THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

EIGHTH EDITION

Editor
John Riches

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PREFACE

In my foreword this year, I will focus on the continuing interest that is being devoted to the position of wealthy families and the markedly different approaches that prevail in Western Europe and the United States in terms of tax information exchange and anti-money laundering policy.

While public beneficial registers for companies will be introduced in the EU in the first quarter of 2020, the United States continues to pursue its own agenda where the primary focus of its anti-money laundering policy continues to be around financial institutions.

In broad terms, it is still accurate to say that the principal impetus for ongoing policy initiatives in this area is being driven by the EU, OECD and the Financial Action Task Force (FATF). This has been underlined by two important events in the past week or so as I finalise this foreword. Firstly, the decision of the UK Crown Dependencies[1] to voluntarily adopt public registers of beneficial ownership by 2023. Secondly, FATF's publication of its 2019 guidance for trust and corporate service providers (TCSPs) (the last version was published in 2008). I will return to both of these topics below but, in general terms, they underscore the sense of the 'transparency juggernaut' maintaining its momentum.

I will first deal with EU developments. The focus of activity here is the measures being introduced at Member State level to implement the Fourth and Fifth Anti-money Laundering Directives (4AMLD and 5AMLD, respectively). With some notable exceptions (including the UK, Malta Germany, Luxembourg, Portugal and Ireland), Member States have been quite slow to implement 4AMLD. In practice, implementation in other jurisdictions looks like it will be subsumed into the widened scope of 5AMLD.

So far as corporate registers are concerned, these are due to become public in the EU and wider EEA in early 2020 under 5AMLD (in the UK, the register was public from inception so the change here will be less marked). In the arena of trust registers, the scope of trusts that are within scope has been substantially expanded from those that generate tax consequences and those that are administered in the relevant jurisdiction. The Directive makes reference to 'express' trusts. There is significant uncertainty as to how this term will be construed as, on an expansive reading, it would require, in a UK context or co-ownership of land and joint bank accounts, to be reported. As a general proposition, trust registers are private and it would only be possible to gain access to the information on the beneficial owners of a trust where the applicant can demonstrate a legitimate interest.

It seems likely, from a consultation that has recently been launched by the UK government, that those seeking access to the trust register will have to demonstrate some

1 Jersey, Guernsey and the Isle of Man.

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specific evidence of money laundering or terrorist financing activity to justify this. In essence, general 'fishing' expeditions by investigative journalists into the affairs of the wealthy will, hopefully, be discouraged.

Some curious features of the directive implementing 5AMLD have potentially wide-ranging consequences for trusts that are not regarded as resident in the EU or EEA. On a literal reading of the directive, it could be argued that such trusts will be required to register in circumstances where they have a business relationship with an obliged entity – this includes not only financial institutions but lawyers, accountants and other equivalent professionals. We will have to await the detailed regulations to see the final policy stance taken on this issue.

One other area where 5AMLD leads to a surprising outcome is in circumstances where a trust is deemed to control any company that is not incorporated within the EU or EEA. In these circumstances, the directive makes provision for public access to information about the trust; the logic here is that if the relevant company does not open up its information to public scrutiny then the trust that owns it should be disclosed instead. What is completely unclear at this stage is whether this will provide de facto public access to information about trusts that control non-EU or non-EEA companies or whether it will only afford such access in circumstances where the applicant already has detailed information about the relevant company or trust.

Another interesting issue that arises in Luxembourg, where a trust is the ultimate beneficial owner of a Luxembourg company, is that information about the settlor, beneficiaries, protectors and any other natural person exercising effective control will be publicly available on the corporate Register of Beneficial Owners from 31 August 2019. This is markedly different from the position under the UK Corporate register in the case of a trustee owner where the persons with significant control or 'PSC' rules look to those who control the trustee decisions alone rather than those who are beneficiaries of a trust.

The general scope of trust registers in the EU under 4AMLD is starting to become clearer. Following on from the UK and Malta, Ireland recently published its regulations at the end of January 2019. These regulations will, as noted, be potentially subject to material expansion once 5AMLD is implemented.

One general concept within 5AMLD is the proposal that trusts can be effectively passported; in other words, once the trust can evidence registration on one EU or EEA register, this will avoid the need for duplicate registrations. Whether this will result in any practical compliance gains or advantages remains to be seen. In terms of its scope, the information being provided on trusts in the centralised Beneficial Ownership Register will be restricted to information about individuals and will not address (as is the case with Common Reporting Standard (CRS)) asset values.

There are clear signs that the EU is intent upon exporting its concept of centralised trusts and corporate beneficial ownership registers to the rest of the world. Recent commentaries have suggested a move to a global standard in this regard by 2023. NGOs active in the transparency arena have started to advocate the creation of an overarching integrated global asset register for wealthy families although it is difficult to gauge policymakers' enthusiasm for such a radical step.

The position of the UK if Brexit finally happens is also interesting. The UK seems intent upon implementing 5AMLD and has shown no signs of losing its enthusiasm for expanding measures in this area along with its European neighbours. The UK has also been

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putting pressure on both its crown dependencies (CDs) and overseas territories (OTs)[2] to adopt the EU's position on public beneficial ownership registers for companies.

