Fabianne de Vos Burchart*

Trustees in Switzerland: The Office of Trustee under the (Draft) Financial Institutions Act[1]

Table of Contents

The Swiss authorities engaged in an ambitious enterprise when they included trustees in the (Draft) Financial Institutions Act. In effect, they undertook to comprehensively regulate and supervise an office centered around an institution not merely unknown under Swiss law, but also governed by underlying principles alien to its legal tradition. The implementation of this regulatory and supervisory framework requires a precise definition of the notion of trustee. The purpose of this article is to explore the definition of a trustee as currently outlined in the (Draft) Financial Institutions Act, reflect on which trust industry actors will require an authorization to carry out their activities in, within or from Switzerland following entry into force of the Act and present the upcoming applicable supervisory framework.

I. Introduction

Ten years[2] after the Hague Trusts Convention[3] entered into force on its soil, Switzerland is in the process of taking an important step towards professionalizing its trust industry.

The country is undertaking this task within the context of the in-depth reform of its financial market regulatory and supervisory framework[4]. The cornerstones of the process, the Financial Services Act[5] and the Financial Institutions Act[6], are to date still debated in Parliament. Publication of the final versions is expected to occur in

* Fabianne de Vos Burchart TEP is an associate with FBT Avocats SA in Geneva and a Ph.D. student at the Center for Banking and Financial Law (CDBF) of the University of Geneva. This article expresses the personal views of the author. This text has been completed by 15 September 2017; written and electronic sources published before 15 September 2017 have been taken into account. The author extends her thanks to Prof. Luc Thévenoz for his comments and observations and Mrs. Céline Stroudinsky Conod and Mr. James Tierney for their careful proofreading.

1 Title inspired by that of Prof. Luc Thévenoz' landmark 2001 publication «Trusts in Switzerland: Ratification of The Hague Convention on Trusts and Codification of the Law of Fiduciary Transfers», which set the stage for ratification of the Hague Trusts Convention by Switzerland in 2007.

2 Switzerland ratified the Hague Trusts Convention on 26 April 2007; it entered into force the following 1 July 2007.

3 Full name: «The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition», available on the website of The Hague Conference on Private International Law: https://www.hcch.net/en/instruments/conventions/full-text/?cid=59.

4 On 28 March 2012, the Swiss Federal Council gave a mandate to the Federal Department of Finance to prepare, in collaboration with the Federal Department of Justice and Police and the Financial Market Supervisory Authority («FINMA»), a preliminary draft for a trans-sectoral regulation of financial products and services and their distribution. The Swiss Federal Council's media release is available (in French) here: https://www.admin.ch/gov/fr/accueil/documentation/communiques/communiques-conseil-federal.msg-id-43953.html.

5 Referred to herein alternatively as the «Financial Services Act», «(Draft) Financial Services Act» or «D-FinSA».

6 Referred to herein alternatively as the «Financial Institutions Act», «(Draft) Financial Institutions Act», «D-FinIA» or the «Act». The latest versions of both the Financial Services Act and the Financial Institutions Act, as approved by the Commission for Economic Affairs and Taxes of the National Council on 15 August 2017, are available (in French) here: https://www.parlament.ch/centers/eparl/curia/2015/20150073/N2%20F.pdf.

2018, with an entry into force still scheduled for 2019[7]. The Financial Institutions Act will govern the requirements for acting as a financial institution[8] on a professional basis whereas the Financial Services Act will govern the provision of financial services[9]. The Swiss authorities formed working groups consisting of experts from the affected industries. This summer, these working groups started drafting proposals for the implementing ordinances of the Acts. These ordinances should significantly clarify the structure and various requirements of the revised regulatory and supervisory framework.

