

SATC

Rubik & Trusts:

Swiss Cooperation in the Area of Taxation

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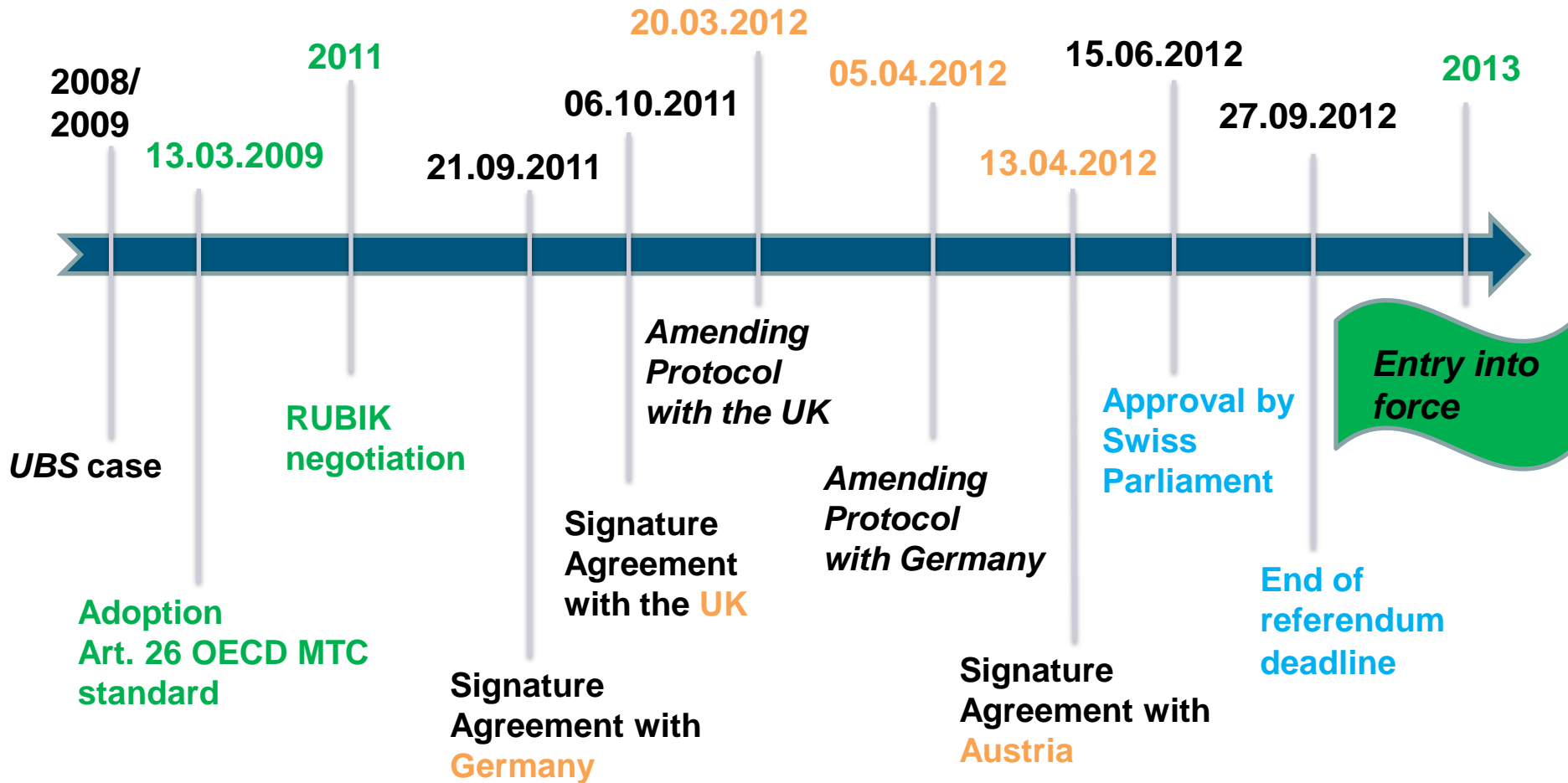


