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Who is a Beneficial Owner?

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Trusts and Banking Relationships – Who is a Beneficial Owner?

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Overview of the problem

The creation of a business relationship between a trustee and a bank[1] is subject to special considerations. These relate less to the relationship between trustee and bank under civil law, rather in the definition of the so-called beneficial owner who is also designated as a person acting as beneficial owner. The concept of the beneficial owner first arises when entering into a banking relationship because the bank must determine who this is in order to comply with legislation concerning the fight against money laundering and the financing of terrorism.[2] The standard forms used by the banks to this end are forms A and T.[3]

Moreover, the concept of the beneficial owner is in practice often erroneously used (and ratification of the Hague Trust Convention[4] changed little in this regard) as a synonym for the concept of the beneficiary of a trust.[5]

The concept of beneficial owner takes on increased significance in tax law, as currently seen in the context of the administrative assistance on the part of the Internal Revenue Service of the United States concerning UBS AG[6] and the Federal Administrative Courts case-law deriving therefrom, and also in respect of the interpretation of the concept of

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1 When a bank customer wishes to establish a trust or when a bank proposes establishment of a trust to the bank customer, the bank, or together with auxiliary personnel concerned with establishment and if need be, the administration of a trust, subsequently offers to the bank customer, or when the bank offers bank asset management services to the trustee, separate questions of law arise that will not be addressed at this point. Cf Oliver Arter, 'Die anwaltliche Tätigkeit bei der Errichtung and Verwaltung von Trusts', in *Commissione ticinese per la formazione permanente dei giuristi CFPG (ed.): Trust e istituti particolari del diritto anglosassone* (Basle, Helbing Lichtenhahn, 2009), p 35 et seq., as well as Oliver Arter, 'Aspekte der Vermögensverwaltung für Trustvermögen', ST 2005, p 592 et seq.

2 Cf in particular the federal law on combating money laundering and terrorist financing in the financial sector, SR 955.0; Ordinance of 8 December 2010 of the Federal Financial Market Supervisory Authority on the Prevention of Money Laundering and Terrorist Financing (FINMA Money Laundering Ordinance 3, MLOFINMA 3) AMLA-FINMA, SR 955.033; Ordinance of 18 November 2009 on the professional exercise of financial intermediation (VBF), SR 955.071; Federal Financial Market Supervisory Authority FINMA: Circular 2011/1, Financial intermediation according to the AMLA, Exposés on the Ordinance on the Professional Practice of Financial Intermediation (VBF), 1 January 2011; The Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) between the Swiss Bankers Association (SBVg) on the one hand and the signatory banks ('Banks') on the other hand of 7 April 2008, hereinafter referred to as 'CDB 08'.

3 Cf CDB 08 (fn 2 above).

4 Convention of 1 July 1985 on the Law applicable to Trusts and on their Recognition, SR 0.221.371.

5 Concerning the meaning of this concept in Swiss Civil law, cf Guy Stanislas, 'Ayant droit économique et droit civil: le devoir de renseignement de la banque', SJ 1999, 413 et seq., as specifically in connection with rights to information and trusts Claudio Weingart, *Anerkennung von Trusts and trustrechtlichen Entscheidungen im internationalen Verhältnis – unter besonderer Berücksichtigung schweizerischen Erb- and Familienrechts* (Zurich, Schulthess, 2010), p 123 et seq.

6 Agreement between the Swiss Confederation and the United States of America concerning a request for administrative assistance from the Internal Revenue Service of the United States of America concerning UBS AG, a public limited company incorporated under Swiss law, SR 0.672.933.612.

beneficial owners[7] pursuant to the agreement on the taxation of savings income with the EU[8] or most recently regarding the concept of the concerned person according to the agreement between the Swiss Confederation and the United Kingdom on common principles of good governance in tax matters[9] as well as the agreement between the Swiss Confederation and the Federal Republic of Germany on common principles of good governance in tax matters and financial markets.[10]

Ultimately, the concept, which will not be explored further, is significant with regards to disclosure requirements pursuant to the Swiss Securities and Exchange Act.[11]

The beneficiary of a trust

The nature of trusts can vary according to various criteria. Express trusts,[12] trusts by

7 Cf Art 4 of the Agreement between the Swiss Confederation and the European Community on measures of Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, SR 0.641.926.81. Cf on trusts and the taxation of savings income: Eidgenössische Steuerverwaltung, Wegleitung zur EU-Zinsbesteuerung (Steuerrückbehalt und freiwillige Meldung), (Bern 1 January 2011), para 79 et seq:

> '[79] Within a trust relationship, the trustee is considered as a beneficial owner within the meaning of the agreement or they are paying agent.
>
> [80] The trustee is the paying agent when they are obliged as such to direct the revenue stream from the trust estate to the legitimate interests. This is particularly the case with trusts of the "fixed interest trust," "life interest trust", "interest in possession trust" and "bare trust" types.
>
> [81] In all other cases, the trustee is basically considered as authorised within the meaning of the agreement. [...].'

8 Agreement between the Swiss Confederation and the European Community providing for regulations, on measures of Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, SR 0.641.926.81.

9 Cf in particular Art 2(h) of the agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on common principles of good governance in tax matters:

> '(h) 'concerned person' means a natural person residing in the United Kingdom who: as contractual partner of a Swiss paying agency account/deposit holder is also beneficial owner of the Assets; or in keeping with the valid Swiss due diligence of a Swiss paying agency based on and in consideration of all of their known circumstances their identification effected is validated as authorised person of the assets to be held:
>
> – A domiciliary company (in particular legal persons, companies, institutions, foundations, trusts and similar associations, which do not engage in any trade, manufacturing or any other commercial activities); or
> – of a life insurance company in connection with a life insurance wrapper; or
> – another natural person that controls an account or deposit with a Swiss paying agency.
>
> A domiciliary company in the aforementioned sense is exceptionally considered an authorised person when evidence is produced that on the basis of the law place where it is established or where the actual administration of the general applicable rules concerning direct taxes are effectively assessed themselves or under the law of the United Kingdom are not considered transparent regarding their income.
>
> A person residing in the United Kingdom is not considered a concerned person with regard to assets of associations of persons, economic units, trusts or foundations, when no beneficial ownership is established in such assets, eg on the basis of the discretionary nature of the corresponding Agreement.'

10 In the Agreement between the Swiss Confederation and the Federal Republic of Germany on cooperation on tax matters and the financial market, we find in Art 2(h) a provision similar to that found in the agreement between the Swiss Confederation and the 'United Kingdom of Great Britain and Northern Ireland on common principles of good governance in tax matters. Cf above fn 9 regarding domiciliary companies under German tax law cf, eg Heiko Kubaile and Hendrik Kuhl, 'Neueste Entwicklungen im deutschen Steuerrecht', StR 2011, 878 et seq.

11 Cf, eg the judgment in the case *Ronny Pecik and Georg Stumpf v. Sulzer AG and Federal Financial Market Supervisory Authority FINMA* concerning reporting requirements under stock exchange law, Federal Administrative Court, judgment of 9 November 2010, B-1215/2009. Cf relating to beneficial owner in stock market company law Dieter Dubs and Urs Brügger, 'Transparenz im Aktionariat durch (objektiv-) geltungszeitliche Interpretation des Art. 685d (2) OR – Die Offenlegung of the wirtschaftlich Berechtigten als Anerkennungsvoraussetzung, Zugleich (auch) ein Ansatz zur Verhinderung des "Empty-Voting"', SZW 2007, 282 et seq., 284 et seq.

12 Trusts that are set up through unilateral expression of the settlor.

operation of law[13] and statutory trusts[14] differ in terms of the manner in which they are incorporated. Express trusts in fixed trusts and discretionary trusts differ in terms of the type of authorisation of the beneficiaries to the trust. The beneficiaries of fixed trusts have a definable, fixed claim to a share of the trust proceeds or trust capital.[15] By contrast, discretionary trusts have no definable claim to a share of the trust proceeds or trust capital. Rather, it is at the trustees' discretion to determine the class of a beneficiary to which, if any, trust proceeds or trust capital received are to be paid out or who in the class of beneficiaries, for a determined period of time or duration, shall be included or excluded.[16] Further distinctions can be made for discretionary trusts, such as whether the trustee is obliged to distribute trust proceeds or not, or if he merely has the discretionary power to decide to whom they shall be paid out,[17] or whether the trustee can additionally decide, whether and to what extent distributions, if any, will be made.[18],[19] A fundamental difference between a fixed trust and a discretionary trust is that a beneficiary of a fixed trust has a claim to their share in the trust property against the trustee, whilst with a discretionary trust they merely hope that the trustee will exercise his authority in their favour. There can be no claim against the trustee until the trustee of a discretionary trust has exercised his authority over the disbursement of trust proceeds or trust capital in favour of a beneficiary.

Provisions relating to the fight against money laundering and terrorism in connection with trusts

A bank's due diligence procedures under the federal law on the fight against money laundering and terrorist financing in the finance sector states, inter alia, that a financial intermediary *must identify the contracting party*[20] and *must ascertain the person acting as beneficial owner*.[21] The obligations concerning the contracting party and those of the person acting as beneficial owner are thus distinct: the contracting party must be identified by means of documentation with probative value, the person acting as beneficial owner must be ascertained by means of information from the contracting party or its representative but without being identified.[22]

13 Trusts by operation of law. In trusts by operation of law, further distinctions are made between resulting trusts (ie trusts that come into existence on the basis of a specified contractual conduct of the settlor) and constructive trusts (ie trusts that arise independently of the will of the settlors based on the discretionary adjudication).

14 By statutes through trusts created, for example, through bankruptcy, in the event of death without a will or joint ownership of property.

15 D Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law relating to Trusts and Trustees* (London, Sweet & Maxwell, 2010), p 84 et seq.; P H. Pettit, *Equity and the Law of Trusts* (Oxford University Press, 2009), p 76; A J Oakley, *Parker and Mellows: The Modern Law of Trusts* (London, Sweet & Maxwell, 2008), p 43.

16 Pettit (fn 15), pp 76, 77 et seq.; Hayton, Matthews and Mitchell (fn 15), p 85; Oakley (fn 15), p 43 et seq.

17 A so-called exhaustive discretionary trust.

18 A so-called non-exhaustive discretionary trust.

19 Pettit (fn 15), p 77 et seq.

20 Cf Art 3 AMLA, in particular Art 3(1) AMLA:
'The financial intermediary, upon entering into a Business relationships, must identify the contracting party on the basis of a conclusive document. When the contracting party is a legal entity, the financial intermediary must make known the power of attorney arrangements of the contracting party and verify the identities of the persons recorded in the name of the legal person of the business relationship.'

21 Cf Art 4 AMLA, in particular Art 4(1)(a) and (b) AMLA:
'The Financial intermediary must obtain a written statement to that effect from the contracting party stating who the person acting as beneficial owner is, when:
a. the contracting party is not the same as the person acting as beneficial owner or if there is any doubt thereof;
b. that the contracting party is a domiciliary company.'

22 Barbara Brühwiler and Kathrin Heim, 'Vereinbarung über die Standesregeln zur Sorgfaltspflicht der Banken 2008' (Zurich/Basle/Geneva 2008), n 4 to Art 3 CDB 08.

Duties of the contracting party

The contracting party to be identified

The contracting party to be identified is the person with whom the bank enters into a business relationship.[23] The contracting party in trusts is the trustee.[24]

Authorisation for establishing a business relationship with a bank

Background

The trustee must further *confirm in writing*, pursuant to the guidelines of the Swiss Bankers Association, that he is *authorised* to establish a *business relationship with a bank* for the purpose of the trust.[25]

The intention of such confirmation is not readily understandable.[26] We may assume that the provision depends on Art 3(1) AMLA. In particular, Art 3(1) AMLA stipulates that the financial intermediary must not only identify the contracting party (provided that it is a legal entity) purely on the basis of documentation with probative value, but must also take note of the contracting party's power of attorney. Since powers of attorney cannot be recognised by trusts as they are generally not registered with bodies similar in nature to company registers, confirmation of the trustee may serve as the equivalent for this purpose.

