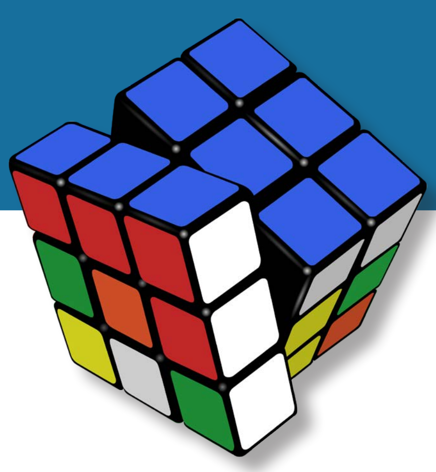
Solving The Puzzle

The impact of the Rubik legislation on UK resident clients of Swiss Banks



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Preface

If UK residents with undeclared Swiss accounts are not already on the case then they have some rapid decisions to make – albeit straightforward ones

Virtually everyone likes to make New Year resolutions. But in 2013, UK-resident clients of Swiss banks with assets they have yet to declare to Her Majesty's Revenue & Customs need to make a particular one top of their list. And it is one they have no choice but to fulfill.

Under bilateral agreements that HMRC has confirmed with Switzerland, they must either declare to HMRC all the assets they hold in those countries or pay a significant level of withholding tax to retain anonymity.

The deadlines for doing so, as far as Swiss banks and their account holders are concerned, are fast approaching: from the 1st January 2013 the UK-Swiss bilateral tax agreement enters into force – prescribing a deadline of 31st May 2013 for finalizing the accounts and amounts subject to future withholding and the one-off levy for regularizing historical UK non-compliance. On this date, withholding tax will be deducted from the client accounts deemed to be 'in scope' and paid over anonymously to HMRC at the various applicable rates. The one-off levy must also be calculated according to a complicated formula based on time and amounts deemed to have escaped UK taxes. There is a considerably more beneficial route to settling any historic UK tax liabilities by using the Liechtenstein Disclosure Facility (LDF), which offers a better long term solution but imposes a Liechtenstein service provider and ultimate disclosure of the tax payer.

Banks are setting their own internal deadlines for submission of the certifications and information required in relation to the accounts and for calculation of the amounts due. The banks need to have finalized the option selected by the client (or to impose one by default) before the 31st May 2013.

Each option requires preparatory work to be done and/or certifications to be obtained from specialized tax firms confirming the client's status. If they have not done so already, clients should immediately contact their Swiss banks and their tax advisers to start the process.

In view of the relative complexity of the issues raised by the UK-Swiss tax agreement and the LDF, and the difficulties faced by individuals in grasping the scope and urgency of decisions required, MPLAM has commissioned this paper from three leading practitioners and experts in Swiss private client wealth structuring and tax reporting. In the following pages they will review and advise on the main issues for both domiciled and non-domiciled clients and identify the key practical problems in determining total tax liabilities, available options and disclosure issues. Most importantly, this paper is designed to focus the attention of private clients and their advisers on the major – and irrevocable — decisions they need to take before the deadlines run out.

MPL Asset Management SA, Geneva is a regulated Swiss wealth management firm specialized in services to UK resident clients and UK expatriates worldwide.

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Introduction

Will you? Won't you? If you haven't already, decide *now*

I can hardly recall a time when the private client affairs of Swiss banks have seemed quite so readily transposable to great dilemmas in literature. Brutus' speech before the battle of Philippi and Hamlet's famous soliloquy may reflect questions similar to those of non-compliant tax payers before consenting to submit to an amnesty. But the Mock Turtle's dance surely qualifies as closest to the client experience offered by Swiss bankers today:

"…Will you, won't you, will you,
Won't you, won't you join the dance?"
"What matters it how far we go?"
His scaly friend replied,
"There is another shore, you know,
Upon the other side…"

This is no great disrespect to the Swiss who have suffered a sea change of political and economic slings and arrows and have, at last, been forced to jettison a previously much more client-friendly - but ethically unsustainable - business model. Greatly oversimplified, the dilemma for the Swiss bank's non-compliant UK client dilemma is:

Do I disclose?

And thereby benefit from the reduced penalties and certainty of a voluntary disclosure, for which the 'Liechtenstein Disclosure Facility' (LDF) offers a unique and possibly unrepeatable opportunity.

OR

Do I stay anonymous?

And pay high withholding taxes under UK-Swiss agreement ('Rubik'), with the risk of further penalties for non-Swiss assets, depending on the circumstances.

OR

Do I run?

By closing my accounts in Switzerland and moving further offshore, which may offer little long term comfort, also depending on the circumstances…(but beware of advice from scaly friends!)

Whatever the circumstances, it is doubtful that the new generation of private bankers, dealing with the quandaries of a previous generation's clients, will begin to understand the agony or the irony of their "non-UK tax complaint" clients' unenviable position. Feelings of dismay and disappointment in the way the tide has turned against Swiss banks and their clients should not distract one from the urgent tasks in hand. These tasks include:

- Determine your position by contacting your bank and obtaining professional advice (banks will provide lists of recommended tax firms)
- If you are 'in scope' for Rubik then take a good look at the alternatives; the disclosure options offered may be better and safer in the long term, especially the LDF, which is a better deal than Rubik
- If you select LDF then apply without delay - via an adviser - for confirmation from HMRC
- If you are 'out of scope' get this status professionally certified (i.e. as a non-domicile, or in an acceptable structure, etc.). Present proof of your status to the bank in the manner they prescribe (detailed below) and well before 31st May 2013

The chapters below, on Rubik and the LDF, go into great detail about the available options, calculations and implementation of the two agreements, both of which have expensive consequences for clients. The authors have much recent practical expertise and know-how to analyse all the different types of circumstamces – for doms and non-doms and for the many innocent heirs to non-compliant situations set up by their parents. Each case needs to be studied on its merits by a specialist. Clients will definitelyneed help to understand what information is needed now and what their situation will be in the future.

That the Swiss banks christened their solution 'Rubik', named after the cube and its conundrums, is perhaps appropriate for them and the Swiss Government (which has to implement the complex formulaes and deduct the tax). But this should not scare off or mesmerise any client into apathy, fight or flight. Selecting a solution is not as hard as it may seem – since long term tax anonymity in the UK is, ultimately, as unsustainable as the Swiss secret account.

Whereas the banks have no intention to be unhelpful and may indeed be sympathetic in view of their past misdemeanours, they will usually be quite unable to undo the past (subject to special cases referred to below), and they are now mostly prohibited from giving effective tax advice. In some cases their interests and those of the client may (as too often in the past) diverge.

From the material presented below it should not be too difficult for the reader to reach the same conclusion as most of the tax lawyers and professional advisers. While it will generate more fees and therefore more costs for the client, the conclusion is basically unavoidable:

Go for the disclosure options or the LDF!

These are likely to be by far the least expensive and most secure solutions in the long term, unless:

- you can BOTH prove to the bank, in the forthcoming 3-4 months, that you are wholly 'out of scope' (for example by being tax compliant in the UK and clearly non-domiciled and non-deemed domiciled), AND that you are certain you have no other undisclosed assets or inheritances outside Switzerland

OR

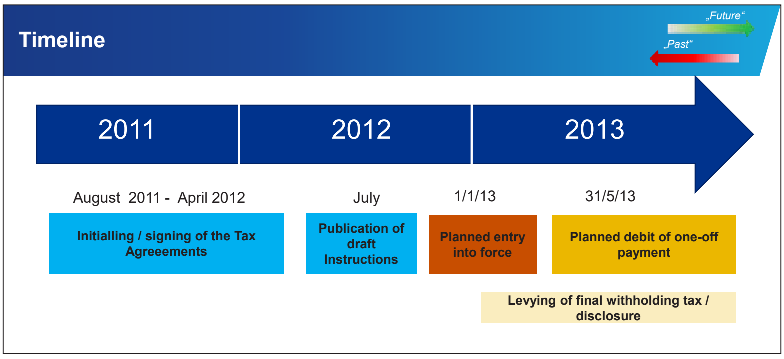
- That you can prove to the bank that they have erroneously assumed you (as a UK taxable person at the time, or currently) to be the "***Beneficial Owner***" and you can prove that the real beneficial owner is 'out of scope' (as with a fully irrevocable discretionary trust or life insurance policy)

While you may consider yourself wholly innocent of the intention to evade any tax, perhaps because of bad advice being given at the time an account was opened,that is not going to change the bank's view of your status, in particular if you or your trustees were ill-advised and signed a "Form A" (beneficial owner form). The debate rages on about 'innocent' clients and about the extent to which some structures, intended to be irrevocable and discretionary at the time, are nevertheless now considered by the banks to be 'in scope' and subject to Rubik withholding. These issues and the way forward are discussed briefly in the final chapter, which is still unlikely to be a source of much comfort for most clients caught in the Rubik conundrum.

Swiss banks and their clients have now joined the rest of the high tax world and need to deal with the new culture of tax transparency and cross-border exchange of information, whether on request, automatic or illegally acquired – a Brave New World indeed).

To protect your family's fundamental right to privacy and to enjoy legitimate confidentiality, it will henceforth be vital for all high net-worth families, not just the wealthiest, to engage lawyers and professional advisers who are able to design and implement robust estate plans, including private pensions, life insurance, etc where beneficiary rights to capital and income, ownership, control and management will each be legitimately segregated and thereby more confidential and tax efficient. Generally, tax authorities can not object to legitimate savings, life insurance and succession plans.

The future is therefore bright for estate planners, for whom a new ocean of work beckons from sensible, compliance-minded clients. Those more adventurous souls who seek solace away from the high tax World will find many delightful far flung domiciles to choose from. But they will have to move, body and soul.



The UK – Swiss Agreement on bilateral tax matters ('Rubik' flat rate withholding tax) and its consequences for UK resident clients of banks in Switzerland

By Jason Gyamerah – US Tax & Financial Services Sàrl, Zurich

As part of the only US and UK tax consultancy firm in Switzerland, Jason Gyamerah and his colleagues at US Tax & Financial Services Sárl have been at the forefront of advice and comment in respect of the recent developments in this new era of tax transparency faced by Swiss Banks, Trustees and other Fiduciaries. With the added benefit of physical presence in both Geneva and Zurich, US Tax & Financial Services, Sárl is considered the first port of call for advice on all aspects of UK and US taxation, especially where disclosures to HM Revenue & Customs or the IRS are a consideration

This article reviews the recent background to the UK-Swiss Agreement in the context of Switzerland's economic and political circumstances, which will go some way to explain the huge change in the banking sector's attitudes towards tax compliance over the last three years. The paper then goes on to analyse the details of the agreement, its immediate costs and consequences to the client and how it will be implemented. Most importantly, it reviews what the clients choices are, both in relation to the agreement itself and the alternative option - which is widely regarded as less onerous and more secure - offered by disclosure under the LDF.