Before the CD's announcement on 19 June 2019,[3] it seemed that the OTs were more likely to agree to the EU's position because of their constitutional status where the UK has a stronger formal say in how they make policy. What is interesting about the CD's position is, in the statement issued by the three Island Governments on 19 June, they describe a three-stage process as follows:

1. *the interconnection of the islands' registers of beneficial ownership of companies with those within the EU for access by law enforcement authorities and Financial Intelligence Units;*
2. *access for financial service businesses and certain other prescribed businesses for corporate due diligence purposes;*
3. *public access aligned to the approach taken in the EU Directive.*

It seems obvious that the CD's collective approach here is to forestall criticism from the EU in particular by being seen to take the lead in moving to public access in a phased manner. The fact that public access is the last stage of this process is revealing. The willingness in interim stages to share information with the EU and obliged entities in the regulated sector may well be a model that other jurisdictions will consider following.

Whether the voluntary adoption of public registers of beneficial ownership for companies in the CDs will stimulate other jurisdictions to follow suit remains to be seen. There have been some indications that the UK and EU stance here is to promote a new global standard of public registers for companies by 2023 mentioned above. Given the UK's pronouncements here, it seems inevitable that the OTs will be forced to adopt equivalent measures to the CDs. It will be interesting to see whether other major offshore jurisdictions such as Switzerland and the Bahamas will react to these events.

As a different matter, the separate subject of establishing centralised trust registers outside the EU is bound to be raised as a parallel issue. This may take longer to surface than pressure to establish corporate registers, but seems bound to raise its head at some stage.

From a wider FATF perspective, the key development in 2019 is the publication in late June 2019 of updated guidance to non-financial services professionals. Three sets of parallel guidance to lawyers, accountants and TCSPs[4] have been issued. There has been a significant time gap since the previous edition, which was published in 2008.

One area where the new guidance will have an important impact in the context of TCSPs is in defining 'beneficial ownership'. In this regard, the new guidance follows an expansive view of what constitutes 'control' for the purpose of beneficial ownership akin to the approach taken in the UK Trust Register. This will be potentially significant going forward in considering who needs to be disclosed in the context of trust structures in governance terms. In particular, holding powers as a minority member of a group or a veto power with respect not only to the appointment and removal of trustees but also to the addition and removal of beneficiaries, for example, will be enough to render an individual as being characterised as a 'natural person exercising effective control'. This is potentially very significant because there

2 A wider group that includes Bermuda, British Virgin Isles ,the Cayman Islands and Gibraltar.
3 https://www.gov.je/News/2019/Pages/BeneficialOwnership.aspx.
4 https://www.fatf-gafi.org/publications/fatfgeneral/documents/public-consultation-guidance-tcsp.html.

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has been no guidance offered by FATF since it published its 2012 recommendations on how to interpret this expression.

It is still very early to try and discern what the impact of the information flows triggered under CRS has been. For compliant structures, the provision of CRS information should only confirm what has already been disclosed by a taxpayer to domestic tax authorities. However, given the growing concerns being expressed by politicians on the 'inequality' theme, the assembling of information about asset holding positions of wealthy individuals may be the tool that is deployed in assessing the potential impact of future wealth or inheritance taxes where these are not currently employed.

There is also a potentially significant crossover from the FATF domain into CRS reporting. In particular, a broader concept of who may be regarded as a 'controller' in the anti-money laundering context is likely to be applied for CRS purposes in due course, given the express linkage that exists in CRS that directly imports FATF definitions of beneficial ownership into the concept of who may be reportable in a trust context as a 'controlling person'.[5] This could, in particular, lead specifically to the disclosure of family members who have more subtle or 'indirect' means of influence over a family trust structure.

One development in an aligned field worth mentioning is the rules on substance for entities incorporated in offshore jurisdictions. These substance rules have taken on an increased significance recently.

The EU Council has created a code of conduct for business taxation to limit the impact of low tax regimes. In 2017, it established a code of conduct group tasked with considering the measures on business tax within a number of non-EU jurisdictions.

In response to assessments undertaken by the EU, the affected jurisdictions (which include a number of the CDs and OTs) have introduced new rules requiring economic substance that will take effect in 2019.

These rules impact companies carrying on 'relevant activities'. The substance requirements have three principal components. These are to demonstrate, that within the jurisdiction, the company:

a is directed and managed;
b undertakes core income-generating activities; and
c has physical presence.

While these measures are primarily relevant in a base erosion and profit shifting (BEPS) context, they are indicative of wider trends in terms of being able to demonstrate the overall substance of these measures that are operated in offshore jurisdictions. This is of potentially greater significance to private wealth structures that may be seen as more passive than active.

There are nine relevant activities that cover banking, insurance, fund management and financing. One specific area includes the role of pure equity holding companies (PEHs). While supposedly aimed at private equity structures, it could conceivably impact a conventional holding company holding varied investments for a family trust.

At this early stage, there is no clear guidance that delineates the boundaries of what constitutes a PEH; what can be said is that family structures could find themselves impacted if the guidance is couched in wide terms.

5 See page 59 of OECD publication in commenting on meaning of 'controlling person' for CRS purposes.

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There is no doubt that the increased cost and complexity of regulation is driving trends towards simpler structures with fewer layers and involving fewer jurisdictions. There appears to be a greater reluctance on the part of corporate service providers to offer a purely passive role as a registered office without any detailed understanding of the operation of the underlying entities themselves. This appears to be coupled with a trend towards re-domiciling entities into jurisdictions where substance can be demonstrated.