Ownership of a trust's assets under civil law

Trusts are based on a legal relationship involving a high degree of trust, by which the trustee owns the fixed and/or movable assets transferred from a settlor, provided that they are held by third parties or for a specific purpose.[27] Anglo-Saxon trusts have no legal personality,[28] which is why the trustee is the owner of the assets held in trust under civil law.[29] Correspondingly, the Hague Trust Convention decreed that the rights regarding the trust's

23 Cf Art 1(1) Swiss Code of Obligations.

24 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt. 106, para 15.3 implementing provisions of Art 2 CDB 08; Schweizerische Bankiervereinigung, 'Kommentar zur Vereinbarung über die Standesregeln zur Sorgfaltspflicht der Banken (CDB 08)' (Basle 2008/2009/2011), Ziff 15.

25 Cf para 15.3 implementing provisions of Art 2 CDB 08.

26 See practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2001–2005, Pt. 3.13: 'since a trust displays no legal character, neither can it enter into any contract nor, in particular conduct any banking relationship. The trustee thus emerges in their role of (fiduciary) owner of the trust assets in the place of the trust. The trustee is consequently account owner and contractual partner of the bank. The identification requirements concern the trustee, for whom it is generally a question of a trust company. The bank must obtain the requisite identification document from the trustee pursuant to Art 4(2)(a) VSB (Extract from the companies' register or equivalent statement). In the event that the trustee is not a legal but rather a natural person in the areas of the purpose and scope of the due diligence agreement, that they must be identified pursuant to the generals rules governing the identification of natural persons. The bank must further assess whether the trustee is authorised to open an account and to deposit the assets entrusted to them in the bank. The bank can fulfil this obligation by verifying and assessing the trust deed (''Identification of Trust'' ''Settlement'' etc.). Meanwhile, it is also conceivable that the bank should have a legal opinion validated by a lawyer to the effect that the trustee is authorised to open an account.'

27 Oliver Arter, 'Anwalt und Trust', in *Winterthur Versicherungen (ed.): Haftpflicht des Rechtsanwaltes*, (Zurich/St Gallen, Dike, 2006), p 113 et seq., p 117.

28 Contrary to the Liechtenstein trust regulation. The trust regulation. is an attempt to implement the US Business Trusts into Liechtenstein law. The trust regulation. is to be qualified as an enterprise with legal character, cf Arter (fn 1 above), pp 592 and 593, fn. 26.

29 Arter (fn 27), p 113 et seq., 126.

assets must be in the name of the trustee or in the name of another person representing the trust.[30],[31]

As the owner of the trust's assets under civil law, as a matter of course the trustee has the authority to enter into a business relationship with a bank; no additional special authorisation is required. Furthermore, no specific power of attorney arrangements[32] normally need to be taken into account and even to the extent that another person who is not the trustee could be authorised to enter into a banking relationship. As such, according to the view put forward here, no separate confirmation would be needed from the trustee authorising the establishment of a business relationship with bank.

Requirement to have a confirmation

The Swiss Bankers Association, however, still requires confirmation in writing from the trustee that he may establish a business relationship for the trust. No formal requirements[33] exist, nor is any further proof necessary to verify the trustee.[34]

Confirmation may be submitted using a form T, through a legal opinion or by other means, such as, for example, by verifying and acceptance of the trust deeds.[35]

30 Another definition, which does not feature, that the rights pertaining to the assets of the trust may also be registered by a representative of the trustee, is found in the so-called 'Principles of European Trust Law' according to which a trust is characterised as follows:

'1 In a trust, a person called the ''trustee'' owns assets segregated from his private patrimony and must deal with those assets (the ''trust fund'') for the benefit of another person called the ''beneficiary'' or for the furtherance of a purpose.

2 There can be more than one trustee and more than one beneficiary; a trustee may himself be one of the beneficiaries.

3 The separate existence of the trust fund entails its immunity from claims by the trustee's spouse, heirs and personal creditors.

4 In respect of the separate trust fund a beneficiary has personal rights and may also have proprietary rights against the trustee and against third parties to whom any part of the fund has been wrongfully transferred.'

In any event, a decisive element is raised in relation to trust assets in Art 2(2)(b) Hague Trust Convention: 'ownership must vest in the trustee' that the representative must thus uphold the trust asset for the trustee.

So Jonathan Harris, *The Hague Trust Convention* (Oxford, Hart Publishing, 2002), p 109. Critical to the provision of Art 2(2)(b) Hague Trust Convention Peter Max Gutzwiller, *Schweizerisches Internationales Trustrecht* (Basle, 2007), n 32 to Art 2 Hague Trust Convention. Consequently, Art 2(2)(b) Hague Trust Convention does not indicate that a trustee has to give a special confirmation when entering into a banking relationship.

31 Art 2(2)(b) Hague Trust Convention. In addition, for the relevant applicable trust law for the appointment, resignation and dismissal of trustees, the ability to act as trustee, and the transfer of tasks of a trustee, cf Art 8(a) Hague Trust Convention.

32 Among trusts, a partial distinction is made between the custodian and the managing trustee: While the custodian trustee keeps the trust deeds and trust assets in his possession, the managing trustee manages the trust assets, executes the discretionary decisions, and exercises powers. Cf in greater detail, s 50, New Zealand Trustee Act 1956, in particular para 2, whereby 'Subject to the provisions of the instrument (if any) creating the trust, where a custodian trustee is appointed of any trust, (a) the trust property shall be vested in the custodian trustee as if the custodian trustee were sole trustee, and for that purpose vesting orders may, where necessary, be made under this Act' but '(b) the management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust shall remain vested in the managing trustees as fully and effectually as if there were no custodian trustee.' Cf also Arter (fn 27), p 122.

33 Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB), (CDB 08) (fn 24 above), para 15.

34 Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24 above), para 15.

35 Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24, above), para 15; Practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2001–2005, Pt 3.13.

Verification by means of trust regulations versus accountability as a constructive trustee

The most effective approach is always for banks to validate the trustee's authority when the banking relationship is being established by means of careful review of the trust provisions such as the trust deed[36] which allows the trustees' actual authorities to be verified. However, the Swiss Bankers Association points out that to avoid any liability as a so-called constructive trustee banks should not accept copies of any trust regulations,[37] in other words that the trustee should in no way be qualified by means of the trust provisions when the banking relationship is entered into. Without providing further detail on the liability of banks as constructive trustees, it should, however, be noted that such liability on the part of banks is only conceivable in exceptional cases and the potential liability of the bank as a constructive trustee stems less from the knowledge of the trust deed but rather where the bank, during the course of carrying out its daily activities, deals with the settlor or the beneficiaries of the trust rather than with the trustee himself whereby the structure of the trust as well as the rights and obligations of the persons involved in the trust are not protected and a potential liability may be created vis-à-vis the beneficiaries of the trust due to creating trust should the trustee engage in illegal dealings.[38] As such, verifying the trustee's confirmation when entering into a banking relationship by means of the trust provisions should not stall due to the fear of potential liability as a constructive trustee.

Legal opinion or simple confirmation by the trustee

On account of the fact that the Swiss Bankers Association was and remains[39] critical of the trustee opting to verify the confirmation using trust deeds when entering into a banking relationship, in the past the trustee's confirmation would routinely be verified by a lawyer's opinion.[40] However, this involved considerable time and expense. This unsatisfactory situation was rectified with CDB 08. In the current version of the regulation[41] it states that confirmation in writing by the trustees, eg using forms A or T, is sufficient and that a legal opinion merely represents an alternative but equivalent means of confirmation to verify the trustee's authorisation.[42]

Although this has until now been handled differently by certain banks due to the since superseded[43] jurisdiction[44] of the Supervisory Board on the Bank's Duty of Due Diligence, it follows that, when entering into a business relationship with a trustee, banks are not obliged to obtain a legal opinion but that this constitutes a valid option to meet the bank's requirement to obtain certification.

Should a bank chose not to verify the trust provisions and not seek a legal opinion, confirmation is best provided by using forms A or T.

36 Cf also Practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2001–2005, Pt 3.13.
37 Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24, above), para 15.
38 Cf *Re Montagu's Settlement Trusts* [1987] CH 264; *Royal Brunei Airlines Sdn Bhd v Philip K M Tan* [1995] 2 AC 378 PC. Generally: John Mowbray, Lynton Tucker, Nicholas Le Poidevin, Edwin Simpson and James Brightwell, *Lewin on Trusts* (London, Sweet & Maxwell, 2008), pp 1623 et seq., 1733 et seq.
39 Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24 above), para 15.
40 Practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2001–2005, Pt 3.13.
41 Para 15.3 Implementing provisions of Art 2 CDB 08.
42 Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24 above), para 15.
43 Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24 above), para 15.
44 Practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2001–2005, Pt 3.13.

Document forgery and guaranteeing irreproachable business conduct

Intentionally providing false information on forms A or T is a criminal offence under Art 251 of the Swiss Criminal Code and is punishable as document forgery.[45] Compliance with due diligence obligations concerning the fight against money laundering and the financing of terrorism is, however, a pre-requisite in terms of guaranteeing irreproachable business conduct[46] under the legislation governing banking supervision.[47]

The bank's duty to provide information

It is often the case that the contracting party is not fully aware of the relevance of forms A and T and how they should be completed. The bank is thus duty-bound to explain[48] forms A and T and their relevance to the contracting party on entering into the business relationship.

This view is also shared by the Supervisory Board on the Banks' Duty of Due Diligence. The Board explains that a bank, with regard to:

> 'its compliance with contractual and pre-contractual obligations [...] must explain to the client the legal nature of form A as well as the criminal liability in the case of false certification and the material content of the [...] statements required, in particular with regard to what is meant by the concept of beneficial owner.'[49]

Forms A and T are primarily designed to address the issues of money laundering and terrorism financing;[50] the most recent case law from the Swiss Federal Administrative Court nevertheless indicated that the information provided in these forms is used to indicate the beneficial ownership for tax purposes.[51]

Duties of the person acting as beneficial owner

Definition of beneficial owner within the context of the fight against money laundering and the financing of terrorism

Federal case law

The concept of beneficial owner is not defined in Swiss legislation relating to the fight against money laundering and the financing of terrorism.[52] The Swiss Supreme Court defines the

45 Cf relating to punishability in connection with a form A that is incorrectly filled in: Supreme Court, judgment of 27 September 1996, 6S.346/1999. On punishability of the bank client by virtue of Art 251 German Criminal Code see also Gunther Arzt, 'Bankkunden, Bankformulare, Falschbeurkundung', recht 2010, 37 et seq.

46 Art 3(2)(c) Swiss Federal Law on Banks and Savings Banks.

47 On compliance with due diligence obligations concerning money laundering Eidgenössische Bankenkommission, *Bulletin 41* (Berne 2000), 15 et seq. Cf in its entirety Oliver Arter, *Bankenaufsichtsrecht in der Schweiz* (Berne Stämpfli, 2008), p 123 et seq.

48 Cf general notions on the obligation to inform in the investment business Sandro Abegglen, '"Point of Sale" – Aufklärung and Produkttransparenz – die Informationspflichten beim Anlagegeschäft der Banken', in Peter R. Isler and Romeo Cerutti (Eds) *Vermögensverwaltung II*, (Zurich, Schulthess, 2009), p 61 et seq.

49 Practice of the Supervisory Commission on the Banks' Duty of Due Diligence 1998-2001, Pt A.4.

50 Cf in particular Federal Administrative Court, judgment of 14 February 2011, A-5974/2010, para 4.2.1 and Federal Administrative Court, judgment of 5 March 2009, A-7342/2008 and A-7426/2008, para 5.5.2.4.

