Trusts & Trustees Advance Access published December 17, 2015

Discretionary trusts—last exit before AEOI? The Swiss view

Michael Fischer* and Tobias F. Rohner†

Abstract

Are discretionary trusts the way of getting around Automatic Exchange of Information? 'No' is the answer if financial assets are to be held or administered in a Common Reporting Standard (CRS) jurisdiction, certainly if the aim is to enjoy the benefit of trust property. Certain loopholes may be open for those prepared to forego the enjoyment of assets or to establish the entire structure in non-CRS territory (which may include the USA). Given the way the world is headed, however, one should not be surprised to see any gaps in the system plugged at some point not too distant.

Introduction

This article is to examine whether in times of Automatic Exchange of Information (AEOI) discretionary trusts could serve as a means to keep one's bank assets and income at bay from the tax man.

With regard to jurisdictions having adopted the 'Common Standard on Reporting and Due Diligence for Financial Account Information' (CRS) and AEOI the answer is straightforward negative. Far-reaching identification and reporting obligations make it practically impossible to maintain the benefit from and hide financial assets in AEOI jurisdiction at the same time.

However, heterogeneous interpretations and implementation of Anti Money Laundering and Know Your Customer (AML/KYC) rules may still leave room for small loopholes.

Legal bases

AEOI is based on the multilateral Convention on Mutual Administrative Assistance in Tax Matters ('Convention'). The Convention was jointly developed by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010. In the OECD's own words the Convention is the most comprehensive multilateral instrument available 'for all forms of tax cooperation to tackle tax evasion and avoidance'.[1] The Convention was amended by the G20 in April 2009 aligning it with the international standard on exchange of information on request and making it available to all interested jurisdictions.

Switzerland signed the Convention on 15 October 2013. Parliamentary approval being imminent, Switzerland is yet to ratify the Convention.

Under the Convention there are three ways of exchanging information, namely (i) upon request, (ii) spontaneous, and (iii) automatic. In its Article

*Michael Fischer, LLM, *Attorney at Law, Certified Tax Expert,* FRORIEP, Bellerivestrasse 201, PO Box 8034, Zurich, Switzerland. Tel: +41 44 386 60 00; Fax: +41 44 383 60 50; Website: www.froriep.com

†Tobias Rohner, *Attorney at Law, Certified Tax Expert,* FRORIEP, Bellerivestrasse 201, PO Box 8034, Zurich, Switzerland. Tel: +41 44 386 60 00; Fax: +41 44 383 60 50; Website: www.froriep.com

1. <http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm> accessed 28 September 2015.

doi:10.1093/tandt/ttv193

6, entitled 'Automatic exchange of information', the Convention provides that with:

> respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, two or more [Contracting States] shall automatically exchange the information referred to in Article 4.

The introduction of AEOI between jurisdictions requires further steps, including in particular an additional treaty, the 'Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information' (MCAA). In Switzerland, the MCAA is, together with the Convention, currently before Parliament for approval. The Swiss National Council approved it on 16 September 2015. Initial debates in parliamentary commissions and the unambiguous decision by the Swiss National Council leave little doubt that the Parliament's second chamber, the Swiss Council of the States, will give their approval, allowing for information to be automatically exchanged after 1 January 2018.

The MCAA sets out the information to be exchanged between contract parties and related modalities, including in particular timing and form. Also, the MCAA contains the CRS as comprehensive annex. The CRS sets forth detailed rules on 'reporting and due diligence standards that underpin the automatic exchange of financial account information',[2] less technically speaking who is to collect what type of information on what type of accounts and how such information is then to be reported. CRS is designed to be essentially aligned with the pre-existing Foreign Account Tax Compliance Act (FATCA) system.[3]

Proceeding by way of a multilateral agreement carries the obvious advantage of allowing simplified amendment in the event of a subsequent change to the AEOI standards. A mere update of the MCAA approved by participating jurisdictions, rather than cumbersome bilateral negotiations, will suffice and thus support uniform development between all participating jurisdictions. Any *intra legem* specifications to the CRS will occur via the OECD commentaries, expressly defined to be part of CRS.[4]

At the October 2014 meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes in Berlin, 89 jurisdictions agreed to implement AEOI from 2015.[5] The last financial centres not yet having decided on the introduction of AEOI are Bahrain, Cook Islands, Nauru, Panama, and Vanuatu. Also, a number of developing jurisdictions not qualifying as financial centres will introduce AEOI at a later stage only. Against that background, there is no room to doubt that AEOI and CRS will prevail as the global standard and that, ultimately, no jurisdiction will be in a position to stand aside.