I. Recent history & background to the UK-Swiss agreement

The Swiss banking sector contributes circa 6.7% of the nation's gross domestic product and is therefore an important contributor to the country's prosperity. With around 10% of the country's tax revenues and 142,000 skilled jobs in Switzerland attributed to the banking sector, the "legitimate protection of clients' privacy in financial matters is an important factor in this success". According to the Swiss Banking Association (SBA):

"Switzerland has therefore made strong efforts to prevent abuse at the international level by means of international administrative and judicial assistance processes and cooperation based on multilateral and bilateral agreements, such as the recent adoption of the OECD DTA Article 26 standard. The Swiss banks have consistently supported Switzerland in these efforts and implemented the corresponding measures.

A variety of problems and issues have arisen in the cross-border banking business in recent years that jeopardise important political and economic bilateral relations. In response to these developments, the Swiss Bankers Association has promoted the *2015 Financial Centre Strategy* since 2009."

This strategy is based on the following four pillars:

1. **Retention and strengthening of client trust through regularisation**

   Given the trust that foreign clients have in the Swiss legal system and the fiduciary responsibility exercised by the Swiss banking sector, the regularization of untaxed assets in Switzerland is at the heart of any future solution with foreign tax authorities.

2. **Future focus of Swiss banking sector on attracting taxed assets**

   The sector's focus is to be concentrated on the acquisition and management of taxed assets from foreign clients. This approach is supported by the adoption of the global standard of Article 26 of the OECD Model Double Taxation Agreement, which provides for administrative assistance on a case-by-case basis for all tax offences where there is legitimate suspicion.

3. **Protection of privacy remains key**

   The retention of the protection of client privacy is a central aspect of the Swiss legal approach, while making it possible for action to be taken to combat or prevent all tax offences.

4. **Growth and market access**

   A strong banking sector is central to the continued growth of the Swiss economy. A prerequisite to this growth is an improvement in the sector's competitiveness with other international financial centres. At the international level, other countries must respond in kind to the flat rate tax model by improving market access for financial services from Switzerland and reducing existing bilateral discrimination.

In December 2009, the Swiss Banking Association (SBA) issued a proposal document simply titled "*Project Flat Rate Tax*" with a view to outlining Switzerland's potential approach to resolving various challenges facing Swiss banking institutions in dealing with the issue of tax transparency within the international environment. The aim of this project was to ensure that assets of foreign domiciled clients of Swiss banking institutions are compliant with respect to the tax laws of the client's tax domicile. A parallel goal of this proposal was also to preserve "the legitimate protection of clients' privacy in financial matters", which is generally accepted as one of the overriding contributing factors to the success of the Swiss banking sector. The stated objectives of the SBA's Flat rate Tax proposal were:

- The application of a flat rate tax with a prospective effect and protection of privacy: the taxation of the investment income of foreign domiciled clients is defined with treaty states receiving the full amount of tax owed immediately and the preservation of clients' financial privacy guaranteed long-term
- Possible flat rate tax with retroactive effect: the incorporation of a flat rate tax with retrospective effect (depending on the requirements of the relevant foreign jurisdiction). Alternatively, the assets of certain clients would be decriminalised after expiry of the limitation periods
- In return, Switzerland would be guaranteed "undiscriminated access" to the financial markets of the foreign jurisdiction on the basis of their national laws

The crystallization of the aims and objectives of the Swiss banking sector, as outlined in the 2015 Financial Centre Strategy and Project Flat Rate Tax were embodied in the signing of the "Rubik" bilateral agreements with the United Kingdom and Germany respectively during 2011.

II. Scope of the Rubik agreement: "relevant assets & persons"

On October 6th 2011 the UK Government signed a tax agreement with Swiss authorities regarding the regularisation of existing untaxed assets and introduction of a final withholding tax on future income. The scope and purpose of the agreement was "...to ensure the effective taxation in the United Kingdom of relevant persons..."

An additional intention of the agreement was that it will achieve the level of cooperation between the UK and Switzerland in respect of the taxation of income and gains on relevant assets equivalent to the outcome that would be achieved through an automatic Exchange of Information Agreement.

The objective of the agreement was for the UK and Swiss authorities to provide assistance to each other in respect of:

- The tax regularisation of relevant assets held in Switzerland by or for relevant persons
- The effective taxation of the income and gains on relevant assets held in Switzerland by or for relevant persons
- Further exchange of information by the UK to ensure the effective taxation of Swiss residents regarding assets in the UK

The requirements of the agreement will come into force on January 1st 2013 but the ultimate deadline for the computation and deduction of withholding tax by the banks is 31st May 2013.

Relevant Assets and Relevant Persons

Under the terms of the Agreement, the requirements placed on the Swiss banks are to be applied to "*relevant assets*" held by or for "*relevant persons*". In this case, UK residents who are "*beneficial owners*"). To assist Swiss banks in navigating the terms of the agreement, the related Protocol defines relevant assets and relevant persons as:

Relevant asset: All forms of bankable assets booked or deposited with a Swiss financial institutions including (but not limited to):

- Cash accounts and precious metals accounts
- Bankable assets held by a Swiss paying agent acting as a fiduciary agent
- All forms of stocks, shares and securities
- Options, debts and forward contracts
- Other structured products traded by the banks such as certificates and convertibles

For the purposes of the Agreement the following are **NOT** be regarded as relevant assets for:

- Contents of safe deposit boxes
- Real property
- Chattels
- Insurance contracts which are regulated by the Swiss Financial Market Supervisory Authority, with the exception of assets held by an insurance company in an account separate from the insurance company's main accounts combined with a minimal risk protection and where the pay-out or redemption is not restricted to death, disability or illness (hereinafter referred to as "insurance wrappers")

Relevant person: An individual resident in the United Kingdom, who is:

- The account holder or deposit holder and beneficial owner of assets; or
- Is identified by the Swiss financial institution, in accordance with the Swiss due diligence obligations, as the beneficial owner of assets held by:
  - A domiciliary company (i.e. legal entities, companies, institutions, foundations, trusts, fiduciary companies and other establishments not exercising a trading or manufacturing activity or another form of commercial operations); or
  - An insurance company in an "insurance wrapper"; or
  - Another individual by means of an account or a deposit with a Swiss financial institution

A domiciliary company is considered to be the beneficial owner if it is itself subject to effective taxation under the general rules for direct taxation applicable under the law of its place of establishment or its place of effective management, or if it is treated as non-transparent under UK law.

An individual resident in the UK is not considered to be a relevant person with regard to assets of associations of persons, asset structures, trusts or foundations if it is not possible to ascertain the beneficial ownership of such assets, e.g. due to the discretionary nature of the arrangement.

The beneficial owner of an insurance wrapper is not considered a relevant person, where the insurance company confirms to the Swiss financial institution that it will deliver the appropriate certification to the relevant UK authority.

III. Implementation of the Agreement:

Under the terms of the Agreement all financial institutions in Switzerland are required to comply with the requirements and their responsibilities as laid out in the terms of the Agreement. This effectively results in the Swiss financial institutions acting as withholding and reporting agents for the Swiss Federal Tax Administration (SFTA), which will then liaise with the UK tax authorities.

The implementation of the agreement has put two requirements on Swiss banks as follows:

- **Historical tax liabilities**:
  - Bank accounts open between 31 December 2010 and 31 May 2013 and held by individual UK taxpayers will be subject to a one-off levy of between 21% - 41% (25% on average) on the value of the bank account. The value on which the levy will be applied is dependent on the length of time the assets within the account have been located in Switzerland. This is in lieu of the historic tax liabilities, interest and penalties that may apply. No further liability (including interest, penalties and surcharges) to UK IT, CGT, IHT or VAT, arising prior to the date of the Agreement coming into force, in

respect of the Swiss asset. However, this will have to be agreed with HMRC. Note that the Agreement does not cover liabilities to other potential UK taxes such as CT, PAYE, and NIC.

- **Future Withholding**
  - From 2013 withholding tax will be automatically applied on income and gains derived from Swiss bank accounts of 48% and 27% respectively. Dividend income will be subject to a 40% withholding tax. Interest amounts that are subject to EU-Savings Tax are excluded from withholding
- **Notification**
  - Under the Agreement Swiss banks are required to notify customers as to the impact of the agreement on them, their obligations and rights. The levy and withholding tax can be avoided by the taxpayer giving his consent to the disclosure of data to HMRC.
- **Non-domiciled individuals**
  - The terms of the Agreement include specific provisions relating to individuals who are UK resident but not UK domiciled ("RND"). These provisions mean that the potential benefits of RND status are as follows:
  - Historical tax liabilities: RNDs have the following two additional options:
    1. Submit a self-assessment of any unpaid UK tax liabilities to HM Revenue & Customs; or
    2. Opt out of the one-off levy
  - Future Withholding: Future withholding tax will only be levied on income or gains which have arisen form a UK source and/or any income and/or gains that are remitted to the UK (i.e. income and/or gains brought to, received or used in the UK).

The above benefits can only be achieved by the individual providing certification of their RND status to the relevant Swiss bank. This certification must be provided by a lawyer, accountant or tax advisor who is a member of a relevant professional body. The certification must verify that:

- The relevant person's UK tax return for the relevant tax year includes a claim or statement that the relevant person is not domiciled within the UK
- Where appropriate, a remittance basis claim has been made
- To the best of the knowledge of the professional signing the certificate, the domicile status of the relevant person is not formally disputed by HMRC

The certification must be supplied to the Swiss bank within the following applicable time periods:

- Historical tax liabilities (one-off levy): The RND will need to submit a certificate to their Swiss bank by 31 May 2013
- Future withholding tax: the RND will need to provide the Swiss bank with:
  1. A declaration of intent to claim the remittance basis of taxation for the following tax year
  2. A certificate of non-UK domicile by 31 March following the end of the relevant tax year

"The requirements of the agreement will come into force on January 1st 2013 but the ultimate deadline for the computation and deduction of withholding tax by the banks is 31st May 2013."