51 Cf etwa Federal Administrative Court, judgment of 27 June 2011, A-6662/2010, para 6.2. Cf in its entirety below at *Ability to exert economic control and right of disposal*. See also Peter Nobel, UBS-Urteil, '"Wirtschaftlich Berechtigter" ist nicht gleich wirtschaftlich Berechtigter', Jusletter, 23 March 2009.

52 Cf David Wallace Wilson, 'Le Trust, Janus de la réglementation bancaire: formulaire A ou formulaire T', in Isabelle Augsburger-Bucheli and Bertrand Perrin (Eds) *Les enjeux juridiques du secret bancaire*, (Geneva/Paris, Schulthess/L'Harmattan, 2011), p 125 et seq.

beneficial owner as the one who 'is actually able to determine in respect of the assets to whom they thus belong in economic terms.'[53] As such technical legal constructions[54] are meaningless 'in stopping the assignment of the assets from an economic standpoint.'[55]

The definition from the Swiss Supreme Court by which the beneficial owner is the one who 'is actually able to determine in respect of the assets to whom they thus belong in economic terms'[56] highlights clearly the dilemma arising from the absence of a definition of this concept: the Swiss Supreme Court states that it is the person who is *actually able to take decisions in respect of the assets*, and yet the definition also includes the notion that it is he who shall be *beneficiary of the assets*. If the Swiss Supreme Court now links both parts of the concept with the adverb 'thus', it is implied that he who can take decisions in respect of the assets is *accordingly*[57] also he to whom the assets belong from an *economic point of view*. However, this is not necessarily the case with trusts and particularly for the reverse scenario. It is normally the case with trusts that the person who is the beneficiary of a trust's assets,[58] at least when ''playing the trust game'',[59] has no means of making decisions regarding the trust's assets.

In addition, the terminology from the Swiss Supreme Court 'to whom the assets belong from an economic point of view' is an unfortunate choice. Even when applied to the Swiss Supreme Court ruling on money laundering, the question of 'to whom economic assets belong' relates to relationships under civil law. The concept of economic affiliation that is ultimately applied to economic ownership is not only unknown under Swiss property law, but the concept of economic ownership is misleading because by its very nature economic ownership is not ownership.[60] Furthermore, the Swiss Supreme Court once again confirmed recently in its judgment of 17 January 2011 that Swiss property law does not recognise economic ownership.[61] For this reason, it is recommended that the term 'favourable treatment'[62] be used in respect of assets.

Financial Action Task Force (FATF) recommendations

Recommendation 5 of the FATF 40 Recommendations provides for the following with regards to beneficial owners, etc in the context of customer due diligence:

> 'Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions taking reasonable measures to *understand the ownership and control structure of the customer*.'[63]

53 BGE 125 IV 139, 143.
54 BGE 125 IV 139, 143.
55 BGE 125 IV 139, 143.
56 BGE 125 IV 139, 143.
57 The German notion of 'mithin' (cf the Online Lexikon des Duden, available at http://www.duden.de/rechtschreibung/mithin) means 'consequently, correspondingly, thus'.
58 Re enforceable claims by beneficiaries cf further para 2 and previous para 5.4.1.
59 Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 5.4.3; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 5.4.2; Federal Administrative Court, judgment of 1 September 2011, A-6872/2010, para 9.3.1; Federal Administrative Court, judgment of 5 March 2009, A-7342/2008 and A-7426/2008, para 5.5.2.5.
60 So Robert Haab, August Simonius, Werner Scherer, Dieter Zobl, Zürcher Kommentar zum schweizerischen Zivilgesetzbuch, IV. Band, Das Sachenrecht, 1. Abteilung, Das Eigentum, Art 641 – 729 ZGB (Zurich, Schulthess, 1977), n 24 to Art 641 Swiss Civil Code.
61 Supreme Court, judgment of 17 January 2011, 5A_732/2010, para 3.
62 Cf above 'The beneficiary of a Trust'.
63 Financial Action Task Force FATF: 40 Recommendations, Recommendation 5. Emphasis added.

Beneficial owner is thus "the natural person(s) who *ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted*. It also incorporates those *persons who exercise ultimate effective control over a legal person or arrangement*."[64]

FATF recommendation 5 provides more information on beneficial owners:

> '... Identify the beneficial owners, including forming an understanding of the ownership and control structure, and take reasonable measures to verify the identity of such persons. The types of measures that would be normally needed to satisfactorily perform this function would require identifying the natural persons with a controlling interest and identifying the natural persons who comprise the mind and management of the legal person or arrangement.'[65]

It is specifically stated in FATF recommendation 34 in respect of trusts[66] that:

> 'Countries should take measures to prevent the unlawful use of legal arrangements by money launderers. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the *settlor, trustee and beneficiaries*, that can be obtained or accessed in a timely fashion by competent authorities.'[67]

The concept of beneficiary is interpreted differently from country to country.[68] There is a particular lack of coherency regarding whether the concept of beneficiary simply means classes of beneficiaries or specific individuals.[69]

The FATF recommendations reveal two things: on the one hand, the beneficial owner(s) is/are identified as the/those person(s) who actually determine the decision-making processes regarding assets and, on the other hand, information must – independent of the concept of beneficial owner – be available from trusts on the settlor, the trustee as well as on the beneficiaries. Otherwise it follows that, contrary to what was just illustrated by federal case law on the concept of beneficial owner who is the one who can actually dispose of assets and not the one to whom the assets belong to from an economic standpoint or, in other words, the one who benefits from them. Thus beneficial owner can thereby be either the one who can actually dispose of the assets or the one who benefits from them.[70]

64 Financial Action Task Force FATF, Money Laundering, Glossary to the 40 Recommendations. Emphasis added.

65 Interpretative Notes on the Financial Action Task Force FATF, 40 Recommendations, Recommendation 5.

66 Cf for legal entities such as foundations, institutions, associations, etc Financial Action Task Force FATF, 40 Recommendations, Recommendation 33: 'Countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures.'

67 Financial Action Task Force FATF, 40 Recommendations, Recommendation 34. My emphasis.

68 Financial Action Task Force FATF, Report Money Laundering Using Trust and Company Service Providers, October 2010, Pt 86.

69 Financial Action Task Force FATF, Report Money Laundering Using Trust and Company Service Providers, October 2010, Pt 86.

70 Cf on future developments Financial Action Task Force FATF, Consultation Paper, The Review of the Standards – Preparation for the 4th Round of Mutual Evaluation, Second public consultation, June 2011, para 8 et seq.

Wolfsberg Principles

The Wolfsberg Group comprising 11 global banks whose mission includes defining a set of standards for private banking has the following to say on beneficial owners:

> 'The term ''beneficial ownership'' is conventionally used in anti-money laundering contexts [...] to refer to that level of ownership in funds that, as a practical matter, equates with *control* over such funds or *entitlement* to such funds. ''Control'' or ''entitlement'' in this practical sense is to be distinguished from mere signature authority or mere legal title. The term reflects a recognition that a person in whose name an account is opened with a bank is not necessarily the person who ultimately controls such funds or who is ultimately entitled to such funds. This distinction is important because the focus of anti-money laundering guidelines [...] needs to be on the person who has this ultimate level of control or entitlement. Placing the emphasis on this person is a necessary step in determining what the source of funds is.'[71]

Further explanation is provided on beneficial owners in the context of trusts:

> 'In the typical case, it would be clear which person has ''beneficial ownership'' for purposes of the Guidelines. For instance, in the case of an industrialist who establishes a trust for the benefit of his wife or minor children, the beneficial owner would be the industrialist settlor, namely, the ''provider of funds'' [...]. The appropriate due diligence should be conducted with regard to the industrialist, including background checks and the requisite inquiry as to source of funds. If appropriate, the banker should consider identifying the beneficial owner by reference to official identity papers. Even though the wife or children have a beneficial interest in the trust, they should not be treated as ''beneficial owners'' for anti-money laundering purposes. That is, it would not make sense to do due diligence with respect to the wife's or children's source of funds, although it may be appropriate to do some due diligence with respect to their background and reputation.'[72]

The definition of beneficial owner according to the Wolfsberg Group's Principles also shows that between power of disposition and beneficiary neither identity prevails. Rather, both elements have their own separate relevance but both fall under the definition of beneficial owner. By way of clarification, it should be added that in terms of the beneficial owner the Wolfsberg Principles focus on who controls the assets and not on the person who is beneficiary of these assets in terms of the obligations concerning the fight against money laundering and terrorism. It should also be noted that the Wolfsberg Principles state that it must not only be established who the beneficial owner is but also require an in-depth examination of the background and origins of the beneficial owner's funds. It is therefore easy to understand why the obligations concerning the beneficial owner vary according to the persons, their respective power of disposition over assets and persons who should be beneficiaries of assets.

71 Wolfsberg FAQs on Beneficial Ownership, Q1. What does 'beneficial ownership' mean?, available at http://www.wolfsberg-principles.com/faq-ownership.html#1.

72 Wolfsberg FAQs on Beneficial Ownership, Q4. What does 'beneficial ownership' mean in the context of trusts?, available at http://www.wolfsberg-principles.com/faq-ownership.html#4.

Message on the law against money laundering

The following message on the law against money laundering can be gathered with regards to the duties to determine who the person acting as beneficial owner is in the context of trusts:

> 'When the person acting as beneficial owner has yet to be determined, and this is occasionally the case with trusts, all relevant information must be collected, for example, the names of the persons authorised to give instructions to the contracting party or the persons considered to be potential beneficiaries of the trust.'[73]

Even though little can be gathered from the message on the law against money laundering, it does determine that both those who are actually able to make decisions about assets as well as those, who should be beneficiaries of the assets, to the degree that this can be ascertained, should be considered beneficial owners.

Own definition of beneficial owner

One definition of beneficial owner in the context of the fight against money laundering and terrorism for interpretation under Swiss law based on the view put forward here encompasses two parts, namely (I) *power of disposition* and (II) *beneficiary*, and can be expressed in the following manner: a beneficial owner is someone who either (I) (1) is the owner of the contracting party; (2) controls the contracting party legally or operationally; (3) carries out transactions on the instruction and on the account of the contracting party; or (II) is the beneficiary and thus the person to whom the enjoyment of the assets held through the contracting party (1) belongs[74] or (2) should belong.[75] A person to whom assets at best only supposedly or could belong to is not a beneficial owner.[76]

General information on establishing the beneficial owner

Principle: Assumption that the contractual partner and the beneficial owner are the same

As a matter of principle, banks may assume that the contractual partner is the same as the beneficial owner.[77] There are, however, a number of exceptions.[78]

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73 Memorandum on the federal law on the fight against money laundering in the finance sector (AMLA) of 17 June 1996, BBl 1996 III 1101 et seq., 1125 et seq.

74 Cf 'The beneficiary of a Trust', 'Authorisation of certain persons: irrevocable fixed trust' as well as 'Revocable Trust'.

75 Cf 'The beneficiary of a Trust', 'Authorisation of certain persons: irrevocable fixed trust' as well as 'Revocable Trust'.

76 Cf 'The beneficiary of a Trust', 'Exception in the identification of the beneficial owner: assets without beneficial ownership' as well as 'Absence of authorisation of designated persons: irrevocable discretionary trust'.

77 Art 3(1) CDB 08. Cf also Detlev Michael Basse-Simonsohn, 'Effizientere Geldwäschereibekämpfung der Schweizer Banken und Effektenhändler mit der neuen Sorgfaltspflichtvereinbarung (VSB 08)?', recht 2008, 75 et seq., 87.

78 For further exceptional cases hereafter that have not been dealt with, cf Art 3(3) and (4) CDB 08:

> '3 With regard to cash transactions involving amounts greater than CHF 25,000, pursuant to Art 2, a declaration by the contractual partner of the beneficial owner is still required. The banks record the declaration of the contractual partner in writing. They are free to choose whether they wish to use form A for this purpose or not.
>
> 4 If there are simply companies in a business relationship and not businesses registered in the commercial register as beneficial owners, no declaration need be provided by the beneficial owner when the authorisation of the single company or of the company is recorded in writing and does not exceed the amount of CHF 25,000.00 booked on this account.'

