

# Comparing the Swiss and United Kingdom cooperation agreements with their respective agreements under the Foreign Account Tax Compliance Act

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## ***Abstract***

An agreement between the United Kingdom (UK) and Switzerland came into force in early 2013,<sup>1</sup> providing for a process of clearing tax liabilities on UK residents' bank accounts in Switzerland, a withholding tax for future income and gains on such accounts, plus an authorisation for providing details to HM Revenue and Customs (HMRC). This paper compares this European-focussed initiative with the controversial enactment of the Foreign Account Tax Compliance Act (FATCA) in 2010 by the United States (US) Congress.<sup>2</sup> With regard to FATCA, the focus will be the decisions made by Switzerland and the UK to enter into intergovernmental agreements (IGAs) with the US and the resulting IGAs.

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<sup>1</sup> *Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on Cooperation in the area of Taxation* (London, 6 October 2011) and the Protocol amending the *Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on Cooperation in the area of Taxation* (20 March 2012).

<sup>2</sup> Pub. L. No. 111–147, 124 Stat 71 (March 18, 2010).

## 1. INTRODUCTION

Following the Global Financial Crisis (GFC), the pressure from governments to collect outstanding taxes, especially those from residents' offshore bank accounts, has risen dramatically. Initiatives include further efforts by the Organisation for Economic Cooperation and Development (OECD) to encourage expansion of the Global Forum on Tax Administration (Global Forum) while concurrently expanding the network of Tax Information Exchange Agreements (TIEAs) and bilateral double tax agreements (DTAs). A notable feature of this new emerging environment of enhance regulation is a series of globally reaching initiatives designed to facilitate the efforts of revenue authorities to collect outstanding taxes.

This paper seeks to examine the impact of two such initiatives. The first is the recent Switzerland–United Kingdom Tax Cooperation Agreement (Cooperation Agreement),<sup>3</sup> an example of the closer working relationship between the UK and Swiss Governments. The second is the 'controversial' enactment of the Foreign Account Tax Compliance Act (FATCA) as part of the Hiring Incentives to Restore Employment Act (the HIRE Act) in 2010 by the United States Congress.<sup>4</sup> In particular, it focuses on the Intergovernmental Agreements component of FATCA as between the UK and Switzerland.

The paper utilises document analysis and a review of the emerging literature to assess the potential impact of these two important developments in international taxation. It is policy focussed and takes a critical realist perspective with respect to both the 'global' initiatives reviewed and the decisions by the UK, US and Switzerland to be signatories to them. In a sense, this creates a novel triangular relationship between these three nations. What these initiatives may eventually give rise to forms the motivation for the paper. The UK was the first country to sign an IGA with the US, while Switzerland was the sixth. The Cooperation Agreement represents one of three similar agreements between the Swiss, and Germany and Austria, with the potential for a similar agreement with France to emerge in the future.

The signing of the Cooperation Agreement occurred on 6 October 2011, with the Cooperation Agreement coming into force on 1 January 2013.<sup>5</sup> This agreement is of significance, not only because Switzerland and the UK collectively managing approximately 50 per cent of the world's offshore wealth,<sup>6</sup> but it also marked a start of a gradual 'thaw' in Swiss bank secrecy.<sup>7</sup> The agreement provides for UK taxpayers that have assets held in Switzerland. In relation to UK domiciled taxpayers, they will

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<sup>3</sup> *Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on Cooperation in the area of Taxation* (London, 6 October 2011). This agreement has been amended by way of Protocol in 2012. The reference to the UK includes England, Scotland, Wales and Northern Ireland.

<sup>4</sup> Pub. L. No. 111–147, 124 Stat 71 (March 18, 2010). FATCA comprises sections 1471 to 1474 of the Internal Revenue Code 1986.

<sup>5</sup> *Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on Cooperation in the area of Taxation* (London, 6 October 2011) and the *Protocol amending the Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on Cooperation in the area of Taxation* (20 March 2012).

<sup>6</sup> See Itai Grinberg, "Emerging Countries and the Taxation of Offshore Wealth" (2013) *Georgetown Public Law and Legal Theory Research Paper* No 13–031, at 3 and 20.

<sup>7</sup> For an overview of Swiss banking secrecy and major developments, see Helga Turku, "The International System of States' Checks and Balances on State Sovereignty: The Case of Switzerland" (2012–2013) 38 *North Carolina Journal of International Law and Commercial Regulation* 809–874.

be subject to one of two outcomes. The first is a one-off payment on 31 May 2013 to clear past unpaid tax liabilities and/or a withholding tax on income and gains for the future from 1 January 2013. The alternative is that they will need to authorise their bank or paying agent to provide details of their Swiss assets to HM Revenue & Customs (HMRC). The one-off payment will clear those tax liabilities relating only to assets included in the figure of capital used in the payment calculation. In most cases, this will be the account balance at either 31 December 2010 or 31 December 2012. There are separate rules for non-UK domiciled individuals.

A potentially more dramatic development which is beyond the scope of this paper is Switzerland's decision in October 2013<sup>8</sup> to sign the OECD's revitalised Multilateral Convention for Mutual Administrative Assistance in Tax Matters (Multilateral Convention).<sup>9</sup> The Multilateral Convention, which acts as a form of support structure underpinning numerous bilateral DTAs and tax information exchange agreements (TIEAs), became 'globally' relevant with an amending protocol in 2010, which brought it into line with current international standards on transparency and exchange of information. As at 30 June 2014, 66 signatories/jurisdictions have signalled their commitment to the Multilateral Convention (including all of the G20 countries<sup>10</sup> and China), with 37 signatories to date having ratified the Multilateral Convention.

FATCA, as one of a series of provisions in the HIRE Act, is a US initiative to combat tax evasion by US persons holding assets in offshore bank accounts and through other offshore intermediaries. FATCA also represents the difficult political environment caused by the deferred prosecution by the US of UBS based in Switzerland. These provisions (together with a third provision that requires additional reporting by US investors in foreign investment companies) were designed to close down loopholes and increase tax compliance generally, by requiring investors to report and pay taxes on their income from US sources. However, projections suggest these provisions will raise revenue to offset the cost of tax incentives contained in the HIRE Act to encourage job creation. FATCA represents an evolutionary step in the international tax system according to Grinberg.<sup>11</sup>

In brief, FATCA obligates foreign financial institutions (generally offshore banks, private equity and hedge funds and other foreign financial institutions, known as FFIs) to enter into agreements with the Internal Revenue Service (IRS), disclosing the identities of US persons who hold accounts or interests in such FFIs. The failure by an FFI to comply with these rules will result in a 30 per

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<sup>8</sup> OECD, Switzerland signs Multilateral Convention on Mutual Administrative Assistance in Tax Matters (OECD, Paris, October 2013). At the time of writing Switzerland has yet to enact ratifying legislation.

<sup>9</sup> OECD, *Multilateral Convention for Mutual Administrative Assistance in Tax Matters* (1988), as amended in 2011 (CETS 127). See also the Council of Europe's (CoE's) *Explanatory Report on the Multilateral Convention* (2011).

<sup>10</sup> The G20 members are: Argentina, Australia, Brazil, Canada, China, France, Germany, Indonesia, India, Italy, Japan, Korea (Republic of), Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, United States, and the European Union. Details of signatories as at 3 July 2014 are available at: <http://www.oecd.org/tax/exchange-of-tax-information/a-boost-to-transparency-and-international-tax-cooperation.htm> (accessed 8 July 2014).

<sup>11</sup> Itai Grinberg, "Beyond FATCA: An Evolutionary Moment for the International Tax System" (2012) *Georgetown University Working Paper* (January 27, 2012). For an updated version of this working paper, see Itai Grinberg, "The Battle over Taxing Offshore Account" (2012) 60 *UCLA Law Review* 304–383. See also Scott D Michel, "FATCA: A New Era of Financial Transparency" (2013) 215(1) *Journal of Accountancy* 52–56.

cent withholding tax on all (or a portion) of payments made to the FFI. This includes US-source dividends, interest, and capital gains from the sale of US shares and securities (and certain other payments that are not generally relevant to private equity or venture capital funds) by the FFI. One of the myths about FATCA is that it is a tax; FATCA is not a tax but a mechanism to make it easier for the IRS to audit income and assets that would remain hidden offshore.<sup>12</sup> Thus essentially FATCA is designed not so much to collect tax but rather to compel FFIs and other entities to disclose on an annual basis information about US account holders who may not be complying with US tax reporting rules. FATCA was to apply to payments made to FFIs from 1 January 2014 with a phased application over the following three years. The application date was pushed back six months to 1 July 2014.<sup>13</sup>

The remainder of this article is structured as follows. In the next section, the article provides a brief review of recent efforts at enhanced tax cooperation between governments, followed in section 3 by an analysis of the key developments associated with the Cooperation Agreement between the UK and Switzerland. Section 4 focusses on the role of FATCA leading to the IGAs signed with each of the UK and Switzerland. Section 5 draws out a number of themes and issues from the preceding discussion, with section 6 setting out the concluding observations and suggestions for future research.

## 2. AN OVERVIEW OF THE TAX COOPERATION LITERATURE

Contributions on the subject of greater cooperation in taxation across borders are extensive, whether it is at the governmental level or by revenue authorities. It is not the aim of this paper to traverse this literature other than to highlight several recent contributions. The following discussion draws from an earlier paper by Sawyer.<sup>14</sup>

In the context of tax competition (the antithesis of tax cooperation), Genschel and Schwarz<sup>15</sup> provide an excellent overview of how the rise in tax competition of the 1980s and 1990s has gradually been displaced in much of the developed world by efforts to enhance tax cooperation, by both unilateral, bilateral and multilateral methods. The authors summarise the efforts at reducing tax completion through cooperation, highlighting that while there has been progress towards greater cooperation, this has not extended to greater tax harmonisation between nations.<sup>16</sup> In terms of future predictions, the authors see a slowdown in capital and corporate tax completion due mainly to domestic constraints following the GFC. They unsurprisingly predict a substantial rise in international tax cooperation, which is

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<sup>12</sup> Kimberley Tan Majure and Matthew R Sontag, "FATCA: Myths, Mysteries and Practical Perspectives" (2012) 64(4) *The Tax Executive* 315–321, at 315. Majure and Sontag also emphasise that FATCA applies to non-financial companies, that payment of the 30 per cent withholding tax will not necessarily be a solution, along with a number of other key practical matters.

<sup>13</sup> See Internal Revenue Service, *Revised Timeline and Other Guidance Regarding the Implementation of FATCA: Notice 2013-43* (July 12, 2013); available at: <http://www.irs.gov/pub/irs-drop/n-13-43.pdf> (accessed 15 July 2013).

<sup>14</sup> Adrian Sawyer, "Assessing the Implications of the Multilateral Convention of Mutual Administrative Assistance in Tax Matters and the Foreign Account Tax Compliance Act: An Australasian Perspective", *Paper presented at the Tax Research Network Conference*, University of Exeter, September 2–4 (2013).

<sup>15</sup> Philipp Genschel and Peter Schwarz, "State of the Art: Tax Competition — A Literature Review" (2011) 9 *Socio-Economic Review* 339–370.

<sup>16</sup> *Ibid.*, at 362–363.

evidenced by European (for example, UK and Swiss agreements) and US initiatives that this paper analyses. They state:<sup>17</sup>

Perhaps most importantly, large transformation economies, such as China, India and Brazil, have recently joined the major OECD countries in their quest for tax cooperation as evidenced most clearly by strongly worded G-20 tax policy pronouncements. There is *mounting political pressure on small countries and tax havens to behave cooperatively in taxation*.

In terms of the state of ‘global tax governance’, Wouters and Meuwissen<sup>18</sup> examine the state of play concerning moves in the area of greater governance of tax policy and practice from a global perspective. With the aftermath of the GFC, international initiatives concerning tax governance have gained political momentum. The authors examine the roles and work of the G20, OECD, United Nations (UN), International Monetary Fund (IMF) and the World Trade Organisation (WTO). The authors suggest<sup>19</sup> that the OECD has engaged in a symbiotic relationship with the G20, with the IMF’s input less effective. While arguably the UN is a truly global actor, it lacks institutional capabilities in the area of taxation, and thus relies on other actors in this regard (such as the OECD). International cooperation is now the norm with respect to exchange of information and fiscal transparency. The authors comment that international standards require implementation before they become effective, stating:<sup>20</sup>

Whereas standards may be elaborated at global level, *a separate process that integrates the standards into binding agreements is necessary to translate ‘governance’ into ‘law’*. Often, binding agreements are elaborated at the regional or bilateral level, rather than at a global level.

They conclude by observing that inclusiveness will be vital to future enhancement of global tax governance.<sup>21</sup>

The gradual emergence of global tax governance is unavoidable in an ever more interdependent and globalized world. ... Today, *no fully effective and legitimate global tax policy-maker exists*. To ensure a further legitimate and effective emergence of global tax governance, specific attention should be paid to *inclusiveness of the policy processes*, vertical and horizontal interaction among the relevant fiscal authorities, implementation of policy initiatives, international oversight, and conversion from tax ‘governance’ to tax ‘law’.

While there have been numerous calls for some form of World (or International) Tax Organisation to undertake such a coordinating role, to date there is little in the way of tangible progress.<sup>22</sup> The IMF in 2010 revised the idea of a World Tax Organisation as

<sup>17</sup> Ibid, at 364 (emphasis added).

<sup>18</sup> Jan Wouters and Katrien Meusissen, “Global Tax Governance: Work in Progress?” (2011) *Leuven Centre for Global Governance Studies*, Working Paper No 59.

<sup>19</sup> Ibid, 29.

<sup>20</sup> Ibid, 30 (footnotes omitted, emphasis added).

<sup>21</sup> Ibid, 31 (emphasis added).

