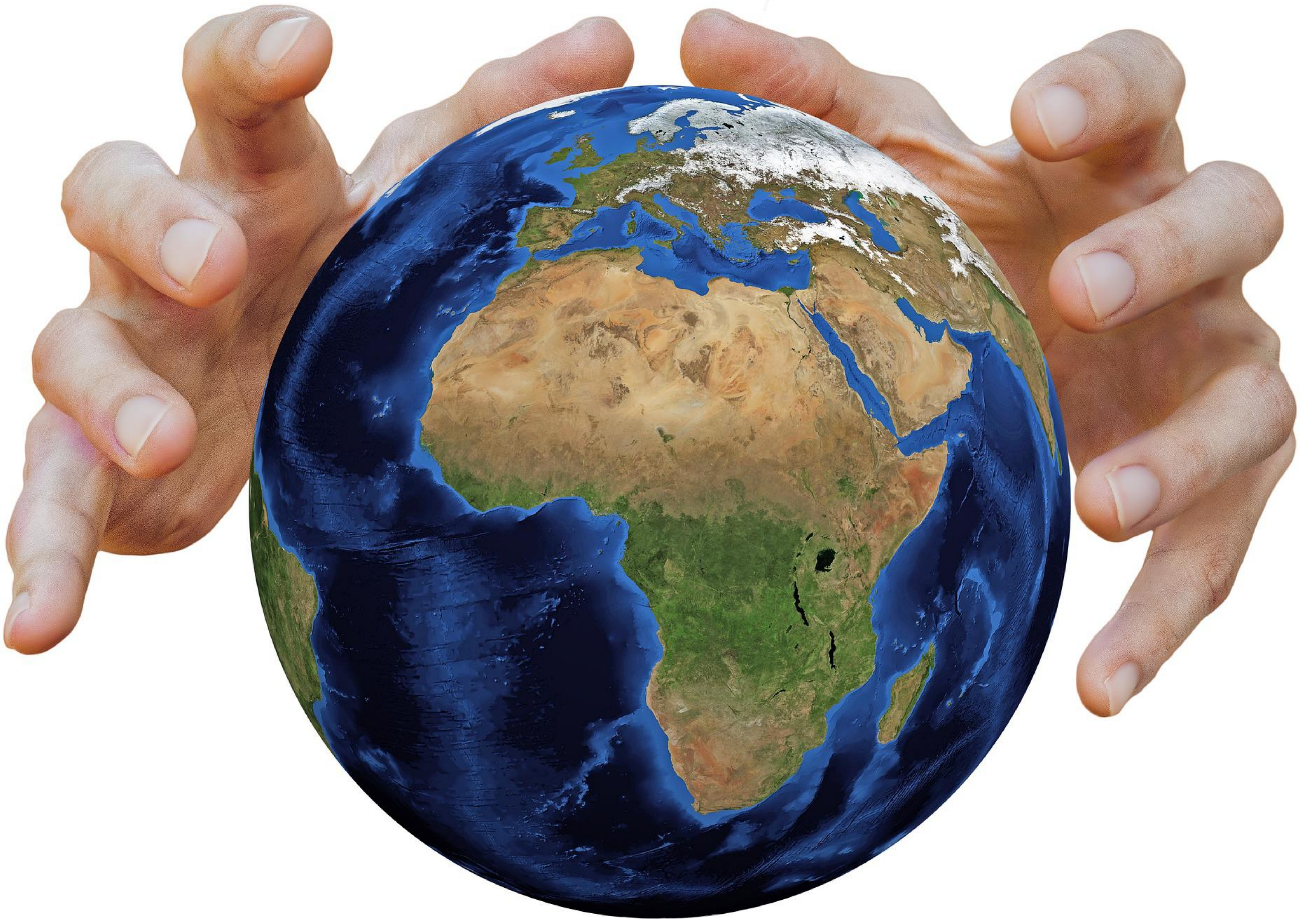
Transnational Taxation Network

TTN MEMBER INSIGHTS

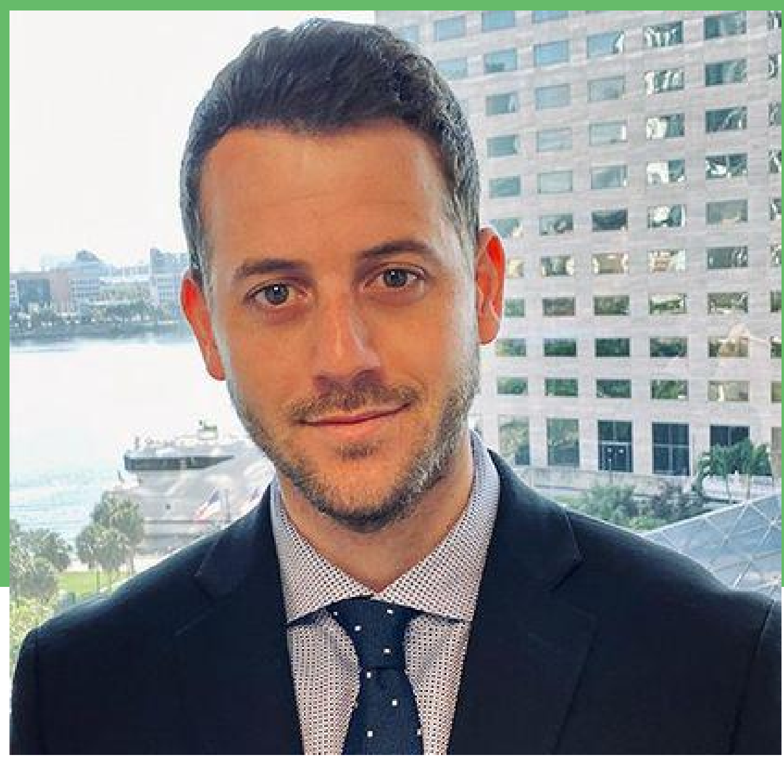
DECEMBER 2022 // NO.3

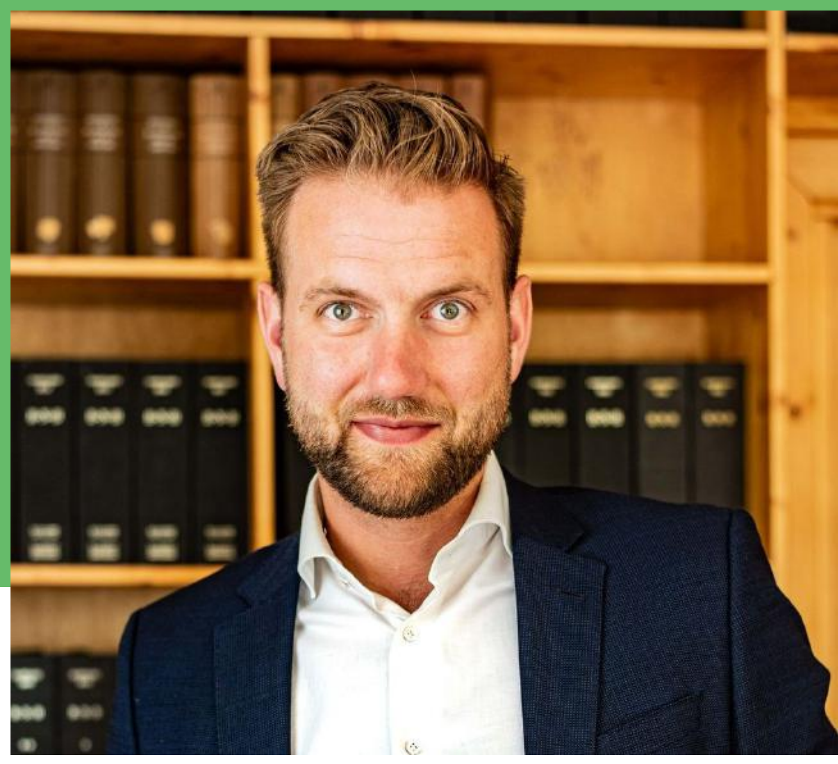


Editorial Team:

Adrian Giordano Imbroll
Jeff Hagen
Erik Herkströter

Message From The Editors





Dear TTN Members,

In this edition of TTN Member Insights...

In this edition of TTN Member Insights, in addition to bringing you the highlights covered by our speakers and memories of Geneva, there are the following articles:

Jeff Hagen (Miami) has submitted an article in relation to the Corporate Transparency Act in the United States. The "CTA" final rules have finally been published, with widespread implications for beneficial ownership reporting requirements beginning in 2024 in the U.S.

Arnaud Jouanjan (France) describes the distinct advantages of utilizing tax planning in his home jurisdiction, particularly with respect to both life insurance and usufructs.

Peter G. Economides (Cyprus) describes how certain trends are leading corporate entities and individuals alike to relocate to Cyprus. These advantages include both domestic (revised residency requirements) and international reasons (EU membership), among other reasons.

Finally, four Swiss authors combined on two articles: **Thierry Boitelle** and **Sarah Meriguet** discuss how Pillar Two of the OECD is progressing with respect to Switzerland, and **Anna Sidorova** and **Aymeric Serre** provide an overview of employee share plans as they relate to both a Swiss and international perspective.

Additionally, **Aldona Leszczynska-Mikulska (Poland)** was interviewed by the editors for our "Member Spotlight" column.

Finally, as previously mentioned, highlights from the conference in **Geneva, Switzerland** as well as information pertaining to upcoming conferences in **Chicago** in May, and **Paris** for the 2023 Annual Conference next September is provided, although more information is sure to come in the coming months. For more information, please contact Yvonne den Burger at yvonne@ttn-taxation.net.

We also urge you to review new Executive Committee's statement on the next page about the exciting future of TTN.

Thank you for reading TTN Member Insights, and we look forward to continuing to bring you the latest tax law updates from TTN Members, as well summaries of our events. Please reach out to our editorial team should you wish to submit an article for our next edition.

Sincerely,

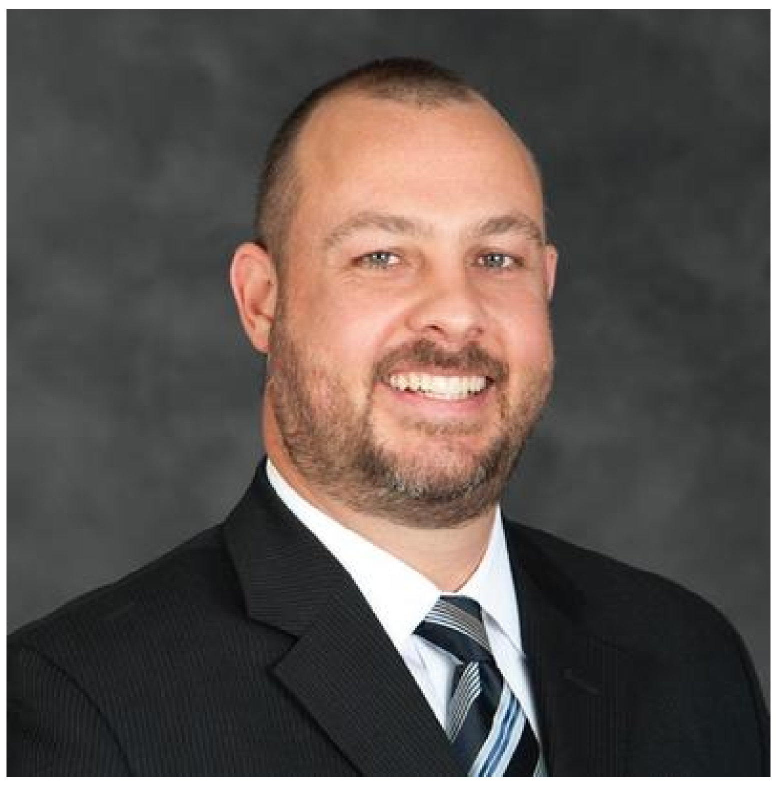
The Editorial Team

Adrian Giordano Imbroll (Malta)
Jeff Hagen (Miami)
Erik Herkströter (Netherlands)

