INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

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National Report of Switzerland (private clients)

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INTRODUCTION

1. Private Clients

As the world becomes increasingly globalised, it is becoming easier for everyone to hold assets through structures and to make and manage investments through financial institutions outside of its own country of residence. International organisations such as the OECD and the FATF, institutions such as the EU and of course the USA are at the forefront when it comes to combatting tax evasion, money-laundering and terrorist financing. Due to this development, the last several years have brought a new wave of greater financial transparency.

With more than 90 countries already committed to the OECD's Common Reporting Standard (Standard for Automatic Exchange of Financial Account Information), the first stage amongst the early adopters will come into effect on 1 January 2016. The EU recently introduced its new anti-money laundering (AML) rules, namely the Fourth EU Anti-Money Laundering Directive ("4AMLD"). The main novelty of the new Directive is the introduction of a central UBO-register, a public register which identifies the ultimate beneficial owners (UBOs) of companies and trusts. EU Member States have until June 26, 2017 to transpose the requirements of the 4AMLD into national law. Then of course financial institutions are faced with the long arm of the US-legislation in the form of the Foreign Account Tax Compliance Act, known as FATCA.

At the same time, the world is becoming more and more dangerous to any wealthy individual. Unjustified law suits, invented claims, bankruptcy of whole countries, asset seizure, increasing liability risks or the risk of kidnapping, whatever the reason may be, the need for anonymous asset protection structures is bigger than ever.

When planning their individual asset protection structure, international families, high net worth individuals and their advisers are confronted with these changes in new tax and asset reporting regimes and reporting rules. Especially where anonymity is sought, these rules can have far reaching consequences. For the unwary, these new regulations are a potential minefield. Advisers are looking for ways how to lessen the impact of these rules.

Now, how are these issues dealt with in your country? In this section, we would like to find out what kind asset protection structuring possibilities your country offers and how these are affected by the recent international and national compliance and filing requirements.

2. Tax

Simultaneously with the introduction of more transparency regarding the structuring of privately held assets, the international developments also strive to more transparency regarding the income and tax planning. Multinationals but also privately owned companies held by the same international families and high net worth individuals who are subject to the transparency requirements as described above, are also faced with increasing

transparency and compliance requirements regarding their tax position and exchange of information between states.

On 5 October the OECD published the final reports regarding the Action Plan Against Base Erosion and Profit Shifting ("BEPS"). The BEPS Action Plan is aimed to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created. The background furthermore lies in three key pillars identified by the OECD: introducing coherence in domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty. The proposed actions by the OECD regard inter alia Country-by-Country reporting, mandatory disclosure of tax schemes and international exchange of information between states.

On 6 October 2015 unanimous agreement was reached between the EU Member States on the automatic exchange of information on cross-border tax rulings. According to the European Commission, the lack of transparency on tax rulings can be exploited by certain companies in order to artificially reduce their tax contribution. Where currently Member States have the discretion to decide whether information such as a tax ruling should be exchanged with another Member State, the proposed amendment to Directive 2011/16/EU will require Member States to automatically exchange information on their tax rulings. The deadline for implementation of the amendment is the end of 2016 as the Directive will come into effect on 1 January 2017.

Although the transparency requirements on tax planning aim to tackle tax avoidance and aggressive tax planning, all tax payers, "aggressive tax planners" or not, will be faced with an increased administrative burden. Their advisors operate in an ongoing changing environment and are challenged by the international developments when advising their clients on the best tax strategy and e.g. on whether it is still beneficial to obtain a tax ruling. Perhaps it can be questioned whether the key pillar of certainty is still supported.

Now, how are these issues dealt with in your country? In this section, we would like to find out in what way your country is introducing the transparency requirements proposed by the OECD and the European Commission besides the requirements that already exist and how these developments may affect the future tax strategy of your clients.

1. Private Clients

1.1. Asset Protection – structuring possibilities and other means of asset protection

1.1.1. *Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?*

Swiss law belongs to continental law systems, which do not have any trusts in their legislation. As such, it is not possible to speak of a "Swiss trust". This being said, Switzerland ratified the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition in 2007. Since then, Swiss Courts and authorities must recognize trusts, even though those are governed by foreign rules.

It is interesting to note that Switzerland has implemented *ad hoc* rules for the registration of real estate held by a trust and for the bankruptcy of a Swiss trustee. The former rules allow the registration of Swiss real estate in the Land Register (mandatory) under the trustee's name indicating expressly the trust relationship. This protects the beneficiaries as it prevents the seizure of the real estate in case of bankruptcy of the trustee.