Although the Convention and the MCAA essentially form the substantive bases of AEOI they are, among other things for lack of sufficient degree in

2. OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD 2014) 93.

3. FATCA does deviate in certain aspects from the CRS system because of US tax legislation, in particular the concept of taxation on the basis of citizenship and the presence of a significant and comprehensive FATCA withholding tax. Although one could say that the CRS is a by-product of FATCA, the USA has previously signalized that they will not sign the MCAA. This is not further astonishing when considering the purpose of FATCA. FATCA is part of a larger piece of legislation (Hiring Incentives to Restore Employment Act) introduced in the USA in 2010 to ensure that that US persons are fully disclosing their worldwide income to the Internal Revenue Service. The implementation of FATCA by inter-governmental agreements has enabled the USA to collect information about all US persons, ie all US taxpayers without having generally agreed that the USA will also provide information reciprocally. However, pursuant to the Agreement between Switzerland and the USA for cooperation to facilitate the implementation of FATCA, the USA have expressed their willingness to negotiate an agreement on a reciprocal basis when and to the extent Switzerland seeks to collaborate with the USA to implement FATCA based on direct reporting by Swiss Financial Institutions to the Swiss Government followed by the transmission of such information to the USA.

4. MCAA s 1 (1) (f).

5. Statement of outcomes of meeting of Global Forum on Transparency and Exchange of Information for Tax Purposes of 28–29 October 2014, Annex 2: Andorra, Anguilla, Antigua and Barbuda, Argentina, Aruba, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Bermuda, Brazil, British Virgin Islands, Brunei, Canada, Cayman Islands, Chile, China, Colombia, Costa Rica, Croatia, Curacao, Cyprus, Czech Republic, Denmark, Dominica, Estonia, Finland, France, Germany, Gibraltar, Greece, Grenada, Guernsey, Hong Kong (China), Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Macau (China), Malaysia, Malta, Marshall Islands, Mauritius, Mexico, Monaco, Montserrat, The Netherlands, New Zealand, Niue, Norway, Poland, Portugal, Qatar, Romania, Russia, Saint Maarten, Samoa, San Marino, Saudi Arabia, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sweden, Switzerland, Trinidad and Tobago, Turkey, Turks and Caicos, United Emirates, United Kingdom, Uruguay.

detail, not self-executing. Accordingly, domestic implementing legislation is required at the level of each participating jurisdiction.

Switzerland is introducing an AEOI Statute (AEOIS) plus a related Ordinance, both currently before Parliament too. Among other things, AEOIS and the Ordinance serve to provide specification in respect of certain options and open definitions contained in the CRS. For example, according to domestic law the community of flat owners sharing one building (*Stockwerkeigentümergemeinschaft / communauté des propriétaires d'étages*) does not qualify as a Reporting Financial Institution. Further, the Swiss draft AEOIS contains provisions on the organization and competence of the responsible authorities, procedure, legal remedies, and criminal provisions.

Discretionary trusts

Switzerland does not have a domestic substantive trust law meaning that a trust cannot be subject to Swiss law. However, having adopted the Hague Convention on the Law applicable to Trusts and on their Recognition Switzerland recognizes foreign trusts.

In respect of trust-related taxation, the Swiss Federal Tax Administration (FTA) issued guidance on the treatment of trusts for Swiss tax purposes by way of a so-called Circular.[6] In a practical, but somewhat simplifying, manner the Circular distinguishes between 'revocable' and 'irrevocable' trusts, and further between 'fixed interest' and 'discretionary' ones. Practice will often look at substance rather than form, in other words how a trust structure is 'lived' (eg regular distributions from a discretionary trust may result in a requalification for Swiss tax purposes as 'fixed interest').

Pursuant to the Circular's definition, under a fixed interest trust the trustee lacks discretion as to income distributions and/or trust fund appointments, the beneficiary has an enforceable legal claim, resulting in trust assets (or parts thereof) and related income being attributed to him.

