

Exchange of information: a violation of fundamental rights ?

The global movement of recent years towards greater tax transparency has thrust upon us the automatic exchange of tax information ("AEOI"), embodied in the OECD's Common Reporting Standards ("CRS"). In effect, the edicts of the OECD, a non-elected organization of bureaucrats, have shifted tax information from away from national parliaments to new "international common standards".

These CRS norms have been almost universally accepted as a necessary evil, although only grudgingly by the financial sector, given the immense implementation costs. Surprisingly little concern has been voiced regarding the unconditional, across the board CRS approach to big data collection, especially when witnessing the hysterical reactions in some countries to Facebook, or Google data transfer issues.



Walter Stresemann
Treasurer and member of
the ARIF Committee

Yet, one may argue that the CRS – the reach of which goes far beyond the US "FATCA" reporting system – raises questions with respect to its compatibility with the legal systems of individual nations and that of the European Union (EU) in particular. Indeed, one may argue that the provisions of the CRS raise important issues in relation to the fundamental right to privacy and to the protection of personal data.

A study of the European Banking Federation has drawn an analogy between CRS and a significant decision of the European Court of Justice, which in 2014 invalidated the so-called "Data Retention Directive" on the basis of the European Charter on Fundamental Rights. The Court ruled that "the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives".

Similar principles of proportionality exist in the national data protection laws and jurisprudence of many European countries and it may be legitimately asserted that

the CRS provisions, mandating the collection and reporting of very comprehensive items of information pertaining to the identity and financial situation of each person, may constitute a similar, serious violation of Articles 7 and 8 of the European Charter of Fundamental rights.

Indeed, the vast scope of CRS makes every citizen a potential suspect: it applies to everyone, everywhere, even when

there is no evidence of tax evasion. The CRS data collection and processing is not limited to a particular time period and/or to a specific geographical zone, neither is it limited to a circle of particular persons suspected or likely, in one way or another, to be linked to acts of tax evasion.

Moreover, the access by national authorities to the collected data is not dependent on any independent prior review and there is a total absence of any specific, related criteria for limiting the access, subsequent exploitation and use of the data collected through AEOI to what is strictly necessary in the light of the objective pursued.

This unregulated, constant and continuous financial surveillance of taxpayers' private life may in Europe further undermine trust in governments and lead to legal challenges against them and perhaps also financial institutions.

Meanwhile, here in Switzerland the Federal Council has repeatedly emphasized the importance of a level playing field and strict data protection rules in implementing AEOI. It is now well known that the USA is not participating in CRS. Furthermore, the most recent choice of South Korea as an AEOI partner – a country which according to the Swiss Federal Data Protection Commissioner has insufficient data protection standards – should at the very least stimulate further debate.

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IMPRESSUM

Newsletter: 2 issues a year, distributed by electronic mail, hard copy if required.

Publisher: Association Romande des Intermédiaires Financiers (ARIF), 8 rue de Rive, 1204 Geneva.

Editor-in-chief: Norberto BIRCHLER (General manager)

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Training schedule 2016-2017

2016					
E	17 March 2016	B	9 am - 5 pm	Geneva	Basic training - MLA
I	13 aprile 2016	C	14 alle 17 ore	Lugano	«Implementazione delle modifiche della LRD»
D	14. April 2016	B	9 Uhr - 17 Uhr	Zürich	Grundausbildung - GwG
D	15. April 2016	C	9 Uhr - 12 Uhr	Zürich	«Umsetzung der GwG-Änderungen»
E	19 May 2016	C	2 pm - 5 pm	Geneva	«Implementation of the MLA amendments»
F	22 juin 2016	C	13h30 - 17h30	Lausanne	«Audits LBA et CoD : nouveautés»
F	22 septembre 2016	B	9h. - 17h.	Lausanne	Formation de base - LBA
F	6 octobre 2016	CoD	13h30 - 17h30	Genève	Formation de base - CODE DE DEONTOLOGIE
F	24 novembre 2016	C	18h. - 21h.	Genève	«LSFin/LEFin : les nouvelles lois financières» 
E	7 December 2016	B	9 am - 5 pm	Geneva	Basic training - MLA
2017					
F	1 février 2017	C	14h. - 17h.	Genève	«Mise en oeuvre des modif. LBA» (reprise) 
D	22. März 2017	B	9 Uhr - 17 Uhr	Zürich	Grundausbildung - GwG
E	6 April 2017	CoD	1:30 - 5:30pm	Geneva	Basic training - CODE OF DEONTOLOGY
E	4 May 2017	C	2 pm - 5 pm	Lausanne	«FinSA/FinIA : the new financial laws» 
F	18 mai 2017	B	9h. - 17h.	Genève	Formation de base - LBA
F	14 juin 2017	C	14h. - 17h.	Genève	«Criminalité organisée / Délit fiscal qualifié» 
F	21 juin 2017	C	13h30 - 17h30	Genève	«Audits LBA et CoD»