Message From The New Executive Commitee

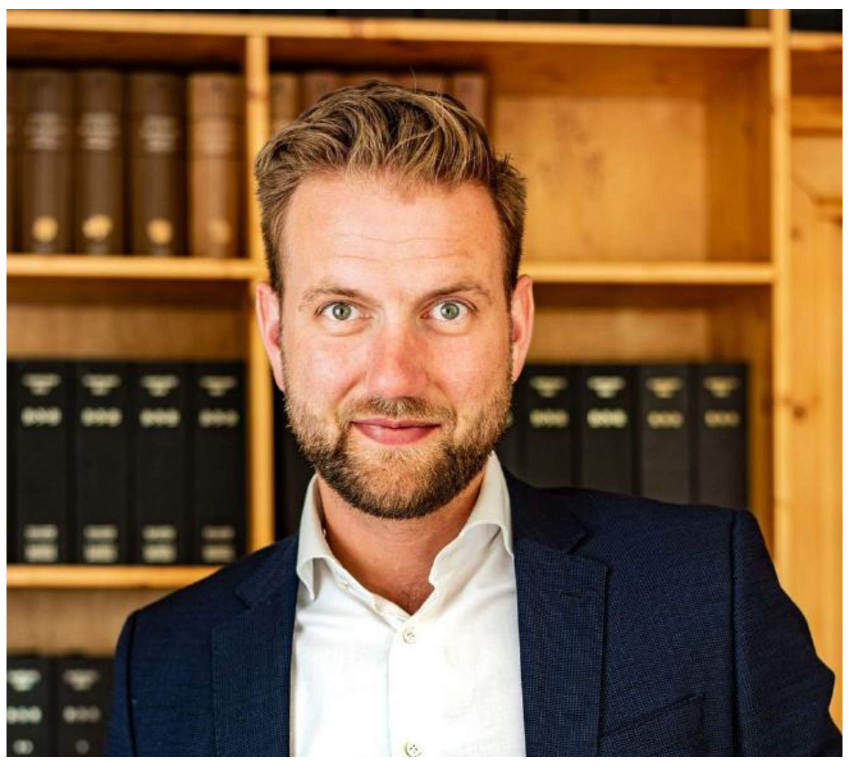
It brings us great pleasure to inform you that following the Annual Meeting in Geneva on September 23, TTN has a new Executive Committee that is working to make TTN a thriving and exciting organization again while retaining our camaraderie and deep roots.

As part of its mandate, the new EC is tasked with reinvigorating TTN with increased membership, and better attended conferences and events. If you have any ideas that you want to share to that end, or if you want to participate in any capacity on this revival, please do not hesitate to contact us. The names and responsibilities of the new members of the Executive Committee are:

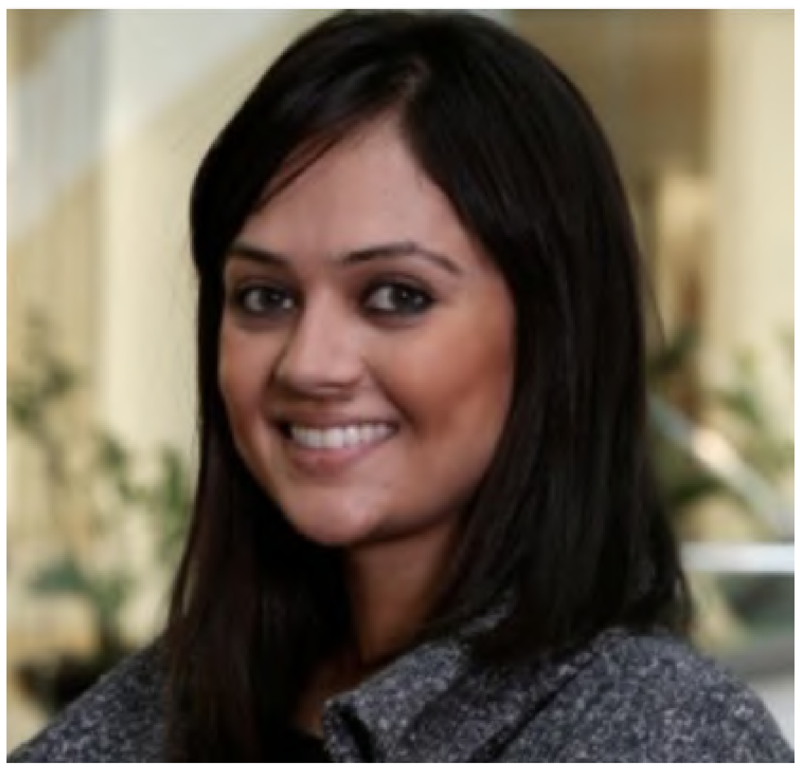


Arturo Brook,
President

Adrian Giordano Imbroll,
Vice President

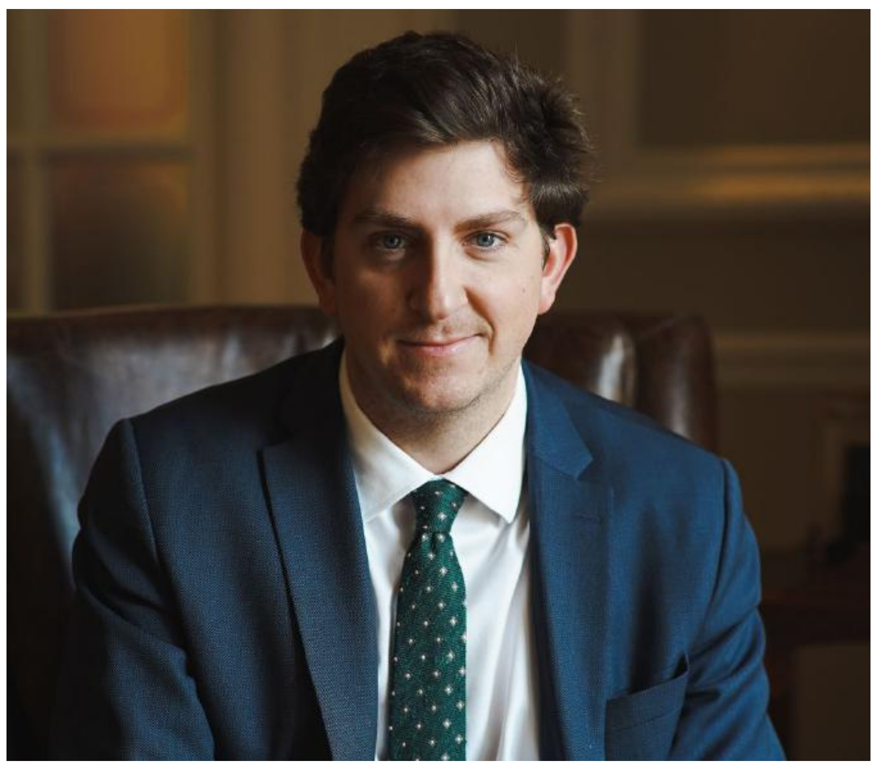


Erik Herkströter,
Treasurer



Ruby Banipal,
Head of Conferences Committee

Jeff Hagen,
Head of Publications Committee



Ricky Gutierrez
Head of Social Media & Branding

We are excited to participate on this TTN revival, and will strive to make it an organization that we are all proud to belong to. TTN has a bright future ahead! Following is a summary of what the new EC is working on:

Conferences and Webinars

Chicago has been selected as the venue for our 2023 Americas Conference (May 2023). Paris has been selected as the venue for our 2023 Annual General Meeting and European Conference (Sep 2023). We are also happy to report that, along with the AGM and Conference, the Tax Course is coming back. The formal dates for both Conferences are advertised at the end of this publication.

The last webinar took take place on November 30 and focused on the much anticipated USA Corporate Transparency Act. The webinars are free of charge and are a great way of showcasing our network and the technical knowledge of our members.

Dutch Association

The EC will continue to work on the formation of the new Dutch Association that shall carry on with TTN and with winding down the existing Swiss Verein. Details will be shared as we progress along on this project.

New Initiatives

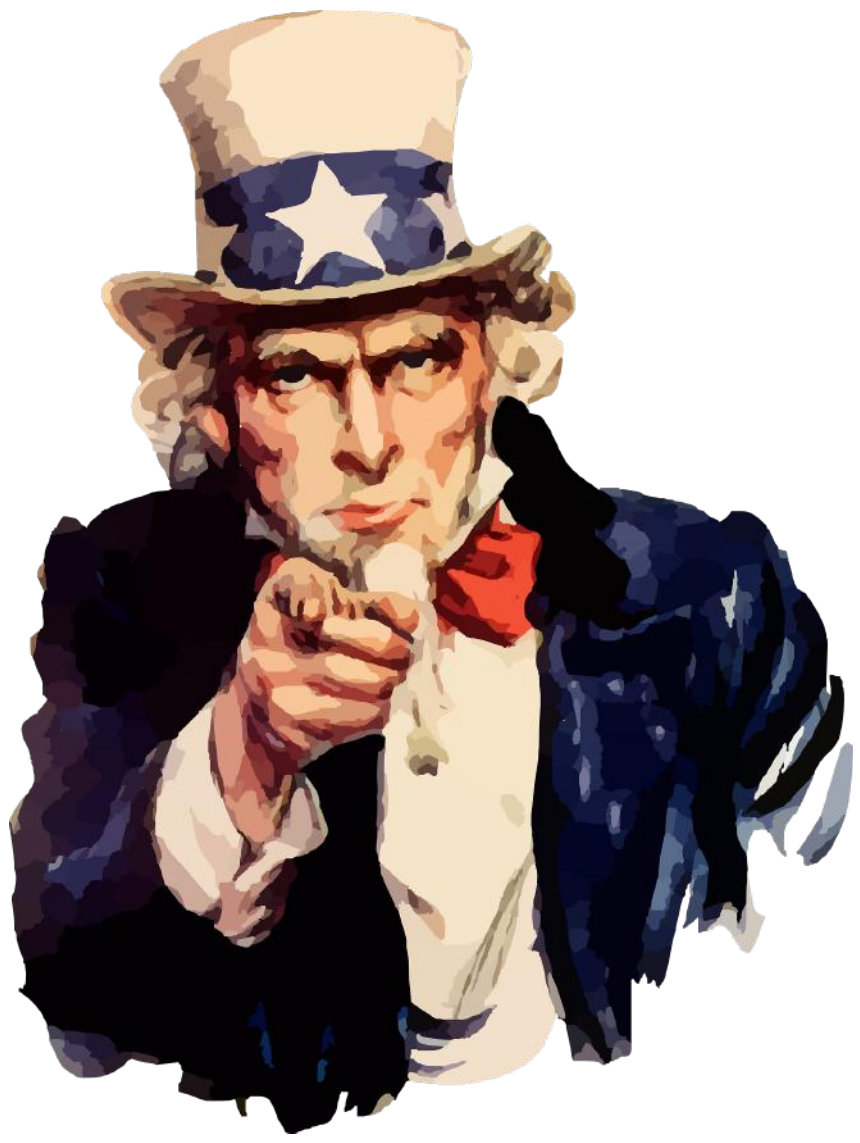
The new EC is particularly focused on several new initiatives to increase membership and participation in our events. The EC wants to remind all members that this organization belongs to all of us, and the success of TTN depends on everyone's participation. Please, if you have any interest in participating or assisting in any capacity, or if you have any ideas you want to share, please reach out.