IV. Decisions required by client: options under the UK/Swiss Agreement:

- **Option One***:
  - Suffer anonymous one-off levy (and future withholding) in respect of relevant asset(s)
- **Option Two***:
  - Authorize disclosure of the income and gains arising on relevant asset(s) to Swiss authorities:
    - Result – Swiss authorities will disclose: identity, UK tax reference, name/address of Swiss bank, account number, UK tax year concerned and details of income and gains arising on relevant asset to HMRC
- **Option Three**:
  - Make a voluntary disclosure to HMRC and consider using the Liechtenstein Disclosure Facility (LDF) – (penalties limited to 10% of tax due).

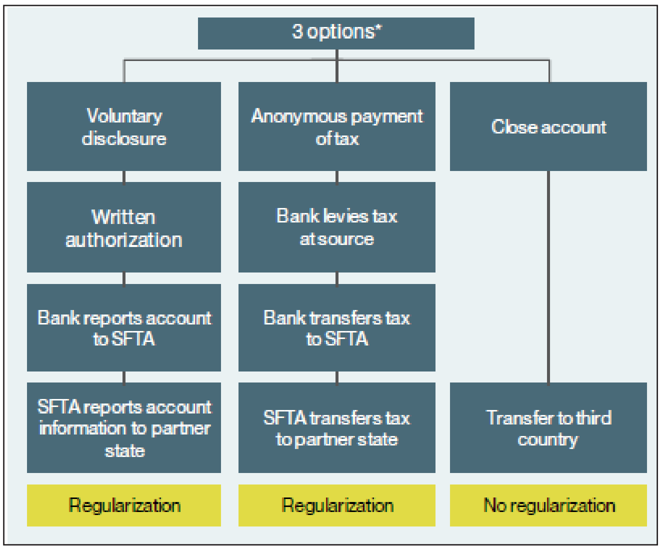


*Table Source: CAPCO.COM

*NOTE: The use of options One and Two above do not ensure complete UK tax compliance as any disclosure under these options can only apply to Swiss situs assets and benefit for the withheld amounts can only be obtained via a future disclosure to HMRC. There is also a potential risk that authorization of a disclosure under option Two may lead to a potential HMRC enquiry/investigation.

- **Option Four**:

Make a voluntary disclosure to HMRC other than under the LDF – (potential penalties of 30% to 150% of tax due in respect of Swiss assets)

- **Option Five**:
  - Move relevant assets to another jurisdiction.
    - **Result** – One-off levy will not be applied if assets moved prior to 31 May 2013 – This may only defer the UK tax issue. Swiss authorities will inform HMRC of the top 10 destinations to which assets have been moved
    - **Risk**:
      - HMRC are actively pursuing similar agreements with other jurisdictions and have increased resources to combat tax evasion. Potential increased tax liabilities, higher penalties of up to 200% than if taxpayers make a voluntary disclosure or use the Swiss Agreement
      - Increased potential for criminal prosecution
      - Potential intrusive HMRC investigation and associated costs if HMRC contact a taxpayer prior to the Swiss Agreement coming into force

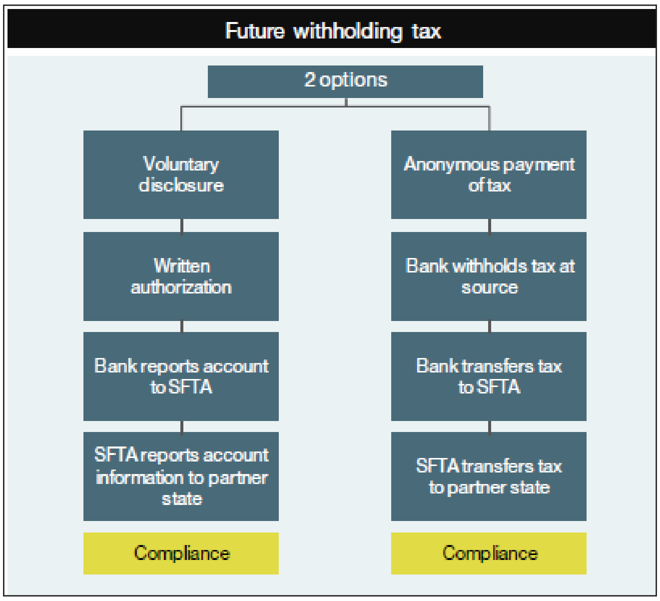


*Table Source: CAPCO.COM

V. Comparison with Lichtenstein Disclosure Facility (LDF)

Background and development of LDF

In August 2009 an historic agreement between HM Revenue & Customs ("HMRC") and the Government of the Principality of Liechtenstein was annouced to provide for the introduction of a five year UK taxpayer assistance and compliance programme via a special disclosure facility, the Liechtenstein Disclosure Facility ("LDF"). The agreement is widely regarded as one of HMRC's most purposeful initiatives to increase the tax compliance of certain UK residents. This initiative was a result of what some are calling a "perfect storm" of events including:

- The theft of personal data in relation UK citizens holding assets that in some cases were untaxed in the UK
- The increasingly difficult economic climate brought on by the 2008 banking and financial crisis
- The increased cooperation between tax authorities of different jurisdictions resulting in a number of Tax Information Exchange Agreements ("TIEA") which enable countries to share and exchange information on their taxpayers

On August 11th 2009 the UK and Leichtenstein signed a TIEA and Memorandum of Understanding ("MOU") supported by a subsequent Joint Declaration. The purpose of the MOU and Joint Declaration was to set out the agreed actions of both countries and included the details of the LDF.

Overview of the Liechtenstein Disclosure Facility

- The LDF allows individuals with unpaid UK taxes relating to previously undisclosed income or capital gains linked to offshore accounts and assets held in the Principality of Liechtenstein to settle related tax liabilities and late payment interest charges and penalties
- The terms of the LDF also provide for its use by those UK taxpayers who do not have an existing asset in Liechtenstein provided they do have such an asset at the time of registering with HMRC for participation in the LDF and they held an offhsore asset (worldwide) on 1st September 2009
- The LDF provisions apply to all UK Resident and/or certain non-UK Domiciled individuals who have any interest in a "Relevant Asset" operated and/or managed in the Principality of Liechtenstein (i.e. Accounts, Trusts, Regulated Trusts, Stiftungs, Foundations, Anstalts or Corporate entities) and would otherwise be subject to UK tax
- Wth effect from 1st September 2012, those wishing to particpate in the LDF are required to confirm a "Meaningful Relationship" with Liichtenstein to the relevant Liechtenstein Financial Intermediary (FI) so that in turn the FI issues the required Certificate of Relevance to enable participation in the LDF. In July 2012 the Leichtenstein Government issued an amendment to the terms of the original LDF agreement via the UK TIEA ordinance. The intended purpose of the amendment is to enable new long term relationships to be established with the Liechtenstein Financial Centre
- The amendment defined a "Meaningful Relationship" by establishing the following thresholds of the materiality of a business relationship:
    - Banks: At least 20% of the worldwide undisclosed bankable assets (or CHF3 million) that are to be registered for participation in the LDF must be held in Liechtenstein
    - Trust Company: At least 10% of the undisclosed worldwide bankable assets (or CHF1 million) that are to be registered for participation in the LDF must be held in Leichtenstein
    - Legal Entity domiciled abroad but managed in Liechtenstein: At least 15% of the undisclosed worldwide bankable assets (or CHF1 million) that are to be registered for participation in the LDF must be held in Liechtenstein
    - Insurance Company in Liechtenstein: a policy with a minimum premium of CHF150,000
- The provisions of the LDF were implemented on 1st September 2009 and the facility will continue until 2016 (extended from 2015) unless the individual is notified directly by a Liechtenstein Financial Institution, in which case other time limits will apply. The time limit for particpation in the LDF is more generous than that of previous HMRC disclosure initiatives but, nevertheless,

any delay may increase the penalty charges if the disclosure is made outside of the LDF or HMRC initiate an enquiry/investigation into the individual's affairs

- Generally, HMRC's powers allow them conduct enquires for periods going back as far as 20 years in circumstances where the individual's UK tax non-compliance is suspected to have been deliberate. Under the terms of the LDF, HMRC limits the assessment period to tax years beginning 6th April 1999 onwards (or accounting periods from 1st April 1999).
- Where resulting additional tax arises from innocent error or carelessness the disclosure period is limited to four or six years respectively
- Under the provisions of the LDF, an individual may be able to claim immunity from criminal prosecution if the disclosure includes a full declaration of their previously undeclared worldwide assets and income held offshore. This amnesty will apply if any income tax, capital gains tax, inheritance tax etc. outstanding is paid in full together with additional interest and penalty charges. Outside of the LDF, ordinarily HMRC can, in extreme cases, apply a penalty of 200% of the tax outstanding and recommend criminal prosecution leading to a conviction and a possible sentence of up to seven years imprisonment

Tax, interest and beneficial penalty rates of the LDF

- Particpation in the LDF provides for settlement of all UK taxes including (but not limited to) Income Tax, Corporation Tax, PAYE, Capital Gains Tax, VAT and Inheritance Tax
- The LDF provides for settlement of all related taxes, late payment interest charges and a favourable 10% penalty rate (20% for tax years post 2008/2009). The penalty for the full disclsoure period is increased to 30% where the assets being disclosed were not declared to HMRC during a previous tax investigation
- The terms of the LDF are complicated. In some cases, the LDF may lead to tracking changes in UK tax, trust and residency laws for the tax years from 1999/2000 to the year of disclosure. There are further regulations (under the LDF) that allow a composite rate of tax of 40% to be applied to the taxable amounts (covering all taxes due), but which would, in turn, involve intensive and time consuming scrutiny of the movement of an individual's funds to ascertain the taxable amounts
- Where it can be demonstrated that reasonable care was taken or that any error or omission of disclosed income and/or gains was entirely innocent, HMRC will not seek to impose penalties

VI . Final opportunity

HMRC has announced that it "will not offer these preferential terms to offshore account holders again"...and "this will be the final opportunity of its kind" (HMRC website).

Taxpayers who do not make use of this final opportunities may face penalties of at least 30% (up to 200%) if HMRC raises its own enquires as a result of future investigations that will ultimately lead to the banks having to reveal the account information.