<sup>22</sup> See for example: Vito Tanzi, ‘Is there a Need for a World Tax Organisation?’, in Assaf Razin and Efraim Saka (eds), *The Economics of Globalisation: Policy Perspectives from Public Economics* (Cambridge University Press, 1999), 173–186; Dale Pinto, ‘A Proposal to Create a World Tax Organisation’ (2003) 9(2) *New Zealand Journal of Taxation Law and Policy* 145–160; Adrian J Sawyer, *Developing a World Tax Organisation: The Way Forward* (Fiscal Publications, 2009); Dale Pinto and

a way of energising the fight against tax evasion and avoidance.<sup>23</sup> Thus to date initiatives have been led by various organisations (such as the OECD) or major influential jurisdictions, such as the US, and the UK and Switzerland in Europe.

This paper focuses on two relatively new moves towards greater tax cooperation, the first emerging from Europe (namely the Cooperation Agreement between the UK and Switzerland), and the second being the US ‘unilateral’ FATCA initiative. This article does not extensively traverse other OECD initiatives or the Global Forum’s TIEA initiative, since the literature is extensive. Nevertheless, a brief comment is necessary to contextualize the environment.

In relation to the TIEA initiative, Soriano suggests that there appears to be little future for the TIEA unless it undergoes radical reform.<sup>24</sup> This is largely due to the OECD and Global Forum focusing on the quantity of TIEAs and less on the ‘quality’ of the signatories.<sup>25</sup> The OECD and Global Forum have yet to formally review the standard under the TIEA model and how traditionally “uncooperative” tax havens are acting under these TIEAs.<sup>26</sup> The OECD frequently promotes the TIEA model as the international standard of ineffective transparency and collaboration.<sup>27</sup> As Soriano observes<sup>28</sup>:

... a TIEA is a tool that allows banking havens to make a *show of cooperation* while *continuing with their essential business of selling tax evasion services to residents of rich countries*. It is a contract which cannot function if there has been no meeting of the minds, and it is *not an efficient way to address information sharing*, insofar as it cannot force domestic actors to do what they have no interest in doing. It also does not specify what is to be done if there are no appropriate domestic legal provisions to collect the information: there is no obligation to create new or quicker mechanisms to access information contained in the TIEA model.

Sawyer concludes with respect to the TIEA initiative:<sup>29</sup>

The initial focus of Global Forum was a ‘numbers game’, illustrated by the total number of TIEAs, plus minimum of 12 agreements per ‘blacklist’ jurisdiction. To be fair, there is now some qualitative analysis emerging with the Peer Review process and the release of their country reports.

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Adrian Sawyer, ‘Towards Sustaining the Future of Taxation: Is a World Tax Organisation Necessary and Feasible in Today’s Globalized World?’ (2009) 24(2) *Australian Tax Forum*, 179–205; and Dale Pinto and Adrian Sawyer, “Building Bridges Between Revenue Authorities: Would a World Tax Organisation Be a Key Facilitator?” (2011) *Journal of Applied Law and Policy*, 25–40.

<sup>23</sup> Carlo Cotarelli and Andrea Schaechter, *Long-Term Trends in Public Finances in the G-7 Economies*, IMF Staff position note, SPN/10/13, 21 (Sept. 2010), <http://www.imf.org/external/pubs/ft/spn/2010/spn1013.pdf>.

<sup>24</sup> Alberto Gil Soriano, “Toward an Automatic but Asymmetric Exchange of Tax Information: the US Foreign Account Tax Compliance Act (FATCA) as Inflection Point” (2012) 40(1) *Intertax* 540–555, 553.

<sup>25</sup> See Adrian Sawyer, “Peer Review of Tax Information Exchange Agreements: Is it *More* than just about the Numbers?” (2011) 26(3) *Australian Tax Forum*, 397–427.

<sup>26</sup> *Ibid*, 542.

<sup>27</sup> *Ibid*, 543.

<sup>28</sup> *Ibid*, 543 (references omitted and emphasis added).

<sup>29</sup> Adrian Sawyer, “The OECD’s Tax Information Exchange Agreements: An example of (in)effective global governance?” (2011) *Journal of Applied Law and Policy* 41–54, 54 (emphasis added).

TIEA ‘effectiveness’ is seriously in question. While there is a regulatory processes in place this does not necessarily guarantee effective information exchange. ... the TIEA initiative will need to undergo major revision if it is to have any realistic chance of making effective inroads to information exchange. Systematic change to the Model TIEA ... appears to be most unlikely. This leaves the question open as to whether the TIEA initiative is an expensive exercise in ‘window dressing’ that leaves tax havens with little to fear and other countries with little to gain.

Most recently, Rosenzweig suggests a new approach to encouraging tax cooperation that is working outside of tax treaties. After building his case, Rosenzweig concludes:<sup>30</sup>

*The primary thesis of this Article is that the fundamental problem with cooperation in the modern international tax regime is precisely that it builds on the tax treaty model, thus effectively excluding non-treaty member countries from the system. Instead, this Article proposes the creation of a non-treaty-based cooperation mechanism, not to rule on which country should be entitled to tax a particular item of income as an economic matter, but rather to focus primarily on the mission of overcoming the modern collective action problem facing the international tax regime. Building a tax cooperation mechanism specifically around the premise of incentivizing cooperation of the least cooperative states in this manner could harness the same forces that led to the emergence of the modern international tax regime in the early twentieth century to address the fiscal crisis facing the early twenty-first century, thereby making all countries better off: poorer countries through winning specific disputes and wealthier countries through increased international tax cooperation.*

This brief review does not purport to be comprehensive in terms of the breadth of global and regional initiatives directed at enhancing tax cooperation,<sup>31</sup> nor does it systematically examine in depth the initiatives highlighted in the discussion.<sup>32</sup> The paper does not explore other matters, such as concerns over governance and the impact that tax secrecy has on tax morale. Nevertheless, in the context of tax morale, efforts to enhance the exchange of information encourage taxpayer compliance, whereas the reverse may give an impression of legitimising tax evasion and avoidance through failing to encourage taxpayers to declare their income.<sup>33</sup> An in-depth discussion would not serve the objectives of this paper, namely to focus on two major initiatives that have implications for tax cooperation within the UK, Europe (focussing on Switzerland) and the US. The article now turns to providing a brief background to the UK and Swiss Tax Cooperation Agreement.

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<sup>30</sup> Adam H Rosenzweig, “Thinking Outside the (Tax) Treaty” (2012) *Wisconsin Law Review* 717–786, 783–784 (emphasis added).

<sup>31</sup> For a recent proposal for enhancing tax cooperation, see H David Rosenbloom, Noam Noked and Mohamed S Helal, “The Unruly World of Tax: A Proposal for an International Tax Cooperation Forum” (2014) 15(2) *Florida Tax Review* 57–86.

<sup>32</sup> For further analysis of developments in exchange of information in the EU, see Roman Seer, “Recent Development in Exchange of Information within EU for Tax Matters” (2013) 22(2) *EC Tax Review* 66–77.

<sup>33</sup> See for example, James Alm and Beno Torgler, “Culture Differences and Tax Morale in the United States and in Europe” (2006) 27 *Journal of Economic Psychology* 224–246.

### 3. THE SWITZERLAND – UNITED KINGDOM TAX COOPERATION AGREEMENT

As noted earlier, signing of the Swiss Confederation-UK Taxation Cooperation Agreement occurred on 6 October 2011, and came into effect on 1 January 2013. The object of this agreement is to provide for bilateral cooperation between the UK and Switzerland to ensure the effective taxation in the UK of relevant persons.<sup>34</sup> The focus of the agreement is both to regularise the past (through a one-off payment to clear tax liabilities), and to create a regular withholding mechanism for income and gains on an ongoing basis.<sup>35</sup> The Cooperation Agreement also seeks to encourage voluntary disclosure by UK domiciled and non-domiciled resident taxpayers,<sup>36</sup> and provides for administrative matters, such as processes for handling the requests for information, transfer of assets and payments, an expense allowance for Switzerland and audits of Swiss paying agents.

In relation to the Cooperation Agreement, the House of Commons Treasury Committee (Treasury Committee) expressed concern over the apparent favourable treatment of those with Swiss assets over other taxpayers. Of major concern was the fact that the withholding rates applied to income and capital is lower than the top UK rates.<sup>37</sup> HMRC's David Hartnett responded:<sup>38</sup>

The 48% is a calculation based on the top rate of 50% when money would often not come in, or generally not come in, until 31 January following the end of the tax year. This money will come in earlier, so we calculated a withholding based on that anticipation of money.

The Treasury Committee correctly observed that this logic does not apply to domestic withholding rates on UK income, such that they will vary depending upon the time of withholding of tax or payment of the tax following the filing of a return. The Treasury Committee then observed:<sup>39</sup>

55. Any perception that those with offshore accounts are paying lower taxes than compliant taxpayers creates a *risk that the agreement may encourage taxpayers to seek opportunities to evade tax in the belief that they will be able to reach a favourable settlement in future*. Also, any perception that

<sup>34</sup> See note 1, above, Article 1.

<sup>35</sup> The Cooperation Agreement originally provided for interest income, dividends and other income, plus capital gains. VAT is also included. It now includes inheritances and excludes interest income.

<sup>36</sup> Details on the process for non-domiciled individuals are available in an HMRC advice: UK–Swiss Confederation Taxation Cooperation Agreement: remittance advice (11 December 2012); Legislative changes will be included in the Finance Bill 2013 through introducing a new section 26A to Schedule 36 of the Finance Act 2012; see further on HMRC's website. It is anticipated that over 265,000 British citizens living in Hong Kong could be affected by the Cooperation Agreement. According to Democratic Party lawmaker, James To Kun-sun, "people would rather choose to disclose and argue with the government, hoping that some money would turn out not to be taxed." This would be preferred over facing penalties. See Simpson Cheung, "Long arm of UK taxman reaches city", *South China Morning Post* (25 February 2013).

<sup>37</sup> House of Commons Treasury Committee, "Closing the Gap: HMRC's record at ensuring compliance", *29<sup>th</sup> Report of the Session 2010-12 HC 1371* (March 2012); available at: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/1371/1371.pdf> (accessed 4 March 2013).

<sup>38</sup> *Ibid*, at 15.

<sup>39</sup> *Ibid*, at 15 (emphasis added).



some taxpayers are receiving more favourable treatment than others is likely to discourage voluntary compliance.

This observation is in accordance with the behavioural tax compliance literature, such that fairness perceptions are critical to encouraging compliance.<sup>40</sup> The Treasury Committee went on to recommend that:<sup>41</sup>

... HMRC, when publicising the UK-Swiss tax agreement, *explains clearly the reasons for the lower rates of tax being withheld from Swiss bank accounts*. If there are to be similar agreements in future with other jurisdictions, the Government should seek agreement for the same effective tax rates that apply to UK taxpayers.

However, modifications to the original agreement occurred by way of a protocol on 20 March 2012.<sup>42</sup> This protocol clarifies the relationship between the Cooperation Agreement and the European Union's Savings Agreement (EUSA) with Switzerland.<sup>43</sup> The Protocol was necessary to ensure the Cooperation Agreement is in accordance with the EUSA. Consequently, where a relevant person has incurred a withholding tax under the EUSA (instead of a withholding tax on their interest payment under the Cooperation Agreement), an additional 13 per cent 'tax finality payment' needs to be paid to obtain tax clearance under the terms of the Cooperation Agreement. This achieves the same effect as the 48 per cent withholding tax levied under the original terms of the Cooperation Agreement. The protocol also introduces a new Inheritance Tax levy on the death of the relevant person unless their personal representatives authorise the Swiss bank to disclose the account details to the UK. This was an oversight in the original Cooperation Agreement. Overall the rates are based on the relevant tax rates applicable in the partner states in order to prevent a distorting effect of tax competition.

The EU Savings Directive, which the UK Government supports, aims to counter cross-border tax evasion by collecting and exchanging information about foreign resident individuals receiving savings income outside their resident state. EU

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<sup>40</sup> See, for example, the literature review by Maryann Richardson and Adrian Sawyer, "A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects", (2011) 16(2) *Australian Tax Forum*, 137–320.

<sup>41</sup> House of Commons Treasury Committee, above n 37, 15 (emphasis added).

<sup>42</sup> *Protocol Amending the Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on Cooperation in the Area of Taxation* (London, 20 March 2012). The UK has also declared that it will not actively seek to acquire customer data stolen from Swiss banks, and HMRC has clarified its position with respect to criminal investigations of relevant persons.

<sup>43</sup> See European Council, *Directive on taxation of savings income in the form of interest payments*, Directive 2003/48/EC (2003); and European Council and Swiss Confederation, *Agreement between the Swiss Confederation and the European Community 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* (26 October 2004). This agreement protects the secrecy of bank clients while ensuring that interest income is taxed by way of a withholding tax payable to EU member countries. EU nations can choose between the Swiss retention tax and making a voluntary declaration to their home tax authority. On 14 May 2013, the European Commission announced that Switzerland, amongst other European nations, has agreed to negotiate a stronger savings tax agreement with the EU; see Algirdas Šemeta, "Press conference remarks at Council of Finance Ministers (May 14, 2013). For a discussion on the strengths and weaknesses of the EU Savings directive, see Tyler J Winkleman, "Automatic Information Exchange as a Multilateral Solution to Tax Havens" (2012) 22 *Indiana International and Comparative Law Review* 193, 204–208. Under the EU Savings Directive, Switzerland has made the following payments: CHF510 million in 2013, CHF615.4 million in 2012, CHF506.5 million in 2011; CHF432 million in 2010 and CHF534.8 million in 2009.

members are required to make the necessary legislative changes within their jurisdiction to enable the EU Savings Directive to operate effectively. Consequently, HMRC collects information about the payment of savings income to certain overseas residents and exchanges this with certain other countries in the EU. With Switzerland not being a member of the EU, a separate agreement between the EU and Switzerland was necessary.<sup>44</sup> Similarly, the UK negotiated the Cooperation Agreement with Switzerland.

