

Banking - Switzerland

Aborted Lex USA and its consequences

Contributed by [Meyperlustenberger Lachenal](#)

August 02 2013

Aborted Lex USA Consequences of refusal of Lex USA

Aborted Lex USA

On May 29 2013 the Swiss government adopted a draft bill that aimed to put an end to the tax dispute between the United States and Swiss banks that have allegedly helped clients to avoid US taxes. The draft bill – the Federal Act on Measures to Facilitate the Resolution of the Tax Dispute between Swiss Banks and the United States (Lex USA) - for the attention of the Federal Parliament, intended to enable banks to cooperate with the US Department of Justice (DOJ) in order to regularise their situation with the US authorities.

Swiss banks would have been allowed to pass on more confidential information to US authorities. This included, in particular, information about business relationships concerning US persons and details on employees who were involved in the US business relationships within the respective banks. Hence, information relating to employees of Swiss banks that dealt with US clients, or that organised and followed their business relationships, should have been forwarded to US authorities, as well as information regarding third parties active in a similar way with regard to such business relationships (eg, asset managers, attorneys). However, banks cooperating with the DOJ would have been obliged by law to provide maximum protection for their employees. This included:

- the obligation to provide prior information to safeguard employees' rights to information;
- the obligation to provide for employees' welfare under labour law and protection against discrimination and dismissal.

The banks and their representatives would have been required by law to conclude an agreement with the relevant employee associations which satisfies these minimum requirements. Client data, including account information, were not covered by the scope of the act. The disclosure of client data would have occurred exclusively within the scope of administrative assistance procedures based on a valid double tax agreement. Hence, banks would have remained banned from passing on client names or account details under the deal, but they could have revealed a trail of data leading to US tax dodgers with undeclared assets hidden in Switzerland.

The Federal Parliament dealt with the Lex USA during the last summer session. The urgency was due to the fact that the United States are not willing to wait any longer over this issue. The outcome of the vote at Parliament was uncertain, however, the fact that the future of two cantonal banks is at stake in the US proceedings could have led to an adoption of the bill. Nevertheless, on June 19 2013, the Federal Parliament rejected the Lex USA, mainly because it was based on a unilateral US programme that Parliament considered too far reaching. Several commentators also pointed out the absence of an agreement with the US authorities and the lack of legal certainty with regard to the admission of banks to participate in the US regularisation programme.

Consequences of refusal of Lex USA

On July 3 2013 the Swiss government set out the principles – not yet published – for cooperation between the Swiss banks and the US authorities to resolve the tax dispute within the scope of existing law and particularly data protection and employment law. On the basis of these principles, banks will have the option of applying before the federal government for an individual authorisation based on Article 271 of the Swiss Criminal Code that governs "activities carried out on behalf of a foreign state". This solution – which does not require the approval of the Federal Parliament – will enable

Authors

[Christophe Rapin](#)



[Christophe Pétermann](#)



[Daphné Lebel](#)



Swiss banks to cooperate with the DOJ in order to regularise the situation with US authorities.

With this new solution, Swiss banks will be allowed, by means of prior authorisation and in the framework of the principles fixed by the Swiss government, to pass on more confidential information to US authorities. However, as was the case with the Lex USA, the personal rights of potentially affected employees and third parties must be taken into account.

The duty to provide prior information to the employees and affected third parties and their right to be informed must be safeguarded by the banks. Regarding employees an extended duty for assistance and an adequate protection against discrimination in recruitment must be ensured by the banks in order to apply successfully for authorisation.

Affected third parties include the banks which feature in the 'Leaver lists', because they welcomed clients which left one of the banks currently prosecuted. The Leaver lists contain non-personalised data in connection with the closure of accounts and the associated transfer of funds to another bank in Switzerland or abroad.

As was the case with the draft bill, client data, including account information, is not covered by the scope of the principles. The disclosure of client data will occur exclusively within the scope of administrative assistance procedures based on a valid double tax agreement.

All banks against which criminal proceedings have already been initiated must obtain an individual authorisation.

Further talks will be conducted with the DOJ on the basis of the parameters that have been adopted by the Swiss government. These discussions will concern the launching of a US unilateral programme that will enable banks against which no criminal proceedings have been initiated so far to cooperate with US authorities. Participation in the programme for these banks would also require prior authorisation.

With this new solution, the Swiss government confirmed that it is assuming its responsibility regarding the financial sector. If banks are not authorised to cooperate with the US authorities, the initiation of further criminal investigations or charges concerning banking institutions could not be ruled out. The uncertainty for the Swiss financial sector would continue to exist.

The new solution proposed by the Swiss government is generally welcomed, especially by the Swiss Banking Association. However, some commentators pointed out that the absence of a formal legal basis for this new solution could lead to legal uncertainty again.

For further information on this topic please contact [Christophe Rapin](#), [Christophe Pétermann](#) or [Daphné Lebel](#) at Meyerlustenberger Lachenal by telephone (+41 22 737 10 00 or +32 2 646 02 22), fax (+41 22 737 10 01 or +32 2 646 75 34) or email (christophe.rapin@mll-legal.com, christophe.petermann@mll-legal.com or daphne.lebel@mll-legal.com).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2013 Globe Business Publishing Ltd