At the same time, an increasing awareness as to the implications of disclosure of beneficial ownership is also generating a more reflective view on the retention of control either by settlors or by beneficiaries or connected family members.

In summary, therefore, the theme of ever-greater levels of transparency and increased complexity of overlapping regulation continues. The dichotomy between Western Europe and the United States, in terms of their different approach to these issues, also remains very apparent to observers.

John Riches
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London
August 2019

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Chapter 35

SWITZERLAND

Frédéric Neukomm, Heini Rüdisühli and Alexandra Hirt[1]

I INTRODUCTION

Switzerland has long been an attractive destination for wealthy individuals and families. Many reasons can be advanced for this: neutrality and political stability; its status as a safe haven; its central location within Europe; its reputation for high service standards; its role as a key player in the custody and management of private wealth; and its system of taxation and bank secrecy.

Since the turn of the century and the growth of globalisation, Switzerland has been faced with a new world order and accelerating internal and external demands for change. Recurrent incidents of data theft in banks, the well-publicised litigation in the United States involving UBS, the financial crisis and ever-increasing multilateral demands for automatic exchange of information have contributed to produce a breathtaking rate of change.

In this context, the Swiss government has at times seemed overwhelmed. However, if one pauses to look at all that has and will be done, it is notable that the quintessential Swiss characteristics of democracy, negotiation and healthy obstinacy are producing positive results.

In particular, now that the switch to exchange of information in tax matters has been accepted globally, there are encouraging signs that Switzerland remains a destination of choice for wealthy individuals and for the custody of private wealth. Switzerland's status as a safe haven now holds centre stage. This seems largely due to the significant efforts of the government to assemble the framework, tools and skills to manage private wealth in a transparent digital economy, without losing sight of the individual or respect for the rule of law.

II TAX

i The federal tax system

Switzerland is a federal state consisting of 26 cantons. Income tax is levied at the federal, cantonal and municipal levels, while wealth tax and gift and estate tax are levied at the cantonal and municipal levels only. The cantons are competent to assess and collect most direct taxes, including federal income tax.

The rules for assessment of income and wealth are widely harmonised by federal law. Consequently, the cantons impose cantonal tax using the same basis as for the federal tax,

1 Frédéric Neukomm and Heini Rüdisühli are partners and Alexandra Hirt is an associate in the private client practice group at Lenz & Staehelin.

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except for certain minor rules (e.g., social deductions). The cantons are competent to set their tax rates, and the municipalities generally set their tax rate by reference to the cantonal tax rate.[2]

Switzerland is not a low-tax jurisdiction for ordinary taxpayers. Switzerland may, nevertheless, be fiscally attractive for high net worth individuals because it offers low tax rates in certain municipalities, an exemption from capital gains on movable private assets and reduced taxation of dividends.

The other advantages are the well-established ruling practice that allows individuals and businesses alike to discuss in advance the tax treatment of certain transactions or structures and the lump sum tax regime for foreigners who do not engage in any gainful activity.

ii Personal taxation

Income tax

Switzerland taxes Swiss residents on their worldwide income except for income derived from a foreign trade or business or real estate located abroad. Non-residents are taxable if they own businesses or real property in Switzerland, or if they receive employment income from a Swiss employer or director fees from a Swiss company.

Capital gains exemptions

Capital gains on movable assets, such as shares in companies or works of art, are not taxed if the gain results from the sale of private assets as opposed to business assets. Business assets are assets that are related to a business located in Switzerland.[3]

Capital gains on real property located in Switzerland are exempt from federal income tax if the property is part of an individual's non-business or private assets. Such gains are subject to a cantonal and municipal property gains tax. The applicable tax rate varies greatly depending on the canton and on the duration of the holding of the property. Rates generally vary between zero per cent for very long holding periods and 30 per cent, but can be as high as 60 per cent in the case of a short holding period.

Dividend taxation

Dividends from qualifying participations of at least 10 per cent are more favourably taxed. For federal income tax, a 40 per cent tax relief is granted for participations held as private assets so that only 60 per cent of the dividend income is subject to taxation. As a result of the Swiss corporate tax reform approved by the Swiss electorate in a popular vote in 2019, the

2 Tax rates are generally progressive. The maximum federal tax rate is 11.5 per cent, and maximum cantonal and municipal tax rates vary between 10.8 per cent (canton of Zug) and 34.5 per cent (canton of Geneva). The overall income tax rate can thus be comprised between 22.3 and 46 per cent. Similarly, the maximum wealth tax rates vary between 0.1 per cent (canton of Nidwalden) and 1 per cent (canton of Geneva). The tax rates are generally higher in the French-speaking part of Switzerland and in the urban areas (Zurich, Basel, Bern, Lausanne, Geneva).

3 The concept of business has, however, been interpreted extensively by the cantonal tax administrations and the Swiss Supreme Court. They consider an independent business activity may exist where a taxpayer acts in a professional manner, for instance, by systematically trading in securities. This extensive interpretation led to uncertainty, and safe-haven rules have been published by the Swiss Federal Tax Administration.

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tax relief will be reduced to 30 per cent from 2020. The incentives granted at cantonal level vary from canton to canton. Most cantons apply a relief similar or comparable to the federal tax relief.