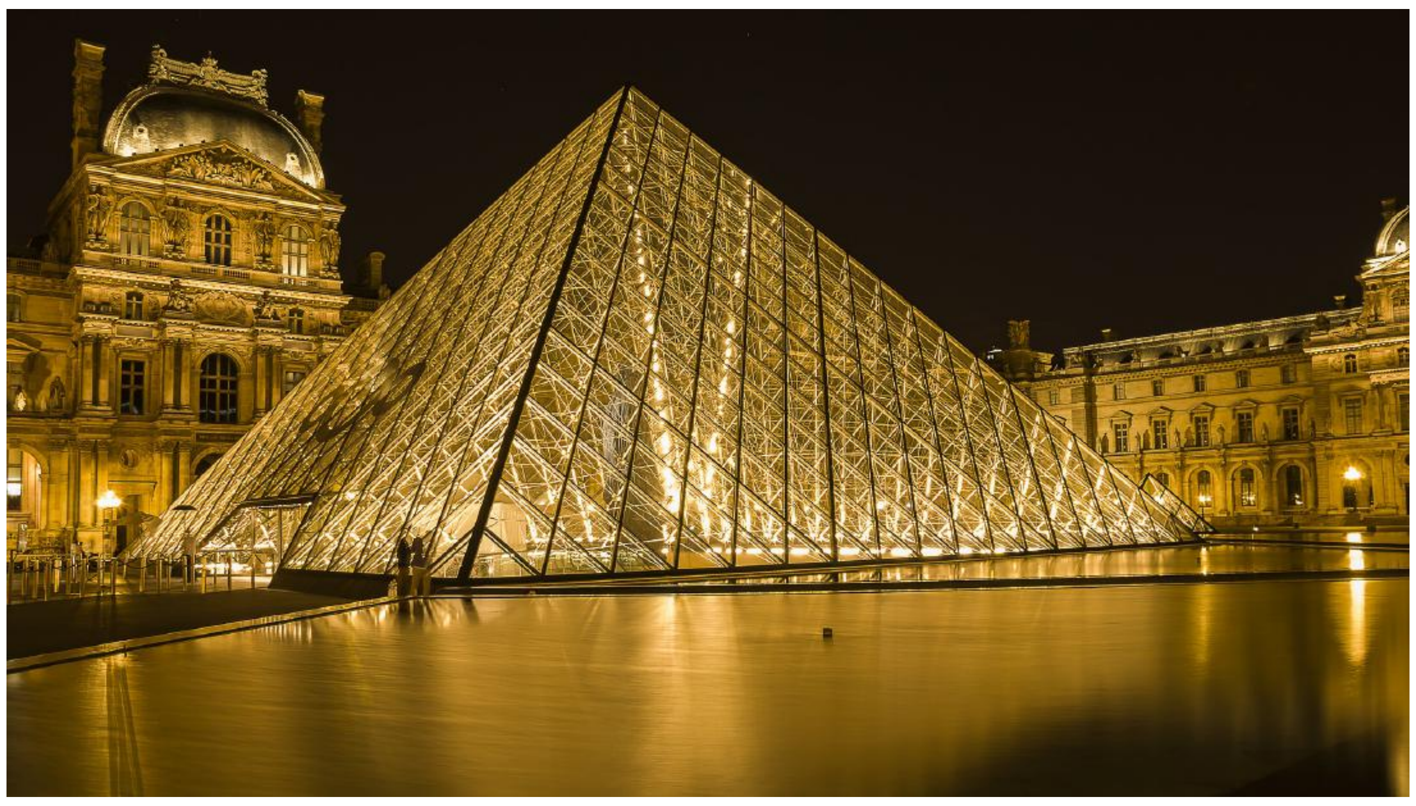
In closing, we want to thank the retiring members of the EC for their work for our organization. We are looking forward to a great and reinvigorated TTN!

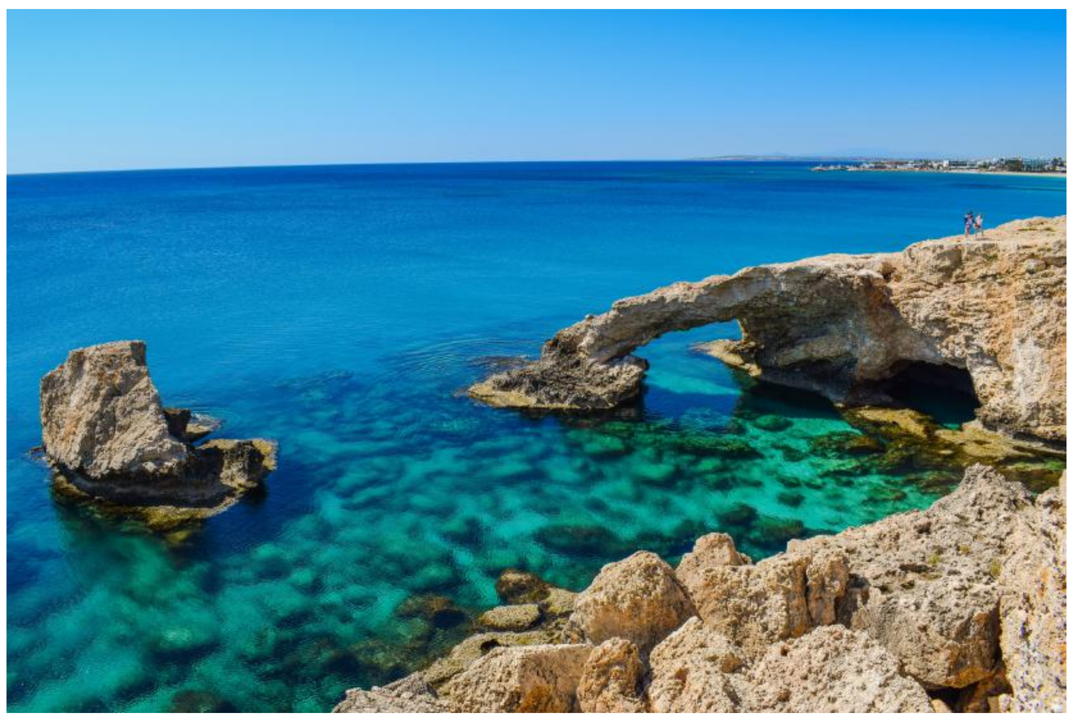
Sincerely,

The Executive Committee
Transnational Taxation Network

ARTICLES







THE IMPACT OF THE U.S. CORPORATE TRANSPARENCY ACT (CTA)

by **Jeff Hagen,** Harper Meyer LLP

Most countries for years have collected identifying information on the ultimate beneficial owners of companies established in their jurisdictions. Obtaining this information provides more global transparency and security to thwart increasing terrorism and tax evasion, but also infringes on the privacy that corporate structuring once offered. In recent years, international persons seeking this privacy and personal security migrated some of their structure to the United States, at least in part due its conservative pace in adopting such legislation and requirements. Not only was beneficial owner information not federally required in the United States until now (except in certain cases, upon filing U.S. income tax returns) but many states have laws with privacy advantages, which functions as a form of state-to-state competition. In Delaware, for example, state law does not require disclosure of the Managers of a limited liability company ("LLC"), and the owners of most entities historically have not been disclosed to state governments. As most countries were peeling back the curtains, these seemingly archaic rules positioned the United States as an ideal location for many forms of private investment. While the information collected in accordance with the U.S. Corporate Transparency Act ("CTA") will not be available to the public, it will cause U.S. entity beneficial owner information to be filed with the federal government and be updated on an going forward basis. The CTA will not change how U.S. entities are taxed, but it will have an impact on how we as attorneys advise our clients.

CTA: Overview

Passed as a law in 2021, the CTA has operated as a concept opined on by legal prognosticators until only recently, when its final regulations were released by the U.S. Treasury with White House approval. With the release of these final regulations,

we now know that beginning January 1, 2024, all new companies will have 30 days from establishment to submit an electronic filing with FINCEN (Financial Crimes Enforcement Network) containing information about the entity and its beneficial owners. There are exemptions as to which companies need to submit reports under the CTA, but these apply mainly to large companies that file other types of reports already with much of the requested CTA information. For the most part, only companies with over 20 employees and over $5 million in annual revenue are exempt from filing. Companies existing prior to January 1, 2024 will have until December 31, 2024 to submit their reports to fully comply with the CTA. Any type of entity which files a formation document with its state's Secretary of State (corporations, limited partnerships, LLCs, statutory foundations, foreign corporation qualified to do business in the U.S., all come to mind) will need to comply. Trusts will not need to file reports themselves, but to the extent a trust owns interest in an entity that does report, the trustee and vested beneficiaries of that trust would have reporting obligations.

The definition of beneficial owner in the CTA is wider than one might expect. The traditional notion of beneficial ownership extends to individuals with at least a 25% direct or indirect beneficial interest in the reporting entity. However, the CTA definition also applies to persons with "substantial control" of the entity. The regulations are clear that this can apply to individuals with no ownership but who do have senior officer powers. Directors with control over certain managerial decisions or officers granted certain dealmaking abilities would be.reported.

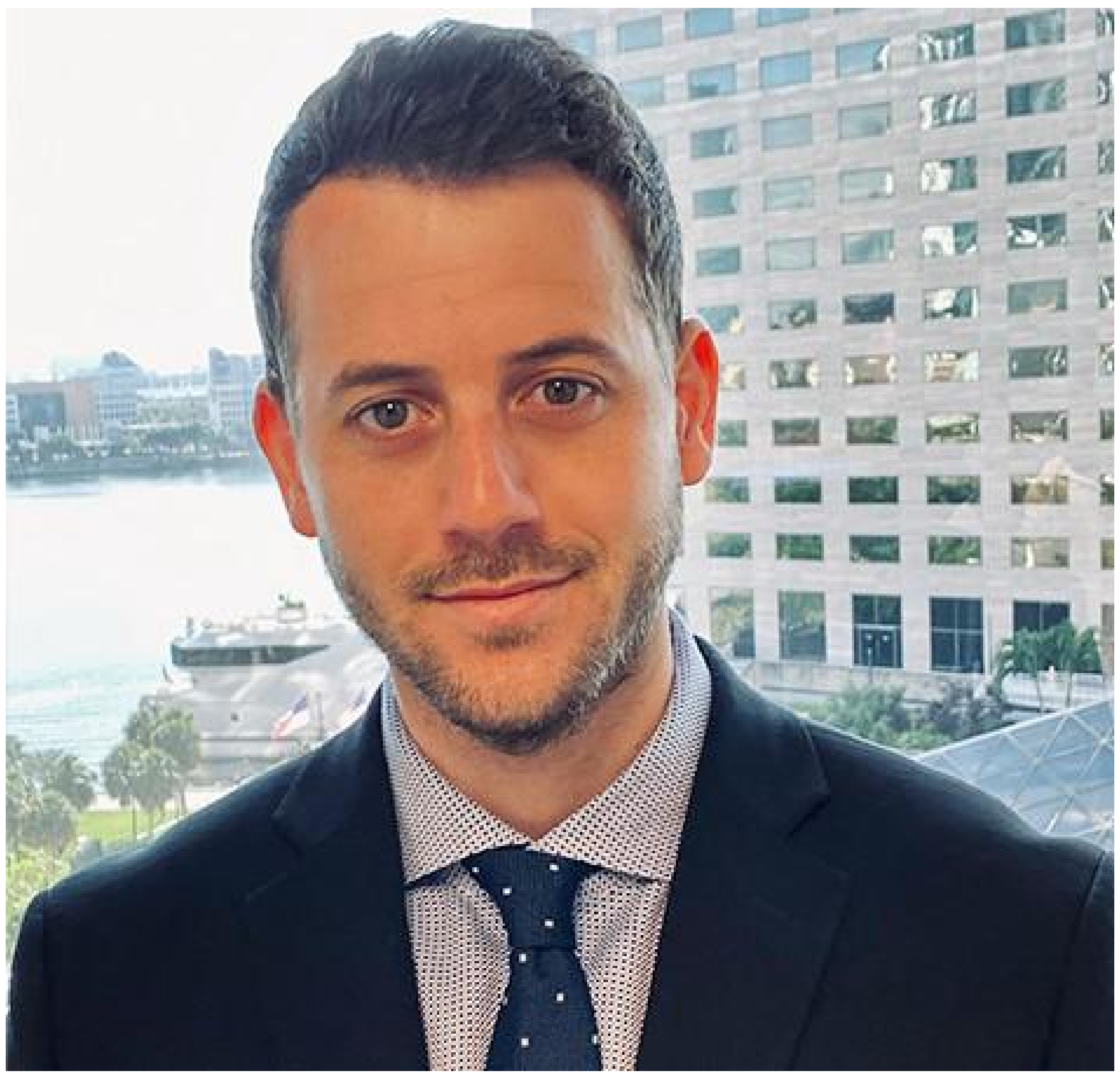
Beneficial owners will need to provide a copy of a passport or other identify document, birthdate, and their home address. Upon a transfer of shares (or even an appointment of a new senior officer), the company would need to update its CTA filing within 30 days of the change. Beneficial owners are not the only persons reported under the CTA; so, too, are persons who are considered to be "company applicants." An applicant is defined as the person who directly files the formation document for the company with the Secretary of State, or a person who directs such person to make the filing. For companies formed prior to 2024, applicant information is not required to be submitted, but for new companies formed thereafter, such information is required. This may cause attorneys to reconsider how cavalier they are with forming companies on behalf of new clients who may have only been recently referred. This may also give paralegals pause whether they feel comfortable making filings at an attorney's direction.

The penalties for not submitting the appropriate filings as required by the CTA are $500 per company per day of the inaccurate filing. This is only to the extent that the incomplete or inaccurate filing was willful, which can be determined by FINCEN on a facts and circumstances basis. To avoid unnecessary duplicative filings, once an individual submits their information forthe first time on a CTA filing, the individual is assigned a "FINCEN identifier." On future filings by that individual, the FINCEN identifier can be entered instead of all of the information of the individual time and time again. Nevertheless, experts anticipate that CTA will be a significant time and financial burden on all parties involved.