Absent at the outset of the reform process, the *trustee* made a surprise appearance in the (Draft) Financial Institutions Act in November 2015[10]. The inclusion of trustees in the Act had been requested and was welcomed by the interested industry[11]. It does, however, open the door to an entirely new set of challenges. How indeed could Switzerland comprehensively regulate and supervise an office centered on an institution not merely unknown under Swiss law, but also governed by underlying principles considered alien to those underlying its legal tradition[12]? After all, recognition of a trust's distinctive legal effects through ratification of the Hague Trusts Convention is one thing; the oversight of the office of trustee is another.

The first step towards the implementation of a regulatory and supervisory framework specific to trustees is a precise definition of the notion of *trustee*. This definition is of central importance, as it serves as a basis for determination of the material scope of application of the Financial Institutions Act and enables relevant stakeholders to identify which trust industry participants will effectively be subject to prudential regulation.

The purpose of this article is to explore the definition of *trustee* as currently outlined in the (Draft) Financial Institutions Act, reflect on which trust industry actors will require an authorization to carry out their activities in, within or from Switzerland upon enactment of the new regulation and present the upcoming applicable supervisory framework.

After highlighting the various components of the office of trustee (section II.), we shall examine when, to which extent, and under which conditions Swiss (section III.) and foreign (section IV.) trustees should fall to be regulated and when they would be exempted from the obligation to request an authorization (section V.). We shall then review the supervisory framework applicable to trustees (section VI.) before concluding (section VII.).

II. The Trustee under the (Draft) Act

1. Preliminary Considerations

By including trustees in the (Draft) Financial Institutions Act, the Swiss authorities engaged in an ambitious enterprise. The concept of *trust* is certainly famous for being elusive and undefinable. Alfred von Overbeck referred to it as «a somewhat troubling foreign institution»[13]. The authors of the Principles of European Trust Law stated that «reaction to hearing the word «trust» may well be one of caution and fear», further indicating that «the word is versatile and chameleon-like»[14]. David Hayton for his part compared it to an elephant (difficult to describe but easy to recognize)[15].

Without the guidance and familiarity with the institution provided by a domestic trust law, the attempts of the Swiss authorities to define the activities carried out by trustees were bound to be perplexing. The diversity of Switzerland's trust industry, which embraces trusts governed by a variety of foreign laws, further reinforced the difficulty of the exercise.

Setting aside issues of definition, it should be noted that the notion of trust is broad and flexible[16]. The features

---

7 The Acts were approved by the National Council on 13 September 2017, see here for additional information: https://www.parlament.ch/fr/services/news/Pages/2017/20170913183612507194158159041_bsf169.aspx. They are now returning to the Council of States.

8 Art. 1 para. 1 D-FinIA.

9 Art. 1 para. 2 D-FinSA.

10 The Federal Council presented the (Draft) Financial Institutions Act together with the (Draft) Financial Services Act and the Dispatch to the Parliament on 4 November 2015. See the Federal Council's media release available here: https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-59331.html.

11 Alongside ratification of the Hague Trusts Convention, highly regarded professionals within the Swiss trust industry joined forces to create the Swiss Association of Trust Companies («SATC»). The purpose of SATC is to engage in the furtherance and development of trustee activities in Switzerland, to ensure a high level of quality and integrity, and the adherence to professional and ethical standards in the trust business in Switzerland. It also saw itself as a trailblazer for future regulation of trust services or trust companies, an objective which it is now in the process of achieving. For more information, see SATC's website: http://www.satc.ch/.

12 See on this topic: Henry Hansmann and Ugo Mattei, «The Functions of Trust Law: A Comparative Legal and Economic Analysis», in New York University Law Review, Volume 73, Number 2, May 1998, pp. 438–445. For a more nuanced approach, see the Introduction to the Principles of European Trust Law, 1999, pp. 3–5.

13 Alfred von Overbeck, «Explanatory Report on the 1985 Hague Trusts Convention», in Proceedings of the Fifteenth Session, tome II: Trusts – applicable law and recognition, The Hague, 1984, p. 373 para. 14.