Under a discretionary trust, the members of the class of beneficiaries have no enforceable claim against the trustees. Accordingly, prior to any distributions beneficiaries are under no obligation to declare the trust assets and related income in their tax return. Assets settled under a discretionary trust by a Swiss resident settlor will remain attributable to him. If, however, the settlor of a discretionary trust is tax resident abroad the assets and income will not be allocated to him if he later moves to Switzerland (provided, in particular, he genuinely gave up control). A Swiss resident beneficiary will be taxed on distributions out of trust income (including capital gains); distributions of capital may be tax free.[7]

Qualification of trusts in an AEOI context

Some non-Swiss resident individuals have been raising the question whether an irrevocable discretionary trust might serve as a tool to shelter their bank assets and income held in Switzerland from AEOI. The suggested rationale being that if held in an irrevocable discretionary trust the assets are no longer allocated to the settlor since he is deemed to have given up the right of disposal. Assets and income cannot be attributed to the beneficiaries either as they have a mere expectation and no enforceable right to receive directly or indirectly (eg through a nominee) a distribution. As a result, so it is argued, as long as the assets and income of the trust can be allocated neither to the settlor nor to the beneficiaries, the involved persons are out of the AEOI's scope which may enable the trustee to keep the assets and income undisclosed.

Financial Institutions[8] under an obligation to report pursuant to AEOI include banks, custodians, specific insurance companies, and investment entities

6. FTA Circular 20 of 27 March 2008, Taxation of Trusts ('Circular').

7. Circular, 5.2.3.

8. See Defined Terms in CRS, s VIII(A)(3): Custodial Institutions, Depositary Institutions, Investment Entities and Specified Insurance Companies, all defined in CRS, s VIII(A)(4)–(8).

such as individual and collective investment vehicles. As will be explained, trusts, too, may qualify as Financial Institution.

The first question relates to the law applicable to the qualification of a trust. According to the CRS Commentary a trust is not necessarily qualified under its applicable law but primarily under that of the jurisdiction where the trustee is considered tax resident,[9] provided always the trust is not itself under a duty to report as a consequence of its tax residence in another jurisdiction.[10] Thus, the law applicable to a trust (eg Guernsey) will be of little relevance in AEOI-related practice if the trustee is not tax resident in that same jurisdiction.

Once the question of applicable law is resolved one has to examine whether a trust qualifies as Financial Institution. A trust qualifies as Investment Entity and thus as Financial Institution if (i) the trust or its financial assets are professionally managed, eg by a corporate trustee qualifying as Financial Institution and (ii) the trusts gross income primarily results from trading, investment, or re-investment of financial assets (passive income).[11] Professional management means that the management of the trust or its financial assets is carried out by a corporation qualifying as Financial Institution pursuant to AEOI.[12] That will usually be the case with regard to a corporate trustee. The fact that a trust holds a financial account (eg a depository account) with a Financial Institution does not of itself mean that the trust is a Financial Institution. As a consequence, a trust whose bank portfolio is managed by a bank or an asset manager will usually qualify as Financial Institution.

Where individuals act as trustees the above requirements will usually not be met because an individual cannot be an Investment Entity[13] with the consequence that the trust in question will not qualify as Financial Institution. As a result, the trust itself is not obliged to identify and report the controlling persons. Rather, it is for the Financial Institution with which the trust's financial accounts are maintained to discharge reporting and due diligence obligations.

In practice, this is relevant as pursuant to the Commentary the definition of controlling persons will differ depending on whether a trust qualifies as Non-Financial Entity (NFE) or as Financial Institution (cf below section 'Trust qualifies as NFE').

Trusts primarily holding real assets (eg real estate, vessels, cultivated land) will usually not meet the second limb of the Financial Institution test (gross income from financial assets). Assuming they do not fulfil one of the two conditions they will qualify as NFE, usually as passive NFE.

To the extent a trust qualifies as Financial Institution but is not resident, yet holds financial accounts in an AEOI jurisdiction, it will, from the perspective of the identifying Financial Institution, qualify as passive NFE (cf below section 'Trust qualifies as NFE').[14]

By way of example, a Vanuatu resident trust holds a professionally managed portfolio at a Swiss bank. Until now, Vanuatu has not indicated its readiness to introduce AEOI. From the Swiss bank's perspective the trust will qualify as passive NFE although it is professionally managed. As a consequence, the Swiss Financial Institution is required to identify and report the trust's controlling persons. As already mentioned above, the qualification of a trust as NFE or as Financial Institution plays a relevant role in the definition of the scope of controlling persons (cf below section 'Trust qualifies as NFE').