VII. Aide memoire – LDF vs. UK/Swiss Agreement

As an aide memoire the table below sets out the issues that will need to be resolved and the timescale to be adhered to in order to claim the benefits of the UK/Swiss Agreement and LDF respectively:

UK/Swiss Agreement	LDF
Timing	
Agreement comes into force on 1st January 2013	Five year window to disclose from 1 September 2009 for those with "Relevant Property" and 1 December 2009 for those who have since aquired relevant property
Key features	
• One-off levy of between 21% and 41% (average 25%) of the balance applied to Swiss bank accounts held on 31 December 2010 that remain open on 31 May 2013 • Swiss bank as "paying agent" will levy annual witholding tax on income and gains arising form the relevant asset at: • 48% - Interest Income (excluding interest subject to EU-Savings Tax) • 40% - Dividend Income • 48% - Other Income • 27% - Capital Gains	• Offer of compsite rate of tax (starting at 40%) • Fixed 10% penalty of tax due • Interest also payable on tax due • Immunity from criminal prosecution if full disclosure and no proceeds of crime • Limited period of disclosure, ie from April 1999
Procedure	
• **Option One**: Suffer anonymous annual withholding tax on income and gains of relevant asset(s). This is default position if neither option One nor Two is chosen • **Option Two**: Authorize disclosure of the income and gains arising on relevant asset(s) to Swiss authorities: Result – Swiss authorities will disclose: identity, UK tax reference, name/address of Swiss bank, account number, UK tax year concerned and details of income and gains arising on relevant assets to HMRC • **Option Three**: Make a voluntary disclosure to HMRC under the LDF – (penalties limited to 10% of tax due) • **Option Four**: Make a voluntary disclosure to HMRC other than under the LDF – (potential penalties of 30% to 100% of tax due) • **Option Five**: Move relevant assets to another jurisdiction (High Risk!)	• Establish relevant proerty in Liechtenstein and obtain Certificate of Relevance for registration in the LDF • Bespoke service offered by HMRC • Disclosure reference and certificate issued within 60 days after initial disclosure to HMRC • Full disclosure report submitted to HMRC including computation of overall tax liability within seven months (if composite rate used) or 10 months in other cases • Election of composite tax rate of 40% (covering all UK taxes incl inheritance tax) • Collating old records and forensic analysis of raw data from bank accounts to determine UK tax figures • Calculation of interest and penalties due
After the submission	
	• Further HMRC correspondence if required • Disclosure Certificate issued by HMRC as guarantee of finality

The Liechtenstein Disclosure Facility (LDF) and HMRC's procedures

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As a former senior officer within HMRC, and now in charge of implementing the LDF and related client reporting for one of the UK's most experienced private client tax firms (Smith Williamson LLP which recently took over the tax practice of BTG), Andrew McKenna must be one the most authoritative individuals in the UK for advising on the practical aspects of the LDF.

This article covers LDF's background and the main practical issues faced by clients – whether domiciled in the UK or non-domiciled - in making the decision to proceed with the LDF disclosure process. It emphasizes the major benefits of the LDF, in terms of certainty, permanency, comprehensiveness and lower average costs, and compares it to the Swiss-UK agreement.

The received opinion within the industry is clearly that the LDF is the best solution and that the Swiss-UK agreement, despite its apparent benefits for families seeking anonymity, may not deliver a complete or permanent solution to UK residents.

I. Where the LDF and UK – Swiss Agreement sit within HMRC

In understanding how HMRC will deal with the LDF and UK–Swiss agreement going forward, it is worth understanding how it is structured to deal with such matters.

HMRC contains officers who deal with tax enquiries across the country – working within regional teams. Sitting atop that group of investigators is Specialist Investigations (SI) and as a separate body, Criminal Investigations (CI). These two offices deal with the serious civil and criminal cases of tax fraud and avoidance. Separately, HMRC has set up the Offshore Co-ordination Unit (OCU) a team dedicated to managing and effectively controlling the following areas:

- LDF
- K – Swiss Agreement
- FATCA
- Stolen bank data
- Offshore bank information obtained from UK banks

This unit will, as its name highlights, co-ordinate the technical matters arising within the LDF and UK–Swiss agreement as well as ensuring that any enquiries and disclosures arising within this area of work is passed to the most suitable office for it to be worked. For example, this unit will deal with the 500 information requests which are made in accordance with the UK–Swiss agreement protocol at Article 33.

The LDF has been in place for three years now and across the SI office network there are a number of specialist officers who deal with any technical queries or anonymous disclosure questions via the LDF agreement. They aim to maintain a common understanding and application of the LDF agreement and a centrally-based technical expert ensures consistency within that group along with facilitating the involvement of various HMRC specialist officers as required to provide advice on particular tax law matters as they arise.

II. HMRC guidance and where to go

In terms of guidance for each of these HMRC initiatives, this can be found as follows:

LDF

A dedicated set of internet web pages can be found at –

www.hmrc.gov.uk/disclosure/liechtenstein-disclosure.htm

With an extensive Questions and Answers section found at –

www.hmrc.gov.uk/disclosure/liechtenstein-faq.htm

If questions specific to a prospective LDF registration need to be addressed directly to HMRC then in accordance with the LDF Memorandum of Understanding, specialist officers can be contacted on the contact details below. Any queries will be answered as extensively as possible. For instance, to help facilitate any considerations of whether or not the case qualifies for LDF registration or indeed how HMRC would react to a specific matter in terms of how it would be taxed.

HMRC has set up a telephone helpdesk to provide help and advice on the LDF. You can contact the helpdesk on:

Tel: 0845 600 4680
Or calling from outside the UK:
Tel: +44 151 300 2750
Lines are open from 8.30am to 5.00pm
(UK local time), Monday to Friday.

By post - Alternatively you can write to HMRC at the following address:

Specialist Investigations
LDF Team S06941
PO Box 29992
Glasgow
G70 6AB

It is advisable to use a specialist to assist in any approach to the LDF team since the basis of that approach and communication could affect the progress and acceptability of any subsequent disclosure within the LDF regime.

UK – Swiss Agreement

Under the provisions of the agreement, amongst other duties, Swiss paying agents are obliged to identify UK residents, levy relevant charges, process disclosures and transfer funds to the UK via the Swiss authorities. Consequently, implementation of the agreement in these matters is therefore a matter for the Swiss paying agents as instructed by guidance from the SFTA. As of writing, this guidance is available on the relevant Swiss internet site, now in finalised form, but it is only available in German. A UK translation is expected in due course.

It is this guidance which must be referred to if any there is any requirement for clarification on the definition of relevant assets, relevant persons or other associated issues. HMRC has stated that it will not be appropriate for it to comment on the application of the agreement in these areas.

Whilst this approach is understandable given the emphasis on the Swiss paying agents administration of the agreement it does mean that there are some differences in interpretation of the agreement.

The UK has a dedicated UK – Swiss agreement internet page at –

www.hmrc.gov.uk/taxtreaties/ukswiss.htm

A Question and Answer section is also available on this site but it is not as expansive as the LDF page. However, it is expected that it will expand significantly as the 1 January 2013 deadline approaches –

www.hmrc.gov.uk/taxtreaties/ukswiss-faqs.htm

In addition, HMRC will be adding sections to its internal Enquiry Manual and International Manual which will deal with various matters and give appropriate advice and practice guidelines for its tax investigators. For example how they should respond to the presentation of a UK – Swiss agreement certificate detailing taxes which have been with held and paid over to HMRC during any enquiry they are conducting.

In respect of both the LDF and the UK – Swiss agreement the UK has a team of experts liaising with the Swiss and Liechtenstein tax and Governmental bodies to ensure a smooth application of the agreements and the management of any technical and administrative matters as the agreement progress over time.

From discussions with various professionals within Switzerland it is clear that there is still some doubt and confusion over the UK – Swiss agreement and how it will operate. In particular, who it will apply to – for example the confusion around discretionary trust structures - and the meaning of ‘cleared’ funds and to what extent any past tax liabilities are dealt with by the application of the agreement.

The LDF by comparison is a more stable and mature facility which has developed over the last three years to iron out differences of interpretation and these have been clearly published on the HMRC LDF web site and communicated via the network of LDF specialist officers to their various tax professional contacts.

Overall, any individual considering the LDF or the UK–Swiss agreement will need to discuss the practical implications of choosing between them as well as the financial cost and future implications for that individual post disclosure with a specialist who can advise on the various matters.

Simple reliance on the advice and guidance available on the various web sites and from the Swiss banking community will not be adequate given the potentially serious consequences of getting it wrong – which at worst would be a criminal prosecution by HMRC.

III. Dealing with non residency and non domicile within the LDF and UK–Swiss agreement

The impact of the UK–Swiss agreement in particular for those individuals with a UK address and a Swiss relevant asset will be significant and raises queries and concerns on a number of fronts:

- What is the domicile status of an individual?
- Has it been agreed with HMRC?
- What is the consequence of a challenge in the future concerning an Individual's domicile status?
- What is HMRC's approach to domicile within the LDF?
- How does an individual deal with a non-residency claim – to satisfy the exclusions of the Swiss agreement?

In terms of the UK–Swiss agreement, non-domicile status and non-residency status is significant in respect of how the agreement will be applied. There are specific rules describing how an individual must prove to the Swiss paying agent that they are non-resident or non-domiciled at Articles Three and Four of the agreement. These are very prescriptive and do not allow for any ambiguity. A failure to meet the requirements will leave an individual liable to the application of the one off payment for the past or subject to the disclosure of their details to HMRC.

Interestingly the LDF offers a lot more flexibility within this area. Specifically HMRC have agreed to undertake a consideration of an Individual's domicile status and confirm it for the purposes of and to cover the period up to the end date of the LDF disclosure as made. Indeed given the ability to undertake discussions with HMRC on an anonymous basis in the LDF procedure – any such HMRC view could be done before LDF registration and indeed before HMRC even know the name of the discloser.

Similarly details of a person's residency status could be given to HMRC with a view to obtaining HMRC's view or agreement to a non residency status – again for and covering the period of and up to the end date of the LDF disclosure.

Clearly this discussion and engagement with HMRC is a very valuable benefit of the LDF. It is of course essential that a full disclosure is made in obtaining any agreement. If such an engagement was found to be incomplete at a later date by HMRC, subsequently having been relied upon in any LDF disclosure, then the severest of criminal or civil tax penalties would be applied by HMRC.

So in terms of the UK–Swiss agreement there will need to be a history of, and provable basis for, a non- residency or non-domicile claim being made – supported by the appropriate documentation and legal or tax professional sign off. If that is not available then there is no engagement process to address or solve that problem within the terms of the agreement. The LDF by contrast does allow engagement, with anonymity if preferred, before or after LDF registration.

Finally, within this area of non-residency and non-domicile, HMRC has certainly toughened up its approach to challenging any claims to either position, even with the previously described LDF process. It is, however, still a highly efficient and effective process given HMRC will not under any circumstances give an opinion or decision about non-domicile by way of an unprompted approach by any Individual other than in the LDF scenario. Additionally, HMRC will not give a certificate to verify non-residency in the UK.