Wealth tax

Cantons and municipalities levy wealth taxes on worldwide net assets,[4] except for real estate abroad. The majority of the cantons apply progressive tax rates and maximum rates vary between 0.1 and 1 per cent.[5] In the cantons that have high wealth tax rates, wealth tax can have a significant impact on the overall tax burden, and tax structuring or pre-entry tax planning is sometimes advisable.

Lump sum

The 'lump sum' or 'flat' tax system in Switzerland opens the possibility for foreign citizens resident in Switzerland to pay their taxes based on a lump sum, subject to certain minimum criteria.

Foreign citizens who come to live in Switzerland for the first time (or after an absence of 10 years) and who do not engage in any gainful activity in Switzerland may, upon request, be taxed on a lump sum basis for cantonal and communal income, net wealth and federal income tax purposes. A limited professional activity can be carried on outside Switzerland.

Under the lump sum arrangement, tax is levied on the basis of a deemed income based on the annual living expenses incurred in Switzerland and abroad by the taxpayer and his or her family.

The tax due on the agreed tax base is calculated on the basis of the ordinary income and net wealth tax rates applicable to that agreed tax base.

In any event, the tax due must not be less than the taxes determined in a 'control calculation' under which certain specific Swiss-sourced items (e.g., income and wealth from real estate situated in Switzerland or securities issued by companies domiciled in Switzerland) are aggregated. The ultimate tax payable is the higher amount determined by the control calculation and the agreed flat tax. The lump sum tax system applies only to income and net wealth tax, not to inheritance taxes.

The lump sum tax system has been subject to political discussion in the past, and the canton of Zurich and four other cantons abolished the lump sum tax system for cantonal and municipal taxes, while other cantons tightened their conditions. Under the new federal legislation, the minimum amount of taxable income is calculated by multiplying the deemed rental value of the real estate owned by the taxpayer (respectively the rent paid) by seven, with a minimum tax base for federal tax of 400,000 Swiss francs. In practice, the actual tax basis is determined by an advance ruling from the tax administration of the canton in which the individual wishes to take up residence. In the majority of cantons there is a practical minimum tax base (threshold) or an amount of tax, even if the expenses as determined above are less than this amount.

4 Market value of the assets minus debt.

5 Certain cantons allow further deductions. Recently, certain cantons have also introduced a 'wealth tax shield' to reduce the wealth tax payable by individuals who have a proportionally low taxable income.

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Withholding tax

Switzerland applies a withholding tax of 35 per cent on dividends, interest from bonds issued by Swiss residents and interest paid by Swiss banks. This tax is fully refunded to residents who declare their income in their tax return, and can also be partially or totally refunded to foreign residents subject to international tax treaties. Because of this withholding tax, tax planning is often needed for foreign-resident individuals who wish to incorporate holding structures in Switzerland.

iii Gift and estate tax

At the federal level, there is no gift and estate tax, but at the cantonal level, gift and estate tax is levied by most cantons, with the exception of the canton of Schwyz and Obwalden. Tax jurisdiction normally lies with the canton of the last domicile of the deceased, respectively the donor. Where the deceased has his or her final domicile in Switzerland, the entire worldwide estate, with the exception of foreign real property and assets belonging to a foreign permanent establishment, is subject to Swiss estate tax. Swiss real property and Swiss businesses that are the subject matter of a gift or a bequest can give rise to Swiss gift and estate tax even if the donor or the deceased was not Swiss domiciled.

The scope of the gift and estate tax varies greatly among cantons. The surviving spouse is exempt from estate and gift taxes in all cantons. All cantons, except Vaud, Neuchâtel, Appenzell Inner Rhodes and Lucerne, exempt gifts and bequests between parents and direct descendants. The tax rates on gifts and bequests, which are generally progressive, vary greatly depending on the relationship between the parties and the canton. The tax rate may be as high as 55 per cent in the event of a gift or bequest to an unrelated person.

iv Exchange of information, withholding tax on banking assets and FATCA

Until March 2009, Switzerland's treaty network did not provide for exchange of information to internationally agreed standards, as information exchange was generally limited to exchange for the purposes of the application of the treaty. In some treaties with Organisation for Economic Co-operation and Development (OECD) and EU Member States, Switzerland also provided for exchange of information in cases of tax fraud and acts of similar gravity.

On 13 March 2009, the international standard on information exchange for tax purposes was adopted by Switzerland, and the country has moved rapidly to update its bilateral treaties.[6]

On 27 May 2015, Switzerland and the EU signed an agreement regarding the introduction of the Common Reporting Standard (CRS). It entered into force on 1 January 2017.

Parallel to this, work continued on introducing the legal basis and statutory framework (law, ordinance and directive) to implement the CRS in Swiss law.

Switzerland and foreign partner states and territories will exchange information automatically based on the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (MCAA). The MCAA in turn is based on the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters

6 As of 4 June 2019, there were 66 treaties with the international standard in force.

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(administrative assistance convention). Both the administrative assistance convention and the MCAA entered into force on 1 January 2017 together with the Federal Act on the International Automatic Exchange of Information on Tax Matters.

