

# Academy & Finance

## *Rubik, Trusts & Exchange of Information*

**Sandrine Giroud**

14 November 2012 – Geneva

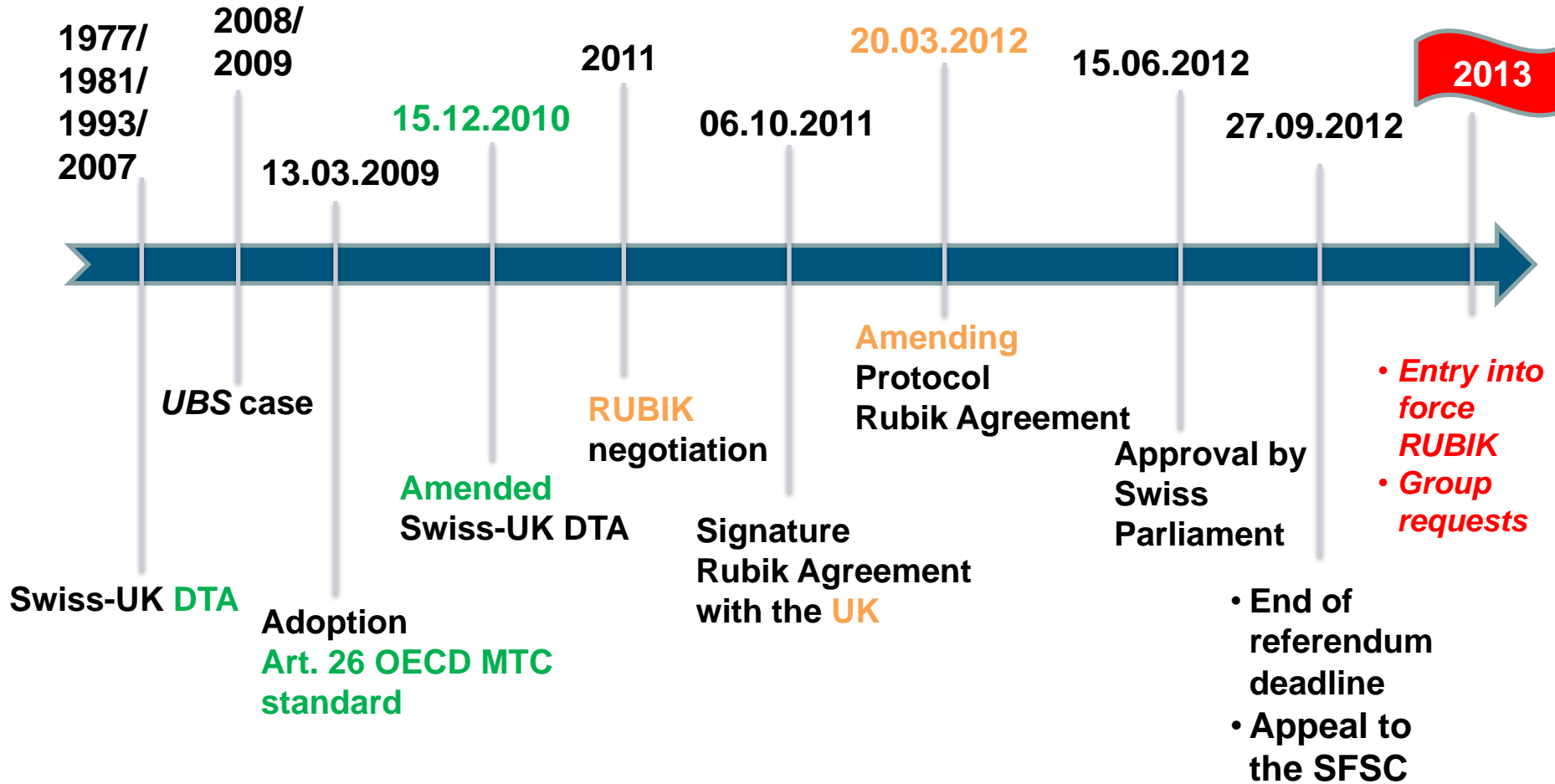


LALIVE

# 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



## 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- **Statistics** re 10 jurisdictions where largest **transfers of withdrawn assets**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

