

Secretary-General  
Secrétaire général

AG/2009.301.amb

7 May 2009

Dear President Mertz,

I appreciate you writing to me on 28 April, after our meeting in Washington, to set out your views on what I know is a very sensitive political issue. I also appreciate that your letter, by mostly focusing on future work, enables a constructive and transparent dialogue. Let me just reiterate that the actions taken by the OECD in this area were fully consistent with the discharge of our duty, that we presented information that was already in the public domain, and that we duly and repeatedly informed your government about those actions, since October last year.

The OECD publishes, on a daily basis, information relevant to one or many of our Member countries, without formally asking for their consent. As a matter of fact, this is one of the recognised prerogatives of the Secretary-General, in order to maintain the independence, credibility and authority of the Organisation. In the case of the tax work, we used information which was already included in the 2008 report titled *Tax Co-operation, Towards a Level Playing Field*, published under the responsibility of the Secretary-General, based on the same questionnaire and criteria that have been used for many years, and in which you have participated. This is not exclusive work. We did not do so for or about a particular Member. It covered all 84 jurisdictions that were defined by the Global Tax Forum and who have been participating in these activities regularly.

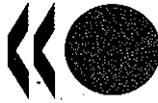
Regarding your country, the only difference between our 2008 and 5 March 2009 reports, and the ones of 14 March and 2 April 2009 is that, by 14 March, Switzerland had committed to adopt the OECD standard on the exchange of tax information. This positive development was duly recorded in my letter to Alistair Darling, Chancellor of the Exchequer of the United Kingdom, of which I gave you a copy on the same date, in London, during the IMFC meetings.

For several months now, our *leitmotiv* was that the level of tolerance in the international community regarding tax evasion was exhausted. Thus, in a letter addressed to Minister Leuthard as early as 24 November 2008, I said "the standards are getting higher and more demanding and we are being asked to be stricter and tougher in our evaluation when dealing with issues of transparency in the tax area. The financial crisis has put the issue of co-operation on tax matters in a different perspective, as mentioned in the *G20 Communiqué*, on top of the long-standing concerns of money laundering, terrorism and organised crime." I also mentioned that "I believe Switzerland does not deserve to be mentioned in that context". I ended up saying "We want to help: but please, don't kill the messenger, we are part of the solution, not the problem".

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Mr. Hans-Rudolf Mertz  
President  
Confederation of Switzerland

Cc: The Right Honourable Alistair Darling, Chancellor of the Exchequer, United Kingdom  
H.E. Mr. Dominic Martin, Head of the Delegation of the United Kingdom to the OECD  
H.E. Mr. Eric Martin, Head of the Delegation of Switzerland to the OECD  
Mr. Mario Draghi, Governor, Bank of Italy



The Annex addresses in more detail the issues you raise in your letter. For some issues we have factual responses; other will need to be discussed by the Global Forum, the Committee of Fiscal Affairs (CFA) and its relevant subsidiary bodies since it is not only up to the Secretariat to decide how this work should be pursued.

Bank secrecy and exchange of information are not new issues for the OECD, nor is the fact that the vast majority of our member countries insist, both in the bilateral and multilateral context, that in today's highly integrated world, governments need better access to information, including bank information, if they are to be in a position to implement effectively and fairly their tax laws. However, the context is new. Indeed, as both developed and developing countries grapple with the severest economic crisis in decades, pressure on public budgets is immense, tolerance for tax evasion has collapsed and the threat of sanctions against non-co-operative jurisdictions is now very real.

I also know from my discussions in Washington with Finance Ministers both from OECD and non-OECD countries alike that they are very pleased with the decision of Switzerland to adopt the Exchange of Tax Information Standard, as set out in Article 26 of the OECD Model Tax Convention.