Later on 18 April 2012, the UK exchanged letter with Switzerland informing that it wished to exercise its right to have a beneficial change in the Cooperation Agreement to match that in the Swiss Federation-Federal Republic of Germany Taxation Cooperation Agreement.<sup>45</sup> This exchange of letters increased the minimum rate from 19 to 21 per cent, and altered the graduated rate formula applied to such assets.

The Cooperation Agreement, as amended, became part of UK domestic law by way of introducing Schedule 36 to the Finance Act 2012.<sup>46</sup> HMRC is encouraging UK taxpayers to choose to make a voluntary disclosure rather than do nothing and have a one-off payment deducted from their Swiss assets.<sup>47</sup> When choosing the voluntary disclosure option, this may be to HMRC directly, through the Liechtenstein Disclosure

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<sup>44</sup> Ibid, (2004 Agreement). On 9 October 2013, the Swiss Federal Council adopted a draft mandate for negotiations regarding a revision of the taxation of savings agreement concluded with the EU. These negotiations had been held up pending a satisfactory solution being found with respect to how the regulation of third country regimes is structured for the provision of cross-border financial services. The draft mandate, prepared by the Federal Department of Finance in collaboration with the Federal Department of Foreign Affairs, will be submitted for consultation to the competent parliamentary committees and to the cantons. The Federal Council will then adopt the definitive mandate, whereupon Switzerland will be able to commence negotiations with the EU.

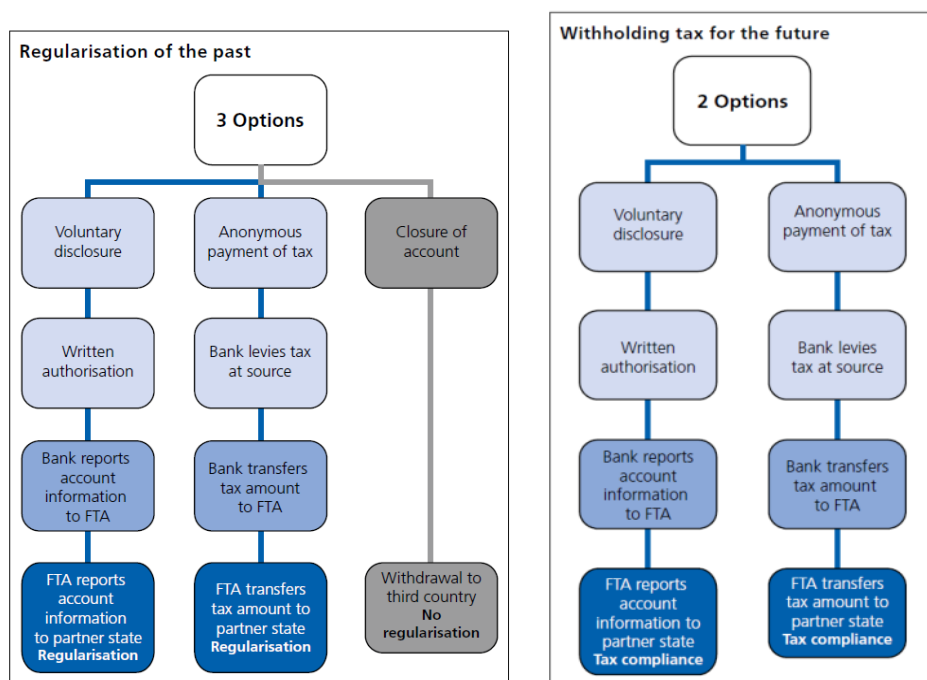
<sup>45</sup> *Agreement between the Swiss Federation and the Federal Republic of Germany on Cooperation in the Area of Taxation* (Berlin, 21 September 2011); as amended on 5 April 2012. See the Mutual Agreement representing the Exchange of Letters of 18 April signed in Berlin (for Swiss Confederation) and in Zurich (for the UK). This agreement was expected to raise €10 billion according to German authorities. The German agreement failed to be ratified by the Upper House (the opposition Social Democratic Party believed the agreement was too lenient and would not support it) and therefore has not come into effect. Indeed, Associate Professor Itai Grinberg testified before the Finance Committee of the German Bundestag against the proposed agreement between Germany and Switzerland; see Itai Grinberg, "Anonymous Withholding Agreements and the Future of International Cooperation in Taxing Foreign Financial Accounts: Testimony before the Finance Committee of the German Bundestag" (2012), *Georgetown University Law Centre* paper. In June 2014, Switzerland announced it was in negotiations to widen its cooperation with France for the exchange of information. This follows a long running dispute over inheritance tax for wealthy French citizens living in Switzerland; see Denis Balibouse, "Swiss agree to widen cooperation with France on tax evasion" (June 25, 2014) *Reuters News* (accessed 8 July 2014). An agreement between Switzerland and Austria has been negotiated; see *Agreement between the Swiss Federation and the Federal Republic of Austria on Cooperation in the Area of Taxation* (12 April 2012). This agreement was expected to raise €1 billion. For an analysis of the 'failed' German agreement, see Ernst and Young, *Agreement between the Swiss Confederation and the Federal Republic of Germany*" (2012) *Tax News* (March) 8–11. A comparison of the Austrian and UK agreements suggests that the UK negotiated a much more potent agreement, including the advance payment of CHF 1.3 billion by 31 May 2013 (Austria no such payment) and a maximum of 500 enquires each year (Austria none). Other variations reflect the main differences between the tax systems in the two countries. The potential fallout from the failure of the German agreement to receive ratification has been largely muted with the UK ratifying its agreement with Switzerland.

<sup>46</sup> Schedule 36, *Agreement between UK and Switzerland, Finance Act 2012*. Schedule 36 provides for the past situation, the future (with respect to income tax, capital gains and the inheritance tax, and general provisions).

<sup>47</sup> HMRC, *The Swiss/UK Tax Cooperation Agreement and HM Revenue & Customs (HMRC): Fact Sheet*, (October 2012); available at <http://www.hmrc.gov.uk> (accessed 4 March 2013).

Facility (LDF),<sup>48</sup> or by way of an HMRC Contractual Disclosure Facility (CDF), which may be applicable in cases of fraud.<sup>49</sup> The LGT Bank Ltd (based in Liechtenstein), provides an excellent comparison of the LDF versus the Cooperation Agreement and concludes that the LDF has advantages over the Cooperation Agreement in terms of reduced risks for UK resident taxpayers, and potentially lower penalties.<sup>50</sup> The Cooperation Agreement works as follows in Figure 1:<sup>51</sup>

**Figure 1: The Swiss-UK Cooperation Agreement: The two approaches**



The two diagrams illustrate the process to regularise the past and for the withholding tax to apply in the future. Swiss banks will deduct a flat-rate tax sum on existing assets from UK clients (the past) and on investment income and capital gains (the future), respectively, and forward this sum to the Federal Tax Administration (FTA) in

<sup>48</sup> *Memorandum of Understanding Between the Government of the Principality of Liechtenstein ("Government of Liechtenstein") and Her Majesty's Revenue and Customs ("HMRC") of the United Kingdom of Great Britain and Northern Ireland relating to Cooperation in Tax Matters* (Vaduz, Liechtenstein, 11 August 2009). Details of the LDF and associated issues are available on the HMRC website at: <http://www.hmrc.gov.uk/disclosure/liechtenstein-faq.htm> (visited 4 March 2013). The LDF was launched in 2009 and runs now until April 2016 (it originally was due to finish in 2015). It supports the review carried out by the financial intermediaries in Liechtenstein to identify person who may have a liability to UK taxation. A Joint Declaration of 11 August indicated discussions were underway towards negotiating a DTA between the UK and Liechtenstein. A Third Joint Declaration of 11 June 2012 confirmed that a DTA had been signed which supplements the 11 August TIEA (the Memorandum of Understanding).

<sup>49</sup> Details of the CDF are available on HMRC's website at: <http://www.hmrc.gov.uk/admittingfraud/help.htm> (accessed 4 March 2013).

<sup>50</sup> LGT Bank Ltd, *LDF vs Agreement UK-CH* (23 January 2013); available at: [http://www.disclosure-facility.co.uk/export/sites/inta\\_ldfinfo/en/dl/LDF-versus-UK-CH-Agreement\\_en.pdf?DSCext.nav\\_type=3](http://www.disclosure-facility.co.uk/export/sites/inta_ldfinfo/en/dl/LDF-versus-UK-CH-Agreement_en.pdf?DSCext.nav_type=3) (accessed 4 March 2013).

<sup>51</sup> The Federal Council, *Report on International Financial and Tax Matters 2013* (January 2013), 33 and 34; available at <http://www.efd.admin.ch> (accessed 4 March 2013). This is a translated document from the original Swiss language.

Switzerland. The FTA will transfer the tax to the UK's HMRC. With this transfer, the tax liability is fully settled, and thus is a final withholding tax. This protects the privacy of bank clients and the UK HMRC receives tax payments that it is entitled to by law. The critical date for Swiss bank clients to make their decisions concerning disclosure or closing their accounts early was 31 May 2013. Overall, the aim is to encourage early disclosure through a lower withholding tax rate.

When comparing the Cooperation Agreement to the LDF, it is important to recognise that the agreement between the UK and Switzerland had to be sufficiently practical to enable Swiss paying agents to administer it. Furthermore, conclusion of the Cooperation Agreement is on entirely different principles to the LDF. The LDF is a comprehensive disclosure opportunity based upon meeting certain conditions. The aims of the Cooperation Agreement, however, are to address the issue of non-compliant assets held or managed by Swiss paying agents for UK residents, and to introduce a mechanism to ensure future income and gains from these assets are subject to disclosure or to a withholding tax, set at a level which reflects the top UK rates. Consequently, it is not really a disclosure facility.<sup>52</sup> As Rawlinson and Hunter suggest, "... it could be described as a combination of an enhanced EU Savings Tax and an exchange of information agreement."<sup>53</sup>

As KPMG comment, for many UK taxpayers, the LDF is still likely to be the most appropriate (and cheaper) route.<sup>54</sup> Why is this so? The key benefits of the LDF are what appears to be a guaranteed immunity from prosecution, the use of a composite rate option (which KPMG suggest can reduce the size of the tax liability substantially), being able to resolve worldwide-undisclosed assets and achieving certainty for the future.

If UK taxpayers transfer all or some of their Swiss accounts, this will not necessarily relieve them from their tax liability. Emphasising the consequences of this new environment, when announcing the new Cooperation Agreement, HMRC Permanent Secretary for Tax Dave Hartnett, stated:<sup>55</sup>

The world is shrinking fast for offshore tax evaders and this agreement will ensure that we know where money that flees Switzerland is heading. We won't be far behind.

<sup>52</sup> Nevertheless, as of 12 June 2012, the LDF led to more than 2,400 UK taxpayers sign up, bringing in £363 million to HMRC; see Randall Jackson, "UK-Liechtenstein Tax Disclosure Scheme Successful" (2012) 66 *Tax Notes International* (June 18) 1115–1116. Dave Hartnett is reported as stating that HMRC expects the LDF to produce up to £1.3 billion from a much larger number of people. HMRC to February 2014 has received £914 million under the LDF, and expects now to receive £1.4 billion by April 2016 under the LDF. See Helen Burggraf, "LDF yield could be less than half of £3 billion target" (2014) *International Advisor* (3 April); available at: <http://www.international-advisor.com/news/tax-regulation/ldf-tax-yield-could-be-less-than-half> (accessed 8 July 2014).

<sup>53</sup> Rawlinson & Hunter, "UK/Swiss Tax Agreement — A Detailed Summary" (2011) *Briefing* (November), 1.

<sup>54</sup> KPMG, *UK-Switzerland Tax Cooperation Agreement* (2013); available at: <http://www.kpmg.com/uk/en/services/tax/personaltax/pages/uk-switzerland-agreement.aspx> (accessed 8 March 2013).

<sup>55</sup> David D Stewart, "UK, Switzerland Agree to Withholding Tax Plan" (2011) 64 *Tax Notes International* (October 17) 167–168, 167 (quoting Dave Hartnett).

On 14 November 2012, Secretary of the UK Exchequer stated:<sup>56</sup>

The days of hiding money in Switzerland in order to evade tax are over. Burying your head in the sand is no longer an option. The only realistic strategy is to talk to HMRC, as quickly as possible.

Early forecasts for revenue under the Cooperation Agreement by the UK Treasury were in the range of £4 billion to £7 billion. Consequently, the net revenue impact for the UK is substantial, although the range is surprisingly variable, suggesting the UK Treasury has little idea of the size of assets held in Switzerland by UK residents. During January 2013, Swiss authorities made an initial payment of £342 million (SFr500 million) to the UK Government as part of an advance payment to May 2013.<sup>57</sup> Another £547 million (SFr800 million) was initially considered to be outstanding, with the total to be reimbursed to the Swiss banks once the equivalent of SFr1.3 billion (£899 million) is reached.<sup>58</sup> However, any further (advance) payments are likely to be less than initially expected as more account holders are voluntarily revealing their accounts and many UK residents are not UK domiciled and thus not liable to UK tax.<sup>59</sup> Total payments from July 2013 to June 2014 as part of the regularisation of untaxed assets amount to £466.8 million, with £10 billion in disclosed assets. For final withholding tax on capital income, the payments for the 2013 calendar year total £58.2 million.<sup>60</sup>

Johannesen has attempted to empirically measure the reduction in Swiss bank deposits induced by the EU Savings Directive.<sup>61</sup> While not specifically including the Cooperation Agreement, the findings indicate a 30–40% reduction in Swiss bank deposits held by EU residents. Furthermore, rather than greater compliance, Johannesen's research reveals that Swiss deposit holders have substituted untaxed alternatives for their Swiss deposits. Assuming a similar reaction under the Cooperation Agreement, this would suggest a reduction in UK resident holding Swiss accounts (part of the aim of the Cooperation Agreement), but also some substitution to untaxed alternatives rather than necessarily leading to enhanced compliance in the longer run.