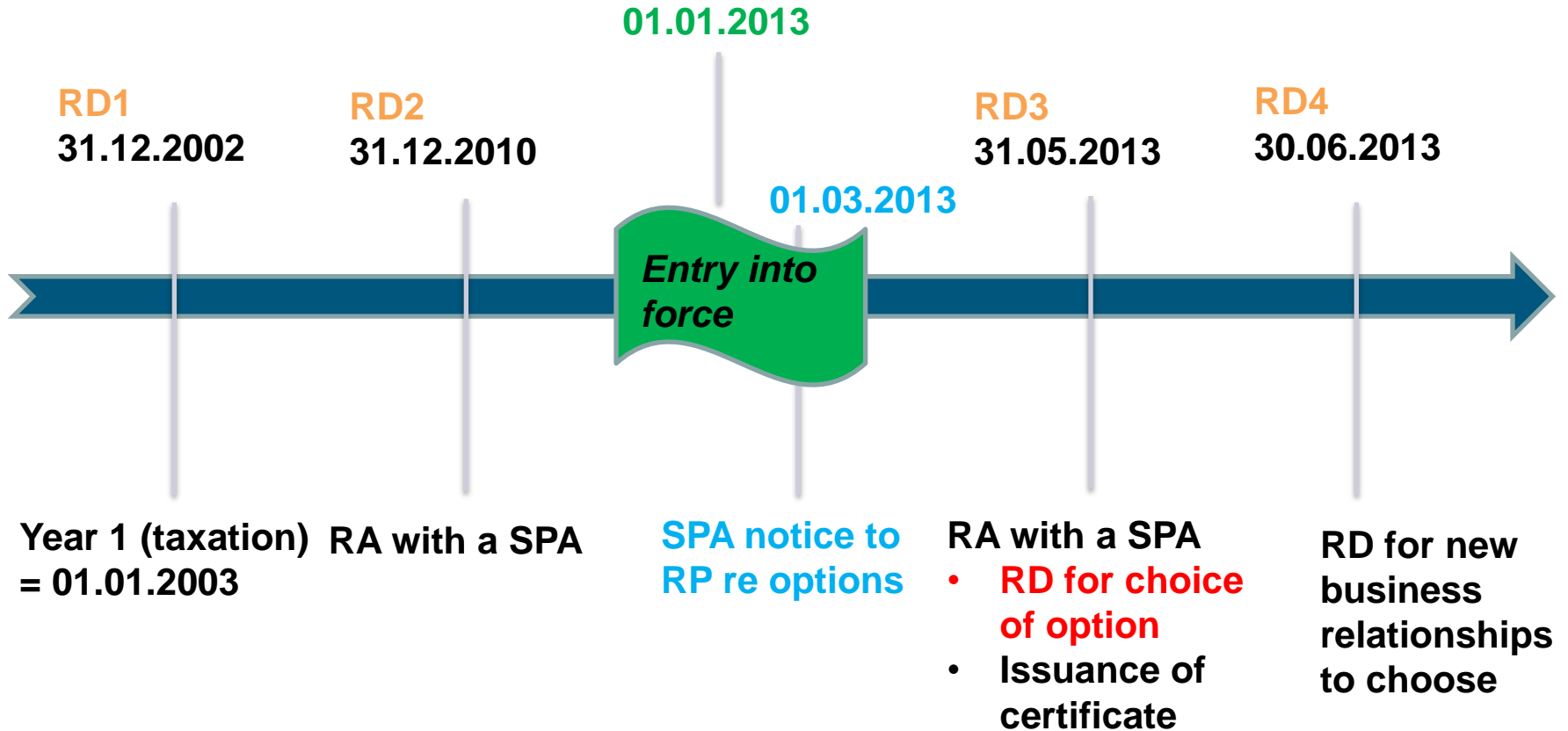
- Anonymous one-off payment (*by default option*)
- Voluntary disclosure
- Closing of Swiss bank account