Exception 1: the contractual partner is identifiably not the same as the beneficial owner or there are doubts about this

Should the *contractual partner* be identifiably *not the same* as the beneficial owner or there are any doubts as to this, a written declaration specifying the beneficial owner is required from the contractual partner.[79] In a trust, the trustee is routinely[80] not the same as the beneficial owner.

Exception 2: the contracting party is a domiciliary company

Banks must obtain another written declaration from the contracting party indicating who the beneficial owner party is when the contracting party is a domiciliary company.[81] The definition of a domiciliary company is outlined below.[82]

Exception in the identification of the beneficial owner: Assets without beneficial ownership

For assets without any beneficial ownership by designated persons, for example as is the case with discretionary trusts or foundations, instead of identifying the beneficial owner a written declaration must be obtained from the contractual partner which confirms these facts.[83] The contracting party's explanation contains information on the actual (ie not the trust) founders or settlors and, where it can be ascertained, those persons that are entitled to issue instructions to the contracting party or their organs as well as those persons to be included as *beneficiaries* according to the category, such as, for example, dependents of the founders or settlors.[84] If curators or protectors exist, they shall also be included in the contracting parties' declaration.[85] Form T must be used for completing this declaration. The form may be amended but the contents such stay the same.[86]

cont.

Cf Further at para 26 implementing provisions of Art 3 CDB 08 concerning the initiation of the business relationship with a natural person by correspondence: 'In any event, the form A declaration is required upon entering into a business relationship with a natural person by correspondence, with the exception of those special cases mentioned in para 18.'

Cf further, para 32 Implementing provisions of Art 3 CDB 08 with regard to pooled accounts and collective deposits: 'In the case of pooled accounts and collective deposits, the bank's contractual partner must provide a complete list of the beneficial owners [. . .].'

Cf Below, para 33 Implementing provisions of Art 3 CDB 08 concerning collective investment vehicles and Investment companies:

> 'If a collective investment structure or Investment company has 20 investors or less, it must be considered as beneficial owner.'

79 Art 3(1) CDB 08.

80 Cf however, on the one hand, Art 2(3) Hague Trust Convention: 'The fact that the founder reserves certain rights and powers or that the trustee themselves has certain beneficiary rights, does not necessarily preclude certain rights and powers to the establishment of a trust.' This is thus consistent with the essential principles of the trust, when a trustee is also (not in their capacity as trustee) beneficiary of a trust.

81 Art 4(1)(b) AMLA; cf further para 37 implementing provisions of Art 3 VSB.

82 Cf 'What is a domiciliary company?'

83 Para 43 implementing provisions of Art 4 VSB.

84 Para 43 implementing provisions of Art 4 VSB.

85 Para 43 implementing provisions of Art 4 VSB.

86 Para 43 implementing provisions of Art 4 VSB.

What is a domiciliary company?

Definition according to the message on the Federal Act on the fight against money laundering

In the memorandum on the federal law against money laundering, the concept of domiciliary companies is defined as follows:

> 'Domiciliary companies involve companies with no real business operations, whose headquarters are determined for the purpose of tax benefits for which they have built advantageous locations. . . . These can involve both corporations as well as foundations or trusts. The legal form, purpose or headquarters thus have no importance. It is, however, essential that domiciliary companies not have their own premises and do not have any staff.'[87]

For some time now taxation has played virtually no role in determining whether a domiciliary company exists or not. However, in future this could change as domiciliary companies are increasingly defined as legal entities. However, this does not prove that they would be effectively taxed at the location of their incorporation or at the location where they are effectively administered based on the general rules for direct taxation.[88]

Definition according to the Ordinance on the Professional Practice of Financial Intermediation (VBF)

Article 6(2) of the Ordinance on the Professional Practice of Financial Intermediation (VBF) defines the concept of domiciliary company as follows:

> 'Legal entities, companies, institutions, trusts, fiduciary companies or similar associations that do not engage in any commercial or manufacturing business or any other form of commercial operation are deemed to be domiciliary companies.'

FINMA circular

According to the FINMA, domiciliary companies are legal entities, companies, institutions, trusts, fiduciary companies or similar associations that *do not engage in any commercial, manufacturing or any kind of service operation* or any other form of commercial trading ('operational business'),[89] but rather serve to administer the assets of the beneficial owner.[90] Domiciliary companies do not maintain their own business premises, they employ no staff of their own or employ staff solely for the purpose of carrying out administrative tasks.[91]

87 Memorandum on the federal law on the fight against money laundering in the finance sector (fn 73 above), 1101 et seq., 1125 et seq.

88 Cf in particular Art 2(h) Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on common principles of good governance in tax matters as well as Art 2(h) Agreement between the Swiss Confederation and the Federal Republic of Germany on cooperation in tax matters and financial markets.

89 The Supervisory Commission recognised that demarcation is not simple. It explained: 'It is true that within the practice of the Supervisory Commission, companies occasionally fall within the notion of domiciliary company, which conduct a modest business and corresponding operative activities. The Supervisory Commission is however well aware of this consequence and has preferred to base itself, for reasons of legal certainty, on purely formal, positive and easily verifiable criteria, which is also ultimately in the bank's interest.' Practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2001–2005 (fn 26 above), Pt 3.1.

90 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 102.

91 Thus, Art 3(b) Regulation by the Federal Financial Market Supervisory Authority on the Prevention of Money Laundering and Terrorist Financing in the Rest of the Finance Sector (FINMA Money Laundering Ordinance 3, MLOFINMA 3) which is no longer in force.

According to the FINMA, criteria for differentiating between domiciliary companies and operational companies can be found in the balance sheet and income statement in particular. It cites the example of strong indications that the company is a domiciliary company, such as where a securities portfolio or another asset represent the majority of balance sheet items whilst in the income statement most of the assets and liabilities are yields or capital gains.[92] In any event, each case must be seen on an individual basis.

The definition of a domiciliary company based on the descriptions set out above is not exhaustive.[93] The FINMA thus sees it in a negative light that, inter alia, legal entities and companies that aim to safeguard the interests of their members or their beneficiaries by way of mutual self-help or which pursue political, religious, scientific, artistic, charitable, social or similar objectives – as long as they exclusively pursue these statutory objectives – are not be considered domiciliary companies.[94] According to FINMA, family foundations are also not, as a matter of principle,[95] domiciliary companies under Swiss law.[96]

Own differentiation between operational activities and asset management

When considering the difference between operational activities and asset management of the beneficial owner,[97] the absence of the entity's own business premises, the absence of their own staff[98] and the consolidation of the balance sheet and income statement[99] are refutable indications of the existence of a domiciliary company.[100]

First of all, it should be considered that not all operational business activity requires the same degree of managerial and personnel resources.[101] A general approach is required which is based on the duties of the trust's trustee.[102] The primary obligation of a trustee is to administer and invest the trust's assets as well as to distribute any benefits to the

92 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 103.

93 This is also borne out in the practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2005–2010. Cf Georg Friedli and Dominik Eichenberger, 'Practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2005–2010', SZW 2011, p 47 et seq., 49, 54 et seq.

94 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 107.

95 The barriers of Art 335 Swiss Civil Code should be remarked as well as those deriving from the Supreme Court case-law in BGE 108 II 393. The Federal Court ruling cited would appear to be chosen rather arbitrarily. The FINMA was probably referring to the controversial separation between admissible family foundations and inadmissible maintenance foundations. Cf Oliver Arter, 'Ausländische Familienunterhaltsstiftungen – BGE 135 III 614', successio 2011, p 125 et seq., 129 with reference to Supreme Court, judgment of 30 November 2006, 5C.68/2006, BGE 108 II 398 et seq., BGE 108 II 393 et seq., BGE 93 II 439 et seq., BGE 89 II 437 et seq., BGE 79 II 113 et seq., BGE 75 II 81 et seq,, BGE 75 II 15 et seq., BGE 73 II 81 et seq. and the leading case BGE 71 I 265 et seq.. Different regarding the admissibility of the maintenance foundation pursuant to Art 335 Swiss Civil Code Peter Max Gutzwiller, 'Die Zulässigkeit der schweizerischen Unterhaltsstiftung', AJP 12/2010, p 1559 et seq.

96 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 107.

97 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 103.

98 Art 3(b) Regulation by the Federal Financial Market Supervisory Authority on the Prevention of Money Laundering and Terrorist Financing in the Rest of the Financial Sector on the prevention of Money Laundering and Terrorist Financing in the Rest of the Financial Sector is no longer in force (Money Laundering Ordinance-FINMA 3, MLOFINMA 3) as well as para 38 implementing provisions of Art 4 CDB 08 and Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24 above), para 38. Cf Mario Giannini, *Anwaltliche Tätigkeit und Geldwäscherei, Zur Anwendbarkeit des Geldwäschereitatbestandes (Art. 305bis StGB) und des Geldwäschereigesetzes (GwG) auf Rechtsanwälte* (Zurich, Schulthess, 2005), p 258.

99 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 103.

100 Likewise, again the notion of 'Indication' at para 38 implementing provisions of Art 4 CDB 08 as well as Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24 above), para 38.

101 Peter Nobel, *Schweizerisches Finanzmarktrecht* (Berne Stämpfli, 2004), § 6 N 77. In the new edition Peter Nobel, *Schweizerisches Finanzmarktrecht und internationale Standards* (Berne 2010), these allegations cannot be found anymore.

102 Nobel (fn 101 above), § 6 N 78.

beneficiaries.[103] Due to his position of trust, a trustee[104] also has a duty take care of the trust's assets and to treat all the beneficiaries equally.[105] The trustee is also required to adhere to the contents of the trust deed and to consider from time to time whether he wishes to continue exercising his powers.[106] Finally, the trustee is accountable to the beneficiaries but is generally not obliged to prepare a balance sheet or income statement. No organisations provisions are necessary for the trustee to perform his duties. Apart from the fact that professional trustees normally operate on their own premises and employ staff, a trustee can also carefully carry on his activities alone and with minimal business infrastructure. It is, however, crucial that the trustee has the necessary knowledge and skills to carry out his activities. Accordingly, trusts can also be operationally active when they operate solely in the financial sector. This supposes, of course, that the trustee can perform his functions autonomously and independently of the beneficial owner.[107] The absence of business premises as well as staff are not definitive indications of the existence of a domiciliary company.[108]

A decisive criterion regarding the distinction made between operational business and domiciliary company is whether or not the trust engages in *commercial, manufacturing or any kind of service business* or any other form of commercial operation,[109] or whether or not they *administer their own assets* – not in the sense of administration of the beneficial owner's assets as per the FINMA-Circular11/1.[110] Market presence is thus the differentiation criterion: where by business is meant an independent, ongoing for-profit economic activity that is established for bringing together the supply and demand of goods, services and rights,[111] the administration of one's own assets is characterised by the absence of any real customers and, when viewed from the outside, there is no recognisable engagement in market events.[112] As rightly illustrated by the FINMA, the balance sheet and income statement provide indications to this effect, especially when a securities portfolio or another asset constitute the majority of balance sheet items and in the income statement most of the assets are income or capital gains derived from the balance sheets.[113]

According to the view set out here, a distinction must be made between an operational business and a domiciliary company through the market presence of the legal entity in question, with the balance sheet and income statement providing key information to that effect.