On 1 January 2019, the Swiss parliament approved the introduction of the automatic exchange of financial account information (AEOI) with 89 partner states. Switzerland's network of AEOI partner states includes all EU and EFTA Member States, almost all G20 and OECD states, Switzerland's most important economic partners and the world's leading financial centres. Financial account information was successfully exchanged with 36 partner states for the first time at the end of September 2018. Based on current international developments, a further 19 partner states are currently to be added to Switzerland's AEOI network, and the AEOI should be implemented with them from 2020–2021 onwards.

Following the enactment of the Foreign Account Tax Compliance Act (FATCA), Switzerland decided to implement Model 2, which means that Swiss financial institutions will disclose account details directly to the Internal Revenue Service (IRS) with the consent of the US clients. The agreement between the United States and Switzerland for Cooperation to Facilitate the Implementation of FATCA was signed on 14 February 2013, and Swiss implementing legislation entered into force on 30 June 2014.

III SUCCESSION

The Swiss inheritance law system is based upon the idea that the community of heirs (community) steps into the deceased's shoes immediately upon his or her death.[7] The assets and liabilities of the deceased vest automatically in the community, the heirs becoming joint owners of the deceased's estate and joint debtors of the deceased's debts. The appointment of a testamentary executor (through testamentary provision) or of an official administrator (through a court decision) is possible, but such person will not be considered to be the owner of the assets of the estate, but merely as limiting the heirs' possession of such assets until partition.

Even though Switzerland recognises testamentary freedom to a certain extent, Swiss successions are based upon a system of statutory devolution of the estate (in the absence of a will) allowing the testator to modify such system to a certain extent by will, but also limiting testamentary freedom by protecting some of the statutory heirs with forced heirship rights. The primary heirs are the descendants,[8] together with the surviving spouse or registered partner.[9] In the presence of descendants, the surviving spouse or registered partner is entitled to 50 per cent of the estate (the descendants having to share the other 50 per cent per capita). In the absence of descendants, the parents (or their descendants)[10] will be heirs (if there is a surviving spouse or registered partner, the latter will be entitled to 75 per cent of the estate).[11]

Some of the statutory heirs are protected by forced heirship rights. Descendants are entitled to a compulsory share of 75 per cent of their intestate entitlement;[12] a surviving spouse

7 Article 560 of the Swiss Civil Code (SCC); '*le mort saisit le vif*'.
8 Article 457(1) of the SCC.
9 Article 462(1) of the SCC.
10 Article 458 of the SCC.
11 Article 462(2) of the SCC.
12 Article 471(1) of the SCC.

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or registered partner and parents are protected up to 50 per cent of their intestate share;[13] other statutory heirs are not protected. The portion of the estate that is not encompassed by the compulsory shares can be freely disposed of by the testator and is usually called the freely disposable share.[14]

Forced heirship rights may also protect the heirs against *inter vivos* acts, in particular revocable transfers and transfers made in the five years prior to death, as well as transfers made with the object of depriving the heirs of their protected rights.[15]

The heirs may leave the infringing testamentary provision or *inter vivos* transfer unchallenged. The protection merely entitles them to claim their rights (either by asserting a claim against the will or against the holder of the assets within a certain time limit and provided that certain conditions are met) or to oppose the delivery of assets held by the community to the person benefiting from a testamentary provision.[16]

By testamentary provision, the testator may designate given persons as heirs,[17] entitle others to legacies,[18] appoint an executor,[19] set up a foundation,[20] or request an heir or a legatee to do something.[21] The question of whether a testamentary trust could validly be set up within the framework of a succession governed by Swiss inheritance law is disputed, even if the current trend seems to be favouring such a possibility.[22]

Besides the unilateral will, which has (under Swiss domestic law) to be written entirely by hand or executed in front of a notary public (and, to a very limited extent, can be made orally),[23] Swiss inheritance law also recognises the possibility of entering into inheritance agreements (to be executed before a notary public). By such an agreement, it is possible for a testator to obtain, for example, the consent of a protected heir to a waiver of his or her full compulsory share (either gratuitously or in exchange for some compensation).

Swiss inheritance law has been largely unchanged since the entry into force, in 1912, of the Swiss Civil Code (SCC); however, with the entry into force, in 2007, of the Federal Act on Registered Partnership, the registered partner has been granted the same rights in inheritance law matters as the surviving spouse.[24] Further, Article 492a of the SCC, introduced in 2013, allows a testator to determine the destination of any assets remaining out of the share of a durably incapacitated heir of the testator without risk of infringing the incapacitated heir's compulsory share.

13 Article 471(2–3) of the SCC.

14 Article 470 of the SCC. In the presence of a surviving spouse or registered partner and of descendants, the compulsory share of the surviving spouse or registered partner will amount to 25 per cent of the estate (50 per cent of 50 per cent) and the compulsory share of the descendants will globally amount to 37.5 per cent of the estate (50 per cent of 75 per cent); the freely disposable share will in such cases amount to 37.5 per cent of the estate.

15 Article 522 et seq. of the SCC.

16 Article 533 of the SCC.

17 Article 483 of the SCC.

18 Article 484 of the SCC.

19 Article 517 of the SCC.

20 Article 493 of the SCC.

21 Article 482 of the SCC.

22 Perrin J, 'The recognition of trusts and their use in estate planning under continental laws', in Yearbook of Private International Law, Volume 10 (2008), pp. 626 et seq., pp. 654–655, and quoted references.