In this same framework, special rules have been implemented in the Swiss bankruptcy laws to ensure that assets under trust are duly ring-fenced for the sake of protection of beneficiaries.

Swiss law does not provide for any express restriction for the settlor from also being beneficiary of a trust relationship (unless this is openly abusive). The question of whether this is lawful is ruled by the applicable law to the trust relationship, which cannot be Swiss law.

1.1.2. *Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?*

Swiss law only allows the constitution of private family foundations under very restrictive conditions. Their creation is exclusively permitted for education purposes or support in case of economic needs for family members. This very restrictive framework is not an incentive for the creation of Swiss family foundations, which are seldom contemplated nor created in practice.

Foreign private foundations (most cases concern foundations created under the laws of Lichtenstein or Panama detaining Swiss assets) are formally recognised and much more used than Swiss ones in practice. A typical structure will involve a foreign private foundation with a Swiss bank account, with or without an underlying company. Generally, according to the law applicable to such foreign foundations, there are no restrictions for the founder from being a beneficiary of a private foundation.

The tax consequences of the creation of a foreign foundation (or a trust) by a Swiss resident must however be carefully considered beforehand (see below 1.1.7.).

Also, foreign foundations should not be used in the purpose of avoiding mandatory law provision, *e.g.*, to avoid forced heirship rules or to proceed with undue transfers to reduce his own solvency vis-à-vis creditors; the constitution of such foundations having this purpose in mind can be formally and successfully challenged before Swiss courts.

1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

Swiss law offers various possibilities to set up structures granting some efficiency for asset protection and ring-fencing, as:

- Creation of a Swiss company with limited liability (*société anynome, Aktiengesellschaft*), offering the advantage that shareholders are not public and can appoint fiduciary directors who are publicly registered with the Commercial Registry of the relevant Swiss canton. The shareholder can keep the shares without publicly disclosing his identity. He can also decide to waive his rights on the company's assets to enhance the efficiency of asset protection, *e.g.* by transferring the shares of the asset holding company into a foreign foundation or trust and appointing himself as beneficiary. However, if this is equivalent to a sham or results to be abusively detrimental to third parties such as creditors, this may be challenged before Swiss courts (see below 1.1.6.). Also, before considering such transfers of assets, tax consequences must be considered closely and carefully (a ruling with Swiss tax authorities is generally highly recommended for this kind of situation).
- Similarly, limited liability Swiss companies can be used to hold real estate and offer a certain ring-fencing protection, but no anonymity.
- Family Swiss holding companies might also be created to hold complex and valuable family assets. This can be particularly effective from a tax and family-governance point of view. A tailor-made approach is the rule in these cases.

1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

Swiss case law has implemented the concept of piercing the corporate veil (or *Durchgriff* in the commonly used German word in Switzerland).

As an exception to the general principle of the proper and legally independent identity of a company, it is possible according to Swiss case to disregard the existence of the entity in place. This is however only possible under very specific conditions, *i.e.*, where the company is used by a unique shareholder or by a shareholder with a controlling stake as an instrument to avoid mandatory law provisions and to obtain unlawful undue advantages.

E.g., this is namely the case when a shareholder transfers significant assets to a company that he controls to escape debt collection proceedings or judgment enforcements. Assets transferred in this way can be subject to freezing injunctions ordered by Swiss Courts (see below 1.1.6.).

Swiss judges also tent to sanction abuse case in a similar was as judges from Common Law jurisdictions do with the shame rules. Swiss Courts will be concerned where the abuse can be demonstrated and will balance the legal entity's right with the behaviour of the settlor and his practical influence on the set up.

1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non-)recognition of foreign judgments) and have there been any changes to these principles recently?

Switzerland has undeniably an old tradition of secrecy and discretion in keeping assets and ensuring their protection. This being said, this country has known dramatic changes in its banking secrecy policy due to the changes occurred in the international tax law landscape. As of today's situation, Swiss banking secrecy is closely connected with tax compliance and no asset protection is offered to foreign residents for tax avoidance purposes.

Switzerland knows general rules for the recognition of foreign judgments and has generally not a restrictive approach on it. As member of the Lugano convention (equivalent to the Brussels I Regulation), Swiss courts basically recognise judgments from EU-States automatically.

This being said, the protection of asset and secrecy is however strong thanks to *ad hoc* law provisions that provide protection. Under certain circumstances,

it is possible to plead that a foreign judgement should not be recognised because it goes against Swiss fundamental law provisions.