What is very clear is that anyone who has not verified their non domicile or non residency status must get the necessary specialist advice within the process of considering their options under the LDF or UK–Swiss agreement.

HMRC has made it quite clear that any claims which are made and subsequently challenged will be considered very carefully and if they are not reasonable and supportable, then criminal prosecution will be considered. Clearly, any claim that is challenged and is subject to debate based on the facts will be dealt with civilly and through the normal HMRC enquiry process.

IV. HMRC compliance activity

Looking at the options open to holders of Swiss relevant assets, clearly the funds can be transferred to another jurisdiction outside of Switzerland so that no liability to any past one-off payment would arise, nor would there be any future withholding tax since there would be no Swiss-based income. Clearly, this would have to be done before 31 May 2013 to avoid the application of the agreement by the Swiss-paying agent.

As part of the UK–Swiss agreement, the Swiss authority will inform the UK within 12 months of 31 May 2013 of:

- The 10 States or jurisdictions to which relevant persons who closed their account or deposit between the date of signature of the agreement and 31 May 2013 have transferred the largest volume of relevant assets
- This will include the number of relevant persons for each of the top 10
- And the volume of assets transferred

Clearly HMRC will consequently be looking to engage with those jurisdictions to follow up on the assets transferred and seek to recover information to facilitate HMRC enquiries into the relevant individuals or to allow a similar agreement to that agreed with Switzerland to recover taxes.

HMRC will in any case be undertaking enquiries using the information it holds from the so called 'stolen bank data' sources along with the extensive collection of offshore bank details that it has obtained through its use of information powers in the UK.

Any individual who is discovered in any such enquiry to have avoided the UK–Swiss agreement by transferring funds will first of all be reviewed carefully for criminal prosecution and if that is not appropriate they will be subject to a high level tax enquiry, which will could result in penalties in excess of 50% being charged in addition to tax and late tax payment interest for the last 20 years.

They may also be subject to HMRC's naming and shaming policy, which will result in their name and address being publicly available, detailing them as a tax evader for one year on a publicly visible site.

Additionally, they may be placed in HMRC's Managing Deliberate Tax Defaulters programme, which will result in close HMRC scrutiny for several years after the enquiry and the submission of additional information annually with the usual tax return.

Both of these intrusive requirements are not applied to anyone undertaking the LDF.

V. Risks for client choosing the UK-Swiss Agreement

When considering the UK–Swiss agreement, individuals must take care to understand fully the meaning of 'regularising' or indeed obtaining clearance for the offshore funds. It must be remembered that:

- Only the amount detailed as cleared as per the certificate ultimately provided by the Swiss paying agent is effectively tax clean
- Withdrawals (including bank charges) are not cleared unless refunded to the account before 31 December 2012 and those funds must not be from a UK bank account
- Any undeclared tax matters outside Switzerland are not cleared
- If there are undisclosed tax matters that are not reflected in the cleared fund balance relating to the years prior to 2002, then these are potentially recoverable by HMRC on any future tax investigation. You will recall that HMRC can recover taxes for up to the last 20 years

The concept of 'regularising' the past by way of the UK–Swiss agreement, and the scope thereof, must be very carefully considered. HMRC has not yet detailed the instructions it will give to its tax investigators, who on challenging an individual are presented with a Swiss certificate in respect of the one-off payment for the past.

Clearly the issues of withdrawals, source of the offshore funds and the length of time any such account has been held must be considered. On such a challenge, the earlier year's tax failures will be in point and will be subject to the normal rules of taxation and penalty charges.

Careful consideration must also be given for the future. The agreement details that any withholding tax charged will cover any tax, interest and penalties that could arise in respect of the Swiss income / gains.

It seems to be a general understanding that this will allow individuals to retain their anonymity since they will be able to leave any Swiss income / gains off their annual Self Assessment tax return. This is certainly an oversimplification and should be a major concern to a potential taxpayer. It is HMRC's undoubted position that individuals should file correct and complete tax returns detailing their worldwide income and gains as appropriate given their residency and domicile status. Anonymity under the Swiss-UK agreement may not be as bullet-proof as the banks implementing it may suggest to the client.

Unfortunately there are complexities within the UK tax system that affect the ability to retain anonymity. For example:

- Individuals whose income exceeds £100k lose their tax free personal allowances so that by the time they earn approximately £115k, they have no tax free allowances. If for example they receive employment income in the UK against which they will be credited with a tax free personal allowance through the UK's PAYE tax system at source on income of £100k, then any Swiss income / gains may result in the loss of the allowance given. So whilst any offshore income will be correctly dealt with for tax purposes by virtue of the agreement, there will be a tax offence in respect of the incorrectly claimed personal allowances that will result – on discovery – of tax, interest and penalty charges
- If an individual was to disclaim their personal tax free allowance – would that be a red flag to HMRC that the individual must have a Swiss account, thus rendering the anonymity position an irrelevancy?

VI. Discretionary Trust structures

The agreement allows discretionary structures where the beneficiaries are not known or clearly identifiable to be excluded from the application of the withholding arrangements for the past and the future.

This identification of the beneficial owner as described earlier in this will be reflected in the Forms A and T which sit on the relevant client papers at the bank.

In many instances the Form T, which is generally appropriate for such discretionary structures has not been completed and the Form A, which has been completed is much less satisfactory.

It is advisable for all Trustees to consider their position and engage with the Swiss paying agent to ensure that the correct position is understood and agreed with regard to how the discretionary structure sits within the UK–Swiss agreement application process. Generally the Swiss paying agent will be ensuring that from its perspective that it has applied the agreement correctly. It will not wish to fall foul of any consequent audit review of its procedures and therefore will not be hugely concerned about clients whose position is not crystal clear: if there is any doubt the client's account will simply be categorized as "in scope" and subjected to withholding.

How Swiss paying agents will react to approaches from Trust companies and their representatives, and what the response will be, will be an interesting process. What is clear is that action needs to be taken to ensure that truly discretionary structures are not included in the withholding arrangements erroneously.

HMRC is very critical of offshore discretionary structures, believing that many are in fact nothing more than layers of secrecy to hide the ultimate owner of the assets from regulatory authorities. It believes the owners, controlling persons and beneficiaries are often the original settlors of the trust.

Of course, many such structures are supported by legal documentation, with trustees and other professionals providing a management role and other administrative services to facilitate the operation of the entity. Consequently, care needs to be taken over what is or is not done to respond to the challenge posed by the UK–Swiss agreement.

Any such offshore structure must ensure that it takes the appropriate action to facilitate compliance with the agreement. That may be by ensuring that the correct forms and understanding of its discretionary nature are updated and understood by the Swiss paying agent, or that the appropriate charges are in fact levied by way of the agreement.

Discovery by HMRC of an offshore structure which purports to be discretionary in nature and consequently has been exempted from the agreement, but on closer examination is not in fact so, will lead to significant tax penalties, if not criminal sanctions.

It may indeed be worth obtaining a third party opinion or review of the structure in place, which can be used to support any approach to be made to the Swiss paying agent.

Finally on this point –any structure that does not meet the discretionary exemption will have to consider what it actually is.

Unfortunately, many structures are set up offshore to hide the identity of the owners, usually the settlors of the funds. If that structure is effectively redundant for discretionary purposes by the impact of the UK–Swiss agreement then how can it be closed or dismantled without incurring any additional tax charges? Does the fact that it is deemed transparent mean that it can in fact be liquidated without reference to any tax liability?

HMRC would not simply agree to any such closure tax free without all of the facts. No easy answer can be obtained without engaging HMRC directly. Again, the LDF does lend itself to such situations given the ability to engage with HMRC with anonymity and in the right circumstances agree how the matter should be dealt with.

In terms of Trust structures then the following should be noted:

Type of Trust	Beneficial owner
Revocable	Settlor or person with right of revocation
Irrevocable and non – discretionary	Person identified under the due diligence process
Irrevocable and discretionary	Out of scope

In terms of identification using the due diligence procedure, this is the procedure operated and applied by the Swiss paying agent in accordance with the Swiss code of conduct on such matters (CDB 08).

But note that in accordance with the UK–Swiss agreement, HMRC expects the Swiss paying agent to use all the information that they hold and not just the due diligence material to ascertain the relevant person.

This places a substantial responsibility upon the Swiss paying agent. Consequently they may fail to identify correctly, make an identification error or in fact correctly identify and apply the relevant administrative requirements.

Any failures to identify or errors may well result in some sort of legal redress if necessary, thus exposing the paying agent to a financial penalty and a loss of business.

For trustees it is clear that certain actions must be taken to ensure that they do the best that they can in administering the UK-Swiss agreement from their perspective including, I suggest:

- Identifying all UK connected structures
- Identifying the Beneficial owner
- Checking with the bank that the documentation held is correct and up to date (Forms A and T etc).
- As necessary checking that the correct tax rate is being applied under the agreement
- In appropriate circumstances, obtaining independent tax and legal advice for each individual case

VII. Current status and progress of implementation of the UK–Swiss agreement

Parties within the Swiss political system attempted to get the requisite number of signatures to force a referendum on the agreement. This was deemed to have failed, although an application for a judicial review of this decision was being considered. When this article was written, this had to be lodged before the end of November 2012. Currently the agreement will come into play on 1 January 2013.

Various Swiss banks are now engaging with their clients to ask if they are to participate in the agreement or allow the provision of their details to HMRC. The process has been initiated before the entry into law of the agreement.

In addition, calculations are ongoing by the top 30 Swiss paying agents – based on European Savings Tax Deductions made - of the upfront payment that the Swiss banks must make to the UK Treasury as per the agreement.

The upfront payment is to be 0.5 billion CHF and will be made up of payments from the 30 financial institutions, taking into account the following exclusions:

Exemptions include:

- UK clients with “resident but not domiciled” status
- Bank accounts with assets of less than CHF 50’000 as per 31 December 2010
- The assets of clients who disclosed their assets for the purpose of the EU tax savings income as per 31 December 2010 and can produce corresponding certification for payment of interest

The payment will need to be made to the UK on 1 January 2013.

The Swiss banks are having a difficult dilemma in the lead up to 1 January 2013. They do not give tax advice and are effectively being asked by the agreement to manage in some way the guidance of their UK based clients through the issues which face them, particularly the choice between the agreement and the LDF.

Advice and guidance from the Swiss authorities has arrived, albeit rather late in the day, and it is still of concern to many banks that on a number of matters, such as the discretionary trusts and non domiciled individuals, the requirements are quite complicated.

