germany will be simplified, i.e. the obligation to initiate client relationships through a local bank branch will be eliminated.

discretionary foundations, as provided for under Liechtenstein's legislation, or discretionary trusts under common law will not be caught by the tightened approach.

The practicality of the provision regarding individuals who decide to move on to another jurisdiction (where the Swiss authorities will advise the German authorities as to the 10 states or jurisdictions to which such persons have transferred the most relevant assets), is doubtful, as, most likely, the new target destination will be a state or jurisdiction that is already known for its beneficial conditions and/or banking privilege. Of course, this may be regarded as an important step forward in identifying key locations that will be subject to future initiatives by the tax authorities. Nonetheless, it is questionable why the tax authorities would allow for the possibility to transfer assets to another location and escape the current initiative in the first place.

The voluntary disclosure for past undeclared funds is deemed to have the effect of a voluntary disclosure under sec. 371 of the General Tax Code in respect of the deposits and accounts declared. However, in this respect, it is not clear how this provision can be reconciled with the amended version of sec. 371 GTC, under which a voluntary disclosure only exempts the taxpayer from punishment if all relevant data for all fiscal offences relating to a specific type of tax, in respect of which the statute of limitations has not yet expired, is submitted. The text of the Agreement implies, that individuals must inform the paying agent in writing which option (one-off payment or disclosure) they choose with respect to each existing account or deposit. Sec. 371 GTC was amended in order to end the practice of "partial disclosures", in circumstances where taxpayers were only afraid of being caught in regard to specific transactions. The Agreement stipulates that the taxpayer must inform the paying agent, in regard to an existing account or deposit, which option is to be exercised. This implies that the Agreement does allow for a "partial disclosure". In addition, the Agreement further states that the legal consequences will depend on secs. 371 and 398a GTC. It is further noteworthy that the newly introduced provision of sec. 398a GTC provides that if the amount of tax evaded exceeds EUR 50,000, the exemption from punishment will only be available if, in addition to the repayment of evaded taxes and interest, a voluntary payment of 5% of the evaded tax is paid.

Regarding the provisions on the exchange of information, where the competent authority of Switzerland shall, on request, provide information to the Germany authorities if the identity of a German taxpayer and plausible grounds are provided, it remains to be seen how this safeguarding measure will function in practice. At first glance, the number of possible requests seems rather small in view of the suspected amount of undeclared funds and their beneficial owners. In addition, the rule leaves a lot of room for interpretation and subsequent discussions between the competent authorities, as the line between plausible and arbitrary grounds for investigating the tax position of a German taxpayer will not always be easy to identify.

Constitutional law issues

Further, it is doubtful, whether the Agreement is compatible with German Constitutional law. The treatment of previously undeclared funds under the Agreement basically constitutes a tax amnesty, as

the one-off payment under the Agreement results in the clearance of any liability for German taxes. Tax amnesties are permissible provided certain constitutional criteria are met. In particular, the principle of equality[29] and the rule of law[30] must be considered. The principle of equality is infringed if a certain group of people is treated differently compared to another group of people, despite the fact that there are no differences that are of such significance that they justify an unequal treatment[31].

Compared to previous tax amnesties, where a bridge to legality was offered to all non-compliant taxpayers, regardless of whether or not the undeclared assets were located abroad or in Germany, the Agreement only offers a bridge to legality for a specific group of persons who hold previously undeclared assets and funds in Switzerland. Of course, voluntary disclosure is available under domestic law to persons holding previously undeclared funds in other jurisdictions but, under this alternative, the non-compliant taxpayer cannot remain anonymous. Anonymity may only be preserved under the amnesty facility offered by the Agreement and thus is only available to a specific group of persons.

In light of the principle of equality, this differentiation, i.e. the possible preservation of anonymity in regard to non-compliant taxpayers with previously undeclared assets in Switzerland in contrast to non-compliant taxpayers who choose other jurisdictions, such as Liechtenstein, appears arbitrary. Further to this, the Agreement also includes a declaration by Germany, according to which Germany will refrain from the active purchase of stolen data on Swiss bank clients in the future. This part of the deal appears to be irritating as well, in particular in light of the recent purchase of data relating to German clients of Luxembourg banks and subsequent investigations[32]. If not from a constitutional point of view, at least from a moral point view, it appears arbitrary to offer absolution only to a specific group of persons with undeclared funds in Switzerland.

