Swiss-American Chamber of Commerce

Agreement between the USA and Switzerland of August 19th, 2009 ("The Agreement"): Current status and potential risks of non-ratification for the Swiss economy

1) Current status and important background

US-Swiss business relationship is key for the Swiss economy

- 2nd largest export market behind Germany (10% of total exports, more stable in crisis than EU countries, large trade surplus)
- US market is key for most globally active Swiss companies with 25-50% of revenues and strong profitability
- US companies in Switzerland make up 5% of GDP (same size as Wealth Management in Switzerland); strong growth in the last 10 years; important strategic questions and uncertainties regarding the Swiss location are facing these companies

"Making the tax system fair" is a key initiative for the Obama Administration and for the success of the Democrats. It has to be taken very seriously.

- In the US, tax evasion is considered a serious crime worthy of relentless pursuit.
- Fight against tax criminals and tax haven is a major element of the Obama Program (in the election campaign and consistently since)
- Fight against tax criminals represents one of the few clear successes; it will be emphasized on the road to difficult and crucial US mid-term elections on Nov 2, 2010.
- The fight against tax criminals is not targeted at Switzerland or UBS specifically, but it is a domestic priority in the US. The misdeeds by UBS (which cannot be condoned) were an important catalyst to focus the attention of this domestic effort on Switzerland and the Swiss banks.

2) Evaluation of situation and options

The Agreement is legal, valid and binding under international law

- Decision of Federal Administrative Court (FAC) does not change the obligations of Switzerland to fulfil the Agreement; it is just a problem of implementation under Swiss law
- Ratification of the Agreement by the Swiss parliament is in line with the Swiss constitution and Swiss laws. It has been publicly proposed as a solution by the President of the FAC, the State Secretary of International Financial Affairs, the Director of the Justice Department and many other well-informed people.
- Renegotiation is not possible. From a US perspective, a deal is a deal. Renegotiation would be considered a gift to tax criminals, which certainly is not an option the US government could consider in light of the upcoming election.

There are only two options

- Option 1: Ratification of the Agreement by the Swiss Parliament: Not a convenient action path for parliamentarians, as there is no win. But it solves the UBS issues once and for all. Legally, all issues have been satisfactorily addressed by various legal experts in academia and government.
- Option 2: Non-ratification of the Agreement: This would equate a formal breach of the valid Agreement by Switzerland, with painful consequences, as described below

One important point in the ratification process is a possible facultative referendum. Most experts agree that in light of the short duration and the very limited scope of the Agreement, a facultative referendum is not necessary. Making such a referendum possible would be the same result as a rejection as the very long process time would be seen by the USA as a breach of Agreement.

Breach of Agreement will lead to "rebalancing measures" by the USA according to Art.5 of the Agreement. Additional actions by the US government and US Congress are well possible.

3) Economic risks of non-ratification of the Agreement

The economic risks to Switzerland will derive from the following factors

- Ratification of the Double Taxation Convention (DTC) of September 23, 2009, will be difficult on both sides of the ocean. Even a cancellation of the current DTT is possible.
- Breach of Agreement by a friendly nation “to protect tax criminals” (US interpretation of a “no” by the Swiss parliament) will massively increase probability of a “Stop Tax Haven Abuse Act”. With such a breach of Agreement, Switzerland would be put at the top of the tax haven black list and risk various punitive measures, such as a non-refundable withholding tax on all payments to Switzerland or discriminatory measures in public projects.
- UBS will be back on the “firing line” and will in one way or the other come under pressure to deliver the information the US seeks under the Agreement
- To reach the goals the US has been seeking through the Agreement, IRS will step up efforts against other Swiss banks, lawyers, tax experts and wealth managers. From the massive documentation delivered by US citizen under the voluntary disclosure program, the IRS is in possession of what the head of the IRS called “a treasure trove of incriminating data”.

These economic risks will have a massive negative effect on the entire Swiss economy

- Large and small Swiss companies with international business face uncertain times regarding DTC, Tax Haven status and possible discrimination in the US markets, leading to negative impact on investments and hiring in the Swiss markets. In the bad scenario of a Tax Haven Act, companies would have to consider moving their Headquarters outside Switzerland, with massive economic impact. Such Swiss international companies currently represent 25% of the Swiss GDP. Large companies might find solutions outside Switzerland, while smaller companies will bear the hardest hit.
- The Swiss Financial Place comes under intensified pressure, with significant risks to their more than 200’000 jobs in Switzerland, their fiscal contribution and their long-term success
- UBS is back in legal limbo, with massive uncertainty for their clients, investors, business partners and the whole financial system. Certain civil or penal procedures in the USA are likely. This threatens several thousand jobs in Switzerland as well as direct and indirect taxes paid by UBS.
- Foreign companies based in Switzerland, especially US companies, would have a difficult time continuing to operate from a Swiss location. Uncertainty would stop new migrations and additional investment. In the bad scenario, a fast exodus would be the consequence.
- Overall, the potentially affected companies represent 35% of the Swiss economy with approximately 1 million jobs.

4) Other impacts of non-ratification

With a “no” in the Swiss parliament, Switzerland is in breach of a binding Agreement. This will make the relationship with our neighbours Germany, Italy and France, with the EU, the OECD and G-20 much more difficult. The Swiss argument about the primacy of the rule of law and the strict Swiss adherence will clearly become invalid. Thus, the upcoming discussions regarding DTC with the neighbouring countries, solving the legacies of undeclared money in Switzerland, as well as the difficult discussion with the EU on corporate taxes, will become very tricky.

5) Conclusion

Switzerland is facing a multitude of difficult problems to resolve the legacy problems and to put the future on a solid ground. Without fast and efficient resolution of these legacy problems, there is no solid way forward. The ratification of the Agreement is an essential part of solving the legacy problems in order to gain the freedom of action to plan the future. Non-ratification would open a true Pandora’s Box and render such planning impossible. It seems like a small price to pay for a positive future for Switzerland.

May 12, 2010 Martin Naville, CEO Swiss-American Chamber of Commerce