F	in French	B	MLA basic training
D	in German	C	MLA advanced training
E	in English	CoD	CoD basic training
I	in Italian		New theme

Every year ARIF trains around one thousand professionals from all over Switzerland, of whom 75% are affiliated members, 12% auditors and 13% non-members (of whom 8% are financial intermediaries affiliated to other SROs or directly regulated by FINMA). By 2017, ARIF will have organised more than 250 seminars in the 16 years since it was established and it is gradually strengthening its role as a multilingual trainer recognised by the other SROs, FINMA and various financial institutions.

Please note that the date of the basic MLA training seminar, in French in Lausanne, (previously fixed for 21st September 2016), has been moved to Thursday, **22nd September 2016**.

Implementation of the MLA amendments

Stéphanie Hodara

Partner, ALTENBURGER LTD legal + tax,
Member of the ARIF Committee

Philipp Fischer

Partner, ABELS Avocats

Sergio Uldry

Founder and Managing Director of BRP TAX SA

19 MAY 2016, 2PM - 5PM
WARWICK HOTEL, 14 RUE DE LAUSANNE, GENEVA

Program and subscription on www.arif.ch

Legal developments

Hearing of ARIF before the Economic Affairs Committee of the Upper House of Parliament (CER-E)

(Public statement of 17.02.2016)

Federal Financial Services Act (FFSA)

Financial Institutions Act (FinIA)

Since 2011, our Association has commented several times on the new regulations for the financial sector, coming out in favour of stepping up client information and of prudential supervision of intermediaries that are active in asset management. But this does not mean that ARIF fully adheres to the Federal Council's proposals made in its draft Federal Financial Services Act (FFSA) and Financial Institutions Act (FinIA) (Message dated 4th November 2015, 15.073).

* * *

Having been heard by the CER-E on 16th February 2016, ARIF has thus expressed the following opinion:

As far as the **FinIA** is concerned, maintaining a delegation of supervision for private bodies to which a public task has been delegated (Art. 35 para. 2 Cst; ATF 2C 887/2010) has been well received and we are fervently in favour of it. It is appropriate to encourage the self-regulatory organisations which so wish and can do so, to make the transition towards a supervisory organisation (SO), rather than devising new structures.

The existing self-regulatory organisations have demonstrated the effectiveness of the model. Therefore we support the proposal to put in place one or more supervisory organisations, which will take over the delegation model implemented with the Anti-Money Laundering Act (MLA), while guaranteeing the independence of the bodies of these supervisory organisations from the intermediaries that they supervise. As far as ARIF is concerned, it is ready to evolve towards the status of a supervisory organisation, subject to a few adaptations that will depend on the content of the FFSA.

One reservation needs to be made about Art. 43g P-LFINMA, which provides that supervisory organisations should be audited by the Swiss Federal Audit Office. 43g P-LFINMA. This link between the private and the public sector is unknown in Swiss law, is proving complicated and is not desirable.

We think that the apparatus of the **FFSA** for its part, as proposed by the draft law, is very cumbersome in administrative terms and should be revised and simplified. The cost incurred by the proposed administrative obligations would be enormous and would damage the financial centre - the opposite of the intended objective. In addition, while the law intends to protect the clients, it defines precisely the financial products and instruments concerned in article 2, but fails to define "the client", before forming all kinds of categories of client in Art. 3. One of the solutions we had advocated during the pre-consultation procedure would be to incorporate the client information obligations and the body of purely private provisions in a section of the Code of Obligations (CO) dealing specifically with the asset management mandate, which would then contain provisions of imperative law protecting the consumers of such financial services.

