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Federal Tax Administration
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English Working Translation - the Comment Letter in German is authoritative

Bern, September 13th, 2023

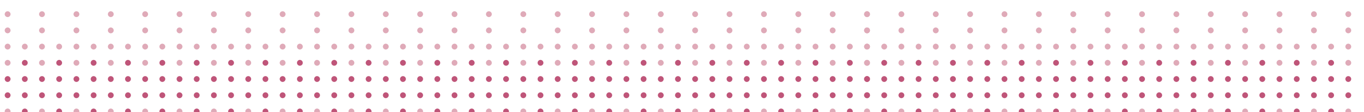
Statement on the Federal Council's draft ordinance of 24 May 2023 on the minimum taxation of large groups of companies (Minimum Tax Ordinance, MindStV) as part of the implementation of the OECD/G20 project on the taxation of the digital economy

Dear Ms. Krenger

We thank you very much for the opportunity to comment on the second partial draft of the Minimum Tax Ordinance in the context of the implementation of the OECD/G20 project on the taxation of the digital economy.

1. General

In general, we would like to state that we support the draft ordinance to a large extent and would only like to see selective improvements. For example, we explicitly welcome the one-stop shop model, which seems to us to be the best way to carry out a quick and correct minimum tax assessment and thus to comply with the demanding international requirements that are currently being developed. We also support the mixed assessment procedure adopted from the ordinary profit tax assessment and the adoption of the procedural principles of the DBG. The mixed assessment will require profound expertise to be built up both by the competent cantonal authorities and by the FTA. Despite this hurdle, we believe that this is the right way to carefully examine the tax returns together with the companies and to ask critical questions. We firmly believe that this expertise on the part of the authorities and companies is indispensable to ward off unjustified claims by foreign states and to protect the Swiss tax substrate. The entire assessment procedure should be carried out digitally. This is indispensable regarding the future and the business location and is therefore self-evident and is also welcomed by SwissHoldings.



2. Request for consideration of a postponement of the introduction date of the OECD minimum taxation to 2025

In early summer, it was still clear to the member companies of SwissHoldings that Switzerland should introduce the OECD minimum taxation (Swiss supplementary tax and IIR) by the beginning of 2024. We assumed that the OECD would have developed and published all the important implementation guidelines by mid-2023, so that in addition to the EU, UK, and Japan, most of the other 143 countries in the so-called Inclusive Framework on BEPS would also aim to introduce minimum taxation by the beginning of 2024. Only the USA would be an exception and refrain from implementation for the time being. The additional administrative effort and the risks of double taxation alone seemed to speak in favour of aiming for implementation in 2024.

According to a recent survey of our member companies, this assessment has turned into exactly the opposite. For a variety of reasons, a clear majority of companies have come out in favour of the Federal Council considering postponing the introduction of the minimum tax until the beginning of 2025. The reason for this sudden change of opinion, which is astonishing to outsiders, is developments at the OECD, but above all the behaviour of important sales market countries for the Swiss economy.

In mid-July, the OECD published new documents on the implementation of the minimum tax. These documents, such as the GloBE Information Return or individual implementation regulations of the Administrative Guidance, are welcomed by the implementation specialists of the companies concerned. At the same time, it turned out that the OECD would need much more time to develop all the implementation guidelines, that there are major differences of opinion between the states on important topics, that important states are successfully delaying implementation and that important guidelines for implementation by companies and authorities are therefore still waiting in the wings. All of this makes it difficult for the Inclusive Framework states to develop legally sound legislation by the end of the year. In the meantime, it must be expected that these requirements will not be available until the end of 2023 or more likely not until the course of 2024, which will make implementation by the companies concerned very difficult or even impossible. As is well known, many Swiss groups will already have to present the impact of the minimum tax on their results when they publish their quarterly financial statements in April 2024.

In addition to delays in new requirements, the OECD is constantly adjusting implementing regulations that have already been issued. For the companies, this means that they must constantly review and, if necessary, revise their previous implementation solutions. In view of these ambiguities, constant changes, and the resulting lack of implementation certainty, it is currently hardly possible for companies to implement correctly for the year 2024. The lack of implementation guidelines and adjustments to existing rules fail to recognise the importance and the effort for companies and authorities resulting from the introduction of the OECD minimum taxation.