After receipt of the first payment, Chancellor of the Exchequer, George Osborne, during the House of Commons Question Time on 29 January 2013, is reported as stating:<sup>62</sup>

<sup>56</sup> HMRC Press Office, "Decision time for Swiss account holders" (2012) *Press Release* (14 November); available at: <http://hmrc.presscentre.com/Press-Releases/Decision-time-for-Swiss-account-holders-68347.aspx> (accessed 4 March 2013).

<sup>57</sup> Office for National Statistics (UK), *Public Sector Finance: January 2013* (February 21, 2013), 13. See also Swissinfo.ch, "British receive initial funds from tax deal" (January 30, 2013); available at: [http://www.swissinfo.ch/eng/politics/British\\_receive\\_initial\\_funds\\_from\\_tax\\_deal.html?cid=34867206](http://www.swissinfo.ch/eng/politics/British_receive_initial_funds_from_tax_deal.html?cid=34867206) (accessed 4 March 2013).

<sup>58</sup> See Swissinfo.ch, *ibid.* Austria does not receive a similar upfront payment, and with the German Senate rejecting a similar deal, it will not receive any payments under a Rubik accord.

<sup>59</sup> Society of Estate and Trust Practitioners, "Swiss banks' guarantees to UK government may have been too generous" (July 2013); at <http://www.step.org> (accessed 8 July 2014).

<sup>60</sup> Swiss Federal Tax Administration, Payments to the UK (2014); available at:

<http://www.estv.admin.ch/intsteuerrecht/aktuell/index.html?lang=en> (accessed 8 July 2014).

<sup>61</sup> Niels Johannesen, "Tax evasion and Swiss bank deposits" (2014) 111 *Journal of Public Economics* 46–62.

<sup>62</sup> David D Stewart, "UK Announces First Payment under Swiss Tax Agreement" (2013) 69 *Tax Notes International* (February 4) 448 (emphasis added).

I can confirm to the House that last night Her Majesty's Revenue and Customs received £340 million from the Swiss Government, a first instalment of the deal we have struck, and *the first time in our history that money due in taxes has flowed from Switzerland to the U.K., instead of the other way round.*

Exchequer Secretary David Gauke stated on 29 January 2013, that “... [o]ur agreement with the Swiss Government will deliver around £5 billion of previously unpaid tax to the UK.”<sup>63</sup> As part of the UK Government's decision to review its future involvement in the EU as to what continued involvement would mean for the UK national interest, HM Treasury released a consultation paper in November 2012. Taxation is one area of relevance to this review, with HM Treasury outlining the restrictions imposed on the UK by its EU membership, but also outlining the scope for entering into its own agreements.<sup>64</sup>

Grinberg comments on the tensions and inconsistencies with the UK decision to enter into the agreement with Switzerland, observing:<sup>65</sup>

*The Swiss-U.K. agreement sits in uncomfortable tension with Chancellor of the Exchequer George Osborne's April 2013 agreement to “work on a pilot multilateral exchange facility... using the model agreed with the US” with France, Germany, Italy and Spain (the “G5 Proposal”). It also is inconsistent with HM Revenue and Customs' (HMRC) claims that the UK will pursue bilateral agreements consistent with the UK-US FATCA IGA, and the G20's April 19, 2013 agreement to work toward a new international standard of automatic information exchange.*

*The internal contradictions of UK policy are important, because the UK's overseas territories and crown dependencies are, in the aggregate, enormously important managers of offshore wealth. ... Furthermore, the UK has asserted substantial control of the negotiations regarding the process and rules under which information on US accounts held in UK overseas territories crown dependencies pass to the United States. By asserting that control, the U.K. gains greater influence over the shape of a future global settlement on information exchange.*

From a Swiss perspective, the Federal Council released a report in January 2013 on financial and tax developments in 2012.<sup>66</sup> In this report Switzerland indicates that it is prepared to sign agreements that respect the privacy of bank clients while ensuring

<sup>63</sup> Ibid.

<sup>64</sup> HM Treasury, *The Government's review of the balance of competencies between the United Kingdom and the European Union* (November 2012). HM Treasury states (p 21, footnotes removed):

“3.63 Member States are themselves able individually to conclude tax agreements with other EU countries or non-EU countries through intergovernmental arrangements. For example, this may be done bilaterally in the form of a Double Tax Treaty, of which the UK has over 100, a Tax Information Exchange Agreement, including the UK-US Intergovernmental Agreement to Improve International Tax Compliance and to Implement FATCA, or agreements like the UK-Swiss Tax Agreement. Alternatively, agreements may be effected multilaterally, such as in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.”

<sup>65</sup> Grinberg, above n 6, 20 (footnotes omitted, emphasis added).

<sup>66</sup> The Federal Council, above n 51, 32–38.

that legitimate tax claims of Switzerland's partner countries are implemented.<sup>67</sup> This is part of a new era for Switzerland (the beginning of a 'thaw' in its traditional banking and associated tax secrecy), in which it has over 40 DTAs containing the new administrative assistance provisions. Switzerland draws attention to it agreeing with the UK to allowing UK tax authorities to submit requests for information that contain the name of the client but not necessarily the name of the bank. The number of requests is subject to an annual limit (currently 500 requests). Reasonable grounds need to form the basis for such requests.<sup>68</sup> It is important to note that, since the Cooperation Agreement affects everyone who is liable to tax in the UK regardless of his or her nationality, it also affects UK-resident Swiss nationals.

Switzerland, having faced pressure from numerous jurisdictions (including the US) following the GFC to assist them in reducing tax evasion, wishes to achieve its objective of being a tax-compliant financial centre. In this regard, it is concluding withholding tax agreements (such as the Cooperation Agreement), improving administrative and mutual assistance in accordance with international standards and extending financial institutions' due diligence requirements. The Swiss Federal Department of Finance states:<sup>69</sup>

From the Swiss perspective, the *final withholding tax is preferable to the automatic exchange of bank data*. Switzerland forwards the tax owed directly to the country concerned and at the same time *protects clients' privacy*. Moreover, the Confederation will continue also in the *future to provide administrative assistance in tax matters in accordance with the OECD standard*. The prerequisite for this assistance is a corresponding double taxation agreement with the enquiring country.

The Tax Administrative Assistance Act 2012 (TAAA) came into force on 1 February 2013, replacing the former Ordinance on Administrative Assistance of October 2010 in relation to various DTAs.<sup>70</sup> The TAAA now governs the provision of administrative assistance under DTAs and other agreements for the exchange of

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<sup>67</sup> Ibid, 32. The Report overviews Switzerland's efforts at bilateral cooperation through entering into DTAs and TIEAs, the process by which it now implements such agreements into its domestic law (the Tax Administrative Assistance Act 2012), international withholding tax agreements (such as the Cooperation Agreement), agreements with the US such as FATCA, and agreements with the EU. Multilateral cooperation initiatives include the Global Forum on Transparency and Exchange of Information for Tax Purposes and working with the UN.

<sup>68</sup> Federal Council, above n 51, 34–35. Furthermore, within one year of the date it comes into force (1 January 2014), the Swiss government will report the 10 jurisdictions to which UK residents transferred the largest volume of undeclared assets.

<sup>69</sup> Federal Department of Finance, *Withholding Tax Agreements* (January 2013), 2 (emphasis added). There is reference to a Federal Act on International Withholding Tax (IWTA) that contains provisions on organisation, procedure, judicial channels and the applicable criminal law provisions. This Act came into force on 20 December 2012. It entered into force ahead of the bilateral agreements to ensure that the upfront payment by Swiss paying agents set out in the agreement with the UK can be transferred to the UK by the deadline of 31 January 2013. No English equivalent has been located, but in translating from German, its full title is the *Federal Law about the International Withholding Tax 2012*. Negotiations are currently underway with Greece and Italy for similar agreements. More recently Switzerland and the EU have a serious disagreement over cantonal company tax practices in Switzerland, with Switzerland emphasising that since there is no agreement between Switzerland and the EU requiring the EU to harmonise its corporate taxes there can be no violation. Since Switzerland is not part of the EU single market, the EC Treaty competition rules do not apply to Switzerland; see Federal Department of Finance, *Switzerland — EU Tax Controversy* (2011).

<sup>70</sup> The full title is: *Federal Act on International Administrative Assistance in Tax Matters (Tax Administrative Assistance Act, TAAA) 2012*. The TAAA was passed into law in September 2012.

information in tax matters (such as TIEAs and the Cooperation Agreement) with respect to both foreign and Swiss requests for administrative assistance. Under the TAAA, the provision of administrative assistance requires a specific request. Importantly, the Cooperation Agreement permits group requests; however, requests that come without concrete indications will not, (such as requests made for the purposes of ‘fishing’). Furthermore, Switzerland will not meet requests for information based on information obtained through actions punishable under Swiss law, such as the illegal acquisition of data. The TAAA also sets out who is to be informed about pending requests and to whom a right to participation and inspect files is provided. There is also an appeal procedure, including the potential for a second appeal body.<sup>71</sup>

More recently Switzerland’s decision in October 2013<sup>72</sup> to sign the OECD’s Multilateral Convention represents a significant step to bringing exchange of information closer to the new emerging standard of automatic exchange.<sup>73</sup> Once ratified, this may serve as the litmus test of how far Switzerland’s ‘thaw’ may potentially go with respect to facilitating information exchange. This is expected to challenge Switzerland, in the view of the OECD in its economic survey of Switzerland published November 2013. Patel is reported as stating that Switzerland is struggling with maintaining a delicate balance, namely:<sup>74</sup>

Switzerland is grappling with the [information exchange] needs for certain jurisdictions while preserving its historical business. ... It is trying to appease the Western world while courting business from the rest of the world. ... How do you sell banking secrecy services while turning over data to the U.S., U.K., and Germany? ... The model of selling confidentiality, but not being a tax haven, really doesn’t work.

Overall Switzerland is seeking to be much more cooperative with other countries with regard to taxation. Switzerland’s involvement in various international bodies illustrates this in part. This includes the OECD (a founding member in 1961), the Global Forum on Transparency and Exchange of Information for Tax Purposes (a member since 2009), the Intra-European Organisation of Tax Administrations (IOTA – a member since 2006), the UN, the International Fiscal Association, and the recent TAAA that gives effect to enhanced cooperation.<sup>75</sup> The actions by Switzerland have also made the EU much more eager to negotiate a comprehensive EU-wide tax agreement with Switzerland, rather than have the UK in particular benefit from being ‘first off the mark.’

In commenting on the Cooperation Agreement in relation to UK domiciled taxpayers, Johnson questions whether it will have any real teeth.<sup>76</sup> He raises the very real matter of whether a person would hold an account in their name and rely solely on Swiss

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<sup>71</sup> State Secretariat for International Financial Matters SIF, *Tax Administrative Assistance Act* (October 2012); available at <http://www.sif.admin.ch> (visited 4 March 2013). The TAAA provides for appeals under the Swiss Administrative Procedure Act 1968(SR 172.021) applies.

<sup>72</sup> OECD, above n 8. As noted earlier Switzerland has yet to enact ratifying legislation.

<sup>73</sup> OECD, above n 9.

<sup>74</sup> Randall Jackson, “Information Exchange will challenge Switzerland, OECD says” (2013) 72 *Tax Notes International* 717–718, at 717–718.

<sup>75</sup> See Federal Department of Finance, *Switzerland’s engagement in international bodies that deal with tax matters* (November 2012).

<sup>76</sup> Trevor Johnson, “The Swiss-UK Tax Agreement: The Fiscal Equivalent of Emmental Cheese” (2011) 64 *Tax Notes International* (December 5) 717–719.



secrecy to avoid detection. It would be expected that some form of intervening structure (for example, trusts or companies) would be in place to ‘muddy the water’, since the Cooperation Agreement does not extend to accounts held by trustees or companies. Johnson also points out that HMRC is entirely reliant on the Swiss paying agents to carry out their role under the agreement and has no sanction available to levy in the case of failure. Johnson also recommends using the LDF rather than the Cooperation Agreement when making disclosures. He makes two further telling points:<sup>77</sup>

*Is it morally right to allow someone to continue to submit an incorrect tax return and give them a tax discount into the bargain? In the current climate even professional tax advisers are beginning to feel uncomfortable with this agreement. ...*

This agreement has been criticized from all quarters. Some advisers say that it is not attractive enough to the tax evader, who would be better advised using the LDF instead. Others are claiming that evaders are being let off lightly. I think both sides have merit in their arguments and some rewriting of the agreement needs to be carried out before it comes into force.

In relation to non-domiciled UK residents, Johnson suggests only those that have been declaring remittance of some but not all of their non-UK income and gains would benefit from using the provisions of the Cooperation Agreement.<sup>78</sup> In fact non-domiciled individuals have a greater range of choices available to them, provided they come within this category. Johnson states:<sup>79</sup>

It seems clear that the agreement as it stands is not perfect — no compromise ever is. The Swiss concerns about banking confidentiality have had to be balanced with the UK’s needs to raise more tax. It is a pragmatic approach that is not going to please everyone, and that includes our European friends. ...

However, it does not seem to be the scope of the UK agreement that has rattled the cages of the European Commission, but rather the fact that the U.K. (and Germany) has gone off and “done its own thing.” It *therefore boils down to a question of sovereignty, which is something of a hot potato in EU-UK relations*. The potential dispute is not going to make for an easy decision for those with a few undeclared millions tucked away in Zurich.