Swiss law already understands the employment contract and the lease agreement in this manner, with the same concern to protect the weak party to the contract. This approach would be entirely satisfactory from a legal viewpoint, and would not render the administrative apparatus more cumbersome. And since protection of investors - who are seen as "consumers" of financial services - appears to be the European authorities' main concern (cf. MiFID2 directive), it seems essential to incorporate this protection in a contract, with some imperative provisions, but this is lacking in the current draft of FFSA.

ARIF has therefore drawn conclusions similar to those of several umbrella organisations (notably USAM, Swiss Forum of SROs and SAAM), by supporting the referral of the draft back to the Federal Department of Finance.

FINMA Circular

«Video and online identification»

(FINMA - 21.12.2015 and 17.03.2016)

The Swiss Financial Market Supervisory Authority (FINMA) has established a regulatory environment to facilitate client onboarding through digital channels. It has drafted a new technology-neutral circular in which the anti-money laundering due diligence requirements now reflect digital business.

An increasing number of financial intermediaries interact with their clients via the internet and using mobile devices. The provisions on combating money laundering and the financing of terrorism should therefore reflect the rapid growth in the digitisation of financial services. The new FINMA circular thus defines the anti-money laundering due diligence requirements so that they are technology-neutral, facilitate digital business and eliminate any unnecessary barriers.

The FINMA Circular 2016/7 «Video and online identification» came into force on 18 March 2016.

Video identification of clients

Regulations now focus on the acceptance of business relationships (onboarding) through digital channels. In compliance with certain requirements, financial intermediaries can onboard clients via video transmission. FINMA has therefore put online identification of the contracting party on par with in-person identification.

Electronic confirmation of authenticity allowed

Other forms of online identification will also be possible. In compliance with certain requirements, the circular provides a variety of approaches to facilitate onboarding via internet. A key element of the rules is electronic confirmation of the authenticity of the client's ID which no longer requires in-person identification at the financial intermediary's place of business.

Another innovation is that the declaration of beneficial ownership no longer requires a handwritten signature which is then submitted in person or returned to the financial intermediary. Overall, the circular regulates alternative procedures fit for purpose in the digital era.

General Meeting 2016

The 18th Annual General Meeting of ARIF will be held on Thursday 3th of November 2016, from 5.30 pm, at the Warwick Hotel Geneva.

Introducing the new members of the ARIF Committee



Stéphanie Hodara



André Mange

Stéphanie Hodara El Bez is a barrister in Geneva and New York, holds a "licence" degree in law from the University of Geneva and an LL.M from Boston University (USA). She is a partner in the law firm ALTENBURGER Ltd legal + tax and is in charge of the Banking & Finance team of the Geneva office of this law firm.

Stéphanie practices in the areas of banking, financial and company law.

She advises independent asset managers, fund managers as well as banks and securities dealers in the areas of contract and regulatory law. She also represents them in connection with national and international procedures or in dealings with the financial market supervisory authorities.

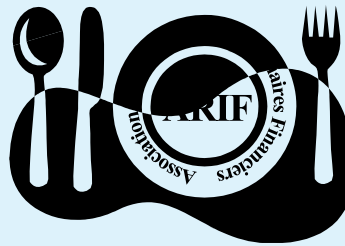
Stéphanie Hodara publishes regularly in the field of banking and financial law and is a regular guest speaker at conferences and training courses.



Trained in law and benefiting from extensive experience as a legal expert in the capacity of secretary general and administrative director of various groups active in intellectual property and the media, in 2004 André Mange joined Berney & Associés, a major fiduciary in French-speaking Switzerland, to organise the MLA function for the group's various financial intermediaries.

Today he divides his time between internal auditing and consulting on MLA and FATCA matters, MLA and Code of Conduct auditing carried out on the financial intermediary clients which are members of the various SROs, ARIF, ASG and OAR-G, and the general secretariat of the various senior management bodies of the Berney Associés group.

Mr. Mange is certified in compliance management from the University of Geneva, class of 2007, and is a member of the Group of Compliance Officers for French-speaking Switzerland.



Lunch-lectures

The Lunch-lectures, which were created with the aim of promoting synergies and discussion between finance professionals, are based on a practical and convivial lunch-seminar format dealing with topical themes and subjects of sectoral importance.

Change of address for mail



In order to speed up access to your letters, ARIF now has a post office box, which ensures fast and safe delivery of your mail. Therefore we invite you to send all correspondence to the address indicated above. Our street address remains unchanged.