Impact on International Clients

Foreign companies that register to do business in the United States are also required to submit CTA filings. Implications for foreign clients don't merely stop there though. International tax practitioners have often advised that a U.S. LLC with no U.S. source income and no U.S. ownership may not be required to file a U.S. tax return. In keeping with this principle, some believe it to be unnecessary to acquire a tax identification number ("TIN") on behalf of such a company. This advice may fall away with the passage of the CTA, as each U.S. entity required to submit a report under the CTA must do so by providing a TIN. Once an entity has obtained a TIN, the IRS may be expecting to receive a tax return from the LLC.

Beyond these new requirements, there also exists the "what's next" factor in the minds of many clients. The U.S. has given no indication it plans to share this information with other countries. Similar to its hesitance to join Common Reporting Standard and its continuance with the application of FATCA, there is a thought that the U.S. gathering this intelligence is to serve its own purposes and will be used sparingly. However, for those with security concerns in their home jurisdictions that seek privacy in their structures, the passage of the CTA may induce additional anxiety. Simply by the information being collected, even if for now held under lock and key, the potential for the U.S. government to share information with other countries cannot be ignored. While the information collected and the teeth behind noncompliance could have been more severe, the fact the information will be collected at all in the first place is sure to cause consternation for those particular clients. As the world shrinks and information becomes more readily available to our governments, the reality is that the CTA's implementation is long overdue. In realty, implementing the CTA in its current form was probably the least intrusive option available to the United States. The CTA's introduction will assist in combating international crime and terrorism and at the same time will not negatively impact the security of beneficial owners.



Jeffrey S. Hagen is a partner with Harper Meyer LLP, located in Miami. He serves on the Executive Committee of TTN, as well as the Editorial Team of TTN Member Insights. If you have questions relating to U.S. Corporate Transparency Act or other international tax issues related to entities formed in the United States, please reach out to Mr. Hagen at jhagen@harpermeyer.com or 305-577-3443.

TWO PRINCIPLES OF ESTATE PLANNING IN FRANCE: LIFE INSURANCE & USUFRUCT

by **Arnaud Jouanjan**, Jouanjan Partners

1. France is full of contradictions...

France is a beautiful country with a strange inheritance/gift tax system.

It is better to know this before buying a property or establishing residence in France. Between spouses, there is no inheritance tax ("IHT") at all, but there is gift tax at a rather high rate. France is ageing, and the young generation is struggling, but a grandparent aged less than 80 years old can only give EUR 31,000 to a grandchild tax free, and nothing to a nephew or grandnephew, except if the grandparent has no children or grandchildren alive.

France is a modern society (same-gender marriages have been legal and very common for over 10 years), but non-married partners pay 60% inheritance on their life-long partner's assets; and anyway they might get nothing from their partner unless there is a valid will in place.

And forced heirship, although very strict, can be overturned quite easily with a life-insurance policy: a complete stranger could end up paying less than 20% tax under a life-insurance whilst a sister or brother would pay 55% tax on the same amount under IHT rules.

Changing a marital regime can have a massive impact on the distribution of assets post-death and on the amount of taxes to pay.

And there are many other strange examples, showing that no one can afford not planning for inheritance, one way or another.

In this article, I want to concentrate on two possible solutions to tricky situations, namely: life insurance policies and usufruct.

2. But France Has Life Insurance...

With inheritance tax rates ranging from 0 to 60%, it is tempting to isolate part of one's assets into a life-insurance policy. For several reasons:

- Assets placed in a life insurance policy are not part of the deceased's estate at death
- They are treated separately, both from a legal and a tax point of view
- They escape forced heirship rules, except in cases of fraud
- Life insurance policies can be distributed to any beneficiary, irrespective of family connection
- Rates are 0% to 31.25% vs. 0% to 45% (to children) and 60% (to a non-parent)

However, a life insurance policy is not a good vehicle for owning private real property.

It is generally a good idea to split someone's assets into two pockets: one with assets held directly (real property, for example) and one with financial assets held through a life insurance policy. Abatements apply twice per heir/beneficiary:

- IHT: EUR 100,000 abatement every 15 years from parent to child
- Life-insurance: EUR152,500 taxed at 0% per beneficiary (even to a non-parent)

Under IHT, two parents with three children can exempt EUR 600,000 in total.

Under IHT combined with life-insurance, they can exempt up to EUR 1.515m, and much more if they want to leave money to remote family or non-parents as well.

Generally speaking, real property and family businesses will tend to stay under direct ownership, whilst financial assets can grow tax free in a life policy before being distributed at reduced transfer rates to beneficiaries.

3. ....and Usufruct!

It is particularly efficient to make lifetime gifts, and it is even better to make them under a usufruct structure.

Lifetime usufruct is the right to use (usus) and to receive the income "fruits" (fructus) from an asset.

The right to sell, gift or destroy an asset belongs to the legal owner ("nu-propriétaire").

Typically, parents would make a lifetime gift of an asset such as real property or shares, for example, to their children. But those parents, if well advised, would probably retain the usufruct of the asset in question. French tax law allocates a certain value to usufruct vs legal ownership. The older the parents are, the smaller the value of their lifetime usufruct. That makes sense.

The positive tax effect of this is that parents are making a gift of the legal ownership only, when they are retaining a lifetime usufruct.

Therefore, parents should anticipate and make gifts while they still are relatively young. For example, parents aged 57 who want to make a gift of a joint asset worth EUR 1.2m to their three children, and want to retain a lifetime usufruct, would be making a taxable gift of EUR 600,000 only. The children would use up their allowances: EUR 100,000 per parent. Here: two parents * three children = EUR 600,000 allowance and no tax at all. When the parents die, the usufruct expires and no tax at all.

Compare this with a situation where the asset was not gifted: it might well be worth three or four million euros when the parents die and that would entail very significant IHT for the children.

And there are two additional bonuses too:
- if the gifts do generate some gift tax, the tax can be paid by the parents, and this is not considered an additional gift. No gross-up in this case;
- 15 years later, the family can have another go: the initial allowance starts again from scratch 15 years after any prior gifts.

4. Conclusion

Sometimes I have the feeling that the French system is like a car with a roaring engine trying to push a concrete wall: lots of energy for nothing.

But anyway, you have a choice: don't plan = pay more (much more) vs plan = pay less (much less).

Arnaud Jouanjan founded his own international tax boutique firm in 1998, after working several years for Erst&Young and Schlumberger Industries. He advises companies and individuals on any French-related international tax issue, and on international estate planning (tax and legal). He is a full member of STEP.

CORPORATE AND PERSONAL RELOCATION TO CYPRUS

by **Peter Economides**, Totalserve

Cyprus continues stronger than ever before to be a preferred international business center, from where foreigners can conduct their business. At the same time it offers an attractive proposition for personal relocation, being a safe and secure base to live and work from and offering a high standard and quality of living.

The combination of a number of factors, including strategic location, EU membership, attractive and efficient tax system, wide double tax treaty network and its high level of professional services, render Cyprus an eminently suitable choice for corporate relocation and for headquartering.

Moreover, being one of the safest countries in the world in which to live, work and raise a family, with high standards of living and education, and combined with a variety of personal tax incentives, Cyprus comprises a sought-after choice for personal relocation as well.

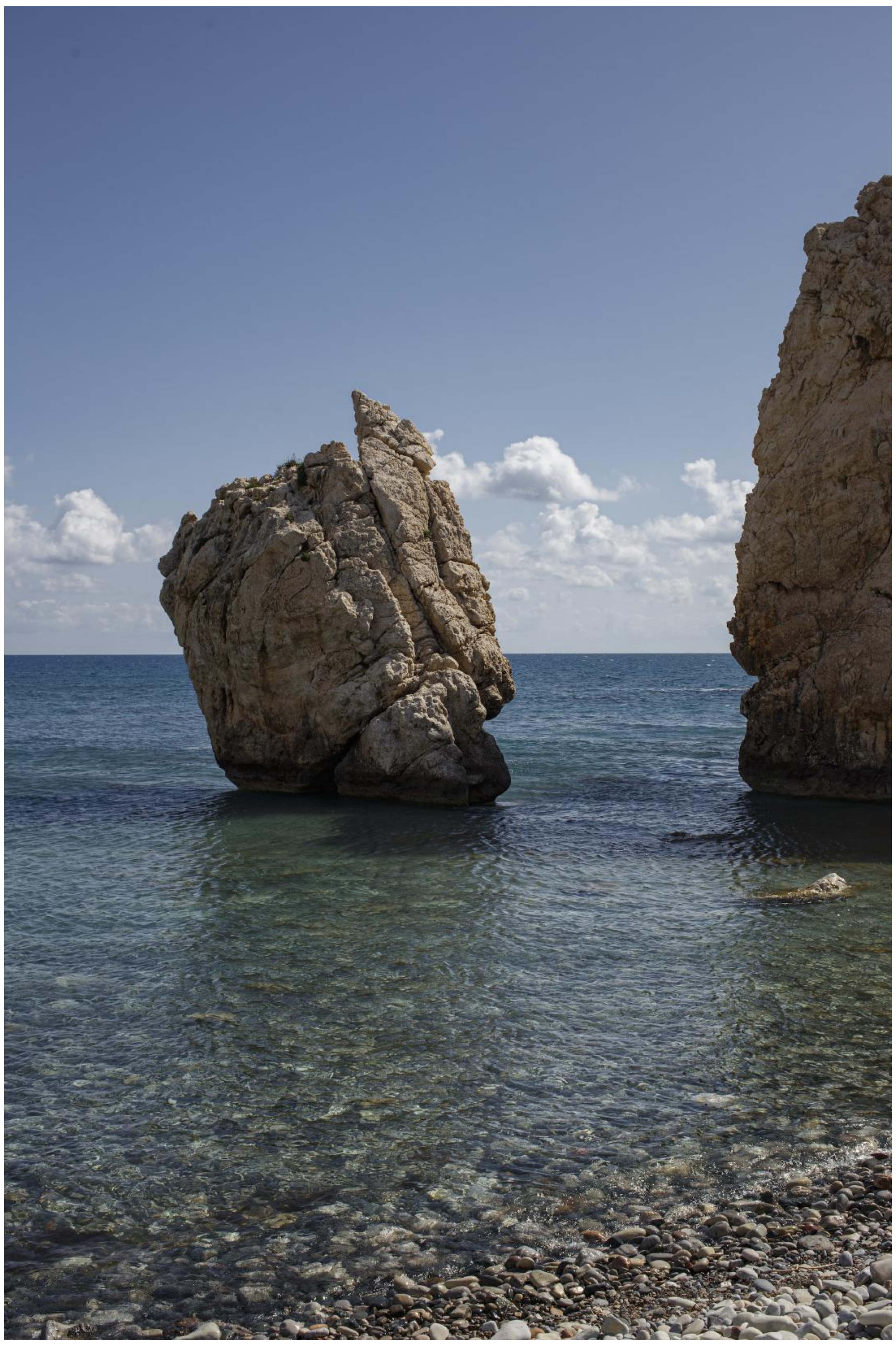
Notwithstanding the above, certain recent international and domestic developments have created additional dynamics and momentum for the Cyprus choice, and have further enhanced its position for corporate and personal relocation, as well as for headquartering.

Domestic developments

In an effort to attract further foreign investments and talent, a formal strategy was approved by the government in late 2021, aiming to enhance Cyprus' position as a sustainable international business and commercial centre, and to contribute in redefining its growth model. The strategy places emphasis on attracting investments in specific sectors such as high-tech, shipping, innovation and R&D, to name a few.

As part of this strategy, a "Business Facilitation Unit" (BFU) has been formed which functions as a single point of contact for foreign companies, its purpose being the fast and efficient processing of requests received for the establishment of companies in Cyprus, or for the expansion of activities of existing companies.

To satisfy the human resource needs of such companies, the government has revised its policies regarding the issuance of residence and employment permits to third-country (non-EU) nationals, with a view to facilitate, simplify and expedite the procedures for relocating qualified and experienced professionals to the island. Consideration is also given to spouses of such persons, who are provided with access to employment in Cyprus, thus allowing them to join their significant other, should they so wish.