14 Commentary to the Principles of European Trust Law, 1999, p. 29.

15 David Hayton, «Trusts», in Vertouwd met de trust – Trust and Trust-like Arrangements, Serie Onderneming on Recht deel 5, W.E.J. Tjeenk Willink (Ed.), Deventer, 1996, p. 3.

16 Some legal scholars argue that its flexibility is what has contributed to its international development; see Henry Hansmann and Ugo Mattei, *op. cit.*, pp. 470–471; David Hayton, «The Uses of Trusts in the Commercial Context», in Modern international developments in trust law, David Hayton (Ed.), Kluwer Law International, London, 1999, p. 145 and Luc Thévenoz, «Trusts: the rise of a global legal concept» in European private law: a handbook (volume II),

of a trust may vary depending on its environment and its intended purpose, which themselves can be complex and shift over time. With this in mind, we will focus herein on Swiss financial market regulation and the objectives it pursues rather than attempt to define trusts and the functions fulfilled by trustees *in abstracto*. A closer look at these objectives will reveal the aspects of the office of trustee that are most relevant to the Swiss legislator.

In this respect, Swiss financial market regulation pursues two core objectives, client protection[17] and market protection[18], as well as two less tangible objectives relating to sustaining the reputation and competitiveness of Switzerland's financial center[19] and ensuring financial stability[20].

From a regulatory perspective, the trustee is perceived as an intermediary operating a vehicle for asset management[21] (the trust) in Switzerland's financial market. The legislator's concern lies with ensuring that trustees meet certain professional standards. These standards aim at preventing them from causing harm to those to whom they are accountable, their counterparties, other financial market operators, or the financial markets themselves. By regulating and overseeing trustees' activities, the regulator is not only able to implement the objectives pursued by financial market regulation, but also to create a level playing field between trustees and other financial market intermediaries carrying out comparable (asset management) activities[22].

The definition of *trustee* under the (Draft) Financial Institutions Act is outlined below.

2. Defining Elements of the Office of Trustee

The Swiss legislator elected to build its definition of the office of trustee on the basis of the latter's relationship with a trust as construed under the Hague Trusts Convention. The current version of the (Draft) Financial Institutions Act provides indeed that[23]:

A trustee is a person who on a professional basis manages or disposes of a separate fund for the benefit of a beneficiary or for a specified purpose based on the instrument creating a trust within the meaning of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition.

The definition[24] of a trust[25] under the Hague Trusts Convention reads as follows[26]:

For the purposes of this Convention, the term «trust» refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics –

a) the assets constitute a separate fund and are not a part of the trustee's own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Four defining elements of the office of trustee may be extracted from the combination of the above two provisions: (i) the management and disposal functions exercised by the trustee, (ii) the existence of a separate fund, (iii) the principle that either someone or a cause must benefit from the activity, and (iv) a minimum level of intensity at which the trustee must operate in order to fall

Mauro Bussani and Franz Werro (Ed.), Stämpfli, Bern, 2014, p. 30.

17 See in particular Art. 5 of the Financial Market Supervision Act («FINMASA») (SC 956.1); Art. 1 para. 2 of the Stock Exchange Act («SESTA») (SC 954.1); Art. 1 of the Collective Investment Schemes Act («CISA») (SC 951.31); Art. 1 para. 2 and Art. 6b para. 2 of the Banking Act («BA») (SC 952.0); Art. 1 para. 2 of the Financial Market Infrastructure Act («FMIA») (SC 958.1) and Urs Zulauf and Mirjam Eggen, Swiss Financial Market Law, Dike, Bern, 2013, p. 6.

18 See Art. 1 para. 2 D-FinIA; Art. 5 FINMASA; Art. 1 CISA; Art. 1 para. 2 SESTA and Urs Zulauf and Mirjam Eggen, *op. cit.*, p. 6.