Trust qualifying as Financial Institution

If a trust qualifies as Investment Entity and thus as Reporting Financial Institution the question arises who of the related individuals, in particular settlor and beneficiaries, need to be identified and reported.

9. OECD, *The CRS Implementation Handbook*, 2015 No 210.
10. ibid, No 82.
11. CRS, s VIII(A)(6)(b).
12. OECD (n 2), Commentary on s VIII, No 15.
13. OECD (n 2), Commentary on s VIII, No 22, Example 5.
14. CRS, s VIII(D)(8).

According to CRS, both equity and debt interests in an Investment Entity qualify as Financial Accounts, either needs to be identified or reported accordingly.[15] Although occasionally seen in practice, in relation to trusts debt interests will more likely play a minor role.

More frequently, the relevant question will be to determine who qualifies as holding an equity interest in a trust. According to CRS, an Equity Interest in the case of a trust qualifying as Financial Institution:

> is considered to be held by any person treated as settlor or beneficiary, or any other individual exercising ultimate effective control over the trust.[16]

A reportable person will be treated as being a beneficiary of a trust if he or she 'has the right to receive a mandatory distribution or a discretionary distribution'.[17]

The Commentary contains indications to what extent beneficiaries have to be identified and reported in any particular period.[18] A reportable person will only be treated as beneficiary if actually receiving a distribution 'in the calendar year or other appropriate reporting period' whereby it is irrelevant whether the distribution was paid or merely made payable.[19] By way of *argumentum e contrario* this means that a discretionary beneficiary who did not receive any distribution will not need to be identified or reported.

This solution seems adequate. Discretionary beneficiaries have no enforceable claim against a trustee as long as no distributions have been made or accrued. As a consequence, beneficiaries are unable to conceal assets and income of the trust from taxation. Considering that the (real) aim and purpose of AEOI is tackling tax evasion, and not primarily creating transparency by all means, there is no need or justification to qualify a discretionary beneficiary as a reportable person.

With regard to the settlor, the CRS sets forth that in 'the case of a trust that is a Financial Institution, an Equity Interest is considered to be held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust'.[20] Accordingly, one may—in accordance with FATCA—assume that the settlor needs to be identified and reported in any case, regardless of him qualifying as controlling person.[21] Assuming AEOI jurisdictions will treat the reporting of settlors in a way similar to FATCA, the trust's financial assets will be allocated to the settlor of a revocable trust in full. In the case of an irrevocable trust the settlor needs to be reported with a value of '0', unless he is also a beneficiary. However, each AEOI jurisdiction defines the scope of the reportable persons independently of FATCA. CRS refers to domestic AML/KYC procedures in a generic manner, still requiring the term Controlling Persons to be interpreted in a consistant manner with the Financial Action Tax Force Recommendations.

To what extent other persons (eg a protector) controlling a trust qualifying as Financial Institution need to be identified and reported is not explained, neither in the CRS itself nor in the Commentary. The Commentary mentions other persons that may qualify as controlling persons only in connection with passive NFE. There, the Commentary refers to the Interpretative Note on Recommendation 10 of the Financial Action Task Force (FATF) Recommendations (February 2012) and states that the term 'Controlling Person' corresponds to the term 'beneficial owner' as described in Recommendation 10.[22] It remains unclear whether the term 'beneficial owner' is broader, meaning more

15. CRS, s VIII(C)(1)(a).
16. CRS, s VIII(C)(4).
17. ibid.
18. OECD (n 2), Commentary on s VIII, No 70.
19. ibid.
20. CRS s VIII(C)(4); OECD (n 9) No 214.
21. FATCA, IGA, art 1.1.mm, defines the term 'Controlling Persons' as follows: means the natural persons who exercise control over an entity. In the case of a trust, such term means the settlor, the trustee, the protector (if any), the beneficiaries, and any other natural person exercising ultimate effective control over the trust.
22. OECD (n 2), Commentary on s VIII, No 132.

encompassing than the term 'Controlling Persons'. Hence, further clarification is needed. But in ordinary circumstances other persons like protectors will not exercise ultimate effective control over the trust and, therefore, will not be able to commit a tax evasion. It is hard to see why information on such parties would need to be collected and reported.

