Rubik & Trusts: Swiss Cooperation in the Area of Taxation

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Plan

I. A few dates

II. RUBIK

III. Trusts
   A. Swiss Paying Agent
   B. Identification of Relevant Persons
   C. Categorisation of trusts
   D. Failure to identify

IV. Trustees’ to do list

V. Conclusion
I. A few dates

- **2008/2009**
  - 13.03.2009: Adoption Art. 26 OECD MTC standard
  - 13.03.2009: UBS case

- **2011**
  - 06.10.2011: Signature Agreement with the UK
  - 21.09.2011: RUBIK negotiation

- **2012**
  - 05.04.2012: Signature Agreement with Austria
  - 20.03.2012: Amending Protocol with the UK
  - 15.06.2012: Approval by Swiss Parliament
  - 27.09.2012: End of referendum deadline
  - 05.04.2012: Entry into force

- **2013**
II. RUBIK (1/3)

- **Final Withholding Tax (FWT) Model** developed by Switzerland
  - to preserve clients’ anonymity in accordance with bank client confidentiality…
  - … while complying with legitimate foreign tax claims

- **Main elements:**
  - Swiss Paying Agents (**SPA**) / Relevant Dates (**RD**) / Relevant Persons (**RP**) – Beneficial owner (**BO**) / Relevant Assets (**RA**) / **UKRND**
  - Banks should collect the tax, which will be transferred anonymously to the foreign tax authorities or clients can self-disclose
  - Enhanced exchange of information system (anti-abuse clause)
  - Improved market access for Swiss financial institutions abroad
  - Solution for illegally obtained tax data
II. RUBIK (2/3)

- **Upfront payment**
  - Swiss banks to pay an upfront payment
  - Will be offset against the tax payments made by clients

- **Regularisation of the past**
  - Anonymous one-off payment (*by default option*)
  - Voluntary disclosure
  - Closing of Swiss bank account

- **FWT**
  - Anonymous payment
  - Voluntary disclosure
II. RUBIK (3/3)

Relevant Dates (RD)

- RD2: 31.12.2010
- RD3: 31.05.2013
- RD4: 30.06.2013

01.01.2013

01.03.2013

Entry into force

- RA with a SPA
- SPA notice to RP re options
- RA with a SPA
  - RD for choice of option
  - Issuance of certificate
- RD for new business relationships to choose

Year 1 (taxation) = 01.01.2003
III. Trusts – Swiss Paying Agents

- Art. 2(1)(e)
  "banks under the Swiss Banking Act of 8 November 1934, securities dealers under the Swiss Stock Exchange Act of 24 March 1995 and natural and legal persons resident or established in Switzerland, partnerships and permanent establishments of foreign companies, which accept, hold, invest or transfer assets of third parties or merely make payments of income or gains for third parties or secure such payments in the normal course of their business."

- Trustee as SPA?
  ► Paras. 36ff Guidelines Regularisation / Paras. 14ff Guidelines FWT
    - Trust = BO → YES
    - Settlor / beneficiary = BO → NO
  ► Delegation possible between SPAs, e.g. between trustee and bank
III. Trusts – Identification of Relevant Persons (1/3)

- Art. 2(1)(h)
  - Any individual resident in the UK
  - Contractual partner of a SPA
    - Account/deposit holder and is BO of the assets; or
    - BO, as determined by Swiss due diligence obligations and all the circumstances known to the SPA, of assets held by:
      - Domiciliary company → trusts
III. Trusts – Identification of Relevant Persons (2/3)

- **Domiciliary company** are “legal entities, companies, institutions, foundations, trusts, fiduciary companies and other establishments not exercising a trading or manufacturing activity or another form of commercial operations”

- **Principle**: domiciliary company ≠ BO

- **Exception**: domiciliary company = BO
  
  - itself subject to effective taxation under the general rules for direct taxation applicable under the law of its place of establishment or its place of effective management; or
  
  - treated as non-transparent with reference to its income under UK law
III. Trusts – Identification of Relevant Persons (3/3)