### FWT

- Anonymous payment
- Voluntary disclosure

## II. RUBIK – Relevant Dates

### ■ Relevant Dates (RD)





# 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

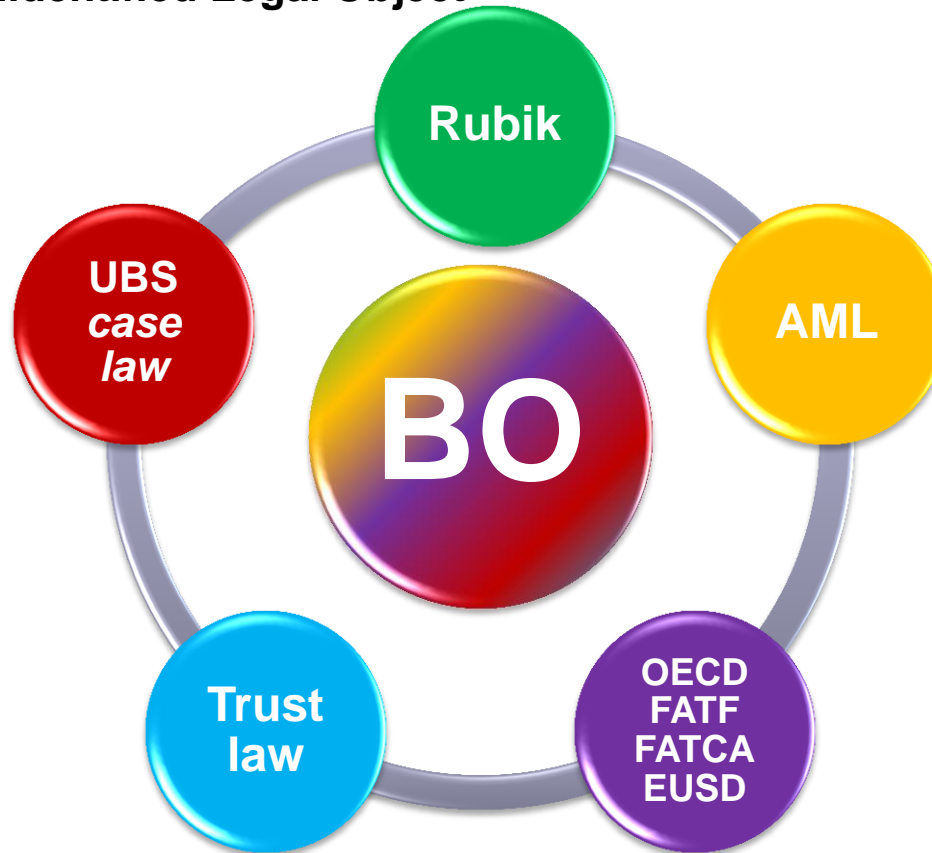
→ Anti-money laundering standard for tax purposes