Any failure to apply the agreement correctly will potentially impact the bank on any subsequent audit by the Swiss Banking association – which will undoubtedly look seriously at any failure to apply the agreement successfully in respect of its relevant client base.

Evidence suggests that the banks are working with specialist advisors from the UK and Switzerland. It is of great importance that such advice is taken given the complexities of the agreement, the LDF and the UK tax regime and the consequent penalties if they get any disclosure or past one-off tax payment wrong.

VIII. LDF progress to date and UK – Swiss agreement projections

The LDF has been in existence since 2009 and during that period has achieved the following results up to September 2012, the latest figures published by HMRC:

Total number of LDF registrations:	3,277 cases
Total yield (including paid on account):	£465 million
Average yield per case:	£186k

After initially estimating that the LDF would yield £1 billion, the HMRC–has revised the figure to £3 billion yield by April 2016, when the LDF concludes. Whilst not all of the settlements have been in relation to Swiss-held assets, a substantial percentage of the 3,277 cases will certainly have a Swiss link.

The Swiss agreement has not yet commenced and although an up-front payment of CHF 0.5 billion will be made by the Swiss banks to the UK, the actual agreement is expected to raise £4 – 7 billion in yield for the UK Treasury, according to the Government. This is a huge sum of money.

This should be understood in the context of statements by Mr David Hartnett to the UK's Chartered Institute of Taxation (CIOT) on 30 September 2011, when he was the HMRC's Permanent Secretary for Tax. He said the UK Government believed that 80% of Swiss accounts held by UK resident taxpayers were not disclosed correctly for tax purposes. Given the size of that client group, the yield estimates make sense. How correct they are in reality will be seen in due course.

Sitting alongside these agreements is the European Savings Directive (ESD), which has been updated to close all of the loopholes that existed in its original draft. The coverage of the ESD will now capture a wide variety of income whether or not it is in the individuals name or contained within a trust or corporate structure. Final ratification and implementation of the revised ESD is awaited as discussions continue to finalise implementation of the new rules. At present,tax continues to be withheld at the rate of 35% on relevant income.

Following discussions between the EU, the UK and Swiss Governments earlier this year it was agreed that the ESD would take priority in terms of deduction over the UK–Swiss agreement withholding conditions detailed within this paper. Consequently, only the balance of say 13% withholding tax would be deducted, in terms of interest for example, by the Swiss banks and paid over to HMRC. The 35% withheld under the ESD would continue to be operated and returned under the ESD -agreed protocols. The ongoing administration and interaction between the two systems will be interesting.

Private client structures: the changing culture of estate planning in Switzerland

By Jacques Leuba – MPL Asset Management SA, Geneva

I. How times have changed – the old model and Form A

Time was, until quite recently, when it would be normal for a client to fly to Geneva or Zurich in the morning, see his or her favorite private banker and private client lawyer and, before the day was out, expect to have opened one or a series of bank accounts for offshore companies - e.g. BVI companies, Panama foundations, Belize trusts, etc. The accounts and the structures would be owned and controlled by the client, often with the client acting as signatory or enjoying a power of attorney, but not, of course, bearing his or her name.

Correspondence would be 'banque restante' and frequently such accounts would be offered a linked credit card made available to the client or his nominees. The shares - or nominee fiduciary mandate - would, more often than not, be deposited with the bank in the client's safe deposit box.

This pure nominee arrangement was much in demand because of it being cheap and wholly controllable by the client despite the fact that it achieved no protection at all against any kind of challenge to its substance. The client would in all such cases be obliged to sign a "Form A" identifying himself as the true or ultimate beneficial owner (UBO) of the assets on the account.

The next step up, only marginally better, would involve a fiduciary company or bare trustee which would have nominal control over the account, in terms of signing powers, but would in fact always be acting upon the instructions of the UBO named on the A Form. Such accounts would also be offered credit cards in the hands of the UBO.

In either case the banker's only obligation was to verify the legally legitimate source of the assets (i.e. they were not the proceeds of 'serious crime' such as fraud but not 'mere' tax evasion by way of omission ("soustraction").

Where tax treaties allowed the client's state of domicile to request information on the client under arrangements for administrative assistance, the Swiss authorities would resist unless the requesting tax authority could clearly identify the client and the bank account and could prove that the client was guilty of a criminal offence recognized in Switzerland (e.g. false accounting) under the "double criminality test".

All this changed on Black Friday, 13th March 2009, the day of a perfect storm of political, economic and judicial pressure on the Swiss (triggered initially by a UBS tax evasion fiasco in the US) when the G20 governments forced the Swiss Federal Council finally to abandon the distinction between tax fraud and tax evasion and, thereby, Switzerland's long prohibition on the inclusion of the bank secrecy clause (article 26 of OECD Model Treaty) in its tax treaties. Belgium, Luxembourg and Austria had also resisted but soon capitulated under the OECD's global initiative for tax transparency.

Henceforth, accounts featuring a Form A would be defenceless against foreign government requests for administrative assistance, the requirements for which are now reduced to a bare minimum (even 'grouped requests' are now admitted). These started flooding in as Switzerland rapidly showed its efficiency in agreeing and ratifying scores of Tax Information Agreements, both with existing and new treaty partners.

II. The new disciplines of estate planning - 'Form T'

All of this had been predictable for many years and alternative, more legitimate estate planning structures, with real substance and with testamentary purposes other than pure tax avoidance, had been in use for many years already by the wealthiest families and their highly-paid, prestigious legal advisers.

The large Swiss private banks owned (and many still own) huge trust and fiduciary companies spread across the offshore world, often in the Channel Islands, Cyprus, Gibraltar, the Bahamas, Cayman, Singapore, Hong Kong, which developed and sold whatever structures suited the clients without much regard for their domestic tax or succession planning requirements.

But the culture of sophisticated tax and estate planning structures had begun to grow, especially in the late nineties with the introduction of anti-abuse provisions in many tax treaties and especially when all the main Anglo-Saxon jurisdictions started adopting the FATF 'all crimes money laundering' legislation. This brought tax offences into the category of money laundering, for which the regulatory and judicial regime was getting much tougher and forced legitimate planners to build much more substance into their structures. (While this FATF standard has still not been fully adopted across the OECD countries, it is fast becoming so, including Switzerland, for which this new legislation is being proposed for 2013).

Meanwhile, however, the Anglo-Saxon concept of trusts and trusteeship was becoming more widely accepted by Swiss institutions at home and abroad. After considerable pressure form the Swiss trust company industry, this led to the adoption into Swiss law of The Hague Trust Convention in 2007, which effectively allows Switzerland to operate as a centre for the administration of trusts, albeit in a civil law country where the trust is an alien concept.

It took until 2007 for the 'Form T' to appear as a regular feature of the private banker's tool kit: it allows the bank properly to characterize and describe in full a genuine irrevocable discretionary trust relationship which previously had not been distinguishable on the A Form. Instead of a UBO the Form T gives ample room for the description of settlor, beneficiaries, potential and class beneficiaries, protector / enforcer, etc. to adequately reflect the legal relationships created in different trust instruments, foundations, pension funds, etc.

Such irrevocable, discretionary structures – and the Form T which encapsulates them - are the diametrical opposite to the flimsy nominee structures, which unfortunately many indiscriminate bankers and fiduciaries continued to sell to clients. Forget client signing powers, credit cards, payment instructions and such like. The discretionary trust relationship and the Form T – which can also apply to discretionary foundations, pension funds, philanthropic foundations etc. – demonstrate the strict discipline of the remote relationship between a settlor and beneficiaries, generating a robust defence against any light-weight attack on a settlor, accused of being the UBO. The Swiss courts are being given ample opportunity to examine and challenge these relationships and an increasing number of Federal Tribunal decisions are upholding them and resisting attacks from both tax and civil litigators.

It is therefore the Form T which should have been used by "innocent" UK settlors whose settlements in Swiss banks were, in many cases, quite wrongly characterized under the old model with a Form A.

Do errors of this kind on the part of the bank and/or the client's advisers (sloppy trustees used to happily go on signing A Forms well after 2007) give such innocent settlors occasion to challenge the Rubik deductions due to amputate the trust fund by as much as 34% on 31st May 2013 and thereafter up to 40% on interest payments etc.?

III. Sorting out the past

In principle, genuine discretionary settlements and life policies are supposed to be exempted but that will depend on the specific procedures (in many cases apparently still being worked on) that are yet to be fully implemented by banks on a largely ad hoc basis. This process also depends on the sophistication of a bank's compliance department, which is often staffed by personnel with very little formal knowledge of trust structures.

Information on procedures and practical definitions for use by bankers in characterising trust and insurance structures is scarce. The same applies to the applicability of IHT nil rate bands and other issues of inheritance. Painful and rather unjustifiable delays and uncertainties remain for clients whose banks 'pushed' them into trusts and life policies presented at the time as wholly viable and legitimate succession planning vehicles subsequently being questioned as inadequate and therefore 'in scope' for Rubik deductions. For example, the issue surrounding a life policy being 'revocable'.

These issues are still now being subjected to lengthy scrutiny by banks' legal departments, not greatly helped by delays in processing the files attributed to the Swiss Bankers Association and the Federal Tax Department.

The latter can hardly be blamed for delays following the general uncertainties which surround the challenges to Rubik, especially from Germany (which has now killed Rubik outright, at least for a year or two) and from the EU, which espouses only full automatic exchange and disapproves in principle of bilateral arrangements.

In effect the UK agreement is a trailblazer (soon to be followed by Austria) and has created a vast accumulation of unresolved procedural issues, logistical tasks and legal niceties for the banks, their lead association and the government department in charge of implementing the agreements.

Where a "Form A" has been signed for an account, indicating the name of a BO resident in the UK, the bank's procedures are likely simply to sweep all the assets indiscriminately into the same condemned category as nominee BVI companies. Even where a Form T has been signed by a trustee or equivalent, indicating the existence of a properly documented discretionary settlement of some kind, the bank's department and external advisers will need to pour over it to verify that it satisfies the stringent requirements of the HMRC.

If the bank's own trust company or insurance company sold the structure, which is now deemed inadequate, the 'innocent' client can justifiably be angry and should indeed attempt to challenge the bank and obtain reimbursement of fees, etc. This may not, however, help the client's status with HMRC, so a disclosure or LDF procedure may in any event be advisable in such cases.

