Plan

I. A few dates

II. RUBIK

III. Trusts under RUBIK
   A. Swiss Paying Agent
   B. Identification of Relevant Persons
   C. Categorisation of trusts
   D. Failure to identify
   E. Trustee’s to do list

IV. Exchange of information
   A. Rubik
   B. Swiss-UK DTA
   C. The future

V. Conclusion
I. A few dates

- 13.03.2009
- 15.06.2012
- 2008/2009
- 15.12.2010
- 06.10.2011
- 27.09.2012
- 2011
- 2013

- Adoption Art. 26 OECD MTC standard
- Swiss-UK DTA
- UBS case
- Amended Swiss-UK DTA
- Signature Rubik Agreement with the UK
- RUBIK negotiation
- Amending Protocol Rubik Agreement
- Approval by Swiss Parliament
- Entry into force RUBIK
- Group requests

- 15.06.2013

- End of referendum deadline
- Appeal to the SFSC

- 20.03.2012
- Group requests
II. RUBIK – Implementing legislation

- UK Rubik Agreement
- UK Rubik Amending Protocol
- Final Withholding Tax Act
- Guidelines of the Swiss Tax Authority
  - Guideline Regularisation
  - Guideline FWT
II. RUBIK – Mechanism

- **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**

- Germany, **UK**, Austria…

- … Italy, Greece, …
II. RUBIK – Main elements

- Swiss Paying Agents (SPA) / Relevant Dates (RD) / Relevant Persons (RP)
  - Beneficial owner (BO) / Relevant Assets (RA)

- Banks should collect the tax, which will be transferred anonymously to the foreign tax authorities or clients can self-disclose

- Statistics re 10 jurisdictions where largest transfers of withdrawn assets

- Enhanced exchange of information system

- Anti-abuse clause

- Improved market access for Swiss financial institutions abroad

- Solution for illegally obtained tax data
II. RUBIK – Three pillars

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 – Relevant Dates

- Relevant Dates (RD)

RD1 31.12.2002
RD2 31.12.2010
RD3 31.05.2013
RD4 30.06.2013

01.01.2013
01.03.2013
01.05.2013
01.06.2013

Year 1 (taxation) = 01.01.2003
RA with a SPA
SPA notice to RP re options
RA with a SPA
• RD for choice of option
• Issuance of certificate
RA with a SPA
RD for new business relationships to choose
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 (1/4)

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 (2/4)

- **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 (3/4)

- 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 – Identification of Relevant Persons (4/4)

- **BO**: an **Unidentified Legal Object**
III. Trusts – Categorisation of trusts (1/3)

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
| TRUST | **REGULARISATION**
| --- | --- | --- |
| **Paras. 90ff Guidelines** | **FWT**
| **Paras. 48ff Guidelines** |  |
| 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 | BO = person as identified under due diligence process | e.g. fixed interest trust |
| | e.g. fixed interest trust | e.g. fixed interest trust |  |
| Irrevocable & discretionary (I&D) | Out of the scope Except special cases | Out of the scope Except special cases |  |
| 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 (3/3)

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

In scope

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
III. Trusts – 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
Art. 33 UK Rubik

“Notwithstanding any other provisions under which the competent authority of the UK may request information from Switzerland, in order to safeguard this Agreement’s purpose the competent authority of Switzerland shall on request provide information to the competent authority of the UK if the identity of a UK taxpayer and plausible grounds are provided by the competent authority of the UK. The request does not have to include the name of the Swiss paying agent.”

Complementary provisions in the Final Withholding Tax Act
IV. Exchange of information – Rubik (2/3)

Request

- must state name of the client but not necessarily name of the SPA
- based on plausible grounds
  - Identification on a case-by-case basis of a tax risk
  - Analysis e.g. previous tax returns, level of income, third party information and knowledge of the persons who were involved in completing a tax return

Maximum 500 per year admissible requests for the first 3 years

No assistance if (1) account/deposit existed at 31 December 2010, (2) no change of BO since 31 December 2010, (3) one-off payment was made, (4) FWT is paid and (5) no new money has been added on the account/deposit since 31 December 2010

Fishing expeditions are excluded

Judicial assistance based on DTA is reserved
IV. Exchange of information – Rubik (3/3)

- Obligation to **notify** exchange of information request to UK taxpayer
- Request limited to prior **10 year period**
- Possibility to **appeal** decision to proceed to exchange of information
- **Tax Administrative Assistance Act** applicable by analogy
IV. Exchange of information – Swiss-UK DTA (1/5)

- Swiss-UK DTA
- Tax Administrative Assistance Act
- Tax Administrative Assistance Ordinance
- OECD Model Tax Convention → Art. 26 standard
IV. Exchange of information – Swiss-UK DTA (2/5)