Compatibility with EU law

In view of the EU Savings Directive[33] and the Savings Agreement, which provide for equivalent measures, it is questionable whether Germany actually has the competence to conclude a separate agreement with Switzerland relating to the same issue. If the European Union enters into an international agreement with a third country by exercising exclusive external competence, the Member States no longer have the right to conclude such agreements themselves in the area concerned. As the sole signatories of the Savings Agreement were the European Union and the Swiss Confederation, the

[29] Art. 3(1) of the German Constitution.

[30] Art. 20(3) of the German Constitution.

[31] BVerfG, 2 BvL 14/05, 25 February 2008, Para. 22.

[32] Newsletter, Spiegel Online, 13 October 2011, available at http://www.spiegel.de/wirtschaft/soziales/0,1518,791682,00.html.

[33] Council Directive 2003/48/EC of 3 June 2003 on the taxation of savings income in the form of interest payments, OJ L 157 of 26 June 2003

European Union concluded the Savings Agreement based on implied external competence. The remaining question is whether or not that external competence was exclusive or shared.

Article 3(2) of the Treaty on the Functioning of the European Union (TFEU)[34] stipulates that the European Union shall have exclusive competence for the conclusion of an international agreement (1) when its conclusion is provided for in a legislative act of the European Union; (2) when it is necessary to enable the European Union to exercise its internal competence; or (3) in so far as its conclusion may affect common rules or alter their scope.

In this respect, it is apparent that the Savings Agreement in the light of point 24 of the preamble and Art. 17(2)(i)[35] of the Savings Directive falls under the first alternative of Art. 3(2) of the TFEU. The second alternative of that provision provides that the European Union also has exclusive external competence when the conclusion of an international agreement is necessary in order to exercise an internal Community competence. This is the case where the exercise of internal and external competence are inseparably linked. The conclusion of agreements with certain third countries was a prerequisite for the Savings Directive to enter into force. Without the integration of these third countries into the scheme provided for by the Savings Directive, the latter could never have functioned as envisaged; the result would merely have been a capital outflow to these third countries. Thus, the conclusion of the Savings Directive and the Savings Agreement were inseparably linked. Assuming that the signing of agreements with third countries was a matter of shared competence, Member States could have entered into individual agreements on the subject with these countries providing for potentially different measures and thus endangering the proper functioning of the scheme envisaged by the Savings Directive[36].

In light of this reasoning, the third alternative of Art. 3(2) seems to be also pertinent, as the conclusion of the Savings Agreement affected common rules, i.e. the Savings Directive. Indeed, the Savings Agreement was, "essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law"[37]. From this, it must be concluded that the European Union concluded the Savings Agreement in accordance with its exclusive implied external competence. Under this assumption,

[34] Although this Article was not included in the EC Treaty at the time of the conclusion of the Savings Agreement, it reflects previously developed jurisprudence on the implied external competence of the EU, see the *AETR* case, ECJ, 31 March 1971, Case 22/70, Commission of the European Communities v. Council of the European Communities. – European Agreement on Road Transport.

[35] Art.17(2)(i) of the Savings Directive provides that Member States shall apply these provisions from 1 July 2005 provided that the Swiss Confederation, the Principality of Liechtenstein, the Republic of San Marino, the Principality of Monaco and the Principality of Andorra 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.

[36] R. Lyal, "Note on the external competence of the European Community in tax matters – the example of the Agreement with Switzerland on the taxation of savings", in M. Lang and P. Pistone (eds.), The EU and Third Countries: Direct Taxation (Alphen aan den Rijn: Kluwer Law International, 2007), p. 68.

[37] New Lugano Convention Opinion, note 54, Para. 128.

Germany does not have the competence to enter into a separate individual agreement with Switzerland on the same subject matter.