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Plan

- 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



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

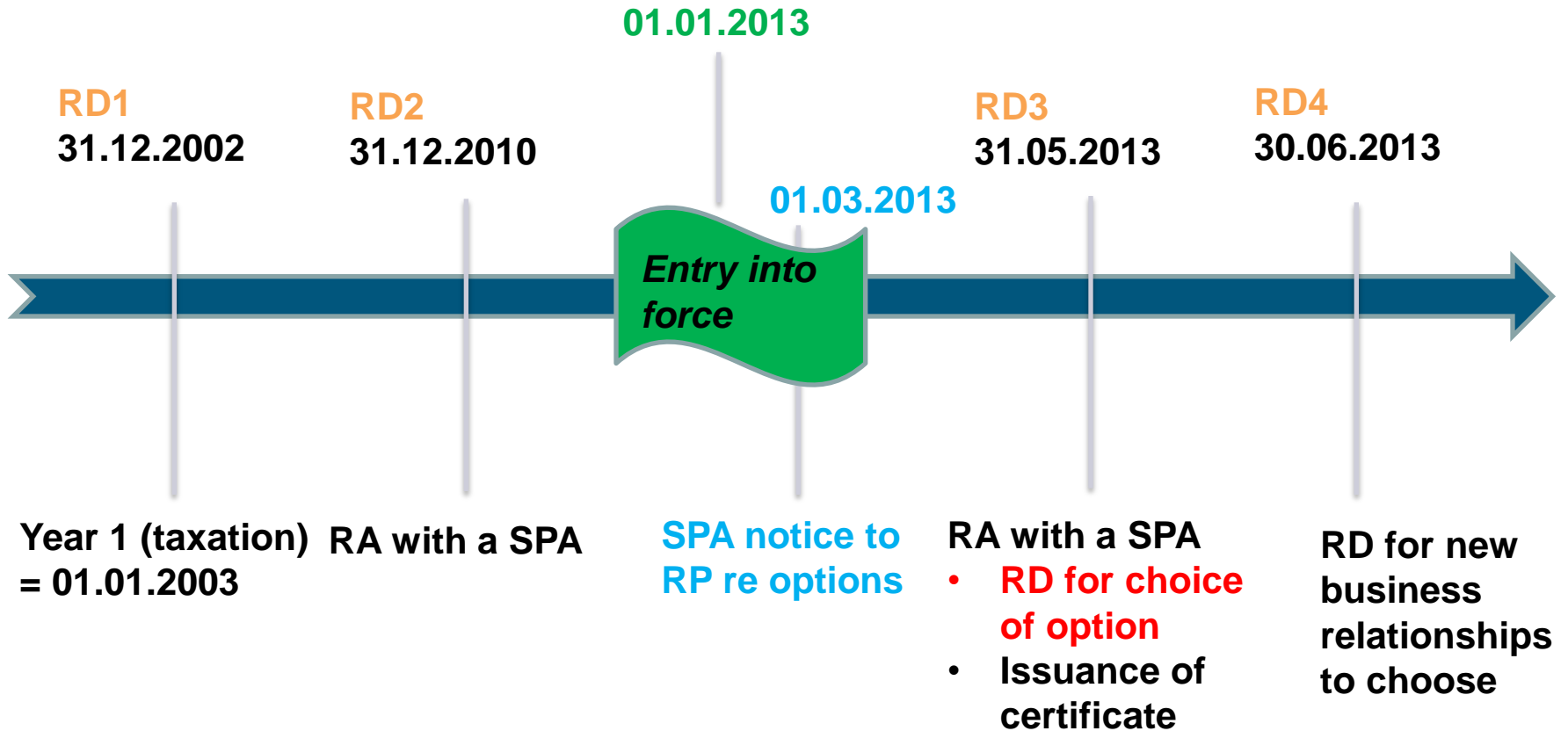
- Anonymous one-off payment (*by default option*)
- Voluntary disclosure
- Closing of Swiss bank account