The agony and irony will be all the greater for clients whose capital was not only inadequately structured but also poorly invested. The Rubik deduction will reduce the capital, but if the sums had been properly declared in the first place there may have been little or no tax to pay anyway due to losses on investments!

Banks will need to tread carefully to remedy these situations or face litigation. Although Swiss lawyers are always expensive, and the larger firms are often conflicted out in relation to big institutions, the courts have increasingly understood the predicament of unhappy clients and there is an army of hungry smaller firms willing to take on such cases.

Conclusion:
The future: a new world of planning

The fact that Switzerland has, at last, been decisive in turning down tax evaders and wishes to regularise the past is good news. In an imperfect world where privacy has to be upheld as a basic right, and where comprehensive automatic exchange is neither practicable for governments nor safe for wealthy families, Rubik is a good first attempt at a 'second best' solution for all concerned – tax hungry countries, Swiss banks and clients worried about privacy in a world of hacking, data theft, indiscriminate media, potentially corrupt officials, leaky government systems, kidnapping, etc.

However, many of the uncertainties surrounding Rubik still need to be ironed out and for this reason alone most tax advisers are against it and recommend the LDF. Quite apart from the greater cost of Rubik, which attacks the capital invested, LDF and other disclosures only impact income.

The future bodes well for the expansion of the pension fund, life insurance and estate planning sectors, all of which offer tax effective onshore and cross-border solutions for the long term protection of wealth and savings. This applies in Switzerland, the world's leading centre for wealth management, as well as to all other financial centres.

Wholly legitimate succession and estate planning should not and must not be attacked as unethical (or morally repugnant!) if these activities are carried out according to properly established, professional codes of conduct and remain strictly within the bounds of the law of a client's home jurisdiction. Having now embarked within a very short period on the difficult road to full compliance with international norms, Switzerland is likely to set high standards for the wealth industry worldwide.

The Authors

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Senior Tax Manager
US Tax & Financial Services Group, Zurich

Jason Gyamerah is a Senior Tax Manager for US Tax & Financial Services, a specialist private client tax consultancy group with offices in London, Zurich, Geneva and Tel Aviv. US Tax & Financial Services has become one of the main players in Switzerland in the area of tax compliance for UK residents.

Jason is a leading expert in US and UK tax reporting, investigations and disclosure issues. Now based in Zurich, he was previously with another leading firm, formerly Chiltern PLC, now BDO Stoy Hayward. He has substantial experience with US and UK private client investigations, trust compliance and consultancy, including negotiations and settlements with both the IRS and HM Revenue & Customs (HMRC). Jason holds a BEng (Hons) degree in Civil Engineering, is a former lecturer in graduate mathematics at the University of Texas and a member of the Association of Taxation Technicians (ATT).

US Tax & Financial Services Sàrl

US Tax & Financial Services in Zurich is specialised in tax advice, planning and reporting for private clients and their banks, trustees and advisers, concentrating on all matters relating to UK and / or US tax. Tax compliance for UK residents - whether domiciled, deemed domiciled or non-domiciled – is at the centre of the firm's Swiss activities, especially now that this has to include the relatively complex arrangements recently agreed under the Swiss – UK bilateral tax agreement ('Rubik') and the Liechtenstein Disclosure Facility (LDF).

The US Tax & Financial Group deals with individual, partnership, corporate, trusts and estate tax affairs for anyone subjected to the US and UK tax systems, wherever they may be in the world. With more than 26 years experience, US Tax & Financial Group have offices in London, Zurich, Geneva and Tel Aviv, bringing expertise from KPMG, Ernst & Young, Arthur Andersen, PwC and Deloitte across a wide range of sectors.

Andrew McKenna BSc (Hons), CTA, CEDR

Partner, Smith & Williamson LLP, Manchester & Geneva

Andrew's career began in HMRC in 1989 and from 1996 onwards he specialised in tax investigation work as a fully trained tax inspector. He spent 5 years in Special Civil Investigations undertaking enquiries into cases of tax fraud and tax avoidance. He co - lead HMRC's Offshore Project Group which investigated tax fraud facilitated through offshore bank accounts.

He left HMRC in 2007 to work in the Tax Consultancy profession and is now a Partner at Smith & Williamson LLP. He now spends at least half of his time in Switzerland advising banks, trustees and their clients on resolving tax disclosures with HMRC, especially in the context of the LDF and the recently confirmed UK-Swiss bilateral tax agreement.

Andrew is a member of the Chartered Institute of Taxation and is qualified as a Chartered Tax Advisor. He is also a qualified mediator with the Centre for Dispute Resolution (CEDR).

Smith & Williamson LLP

Smith & Williamson is one of the leading groups in the UK combining investment management, financial advisory, tax and accounting services, with around 1,500 people operating from 11 principle offices in the UK and Ireland, and an international capability in over 100 countries.

Smith & Williamson is ranked among the top ten firms of accountants in the UK. Its focus is on wealth creation, wealth management and wealth preservation – a unique approach that singles us out from our peers and larger competitors.

The firm provides a broad range of services. For private clients these include fund administration, investment management, pensions and personal financial planning, private client tax and trusts, private banking, trustee and executorship service

As regards tax investigations, the team, which includes a number of ex-senior HMRC inspectors, are vastly experienced in obtaining favourable outcomes for individuals, companies or businesses when faced with intrusive tax enquiries. Specialisms include: the Contractual Disclosure Facility, the

Liechtenstein Disclosure Facility, the complexity of the UK-Swiss Agreement and any dispute with HMRC regarding back taxes or production of information/documents.

Tax Services – Geneva

From the Geneva office Smith & Williamson provide a full range of specialist tax services. The highly reputable team has years of experience of dealing with complex tax issues involving businesses and individuals in respect of their UK and international tax affairs. The office is headed by leading tax investigation experts, Andrew McKenna and Jeff Millington.

The Geneva tax team has the support of the firm's broader business which includes the full range of services: investment management, business advisory services, banking, corporate finance, corporate recovery and forensic accountancy. The office is based in the heart of Geneva and the tax team is on hand to offer expert advice and the best course of action with the benefit of local knowledge.

Jacques Leuba, MA Oxon, TEP

Jacques Leuba is a Director of MPL Asset Management SA responsible for wealth structuring and estate planning.

Educated in the UK (MA (Oxon) TEP) and trained in South America, he worked for several years in commodity and energy finance in Geneva and London (BNP Paribas), and subsequently has enjoyed a successful career in the private banking and trust industry in the Caribbean and Switzerland, where he has held senior positions with UBS, Clariden Leu and Banque Heritage.

Mr Leuba is accredited by OAR-G as a director of a number of wealth management companies regulated in Switzerland and is also a member of the International Tax Planning Association (ITPA), the Society for Trust & Estate Practitioners (STEP), an Associate Member of the International Bar Association (IBA), and has published numerous articles on trade finance and wealth management and is co-editor of "Tax Planning for Hedge Fund Managers" (ITPA 2008).

MPL Asset Management SA, Geneva

Established in 2013, MPL Asset Management is a global organisation that specialises in delivering wealth management solutions for high net worth individuals and corporations alike.

Its core disciplines include investment advice, discretionary and advisory portfolio management, tax mitigation, estate planning, creation and management of Swiss bank accounts, formation and management of trusts and foundations.

In association with highly reputable financial institutions our Geneva based private client division is highly resourced to provide a comprehensive range of professional services to meet the needs of the modern day investor no matter how complex personal circumstances have become.

MPL Asset Management SA is based in Geneva with registered number CH-660.1.930.013-0 and is regulated in Switzerland by the Organisme d'Autorégulation des Gérants de Patrimoine, Geneva (OAR-G) who enforce regulatory compliance in the context of Swiss anti-money-laundering legislation (the Anti-Money Laundering Act 1997) by the Swiss Financial Markets Authority (FINMA).

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Appendix: Explanatory slides & diagrams summarising Rubik & LDF