While now more of historical interest only, an editorial in the UK’s *Financial Times* came out strongly against the Cooperation Agreement, stating:<sup>80</sup>

The rejection of a tax agreement with Switzerland by the upper house of Germany’s parliament is a welcome opportunity to *revisit a deal that was too lenient on tax evaders and those who aid and abet them*. The UK and

<sup>77</sup> Ibid, 719 (emphasis added). Apart from the amendments discussed earlier, there has been no substantial rewriting of the Cooperation Agreement.

<sup>78</sup> Trevor Johnson, “More Holes in the Emmental: A Continuing Look at the Switzerland-UK Tax Agreement” (2011) 64 *Tax Notes International* (December 12), 801-803.

<sup>79</sup> Ibid, 802–803 (emphasis added).

<sup>80</sup> Editorial, “Swiss bank secrecy comes under scrutiny” (2012) *Financial Times* (November 30); as reported by Tax Research UK at: <http://www.taxresearch.org.uk/Blog/2012/11/30/the-ft-says-its-time-to-scrap-the-uk-swiss-tax-deal-because-it-grants-cheats-a-privilege/> (emphasis added).

Austria, which have struck similar deals with Bern, should also see the virtues of a tougher approach.

The deals are all cast in the same mould: *the countries' own tax authorities abdicate their task to Swiss banks*, which will charge anonymous account holders a one-off fee on assets deposited in the past and a regular withholding tax on future income. This money – but not information about the owners' identities – will flow back to the national treasuries to which the taxes were originally owed.

This is better than nothing, even if it may not make back what was originally owed. The sanctioning of anonymity, however, breaches a basic principle: not to grant cheaters a privilege – the ability not to declare their taxable income or assets to the proper authorities – denied to those who play by the rules. This is an injustice in its own right. It also raises the question of how the new agreement can be trusted to work in practice.

Grisel and Gani review the dramatic change in the Swiss policy regarding the exchange of information in tax matters that occurred on 13 March 2009.<sup>81</sup> On this day, Switzerland 'gave up' its traditional restrictive approach, and commenced renegotiating DTAs that adopt the OECD's standard with respect to exchange of information. Consequently, the authors observe that the clients of the Swiss banks are no longer guaranteed quasi-absolute bank secrecy towards their residence country's tax authorities. Grisel and Gani examine the Swiss bank secrecy and its recent evolutionary changes, and focus their analysis on effects this may have on accounts held in trust. They conclude that, to an extent, in certain circumstances trusts may be a barrier against exchange of information between Switzerland and foreign tax authorities.

From a Swiss perspective, Toenz and Krech make the following observation:<sup>82</sup>

These two special tax agreements are *good for the contracting states as they satisfy the interests and requirements of the contracting states equally well*. They respect the protection of bank clients' privacy applicable in Switzerland and also ensure the recovery of unpaid taxes from offshore accounts both for the past and the future.

However, the agreements are very complex indeed and comprise some 32 pages. They impose significant responsibilities on the Swiss financial institutions as well as on the UK or German resident taxpayer, and the time frames within which important decisions must be made are very short. However, *any option chosen by a relevant person to regularize the past has no impact on options available for the future regarding the potential withholding tax on income and gains on relevant assets levied by Swiss paying agents*.

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<sup>81</sup> Guillaume Grisel and Raphael Gani, "Swiss bank accounts held in trust: the Swiss bank secrecy reborn?" (2012) 18(5) *Trust and Trustees* 412–414.

<sup>82</sup> Leonard Toenz and Katja Krech, "Switzerland's Tax Cooperation Agreements with the UK and Germany – Regularizing the Past" (2012) 65 *Tax Notes International* (March 5), 757–759, 759 (emphasis added). For a commentary on the changes brought about by the protocols, see Leonard Toenz and Katja Krech, "Switzerland's Tax Cooperation Agreements with the UK and Germany" (2012) 67 *Tax Notes International* (July 2), 57–60.

Grinberg observes that Switzerland recognised that if it negotiates a small number of anonymous withholding agreements with key countries then this could "... potentially diffuse the pressure to offer uniform automatic information reporting to a broader group of countries."<sup>83</sup> Consequently, Grinberg observes, Switzerland was insistent that the UK support the anonymous withholding model and not work against it when it was involved in future dealings with third parties. Switzerland remains committed to its approach notwithstanding Germany's decision not to ratify its agreement with Switzerland. As Grinberg observes, "[t]he Swiss-U.K. agreement therefore helps establish the basis for a suboptimal equilibrium that militates against the emergence of a uniform multilateral automatic information exchange system."<sup>84</sup>

In early July 2013, the Swiss Bankers Association is reported as stating that there is a much lower level of UK assets being held in Switzerland than previously assumed. In response HMRC Treasury indicated that there was no need from its perspective to revise the overall yield estimate.<sup>85</sup> On 16 July 2013, the FTA published the latest version of the instructions on the agreements on cooperation in the area of taxation with other states and the federal international withholding tax act. The instructions provide Swiss paying agents with an overview of the duties incumbent on them under the Cooperation Agreement, which are available on the FTA's website.<sup>86</sup> The article now turns to focus on the US Government's FATCA, with particular emphasis on the IGAs with the UK and Switzerland.

#### 4. THE FOREIGN ACCOUNT TAX COMPLIANCE ACT — A SWISS AND UNITED KINGDOM FOCUS

##### 4.1 An overview of FATCA

Further to the earlier introductory comments, Kogan summarises the objective of FATCA as follows:<sup>87</sup>

The FATCA framework is intended to *reduce the degree of foreign underreporting, underpayment and non-filing that gave rise to the offshore portion of the federal tax gap*. It aims to achieve this by requiring foreign financial conduits to establish tiered reporting and payment systems that trace for the IRS US source cross-border portfolio income remittances to individual offshore financial accounts directly or beneficially held by US persons. *Through improved reporting the IRS hopes to identify and recover specific revenue items that would otherwise be properly taxable and collectible if they had been properly disclosed.*

FATCA's emphasis on transparency builds upon Treasury Department findings that *'compliance is highest where parties other than the taxpayer*

<sup>83</sup> Grinberg, above n 6, at 17–18.

<sup>84</sup> Ibid, at 20.

<sup>85</sup> See further, Stephanie Soong Johnston, "UK has little to gain from deal with Switzerland" (2013) 71 *Tax Notes International* 225–227.

<sup>86</sup> See <http://www.estv.admin.ch/intsteuerrecht/themen/01317/01347/01352/index.html?lang=en> (accessed 25 July 2013).

<sup>87</sup> Lawrence A Kogan, "U.S. FATCA Information Reporting: A Pretext for Fishing With Like-Minded European and OECD Nations For Long Forsaken Tax Revenues at Exotic Offshore Locations (2012) *Lexis Nexis Emerging Issues* (December), 3–4 (footnotes removed, emphasis added).

*are required to file information reports and withhold taxes from payments made.*<sup>7</sup>

Kogan also observes that the OECD's TIEA framework and its information exchange provision under Article 26 of the OECD's *Model Tax Convention on Income and Capital* provide a partial basis for FATCA. An important difference, however, is that they have been unilaterally developed and implemented, rather than collectively as by the OECD (which focusses on providing incentives, not imposing penalties).<sup>88</sup> Kogan then reviews the general framework for FATCA, and highlights the decision by the EU to adopt Council Directive 2011/16/EU following the enactment of FATCA.<sup>89</sup> The Council Directive provides for the compulsory automatic exchange of available information, and prohibits refusals of requests solely on bank secrecy grounds. Kogan then observes:<sup>90</sup>

Despite the different approaches employed in the Council Directive and FATCA, the EU Commission has expressed its full support for FATCA's objective of "combat[ing] cross-border tax evasion by US persons who use foreign financial institutions (FFIs) to hide assets and avoid reporting income taxable in the U.S.", which the EU views as being consistent with the aim of the Savings Directive. The EU Commission arguably values FATCA because it "open[s] new perspectives for strengthening automatic information exchange between Member States and third countries." In fact, the Commission has expressed its intention "to continue working with the US towards a *more ambitious approach* on automatic exchange of information for tax purposes to be implemented in the longer term.

The remainder of this discussion draws upon an earlier work by Sawyer.<sup>91</sup> Unsurprisingly, the emerging literature on FATCA is US-focussed, highlighting the implications for non-US financial institutions; when originally enacted, there was no indication of the intergovernmental agreement (IGA) approach. Indeed, when first enacted, there were no US Treasury Regulations to assist such institutions in ascertaining their obligations and the implications should they not comply with FATCA.<sup>92</sup>

The US Treasury released Proposed Regulations in February 2012,<sup>93</sup> and accompanied these by a Joint Statement from France, Germany, Italy, Spain and the UK signalling

<sup>88</sup> Ibid, 5–7.

<sup>89</sup> Ibid, 7–12. See also, Council of the European Union, *Council Directive 2011/16/EU of 15 February 2011, on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64/1* (3 November 2011) available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:064:0001:0012:EN:pdf> (accessed 6 March 2013).

<sup>90</sup> Ibid, 11 (footnotes removed, emphasis in original).

<sup>91</sup> See Sawyer, above n 14. Sawyer also provides a detailed analysis of the emerging literature on FATCA and thus there is no need to repeat this analysis in this paper.

<sup>92</sup> Guidance is available from the US IRS website (<http://www.irs.gov>), including details about the necessary forms to be filed (Form 8938).

<sup>93</sup> For a discussion see Roger S Wise and Mary Burke Baker, "Next phase of FATCA guidance arrives with proposed regulations and announcement of possible intergovernmental approach" (2012) 13(2) *Journal of Investment Compliance* 25–39. Final Treasury Regulations under FATCA were released in January 2013.

an intention to develop a compliance solution for FATCA.<sup>94</sup> The Joint Statement indicates that the policy objective of FATCA is to achieve reporting and not to collect the 30% withholding tax from foreign financial institutions.

Consequently, the US Government was open to an IGA approach to improve international tax compliance, and developed a Model IGA.<sup>95</sup> The main benefit of the IGA is its ability to address jurisdictional and legal problems associated with FATCA's extensive reach into foreign jurisdictions. The Model IGA seeks to keep compliance costs as low as possible for financial institutions, with the aim of over time working towards achieving common reporting and due diligence standards.<sup>96</sup> It also eliminates the obligation of each foreign financial institution to enter into a separate agreement with the IRS in order to be compliant with FATCA.<sup>97</sup> The Model IGA also sets out a possible framework for negotiating an IGA.<sup>98</sup> There are two versions of the Model IGA, namely Model 1 (reciprocal and nonreciprocal versions, which Denmark, Ireland, Mexico, Spain and the UK have signed) and the later Model 2 (which Switzerland has signed<sup>99</sup>). Other negotiating jurisdictions thus have a choice to base their negotiations for an IGA).<sup>100</sup> The discussion in this paper refers to an IGA or Model IGA. With time we will see which of the two Model IGAs is preferred, although the expectation is that Model 1 will be preferred by those where secrecy and transparency is less of a concern for their jurisdiction, with Model 2 for jurisdictions

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<sup>94</sup> US Treasury Department, *Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA* (2012).

<sup>95</sup> *Ibid*, Article 4. On 26 July 2012 a Model IGA was released by the US Treasury. A second Model IGA was released later in 2012 as an alternative model for negotiating IGAs. For further details, see Benjamin Berk, Cynthia D Mann, Ehab Farah and Bridget M Weiss, "Treasury Releases Model Agreement for an Alternative FATCA Framework" (2012) 129(10) *Banking Law Journal* 923–928.

<sup>96</sup> *Ibid*, Article 6.

<sup>97</sup> See further, Arnold and Porter LLP, *Treasury releases model agreement for alternative FATCA framework* (2012) Advisory (July).

<sup>98</sup> US Government, *Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA* (2012). This Model Agreement is extensive, setting out a sizeable number of definitions, the timing and manner of exchange of information, the application of FATCA to financial institutions, collaboration on compliance and enforcement, a mutual commitment to continue to enhance the effectiveness of information exchange and transparency, and the process by which the IGA is ratified and how it may be terminated. There is an extensive appendix containing due diligence obligations for identifying and reporting on US reportable accounts and payments to certain non-participating financial institutions.

<sup>99</sup> Reciprocity is optional under Model 2; this model also requires the jurisdiction's FFIs to report directly to the IRS. Under a reciprocal IGA the US and its FATCA partner share information of each other's tax residents who holds financial accounts in the other's jurisdiction. Under the non-reciprocal version, only the US would receive information on its tax residents holding accounts in the other jurisdiction. For a discussion of the Swiss IGA, see Kristen A Parillo, "Switzerland and the US Sign FATCA Agreement" (2013) 69 *Tax Notes International* 715–717. Parillo observes that the Swiss IGA deviates from aspects of the Model 2 IGA including the absence of a commitment to work with other countries to develop a common model for automatic information exchange. Interestingly, the Swiss Federal Council has commenced negotiations with the US to examine a change to a Model 1 IGA, although it remains to be seen what will eventuate.