19 See Art. 5 FINMASA and Urs Zulauf and Mirjam Eggen, *op. cit.*, pp. 107–108.

20 See Art. 1 para. 2 FMIA and Peter Nobel, «Was heisst «Überregulierung»?», in Swiss Review of Business and Financial Market (SZW/RSDA), 2014, p. 591.

21 A comprehensive regulation of asset management activities carried out on a professional basis for the benefit of third parties is one of the main objectives pursued by the in-depth reform of Switzerland's financial market regulatory and supervisory framework. See Swiss Federal Council, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) (in French), 4 November 2015, most notably pp. 8103, 8115 and 8117.

22 The establishment of a level playing field between the various financial market participants is also one of the main objectives pursued by the in-depth reform. See Swiss Federal Council, Dispatch on FinSA and FinIA, most notably pp. 8102 and 8285–8286.

23 Art. 16 para. 2 D-FinIA.

24 In practice, The Hague Trusts Convention does not define the trust institution. Rather, it attempts to «[…] indicate the characteristics which an institution must show – whether this is a trust originating in a common law country or an analogous institution from another country – in order to fall under the Convention's coverage», see Alfred von Overbeck, *op. cit.*, p. 378 para. 36 and pp. 375–376 para. 26–27.

25 The «non-definition» of the trust found in the Hague Trusts Convention was another opportunity to debate the meaning of the concept: for Maurizio Lupoi, the Hague Trusts Convention's trust is *shapeless*, whereas for Luc Thévenoz it is a demonstration that it has become a *global legal concept*. See Maurizio Lupoi, «The Shapeless Trust», in Trusts & Trustees, Volume 1, Issue 3, February 1995, pp. 15–18 and Luc Thévenoz, *op. cit.*, pp. 3–39.

26 Art. 2 Hague Trusts Convention.

within the scope of the Act. These elements are further analyzed below.

2.1 Management and Disposal

Trustees' asset management function, the fact that trustees *manage or dispose*[27] of assets, lies at the heart of the definition set out in the (Draft) Financial Institutions Act. A trustee's tasks entail managing the separate fund, ensuring its value is maintained, and employing it in a restricted manner[28]. The trustee may also provide investment advice, carry out portfolio analysis and offer financial instruments[29].

Under the Hague Trusts Convention, the terms *«to manage and dispose»* are construed as a reference to the fiduciary duties of the trustee; they express the trustee's power and duty to manage the assets and to dispose of them in accordance with the settlor's intent and the rules of law and equity[30]. Under Swiss law and regulation, these terms are not identical in meaning. An asset manager's powers and duties to manage and dispose of assets, as well as the manner in which they must be carried out, are rooted in the obligations he owes to his principal under agency law[31]. Regulatory guidelines further specify these obligations[32].

In comparing both sources of duties, Luc Thévenoz stated that «[i]n Anglo-American law, these fiduciary duties differ from contractual duties by their intensity and the high degree of diligence and loyalty expected of the trustee. As Judge Benjamin Cardozo expressed it in a frequently quoted decision of the New York Court of Appeals in 1928: «Many forms of conduct permissible in a workday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior»»[33].

The regulation of trustees under the Financial Institutions Act will have no effect on the law governing the trust and its resulting relationships. There is indeed no doubt that trustees active on Swiss soil will remain bound by the fiduciary duties characteristic of common law trust relationships. The applicable substantive trust law is to be determined according to the provisions of the Hague Trusts Convention[34].

2.2 Of a Separate Fund

The assets of the trust must be separate from those of the trustee[35]. The separation of trust assets is an essential element of a trust, without which its recognition would have no meaning[36].

Specific provisions on the publicity of the separate nature of certain types of assets held in trust as well as provisions regarding debt collection proceedings have been included under Swiss law[37].