Supplied by courtesy of Jurg Birri and Philip Zuend, KPMG, Zurich

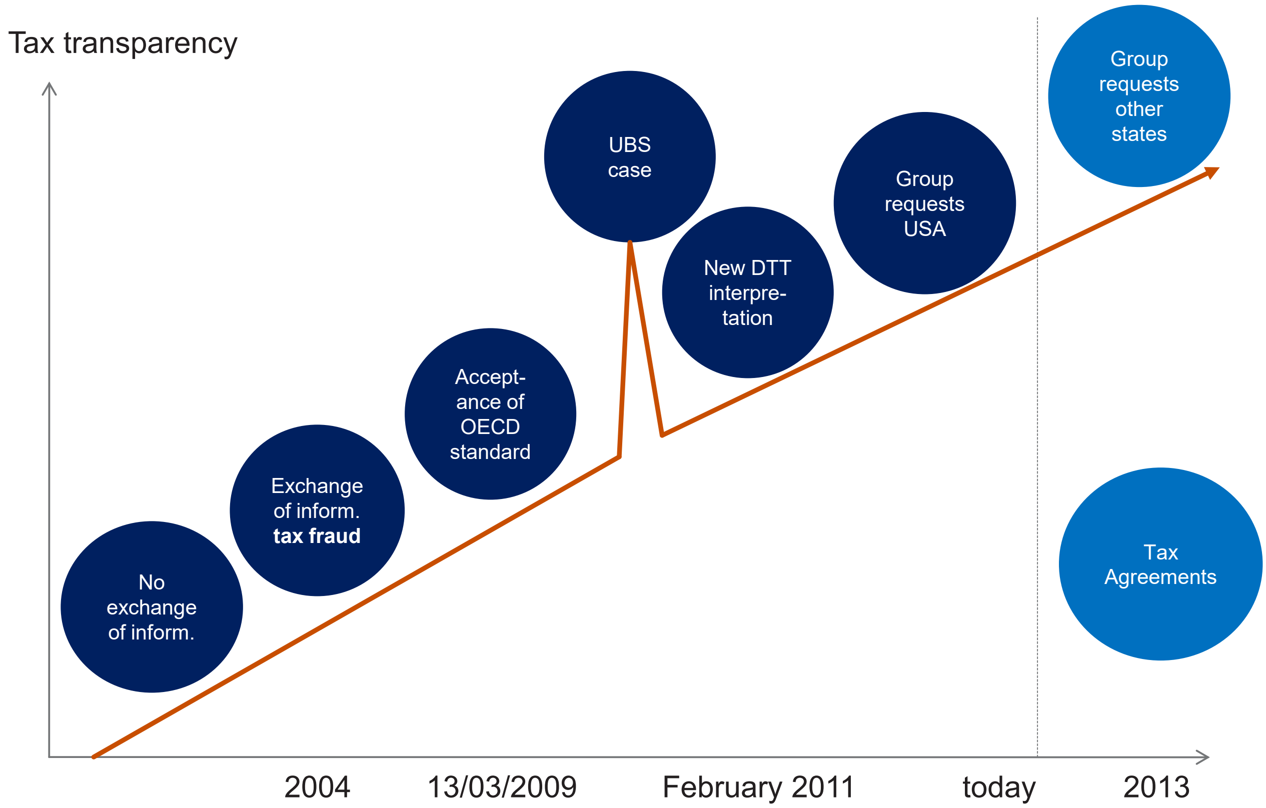
Agenda

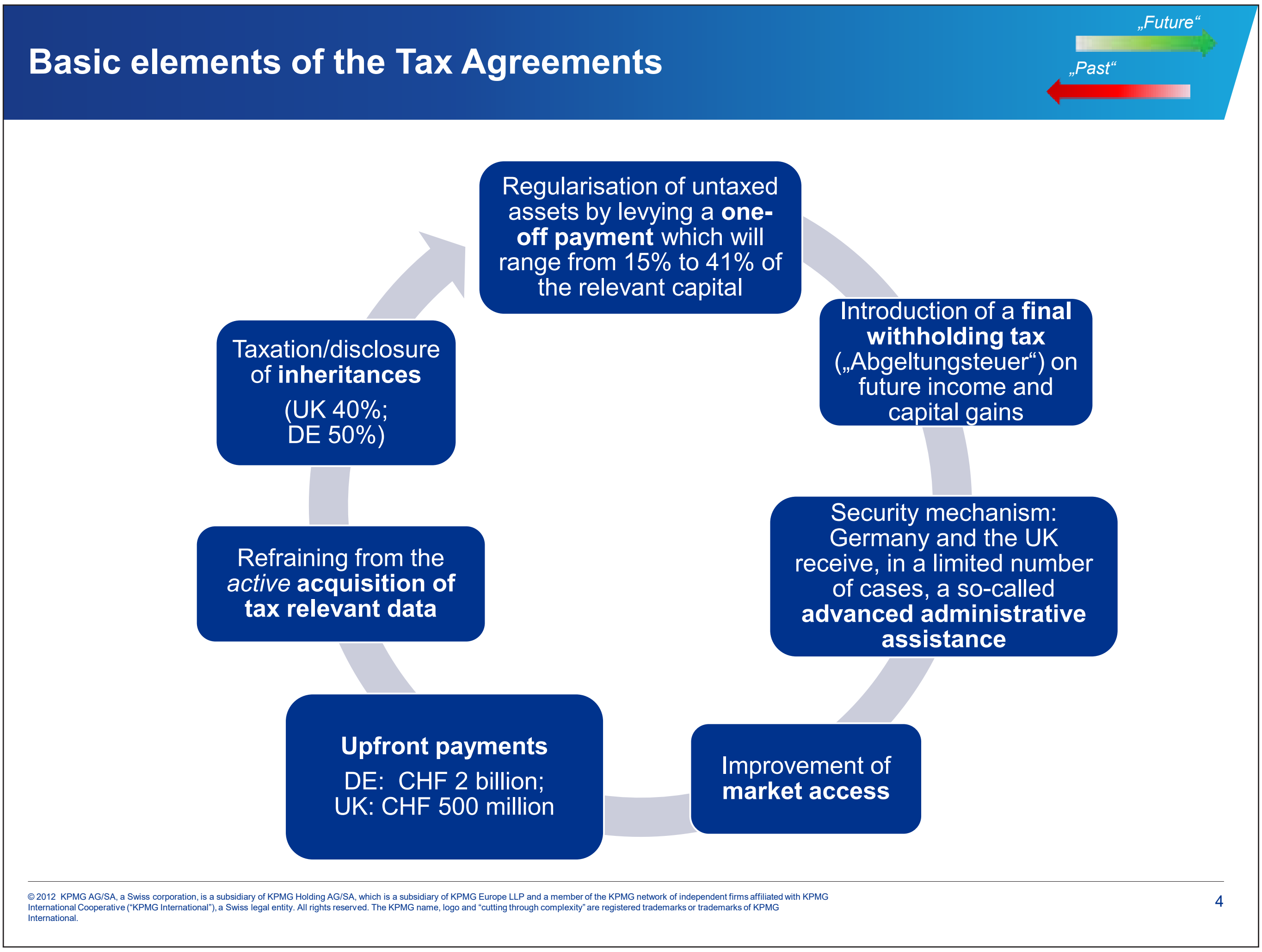
- **Introduction**
- **Regularisation of the past**
  - Characteristics of the Tax Agreement with the UK
- **Taxation of future income and capital gains**
  - Treatment of Non-Doms
- **Taxation of inheritances**
- **Comparison of the Tax Agreements**

cutting through complexity

Introduction

The pressure for more tax transparency remains high




Basic elements of the Tax Agreements
„Future“
„Past“
Regularisation of untaxed assets by levying a one-off payment which will range from 15% to 41% of the relevant capital
Introduction of a final withholding tax („Abgeltungsteuer“) on future income and capital gains
Security mechanism: Germany and the UK receive, in a limited number of cases, a so-called advanced administrative assistance
Improvement of market access
Upfront payments
DE: CHF 2 billion;
UK: CHF 500 million
Refraining from the active acquisition of tax relevant data
Taxation/disclosure of inheritances
(UK 40%;
DE 50%)
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Timeline

„Future“

„Past“

2011	2012	2013

August 2011 - April 2012: **Initialling / signing of the Tax Agreements**

July: **Publication of draft Instructions**

1/1/13: **Planned entry into force**

31/5/13: **Planned debit of one-off payment**

Levying of final withholding tax / disclosure

→ The UK and Austrian Tax Agreements will enter into force on 1 January 2013

→ In Germany, the current federal government no longer has a majority within the Federal Council ("Bundesrat") which is why a rejection of the Agreement is possible

→ **It is possibly only in November/December 2012 finally clear if the German Tax Agreement will enter into force on 1 January 2013**

The alternatives for the past and the future

„Future“
„Past“

„Past“ | „Future“

1 One-off payment
2 Voluntary disclosure
3 Voluntary disclosure (DE/AT) / LDF (UK)

1 Final withholding tax
2 Voluntary disclosure

- Resident in DE/AT/UK on 31/12/2010 and
- account with Swiss paying agent
  - on 31/12/2010 and
  - on 1/1/2013 (DE/AT) and 31/05/2013 (GB), respectively

Resident in DE/AT/UK as from 2013

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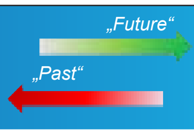
Affected persons



Affected persons	Exemptions
Individuals resident in the UK, Germany and Austria	• Non-UK domiciled individuals
Domiciliary companies (i.e. legal entities, foundations, trusts)	• Exercising a trading or manufacturing activity or another form of commercial operations • Proofing that it is itself subject to effective taxation • Treated as non-transparent with reference to its income under DE/AT/UK law • Irrevocable discretionary trusts and foundations • CH/DE/UK/AT corporate entities, CH foundations and AT private foundations
Insurance wrappers	• “Real” life insurance contracts

Treatment of trusts and family foundations under the Tax Agreement

„Future“

„Past“

For the purpose of the Tax Agreement, a trust or family foundation is generally deemed as transparent, **unless there is no established beneficial ownership of the assets**

- When opening a business relationship, Swiss paying agents have to determine and appropriately document the nature of the trust or the family foundation:
  - Revocable vs. irrevocable trust or family foundation
  - Discretionary vs. non-discretionary trust or family foundation
- Paying agents may rely on the details provided by the contractual party in form T or A

→ Banks may act based on the information which they have received in accordance with the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB; in particular Form A and/or T) governing the verification of the identity of a contracting party as part of the process for establishing business relationships.

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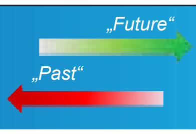
Revocable trust / family foundation



- If a trust or family foundation is documented by the paying agent as revocable, then
  - → regardless of whether it is discretionary or non-discretionary,
  - → the settlor/foundation creator or persons with rights of revocation are deemed to be beneficial owners and thus
  - → are relevant persons for the purposes of the Tax Agreement

→ Revocable trusts / family foundations are treated as transparent under the Tax Agreement

Irrevocable and non-discretionary trust / family foundation

„Future“

„Past“

- If a trust or family foundation is documented by the paying agent as irrevocable and non-discretionary, then
  - → the person documented when the beneficial owner was established by the paying agent is deemed to be the effective beneficial owner and thus
  - → a relevant person for the purposes of the Tax Agreement

→ Irrevocable and non-discretionary trusts / family foundations are treated as transparent under the Tax Agreement

Irrevocable and discretionary trust / family foundation

„Future“

„Past“

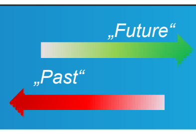
- The Tax Agreement in principle does not apply to trusts and family foundations that are documented as irrevocable and discretionary, as there is no set beneficial owner (unless the trustee qualifies as paying agent)

→ Exception: There are doubts about the declaration made by the contracting party

- Doubts about the declaration made by the contracting party may arise in particular where the paying agent is aware of one or more of the following circumstances:
  - The settlor has signatory powers or a general power of attorney
  - The settlor is sole director of an underlying company
  - The settlor rather than the contracting party regular issues instructions to the paying agent
  - In conjunction with one of the above, the settlor has unrestricted investment powers and takes all investment decisions alone
- If in such case the Trustee or foundation board cannot document (tax opinion) that there is no set beneficial owner according to DE/ATUK law, the beneficiaries documented in the Form T are deemed to be the beneficial owners

→ Irrevocable and discretionary trusts / family foundations documented through Form T are **under certain conditions** treated as **not** transparent under the Tax Agreement

Which assets are covered by the Agreements?



Assets covered by the Agreements

- Gold and precious metal accounts
- Fiduciary investments
- Physical precious metals in collective or individual custody
- All forms of securities, debt instruments and rights (e.g. equities, bonds, etc.)
- Options
- Units in collective investments, regardless of their legal structure
- Structured products and convertible bonds (e.g. certificates)

Assets not covered by the Agreements

- The contents of safe deposit boxes
- Assets held in insurance policies regulated by the FINMA
- Real estate and land
- Movable assets (items such as artworks and jewellery)
- Assets and documents held in an open or closed custody account at the paying agent with no valuation
- Tied assets that form part of retirement benefit savings (pillars 2a and 3)

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