23 Article 498 et seq. of the SCC.

24 Articles 462 and 471 of the SCC.

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Finally, the Swiss government is modernising existing inheritance law in a comprehensive way. It is planned that the reform will be implemented in three steps:

a reduction of forced heirship rights and protection of de facto life partners in cases of hardship (the Federal Council submitted the dispatch to parliament on 29 August 2018);

b facilitation of business succession (the Federal Council opened a consultation procedure on 10 April 2019); and

c correction of technical aspects in the current inheritance law (the dispatch of the Federal Council is expected in 2019/2020).

Even though not directly classed as inheritance law, it is important to mention that a revision of the rules on adult protection entered into force in 2013.[25]

The Swiss conflict of laws rules seek to ensure, as far as possible, the principle of unity of succession. With this objective in mind, the foremost connecting factor in inheritance matters is the place where the deceased had his or her final domicile.[26]

The Swiss courts generally have jurisdiction and apply Swiss law to the whole estate of a person whose final domicile was in Switzerland.[27] Some exceptions exist, in particular, in relation to real estate located in countries claiming to have exclusive jurisdiction over immovable assets;[28] the devolution of the estate of Swiss nationals domiciled outside Switzerland who make the appropriate election;[29] or assets located in Switzerland, where no foreign authority deals with them.[30] Further, Swiss conflict of laws rules enable foreigners (who do not have Swiss nationality at the date of death) with final domicile in Switzerland to submit the devolution of their estate to their national law.[31] This avoids the application of Swiss law, notably possible limitations on the creation of testamentary trusts and forced heirship rights.

As regards persons with their final domicile outside Switzerland, Swiss law[32] looks to the law designated by the rules of conflicts of the deceased's final domicile.[33] In the overall context of conflict of laws rules, one should note that the new European Succession Regulation,[34] which governs and harmonises all conflict of laws aspects of cross-border successions in the Member States of the EU as from 17 August 2015,[35] has a significant impact on estate

25 The revision introduced new planning tools in relation to incapacitated persons. In particular, Articles 360 to 369 of the SCC now provide for the 'advance care directive' (*mandat pour cause d'inaptitude*), enabling a person with capacity to instruct a natural person or legal entity to take responsibility for his or her personal care or the management of his or her assets, or to act as his or her legal agent in the event that he or she is no longer capable of judgement. Articles 370 to 373 of the SCC foresee the possibility for a person with capacity to specify in a patient decree which medical procedures he or she agrees or does not agree to in the event that he or she is no longer capable of judgement.

26 Within the Swiss meaning (see Article 20 of the Swiss Private International Law Act (SPILA) for a definition of domicile: 'the place where a person resides with the intention of settling'), which is closer to the English notion of permanent residence than to the English notion of domicile.

27 Articles 86(1) and 90(1) of SPILA.

28 Article 86(2) of SPILA.

29 Article 87(2) of SPILA.

30 Articles 87(1) and 88 of SPILA.

31 Article 90(2) of SPILA.

32 Article 91(1) of SPILA.

33 Swiss law admits renvoi both in the form of remission and of transmission.

34 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012.

35 With the notable exception of the United Kingdom, Ireland and Denmark.

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planning and settlement processes for Swiss resident individuals or Swiss nationals who have their last habitual residence in the EU, have left assets in the EU, or have elected the law of a Member State of the EU to govern their succession. The Regulation essentially establishes the principles that one single court has jurisdiction to rule on the succession as a whole and that the law of the state where the deceased had his or her last habitual residence also governs the whole of his or her succession. It contains further significant innovations, such as the possibility to elect the law of the state of which a person is a national to govern the succession (*professio iuris*) and a provision favouring the recognition of inheritance agreements. Switzerland is obviously not bound by the Regulation. Yet, considering its close relations with the EU, one may reasonably expect that these new rules should impact cross-border succession planning involving EU Member States bound by the Regulation. In this respect, we note that the Swiss government has proposed a reform of the conflict of law rules relating to succession to bring it more in line with those of the new European Succession Regulation. The reform provides, for example, that persons having more than one nationality may submit their estate to the law of one of their national states, even if such person has the Swiss nationality.

In the event that the deceased was married or bound by a registered partnership, the patrimonial relations between the spouses or registered partners first have to be liquidated to establish what is part of the deceased's estate.

In this regard, even if marriage or registered partnerships generally have very limited effects on the powers of each spouse or registered partner to dispose of his or her assets during the marriage, some rules governing liquidation will need to be taken into account at the end of the marriage or registered partnership.

If the spouses have not entered into any matrimonial agreement, the ordinary Swiss property regime of participation in acquired property (ordinary regime) applies.[36] In this case, each spouse will be entitled to a monetary claim against the other, amounting to half the net value of the assets acquired for consideration during the marriage (in particular, earnings from work and business assets, but not including assets owned prior to marriage or received through gift or inheritance thereafter).