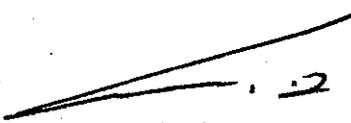
Our work, however, is only beginning. There is now a global movement to address cross border tax evasion. As I mentioned to you and to Doris Leuthard in Washington last week, Prime Minister Gordon Brown has written to all the jurisdictions related to the UK, encouraging them to implement the standard by the next meeting of the G20 in September. President Sarkozy has strongly signalled to French banks that he expects their host jurisdictions to adopt the standard in the next few months, lest they stop operating there. The German Parliament has approved a law containing sanctions to jurisdictions that don't conform to the Standard, and have left the reference to specific jurisdictions for after the elections. The US government has very clearly and firmly come out in favour of the adoption of the Standard, and Congress is considering sanctions to those that don't do so. Just this week the President of the United States identified combating offshore tax non-compliance as one of his priorities. In India, the present political campaign has focused on the need to renegotiate those of its tax treaties that do not currently meet the Standard. I mention this because time is of the essence and the OECD will be monitoring the different jurisdictions and reporting their progress.

Over the next two months there will be ample opportunity for your officials to discuss your proposals with their counterparts. The Forum on Harmful Tax Practices will meet on 13-14 May and the CFA on 28-29 June.

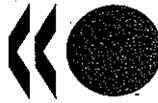
Now that all OECD countries have endorsed the standards it is very much in our collective interest to ensure that there is an effective implementation and that any monitoring process remains multilateral, impartial, transparent and effective. We must achieve a level playing field not just in name but also in practice. This was confirmed by the recent G7 Communiqué out of Washington, which calls on the OECD, FSB and FATF "to intensify their work in conducting objective peer reviews of countries' efforts to strengthen international standards in taxation, prudential supervision, and AML/CFT, respectively, and to identify non-cooperative jurisdictions and develop a toolbox of effective countermeasures."

Let me conclude by saying that I was very pleased to read your statement to the effect that Switzerland is prepared to move swiftly to take this work forward. Having endorsed the Standard, your government and businesses must now have a very strong interest in achieving a consistent implementation. We at the OECD will be pleased to help. I hope that we can also count on your support in moving ahead, specifically with our work on the Strategic Response to the Economic and Financial Crisis.

Yours sincerely,



Angel Gurría



## ANNEX

It is important to recall some of the background to the OECD's long-standing work on improving access to information for tax authorities. In 1996, the OECD Council at Ministerial level gave a mandate to the Committee on Fiscal Affairs (CFA) to undertake work on harmful tax competition. This project was able to build on the more than 30 years of work of the Organisation to improve cooperation in tax matters. In 2000, the CFA issued a report, approved by all members of the Committee, which set out an ideal standard of access to bank information for tax authorities. Progress reports on how far countries were moving to achieve this standard were issued in 2003 and 2007. In 2004, the OECD agreed on a revised text for Article 26 of the OECD Model Tax Convention which specifically requires that bank secrecy cannot impede exchange of information. In practice, all but 4 of the OECD countries (Austria, Belgium, Luxembourg and Switzerland) and many non-OECD countries have been using this standard for many years. In 2003, the CFA submitted to the OECD Council a draft Recommendation to set a deadline for the implementation of this standard (December 2005 was proposed). Switzerland, along with Austria, Belgium and Luxembourg blocked this proposal. The CFA has also over many years examined how to improve the practical aspects of exchange of information, particularly through its Tax Information Exchange Systems Sub-Group. Throughout the last 10 years, I, my predecessor and other members of the Secretariat have had regular contacts with Swiss officials, the Swiss Bankers Association, Parliamentarians and NGOs on this issue.