The infringement of banking secrecy without being authorised by the law or an official authority is a criminal offense being punished with up to three years imprisonment. Also, the infringement of professional secrecy by *e-g-*, a lawyer or a doctor, or the undue disclosure of state secrets by State employees, are punished in the same way.

The recent condemnation of René Falciani (notorious ex-HSBC IT having stolen thousands of clients' name and having disclosed them to foreign authorities) by a federal Swiss criminal court to a 5-years imprisonment sentence shows that the practice is still very restrictive in Switzerland and that, despite recent changes occurred in the field of the banking secrecy vis-à-vis third states' tax authorities, protection for banking and business secrecy and privacy is still effectively granted. Also, Switzerland disposes of a strong legislation regarding data protection; Swiss courts a generally likely to grant strong protection against any form of abuse or undue transmission of personal data.

Finally, it is also interesting to note that one of the current Swiss hot topics is a public initiative aiming at a stronger protection of tax and banking data of mainly Swiss residents. It is still unknown when Swiss population will be called to vote on this initiative. This shows that there still is a great tradition of respect of secrecy and privacy in Switzerland and that a vast portion of the population regrets the broad concessions made in favour of new transparency standards.

1.1.6. *Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?*

In a well-known case concerning interim measures ordered in a billion-dollars divorce case (5A_259/2010, decision dated 26 April 2012, so called Ryboloviev case), opposing a Russian tycoon to his wife in a very litigious divorce, which was finally settled in 2015 through a private and confidential transaction, the Swiss Supreme Court (*Tribunal fédéral, Bundesgericht*) declared as valid very wide freezing injunctions issued in Geneva on assets located abroad and previously transferred to a trust created under the laws of Cyprus by a Swiss resident.

The Swiss Supreme Court protected and confirmed such interim measures saying that the theory of piercing the corporate veil (*Durchgriff*) could be used as an analogy when there are good grounds to pretend that the settlor of the trust has created it only to escape his creditors and to unlawfully hide his assets. Being in the framework of interim measures where the judge has to make a decision quickly and urgently to preserve the claimant's rights, the application of general principles of Swiss law, even though the latter is not

applicable to the involved trust, is justified, as long as the final results are not shocking.

This decision was much criticised as Swiss courts did not analyse the issue at hand under the applicable law of trust and on the basis of general principles of trust law, such as sham, using instead general principles of Swiss company law, regardless of the fact that Switzerland has ratified the Convention on the Law Applicable to Trusts and on their Recognition.

This judgment shows that assets protection structures may be successfully be challenged before Swiss Courts when it can be argued that they are abusive. It also shows that Swiss jurisdiction is even available, under certain circumstances, to obtain judgments with effects going beyond national borders.

This being said, Swiss Courts have also recognised in other cases the validity of genuine trusts, where the settlor separated from a part of his wealth for the benefit of close persons, such as his children. In a quite recent case held before the Court of Geneva (ACJC/15.09.2011), the criminal and civil attachment of trust funds was declared as void by the competent Court for it was judged that the trust was genuine and that it was no longer possible to claim that the settlor had transferred the underlying assets into the trust to disfavour his creditors. On the contrary, the trust had been set up years before for the sake of the settlor's son, affected by a disease, with the consequence that the funds were not part of the settlor's (suitable to be seized) wealth anymore.

1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

When setting up a private foundation or a trust, tax consequences must be carefully analysed with regard to the transfer of assets into these structures.

Swiss tax authorities might indeed consider that the transfer of assets into a foundation (or to a trustee) is equivalent to a donation to a third unrelated party and tax this as such, with potentially very high gift tax rates applied.

However, rulings can be negotiated with competent tax authorities to ensure that lower tax rates are applied as long as the beneficiaries of the foundation (or the trust) are the founder's spouse or descendants (in this case, as most Swiss cantons apply a zero-tax rate for donations to spouses or descendants, the ruling's objective is to obtain a tax-free transfer of assets when setting up a foundation or a trust). If a ruling is not obtained to mitigate tax consequences, not only the transfer of assets may be (heavily) taxed, but all future distributions of assets to the beneficiaries of the structure will probably be deemed as income and taxed as such.

Further difficulties may arise when transferring real estate into trusts or foundations, since other tax (such as land transfer taxes etc.) also come into play.