By matrimonial agreement, spouses can adopt one of two other property regimes (the segregation of assets regime and the community property regime), or modify (to a limited extent) the ordinary regime. Rules are very similar as regards registered partners, except that the default regime is the segregation of assets regime.[37]

In the event that the ordinary regime applies (which is the case for the vast majority of married couples in Switzerland), spouses remain to a very large extent free to deal with their assets as they wish.[38] This being said, to avoid a situation where one spouse could deprive the other of his or her expectancies to half the net value of the assets acquired for consideration during the marriage, Swiss law contains protective provisions allowing – provided certain conditions are met – the taking into account of assets given away by a spouse without consideration in the calculation of the other spouse's entitlements at the time the regime is liquidated.[39] If the assets at that time are not sufficient to cover the spouse's claim, it might even be possible in certain cases for the aggrieved spouse to claim assets from the

36 Articles 181 and 196 et seq. of the SCC.

37 Article 18 et seq. of the Federal Act on Registered Partnership.

38 Article 201(1) of the SCC.

39 Articles 208 and 214 of the SCC.

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person having received or benefited from the assets.[40] According to a Geneva Court of Appeal decision, assets transferred to a trust set up by one of the spouses may be taken into account at their market value at the time of the transfer. A Federal Tribunal decision confirmed that in certain circumstances the aggrieved spouse may obtain a freezing of the trust assets.

In international situations, it should be noted that Swiss matrimonial law will apply to the patrimonial relationships between spouses and registered partners who are domiciled in Switzerland, unless they have chosen another applicable law (among their national laws) or are bound by a matrimonial contract.[41] At the level of the EU, the Council adopted in 2016 two regulations implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes.[42] The Regulations cover on the one hand matrimonial property regimes and on the other hand property consequences of registered partnerships. The Regulations became applicable on 29 January 2019 with regard to the participating EU Member States.

IV WEALTH STRUCTURING AND REGULATION

In Switzerland, one must always distinguish between domestic and international situations.

In purely domestic planning, the use of vehicles is less common except for the very wealthy and for foreign investments. For example, when investing in foreign real estate, local advice may guide the investor towards a company, trust or foundation.

For the many foreigners who hold assets in Swiss banks, it is common that they might select either a trust or foundation, perhaps associated with a company that holds the banking relationship. This is – by some margin – the most significant market segment for the private wealth management sector in Switzerland.

One of the key features of present-day Switzerland is that, except for charitable structures, the trust or foundation that is used will not be Swiss. In this context, Switzerland has ratified and introduced the Hague Trusts Convention[43] into law, thereby providing the basis for recognising trusts (as defined in the Convention) in Switzerland.

At the initiative of the Swiss parliament, the Swiss Federal Council is currently preparing a bill to include 'the legal institution of the trust in Swiss legislation'. The Federal Council has appointed an expert committee to advise it in this respect. This has created a hospitable environment for trustees who wish to act as a trustee in or from Switzerland. Foreign foundations will be recognised and may be used but, as with companies, care must be taken to manage the potential tax consequences.

Both the private foundation or the trust will help the client administer his or her personal wealth and business assets efficiently and effectively during his or her lifetime and through to the next generations. In practice, the private foundation and the trust are not so different in

40 Article 220 of the SCC.

41 Articles 52 to 55 of SPILA. This results in a change of the law applicable to the patrimonial relationships at the time the spouses or registered partners move to Switzerland, and this with retroactive effect to the beginning of the marriage (Article 55(1) of SPILA). In the absence of an agreement to the contrary, this means that the ordinary regime applies to newly arrived married couples (and the segregation of assets regime to registered partners).

42 Council Regulations (EU) No. 2016/1103 and No. 2016/1104 of 24 July 2016.

43 The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition entered into force on 1 July 2007 in Switzerland: www.hcch.net/index_en.php?act=conventions.text&cid=59.

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their effects. They do, however, differ significantly in their structure and management. Unlike a trust, a foundation is an incorporated body that will come into existence upon the deposit or registration of its constitutional documents.

The key advantages of both vehicles are clear. A foundation is a vehicle created to exercise ownership and management rights. The appeal of the foundation is that, in the same way as a company, it possesses separate legal personality and operates like a company, but it does not have any shares. The foundation can also fulfil the same purposes as a trust with respect to asset protection and estate planning.

A discretionary trust's main features are its capacity to protect assets and its capacity to provide a flexible arrangement for the distribution of income and capital among a wide range of beneficiaries. The great merit of the discretionary trust is its flexibility and, therefore, capacity to adapt to changing family circumstances, taxes and regulation.

The most appropriate structure will be dictated by several factors including how comfortable the client feels with either one.

i Taxation

Trusts

Swiss tax laws do not have specific rules regarding trusts, but the cantonal and federal tax authorities have issued administrative regulations regarding the taxation of trusts. Under these rules there is no taxation of a trust as such, or of the trustee in connection with the trust's assets. Therefore, taxes, if any, are levied at the level of the settlor of a trust or at the level of the beneficiaries. For purposes of taxation, the authorities differentiate between revocable trusts, irrevocable discretionary trusts and irrevocable fixed interest trusts. Trusts may easily be considered revocable under the rules in place. Revocable trusts are disregarded for Swiss tax purposes. Irrevocable discretionary trusts are recognised unless they have been settled by a settlor who was a Swiss tax resident at the time of the establishment of the trust and they are hence often used as a component of pre-entry tax planning.

Foundations

As foundations have legal personality, foundations are themselves subject to profit tax and capital tax to the extent they are domiciled in Switzerland for tax purposes. Tax rules applicable to foundations established in Switzerland are a clear obstacle to the use of Swiss foundations in an asset-structuring context. However, foundations whose assets are applied for charitable purposes are exempt from taxes and are hence often used in Switzerland.

ii Applicable anti-money laundering regime

The Swiss Anti-Money Laundering Act (AMLA)[44] applies to all financial intermediaries who, on a professional basis, accept assets belonging to third parties.