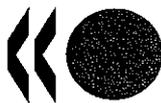
- It may also be helpful if I explain briefly the role of the Global Forum. The Global Forum elaborates the standards of transparency and exchange of information and provides regular assessments of how far countries have implemented these standards. The Forum also provides a platform where jurisdictions can discuss some of the broad policy issues that arise in these areas. The Global Forum was created in 2000 and initially was open to all OECD countries and to all of the jurisdictions identified as tax havens in 2000 that committed to implement the principles of transparency and effective exchange of information for tax purposes. Jurisdictions which committed to the standards became Participating Partners along with OECD countries. Participation in the assessments and in the implementation of the standard by the Global Forum has grown to include Observer countries to the CFA (Argentina, Chile, China, Russia, South Africa) as well as other financial centres. When the Forum met in Berlin in 2004 the Participating Partners agreed to invite other financial centres to participate in this work, including jurisdictions that had been identified as tax havens in 2000 but which had not yet committed to the standards, as well as other significant financial centres (Brunei, Costa Rica, Guatemala, Hong Kong (China), Macao (China), Malaysia, Philippines, Singapore, United Arab Emirates, Uruguay). Two of them, (Hong Kong, China and Macao, China) endorsed the standards at the meeting. A number of CFA Observer countries (Argentina, China, Russia, South Africa) also endorsed the principles at the Melbourne meeting. The work of the Forum is steered by the Sub-Group on Level Playing Field issues, which includes representatives of OECD and non-OECD jurisdictions.

Let me now address each of the points that you raise:

1.

- *How have the countries concerned by this list been included in its compilation?*

The jurisdictions included in the 2<sup>nd</sup> April Progress Report are the 84 jurisdictions covered by the OECD Global Forum's most recent assessment. The Global Forum survey covers all OECD countries, observer countries to the Committee on Fiscal Affairs, the jurisdictions identified by the OECD in 2000 as "tax havens", and financial centres identified in the Global Forum's 2004 Berlin Report. The process for gathering and verifying the information to produce the Global Forum assessments is set out in the 2004 Berlin Report, which is available on our website and is also described in the 2006 assessment. All jurisdictions covered by the assessments produced by the Global Forum on Taxation in 2006, 2007 and 2008 were invited to respond to a questionnaire. The reports were circulated to all jurisdictions for approval before being finalised. Switzerland responded to the questionnaires and provided updates for the preparation of each of the reports. Throughout this process, these developments have been discussed and monitored at each of the biannual meetings of the CFA and its relevant subsidiary bodies, which Switzerland regularly attends. At every stage of the CFA and Global Forum process



Switzerland has had equal access to all of the information available on the same basis as the other participating countries.

The 2<sup>nd</sup> April Progress report is based on information extracted from the most recent Global Forum assessment and on publicly available information about the jurisdictions concerned.

- *What qualitative and quantitative criteria are to be applied to countries on the list?*

The starting point for the assessment process is the exchange of information standard as set out in Article 26 of the OECD Model Tax Convention, which was revised in 2004 to take into account developments including the 2002 Model Agreement on Exchange of Information on Tax Matters. This standard was endorsed by the G 20 Finance Ministers in Berlin in November 2004 and in Xianghe, China in 2005. It was also recently incorporated into the UN Model Tax Convention.

The progress report issued on 2 April was based upon two criteria which were agreed in the context of the Global Forum's work:

- Has a jurisdiction endorsed the standard and agreed to implement it?
- Whether the jurisdiction has signed 12 or more agreements (Treaties or Tax Information Exchange Agreements) which meet the standard? (At the time of the 2 April report, Switzerland had not signed a single one.)

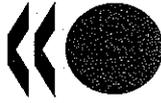
These measures are an indicator of progress at a certain point in time and will be reviewed by the relevant bodies as further developments occur. The signing of 12 or more agreements as a basis for assessing substantial implementation of the standard by 84 jurisdictions covered by the Global Forum survey was discussed in 2008 by the Forum on Harmful Tax Practices and on the 26<sup>th</sup> November the new assessment process was communicated to all 84 countries covered by the Global Forum assessments. At its January 2009 meeting the CFA confirmed its endorsement of this approach.