2.3 For the Benefit of a Beneficiary or for a Specified Purpose

In English and American legal writings, the presence of a beneficiary or a specified purpose is considered as being essential in order that there be a trust[38]. The trustee acts here in the capacity of owner of the trust assets or as the person controlling the trust assets through, for instance, a nominee[39]. He must, however, carry out his activities for the benefit of a beneficiary or for a specified purpose[40]. The very essence of a trust lies indeed in the fiduciary relationship between the trustee and the beneficiaries[41]. The fact that the trustee has rights as a beneficiary is not necessarily inconsistent with the existence of a trust[42].

At the level of the Hague Trusts Convention, the statement that the trustee is accountable expresses the idea

---

27 Both Art. 16 para. 2 D-FinIA as well as Art. 2 para. 2 let. c Hague Trusts Convention refer to the trustee's power and duty to manage or dispose of the assets of the separate fund; Art. 2 para. 2 let. c Hague Trusts Convention additionally refers to the trustee's power and duty to employ the assets. The description of the activities carried out by portfolio managers also encompass the terms «to dispose» of assets, see Art. 16 para. 1 D-FinIA, whereas the terms «to manage» assets are central to the descriptions of the activities carried out by managers of collective assets, see Art. 20 para. 1 D-FinIA, and fund management companies, see Art. 28 D-FinIA.

28 See Art. 18 para. 2 D-FinIA.

29 See Art. 18 para. 3 D-FinIA.

30 Alfred von Overbeck, *op. cit.*, p. 380 para. 46.

31 See Art. 394 to 406 of the Swiss Code of Obligations («SCO») (SC 220).

32 For an overview of the content of asset management contracts and the obligations of asset managers under Swiss regulations, see FINMA Circular 2009/1, «Guidelines on asset management», in particular margin nos. 7.1-26.

33 Luc Thévenoz, Trusts in Switzerland: Ratification of the Hague Convention on Trusts and Codification of Fiduciary Transfers, Schulthess, Zurich, 2001, p. 189.

34 Art. 6 to 10 of the Hague Trusts Convention.

35 See Art. 2 para. 2 let. a and Art. 11 para. 3 Hague Trusts Convention; Art. I para (1), Art. III para. (2) and (3) and Art. V para. (3) of the Principles of European Trust Law; Alfred von Overbeck, *op. cit.*, p. 379 para. 44; Geraint Thomas and Alastair Hudson, The Law of Trusts, 2nd edition, Oxford University Press, Oxford, 2010, section 1.05, p. 13 and David Hayton/Paul Matthews/Charles Mitchell, Underhill and Hayton: Law relating to Trusts and Trustees, 17th edition, Butterworths, London, 2006, section 1.1 (1), p. 2.

36 Alfred von Overbeck, *op. cit.*, p. 394 para. 108.

37 See Art. 149d SPILA and Art. 284a and 284b of the Debt Enforcement and Bankruptcy Act («DEBA») (SC 281.1). See also Swiss Federal Council, Dispatch on the Hague Trusts Convention, pp. 586–587, section 1.7.2.1.

38 Alfred von Overbeck, *op. cit.*, p. 379 para. 39.

39 Art. 2 para. 1 and 2 let. b Hague Trusts Convention. See also Commentary to the Principles of European Trust Law, 1999, pp. 39–40.

40 Art. 16 para. 2 D-FinIA and Art. 2 para. 1 Hague Trusts Convention. See also Art. I para. (1) of the Principles of European Trust Law.

41 Alfred von Overbeck, *op. cit.*, p. 379 para. 40.

42 Art. 2 para. 3 Hague Trusts Convention.

that the beneficiaries have rights against the trustee which they may assert in a court of equity and also suggests the supervisory power of those courts[43].