In practice, one may encounter US structures set up for non-US persons with the aim of taking advantage of the possibly somewhat one-sided US approach to exchanging information. Whereas it is fair to say that the USA were among the first to see the benefit of receiving information on their own tax payers from other jurisdictions they appear less in a hurry to reciprocate. For non-US persons an all-US structure (including, in particular, a foreign non-grantor trust with a US trustee holding financial assets in a US bank) might indeed allow to remain below radar. But, even if that were the case, it seems unlikely that such solutions would prove efficient beyond a mid-term horizon.

Trust qualifies as NFE

In its capacity as NFE a trust may qualify as 'active NFE' or 'passive NFE'. In practice, trusts will rarely qualify as active NFE.[23] Practical examples of passive NFE may include trusts whose gross income primarily results from passive business activity.

If qualifying as active NFE the trust needs to be identified and reported by the Financial Institution with which it holds Financial Accounts, subject to the trust itself being resident in a reportable jurisdiction. No report is made on related persons such as settlor and beneficiary.

To the extent a trust qualifies as passive NFE, however, both the trust and controlling persons need to be identified and reported by the Financial Institution. According to the Commentary, the term 'Controlling Person' is to be interpreted in a manner consistent with the FATF Recommendations.[24] However, the FATF Recommendations do not contain a specific definition of the term Controlling Persons. Rather, they contain rules for the identification of the beneficial owners. In respect of trusts, the so-called beneficial owners shall be identified by obtaining sufficient information about the identity of the settlor, the trustee, the protector, the beneficiaries, or class of beneficiaries, and any other individual exercising ultimate effective control over the trust (including through a chain of control/ownership).[25]

Regardless of the above-mentioned option for an alignment of NFE with Financial Institutions, it is worth noting that not all CRS jurisdictions have implemented the 2012 version of the FATF Recommendations, some still apply earlier versions. That may result in certain jurisdictions identifying a smaller number of individuals as 'Controlling Persons' in relation to a trust. Accordingly, during a transitional period it will remain relevant in what jurisdiction the identifying Financial Institution is resident and how that jurisdiction interprets the term 'Controlling Persons' in relation to trusts pursuant to its domestic AML/KYC rules.

Independently of the implementation of the 2012 FATF Recommendations in any particular jurisdiction, the Commentary enumerates the persons qualifying as controlling person in relation to a trust that is an NFE.[26] According to the Commentary and *The CRS Implementation Handbook* settlor, trustee, protector, beneficiaries, or classes of beneficiaries will always be 'Qualifying Persons' regardless of them actually exercising control over the trust.[27] In addition, any individual with 'ultimate effective control over the trust' will qualify as controlling persons.[28]

23. Cf by way of example a 'holding vehicle' of a non-financial group (CRS s VIII (D)(9)(d)).
24. OECD (n 2), Commentary on s VIII, No 132.
25. FATF Recommendations 2012, recommendation 10, C.5.(b)(ii)(ii.i). The FATF is an inter-governmental body with the object to set standards and to promote the effective implementation of legal, regulatory, and operational measures for combating money laundering and terrorist financing. The FATF has developed a series of Recommendations that are recognized as the international standard for combating of money laundering and the financing of terrorism.
26. OECD (n 2), Commentary on s VIII, No 134.
27. ibid. OECD (n 9) No 227.
28. OECD (n 2), Commentary on s VIII, No 134.

This broad-brush definition has the apparent advantage of doing away with the need to enquire whether a person effectively has the power to exercise control over the trust.[29] It is obvious, however, that such a definition results in an increased volume of information being collected and also a heavier administrative burden in respect of the reporting requirements. Not only does this foster an unhealthy tick-the-box mentality, but it will also lead to additional costs on business. In particular, it is likely that the state information receiving would raise additional questions to the persons mentioned when detecting a mismatch.

Further, there are practical problems in the implementation of the CRS requirements. For instance, how does one report a group of discretionary beneficiaries which are not defined by names, but merely by a set of criteria?