<sup>100</sup> Deloitte provide a succinct comparison of the Model 1 IGA, Model 2 IGA and the Final FATCA Regulations; see Deloitte (US), *Comparison of IGA Model Agreements to Final FATCA Regulations* (2013). Deloitte's analysis highlights some significant differences between the two versions of the Model IGA which indicates that subsequent actions based on these IGAs will differ to as degree (this is unable to be assessed at this time).

such as Switzerland and other traditional ‘tax haven’ jurisdictions. That said, Taylor, Shashy and Silverstein aptly observe.<sup>101</sup>

One critical element raised by both Model I and Model II is how foreign governments implement their side of the agreement. *Will the implementing rules in the local legislation be broadly similar across jurisdictions signing up to either model? More importantly, will compliance and enforcement of the rules be broadly similar?*

Under an IGA, the non-US jurisdiction (referred to as a ‘partner jurisdiction’) may enter into a reciprocal agreement with the IRS to adopt local laws under which FFIs will identify and report information about US accounts to the partner jurisdiction tax authority. The partner jurisdiction’s government will then pass that information on to the IRS. The result is that a FFI complying with local laws in a jurisdiction with a reciprocal-type agreement is compliant with the FATCA withholding and reporting requirements. As an alternative, the partner jurisdiction can enter into a non-reciprocal agreement by which they agree to both direct and enable FFIs to register with the IRS and report information regarding their US accounts directly to the IRS (this will not avoid the potential conflict of laws issue).<sup>102</sup> An FFI located in a jurisdiction with this type of agreement must still enter into an FFI agreement with the IRS and comply with the FATCA regulations, except to the extent modified by the IGA. Furthermore, according to de Clermont-Tonnerre and Ruchelman.<sup>103</sup>

*A global financial institution that does business in many jurisdictions could, along with its affiliates, be subject to the FATCA statutory provisions and also several different IGAs, which may have separate rules (unless possibly each IGA has a most favored nation clause similar to that in the U.K. IGA). This could cause massive compliance headaches and unnecessary expense for global financial institutions, unless such institutions attempt to apply a single — most stringent — procedure that would comply with all the different IGAs in place. Anecdotal information indicates that, at least in theory, the Treasury Department has a ‘one size fits all’ approach for IGAs. This limits negotiation to the reciprocal and the non-reciprocal versions of the Model 1 IGA and to the Model 2 IGA.*

On 9 May 2013, the US Treasury released five new Model IGAs, along with four accompanying annexes. The choice of model IGAs now provide for three versions of what was previously known as the Model 1 IGA: a reciprocal Model 1A Agreement where there is an existing TIEA or DTA; a nonreciprocal Model 1B Agreement where there is an existing TIEA or DTA; and a nonreciprocal Model 1B Agreement, where there is no TIEA or DTA. The Model 2 IGA now has two versions, namely a Model 2 Agreement where there is an existing TIEA or DTA and a Model 2 Agreement where

<sup>101</sup> John Clay Taylor, Hap Shashy and Sara Silverstein, “Third FATCA Compliance Model Announced” (2012) 129(9) *Banking Law Journal* 855–859, at 859 (emphasis added).

<sup>102</sup> See further, Jean-Francois de Clermont-Tonnerre and Stanley C Ruchelman, “A Layman’s Guide to FATCA Due Diligence and Reporting Obligations” (2013) 42(1) *Tax Management International Journal* 75–82, at 81–82. According to the authors, “[a] system is also under consideration for use by jurisdictions that have neither a Tax Information Exchange Agreement in place with the United States nor a comprehensive income tax treaty containing an exchange of information provision” at 81.

<sup>103</sup> *Ibid.*, at 82 (emphasis added).

there is no TIEA or DTA.<sup>104</sup> In part this new development indicates a move by the US to potentially incorporate the IGA negotiation process with its TIEA and DTA programmes, an issue that has been recently discussed in the literature. The updated Model IGAs are not substantially different to the earlier versions but reflect the existence of the Final Treasury Regulations. The new model Annex 2 should enable negotiations to speed up as it now accounts for the vast majority of entities. This has proved crucial in the lead up to July 1, 2014 with the negotiations with over 100 jurisdictions leading to 39 concluded agreements resulting in an IGA and 62 ‘in substance’ agreements.<sup>105</sup>

Prior to release of the Model IGA the US Treasury also issued joint statements with Switzerland and Japan concerning their approach to compliance, with a gradual move away from reporting to the IRS to that of each foreign financial institution reporting to their own tax authority.<sup>106</sup> From July 2012, the way forward is clearly an IGA. FATCA took effect from 1 July 2014 with a phased in application over the next three years. The article now turns its focus to the prior literature on FATCA.

Sawyer provides an overview of the emerging literature on FATCA, highlighting the concern over the constitutional rigor of the IGA approach.<sup>107</sup> Christians has seriously questioned the legal pedigree of IGAs, and their constitutional position.<sup>108</sup> She examines the options, concluding that the IGAs are not treaties, nor Congressional-Executive Agreements, nor Treaty-Based Agreements, and therefore must be Sole Executive Agreements. These are agreements made by the US President without Congressional authorisation. She states that this is “... a tenuous status in U.S. treaty-making that raises serious doubt about whether IGAs in fact bind the US as a matter of law.”<sup>109</sup> In contrast, Morse argues that the FATCA IGAs do bind the US Government, at least in the form of administrative guidance.<sup>110</sup> Morse reviews the case law concerning TIEAs and how the FATCA IGAs support the US’s treaty obligations. She argues that the courts should conclude that “... the IGAs bind the US government and require the government to offer the withholding tax relief set forth in the agreements.”<sup>111</sup> Indeed, Morse posits that FATCA IGAs may be brought into future tax treaty ratification rounds to “... cement the position that the IGAs are valid and enforceable congressional executive agreements or treaty interpretations.”<sup>112</sup>

<sup>104</sup> See <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (visited 14 May 2013). The US Treasury updated its Model IGAs on 12 July 2013, and then updated them once again on 19 August 2013. It also launched its FATCA website for online registration by FFIs, various forms and instructions, and made available online videos to assist in explaining the registration process for FFIs.

<sup>105</sup> US Department of the Treasury, *Resource Centre: FATCA Archive* (2014); at <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx> (accessed 8 July 2014). See further Randall Jackson, “ABA Meeting: Treasury looking to accelerate IGA creation” (2013) 70 *Tax Notes International* 752–753.

<sup>106</sup> See US Statement of 21 June 2012 with respect to each of Switzerland and Japan.

<sup>107</sup> See Sawyer, above n 14. Only a brief insight into the themes emerging from the literature is discussed in this paper.

<sup>108</sup> Allison Christians, “The Dubious Legal Pedigree of IGAs (and Why it Matters)” (2013) 69 *Tax Notes International* (February 11) 565–568.

<sup>109</sup> *Ibid*, 567.

<sup>110</sup> Susan Morse, “Why FATCA Intergovernmental Agreements Bind the US Government” (2013) 70 *Tax Notes International* (April 15) 245–247.

<sup>111</sup> *Ibid*, 247.

<sup>112</sup> *Ibid*, 247.

From a European perspective, Eckl and Sambur observe,<sup>113</sup> prior to the February Joint Statement, that FFIs in Europe will not be able to avoid the impact of FATCA, even if they sought to implement a US-divestment strategy. Even if FFIs undertook such a strategy, the pass-through payments provisions would apply making such payments attributable to income derived from US sources. Consequently, FFIs need to develop strategies to minimise the impact of FATCA. Subsequently, as part of the Joint Statement, the IGA approach emerged. With the UK and Switzerland negotiating and signing an IGA under FATCA, it becomes important issue to contemplate when reviewing their positions under FATCA. The article now focuses on the UK and Swiss developments.

#### 4.2 FATCA: The UK and Swiss developments

The UK was the first to sign an IGA under FATCA.<sup>114</sup> The UK-US agreement follows the Model 1 IGA (reciprocal version). Switzerland was the fifth country to negotiate an IGA under FATCA.<sup>115</sup> The most interesting feature (aside from Switzerland agreeing to information exchange with the US) is that a second model was created (Model 2) to enable Switzerland to provide certain information on a nonreciprocal basis to the US (although Switzerland may wish to request the US to provide it with information).

Even with the IGAs signed, uncertainty remained, although this has been reduced by the release of the final Treasury Regulations.<sup>116</sup> The Governments in the UK and Switzerland have released guidance material to assist FFIs in their jurisdictions to meet the obligations under the IGAs.

Key features of the UK IGA include a number of improvements over the Proposed Treasury Regulations for FATCA. For instance, legal barriers to compliance, such as those related to data protection, have been addressed. Importantly, withholding tax will not be imposed on income received by UK financial institutions, and neither will they be required to withhold tax on payments they make. There is a wider scope of institutions and products to be effectively exempt from the FATCA requirements. From a UK perspective, HMRC will receive additional information from the US IRS to enhance its compliance activities.

In welcoming the IGA, UK Chancellor of the Exchequer stated:<sup>117</sup>

<sup>113</sup> Petra Eckl and Jonathan Sambur, "The Impact of the US Foreign Account Tax Compliance Act (FATCA) on European Entities" (2012) 52(1) *European Taxation* 37-41.

<sup>114</sup> *Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland to Improve International Tax Compliance and to Implement FATCA* (14 September 2012). For an overview of the content of this IGA, see Edward Tanenbaum, "Here They Come: FATCA Intergovernmental Agreements" (2012) 41(11) *Tax Management International Journal* 623-625.

<sup>115</sup> *Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA* (February 2013). The title of this agreement in itself is interesting is the emphasis on cooperation to facilitate FATCA, as compared to improving international tax compliance and implementing FATCA for the UK agreement.

<sup>116</sup> Final Treasury Regulations under FATCA were released on 17 January 2013; see Department of the Treasury Internal Revenue Service, *Withholding of Tax on Nonresident Aliens and Foreign Entities* (2013, Publication 515).

<sup>117</sup> HM Treasury, "G5 FATCA agreement strengthens UK ability to tackle tax evasion" (2012) *Press Release* (26 July); available at: [http://www.hm-treasury.gov.uk/press\\_67\\_12.htm](http://www.hm-treasury.gov.uk/press_67_12.htm) (visited 6 March 2013) (emphasis added).



We need to be as tough on tax evasion abroad as we are at home. The Model Agreement constitutes an important step in tackling international tax evasion. *We have achieved substantial changes to how FATCA will be implemented that will provide significant benefits to UK financial institutions while strengthening our ability to tackle the evasion of UK tax.* I look forward to the prompt conclusion of our bilateral negotiations and the signing of our agreement with the United States.

US Treasury assistant secretary, Mark Mazur is reported as stating:<sup>118</sup>

Today's announcement marks a significant step forward in our efforts to work collaboratively to combat offshore tax evasion. We are pleased that the United Kingdom, one of our closest allies, is the first jurisdiction to sign a bilateral agreement with us and we look forward to quickly concluding agreements based on this model with other jurisdictions.

BDO highlight the benefits of FATCA for the UK, and provide an updated timeline for the phased introduction of FATCA.<sup>119</sup> They also note that HMRC plans to issue an implementation consultation paper for UK firms in September 2013 to provide further practical guidance for complying with FATCA requirements. This will provide some (but not a lot of) time for firms to ensure they are fully compliant for 1 July 2014.

In analysing the UK Agreement, PricewaterhouseCoopers (PwC) observe, for example, that the definition of a banking or similar business is narrower under the IGA than under the Proposed FATCA Regulations.<sup>120</sup> They also examine the draft UK Regulations, and suggest there are areas in need of review, including treatment of Collective Investment Schemes and Trusts. The initial lack of detail over practical matters, such as the registration process, method for transmitting data, format for reporting data, compliance issues and such, has been largely resolved prior to the commencement of FATCA on 1 July 2014. Submissions on the UK's draft regulations closed at the end of February 2013. HMRC published in August 2013 the International Tax Compliance (United States of America) Regulations 2013 (ITC Regulations), which contain provisions for the implementation of the UK-US IGA.<sup>121</sup> These regulations are expected to come into force in mid-August 2013, and will have effect for financial accounts held at 31 December 2013. HMRC have also published updated guidance notes to accompany the ITC Regulations, which reflect the 6 month

<sup>118</sup> Marie Sapire and Kristen A Parillo, "First FATCA Intergovernmental Agreement Signed with UK" (2012) 67 *Tax Notes International* (September 24) 1171–1172, 1171.

<sup>119</sup> BDO, *FATCA: Model Intergovernmental Agreement* (September 2012); available from BDO's website at: [http://static.bdo.uk.com/assets/documents/2012/09/FATCA\\_-\\_Model\\_Intergovernmental\\_Agreement.pdf](http://static.bdo.uk.com/assets/documents/2012/09/FATCA_-_Model_Intergovernmental_Agreement.pdf) (accessed 6 March 2013).

<sup>120</sup> PricewaterhouseCoopers, "HM Treasury and HMRC release details outlining the implementation of FATCA in the UK" (2012) *Global IRW Newsbrief* (December 19), 1–6; available from PwC's website at: [http://download.pwc.com/ie/pubs/2012\\_global\\_irw\\_newsbrief\\_dec.pdf](http://download.pwc.com/ie/pubs/2012_global_irw_newsbrief_dec.pdf) (accessed 6 March 2013). See also PwC, "Some Observations About the UK FATCA Agreement" (2013) 69 *Tax Notes International* (January 7) 66–68. Advice has been provided by other leading international firms such as Deloitte, Ernst & Young and KPMG.

<sup>121</sup> House of Commons (UK), *The International Tax Compliance (United States of America) Regulations 2013*; available at: <http://www.legislation.gov.uk/uksi/2013/1962/contents/made> (accessed 15 August 2013).

deferral in respect of the commencement of FATCA on 1 July 2014, together with certain other changes made following informal consultations.<sup>122</sup>

US Treasury Officials finalised a universal electronic format for capturing FATCA data in March 2014.<sup>123</sup> Nevertheless, much work still remains to be done with respect to identifying foreign financial institutions on a multilateral basis, even though FATCA is now operative.<sup>124</sup>

Kogan observes that the UK Government has drafted a plan to replicate FATCA domestically for purposes of securing FATCA-consistent automatic TIEAs with its Crown Dependencies and Overseas Territories (for example, Guernsey, Jersey and the Isle of Man).<sup>125</sup> Kogan concludes:<sup>126</sup>

[I]f imitation is the sincerest form of flattery and what often goes around comes around, then the steady development and evolution of FATCA into an *internationally appealing global regime should warm the hearts of FATCA's US congressional authors and simultaneously send a chill down the spines of US and non-US taxpayers alike.*

An early view from UK firms reflects the sentiment of substantial complexity in their FATCA obligations and a hope that a 'best endeavours' approach to compliance would be acceptable.<sup>127</sup> Coder also comments that the UK thought it was getting a better deal in moving early to secure negotiations for an IGA (along with France, Germany, Italy and Spain), but was surprised when the US announced that Switzerland and Japan had negotiated their own variations to the Model IGA.<sup>128</sup> Coder then reports that Malcolm White, HMRC's FATCA policy lead commented:<sup>129</sup>

It's too burdensome, it's too complicated, and in many instances, it's extraterritorial and puts onerous conditions on businesses, in effect identifying every customer in the world" rather than just U.S. citizens, which is the goal of FATCA, he said. If only IRS officials were as blunt. ... There is no world in the future that doesn't have FATCA in it.