On a personal level, and in order to provide further incentives for relocation, the existing 50% income tax exemption for employment income for expatriates relocating to Cyprus has been extended to include individuals earning an annual salary of at least €55,000 - whereas previously the threshold was significantly higher, at €100,000. In addition, the period of eligibility for the exemption has been extended from 10 years to 17 years.

In addition, a Digital Nomad Visa scheme was approved in early 2022, enabling third-country nationals to temporarily reside in Cyprus for one year (with the possibility for renewal for a further two years) and to obtain an employment permit. The scheme allows nationals from non-EU and non-EEA countries, who can perform their work location independently using telecommunications technology, to temporarily reside in Cyprus and work for an employer registered abroad, or to perform work through telecommunications technology for companies or clients located abroad. Provision is made for family members (spouse and underage children) to be able to reside in Cyprus for the same period as the digital nomad, albeit without the right to be employed or to perform any economic activity in Cyprus.

International developments

Far reaching in its effects, not only for Cyprus but also on a global scale, the Russia – Ukraine conflict has triggered a massive exodus from both countries. Whether a permanent relocation, or temporary until the crisis is somehow resolved, there is a pressing need for suitable jurisdictions, both to physically accommodate these individuals and also for them to be able to work from.

Considering its small size, Cyprus has welcomed a relatively high number of nationals fleeing from the conflict, not least due to the fact that it already had sizeable communities from both countries established on the island, long before the conflict. This substantial influx has unavoidably created pressing needs for new jobs, housing and schooling. And while there are no easy-fix solutions to meet the demand for those needs (at least not in the short-term), the recent measures that were implemented by the Cypriot government for attracting foreign investment could not have come at a better time.

The exit of the United Kingdom from the EU was another fairly recent development that created a need for alternative jurisdictions for corporate relocation. Having no precedent, Brexit gave rise to a number of inherent uncertainties to UK-based businesses conducting international activities. Cyprus, an EU member state and also a former UK colony, is a fairly obvious choice for such businesses, and even more so following the recent efforts and measures taken by the government to attract foreign investments.

Additionally, the enactment of economic substance requirements by various offshore jurisdictions, with more expected to follow suit, has also adversely affected several1 companies carrying out economic activities from such jurisdictions. These requirements generally call for the establishment of adequate economic substance in the countries form which the companies operate from. With this being extremely difficult and costly in practice, a demand arose for alternative suitable jurisdictions. This is where Cyprus comes into play. With the local legislation allowing for inward redomiciliation of foreign companies, and being in a position to facilitate any level of needed substance, it offers a fully compliant, cost competitive and efficient solution.

Concluding remarks

What makes Cyprus so attractive for conducting international business and investments is a unique combination of advantages and qualities that is rare to find. Moreover, the vibrant, multi-cultural and cosmopolitan life, low crime rates and high standard of living and education, combined with the pleasant Mediterranean climate, make Cyprus a tempting proposition for those considering relocation.

The recent developments, both on an international scale as well as on a domestic level, have made the island an even more attractive proposition. While there have been several challenges, difficulties and setbacks over the years, Cyprus has managed through meticulous planning and hard work to repeatedly prove its resilience and adaptability, and continues to grow strong and to be a preferred choice.

Peter Economides is the Founder and Honorary Chairman of Totalserve Management Limited (trust and corporate services) as well as the Founder and Chairman of P.G. Economides & Co Limited (audit firm) and Cloudlayer8 Limited (cloud and IT services). With 50 years of experience in the wider professional services industry, Peter has been instrumental on the landscaping of various related legislations, including the Cyprus trust law. He regularly contributes articles in the international professional press and lectures at various conferences around the globe.

SWITZERLAND ON TRACK WITH IMPLEMENTATION OF OECD'S PILLAR 2

by Thierry Boitelle and Sarah Meriguet,
Boitelle Tax

In October 2021, the OECD/G20 Inclusive Framework (hereinafter "IF") involving over 130 countries agreed on a two-pillars approach to resolve the international tax challenges arising from the digitalization of the global economy (referred as BEPS 2.0). The publication of the model rules for Pillar 2 followed in December 2021. The aim is to avoid a proliferation of national unilateral measures, thus ensuring legal certainty.

The main proposal is the introduction of a global minimum tax rate of 15% for large multinational entities (MNEs), which marks a historical milestone. The agreement also provides details on several key parameters relevant for the application of Pillars 1 and 2.

Given its complexity, Pillar 1 is not yet very advanced compared to Pillar 2, and the detailed rules are still being agreed upon. A signing ceremony of a Multilateral Convention could be expected in the first half of 2023, with the objective of an entry into force in 2024 3 . Pillar 2, which will be implemented through domestic legislation, will most likely be introduced first. An initial application of the Pillar 2 rules in 2023 seems highly unlikely at this stage; it is thus rather expected as of 2024 4 . However, further developments on the implementation are expected in the coming months.

For these reasons, this article focuses on the implementation of Pillar 2 in Switzerland.

Pillar 1 and Pillar 2 At A Glance

The key components of the two pillars can be summarized as follows:

Pillar 1 deals with the reallocation of taxing rights over certain profits generated by MNEs to jurisdictions where customers rather than the businesses, are located ("market states"). The approach is based on a non-physical presence nexus rule with the aim to establish taxablepresence in the digitalized economy, regardless of the MNEs' physical presence. Pillar 1 is about where large global businesses are required to pay taxes.

The rule will apply to MNEs, with global revenue exceeding EUR 20 billion and profit margin above 10%. Jurisdictions in which the MNE derives at least EUR 1 million of revenue will benefit from the new taxing right. To ensure that smaller countries will benefit as well from the new rules, a lower nexus threshold of EUR 250'000 applies where a country's GDP is lower than EUR 40 billion.

Pillar 2 is designed to ensure, through a set of global anti-base erosion (GloBE) rules, that large companies operating internationally pay an effective tax rate of at least 15% in every jurisdiction they operate in. Pillar 2 is about how much tax large global businesses are required to pay.

Entities in scope are MNEs with a global turnover greater than EUR 750 million according to their consolidated financial statements, in line with the already existing Country-by-country reporting (CBCR) threshold.

GloBE rules introduce an additional tax on the difference between the local effective rate and the minimum rate of 15%. The main components of the GloBE rules may be summarized as follows:

2 interlocking domestic rules: Income inclusion rule (IIR) as a primary rule to impose a top-up tax on a parent entity and Undertaxed payments rule (UTPR) as a secondary rule to ensure low-tax income of MNE group members is taxed at minimum effective tax rate of 15%.

Treaty rules: Subject to tax rule (STTR), which allows source taxation on related party payments taxed in recipient country at below minimum rate, and a switch-over rule (SOR).

The OECD rules on minimum taxation are based on a common approach, meaning that jurisdictions are not required to adopt these rules. However, if they decide to implement them into their national law, they should follow the OECD model rules. In addition, they must accept the application of these rules by the other jurisdictions.

Thus, if Switzerland doesn't act, the large groups operating on its territory may be taxed abroad. The confederation has every interest in adapting its tax system in order to preserve its economic and fiscal interests 5 . Switzerland is therefore very active in the implementation of Pillar 2.

On 13 January 2022, The Swiss Federal Council outlined a step-by-step plan, driven by three main guidelines: ensuring minimum taxation, implementing in a targeted manner, preserving federalism.

The Swiss Federal Council plan, a pragmatic step-by-step approach to meet the time pressure

To ensure that the project comes into force by January 2024, the Swiss Federal Council proposed an amendment of the Constitution 6 . The purpose is to create a transitional constitutional provision authorizing the Federal Council to temporarily regulate the minimum taxation by means of a temporary Federal ordinance. This process allows the necessary legal basis (federal law) to be elaborated without the time constraints of an ordinary legislative procedure, which can be very long in Switzerland.

At a later stage, once the application of the international rules is sufficiently clear, the Swiss Parliament will pass a federal law replacing the Ordinance.

The consultation procedure on the draft Ordinance runs until 17 November 2022 and Parliament is expected to decide on the constitutional provision by December 2022. The objective is that the Constitution can be voted on by Swiss citizens in June 2023 (referendum).

The ordinance guidelines: implementing a minimum taxation for MNEs while preserving Switzerland competitiveness and federalism

The minimum taxation will be ensured by a supplementary tax levied on companies that are in scope of Pillar 2. Such supplementary tax will be determined on the basis of a standardized calculation basis, different from the rules normally applicable in Swiss income tax law.

Two types of corporate groups active in Switzerland are affected: those that do not reach the minimum taxation in Switzerland and those that do not reach the minimum taxation abroad.

The Swiss minimum taxation should be implemented in 4 steps:

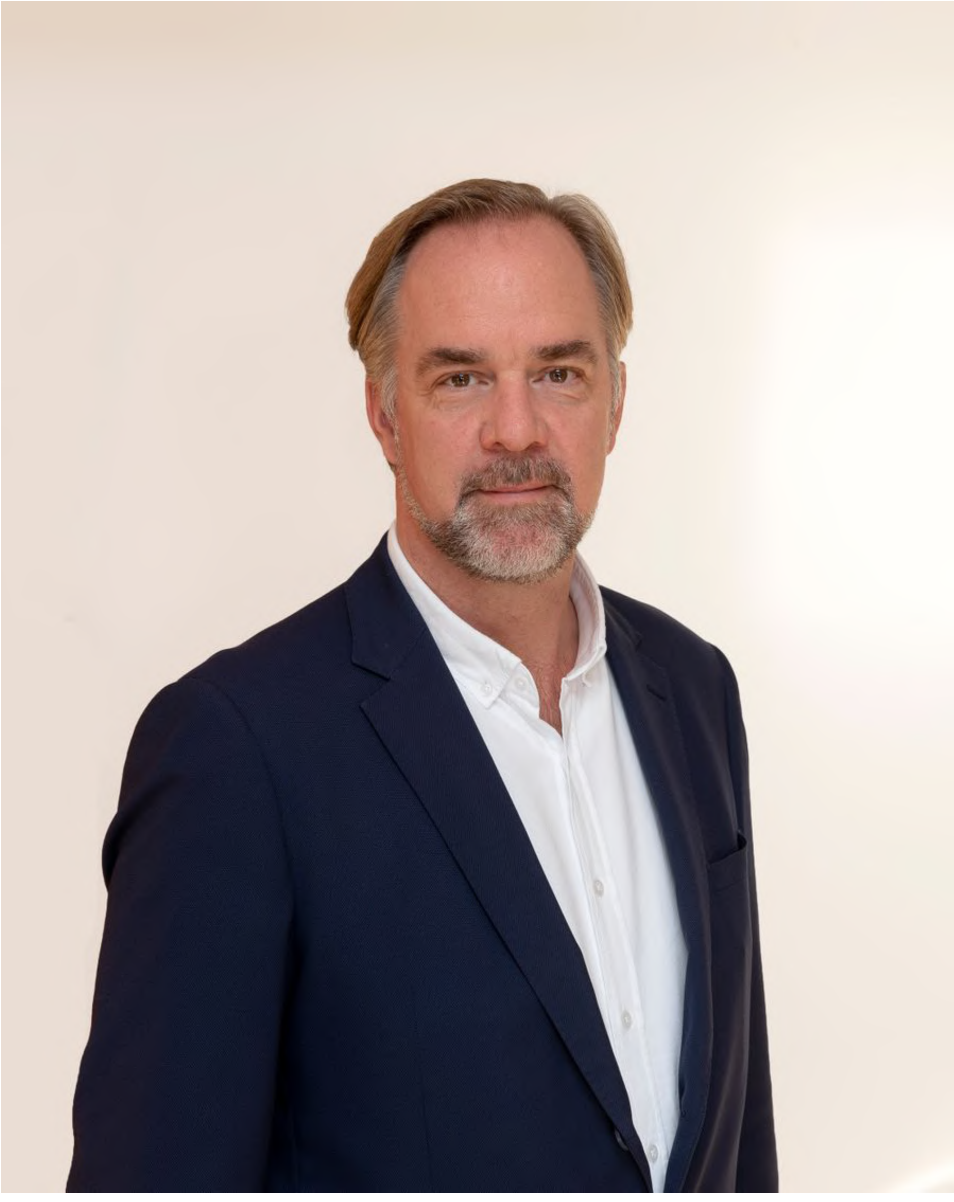
1. determine the tax burden by canton
2. calculate the minimum tax according to the OECD 15%
3. calculate the Swiss supplementary tax (15% - aggregate Swiss tax rate); and
4. allocate the Swiss supplementary tax proportionally to the group entities that contributed to the under-taxation.