103 Cf for the whole issue, Arter (fn 27 above), p 127.
104 On questions concerning legal liability, cf *Armitage v Nurse* [1998] Ch 241.
105 *Nestle v National Westminster bank plc*, [1993] 1 WLR 1260; *Re Barton's Trust* (1868) LR 5Eq 238.
106 Arter (fn 27 above), p 127.
107 Nobel (fn 101 above), § 6 N 78.
108 So para 38 implementing provisions of Art 4 CDB 2008 and Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24 above), para 38.
109 The Supervisory Commission has recognised that demarcation is not simple. It explained: 'It is true that with the pursuant to the Supervisory Commission's practice, companies also occasionally fall within the notion of domiciliary company, which conduct modest business and correspondingly are operationally active. The Supervisory Commission is however well aware of this consequence and has preferred to base itself, for reasons of legal certainty, on purely formal, positive and easily verifiable criteria, which is also ultimately in the bank's interest.' Practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2001–2005 (fn 26 above), Pt 3.1.
110 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 102.
111 Cf Art 2(b) Swiss Ordinance on the Commercial Register.
112 Cf also Zuger Steuerbuch, § 17, para 1.1, available under http://www.zug.ch/behoerden/finanzdirection/steuerverwaltung/steuerbuch.
113 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt. 103.

A domiciliary company or not? Trusts versus Swiss family foundations

Background

According to FINMA-Circular 11/1, a trustee who administers trusts in or from Switzerland, regardless of where the trust asset is located and where the legal order according to which the trust was set up, is 'as a general rule' under the supervisions of the AMLA.[114] According to the same FINMA-Circular 11/1 and under Swiss law, family foundations are those considered 'within the legal framework'[115] and inside 'limits put in place'[116] by the Swiss Supreme Court, whereas domiciliary companies are as a rule not. Why trusts 'as a general rule'[117] qualify as domiciliary companies, whereas Swiss family foundations do not, requires thorough debate.

Features of the Swiss family foundation

Family foundations under Swiss law[118] are characterised by the fact that an asset is at the disposal of a particular family to defray the *costs of bringing up, providing for or supporting family members* or for *similar purposes*.[119] The beneficiaries of a family foundation are limited to the dependents of a particular family which includes particular persons who are related through a blood relation, marriage or adoption.[120] According to consistent Swiss federal case law, the list of the purposes stipulated by law by which family foundations may be established is final.[121] These purposes are to pursue the goals of providing help to the those family members who are beneficiaries at certain stages of their lives, namely during their adolescence, when establishing their own households or setting up on their own as well as in case of emergencies and to meet special needs when they arise.[122] Family foundations that grant benefits to the beneficiaries from the foundation's assets with no special relation to a certain life situation (so-called maintenance foundations) are not allowed according to the current prevailing opinion and case law.[123]

114 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 106.

115 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 107 with reference to Art 335 Swiss Civil Code.

116 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 107 with reference to BGE 108 II 39. Cf above fn 93.

117 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2 above), Pt 106 f.

118 Cf upcoming Oliver Arter, 'Die schweizerische Familienstiftung', in Peter V Kunz, Florian S Jörg and Oliver Arter *Entwicklungen im Gesellschaftsrecht VII* (Berne, Stämpfli, 2012).

119 Art 335(1) Swiss Civil Code.

120 Supreme Court, judgment of 4 March 2002, 2A.457/2001; Hans Michael Riemer (BK-Riemer), *Berner Kommentar zum Swiss Privatrecht, Band I, Einleitung und Personenrecht, Die juristische Personen, Die Vereine, Systematischer Teil und Art. 60 - 79 ZGB* (Berne, Stämpfli, 1990), BK-Riemer, n 109 to Systematischem Teil die Stiftungen; Michael Hamm/Stefanie Peters, 'Die schweizerische Familienstiftung – ein Auslaufmodell?', successio 2008, p 248. By modern understanding, cohabiting partners living in an established relationship also figure among the possible 'Family' beneficiaries.

121 BGE 108 II 393, 394. Art 335 Swiss Civil Code portrays cogent law thereof. Cf Justin Thorens, 'L'article 335 CCS et le trust de common law', in Pierre-Henri Bolle, *Mélanges en l'honneur de Henri-Robert Schüpbach* (Basle, Helbing Lichtenhahn, 2000), p 161 et seq.; Luc Thévenoz, 'Créer et gérer des trusts en Suisse après l'adoption de la Convention de La Haye', in *Journée 2006 de droit bancaire et financier*, (Zurich, Schulthess, 2007), p 68.

122 BGE 108 II 393, 394. Cf in its entirety Arter (fn 95), 125 et seq., 128 et seq.

123 Supreme Court, judgment of 30 November 2006, 5C.68/2006. Cf in its entirety BGE 108 II 398 et seq., BGE 108 II 393 et seq., BGE 93 II 439 et seq., BGE 89 II 437 et seq., BGE 79 II 113 et seq., BGE 75 II 81 et seq., BGE 75 II 15 et seq., BGE 73 II 81 et seq. as well as the landmark ruling BGE 71 I 265 et seq. Differing Gutzwiller (fn 95), p 1559 et seq.

Possible reasons for the different treatment

It can be assumed that a key distinctive feature on which the FINMA may have based its deliberations on the different manners of dealing with trusts and Swiss family foundations is that trusts very often make payments to beneficiaries such as for their accommodation without any special preconditions whereas recipients from a Swiss family foundation may only receive benefits from the foundation's assets in specified, limited circumstances.

Trusts and Swiss family foundations also differ from each other in that the structure of trusts can be revoked and the trust assets may thereby be reverted back to the founder of the trust whilst transferring the assets of a Swiss family foundation back to the founder is exempt. In other words, Swiss family foundations do not allow the founder to reserve in the deed of foundation of the statutory bodies a free termination right for their legal successors, beneficiaries or third parties.[124] The same applies to any modifications or amendments to the foundation documents.[125] The family beneficiaries also have no right to dissolve the family foundation through an unanimous resolution.[126] The situation is different with trusts where not only can the beneficiaries meet to decide that the trust will be terminated[127] but there are also extensive ways of structuring the trust that allow the settlor or third parties to terminate or dissolve the trust or to amend or modify the trust deeds.[128]

Finally, a key factor may have also been the fact that there is a tendency with Swiss family foundations for them to assume that the foundation board remain independent from the beneficiaries, while trusts are more likely to assume that they are actually controlled through the beneficial owners.

Whether these distinctive features are sufficient generally to subject the trustee but not the Swiss family foundation to the AMLA remains to be seen. Even trusts often stipulate that the beneficiaries may only take advantage of the trust assets under the strictest of conditions. In any event, a trustee should also be exempt from the scope of the AMLA if the beneficiaries can only benefit from the trust's assets under similarly restrictive conditions as is the case with the beneficiaries of a Swiss family foundation and if the trustee adopts and implements his decisions independently of the beneficial owner.[129]

Commercial trusts

Trusts that are active in markets[130] are not considered domiciliary companies.[131] The same applies to trusts that hold and manage real estate.[132]

124 BK-Riemer (fn 120), n 24 and n 162 to Systematischem Teil, n 51 to Art 88/89 Swiss Civil Code; cf also Heinrich Honsell, Nedim Peter Vogt and Thomas Geiser (ed.) (BasK-Editor): *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I (Art. 1–456 ZGB)*, (Basle, Helbing Lichtenhahn, 2010), BasK-Grüninger, n 2 to Art 88 Swiss Civil Code.

125 BK-Riemer (fn 120), n 25 et seq. and n 162 to Systematischem Teil; Supreme court, judgment of 1 June 2005, 5A.37/2004, E 3.1.

126 BK-Riemer (fn 120), n 24 and n 162 to Systematischem Teil.

127 *Saunders v Vautier* [1841] EWHC Ch J82 (1841) Cr & Ph 240, (1841) 4 Beav 115 8; 41 ER 482. Cf also the english variation of Trusts Act 1958 (c 62).

128 Cf with further advises Arter (fn 27), 120.

129 Para 39 implementing provisions of Art 4 CDB 08.

130 Cf regarding Commercial Trust John H Langbein 'The Secret Life of the Trust: The Trust as an Instrument of Commerce', Yale LJ 1997, 165 ff.; Robert H Sitkoff 'The Trust as ''Uncorporation'': A Research Agenda', U Ill L Rev 2005, 31; Oliver Arter 'Commercial Trusts', in Oliver Arter and Florian S Jörg *Entwicklungen im Gesellschaftsrecht II*, (Berne, Stämpfli, 2007), pp 307, 323 et seq.

131 Para 39 Implementing provisions of Art 4 CDB 08. Also Wilson (Fn 52 above), 128.

132 Para 39 Implementing provisions of Art 4 CDB 08.

Charitable trusts

Trusts that safeguard the interests of their members or their beneficiaries by way of mutual self-help or which pursue political, religious, scientific, artistic, charitable, social or similar objectives,[133] are not considered domiciliary companies as long as they only pursue the purposes referred to in their statutes.[134]

Unit trusts, investment trusts, REITs

The requirement to identify beneficial owners may also be waived under certain conditions for unit trusts, investment trusts or real estate investment trusts (REITs).[135]

Listed trusts

If a trust is listed on an exchange, it may be exempt from the requirement to identify the beneficial owners.[136]

Trusts with a holding function

Trusts with majority holdings in one or several companies[137] for the purpose of centralising them under uniform management through a majority vote or by other means are not considered domiciliary companies.[138] However, this only applies where the management bodies or managers effectively exercise control.[139]

Identification of the beneficial owner in trusts under Swiss law

Authorisation of certain persons: irrevocable fixed trust

Beneficiaries of fixed trusts have an identifiable, fixed claim to a share of the trust's income capital.[140] They must thus be identified in their capacity as fixed beneficiaries using form A as beneficial owners.

In meeting the requirements for identifying beneficial owners, it is not sufficient, however, to identify the fixed beneficiaries. Any other persons who exercise a power of

133 Regarding Swiss charity foundations: Oliver Arter, 'Charitable Foundations and Associations in Switzerland', (2010) 24 TLI 50 et seq.

134 Art 4(2) CDB 08.

135 Para 33 implementing provisions of Art 3 CDB 08:

> '1 If a collective investment structure or Investment company has 20 investors or less, it must be considered as beneficial owner.
>
> 2 Publicly listed collective investment vehicles and holding companies are thus not required to provide a beneficial ownership declaration. Likewise, the bank can dispense with the identification of the beneficial owners with regard to a collective investment vehicle or investment company when a financial intermediary pursuant to para 34 acts as a promoter or sponsor and the appropriate rules relating to the fight against money laundering and terrorist financing are applied.'

136 Para 42 implementing provisions of Art 4 CDB 08. Cf also Wilson (fn 52), 128.

137 If the subsidiaries of the holding company are to be qualified as domiciliary companies, the bodies of the subsidiaries are considered as financial intermediaries.

138 So-called holding companies.

139 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2), Pt 108; para 39 implementing provisions of Art 4 CDB 08.

140 Hayton, Matthews and Mitchell (fn 15), p 97 f.; Pettit (fn 15), p 76; Oakley (fn 15), p 43.

disposition over the trust's assets should also be identified, even if they are not themselves beneficiaries of the assets.