<sup>122</sup> HMRC, *Implementation of The International Tax Compliance (United States of America) Regulations 2013: Guidance Notes* (2013); available at: <http://www.hmrc.gov.uk/fatca/index.htm> (accessed 15 August 2013).

<sup>123</sup> See IRS, *International Data Exchange* (2014); <http://www.irs.gov/Businesses/Corporations/International-Data-Exchange> (accessed 8 July 2014).

<sup>124</sup> Jamie Arora, "FATCA Progress Expected to Accelerate IGA Process" (2013) 69 *Tax Notes International* (February 18) 636–637.

<sup>125</sup> Kogan, above n 87, 12. In April 2013 Jersey announced that it had finalised a 'FATCA' style agreement with the UK Government; see KPMG, "Jersey agrees to the UK tax package". An agreement for automatic EOI was signed between Guernsey and the UK on 22 October 2013. On the same day the UK and Jersey also signed an automatic EOI agreement. Furthermore, on 5 November 2013, the Cayman Islands and the United Kingdom signed an IGA which closely follows the FATCA IGA currently initialled between the Cayman Islands and the US. See further <http://www.hmrc.gov.uk/fatca/> (accessed 8 July 2014).

<sup>126</sup> Kogan, above n 87, 12 (emphasis added).

<sup>127</sup> Jeremiah Coder, "UK Investment Funds Struggle to contain FATCA Fallout" (2012) 67 *Tax Notes International* (July 9) 132–134.

<sup>128</sup> Jeremiah Coder, "UK Hoping US will make FATCA Easier to Swallow" (2012) 67 *Tax Notes International* (July 9) 95–97.

<sup>129</sup> *Ibid*, 95.

White comments that the UK is not planning to introduce its own version of FATCA, and that he sees the IGA as putting the UK in a better position than under the Proposed Treasury Regulations.<sup>130</sup>

Coder suggests that while the IGA approach was intended to limit the scope of reporting obligations for FFIs using a risk-based approach, the downstream burdens of FATCA reporting may reduce these benefits.<sup>131</sup> Using the UK IGA as the basis for the analysis, HMRC's policy lead for FATCA, Malcolm White, observes that the global intermediary identification number (GIIN) is a good result. The GIIN will cast a wide net as outlined in the Final Regulations under FATCA. According to White, the IGA sets a new standard of automatic information exchange that will flow two ways. This in turn presents opportunities for new unilateral and bilateral agreements. White also suggests that countries will create their own versions of FATCA to enable them to benefit from enhanced information exchange.<sup>132</sup> As more IGAs are negotiated, this should reduce the problems associated with pass-through payment withholding. Being the first country to negotiate an IGA, the UK is somewhat of a pioneer in ironing out issues as well as setting the agenda for other countries. Unsurprisingly, many such countries have consulted with the UK as part of their decision to enter into negotiations with the US for an IGA. HMRC also expects noncompliance with the IGA to be due to minor administrative failures rather than significant noncompliance leading to a sanction under the IGA.<sup>133</sup>

With the UK being the first to sign an IGA, it is expected that there will be some developments that lead to variations in subsequent IGAs and the need for the UK to update its IGA accordingly. In this context, Sheppard comments:<sup>134</sup>

Treasury wants the IGAs to be ambulatory agreements, so that changes to FATCA regulations can be accommodated without formal amendments to the agreements. No country wants ambulatory IGAs more than the U.K., the first country to sign.

Turning the focus now to the Swiss IGA, Harvey, who was involved in developing FATCA, provides some early insights into the Swiss response to FATCA.<sup>135</sup> Harvey emphasises that while Switzerland has the sovereign right to adopt favourable tax and bank secrecy rules, the US also has the sovereign right to protect its tax base by implementing FATCA. Furthermore, if a Swiss financial institution does not want to be part of that regime, it can either avoid the US financial system or incur the 30% withholding tax.<sup>136</sup> Harvey then suggests that the conservative estimate of FATCA raising \$US 8.7 billion could be closer to \$US 30–50 billion, which would suggest the benefits (from a US perspective at least) would substantially outweigh the costs.<sup>137</sup>

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<sup>130</sup> Ibid, 97.

<sup>131</sup> Jeremiah Coder, "FATCA's Practical Efforts Limit Good Intentions" (2013) 69 *Tax Notes International* 718–719.

<sup>132</sup> Ibid, 718.

<sup>133</sup> Ibid, 719.

<sup>134</sup> Lee A Sheppard, "What Bankers Want From FATCA" (2013) 69 *Tax Notes International* 991–992, at 992. The US and the UK have signed a revised Annex II to their IGA, recognising changes to the Model IGAs. The new Annex II comes with a number of changes; see further Kristen A Parillo, "US and UK Sign Revised Annex II to FATCA Agreement" (2013) 71 *Tax Notes International* 47–48.

<sup>135</sup> J Richard Harvey Jr, "FATCA — A Report from the Front Lines" (2012) *Tax Notes* (August 6) 713–716. For a broad overview of the Swiss IGA, see Taylor et al, above n 101.

<sup>136</sup> Ibid, 713–714.

<sup>137</sup> Ibid 714.

Harvey reminded his audience that FATCA builds on the US's Qualified Intermediary regime, and further suggests that in terms of Swiss FI's business models, they should focus on the end game, namely some form of multilateral FATCA regime.<sup>138</sup> Swiss financial institutions appeared to be focussed on closing US customer's accounts, refusing to open new accounts, and demanding outstanding loan balances. Harvey ponders whether this may be designed to make US citizens' lives more difficult and encourage them to advocate for a repeal of FATCA.<sup>139</sup> Harvey concludes with his positive assessment of the moves by the US to address the use of offshore accounts to evade US tax but acknowledges there remains more to be done. While Harvey advocates for a multilateral approach to FATCA,<sup>140</sup> efforts to date through the IGA Model suggest a limited bilateral approach towards cooperation with no sign of a multilateral approach on the horizon.

Furthermore, the State Secretariat for International Financial Matters (SIF) in early 2013 made it clear that Switzerland rejects the automatic exchange of information, a key issue when it negotiated its IGA.<sup>141</sup> On 29 August 2012, the Swiss Federal Council issued a mandate for negotiations with the US on a framework to simplify the implementation of FATCA based on Model 2. An IGA was initialled by the US and Switzerland on 3 December 2012, and finalised on 14 February 2013. It was enacted into Swiss law with effect from 30 June 2014. However, in October 2013, Switzerland signed the OECD's Multilateral Convention,<sup>142</sup> suggesting that it is prepared to embrace the OECD's global standard, namely automatic exchange of information.

The Swiss IGA, based on the Model 2 IGA (but with some variations), provides that Swiss financial institutions deliver information on US accounts directly to the IRS rather than via government bodies (this works in the same way as FATCA itself). Furthermore, financial institutions are not obliged to report the names of recalcitrant<sup>143</sup> US clients, or make a tax deduction for such clients or terminate the client relationship with them. The US can request administrative assistance concerning recalcitrant clients by means of group requests. Information will not be transferred automatically in the absence of consent, but exchanged on the basis of the administrative assistance clause in the DTA. Swiss financial institutions are considered to benefit from simplification measures for the identification of their clients. Importantly, many financial institutions that operate primarily on a local or regional basis are deemed compliant with FATCA. The IGA confirms that the insurance (property insurers) and pension sector (social security funds, pension funds) are excluded from FATCA. Also, independent asset managers are relieved of the obligation to conclude a FATCA contract. With the IGA, the US will not implement the 30 per cent withholding tax. Importantly, the US Treasury Final Regulations on FATCA are applicable to the

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<sup>138</sup> Ibid 714–715. The Governments of the UK, France, Germany, Italy and Spain advised the European Commission on April 9, 2013, that they had agreed to work on a pilot multilateral exchange facility similar to the Model IGA to implement FATCA; see KPMG, "United Kingdom — Update on pilot multilateral exchange of information".

<sup>139</sup> Ibid 715–716.

<sup>140</sup> Ibid 716.

<sup>141</sup> State Secretariat for International Financial Matters, *Implementation FATCA* (14 February 2013); available at: <http://www.sif.admin.ch/themen/00502/00807/index.html?lang=en> (accessed 6 March 2013).

<sup>142</sup> OECD, above n 8.

<sup>143</sup> A client who does not consent to the financial institution transmitting data to the IRS is considered to be recalcitrant.

extent that the Swiss IGA and its annexures do not expressly make provision for derogations from the rules.

Overall, the SIF concludes that this bilateral agreement is in the interests of Switzerland, on the basis that without it Swiss financial institutions would have to manage without reductions in the administrative burden for FATCA implementation. Such a situation would result in a competitive disadvantage relative to financial institutions from countries that have entered into an agreement with the US. The IGA was submitted to the Swiss Parliament for approval and would be subject to an optional referendum. This agreement was approved by the Swiss Parliament<sup>144</sup> and subsequently made effective from 30 June 2014, just prior to FATCA taking effect on 1 July 2014.

This Model 2 IGA is a two-stage, indirect mode of automatic information exchange that effectively works like a direct mode of automatic information exchange. Thus, where there is obstruction from the Swiss accountholder (the recalcitrant client), the IRS will need to file an information request with the foreign tax authority. This means it will take longer for the IRS to have the information at its disposal since it needs a group request on the grounds of the aggregate information. Thus automatic exchange for the purpose of the Swiss IGA applies only with the US, it has the two stages (as noted earlier), and works in one direction towards the US. Interestingly, the Swiss IGA does not contain a commitment, such as that set out in Article 5 of Model 2 (and Article 6 of Model 1), to work with other countries to develop a common model for automatic information exchange.

Byrnes and Munro comment that the group request provision in the Swiss IGA is likely to be tested in the Swiss courts when the first account data for recalcitrant accountholders is the subject of a group request.<sup>145</sup> In relation to the TAAA, they observe that the definition of ‘group’ is narrower than under the FATCA regulations, thereby suggesting that with aggregate requests under FATCA this is unlikely to permit the exchange of information. Nevertheless, the authors do not expect the Swiss courts to decide such a case in favour of the taxpayers. Swiss Parliament approval (which has been received) will effectively be legally binding on the Swiss Courts.

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<sup>144</sup> Thierry Boitelle, “Game, Set, Match USA: The Swiss-US Agreement that Doesn’t Exist” (2013) 70 *Tax Notes International* 1203–1204. The Swiss Council of States (upper house) voted in favour of the US-Swiss IGA on June 20, 2013; see further Kristen A Parillo, “Upper House Approves FATCA Agreement” (2013) 71 *Tax Notes International* 45. The US and Switzerland signed a memorandum of understanding on June 7, 2013 to their FATCA IGA to clarify several provisions; see further Kristen A Parillo, “US and Switzerland Sign MOU on FATCA Agreement” (2013) 70 *Tax Notes International* 1180. Separately on June 19, 2013, the lower house of the Swiss parliament defied the upper house and voted against ratifying an information exchange agreement with the US that would have required Swiss banks to divulge some client information in return for immunity from prosecution; see further Thierry Boitelle, “Swiss Vote Dooms Bank Agreement with US” (2013) 70 *Tax Notes International* 1249. On 27 September 2013, the Swiss parliament approved an amended implementation act regarding the Switzerland — United States FATCA Agreement (2013) of 14 February 2013, largely designed to enable Swiss financial institutions to benefit from the US’s decision to delay the implementation of FATCA to 1 July 2014. This was given effect by way of an exchange of notes.

<sup>145</sup> William Byrnes and Robert Munro, “FATCA and Switzerland: Modell II”, in *Guide to FATCA Compliance* (May 2013), Chapter 19. See also the comments by Gregory C Walsh, Mélanie Crea-Cina, Luubomir Georgiev and Marnin J Michaels, “The Latest Model” (2013) *Step Journal* (May).

In announcing the Swiss-US IGA, Geneva-based lawyer Thierry Boitelle is reported as stating:<sup>146</sup>

Today marks a huge step for Switzerland in becoming a compliant jurisdiction for US persons, where bank secrecy remains when it comes to privacy but where privacy can no longer be a pretext for tax evasion. ... *I think this is a great step forward in Swiss-US bilateral relations, and I am happy that we have achieved this result in a relatively short time frame.* With this agreement entering into force — hopefully soon — the US and Switzerland can devote their time and energy to other bilateral tax issues, in a much more positive context.