- *Why are certain members of the G20 not included? Has the OECD examined the level of international co-operation in tax matters of these countries?*

Only those jurisdictions covered by the Global Forum's most recent survey are included in the report. As indicated above, the Global Forum survey covers all OECD countries, Observer countries to the Committee on Fiscal Affairs (Argentina, Chile, China, Russia, South Africa), the "tax havens" identified in 2000, and financial centres identified in the Global Forum's 2004 Berlin Report (Brunei, Costa Rica, Guatemala, Hong Kong (China), Macao (China), Malaysia, Philippines, Singapore, United Arab Emirates, Uruguay). The reason that certain G20 members are not covered by the 2 April Progress Report is that they had not been covered in any of the Global Forum surveys published to date.

- *What process is to be applied in monitoring implementation of the OECD standard on exchange of information?*

The Global Forum has a well-established monitoring process which includes a self-review and a peer review which it will use to assess the progress made by all 84 jurisdictions covered in the assessment. This process has been endorsed by the Committee of Fiscal Affairs of the OECD. The CFA itself publishes regularly reports on progress made by member countries and Observer countries in achieving the standard referred to above. Switzerland has thus far abstained in the approval of this work in the context of the harmful tax practices project but has approved the progress reports on improving access to bank information for tax purposes in 2003 and 2007.



- *Will the OECD take into account the quality and timeliness of the exchanged information?*

At present, the focus is on ensuring that the legal mechanisms are in place to permit the exchange of information in accordance with the standard. The ultimate objective is "effective" exchange of information, and the CFA and Global Forum will no doubt review the measure of progress as further developments occur. Quality and timeliness are important elements of effective exchange of information programmes, which is why the CFA has undertaken work to improve the practical aspects of exchange of information. Let me point out, as an example, the Manual on Information Exchange on the OECD website, which is aimed to improve the quality and timeliness of exchanges of information.

- *Who is to propose sanctions should these be deemed necessary? What is the process for deciding and imposing such sanctions?*

It is for individual countries to decide on whether, and if so how, defensive measures should be used and already some parliaments are considering or have considered such actions (e.g. Germany, the United States). The OECD provides a forum where the nature and effectiveness of such measures can be discussed and coordinated if countries so desire but at the end of the day each Member country is sovereign and will decide on the most appropriate course of action. As you know, the issue of defensive measures has been discussed regularly since 1998 in the Forum on Harmful Tax Practices and in the Committee itself.

- *What is the definition of "tax havens" as referred to in the G20 communiqué? Are jurisdictions which have "substantially implemented the agreed standard" still deemed to be tax havens according to the criteria applied so far by the OECD?*

The definition of a "tax haven" agreed at the OECD is that set out in the 2000 report, namely:

- 1) *No or nominal tax on the relevant income;*
- 2) *Lack of effective exchange of information;*
- 3) *Lack of transparency; and*
- 4) *No substantial activities.*

*No or nominal tax is not sufficient in itself to classify a country as a tax haven.*

The progress report issued on 2 April looks at only one aspect of this definition, the exchange of information standard, and this is the standard against which the progress of jurisdictions surveyed by the Global Forum (which also covers jurisdictions other than tax havens) was measured. The question of whether the jurisdictions which have "substantially implemented the agreed standard" are still deemed to be "tax havens" is one for the Committee that originally identified them as "tax havens". Note, however, that the G20 was focused on "non-cooperative jurisdictions" including tax havens, thus the definition of "tax havens" may not have been of critical importance to the G20 concerns.

2. *I ask the Secretariat to provide clarification to Member States on how it sees the role of the OECD in monitoring this process. Member States should be consulted prior to any action being taken. As usual in the OECD decisions are to be taken by consensus.*

There is already a monitoring process in place which was agreed by the CFA : the Global Forum process. It consists of a self-review by each jurisdiction initiated through a detailed questionnaire followed by a peer review via a secure website designed for this purpose. Any modification of the existing process would be discussed in the Global Forum and the CFA. This will, as in the past, ensure a full consultation not just with Member countries but also non-Members. I, as Secretary-General of the OECD, can also report on the progress on the basis of the facts gathered through this monitoring process.