FWT

- Anonymous payment
- Voluntary disclosure

II. RUBIK (3/3)

■ Relevant Dates (RD)



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

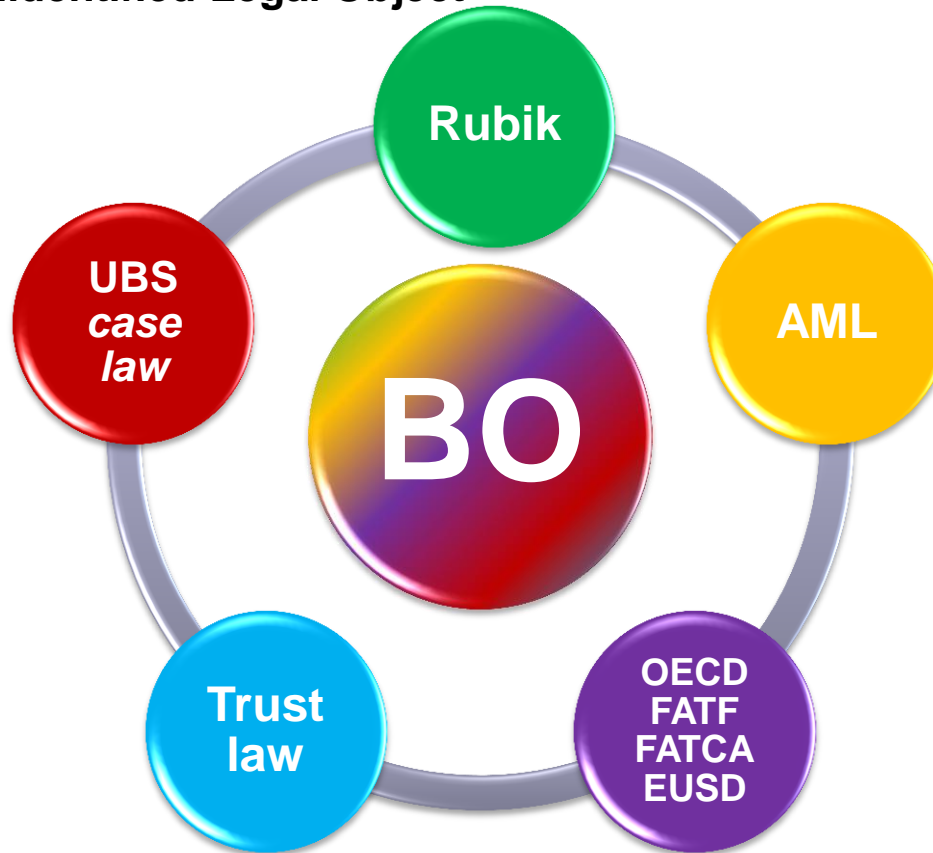
→ Anti-money laundering standard for tax purposes