- Art. 26 OECD MTC

  - Obligation to **exchange** such **information as is foreseeably relevant** for carrying out the provisions of a tax convention ("petite entraide") or to the administration or enforcement of the **domestic tax laws** of the contracting States ("grande entraide")
    → tax evasion is not excluded

  - A Contracting State may **not decline** to supply information solely because the **information is held by a bank**, other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person
    → **Swiss bank secrecy does not prevent disclosure**
IV. Exchange of information – Swiss-UK DTA (3/5)

- **Request** must concern *foreseeable relevant information*
- **Fishing expeditions** are *excluded*
- **Request** based on *stolen data excluded* → violation of good faith principle
IV. Exchange of information – Swiss-UK DTA (4/5)

- **Notification** of request
- Persons abroad must designate a **representative in Switzerland** for notification purposes
- Possibility to **consult the file** and to take part to the proceedings

- **Procedure**
  - **Summary** procedure
  - **Ordinary** procedure

- **Appeal** → Swiss Federal Administrative Court (SFAC) → possibly to Swiss Federal Supreme Court (SFSC)
IV. Exchange of information – Swiss-UK DTA (5/5)

- Partner State submits a request to Switzerland
  - FTA examines the admissibility of the request (preliminary information)
    - Disclosure order: Request to submit information to FTA
      - Holder of information (e.g., bank)
        - Transmission of information
          - FTA examines information and decides on eligibility for administrative assistance
            - In case of rejected eligibility for administrative assistance, no transmission of information to partner state
              - Final decision in case of eligibility for administrative assistance
                - FTA waits for the end of the appeal period or SFAC ruling
                  - Transmission of information
                    - Partner State
          - Notification: Information on administrative assistance procedure and request to notify representative
            - Notification of representative ad litem and/or legal representative (possibly approval of simplified procedure)
              - Person concerned (e.g., bank client) has the right to inspect files
                - Person concerned
                  - Appeal (within 30 days)
                    - SAFC
                      - Appeal dismissed
                        - No information transmitted
                      - Appeal allowed
                        - No information transmitted
                      - FTA closes the case

Source: SIF
## IV. Exchange of information – RUBIK / DTA

<table>
<thead>
<tr>
<th></th>
<th>RUBIK</th>
<th>DTA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Goal</strong></td>
<td>To safeguard the Agreement</td>
<td>To carry out tax convention (&quot;petite entraide&quot;) or enforce the domestic tax laws of the requesting State (&quot;grande entraide&quot;)</td>
</tr>
<tr>
<td><strong>Requests</strong></td>
<td>Individual requests</td>
<td>Individual and group requests (2013)</td>
</tr>
<tr>
<td><strong>Pre-information</strong></td>
<td>Requesting State must inform tax payer of incoming request → legal avenues</td>
<td>–</td>
</tr>
<tr>
<td><strong>Information</strong></td>
<td>Existence of a banking relationship (accounts/deposits)</td>
<td>All taxes or taxes set out in the DTA</td>
</tr>
</tbody>
</table>
| **Conditions**      | - Identity of the taxpayer (e.g. name, address, date of birth, professional activity)  
                        - Plausible grounds (tax risk)  
                        - No need to identify SPA  
                        - No fishing expedition  
                        - No stolen data | - Information foreseeably relevant  
                        - Individual request: Information identifying the person and name/address information holder  
                        - Group request: Pattern  
                        - No fishing expedition  
                        - No stolen data |
| **Information holder** | Request from STA to all SPA                                         | Request only from indicated information holder                         |
| **Quota**           | Limitation (e.g. UK 500/year for the first 3 years)                  | –                                                                   |
| **Legal avenues**   | STA → SFAC                                                            | SFAC → SFSC                                                        |
IV. Exchange of information – The future

- OECD Standards: Group requests (→ January 2013)

- FATF Recommendations: Serious tax crimes as predicate offences to money laundering (→ 2013)

- FATF Recommendations/Egmont Group principles: MROS allowed to transmit specific financial information such as bank account numbers, or information on money transactions or bank balances to foreign FIUs (→ June 2012 Swiss government Explanatory Dispatch / implementation 2013?)

- Swiss Government: White Money Strategy (→ Report due in September 2012; delay; 2013?)
V. Conclusion

- Changing times, **changing reflexes**
- **Legal uncertainty** regarding key legal concepts (e.g. BO)
- Better **more information** than less about your clients
- Need for **highly qualified professionals**
- Better to **anticipate** / be reactive
  - Tax / legal advice
  - Legal actions
Thank you

Sandrine Giroud
LALIVE
sgiroud@lalive.ch
www.lalive.ch