Trustees and directors of foundations or offshore companies who conduct their business in Switzerland, regardless of the law governing the trust or foundation or the location of the assets, are Swiss financial intermediaries and subject to the provisions of the AMLA. Whether

44 Federal Act of 10 October 1997 on combating money laundering and terrorist financing in the financial sector.

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the protector of a trust falls within the definition of financial intermediary depends on his or her powers. The AMLA was amended on 1 January 2016 to introduce, in particular, serious tax offences as offences giving rise to money laundering.

The Swiss Association of Trust Companies (SATC) was established in 2007. Its purpose is to engage in the development of trustee activities in Switzerland and to help ensure a high level of quality, integrity and adherence to professional and ethical standards in trust businesses in Switzerland. The SATC imposes certain requirements on its members.[45]

The Swiss financial regulatory framework is undergoing further important structural changes. Historically, only banks, insurance companies, financial intermediaries active in the field of collective investment schemes (e.g., fund management companies), securities dealers and stock exchanges have been subject to a licensing obligation in Switzerland. Asset managers, except in limited cases when acting as the manager of a Swiss fund, were not required to be licensed unless the asset managers had custody of client assets. In the fund sector, Swiss managers of non-Swiss funds are now subject to a licensing requirement. This legal reform was embodied in a revision of the Federal Act on collective investment schemes, driven by the EU's Alternative Investment Fund Managers Directive. Such revision entered into force on 1 March 2013. Further, Swiss and foreign asset managers of Swiss pension funds must be duly supervised.

In addition, on 15 June 2018, the Swiss parliament adopted the Federal Act on Financial Services (FinSA) as well as the Federal Act on Financial Institutions (FinIA). This new legislation is expected to enter into force on 1 January 2020.

The objective of the FinSA is to provide for a new legal framework on the provision of financial services in Switzerland, including when such services are provided on a cross-border basis into Switzerland. The main features of the FinSA are the rules of conduct (e.g., suitability or appropriateness tests), which are largely inspired by EU standards, in particular the Markets in Financial Instruments Directive. The Act provides for a new registration requirement applicable to non-Swiss financial services providers who render services in Switzerland on a cross-border basis.

The FinIA provides for a new legal framework governing the supervision of all financial institutions, with the exception of banks and insurance companies that remain regulated by specific legislation tailored to their needs. A key alignment with international standards is the introduction of a prudential supervision over independent asset managers and trustees. This prudential supervision is based on a 'two-tier supervisory regime', where the Swiss Financial Market Supervisory Authority (FINMA) is responsible for licensing the independent asset managers and trustees, with a right to impose sanctions and set minimum requirements, including as to corporate governance, but where the ongoing (day-to-day) supervision is delegated to privately organised and FINMA-licensed supervisory organisations. This system benefits from a wide consent within the Swiss financial industry and is a positive element of the new legislation.

From October 2018 to February 2019, there was a formal consultation process on the three ordinances containing the implementing provisions for the FinSA and the FinIA:

45 Its members must have adequate professional indemnity coverage and minimum educational and professional experience thresholds for senior managers acting within Switzerland. A further requirement is that all members of the SATC have adopted adequate internal processes and controls, such as the four eyes principle, meaning that trustee decisions require the approval of at least two qualified trust officers.

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the Financial Services Ordinance, the Financial Institutions Ordinance and the Supervisory Organisation Ordinance. These ordinances will be finalised shortly before their entry into force, which is expected on 1 January 2020.

Further and independently from the FinSA and FinIA, the Banking Ordinance was modified. The reliefs that were incorporated aim to accelerate the development of fintechs within the Swiss financial market.

V OUTLOOK AND CONCLUSIONS

As can be seen from the above, Switzerland is undergoing rapid and profound change.

In 2009, Switzerland adopted the OECD international standard for the exchange of information under tax treaties, a move heralded as the end of banking secrecy and tax avoidance for people holding undeclared funds in Swiss banks.

In late 2012, the government announced the details of its white money strategy and identified the areas of asset management, pension funds and capital markets as those with significant growth potential. To help in this regard, the government plans to base its financial market policy on strengthening competitiveness, combating abuses and improving the framework, with quality, stability and integrity as its key objectives.

Since then, the US programme and related settlements, FATCA implementation, automatic exchange of information involving the EU and the rest of the world, amendments to AMLA and the major revision of the law on financial services and institutions as well as a clear fintech strategy, give hope that Switzerland has bedded down its framework for the era of transparency.

In the short to medium term, the uncertainty that accompanies change and the complexity and cost that goes hand-in-hand with such profound changes is affecting the whole wealth-management industry. The government's ambition to close Switzerland to undeclared funds and develop a strong financial services sector is clear.

At different times, the features that make Switzerland attractive have had varying importance. It should be clear to all concerned that Switzerland will be less secretive in the future. It is certainly not a tax-neutral jurisdiction, but there are still many reasons why it remains the home of individuals of significant wealth and a key player in the custody and management of private wealth. In the current environment, it appears that Switzerland's status as a safe haven has retaken centre stage.

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