3. *Furthermore, in the light of recent events the Secretariat should clarify the role of the Global Forum on exchange of information in this process and revise the mandate and composition of this forum. Is the Global Forum a standard setter or will the Forum's role be limited to evaluating progress? The revised mandate should be submitted for approval to the CFA and then to the Council. A revised mandate should, inter alia, clarify the criteria for jurisdictions to have "substantially implemented the internationally agreed tax standard" and it should ensure that effective monitoring is extended to all Member States of the G20.*

The CFA revised and agreed the mission statement of the Global Forum last January in accordance with the OECD rules and work methods. The Mission Statement provides as follows: "The Global Forum's mission consists of organising a dialogue between OECD and non OECD member countries on transparency and exchange of information on taxation, which constitute the conditions of fair competition. The Global Forum aims to achieve the largest possible consensus on the definition and implementation of high standards of transparency and exchange of information and to regularly assess States' practices in these areas." Please note that the reference is to "the largest possible consensus", not necessarily to full consensus or unanimity.

4. *Beyond formal compliance with the standard, monitoring should be extended to the effective application of the exchange of information. In so doing, the OECD should monitor effective access to, and effective cross-border exchange of information, e.g. with regard to the (ultimate) beneficial owner of funds placed in bank accounts. This is an essential prerequisite for a "level playing field".*

Paragraph 5 of Article 26 of the OECD Model Convention now provides that a Contracting State cannot "decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person." The standard for ownership and identity information agreed in the Global Forum is set out in paragraph 26 of the 2006 Assessment by the Global Forum.

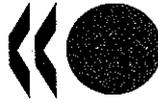
26. Ownership and identity information should cover the type of information that other countries might legitimately expect to receive in response to a request. In the case of a company or partnership a requesting country is typically interested in the identity of its shareholders or partners. In cases where there are reasons to believe that a legal ownership position may be subject to a nominee or similar arrangement, countries may also request information on the identity of the persons on whose behalf the nominee (or similar person) is acting. Where trusts or foundations are concerned, information may be requested on the identity of beneficiaries, trustees, members of the foundation council, settlers, founders, or any other person (including protectors and enforcers) able to direct how assets of the trust or foundation are dealt with. Similar ownership or identity information should also exist for other organisational structures that cannot be classified as a company, partnership, trust or foundation and that may be relevant to information exchange.

-Tables D1-5 of the 2006, 2007, 2008 Global Forum assessments set out the legal frameworks of each of the jurisdictions surveyed on this issue.

5. *The timeframe for implementation of commitments made should allow sufficient time for the negotiation of bilateral agreements and for those agreements to be signed, ratified and to enter into force. In determining progress made, account should be taken of the nature of the agreements (DTAs or TIEAs). It is to be expected that the revision of DTAs will generally require more time.*

We recognise that the renegotiation of tax treaties may take time but we also need to recognise that the international community is expecting a swift implementation. Our relevant subsidiary bodies have already started examining how this can be achieved and the Secretariat is ready to assist Switzerland in this endeavour.

6. *An in-depth analysis should be conducted of the best way to ensure taxation of cross-border payments of interest or other forms of capital earnings. In particular, such an analysis should compare the effectiveness of existing systems based on a withholding tax as compared to systems based on*



*automatic exchange of information. The possibility of extending such systems to all other states of the Global Forum should be examined.*

The issue of withholding tax versus automatic exchange of information is one that the CFA has examined on several occasions in the past. Withholding tax on specific types of income can serve a purpose but cannot be an effective substitute for exchange of information for all tax purposes. It is necessarily limited to the type of income on which tax is withheld. The standard agreed by the CFA in the 2000 report on Improving Access to Bank Information for Tax Purposes is "exchange on request". If Switzerland wishes to revisit the question once more it should do so in the appropriate forum, i.e. the CFA. I note that the EU countries have had experience now under the Savings Directive with the two systems and they have signalled that there may soon be a shift from withholding to automatic exchange of information.