Using form A as opposed to form T for irrevocable discretionary trusts, the settlor is not identified for the fixed trusts. According to FATF international standards, this is inadequate because it has practically no effect[141] since in the absence of any personal contact with the settlor, as is the case where the settlor is not also a fixed beneficiary of the trust, banks routinely review the origin of the assets transferred and must employ means other than form A to identify the settlor.[142]

Absence of authorisation of designated persons: irrevocable discretionary trust

With trusts where no persons have been identified as the beneficial owner (there may be beneficiaries but these are not beneficial owners[143]), for example so-called discretionary trusts, instead of identifying the beneficial owner, a written declaration must be obtained by the contractual partner using form T which confirms this state of affairs.[144]

The declaration must include the information concerning the effective (not fiduciary) settlor and, where they may be determined, those persons entitled by the contractual partner or their bodies to receive instructions, together with those who are possible beneficiaries[145] (by category, for example members of the founder's family).[146]

Where there are protectors,[147] they shall likewise be included in the declaration.[148] When submitting the declaration through the contractual partner, banks may use the so-called form T or their own relevant forms with the same contents as are in the template form.[149]

The information that banks must record for discretionary trusts complies in full with both FATF requirements and Swiss money laundering legislation – even the settlor is identified on form T unlike on form A.[150]

It is somewhat misleading that guardians must also be stated on form T. More details on this can be found in the comments on CDB 08 where information on the protector(s) and/or third parties must be provided by the contractual partner only where these beneficiaries may decide how to dispose of or employ the assets and how the trustee is bound by this.[151]

Whether a financial intermediary is a protector or not depends on his authority.[152] If the protector has no power other than to substitute the trustee or a right of veto for

141 On this point once again, Swiss efforts in the fight against money laundering and the financing of terrorism were accordingly not criticised by the Financial Action Task Force FATF in their latest report. Cf Financial Action Task Force FATF, 'Rapport d'évaluation mutuelle, Rapport de suivi, Lutte contre le blanchiment de capitaux et le financement du terrorisme, Suisse', Paris 27 October 2009.

142 Cf Art 14(2)(b) MLOFINMA (fn 2).

143 Likewise, the Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24), para 43.

144 Para 43 implementing provisions of Art 4 CDB 08.

145 The term 'first beneficiary' used in form T is misleading, as it could also be mistaken for 'fixed' nomination of beneficiary. Cf Form T, para 3 CDB 08. The notion of 'first beneficiary' should therefore be replaced according to the intent and purpose of the provision through the notion of 'designated beneficiary'.

146 Para 43 implementing provisions of Art 4 CDB 08.

147 For the protector, cf Oliver Arter, 'Protektor eines Trusts', ST 2006, p 729 et seq.

148 Para 43 implementing provisions of Art 4 CDB 08.

149 Para 43 implementing provisions of Art 4 CDB 08.

150 Cf 'Authorisation of certain persons: irrevocable fixed trust'.

151 Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24), para 43.

152 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2), Pt 106.

investment or distribution decisions by the trustees, the protector is not subject to money laundering legislation.[153] That he is not subject to money laundering legislation is primarily due to the fact that the powers of the protector are limited to the actions of the trustee being dependent on the protector's consent or the fact that this latter can replace the trustee.[154] Should the protector be vested with the authority to directly dispose of the trust's asset, then the protector shall be qualified as a quasi-trustee which shall be subject to the money laundering legislation not as protector but as a quasi-trustee.[155]

Revocable trusts

For revocable trusts, the revocable beneficiaries must complete form A as a beneficial owner.[156] It also follows from the case law of the Supervisory Board on the Banks' Duty of Due Diligence that only the revocable beneficiaries and not the beneficiaries of a revocable trust are to be identified.[157] This is not correct based on the view put forth here because the concept of the beneficial owner also includes the fixed interest beneficiaries of a trust as they have a claim to the proceeds or capital of the trust until the trust has been revoked.

With a fixed revocable trust all fixed beneficiaries should also be declared beneficial owners, while in discretionary revocable trusts the same should be done as with irrevocable discretionary trusts and those persons that are eligible beneficiaries are to be declared on the declaration of the contracting party.

Beneficial owner as defined in State Treaty 10[158] with the United States

Text of the agreement

The annex to the agreement between the Swiss Confederation and the United States of America on the request for information from the Internal Revenue Service by the United States of America regarding UBS AG sets forth the criteria for granting administrative assistance.[159] Generally, a request for administrative assistance assumes clear identification of the person(s) concerned. However, the names of the US customers at UBS AG Switzerland in this request for administrative assistance must not be mentioned and this relates to:

- the detected specific misbehaviour of certain individual taxable US persons with non-W-9-accounts held at UBS AG in their own names or in non-operational offshore businesses, for which they were beneficiary owners; and
- the particularities in para 4 of the facts in the Deferred Prosecution Agreement[160] of 18

153 FINMA-RS 11/1, Financial intermediation according to the AMLA (fn 2), Pt 106.
154 Hayton, Matthews and Mitchell (fn 15), 47 f.
155 Arter (fn 146), 730.
156 Para 44 implementing provisions of Art 4 CDB 08; Commentary on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 08) (fn 24), para 44.
157 See practice of the Supervisory Commission on the Banks' Duty of Due Diligence 2001–2005 (fn 26), Pt 3.15.
158 Agreement between the Swiss Confederation and the United States of America concerning a request for administrative assistance from the Internal Revenue Service of the United States of America concerning UBS AG, a public limited company incorporated under Swiss law, SR 0.672.933.612.
159 Agreement between the Swiss Confederation and the United States of America concerning a request for administrative assistance from the Internal Revenue Service of the United States of America concerning UBS AG, a public limited company incorporated under Swiss law, SR 0.672.933.612.
160 United States District Court Southern District of Florida, Case No 09-60033-CR-COHN, *United States of America v UBS AG*, Exhibit C to Deferred Prosecution Agreement, Statement of Facts.

February 2009 between the United States and the group of natural persons described by UBS AG.[161]

Accordingly and in compliance with para 4 of the statement of facts in the Deferred Prosecution Agreement between the United States of America and UBS AG of 18 February 2009, the following general requirements for identifying the persons falling under a request for administrative assistance shall be considered to have been met for the following natural persons:

(a) Customers of UBS AG domiciled in the United States with undisclosed (non-W-9) custody accounts and banking deposit accounts in excess of CHF 1 Million (at any point during the period from 2001 to 2008) held directly at UBS AG and who were *beneficial owners* thereof where there are grounds to suspect fraud and the like in this regard;[162] or
(b) US nationals (regardless of their place of residence) who were *beneficial owners* of an offshore company accounts opened during the period from 2001 to 2008 where there are reasonable grounds to suspect fraud and the like[163] in this regard.[164]

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161 Agreement between the Swiss Confederation and the United States of America concerning a request for administrative assistance from the Internal Revenue Service of the United States of America concerning UBS AG, a public limited company incorporated under Swiss law, SR 0.672.933.612, Annexe.

162 'The criteria agreed for determining ''fraud and the like'' for this petition with regard to the double taxation agreement in force are set forth as follows:

For undisclosed (non-W-9) custody accounts and banking deposit accounts (as described in para 1.A of this Annex), in cases when there are grounds to suspect, that the taxable person domiciled in the USA have committed the following:

a. fraudulent behaviour consists of suspicious acts, including act intended to conceal assets and to reduce declared income based on ''webs of lies'' or by submitting incorrect or false documents. Where such conduct has been substantiated, account holders with assets of less than CHF 1 Million (except for accounts with assets of less than CHF 250,000) during the relevant period shall also figure within the group of US persons covered by this petition; or
b. continued and severe tax offences, for which the Swiss Confederation under Swiss law and administrative practice can provide information based on the legal interpretation of the cases involving the contracting parties in which
   (i) the taxpayer domiciled in the USA failed to complete a W-915 form during a period of at least 3 years (including at least one request over the years) and (ii) the UBS account in any one of the three-year periods, which includes at least one request over the year, receives yearly average income in excess of CHF 100,000. For the purpose of this analysis, income shall be defined as gross income (interest and dividends) and capital gains (which in the assessment of the main issue of this request for administrative assistance equals 50% of the gross sales proceeds calculated and realised on the accounts during the relevant period).

''Webs of lies'' based on the banking documents can exist when beneficial owners (i) use false documents; (ii) operate within a framework of action which is described in the ''hypothetical case studies'' in Annex on the mutual agreement concerning the smooth operation of Article 26 of the double taxation agreements (eg, by including among them legal or natural persons as a fence or as front men for the repatriation or transfer elsewhere of assets in the offshore-accounts); or (iii) Use telephone cards to disguise the source of the dealings. These examples are not exhaustive. Depending on the relevant facts and circumstances, the FTA can also qualify additional activities as ''Webs of lies''.'

163 'The criteria agreed for determining ''tax fraud and the like'' for this petition with regard to the double taxation agreement in force are set forth as follows:

For ''offshore company accounts'' (as described in para 1.B of this Annex), for which there are clear grounds for suspecting that the American beneficial owners committed the following:

a. as fraudulent conduct, suspicious acts, including activities for the purpose of concealing assets and for underreporting income, based on ''Webs of lies'' or submitting incorrect or false documents, except for US beneficial owners of accounts in Offshore-Companies containing assets during the relevant period of less than CHF 250,000; or
b. continued and serious tax offences, for which the Swiss Confederation under Swiss law and administrative practice can procure information, and which is based on the legal interpretation of the cases involving the contracting parties, in which the US-person failed to provide evidence despite a demand by the FTA that the person fulfil their tax reporting requirements in relation with their interests in such Offshore-Companies (ie through authorisation by the FTA, with IRS copies of the

Case law of the Federal Administrative Court

Concept of beneficial owner

There is no specific definition of the concept of a beneficial owner in State Treaty 10.[165] The identification criterion for a beneficial owner in State Treaty 10 should ensure that account information from a US person will be forwarded to American tax authorities where they have an advanced corporate structure from a fiscal point of view in order to circumvent the obligation to submit a declaration for the assets on the company account and the income deriving therefrom.[166] Correspondingly, the concept of beneficial owner should serve to

cont.

FBAR-declaration of the tax obligations for the relevant years to be obtained). Lacking such validation, the Swiss Federal Tax Administration will provide disclosure, provided (i) the account of the offshore company has existed for a prolonged period (ie at least 3 Years, (including at least one request over the years) and (ii) that during any of the three-year periods, including at least one request over the years, records an annual average income in excess of CHF 100,000.

c. for the purpose of this analysis, income shall be defined as gross income (interest and dividends) and capital gains (which in the assessment of the main issue of this request for administrative assistance equals 50% of the gross sales proceeds calculated and realised on the accounts during the relevant period).

''Webs of lies'' can be present when it arises from the bank documents that the beneficial owners continuously and seriously violate the administration and investment of the assets held in the account of the offshore company totally or partially under their control or any other formalities or contents of the alleged company property, (ie the offshore company acts as front man, shell company or alter ego of the American beneficial owner), whilst the beneficial owners (i) display discrepancies with the entries made in account documentation or with the investment decision tax forms submitted by the bank to the IRS; (ii) use telephone cards or special mobile telephones to disguise the source of the dealings; (iii) Make deceptive use of debit or credit cards for repatriating capital or transferring capital in other ways for the payment of personal expenses or for making routine payments of credit card invoices for personal investments for the affectation of Assets of the offshore company account; (iv) authorise electronic funds transfers or other payments from the account of the offshore company to accounts in the United States or elsewhere that are held or controlled by the American beneficial owner or by a related person in order to disguise the true origin of the person authorising the said electronic funds transfers; (v) call in legal or natural persons as a fence or front man for repatriating or assets or otherwise transferring assets into the account of the offshore company; or (vi) grant ''loans'' to the American beneficial owner or related person that come directly out of the assets in the offshore company account , through which they were secured or paid. These examples are not exhaustive. Depending on the relevant facts and circumstances, the FTA can also qualify additional activities as ''Webs of lies''.

''Reasonable grounds for suspicion'' exist according to the Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 5.1, from the moment the person involved in administrative assistance procedures – notwithstanding (possible) demands by the FTA – fails to demonstrate that their tax reporting requirements with regard to their interest in the ''offshore company'' had been fulfilled as far as the FTA had been authorised, by the IRS copies of the FBAR declaration (Reports of Foreign bank and Financial Accounts) that were to be provided for the relevant years. Cf also Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 2.3.'

On 'fraudulent behaviour' cf Federal Administrative Court, judgment of 13 October 2011, A-6906/2010, para 13.

164 Regarding QI-Standards cf Urs R. Behnisch, 'Amtshilfe in Steuersachen an die USA: Zur Bedeutung der QI-Normen', Jusletter 26 January 2009. According to the Federal Administrative Court it is however irrelevant, whether State Treaty 10 ties in with the QI-procedure or not, which is why, in the corresponding administrative assistance procedures, it was not incurred in the plea against the US tax law. Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 5.1.