Tax issues must accordingly be reviewed very carefully before proceeding with a transfer of assets in this framework. This may consist in tailor-made solutions for significant values; the assistance of qualified Swiss lawyers is necessary in this framework.

1.2. National and international transparency requirements

1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

On 27 May 2015, Switzerland and the EU signed an agreement regarding the introduction of the global standard for the automatic exchange of information in tax matters. The automatic exchange of information between Switzerland and the 28 EU member states will begin in 2018 with data of 2017 (so retroactively for 2017 as a general rule).

1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

The agreement between Switzerland and the United States on cooperation to simplify the implementation of FATCA entered into force on 2 June 2014.

The Federal Council (Swiss federal government) brought the corresponding implementing act into force on 30 June 2014. FATCA implementation in Switzerland is based on Model 2, which means that Swiss financial institutions will disclose account details directly to the US tax authority with the consent of the US clients concerned. The United States will have to request data on recalcitrant clients through normal administrative assistance channels.

The Federal Council approved the mandate for negotiations with the United States on switching to Model 1 on 8 October 2014. The mandate provides for the automatic exchange of information. It is still unknown at the present time (February 2016) when there will be a corresponding agreement.

1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

As from July 2015 and January 2016, Switzerland has implemented FATF standards into its own legislations through many ad hoc changes in its main legislation body.

The main changes are the following:

- Duty to report to the company the acquisition of bearer shares (of an unlisted Swiss company);
- Duty to report to the company (but not to authorities though) the identity of the ultimate beneficial owner (acting alone or together with third parties) who exceeds 25% of the share capital or voting rights of the company;
- Duty of the company to keep a register of bearer shareholders and of ultimate beneficial owners

In case of breach of these duties, rights attached to the shares are suspended and said shares cannot generate any financial benefits (dividends and the like).

It is worth mentioning that, despite these new restrictions and the consequent enhanced transparency, the board of directors of a Swiss company will not be held responsible if, despite its best efforts, the notifications made to the company regarding the identity of the ultimate beneficial owner end up being false. Only in case of serious doubts should the board make inquiries on the received information that has been reported into share register.

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In addition, new provisions have been introduced into Swiss law to implement the FATF recommendations. The main changes are the following:

- Registration with the Commercial Registry of a Swiss canton of all existing Swiss family foundations;
- In the framework of any transactions carried out in Switzerland, the financial intermediary must know the name of the beneficial owner and identify his/her identity with the due care as imposed by the specific circumstances;
- Enhanced possibility to convert bearer shares into registered shares;
- Introduction into Swiss criminal law of the so-called preliminary infringement of anti-money laundering provisions. In tax matters, this is the case when, following false declarations or a tax fraud structure,

the amount of avoided tax amounts to at least CHF 300,000 (for any tax period);

- Enhanced duty of diligence with PEP in any kind of business relationship or transaction;
- Enhanced due diligence duties for professionals accepting payments of over CHF 100,000 in cash.
- Enhanced powers of control for the Swiss AML-bureau of communication (central bureau receiving all announces of possible money laundering activities from the involved financial intermediaries being in a legal obligation to denounce any suspicions of this kind).

1.2.4. *Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?*

No, bearing in mind Switzerland is not a member state of the EU.

1.2.5. *If not, does your jurisdiction know similar shareholder registers?*

See above 1.2.3.

1.2.6. *Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?*

Automatic exchange of information might also be introduced at a Swiss level, although it is still unclear whether this will indeed be the case because of recent changes in the Swiss government, leading to a politically less intrusive approach in this framework.

As in every OECD country, the trend shows that pure and full anonymity is less and less guaranteed. However, if such anonymity is not as strong as it used to be towards tax and/or official authorities, it is still very efficient in Switzerland towards third parties, *e.g.*, third parties with no official situation wanting to gather information of the shareholding structure of a company.

Swiss Company Registries still guarantee the full anonymity of the shareholder of a Swiss company with limited liability (either with registered or bearer shares; so called *société anonyme* or *Aktiengesellschaft*).

The Swiss system also offers a great discretion regarding the very limited publicity of tax returns, which are not public; a citizen can only have access to other peoples' tax returns on the basis of exceptional and well justified grounds (the practice varies from one Canton to another but one can say that, a general rule, tax secrecy is well preserved in Switzerland).

Given the current political climate in Switzerland, no further immediate threats to privacy are expected in the next years, although changes may occur

very quickly in this framework due to an increased international pressure in Switzerland, forcing it to implement new standards. This is however not the case at present and standards should not go beyond the changes set out in the present document.