The aim is to implement the minimum taxation in a targeted manner, which means that only companies that meet the scope of application are affected. The federal and cantonal income tax remains unchanged.

In order to preserve the cantonal sovereignty, the taxation and collection of the supplementary tax will be carried out by the cantons. 75% of the revenues from the supplementary tax will also be allocated to the cantons. The other 25% will be allocated to the Confederation.

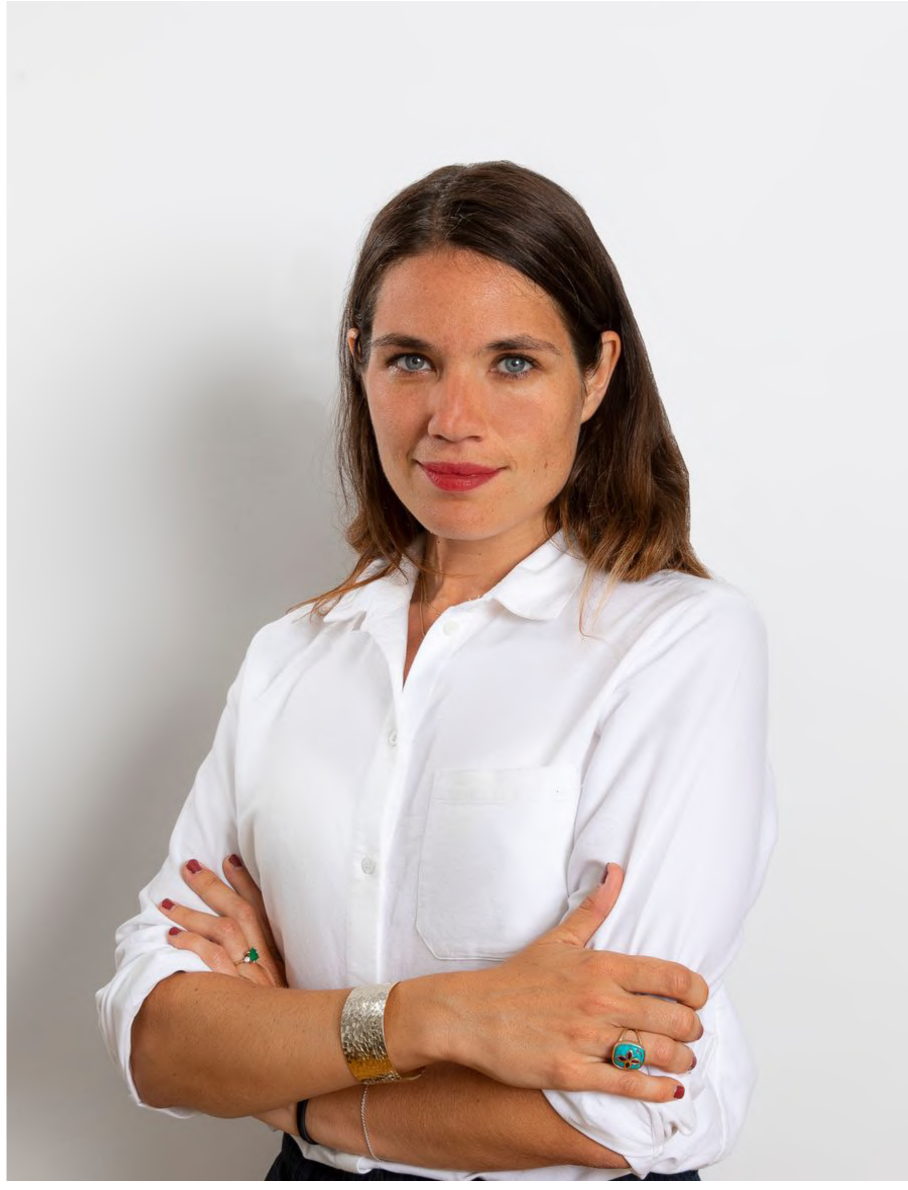
Financial consequences are uncertain. In the short term, additional tax revenues from supplementary tax are estimated at CHF 1 to 2.5 billion. Such increase in tax revenue gives Switzerland the leeway to strengthen its attractiveness to corporate groups. Cantons are indeed encouraged to implement tax incentives and measures to promote their economic position. In that respect, in a new report on Pillar 2, the OECD provides guidelines on how the tax incentives should be used under the global minimum corporate tax framework 7.

According to such guidelines, tax incentives should focus on expenditure rather than income. Known for its punctuality, Switzerland is in line with the OECD's tight timeline. Everything seems under control for an introduction of Pillar 2 by 1 January 2024, as planned.



With 25 years of experience in international taxation, **Thierry Boitelle** founded his own boutique firm Boitelle Tax in 2022. In his daily practice, he renders Swiss and international tax advice with a focus on inbound investment by multinational companies establishing headquarters, group finance centers, holdings, captive insurance, and intellectual property companies in Switzerland. Thierry also offers more than 20 years of niche tax expertise in the field of commodities trading.

He further advises high net worth individuals and company executives on the tax and legal aspects of immigration to Switzerland. Thierry holds a master's degree (LLM) in Taxation from the University of Leiden (1997) and regularly speaks and writes about Swiss and international taxation, e.g., in the LLM Tax program of the University of Geneva.



With more than 8 years of experience in tax law, **Sarah Meriguet** is a senior tax associate at Boitelle Tax. Sarah Meriguet's practice covers numerous aspects of Swiss and international taxation. She focuses on advice to corporate entities and private clients on a wide variety of taxation matters, including corporate reorganizations, cross-border transactions, purchase and sale of businesses, personal tax, transfer of residence, succession, and estate planning. She completed a LL.M. in Swiss and International Tax Law at the University of Geneva and holds a diploma as a Qualified Lawyer in France

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EMPLOYEE SHARE PLANS: A SWISS AND INTERNATIONAL PERSPECTIVE

by **Anna Sidorova**, Boitelle Tax, and **Aymeric Serre**, Bonnard Lawson

The types of income in Swiss tax law are numerous and varied. One of the first types that is listed in the law is income from a dependent gainful activity and more specifically income from employee shareholdings.

Employee share plans typically consist of offering shares and/or options as an equity-based compensation, allowing employees to acquire company shares at a predetermined (purchase, strike, or formula) price, usually after a vesting period after which the employee fully acquires the shares or obtains the right to exercise the option. Employee share plans are an increasingly common form of additional compensation and employee retention, offered by listed companies as well as by non-listed ones. Such compensation is treated as income from employment to the extent that the subscription, purchase, or strike price offered to employees is lower than the market value of the shares.

In practice, several questions arise in connection with such employee participations, e.g., when the income is considered realized or how the amount of taxable income is determined. Another question concerns international situations and the allocation of taxing rights between different countries of residence and employment of the worker.

In this article, we will give an overview of the tax treatment of such equity-based compensation from a Swiss and international perspective by first presenting different types of compensation which exist, then distinguish their tax treatment and finally discuss some particular aspects in cross border situations. We will illustrate these points with a practical example at the end.

I. Types of Share Plans and their Swiss domestic tax treatment

Different types of share plans exist. The most commonly used plans will be detailed below, although this article will not provide an exhaustive list:

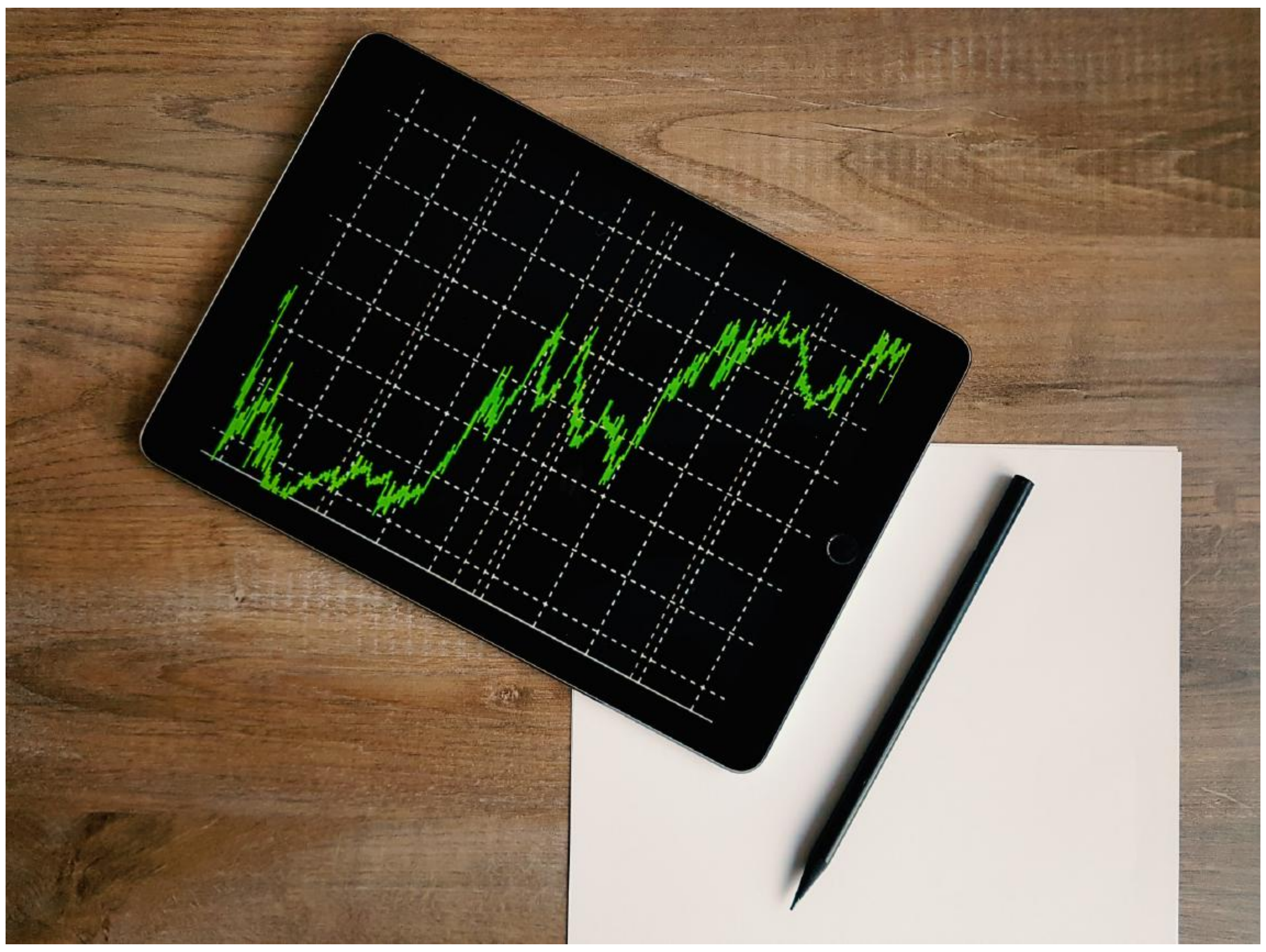
1. Shares with or without restrictions
2. Stock options with or without restrictions
3. “Phantom shares” and “stock appreciation rights”

As the legal mechanism of each type of share plan is different, their applicable tax regimes differ too.

A. Legal Mechanisms

Restricted and unrestricted shares are shares of the employer company that are given, or eventually sold for a reduced price, to employees benefiting from the share plan. Potentially, these shares give limited voting rights (e.g., class B shares vs. class A shares).

When such shares are unrestricted, the beneficiary employee is free to sell them immediately after granting. When they are restricted, the beneficiary employee has a contractual obligation to keep them for a certain period of time. Sometimes, shares are effectively granted after the expiry of a certain period of time, for example if the beneficiary employee meets some performance achievements or if the employee simply remains employed the company for a given period of time. Therefore, during this period the advantage can be forfeited or revoked if the employee does not fulfill the relevant conditions. This period is generally known as the vesting period and until the expiry of the vesting period, the employee only has an expectation.



Stock options are rights to buy shares of the company for a price fixed in advance. Generally, the beneficiary employee must exercise the option within a certain period of time. This feature depends on whether the stock options are granted with or without restriction.

In the context of a stock option plan, there can be a vesting period too.

Finally, phantom shares and stock appreciation rights ("SARs") are quite similar. Their mechanism aims at duplicating the performance of the employer company shares' value and grant the equivalent of such a performance in cash (or eventually in shares).