The OECD has recognized this practical issue and stated that where beneficiaries are not individually named but identified as a class, the CRS does not require that all potential members of the class be treated as reportable persons. Rather, when a member of a class of the beneficiaries receives a distribution from the trust or intends to exercise vested rights in the trust property, this would lead to a reporting obligation.[30]

With regard to Switzerland, the FATF Recommendations seem to suggest that settlor, trustee, protector, beneficiaries, or class of beneficiaries need not per se be identified. According to what appears to be the prevailing view in Switzerland, shared by the Swiss Bar Association, those individuals need to have effective control over the trust, and/or its assets, to become reportable. Participating jurisdictions have the right to align the scope of the beneficiary(ies) of a trust treated as NFE with the scope of the beneficiary(ies) of a trust that qualifies as Financial Institution. In such a case, the Reporting Financial Institutions would only need to report discretionary beneficiaries in the year they actually receive a distribution from the trust. Jurisdictions allowing their Financial Institutions to make use of this option must ensure that such Financial Institutions have appropriate safeguards and procedures in place to identify whether a distribution is made by their trust Account Holders in any given year.[31] For Switzerland, the question of such alignment is expected be dealt with in an Ordinance of the Swiss Federal Council.

Swiss anti-abuse clause

The draft AEOIS contains an anti-abuse provision.[32] It prevents Reporting Swiss Financial from administering or supporting in any other way artificial structures, the sole or main purpose of which is to circumvent obligations pursuant to relevant treaties or AEOIS. Further, a reporting Financial Institution which may have acted in breach will still have to comply with its obligations under applicable treaties and the statute, regardless of the artificial structure. This means that the artificial structure will be treated as non-existent. Anyone acting in breach of the anti-abuse clause will be punished with a severe fine. Hence, if today a discretionary trust will be established in or converted into the form of a Financial Institution under the CRS solely or principally for the purpose of keeping beneficiaries or other controlling persons undisclosed—although they would have to be disclosed if the CRS had not been implemented—and if the arrangement cannot be justified by any other sound reasons, this will probably constitute a breach of the anti-abuse rule.

Conclusion

Against this background, it will be difficult not to say impossible to use trust structures in AEOI jurisdictions for hiding bank assets from the tax authorities.

29. OECD (n 9) No 227.
30. ibid, No 228.
31. ibid, No 16.
32. art 31(I) and (II) draft AEOIS.

It is only in the case of discretionary trusts qualifying as Financial Institution or in the event jurisdictions treat the beneficiaries of a trust qualifying as NFE equally to a Financial Institution that beneficiaries[33] will remain unreported for a certain time. This, however, is true only as long as the beneficiaries do not receive any distributions from the trust. Upon receipt of a distribution, beneficiaries will become reportable persons, too.

If, from a Swiss perspective, a structure were found not to be subject to any specific reporting obligations under the relevant treaties and the AEOI, there is a likelihood of the Swiss anti-abuse clause applying, meaning that the structure will be ignored and all controlling persons and probably also non-controlling persons such as the settlor of a discretionary trust or discretionary beneficiaries would need to be reported. One may expect the Swiss Government to provide clarification by way of Ordinance.

To the extent discretionary trusts are, for AEOI purposes, resident or maintaining Financial Accounts in CRS jurisdictions they are not a means to get around AEOI. The identity of the settlor, beneficiaries, and other controlling persons will be reported, regardless of the trust qualifying as Financial Institution or as passive NFE. In respect of non-US persons it may be difficult for their home jurisdiction, however, to obtain information automatically if assets are held in an exclusively US structure.

Finally, there is always an option of information exchange on request provided, of course, a double taxation treaty containing Article 26 of the OECD model convention applies. In the event one jurisdiction wishes to know whether one of its taxpayers is a discretionary beneficiary it may submit an information request to the jurisdiction in which the settlor or the trustee is tax resident and ask for the name of the beneficiary to be disclosed.

Michael Fischer *advises private clients on their domestic and international estate and tax planning, as well as on philanthropic projects and governance-related issues. He acts on behalf of corporations, too, in particular family-held companies, on domestic and cross-border tax matters. His practice also includes contentious matters before Swiss tax authorities and courts. E-mail: mfischer@froriep.ch*

Dr Tobias Rohner *specializes in national and international tax law. His extensive experience includes dealing with tax issues in connection with corporate finance, acquisitions, reorganizations and restructurings, and representing clients before the Swiss courts. He regularly advises private clients on their tax and business activities, and provides international administrative assistance in tax matters. E-mail: trohner@froriep.ch*

33. Participating states may allow Reporting Financial Institutions to align the scope of the beneficiaries of a trust treated as controlling persons of the trust with the scope of the beneficiaries of a trust treated as reportable persons of a trust qualifying as Financial Institution (CRS Commentary on s VIII, No134). In practice, this would mean that discretionary beneficiaries would also need to be reported as controlling persons only upon an actual distribution even in relation to massive NFE qualifying trusts.