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John Riches

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PREFACE

I would like to focus my remarks on some of the key trends that might be expected to affect the world of high net worth individuals in the immediate aftermath of the covid-19 pandemic.

I ISSUES DURING THE PANDEMIC

During the pandemic, we have seen a relatively consistent pattern among OECD countries of measures that are mainly focused on delaying obligations to file tax returns and make tax payments to reflect the turmoil in some business and personal finances that these exceptional circumstances have wrought. Interestingly, at the beginning of April the OECD issued an analysis examining double tax treaties and the impact of the crisis on individuals' presence, which may have been constrained as a result of the pandemic. The following were notable conclusions.

i Permanent establishments

For individuals constrained to work in a different location and, in particular, for those working from home, provided the state of affairs is regarded as temporary and exceptional it would not generate the required degree of permanency to create a fixed place of business.

ii Corporate tax residence

The view from OECD is that the temporary relocation of board members to different locations will not generally impact a company's tax residence.

iii Personal tax residence generally

In considering where an individual's centre of vital interest may be, any exceptional circumstances generated by the covid-19 pandemic should not, by themselves, cause an individual's residence to change.

One specific area where countries have taken steps to introduce exceptional guidance is in the context of a day count test. Specifically, Australia, Ireland and the UK have given guidance in the context of disregarding days of presence where this is used as a factor in determining residence. Clearly in all these cases, significant care needs to be taken to ensure that a temporary, exceptional circumstance does not become a permanent state of affairs. Where any tax analysis is dependent upon an individual being constrained in their ability to travel, it is likely to be prudent to keep contemporaneous records of attempts to travel to show that an individual has not changed his or her behaviour or residence in consequence of the crisis on a more permanent basis and taken the opportunity to leave the relevant country as soon as possible. Difficulties may arise if an individual in Country A is unable to travel to Country B but could have gone to other locations. Will it be possible to argue that all steps were taken to leave if the individual waited until it was possible to travel to Country B?

II POSSIBLE RESHAPING OF TAX POLICY POST COVID-19

There have been many pronouncements and speculations appearing in the media about how national governments will look to finance the deficits they have incurred during the crisis. A significant degree of speculation has focused on the extent to which high net worth individuals will be targeted with an increased tax burden as one of the mechanisms for financing government deficits. Speculation varies between the possible introduction of some form of annual wealth tax to increased estate taxes.

One interesting example is a proposal in Argentina for a one-off tax levy on ultra-high net worth individuals (UHNWI). The bill being promoted in Argentina proposes a one-time tax on wealth calculated on personal assets of Argentine residents as at 31 March 2020. For individuals with a personal asset base of US$3 million, the proposed rate of tax would fall in the range of 2 per cent to 5.5 per cent. This would be in addition to the current annual wealth tax burden of 2.25 per cent for individuals on wealth that is held outside of Argentina. An article published by an Argentine think tank in April 2020[1] sets out an interesting array of proposals that have been advanced, principally by opposition parties, in South America and Europe. One additional strand that has emerged in Europe is the exclusion from state aid programmes for companies that are headquartered in 'tax havens'. This has been promoted in countries including the United Kingdom, Denmark and France.

A pan-European tax for UHNWIs in the EU has been suggested by economists, Gabriel Zucman and Emmanuel Saez (University of California at Berkeley) and Camille Landais (London School of Economics).[2] The suggested parameters they advance would be to tax those holding assets of more than €2 million (the top 1 per cent) at 1 per cent, those holding assets of more than €8 million (the top 0.1 per cent) at 2 per cent above that threshold and those holding more than €1 billion at 3 per cent above that threshold. They also argue that by making the tax EU-wide, there will be no incentive for individuals to relocate within the EU to avoid the tax.

Historically, one of the objections that has been raised, certainly in Europe, to wealth taxes is the relative inefficiency in the collectability of wealth tax because of the significant degree of compliance work required in checking an individual's filings and valuing their net worth to calculate the levy.

Clearly there is a paradox for tax authorities in considering any form of one-off, or permanent, tax measures that are targeted on high net worth individuals, namely the concern that such measures do not detract from the efforts of business entrepreneurs to create employment and prosperity for others. Furthermore, there will clearly be concern about measures that could be seen as targeting wealthy individuals from other jurisdictions who are looking to locate in the relevant country where increased tax measures could both discourage

1 https://centrocepa.com.ar/files/informes/20200502-wealth-tax.pdf.
2 https://voxeu.org/article/progressive-european-wealth-tax-fund-european-covid-response.

high net worth migrants from relocating to the jurisdiction or, in some cases, might create an incentive for such individuals to give up their residence.

If new measures of this character are proposed, it will be very interesting to see, in countries such as the UK or Italy that have special regimes for non-domiciliaries, how those regimes will be impacted, if at all, by tax-raising measures targeted at wealthy individuals.

Turning to estate taxes, one recent proposal that is worthy of note in the UK is a report published in January 2020 by a cross-parliamentary group of politicians that considered the UK's inheritance tax policy in the context of intergenerational fairness.[3] Notable conclusions from the report were to highlight the extent to which the UK's rule exempting gifts between individuals that occurred more than seven years before the death of the donor as allowing the very wealthy to mitigate their estate tax burden in a way that is not open to those of more modest means who do not have significant surplus to donate to future generations. The central proposal from the report was to scrap a 40 per cent inheritance tax burden levied on gifts occurring on death or within seven years with a flat rate 10 per cent tax that would apply to all gifts giving each individual a lifetime allowance for gifts that were exempt. Part of the thinking behind switching to a donee-based tax system is to encourage senior generations to make wealth transfers to younger generations (potentially from grandparents to grandchildren) in a manner that rebalances the distribution of wealth towards the young. While such measures are unlikely to be central in financing any deficits arising from the covid-19 pandemic in the short term, it will be interesting to see whether a flat rate tax, at a lower level, will find favour with policy makers in the UK. The thinking of the group issuing the report was that the overall unpopularity of the current regime, where taxes are levied on death could be overcome by one that is levied at a much lower rate and is applied uniformly to gifts during the lifetime as well as on death.