B. Swiss Domestic Tax Regime

The tax regime of each type of plan follows their specific legal features. In Switzerland, the legislator set up the tax treatment of share plans through the articles 17a to 17d of the Swiss Federal Direct Tax Act. The Swiss federal tax authorities gave additional explanations and interpretations of the law in a published Circular (Swiss Federal Tax Administration, Circular n°37).

Shares: are taxable as a salary in kind upon granting. When granted without any restriction, the taxable basis is the market value of the shares granted (minus the acquisition price, if any). When granted with restriction, i.e., when the employee cannot sell the share before a certain period of time, the taxable base is determined with a 6% discount per year of restriction. This discount is also applicable to determine the taxable value of the share for wealth tax purposes. When shares are effectively granted upon the expiry of a vesting period, the taxation occurs only at vesting. Before the vesting, the shares are not to be included in the taxable wealth of the beneficiary employee. Upon sale, any gain realized is treated as a capital gain. Under Swiss law, a capital gain realized on a share held in the private wealth is normally tax exempt. For an employee, it is most common that the share will be considered as part of the private wealth.

Stock options: when stock options are granted without restriction or when they can be freely traded on a stock market, their granting triggers a taxation as a salary in kind. The taxable basis is the market value of the option minus the acquisition price paid by the employee, if any. Such options must be included in the taxable wealth at the market value of the option and any future sale or exercise of such options normally generates a tax-exempt capital gain if such options are part of the private wealth (which would generally be the case for an employee). When stock options are granted with restriction, they become taxable as a salary in kind upon exercise only (i.e., after the expiry of the restriction period). In such case, the taxable basis is determined at the fair market of the underlying share acquired through the exercise, minus the exercise price payable by the employee.

Phantom and stock appreciation rights: as these types of plans are generally cash-based, the taxation only occurs when the cash is acquired or paid, and the advantage is treated as a salary. The Swiss domestic tax regime is thus quite clear and relatively easy to apply. However, difficulties rise when the employee has successively been tax resident of two or more countries between the grant and the vesting and / or the sale of the share and/or the sale or exercise of the option.

II. International allocation and taxation at source

A. Proportional Taxation

A new provision in Swiss tax law entered into force on 1 January 2013 dealing with the treatment of employee options in an international context. To the extent that the taxpayer was not domiciled in or resident of Switzerland during the entire interval between the acquisition and the exercise of the non-negotiable (blocked) and unlisted employee option (i.e., vesting period), cash benefits derived from his employee options are taxed in proportion to the ratio of the entire interval to the period spent in Switzerland, i.e. between the acquisition and the effective start of the right to exercise blocked employee options). With this new approach, Switzerland adopted a method more in line with Art. 15 of the OECD Commentary. It should be noted that this treatment does not only apply to non-tradable employee options, but also to so-called share or participation expectations, due to an express reference in Swiss tax law.

One point to be aware of is that, as with the income attribution rules, States sometimes have different regimes in their domestic law for defining the time of realization of income, and hence of taxation. Such differences in definitions can in practice lead to double taxation or double non-taxation when a taxpayer moves from one state to another during a tax period.

In resolving such a case, it should first be checked if a Double tax treaty ("DTT") applies. DTT's sharing rules allowing the source state to tax certain items of income or capital do normally not provide any restriction as to when the tax in question should be applied. In this respect, the OECD 2017 Commentary confirms that the residence state must grant relief by way of imputation or exemption, even if the source state taxes the income or capital in a later or earlier year.

Under Swiss tax law the proportional taxation applies both in the case of arrival in Switzerland ("import") and in the case of departure ("export"). The calculation is made as follows:

$$\frac{\text{Total amount of benefit received by the employee} \times \text{Number of days worked (subject to any days worked in a third country) in Switzerland during the vesting period}}{\text{Number of days in the vesting period}}$$

B. Imported Shareholdings

"Imported" employee shareholdings are deemed to be employee options, expectations on employee shares, or employee share options, or employee share expectations which were acquired when the employee was resident abroad and which were realized after he or she has moved to Switzerland. Imported employee shareholdings, which under Swiss law would be taxed at the time of allocation, can be realized tax-free in Switzerland. Taxation of the income from work following the early vesting remains reserved. Income which, under Swiss law, would be taxed at the time of realization, is taxed proportionally, subject to progressive taxation, provided that a change of residence has taken place between the time of allocation and the time of realization of the employee participation.

C. Exported Shareholdings

"Exported" employee shareholdings are employee options, employee share expectations or so-called employee shareholdings which were acquired when the employee was resident of Switzerland, and which were realized after the employee moved abroad. The export of employee shareholdings which, under Swiss law, must be taxed at the time of allocation, has no tax consequences. This does not apply to cases in which employee shareholdings are awarded as a bonus for services rendered in Switzerland and are therefore subject to tax at source (see hereafter).

D. Taxation at Source

Swiss tax at source is notably due in situations when an employee is domiciled abroad at the time he/she receives cash benefits derived from non-negotiable employee options and is levied on the proportional share of the benefit. Income thus obtained from the exercise of the options abroad will be subject to the Swiss federal tax at source at a flat rate of 11.5%. On top of the federal source tax, a Swiss based (former) employer also has to withhold the cantonal and municipal source taxes. Cantons are free to set the relevant rates. For instance, in Zurich, Geneva and Vaud, thecantonal/municipal flat rate is 20% (leading to a combined Swiss source tax rate of 31.5%). The (former) Swiss employer is obliged to pay the resulting source tax.

From a procedural standpoint, a certificate with the details of the employee's shareholding must be attached to the employee's source tax statement.

III. Practical Example: Swiss-US-UK Case

A is an employee of a US parent company. On January 1st, 2014, he received employee options free of charge, which vest at the end of a 5-year vesting period. At the time he received these options, A still lived and worked in the US. Two years later, on January 1, 2016, A is sent to Geneva, Switzerland to work in the subsidiary of the US parent company, where he then worked 3 years (until December 31, 2019). A could thus exercise his options in Switzerland. However, he decided to wait for some more time as in his opinion the share price was not high enough yet in December 2019. A finally decided to exercise the options in December 2020, i.e., 7 years after granting, at the time when he no longer lived in Switzerland but in the UK where he worked for another subsidiary of the US parent company. The cash benefit realized by him on exercise amounts to CHF 100 per option.

First of all, employee options are normally taxed in Switzerland at the time of exercise if they are neither freely available nor listed on the stock exchange. A earned the employee options during the 5-year vesting period. Since A worked in Switzerland for only 3 years during this period, Switzerland, according to its internal law, only taxes the cash benefit realized proportionally, up to a maximum of 3/5ths or CHF 60 per option.

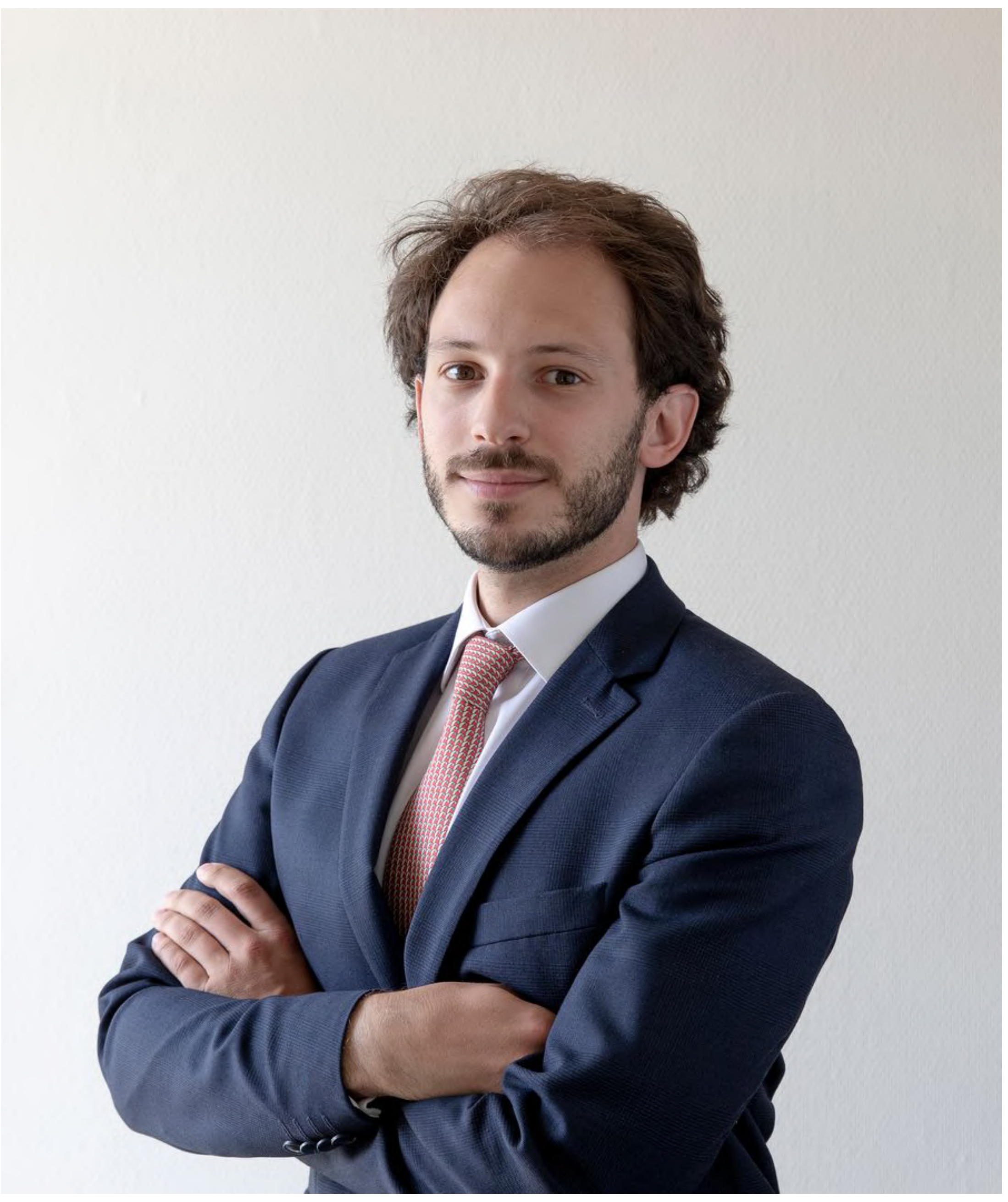
Since A was no longer domiciled in Switzerland at the time the gain is realized, the Swiss subsidiary must pay the source tax on the Swiss taxable portion of the cash benefit of CHF 60 per option to the Geneva tax administration. Direct federal tax amounts to 11.5% of the share of the appreciable cash benefit or CHF 6.90 per option. Cantonal and municipal taxes amount to 20%, i.e., CHF 12 per option. The income should be declared in the annual salary certificate, and it is taxable as the employee's regular income, i.e., taxed at source and/or in the annual Swiss tax return.

Please see the following small diagram to illustrate the calculations above:

Residence	From	To	Vesting Period (in days)	Part	Cash benefit per option
U.S.	01.01.14	31.12.15	730	2/5	40
Switzerland	01.01.16	31.21.19	1096	3/5	60
UK	01.01.20				
Total			1826	5/5	100

We closely monitor the evolution of the legislation and the practice in this field to better assist our clients in their requests and we will gladly advise you on any question you may have in relation to the analysis and taxation of employee share or option plans from a Swiss and international point of view.