## ■ All the circumstances known to the SPA

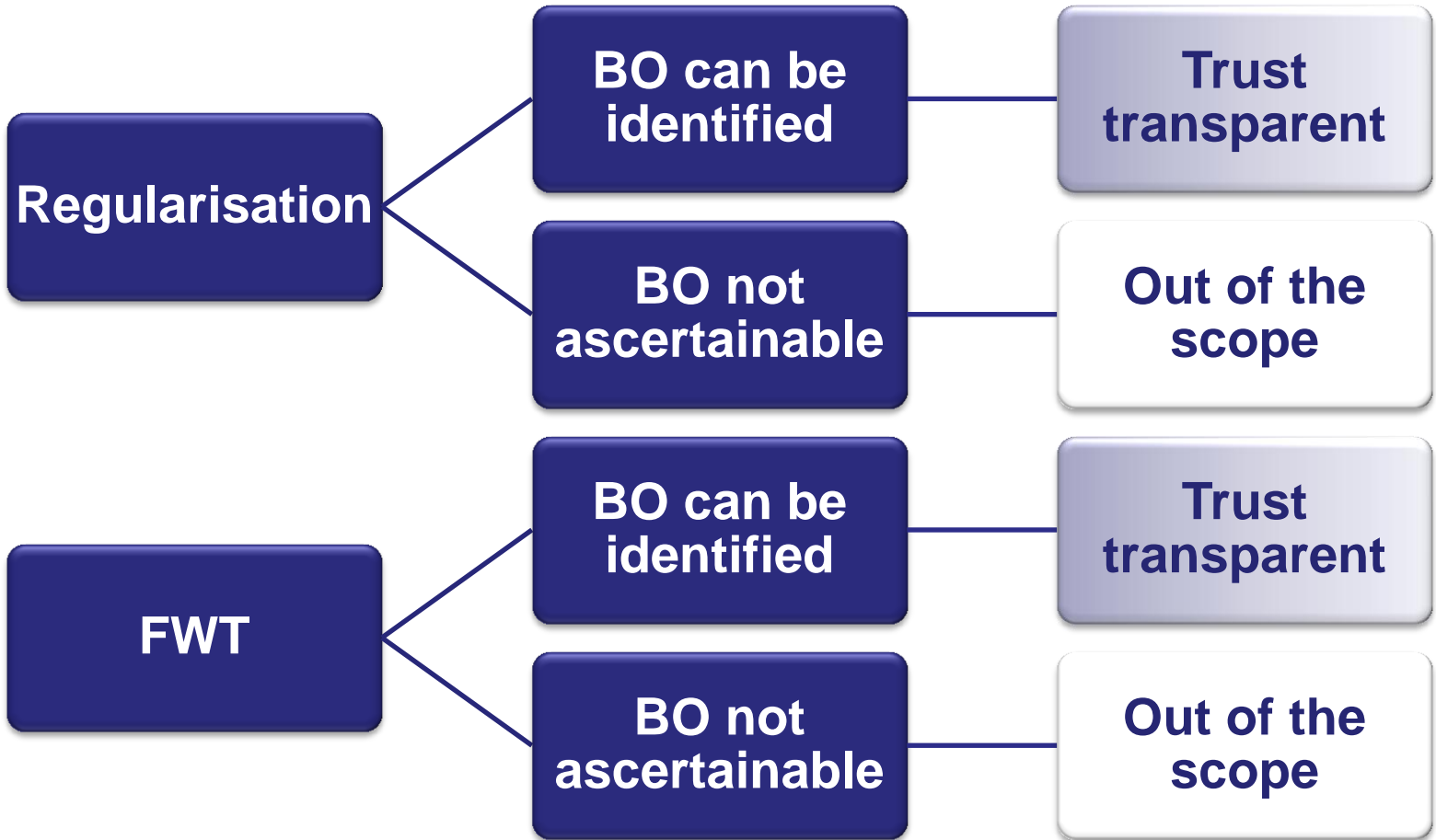
- ▶ Undefined
- ▶ *“HMRC expects SPA to use all information they hold – including but not limited to that obtained as part of their due diligence process”*

# III. Trusts – Identification of Relevant Persons (4/4)

- **BO: an Unidentified Legal Object**



### III. Trusts – Categorisation of trusts (1/3)



### III. Trusts – Categorisation of trusts (2/3)

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

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

### 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

## IV. Exchange of information – Rubik (1/3)

- 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)