165 On 19 August 2009 the Swiss Confederation and the United States concluded an agreement concerning a request for administrative assistance from the Internal Revenue Service of the USA against UBS AG, a stock corporation incorporated under Swiss law (Agreement 09, AS 2009 5669). Following judgment of the Federal Administrative Courts of 21 January 2010, A-7789/2009, a protocol agreed by the Federal Council on 31 March 2010 with the United States amending agreement 09 (Protocol 10, AS 2010 1459). The 09 Agreement and Protocol 10 were approved by federal resolution of the Federal Assembly on 17 June 2010 (AS 2010 2907). The consolidated version of Agreement 09 and Protocol 10 was designated State Treaty 10 (SR 0.672.933.612).

166 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.2.

create constellations 'through which, from an economic perspective (substance over form[167]) the offshore company exists simply to evade the compulsory tax reporting requirements or for the purpose of tax evasion with respect to the USA'.[168]

It is thus key for beneficial ownership to what extent the beneficial owners were able to continue controlling economically and dispose of the assets on a bank account[169] and the income derived therefrom through the formal framework of an offshore company.

Concept of offshore company accounts

The concept of offshore company accounts refers to bank accounts of corporate entities in the broader sense, including offshore types of companies[170] which would not be regarded as taxable entities under Swiss or American company- and/or tax law.[171] These legal entities must merely be capable of fostering a lasting customer relationship with a financial institution such as a bank and retaining ownership.[172] To be considered as a company, in compliance with any foreign laws regarding established foundations and trusts, both of these legal entities must thus be capable of retaining ownership and maintaining a good relationship with a bank.[173]

167 Cf regarding this criterion in US tax law *Weiss v Stearn*, 265 US 242, 254 (1924): 'Questions of taxation must be determined by viewing what was actually done, rather than the declared purpose of the participants; and when applying the provisions of the Sixteenth Amendment and income laws ... we must regard matters of substance and not mere form.' See also *Helvering v Clifford*, 309 US 331 (1940); *Gregory v Helvering*, 293 US 465 (1935); *Louis Markosian and Joan P Markosian v Commissioner of Internal Revenue*, 73 TC 1235 (1980); *George V Zmuda and Walburga Zmuda v Commissioner of Internal Revenue*, E731 F.2d 1417 (9th Cir 1984).

168 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.2.

169 Cf also Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 3.2, by which the criteria in annex to State Treaty 10 for each individual account for which information must be delivered to the IRS, which must be examined separately and fully completed and the circumstance that, in relation to an account, all of the conditions under State Treaty 10 – as well as the characteristics of the account in addition to the conditions pertaining to the beneficiary person or persons – have been fulfilled, proves insufficient for providing administrative assistance for other related accounts for which said person(s) is/are account owner or beneficial owner(s). Cf also Federal Administrative Court, judgment of 15 August 2011, A-8261/2010, para 4, Federal Administrative Court, judgment of 27 June 2011, A-6939/2010, para 6.2, Federal Administrative Court, judgment of 4 May 2011, A-6792/2010, para 9.1.2, Federal Administrative Court, judgment of 28 April 2011, A-52/2011, para 6.4 and Federal Administrative Court, judgment of 14 February 2011, A-6258/2010, para 11.3. Cf regarding Liechtenstein Anstalt Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 5.4.4.

170 Cf further concerning the notion of 'offshore' Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.1.2, whereby 'offshore' means that the company is located in a State and founded under the laws of the State in which the state control (with respect to regulations) is weak or in which the said company enjoys low taxation or no taxation at all. 'Offshore companies', according to the Federal Administrative Court, also conduct as a general rule (for the most part) their business operations not in the State in which they have their official headquarters. Cf further Federal Administrative Court, judgment of 16 June 2011, A-7017/2010, para 4.2.1.2 and Federal Administrative Court, judgment of 10 June 2011, A-7242/2010, para 7.2.1.2.

According to the Federal Administrative Court 'operative' companies can also be 'offshore companies'. Cf Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.1.3; Federal Administrative Court, judgment of 18 August 2011, A-7018/2010, para 3.4; Federal Administrative Court, judgment of 11 July 2011, A-6242/2010, para 3.8; Federal Administrative Court, judgment of 16 June 2011, A-7017/2010, para 6.2.3; Federal Administrative Court, judgment of 10 June 2011, A-7242/2010, para 7.4.2.

171 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.2.1.

172 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.2.1.

173 Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.1.1; Federal Administrative Court, judgment of 22 August 2011, A-7018/2010, para 3.3; Federal Administrative Court, judgment of 11 August 2011, A-6722/2010, para 3.4.1; Federal Administrative Court, judgment of 31 March 2011, A-6455/2010, para 3.2.1; Federal Administrative Court, judgment of 14 February 2011, A-5974/2010, para 3; Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.2.1.

Ability to exert economic control and right of disposal

In keeping with the key criterion of decision-making powers within the concept of the beneficial owner of the DBA-USA 96 and the OECD-MA, it is relevant in determining whether there exists beneficial ownership in an offshore company account pursuant to State Treaty 10 the extent to which the US Person was able to continue to *control economically* and *dispose of* the assets in the USB account of the offshore company as well as any income derived therefrom.[174]

If a US person had the power to make decisions about how the assets on the UBS account should be managed and/or if yes, then how they or the income derived therefrom should be used, then from an economic perspective the US person was not dissociated from this asset and the income derived therefrom.[175] The offshore company here is a case of substance over form pursuant to State Treaty 10 and should be seen as being transparent and the beneficial ownership in the offshore company account is to be seen as given.[176] Whether and to what extent the economic power of disposition and control over the assets held in the UBS account and the income derived therefrom in the relevant period from 2001 to 2008 actually existed must be assessed on a case-by-case basis and entirely based on facts.[177]

The criterion and evidence to be applied[178] are also dependent on the legal form chosen for the offshore company.[179] In its jurisprudence, the Swiss Federal Administrative Court recognised the following evidence and criteria, which could provide indications of the beneficial owner's control and authority to dispose:

- a mandate agreement exists between the US person and the Foundation Board;[180]
- the US person may modify the statutes of the foundation at any time;[181]

174 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.2.
175 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.2.
176 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.2.
177 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.2.
178 Cf essential Federal Administrative Court, judgment of 15 July 2010, A-4013/2010. Cf also Federal Administrative Court, judgment of 13 October 2011, A-6906/2010, para 4.1; Federal Administrative Court, judgment of 7 March 2011, A-6873/2010, para 5; Federal Administrative Court, judgment of 11 January 2011, A-4904/2010, para 4.1; Federal Administrative Court, judgment of 11 October 2010, A-4876/2010, para 3.1.Critical on the procedures before the Federal Administrative Court. Rainer J Schweizer, 'Der Rechtsstaat und die EMRK im Fall der Kunden der UBS AG', AJP 2011, p 1007 et seq., and Martin Schaub, 'Der UBS-Staatsvertrag und die EMRK, Bemerkungen zum Urteil A-4013/2010 des Bundesverwaltungsgerichts – gleichzeitig eine Studie zur Hierarchie des Völkervertragsrechts', AJP 2011, p 1294 et seq. The foregoing shall not be further discussed with regard to the procedural aspects.
179 Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.2.
180 Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.2.2; Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 4.4; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 4.4, para 5.4.1; Federal Administrative Court, judgment of 12 August 2011, A-6660/2010, para 3.2; Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 4.3; judgment of 4 February 2011, A-5974/2010, para 3.2; Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.3; Federal Administrative Court, judgment of 5 March 2009, A-7342/2008 and A-7426/2008, para 5.5.3.3.
181 Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.2.2; Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 4.4; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 4.4, para 5.4.1; Federal Administrative Court, judgment of 12 August 2011, A-6660/2010, para 3.2; Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 4.3; judgment of 4 February 2011, A-5974/2010, para 3.2; Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.3.

- the US person is designated in a by-law as the beneficiary during his lifetime with succession arrangements on his death;[182]
- the US person can, according to a regulation, have unlimited powers for disposing of assets;[183]
- the US person is intended as the ultimate beneficiary in the statutes of the foundation;[184]
- the US person, the Foundation Board and the beneficiary are in fact the same;[185]
- the US person has signature rights on the bank accounts of the foundation;[186]
- the US person is listed as such in form A (this does not represent merely an indication but rather sufficient evidence thereof);[187]
- the US person has full power of attorney;[188]

182 Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.2.2; Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 4.4; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 4.4, para 5.4.1; Federal Administrative Court, judgment of 12 August 2011, A-6660/2010, para 3.2; Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 4.3; judgment of 4 February 2011, A-5974/2010, para 3.2; Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.3.

183 Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 6.1.

184 Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.2.2; Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 4.4; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 4.4, para 5.4.1; Federal Administrative Court, judgment of 12 August 2011, A-6660/2010, para 3.2; Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 4.3; Federal Administrative Court, judgment of 4 February 2011, A-5974/2010, para 3.2; Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.3.

185 Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.2.2; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 4.4, para 5.4.1; Federal Administrative Court, judgment of 12 August 2011, A-6660/2010, para 3.2; Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 4.3; judgment of 4 February 2011, A-5974/2010, para 3.2; Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.3.

186 Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 6.2.2; Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 4.4; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 4.4, para 5.4.1; Federal Administrative Court, judgment of 12 August 2011, A-6660/2010, para 3.2; Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 4.3; Federal Administrative Court, judgment of 8 April 2011, A-6676/2010, para 4.4.4; judgment of 4 February 2011, A-5974/2010, para 3.2; Federal Administrative Court, judgment of 10 January 2011, A-6053/2010, para 7.3.3.

187 Federal Administrative Court, judgment of 11 August 2011, A-6722/2010, para 3.5.2. et seq.; Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 6.1; Federal Administrative Court, judgment of 21 March 2011, A-7012/2010, para 5.3.1 f.; Federal Administrative Court, judgment of 14 February 2011, A-5974/2010, para 4.2.1. Cf also Federal Administrative Court, judgment of 4 February 2011, A-5974/2010, para 4.2.2: 'Accordingly, it is not relevant for the current assessment to cite the reasons for which complainant 2 of UBS AG should be designated as beneficial owner on the account of Complainant 1. What is involved here is rather an assumption of the facts which must be clearly and decisively disabled from the complainants. Should they not succeed in demonstrating them in the sense referred to the Federal Administrative Court, that complainant 2 was wrongly referred to by the UBS AG on the corresponding forms as beneficial owner on the account of complainant 1 and accordingly, that they at no time had during the years 2001 to 2008 the power to dispose of economic assets and control the assets and the income generated there from it held in the UBS account of complainant 1, must be retained on the assumption of the lower court.' Cf further, Federal Administrative Court, judgment of 14 February 2011, A-5974/2010, para 4.2.1; Federal Administrative Court, judgment of 20 October 2011, A-7976/2010, A-7978/2010, A-7979/2010, A-7980/2010, A-7982/2010, A-7983/2010, para 2.2; Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 6.2; Federal Administrative Court, judgment of 15 July 2010, A-4013/2010, para 2.2 and Federal Administrative Court, judgment of 5 March 2009, A-7342/2008 and A-7426/2008, para 5.5.2.4. Tax law relation explained versus form A cf in detail Behnisch (fn 163), Pt 42.

188 Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 6.1. Federal Administrative Court, judgment of 5 March 2009, A-7342/2008 and A-7426/2008, para 5.5.3.3.