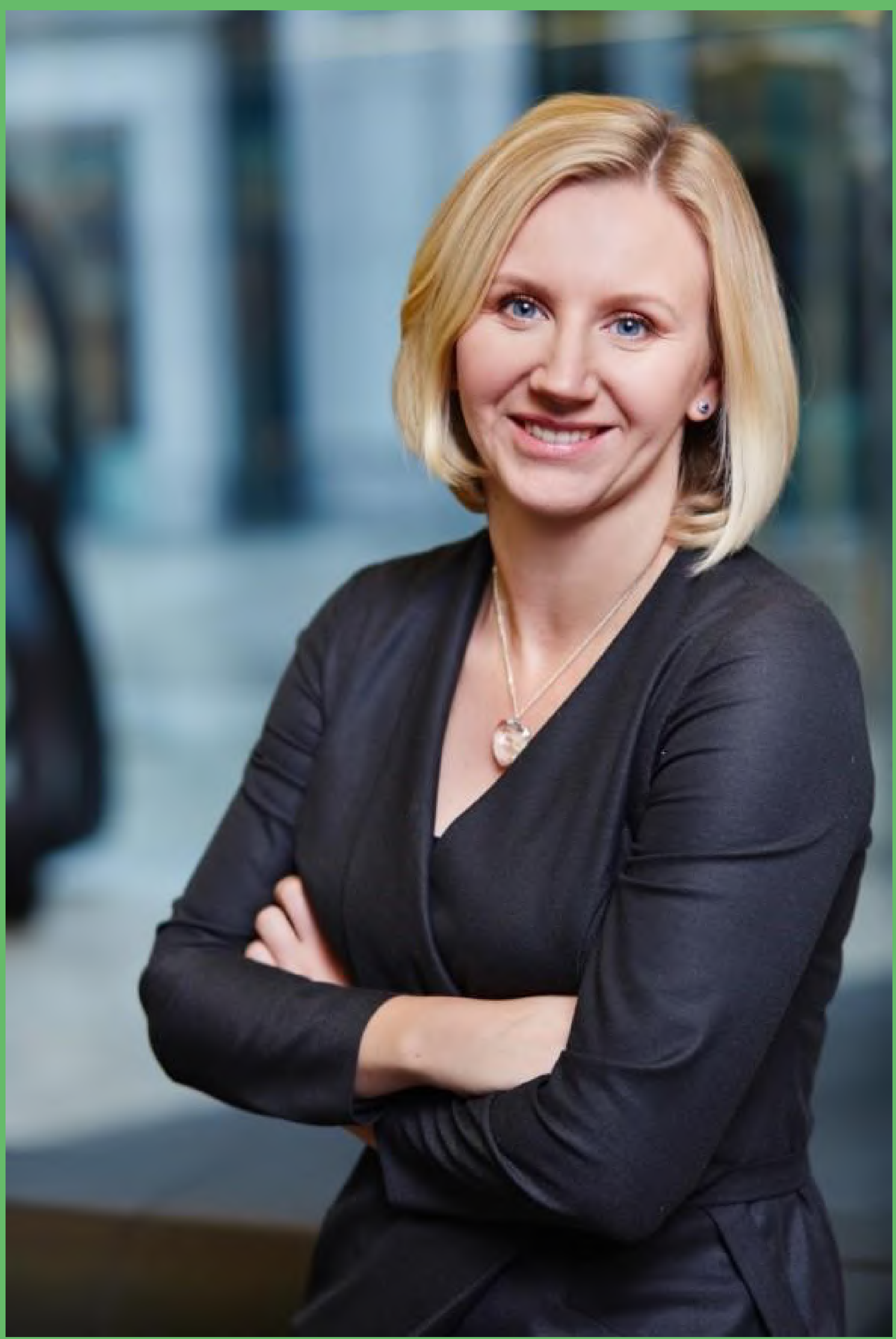
Anna Sidorova is a senior tax associate at Boitelle Tax. Anna has over 6 years of experience in international and Swiss taxation of individuals and legal entities, combined with theoretical specialization due to her completed LL.M. in international taxation and ongoing Swiss Tax Expertise diploma. Her practice notably includes negotiation of tax rulings, tax and legal support in relocation of companies and individuals, restructuring procedures, private clients services and estate planning, tax compliance and tax audit procedures and application of Double Tax Treaties.



Aymeric Serre is an associate in the Lausanne office of Bonnard Lawson. He is a qualified attorney-at-law in France (Paris Bar) and is registered with the Canton of Vaud (Switzerland) as a foreign lawyer, authorized to practice as such in Switzerland. Aymeric mainly works for private clients on French and international tax planning and estate tax. His practice also includes privately owned businesses and tax litigations.

Member Spotlight:

Aldona Leszczynska-Mikulska, Poland



1. Can you tell us about your practice and how you came to join TTN?

I am an attorney-at-law and certified tax adviser. I'm currently heading the Private Client Practice of the GWW law firm, based in Poland, where I am the equity partner in taxes. Before joining GWW, (gww.pl) I worked for over twelve years now in international taxation team for one of the law firms in Poland, and Big Four where I started m professional career.

GWW is a national law firm of around 150 lawyers. As a full-service law firm, we cover almost all areas of law which a strong focus on taxation.

2. What are some of your interests outside of the practice of law?

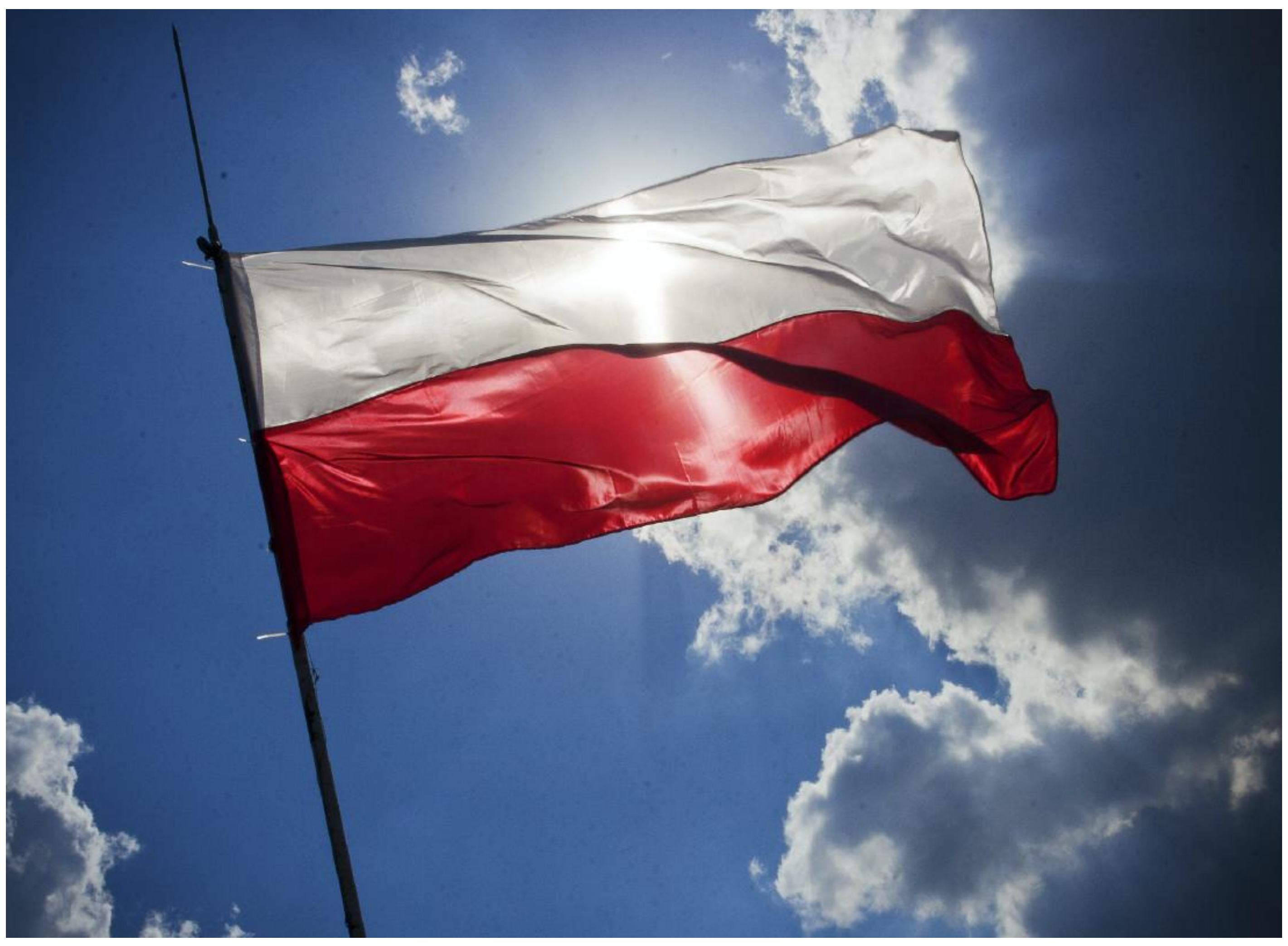
Well, if only possible, I enjoy traveling – specifically after the slowdown and lockdowns we experienced over the last two years. I try to be active in sports, mainly tennis and windsurfing.

3. What is one area of law in your jurisdiction we should all keep an eye on going forward?

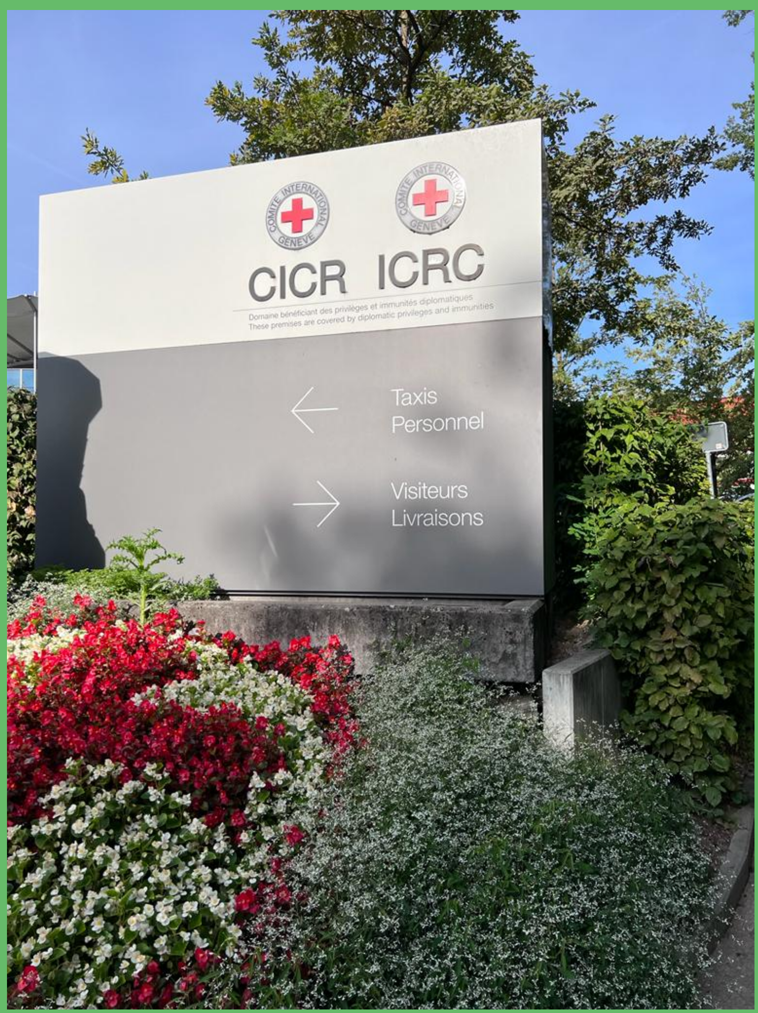
Unfortunately, or fortunately (business-wise) these are taxes. In Poland, the last two years brought the tax reform (called the Polish new deal) which resulted in plenty of controversies after the too-hectic implementation. On the other hand, the Polish tax authorities as of 2016 became much more active in the field of scrutinizing international tax planning, holding structures, or fiduciary structures.

4. What are the impacts, if any, of the war in Ukraine on your practice?

Locally and globally, it has a huge impact. Local businesses are starting to face a recession. There is also a decrease in foreign investments in the entire CEE region and M&A transactions. Poland has still economic growth and good perspectives, but the Polish HNWI or family business owners are much more focused over the last two years on asset protection issues, relocation of assets, or preparation for the relocation of families or businesses. It is not a massive trend but is visible.



<u>Geneva</u> - 23 Sept 2022, Philanthrophy and Tax



The Conference was held at the International Committee of the Red Cross

Jeff Hagen, Arnaud Jouanjan, Xavier Gutierrez, Ricky Gutierrez, and Adrian Imbroll Giordano at Le Bologne

Thierry Boitelle presents on taxation in Switzerland while at the conference

Michael & Kelly Legamaro, Thierry Boitelle, Jeff Hagen, Adrian Imbroll Giordano, and Steve Hagen at the welcome cocktail at Rothschild (Suisse) SA

Robert Nathan and Barbara Ingenbleek-Boshuis at dinner at Le Bologne

Jan Hendricks, Alessandra Pagani, Steven Hagen, Yvonne den Burger, and Arnaud Jouanjan

Upcoming TTN Conferences:

Chicago
Tax Conference: 26 May 2023

Paris
Tax Course: 21 Sept 2023
Tax Conference & AGM: 22 Sept 2023