As part of the new implementation requirements, the OECD created exemptions in mid-July for countries that do not intend to implement for a few years (UTPR safe harbour). In other words, the OECD is rewarding those countries that are not yet ready in 2024 and eliminating the negative financial

consequences if these countries do not want to implement until 2025 or even later. The consequence of this is that, in addition to the USA as the largest economy, more and more economically important countries such as India, China and most Latin American countries, to name but a few, are only presenting vague implementation plans or simply nothing at all. New Zealand, for example, is now aiming for implementation only when a critical mass of states is in place. Dubai or Singapore as important competitors have either only made vague announcements or directly promised an implementation in 2025 at the earliest. At present, it must be assumed that only between a quarter and a third of the 143 states in the Inclusive Framework on BEPS are aiming for rapid implementation. What consequences this will have for the project must be closely monitored. Whether this project has any future at all in view of the disagreements between established industrialised countries (EU, UK, JP, KR, AUS) and important BRICS countries that have been developing for some months now seems uncertain at present. It must be assumed that China (like the USA) will continue to rely on low corporate taxes in addition to subsidies to ensure the attractiveness of its location. Accordingly, the two countries driving the OECD minimum taxation, France, and Germany, which rely heavily on subsidies, could not prevail internationally. Even in the EU, only a minority of member states have presented draft legislation so far, which calls into question an EU-wide introduction for 2024. Based on the assumption that the minimum tax will potentially never be introduced in the largest economies and that there is great uncertainty internationally regarding the introduction of the UTPR, many companies from the USA in particular, but also from other countries, are currently working intensively on adapting their structures in such a way that the Swiss treasury, but also the EU states or the United Kingdom, can no longer access this tax substrate. For the Swiss business location and the Swiss treasury, this could result in noticeable damage or losses over a longer period.

So far, Switzerland has strongly oriented itself towards the EU. The UTPR, with which the states of subsidiaries can access the tax substrate of the states of the parent company, will come into force in the EU at the beginning of 2025 according to the directive. All other major economies also want to implement the UTPR by 2025 at the earliest. At the same time, the world consists of far more states than the EU member states. For many Swiss corporate groups affected by minimum taxation, other markets such as the USA, China or Latin America are more important than the EU. In view of the great uncertainty described above, our Swiss business groups as well as our foreign member companies are pleading with a clear majority for the Federal Council to wait as long as possible and decide only in December whether the OECD minimum tax (IIR and QDMTT) should really be introduced as early as 2024. Until then, Switzerland (Confederation, cantons together with business) should systematically and comprehensively observe international developments, develop possible alternative scenarios to an introduction in 2024 and examine which is the most promising path for Switzerland and how Switzerland can react as flexibly as possible to international changes. In doing so, the advantages and disadvantages of all possible scenarios for action must be carefully weighed up, whereby no greater weight should be attached to short-term reduced or additional revenues from companies or the treasury (Confederation, cantons, and municipalities). Instead, Switzerland should focus intensively on ensuring its existing competitiveness in the future and thus positively influence its short-, medium- and long-term financial situation.

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3. No penalties due to little known detailed specifications

The relevant international provisions for the implementation of the OECD minimum taxation are extremely demanding for companies and authorities and as mentioned above, are still subject to major changes that can hardly be fully understood by companies (as well as by the administration). At present, it must be assumed that detailed requirements and clarifications will continue to be published over the next few years. Most Swiss companies will hardly have sufficient resources to follow all the developments without exception. Tax advisors, too, often make vague statements. Against this background, we have great difficulty with the provision that tax penalties should also be imposed in the case of negligence (Art. 28 et seq.). Of course, we are aware of the international requirements in this regard as well as the requirements of the Federal Constitution (transitional provisions). Nevertheless, the tax authorities should take the special circumstances into account and refrain from initiating or carrying out factually unjustified criminal tax proceedings, especially in the early years (beyond the OECD deadline).

4. Use of the Local Accounting Standard at the QDMTT Safe Harbour

In mid-July, the OECD issued new detailed guidelines (Administrative Guidance), which could not yet be processed in the present consultation draft from May. Companies and tax advisors have noted that a helpful simplification has been created for companies and the administration in connection with the Swiss supplementary tax (see p. 80 ff. Admin. Guidance of July 2023). The simplification allows states to make QDMTT calculations based on a local accounting standard. This could be an advantage for groups of companies that use the more demanding IFRS or the US GAAP accounting standard (or another complex international accounting standard) for the consolidated financial statements. For the so-called QDMTT assessment, i.e., for the Swiss supplementary tax structured according to international standards, they could use the accounting standard Swiss GAAP FER (= Local Swiss Financial Accounting Standard), which is generally closer to Swiss tax law. However, this is only the case if they are also prepared to have their Swiss GAAP FER financial statements audited. Due to the proximity to Swiss tax law, we also expect advantages for the Swiss tax authorities, as they can carry out assessments based on such a local Swiss accounting standard instead of based on international standards. However, for groups of companies (Swiss and foreign) to benefit from this regulation for their Swiss companies, certain additions must be made to the Minimum Tax Ordinance. In particular, the requirements of 3 (b) of the "Standards for a QDMTT Safe Harbour" must be implemented in the Minimum Tax Ordinance. At this point, we request that the Federal Council grant this optional option to companies here. To our knowledge, numerous governments are currently considering granting their companies this option to apply a Local Financial Accounting Standard for QDMTT calculations.