■ All the circumstances known to the SPA

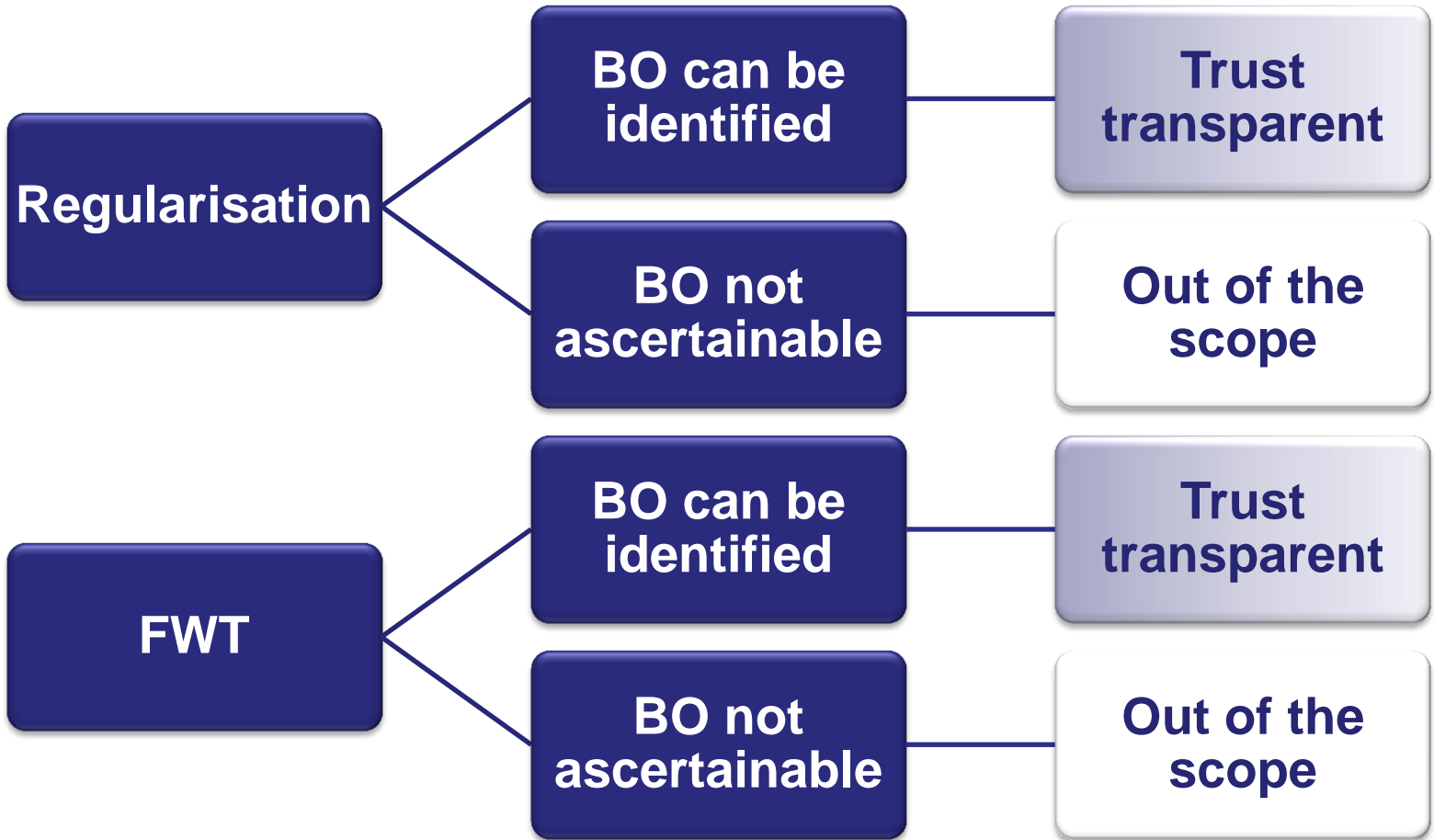
- ▶ Undefined
- ▶ *“HMRC expects SPA to use all information they hold – including but not limited to that obtained as part of their due diligence process”*

III. Trusts – Categorisation of trusts (1/4)

- **BO: an Unidentified Legal Object**



III. Trusts – Categorisation of trusts (2/4)



III. Trusts – Categorisation of trusts (3/4)

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

III. Trusts – Categorisation of trusts (4/4)

TRUST irrevocable & discretionary		
REGULARISATION	FWT	
<ul style="list-style-type: none"> • Settlor has signatory powers or a general POA • Settlor is sole director of an underlying company • Settlor (instead of the contracting party) regularly issues instructions to the SPA • In addition to one of the above factor, settlor has unrestricted investment powers and takes all investment decisions alone 	<ul style="list-style-type: none"> • Settlor documented as beneficiary on Form T • Settlor / beneficiary on Form T act as trustee • Settlor or beneficiary as documented on Form T has signatory powers or general POA <i>Exception: not applicable if powers are limited to management or information</i> • Settlor or beneficiary as documented on Form T acts as protector who also has signatory powers or general POA <i>Exception: not applicable if powers are limited to management or information</i> 	Idem REGULARISATION
In scope	In scope	

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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