Another notable initiative from the EU that is likely to, potentially, impact private clients are the proposals incorporated within the sixth version of the EU Directive on administrative cooperation (DAC6). DAC6 aims to provide the tax authorities of EU Member States with additional information to enable them to close potential loopholes in tax legislation and harmful tax practices. Intermediaries advising on cross-border arrangements involving EU jurisdictions are obliged to report details of the arrangements and the relevant tax payers involved to their Member States who will share the information with other Member States' tax authorities. If there is no intermediary with an obligation to report, the relevant taxpayer will be obliged to do so. For the purposes of DAC6, an arrangement is interpreted very broadly and a cross-border arrangement is reportable if it concerns at least one EU member state and satisfies at least one of the hallmarks described in the Directive.

The hallmarks are very broadly worded and describe certain characteristics which, if satisfied, make the arrangement reportable. The majority of the hallmarks cover arrangements with some form of tax 'benefit' but there are specific hallmarks relating to arrangements that undermine the application of automatic exchange of information agreements such as the Common Reporting Standard and attempts to conceal beneficial ownership. A key concern with this particular hallmark is that the test appears to be wholly objective and the intentions of the parties are arguably not relevant. Intermediaries acting for high net worth individuals

3 www.step.org/sites/default/files/media/files/2020-05/STEPReform_of_inheritance_tax_report_012020.pdf.

and their structures will need to consider the impact of these rules on any arrangements entered into that may concern one or more EU Member States.

Turning away from the tax arena, many jurisdictions have introduced measures during lockdown to facilitate the digital execution of documents, including wills. It will be interesting to see to what extent policymakers will be happy to allow such measures to prevail on a long-term basis. Historically, the very strict measures that prevail on the execution of wills are clearly designed as a protective measure to mitigate the impact of undue influence. It seems likely that such measures will become a permanent part of the overall landscape for the execution of wills going forward. In circumstances where wills are drawn up by professional advisers who have direct contact with a testator or testatrix without the intervention of family members, such measures could well be a welcome relaxation that will make it easier for individuals to make wills in the years ahead in circumstances where it is likely to be less easy to travel to meet, in person, with one's professional advisers for a significant period of time. Given that, in many circumstances, there is a significant degree of 'inertia' that stops individuals from engaging with estate planning, this can only be a welcome development.

In conclusion, we can expect a significantly changed paradigm to prevail to the planning arena for wealthy families in the months and years ahead once the primary crisis generated by the pandemic concludes. A key area of uncertainty at present is the extent to which enhanced tax measures will be targeted at the wealthy. The wider changes in business practice and greater use of video meetings could, however, provide something of a 'silver lining' in terms of making it easier for individuals to access reliable estate planning and succession advice and measures on digital execution could facilitate the easier execution of documents once that process is concluded. What is certain is that a combination of these various measures is likely to significantly impact the planning environment for wealthy families in the years ahead. It seems likely in this context in particular that the EU will become more assertive in its approach to wealthy individuals and their tax affairs as DAC6 is implemented.

John Riches
RMW Law LLP
London
July 2020

Chapter 32

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.

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 30 per cent tax relief is granted for participations held as private or business assets so that only 70 per cent of the dividend income is subject to taxation. The incentives granted at cantonal level vary from canton to canton. The cantons tax at least 50 per cent of the dividends.

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.

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.

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

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.

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 cantons 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 European Union (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 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 (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.

By 1 January 2020, the Swiss parliament approved the introduction of the automatic exchange of financial account information (AEOI) with 107 partner states. Switzerland's

6 As of 17 June 2020, there were 68 treaties with the international standard in force.

network of AEOI partner states includes all EU and European Free Trade Association Member States, almost all G20 and OECD states, Switzerland's most important economic partners and the world's leading financial centres.

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. On 8 October 2014, the Federal Council approved the mandate for negotiations with the United States on switching to Model 1. To date, however, it is still unclear when there will be a corresponding agreement.

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 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]

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.
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

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.

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 (this reform is currently being discussed in the Swiss parliament; it is expected to come into force in 2021 or 2022);

b facilitation of business succession (the dispatch of the Federal Council is expected in 2021); and

(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.

c correction of technical aspects in the current inheritance law (the dispatch of the Federal Council is expected in 2020/2021).

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 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

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.

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. The Federal Council submitted the dispatch to parliament on 13 March 2020.

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 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.

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.
40 Article 220 of the SCC.

In international situations, 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 consultation procedure is expected in 2021. 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 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

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.

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 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 Federal Council submitted a dispatch to parliament on 26 June 2019 in order to introduce further due diligence obligations and reporting duties. The National Council of the parliament decided not to treat this proposal in spring 2020. The Council of States will deal with the reform next.

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

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 entered into force on 1 January 2020 – together with the implementing ordinances.[46]

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.

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.

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.

46 The three ordinances containing the implementing provisions for the FinSA and the FinIA are the Financial Services Ordinance, the Financial Institutions Ordinance and the Supervisory Organisation Ordinance.

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.

Appendix 1

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