5. On the individual provisions of the ordinance

Re Article 5(2) (determination of the taxable business entity): The envisaged solution for exceptional cases where no or several business units are taxable in Switzerland for the international supplementary tax under the IIR could in practice lead to the taxable business unit changing from year to year. In many cases, this change is also likely to lead to a change of the one-stop shop canton. In our opinion, a solution should be developed here that allows for more continuity and permits such changes only every three to five years, for example. More continuity is in the interest of the cantons

as well as the companies concerned. We are aware that the international guidelines set limits to this concern. Nevertheless, the administration and the economy should once again examine whether a better solution is possible that allows for more continuity.

Regarding Article 6 (joint and several liability): The proposed joint and several liability solution is excessive from the point of view of the member companies of SwissHoldings. It is unnecessary for the tax administration to decide for itself which business unit of a group of companies belonging to Switzerland should be liable. In practice, joint and several liability leads to the fact that in many M&A transactions and other legal transactions, the joint and several liability risks must be included in a large number of contracts. Depending on the contract, the potentially high financial risks are likely to unnecessarily startle counterparties, investors or boards of directors and lead to many transactions that are profitable for Switzerland no longer having to be conducted here or without Swiss companies. Such consequences must be avoided at all costs. In this sense, it would be desirable to limit the liability of each business unit to the supplementary tax allocated to it according to Art. 12 (allocation of the supplementary tax to the business units). Subsidiarily, the liability should focus on that company which has the most participations and thus indirectly owns the assets of the subsidiaries or otherwise has the most assets.

On Articles 8 to 10 (scope of application): Our criticism in this regard is not aimed at adapting the draft ordinance on minimum taxation, but rather the Federal Council Ordinance on the International Automatic Exchange of Country-by-Country Reports of Multinational Corporations (ALBAV of 29 September 2017). According to Articles 8 to 10 of the draft ordinance, groups of companies whose ultimate parent company has an annual consolidated turnover of 750 million euros are subject to the OECD minimum taxation (Swiss as well as international supplementary tax). In the first three years, affected groups of companies can benefit from massive administrative relief if their country-by-country report (so-called CbC Report) meets certain requirements. The conditions are set out in the so-called Transitional CbCR Safe Harbour Guidelines. In practice, the facilitations are also of considerable financial importance for many groups.

According to the OECD-BEPS Rules of 2015, all groups of companies with a consolidated turnover of the parent company of 750 million euros must prepare a country-by-country report. However, the Swiss implementation of the 2015 OECD rules still provides for a conversion of euros into Swiss francs. As is well known, the Swiss franc has become significantly stronger against the euro in recent years. According to the above-mentioned Federal Council Ordinance of 2017 (Art. 3 ALBAV), only Swiss corporate groups with a consolidated annual turnover of 900 million Swiss francs must complete a country-by-country report and have it exchanged internationally. Swiss corporate groups between 750 million euros consolidated turnover and 900 million francs consolidated turnover may voluntarily prepare this report. However, such groups that are subject to the OECD minimum tax cannot use this voluntary report to claim the Transitional CbCR Safe Harbour. However, it is precisely such Swiss groups that would be extremely grateful if they could use the Transitional CbCR Safe Harbour. We therefore ask the Federal Council to initiate the necessary steps at this point and to amend Art. 3 of the ALBAV accordingly.

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Regarding Article 12 paragraph 2 (attribution of the supplementary tax to the business units): The attribution of the Swiss supplementary tax may trigger additional liquidity and accounting burdens for individual Swiss business entities, which they may not be able to bear due to their liquidity situation and equity capital resources. Accordingly, business groups should be allowed (in deviation from the rules provided for in Art. 12) to pass on such additional tax burdens within the business group according to economic considerations, without having to reckon with withholding tax and/or stamp duty consequences. Furthermore, Switzerland should not provide for a charge of foreign additional tax (IIR and UTPR) to foreign members of the group of companies, as it is to be expected that many foreign jurisdictions will not accept such a charge.