Temple-West comments that the Swiss Bankers Association welcomed the FATCA IGA but remains critical of the compliance and administrative burdens of the associated US law. He also notes that the Swiss IGA may serve as the model for Luxembourg and Austria as they seek to negotiate IGAs.<sup>147</sup>

Thus, having analysed the UK and Swiss IGAs under FATCA, the paper now draws out some emerging themes and issues as a result of comparing these two IGAs. Most recently, on 7 June 2013, Switzerland and the US signed a memorandum of understanding on technical and administrative interpretations of their IGA concerning FATCA.<sup>148</sup> On June 7, 2013, the US and Switzerland signed a Memorandum of Understanding with regard to their IGA.<sup>149</sup>

The apparent ‘acceptance of the inevitable’ is not held by all in Switzerland. On October 7, 2013, a coalition of Swiss political groups announced plans to launch a referendum against the Swiss law implementing its IGA under FATCA. Under the political system, if this group can gain sufficient signatories, the issue will be put to a national vote.<sup>150</sup> Nevertheless, FATCA’s application, including disclosure obligations, took effect from 30 June 2014 for Switzerland. Furthermore, it would appear Switzerland is seeking to ‘speed up the thaw’ with respect to exchange of information. The Swiss Federal Council announced that it intends to switch its IGA under FATCA from the current Model 2 format to the more expansive Model 1 format (potentially with reciprocal exchange of information). Negotiations in this regard commenced in May 2014.<sup>151</sup>

## 5. EMERGING THEMES AND ISSUES

The preceding discussion on moves by the UK to conclude a cooperation agreement with Switzerland outside of an EU-wide agreement with Switzerland, and each of Switzerland and UK negotiating an IGA with the US under FATCA, are evidence of a

<sup>146</sup> Kristen A Parillo, “Switzerland and US Sign FATCA Agreement” (2013) 69 *Tax Notes International* (February 25) 715–717, 715 (emphasis added).

<sup>147</sup> Patrick Temple-West, “Update 2: Switzerland, US sign pact on fighting tax evasion” (2013) *Reuters* (February 14); at <http://www.reuters.com> (accessed 20 March 2013).

<sup>148</sup> See [http://www.swissinfo.ch/eng/business/Swiss\\_and\\_US\\_agree\\_on\\_FATCA\\_interpretation.html?cid=36086564](http://www.swissinfo.ch/eng/business/Swiss_and_US_agree_on_FATCA_interpretation.html?cid=36086564) (accessed 14 June 2013).

<sup>149</sup> See Kristen A Parillo, “US and Switzerland Sign MOU on FACTA Agreement” (2013) 70 *Tax Notes International* 1180.

<sup>150</sup> Stephanie Soong Johnston, “Swiss Coalition Seeks FATCA Referendum” (2013) 72 *Tax Notes International* 104–105.

<sup>151</sup> Ulrika Lomas, “Switzerland Enacts Law to Support FATCA” (2014) *Tax-News.com* (accessed 8 July 2014).

new era of closer cooperation between these three nations. Their relationships can be illustrated as follows in Figure 2:

**Figure 2: UK and Swiss international tax relationships**

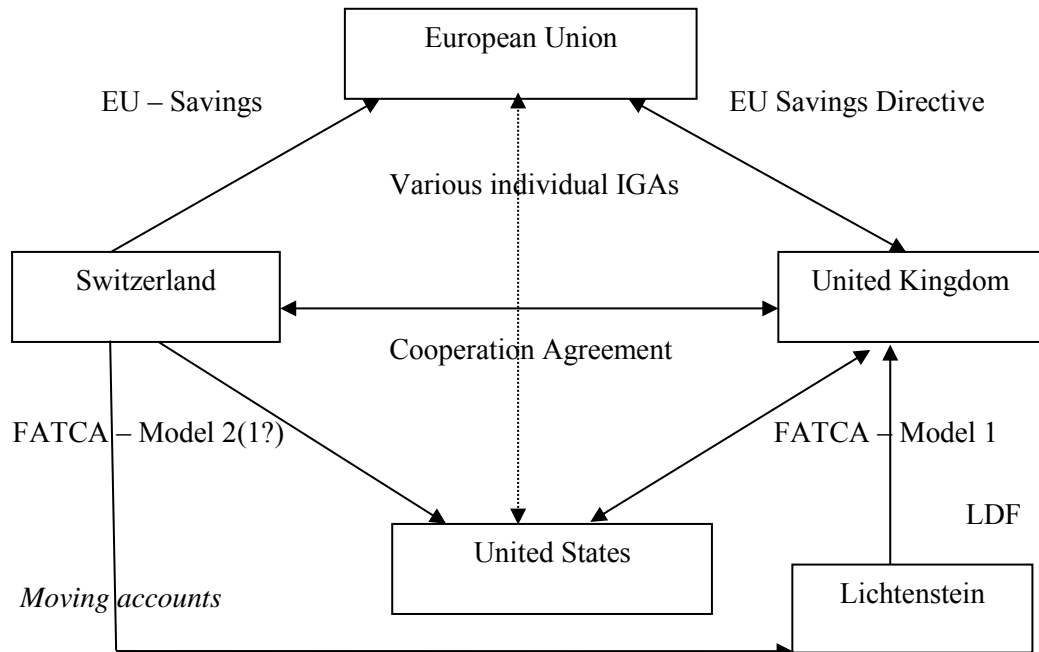


Figure 2 illustrates the relative complexity of the agreements between each of Switzerland, United Kingdom, United States and the European Union in relation to tax cooperation that have been analysed in this paper. The discussion does not consider the various DTAs between the three countries and members of the EU, nor the fact that the US, UK and Switzerland are signatories to the OECD's Multilateral Convention (although Switzerland is yet to ratify).<sup>152</sup> The arrows are indicative of the flow of information, illustrating clearly the Swiss refusal to enter into automatic exchange of information agreements, albeit reluctantly being will to cooperate in tax matters. Figure 2 does not reveal the extent to which discussions and subsequent agreements reached between the UK and its dependencies (such as Guernsey, Jersey and the Isle of Man) for FATCA-type IGAs and efforts by the UK to align more closely their relationship with these jurisdictions.

Also not illustrated above in Figure 2 is the EU's desire to create an EU-Switzerland Cooperation Agreement rather than have separate agreements, such as the UK-

<sup>152</sup> Recently, in June 2013 the G20 has endorsed the Multilateral Convention as the basis for which the OECD's desired standard of automatic exchange of information should be based; see OECD, *A Step Change in tax Transparency: OECD Report for the G8 Summit* (OECD, 2013). The G8 comprises Canada, France, Germany, Italy, Japan, Russia, United Kingdom and United States. Switzerland signed the Multilateral Convention on 15 October 2013, becoming the 58<sup>th</sup> country to do so; see further OECD, *Switzerland signs Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, (2013) Media Release; available at: <http://www.oecd.org/tax/switzerland-signs-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters.htm> (accessed 16 October 2013).

Switzerland and Austria-Switzerland agreements. Figure 1 earlier in the paper illustrates how the UK-Swiss Cooperation Agreement has two parts to it, namely the regularising of the past (up to 31 May 2013) and the position going forward. Related to this Cooperation Agreement is the option to use Lichtenstein's disclosure facility until early April 2016.

The labyrinth of relationships above suggests both a world that is getting closer, potentially more cooperative, but at the same time, immensely complex for taxpayers, their advisors, and various financial institutions/agents, to determine the implications for those holding accounts in Switzerland under the new closer relationship with the UK and the US. Concurrently the LDF option needs to be compared with the UK-Swiss Cooperation Agreement.

Arguably there is a common origin to these developments, namely the EU's Savings Directive for EU members, necessitating changes to domestic legislation in EU member countries, and the OECD's Multilateral Convention. Both agreements have been influential on the development of FATCA, with the EU Savings Directive particularly influential on changes to the UK-Swiss Cooperation Agreement. However, perhaps the greatest influence was the Swiss decision in March 2009 to change its stance in terms of cooperating with other countries on tax administration through introducing the information exchange concept into its DTAs. The recent enactment of the TAAA signifies a new willingness by Switzerland to formally legislate for enhanced tax cooperation, signalling the 'thaw' in secrecy and a move towards enhanced cooperation is well and truly underway.

Perhaps this change in stance was influenced by developments with the UBS and the US, perhaps it was a recognition that Switzerland needed to adapt if it were to survive as a major financial centre. It is clear that Switzerland needed to act with regard to FATCA otherwise its financial institutions would be severely hampered in raising and attracting capital investments.

From the other side, the UK has managed to be a leader in terms of signing the first IGA with the US under FATCA, expecting to receive benefits that other jurisdictions would not (subsequent developments have largely negated its 'first cab off the rank' approach). It also ratified the first Cooperation Agreement with Switzerland to secure outstanding taxes on UK residents (domiciled and non-domiciled in the UK); Austria has followed but Germany failed to ratify its agreement. A similar agreement may be negotiated by Switzerland with France. The UK has been particularly successful in negotiating an upfront payment of up to £1.3 billion by 31 May 2013 and a number of named taxpayer information requests.

To expect the path ahead to be a smooth one would be naïve. FATCA continues to be a moving target, although with the Final Treasury Regulations available, the focus is now on the practical implementation of the IGAs (including the sizeable number of negotiations leading to in substance agreements). As at the time of writing, July 1, 2014, has just passed and FATCA has 'commenced'. In terms of the various disclosure-type cooperation agreements, these are in their early days and estimates of revenue for the UK (under both the Swiss agreement and LDF) have proven to be too optimistic. However, the likelihood of a significant windfall for the UK may be evaporating as future payments on behalf of Swiss banks are not expected to be at the



levels suggested by the UK Treasury. Indeed as Johnson has suggested,<sup>153</sup> given the limitation of these new rules to focus on account holders who are individuals, the disclosure requirements do not extend to trusts and companies. Many Swiss direct account holders are expected to be entities with the agreements unable to be used to trace back to beneficial owners who are individuals.

As with most tax changes, once those affected work through the issues, they will look to either find new ways to stay outside of the new disclosure regime (such as by switching to untaxed substitutes), or if this proves to be too difficult, will evaluate their options to determine which is the least fiscally expensive and the least risky from the perspective of possible penalties. With respect to the UK, the LDF is recommended to be safer than the UK-Swiss Cooperation Agreement, although this will require UK residents to transfer their accounts to Lichtenstein and make the disclosure by early April 2016. Others will have come forward and made their disclosure before 31 May 2013. Some will choose to do nothing and have the withholding tax applied. Still others will look to change the way they hold their accounts and move these into a trust or company structure. Furthermore, it would appear that Swiss deposit holders are substituting their investments for untaxed alternatives rather than actively complying.<sup>154</sup> From a FATCA perspective, much of the decision-making is taken away from the account holders; the Swiss authorities will be responding to requests made under the IGA or alternatively FATCA will apply with the 30% withholding tax imposed.

Collectively these initiatives show a closer relationship between the UK and Europe, and particularly the UK and Switzerland, the jurisdiction that has proved to be an obstacle in the past to provide information such that UK tax authorities can impose tax on income held in Swiss accounts. How effective this will be remains to be seen, particularly in terms of how account holders react, including whether use of the LDF is seen as a preferable approach. It also shows a closer relationship between the US, UK and Switzerland, with the UK and Switzerland signing the first and fifth FATCA IGAs, respectively. Even here Switzerland has had limited success in refusing to recognise automatic information exchange but permitted a limited form of group requests based on a second form of Model IGA. However, Switzerland's decision to sign the Multilateral Convention as well as to commence negotiations for a Model 1 IGA, suggest it is prepared to work with enhanced information exchange, including potentially the OECD's desired global standard of automatic exchange of information.

## 6. CONCLUDING OBSERVATIONS AND FUTURE RESEARCH

The preceding discussion may appear to illustrate a web of complex arrangements to enhance the level of cooperation between three major financial centres (Switzerland, UK and US), with some influence asserted by the EU. It is also premised on agreements, which one expects will be examined closely in terms of particular wording, their scope, and whether an approach based on the underlying purpose and spirit should be taken, or one of ordinary interpretation of the words. Much fanfare has emerged over these momentous changes following the GFC, especially that of Switzerland in moving away from its strict protection of bank secrecy, to a limited form of providing information in accordance with various agreements. The change I

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<sup>153</sup> See Johnson, above n 76 and n 78.

<sup>154</sup> See Johannesen, above n 61.

would argue is largely due to self-protection and an appreciation that Switzerland needs to operate within the new emerging global tax cooperation environment.

However, this paper has a number of limitations. The most important of these is that the comments reflect those of an ‘outsider’, rather than someone closely involved with the various cooperation agreements, and the subsequent ratification decisions, and the FATCA IGA negotiations. That said it is an advantage, in that being an outsider, one is more free to offer a critical realist’s perspective without the limitations of secrecy and restrictions on publicly commenting on matters of national importance associated with one’s occupation, particularly as a government official.

A more significant limitation is that these are emerging developments and their full impact is yet to be felt. Indeed FATCA now applies from 1 July 2014, and the UK-Swiss Cooperation Agreement has moved on from the ‘regularising of the past phase’ as we are now past 31 May 2013. Consequently as data on their use by the revenue authorities is made available it is reviewable. A further limitation is that without reviewing the effects on smaller jurisdictions that may be unable to enter into some form of international agreement (or treaty); these observations may not be more widely generalizable.<sup>155</sup>

In terms of future research, there is clearly considerable scope to review whether these various agreements have been effective in achieving their objective once they have been operative for some time. Thus in relation to the US-Swiss Cooperation Agreement, it will be of interest to assess how much revenue the UK secures from both the regularising of the past and the future approaches to disclosure and taxing UK residents with Swiss accounts. Early signs are that it will be significantly less than originally expected. Likewise, it will be revealing as to whether the LDF continues to prove to be lucrative for the UK, and whether the Swiss courts receive any challenges to the operation of the agreement. Again, it is anticipated now that the revenue raised will be less than half that originally expected.

Similarly, now that FATCA is operative, research into behavioural changes, revenue collection and any potential challenges in the Swiss Courts will offer plenty for future researchers to examine. More broadly, the overall development of FATCA (such as how many other jurisdictions will conclude an IGA on the Model 2 basis similar to Switzerland, or indeed whether Switzerland will actually move to a Model 1 IGA), and whether the EU takes action to conclude an EU-wide agreement with Switzerland, remain appealing areas for further research.

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<sup>155</sup> See Rosenzweig, above n 32.