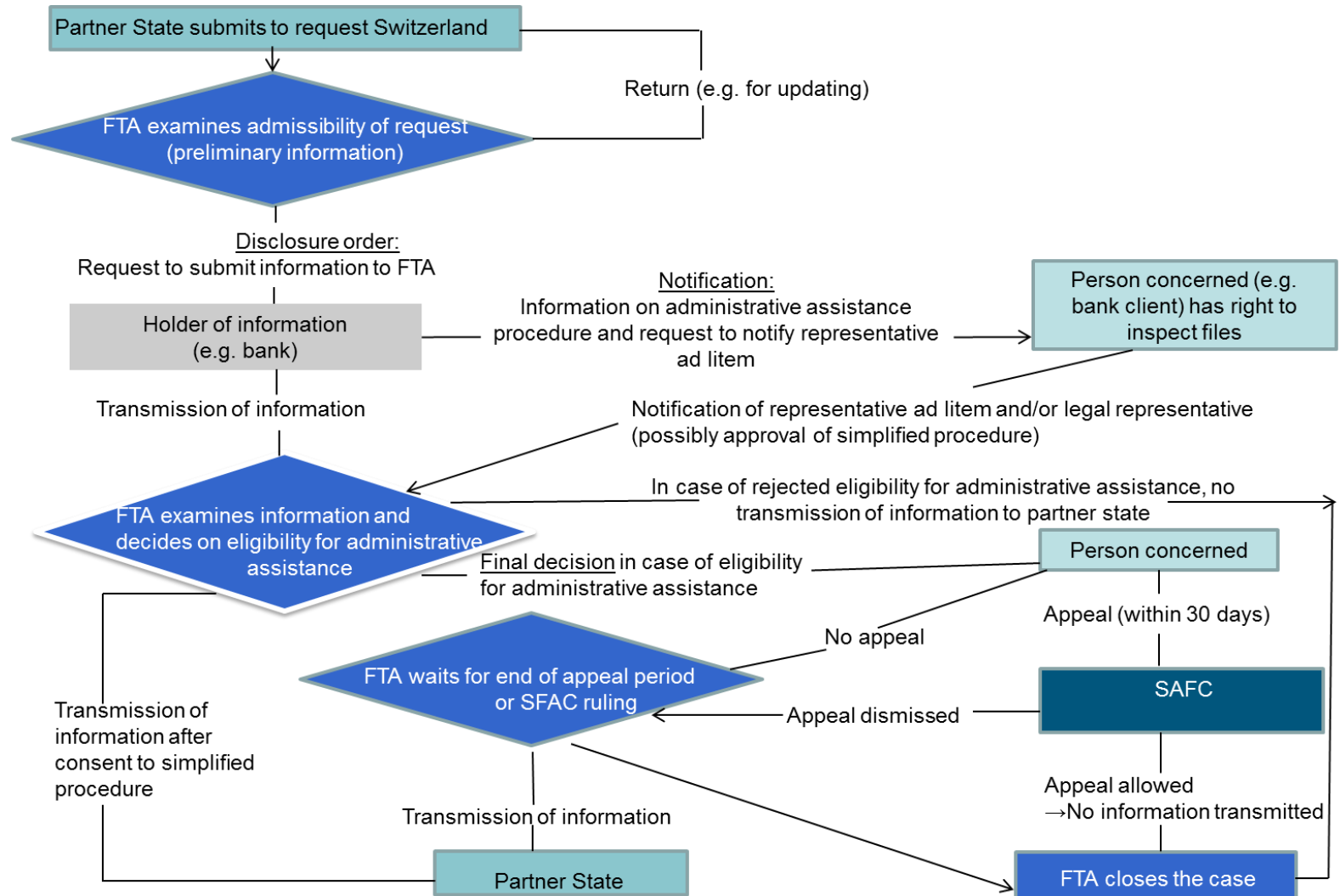
- **Request** must concern **foreseeable relevant information**
- **Fishing expeditions** are **excluded**
- **Request** based on **stolen data** **excluded** → violation of good faith principle



## 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)



Source: SIF

## IV. Exchange of information – RUBIK / DTA

|                           | RUBIK   | DTA   |
|---------------------------|---|---|
| <b>Goal</b>               | To safeguard the Agreement  | To carry out tax convention (“ <i>petite entraid</i> e”) <u>or</u> enforce the domestic tax laws of the requesting State (“ <i>grande entraid</i> e”)   |
| <b>Requests</b>           | Individual requests   | Individual <u>and</u> group requests (2013)   |
| <b>Pre-information</b>    | Requesting State must inform tax payer of incoming request → <b>legal avenues</b>   | –   |
| <b>Information</b>        | Existence of a banking relationship (accounts/deposits)   | All taxes or taxes set out in the DTA   |
| <b>Conditions</b>         | <ul style="list-style-type: none"> <li>• Identity of the taxpayer (e.g. name, address, date of birth, professional activity)</li> <li>• <b>Plausible grounds</b> (tax risk)</li> <li>• <b>No need to identify SPA</b></li> <li>• No fishing expedition</li> <li>• No stolen data</li> </ul> | <ul style="list-style-type: none"> <li>• Information <b>foreseeably relevant</b></li> <li>• <u>Individual request</u>: Information identifying the person <u>and</u> name/address information holder</li> <li>• <u>Group request</u>: Pattern</li> <li>• No fishing expedition</li> <li>• No stolen data</li> </ul> |
| <b>Information holder</b> | Request from STA to <u>all</u> SPA  | Request only from indicated information holder  |
| <b>Quota</b>              | Limitation (e.g. UK 500/year for the first 3 years)   | –   |
| <b>Legal avenues</b>      | <b>STA → SFAC</b>   | <b>SFAC → SFSC</b>  |

## 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](mailto:sgiroud@lalive.ch)  
[www.lalive.ch](http://www.lalive.ch)



**LALIVE**