Regarding Article 16 paragraph 5 letter d (information system supplementary tax): According to the draft ordinance, the groups of companies concerned will have to submit three different tax returns. One for the Swiss supplementary tax, one for the International Supplementary Tax IIR and one for the International Supplementary Tax UTPR (as soon as introduced). This circumstance alone is a good indication of the great administrative burden for the groups of companies concerned. An even greater burden will be placed on the companies because of the requirements for the internationally prescribed GloBE Information Return (GIR). Against this background, the companies are grateful if duplications between the requirements of the GIR and the Swiss tax returns are eliminated. Information from the GIR, insofar as it is available to the Swiss tax authorities, should therefore not be requested again. In our opinion, the listing of all business units, for example, should not be part of the Swiss tax returns. In general, an attempt should be made to reduce the effort of the companies to what is absolutely necessary. A system with master data that is used for all three tax returns could therefore make sense.

Regarding Article 20 (Elective rights): According to the draft ordinance, optional rights of the group of companies are to be exercised together with the supplementary tax return. This requirement appears to us to be too absolute and should therefore be relativised. In practice, it can happen that certain options, such as the substance-based income exclusion, do not have to be claimed at all when filing the tax return because no Swiss supplementary tax is due. However, if the tax administration makes corrections later, this may change, and the substance-based deduction would help to reduce the Swiss supplementary tax. It should be possible to take such changes into account, which is why we propose a relativisation of the requirements.

Regarding Article 22 (Special provisions on the assessment order): The factors that the assessment orders must contain are only rudimentarily regulated in the current draft. One factor that must certainly be included is the allocation of the supplementary tax to the various Swiss business units in accordance with Article 12 of the draft ordinance. We are therefore of the opinion that business and administration should carry out further work together in this area. These should definitely also include the structuring of the tax returns.

Regarding Article 23 (objection): The wording of the provision does not contain any express right of objection on the part of the taxpayer. To prevent possible misunderstandings, the taxpayer's right of objection should also be expressly mentioned in Article 23 - despite the general reference in Article 14 of the Ordinance to Articles 102-173 DBG on procedural law.

Re Article 26 (Maturity): We support the regulation provided for in the draft ordinance. In contrast, the Conference of Finance Directors proposes a uniform due date (end of March of the second year after the end of the respective business year). This solution also seems appropriate to us; however, only for those groups of companies whose financial year ends on 31 December. However, many of our companies have a different financial year, which ends at the end of March, the end of June, the end of August or the end of September. These companies are disadvantaged by a uniform due date at the end of March.

Regarding Article 39 paragraph 2 (transitional provisions): As already stated in our opinion on the first part of the Minimum Tax Ordinance of August 2022, we urge great caution regarding the rapid introduction of the UTPR. The application of the UTPR could lead to Switzerland forcing US corporations to pay tax on income taxable in the USA in Switzerland and to pay the taxes here. The USA, nota bene, the most important market for Swiss exports, is unlikely to put up with this. Not surprisingly, the application of the UTPR by other states is being specifically opposed by important representatives of the US Republicans and, with them, the Tax Committee of the Republican-dominated House of Representatives. In May, for example, all Republicans on the House Tax Committee introduced a bill that would impose additional taxes on individuals and companies' resident in countries that apply the UTPR. Admittedly, the OECD has since reacted and adopted a transitional arrangement, particularly in favour of the USA. Nevertheless, we warn against the Federal Council setting the date for the entry into force of the UTPR already in the current year. Like other countries (e.g., UK, etc.), the Federal Council should observe international developments and decide on the entry into force and concrete application of the UTPR later. The solution of the EU, which already decided at the end of 2022 to apply the UTPR from 2025, does not seem appropriate to us at this point in time (for further information on the situation in the USA, we refer to our update from the beginning of July).

In addition, Switzerland should carefully examine, beyond the UTPR regulation, whether it will remain attractive for investments by US corporations in the future in an international comparison. US corporations (as well as Swiss corporations) regularly and thoroughly analyse the framework conditions at their locations. Changes such as the introduction of the OECD minimum taxation include opportunities, but also risks. We therefore welcome the fact that a sub-working group is looking in detail at the situation for US corporations and examining whether adjustments can be made within the framework of the present Minimum Tax Ordinance. US companies are directly and indirectly the most important foreign investors in Switzerland. They therefore make a significant contribution to Switzerland's economic well-being.

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6. Outside the Ordinance

For reasons of legal certainty, our member companies would like to receive guidance on the interpretation or alignment between OECD and Swiss law on the Equity Investment Inclusion Election. As part of the Administrative Guidance of February 2023, the OECD introduced the so-called Equity Investment Inclusion Election. This allows taxpayers to choose whether to include, for example, fair value gains or losses and impairments on ownership interest, as well as the corresponding current and deferred tax impacts, in GloBE income or losses and in the adjusted covered tax basis. It would be helpful if the Swiss guidelines explicitly confirmed the applicability of this option to all types of ownership interests, including investments in subsidiaries.

We thank you very much for considering our concerns.

Best regards

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