- **Swiss due diligence obligations**
  - Anti-Money Laundering Act
  - Agreement on the Swiss banks’ Code of Conduct with regard to the exercise of due diligence (CDB 08)
    → Form A and T

→ Anti-money laundering standard for tax purposes

- **All the circumstances known to the SPA**
  - Undefined
  - “HMRC expects SPA to use all information they hold – including but not limited to that obtained as part of their due diligence process”
III. Trusts – Categorisation of trusts (1/4)

- **BO**: an Unidentified Legal Object
III. Trusts – Categorisation of trusts (2/4)

- **Regularisation**
  - BO can be identified: Trust transparent
  - BO not ascertainable: Out of the scope

- **FWT**
  - BO can be identified: Trust transparent
  - BO not ascertainable: Out of the scope
### III. Trusts – Categorisation of trusts (3/4)

<table>
<thead>
<tr>
<th>TRUST</th>
<th>REGULARISATION Paras. 90ff Guidelines</th>
<th>FWT Paras. 48ff Guidelines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revocable</td>
<td>BO = settlor / person with right of revocation</td>
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</tr>
<tr>
<td>Irrevocable &amp; non discretionary</td>
<td>BO = person as identified under due diligence process</td>
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<td></td>
<td><em>e.g. fixed interest trust</em></td>
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</tr>
<tr>
<td>Irrevocable &amp; discretionary (I&amp;D)</td>
<td>Out of the scope Except <em>special cases</em> →</td>
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</tr>
<tr>
<td>I&amp;D set up between RD2 and entry into force</td>
<td>No regularisation</td>
<td>–</td>
</tr>
<tr>
<td>Underlying company</td>
<td>Rules applicable to trusts</td>
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</tr>
</tbody>
</table>
### III. Trusts – Categorisation of trusts (4/4)

#### TRUST
irrevocable & discretionary

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<th>REGULARISATION</th>
<th>FWT</th>
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<tr>
<td><strong>• Settlor has signatory powers or a general POA</strong>&lt;br&gt;<strong>• Settlor is sole director of an underlying company</strong>&lt;br&gt;<strong>• Settlor (instead of the contracting party) regularly issues instructions to the SPA</strong>&lt;br&gt;<strong>• In addition to one of the above factor, settlor has unrestricted investment powers and takes all investment decisions alone</strong></td>
<td><strong>• Settlor documented as beneficiary on Form T</strong>&lt;br&gt;<strong>• Settlor / beneficiary on Form T act as trustee</strong>&lt;br&gt;<strong>• Settlor or beneficiary as documented on Form T has signatory powers or general POA</strong>&lt;br&gt; <em>Exception</em>: not applicable if powers are limited to management or information&lt;br&gt;<strong>• Settlor or beneficiary as documented on Form T acts as protector who also has signatory powers or general POA</strong>&lt;br&gt; <em>Exception</em>: not applicable if powers are limited to management or information</td>
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</tbody>
</table>

*Idem REGULARISATION*
III. Trusts – Failure to identify

**Failure to identify**
- Notification to the RP
- Regularisation request
- At the discretion of the Contracting States

**Identification error**
- Opposition to the SPA re Certificate
- Opposition to the STA
- Appeal to the SFAC

**Damage to the RP**
- Civil action
IV. Trustees’ to do list

- Examination if **qualification as SPA**
  → possible **delegation agreement** with the bank

- Identification of **UK-connected structures** with assets in Swiss banks on 31 December 2010

- Identification of **BO**

- Verification of the **bank’s documentation**
  → Identification of the correct RP / application of the appropriate tax rate

- Request independent **tax & legal advice** regarding individual circumstances
V. Conclusion

- **Legal uncertainty regarding the delimitation of the BO concept**
  - Emphasis on tax principles rather than due diligence principles
  - Substance over form
  - Risk-based approach

- **Better more information than less**
  - To allow categorisation of trust and identification of BO
  - Amend/complete Form A and T

- **Need for highly professional trustees**
  - Trustees need to be proactive
  - Coordination between possible SPAs
  - Tax / legal advice
  - Legal actions
Thank you

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