- the US person has a mandate authorising drawings and dispositions;[189]
- the US person has executed transfer orders through bank accounts;[190]
- the US person can decide for themselves without the consent of the Foundation Board regarding the investment of assets;[191]
- it is evident from decisions made by a trust or a foundation that the earnings of the US person are probably authorised by the competent bodies and thus the administrative requirements were met. However, according to further documents, the bodies ultimately have no power to refuse the requests of the US person and that this is significant in the context that the bodies approved the earnings of the US person as a general rule together for several years and subsequently granted;[192]
- no accounting records;[193] and
- de facto economic control and power of disposition exist over the assets and the income derived from the offshore company account.[194]

On the other hand, the following are not beneficial owners:

- discretionary beneficiaries (beneficiaries with no legal claim) in accordance with the articles and by-laws and on the basis of decisions made by the Foundation Board is a beneficiary of the foundation assets at a rate of 5 per cent per year but who exercises no influence or control;[195]
- those included in the order of beneficiaries of foundations as primary beneficiaries of the capital and proceeds in the lifetime of the respective foundation but that are also not capable within the time and scope of payments to exert meaningful influence on their own behalf[196] whereby it shall serve for this purpose as an indication on the statutes and orders of beneficiaries of the foundations and on the articles of association, where applicable, of the underlying companies;[197,198]
- a person related to the administrative assistance procedure when the 'foundation game is played'[199] and which thus has no control or power of disposition over assets;
- those persons who under certain circumstances through possible amendment to the order of beneficiaries through the foundation board may belong to the group of beneficiaries;[200]

189 Federal Administrative Court, judgment of 5 March 2009, A-7342/2008 and A-7426/2008, para 5.5.3.3.
190 Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 6.1.
191 Federal Administrative Court, judgment of 8 April 2011, A-6676/2010, para 4.4.4.
192 Federal Administrative Court, judgment of 20 June 2011, A-6874/2010, para 6.3.
193 Federal Administrative Court, judgment of 5 March 2009, A-7342/2008 and A-7426/2008, para 5.5.3.3.
194 Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 4.4; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 4.4.
195 Federal Administrative Court, judgment of 14 February 2011, A-5974/2010, para 4.1.2.
196 Although it was recorded in the statutes as well as in the respective order of beneficiaries that the beneficiaries have no actionable claim against the foundation to the benefits of the foundation assets, it was not to be interpreted to such effect, that it was not a question of 'fixed trust' but rather of 'discretionary trust' Federal Administrative Court, judgment of 12 August 2011, A-6660/2010, para 5.4.1 et seq.
197 With reference to Art 154(1) Swiss Federal Act on International Private Law. Cf also Arter (fn 95), p 125 et seq.
198 Federal Administrative Court, judgment of 12 August 2011, A-6660/2010, para 5.3.2, para 5.4.2.
199 Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 5.4.3; Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 5.4.2.
200 Federal Administrative Court, judgment of 12 September 2011, A-6807/2010 and A-6682/2010, para 5.4.3. Cf regarding Liechtenstein establishments Federal Administrative Court, judgment of 27 September 2011, A-6680/2010 and A-6756/2010, para 5.4.4.

- those persons acting as the trustee of a trust because the trustee is bound by the provisions set down in the trust deeds and thereby cannot be considered a beneficial owner of the trust assets since they lack the economic power of disposition.[201]

The essence of the various judgments passed down by the Swiss Federal Administrative Court is that the beneficial ownership of a US person can be taken as given where a US person, acting as beneficiary of an offshore company, could exert meaningful influence over the time and scope of payments made to himself, whether because they are a fixed beneficiary or because it is a revocable trust, a revocable foundation, etc or because actual control and power of disposition over the assets of the offshore company could be exercised and the 'games of trusts and foundations' were not being played.

Summary and outlook

On 1 July 2007, the Convention on the Law Applicable to Trusts and their Recognition came into force in Switzerland.[202] As can be taken from the message to the Hague Trust Convention, the huge growth potential of the trust business has been formally acknowledged because the offshore centres where most trusts were established are coming under increasing international pressure and Switzerland can offer a serious alternative because it can offer both high-quality managerial, consulting services and discretion as well as providing internationally recognised banking supervision and money laundering legislation.[203] As the aforementioned discussion has revealed, various uncertainties persist despite the Hague Trust Convention in dealing with trusts being ratified. These arise due to the fact that Swiss service providers often have insufficient knowledge about which cases trusts are suitable, what the consequences are of establishing a trust for beneficiaries, in particular the settlor and the beneficiaries, and what is required of a trustee in administering foreign trusts. From a Swiss perspective, insufficient or inadequate administration of a trust is often key which may be due to the trustee actually being controlled through the settlor or a beneficiary.

The Swiss Federal Administrative Court has addressed in various judgments the issue of under which criteria a beneficiary of a trust must be qualified as beneficial owner, in particular because a trust is actually controlled through a settlor or beneficiary and the game of the trust is not being played. The criteria developed by the Swiss Federal Administrative Court relating to the aspects of actual control set out should be added to, such as also by determining whether or not the necessary resolutions by the trustee are present, whether or not transactions with third parties are conducted at arm's length[204] whether or not dividends are paid from companies controlled by trusts, whether or not assets are being mixed together, whether or not transactions and companies controlled by trusts are sufficiently capitalised, etc.

201 Disclosed in Federal Administrative Court, judgment of 11 August 2011, A-6722/2010 and A-6936/2010, para 3.5.6.

202 Convention on the law applicable to trusts and on their recognition, SR 0.221.371.

203 The circular on approval and implementation of the Hague Convention on the Law applicable to trusts and on their Recognition of 2 December 2005, BBl 2007 551 et seq., 557.

204 Cf *Dahlstrom v Cm* 61 TCM 2863 (1991): '…transfer assets in non-arm's-length transactions back and forth, creating layers of documentation to impede any examination or investigation… Petitioners owned and enjoyed the income, funnelled through the layers of trusts and paperwork they generated to disguise or hide their income, and they are taxable on that income…'.

It will be interesting to see whether the Swiss courts will implement the criteria from the Swiss Federal Administrative Court in assessing so-called sham trusts[205] cases of 'piercing the corporate veil',[206] claims from spouses,[207] heirs[208] or creditors[209] or incompatibility of the trusts with Swiss public policy.[210]

205 Cf also WKR-Trust, ZR 98 (1999) N 52: 'Although WKR had no authority, whether as founder or as beneficiary of the WKR-Trust, to manage their affairs, he carried out their business on several occasions. Yet, this would only be allowed by the trustee. It is clear from WKR's conduct, that he did not sufficiently know the trust idea as such, or that he did not base himself thereon nor on the legal constraints of the establishment of the WKR-Trusts. Moreover, WKR treated the trust estate like his own assets in an inadmissible manner on several occasions. In light of these circumstances, the WKR-trust is in the absence of a trust intention of the WKR settlor and must thus be qualified as null and void.'
Cf also *Rahman v Chase bank Trust Company (CI) Ltd. And Others* (1991) JLR 103: 'We were unanimously satisfied … that from the date on which (Mr. Rahman) purported to constitute the settlement he exercised dominion and control over the trustee in the management and administration of the settlement, including distributions of capital to himself, to others as gifts or loans, and the making and disposal of investments. He treated the assets comprised in the trust as his own and the trustee as though it were his mere agent or nominee. There was a retention by (Mr. Rahman).'

206 Cf *Esteem Settlement (Abacus (C.I.) Limited as trustee): Grupo Torras S.A. and Culmer v Al Sabah* [2003] JLR 188. Cf also the decision by the Liechtenstein Princely Supreme Court OGH 2 CG. 2006.315 of 1 October 2009 on the reversal of drastic measures: 'The question arises of the responsibility of the defendants together with, from the standpoint pursuant to the private company statute, hence under Liechtenstein law, of the assessment of the so-called inversion of the crackdown. This inverted crackdown allows the legal entity (foundation) that is behind the perpetrator to take drastic measures through the legal consequences deriving from the obligations for which the back man is liable. Such a crackdown requires, among others, that the call for autonomy of the legal entity (foundation) pursuant to Art 2 PGR (Art 2 Swiss Civil Code) is an abuse of law. What is primarily required is a manifestly inappropriate, abusive use of the legal person. This condition is to be affirmed for example, when the establishment by a legal person (foundation) serves to, render their backer incapable of meeting their financial obligations.' Cf the decision of the Liechtenstein Princely Supreme Court 11 UR 2005.48-92 of 3 November 2005: 'If the founder or beneficiary owner has engaged or consulted a legal person in a subjectively abusive manner in order to circumvent the law, has concealed fraudulent acts, consciously breached contractual obligations or fundamental principles of company law, then the clampdown on the legal entity is allowed as an extraordinary remedy by the judge.'

207 Art 15(1)(b) Hague Trust Convention. Cf also Art 48 Swiss Federal Act on International Private Law. Here in particular Art 208(1) Swiss Civil Code: 'With regard to acquisition shall be added:
1. free inducements, that a spouse has made over the last five years towards resolution of the marital property regime without the consent of the other spouse, exception made of the usual and customary gifts;
2. Divestment of assets, Made by a spouse during the marital property regime in order to diminish the other's claim to the interests.'

Cf also Art 220(1) Swiss Civil Code: 'Should the assets not cover the obligations of the spouses or their heirship under legal analysis of the claims to the interests, the beneficial spouse or their heirs may claim the benefits which are to be added to the acquisition up to the level of the shortfall of the third party beneficiaries.'

208 Art 15(1)(c) Hague Trust Convention. Cf also Art 90 Swiss Federal Act on International Private Law. Here in particular Art 470 et seq. Swiss Civil Code with regard to the compulsory obligations and the corresponding legal remedies of the reduction pursuant to Art 522 et seq. Swiss Civil Code, in particular Art 527 Swiss Civil Code: 'last will and testament is subject to the reduction through:
1. the contributions related to charges concerning the inheritance as dowry, furnishings, or transfer of assets, if they are not subject to equalisation;
2. the succession settlements and amounts of the buyouts;
3. the endowments that the deceased could freely revoke, or that during the last five years preceding his death he had staged, exception made of the of the usual and customary gifts;
4. the divestment of assets that the deceased openly carried out for the purpose of avoiding the limitation of disposal of assets.'

With regard to the restoration cf Art 626 Swiss Civil Code:
'1. The legal heirs are mutually obliged to come to a comprehensive settlement with regard to the charges allocated to their share of the inheritance by the testator during their lifetime;
2. what the testator has bequeathed to his descendants in the forms of dowry, furnishings or through liquidation by arrangement, discharge and the like, provided the testator has made no provision to the contrary, remains under the settlement obligation.'

209 Art 15(1)(e) Hague Trust Convention. The Paulian Action can be particularly relevant as also the intended Paulian Action, and in any event, however, the insolvency Paulian Action as well. For the Paulian Action, compare Art 286(1) Swiss Debt Enforcement and Bankruptcy Law: 'With exception of the usual and customary

In any event, in carrying out their activities, whether they are consulting or trust service companies – hence involved in incorporating and administering trusts – Swiss service providers will have to get used to significantly higher standards. This involves not just trust administration being geared more towards the applicable trust statute but focussing more on specific tax legislation requirements as well as, for example, the status of marriage, inheritance and debt recovery, and bankruptcy.

cont.

gifts all gifts and dispositions without payment, that the debtor made within the final year prior to seizure or initiation of bankruptcy proceedings May be contested.' On the Paulian Intention, compare with Art 288 Swiss Debt Enforcement and Bankruptcy Law: 'All legal acts carried out by the debtor against the other side within the last five years prior to seizure or application of bankruptcy proceedings with the recognisable intention to penalise his creditor or to favour another creditor to the detriment of an individual creditor may be contested.' Regarding passive legitimation, see also Art 290 Swiss Debt Enforcement and Bankruptcy Law: 'The action for annulment is intended for persons who have concluded with the debtor the contestable legal acts or who have benefited from him in a voidable manner, and against his heirs or other successors and against third parties in bad faith. The rights of third parties in good faith shall not be affected by the action for annulment.'

210 Art 18 Hague Trust Convention and Art 17 Swiss Federal Act on International Private Law. Compare with the judgment of 30 April 2011, I-22 U 126/06, Dusseldorf Higher Regional Court.

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