In any case, regardless of the joint declaration of Germany and Switzerland and the assumption that the Agreement will have an enduring effect equivalent to the outcome that would be achieved through an agreement regarding the automatic exchange of information, it deviates from the objective of the Savings Directive, which is to achieve residence based taxation of savings income based on an automatic exchange of information. Therefore, the Agreement clearly undermines the common EU aim of moving towards an automatic exchange of information and the abolition of banking privilege, as it reinforces the withholding mechanism that has always been regarded as a second best temporary option in comparison to the automatic exchange of information.

In fact, the Agreement provides that the special withholding tax under the Savings Agreement is not affected, but that any amount in excess of the 26.375%, as set out in Art. 18(1) to (3) of the Agreement, will be refunded by the Swiss paying agent instead of the German tax authorities. Depending on the difference in timing between the refund mechanism under the Agreement and the refund mechanism under the Savings Agreement, the Agreement may be more beneficial for the taxpayer. The special withholding tax rate under the Savings Agreement was recently increased to 35% in order to provide an incentive for countries levying it to abolish their banking privilege and apply automatic exchange of information[38]. Not only can this incentive be alleviated in regard to Switzerland under the Agreement, but it may also result in a problem of distortion of competition between Switzerland, on the one hand, and Austria and Luxembourg, on the other hand.

By entering into separate Rubik Agreements with EU Member States, Switzerland is securing its opposition regarding an automatic exchange of information, which is likely to have a detrimental effect on the Commissions' efforts to negotiate amendments to the existing Savings Directive and equivalent agreements. In this regard, it is not likely that Luxembourg and Austria will agree to switch to automatic exchange of information and refrain from levying a withholding tax under the transitional period of the Savings Directive. The Rubik Agreements, thus, contradict not only the trend within the EU, but also the general trend in international taxation which goes in the direction of increased transparency and exchange of information. Among the EU Member States, which levied a withholding tax instead of exchanging information, Belgium already changed its approach with effect from 1 January 2010 and replaced the withholding tax by an automatic exchange of information. Already in 2009, the OECD started an initiative relating to the exchange of information. In September 2009, the Global Forum on Transparency and Exchange of Information dealing with tax matters, took major steps to confirm the end of the era of banking secrecy as a shield for tax evaders. Building on the extraordinary progress made in 2009 to incorporate the globally accepted standards developed by the OECD in both new and existing agreements, the Forum decided to put in place a robust, comprehensive and global monitoring and peer review process to ensure that members implement their commitments. Therefore, a Peer

[38] For the countries applying the special withholding tax, for example, Austria and Luxembourg, the withholding tax rate has increased to 35% with effect from 1 July 2011.

Review Group was established to examine the legal and administrative framework in each jurisdiction and practical implementation of these standards. The Rubik Agreements are out of touch with this global development.

Concluding Remarks

The obvious loopholes contained in the Rubik Agreement together with the fact that the Agreement provides, as a default option, for the anonymous levying of a withholding tax instead of automatic exchange of information, contrary to the declared aim of the Savings Directive, let the Rubik Agreement appear as a modern way of selling indulgences. In other words, the Rubik Agreement effectively offers the opportunity to individuals to regularize their past undeclared funds and to remain anonymous in the future, while it remains questionable whether future taxation of investment income will improve effectively. In return for a promising support of national budgets through regularization payments, Switzerland requires the other party to a Rubik Agreement to recognize the Swiss bank secrecy. This is not an equal win-win situation for all involved parties. While it is an obvious win situation for Switzerland by safeguarding the bank secrecy, an unexpected heavenly gift for German individuals with undeclared funds in Switzerland who are able to regularize these funds while preserving their anonymity, a short term win for German tax authorities who will receive an advance payment on the one-off payments, it is an obvious loss situation for the EU. Once the Agreement enters into force, it will have a detrimental effect on the EU Commissions' efforts to negotiate amendments to the existing Savings Directive and equivalent agreements. Luxembourg and Austria will not agree to switch to automatic exchange of information and refrain from levying a withholding tax, unless there will be an equal level playing field throughout Europe, including Switzerland. The Rubik Agreements are not contemporary and contrary to the recent trend to end the era of banking secrecy as a shield for tax evaders by increased transparency through exchange of information in tax matters.