2.4 On a Professional Basis

Encompassed within the (Draft) Financial Institutions Act's definition of the trustee is the requirement that his activities be carried out on a professional basis *(gewerbsmäßig, à titre professionel, a titolo professionale).* This condition is typical of financial market regulation and has a recurring and widespread presence. It aims at ensuring that only those who carry out a regulated activity that meets a minimum standard of intensity, which thus qualifies it as a professional activity, fall under the scope of the regulation. Under Swiss financial market regulation, the grounds and thresholds of professional activity vary from one industry to the other, respectively from one activity to the other, on the basis of different functional and quantitative criteria[44].

The Swiss Parliament's Council of States had elected to leave the determination of the professional basis criterion to the Federal Council, which would have specified it in the implementing ordinance to the Financial Institutions Act. The Commission for Economic Affairs and Taxes of the National Council has however amended the project to regulate this point directly in the Financial Institutions Act. This amendment provides that any financial institution carrying out a regulated activity does so on a professional basis from the moment the activity constitutes an independent economic activity that is designed to achieve regular revenues[45]. The Parliament's reconciliation of differences process will determine which solution will prevail.

On a similar note, although trustees are not at present subject to prudential regulation in Switzerland, they are, in their capacity as financial intermediaries, subject to anti-money laundering legislation[46]. The Anti-Money Laundering Ordinance provides that the professional basis criterion is met, and anti-money laundering provisions apply, once a trustee either (i) achieves a turnover exceeding CHF 50'000 per year, (ii) entertains business relationships with more than 20 co-contracting parties, (iii) has the power to dispose of third-party assets exceeding CHF 5 million, or (iv) executes transactions with a total volume of over CHF 2 million per year[47]. Upon entry into force of the Financial Institutions Act, these thresholds will no longer apply to trustees. Indeed, prudentially regulated financial intermediaries[48] are deemed to act on a professional basis for anti-money laundering purposes once the thresholds specific to their activity are met, irrespective of the above thresholds, which apply only to non-prudentially regulated financial intermediaries[49].

III. The (Draft) Act and Swiss Trustees

A Swiss trustee is any trustee[50] with his registered office or place of residence in Switzerland[51] carrying out his activities within or from Switzerland[52]. He may be either incorporated under Swiss law or domiciled in Switzerland. The management of Swiss trustees must effectively take place in Switzerland[53]. The effective management requirement entails that the persons entrusted with management functions must reside in a place from which they will be able to exercise their office[54].

The qualification as a Swiss trustee will subject the person to the full extent of the Financial Institutions Act's personal, financial and organizational requirements. These include provisions on legal form[55], registration[56],

---

43 Alfred von Overbeck, *op. cit.*, p. 380 para. 46.

44 For instance, one is deemed as carrying out a banking activity on a professional basis if one accepts, on an ongoing basis, more than twenty deposits from the public, or makes oneself available to accept deposits from the public, even if upon doing so fewer than twenty deposits result, see Art. 1 para. 2 and Art. 6a para. 3 BA, in combination with Art. 6 of the Banking Ordinance («BO») (SC 952.02). Within the context of securities dealing regulation, own-account dealers, issuing houses, derivative houses and market makers act on a professional basis from the moment their activities constitute a separate and independent economic activity that is designed to achieve regular revenues. Client dealers must additionally maintain accounts, either directly or indirectly, or act as custodians of securities for more than twenty customers, see Art. 3 para. 1 to 5 of the Securities and Stock Exchange Ordinance («SESTO») (SC 954.11) and FINMA Circular 2008/5, «Securities Dealers», margin nos. 12, 13 and 49. Art. 2 let. b of the Commercial Register Ordinance («CRO») (SC 221.411), which defines what constitutes a «business» from the commercial register's perspective, is also relevant within this context.

45 Art. 2a D-FinIA.

46 As persons who, on a professional basis, accept or hold on-deposit assets belonging to others or who assist in the investment or transfer of such assets, see Art. 2 para. 3 of the Anti-Money Laundering Act («AMLA») (SC 955.0)

47 Art. 7 para. 1 of the Anti-Money Laundering Ordinance («AMLO») (SC 955.01). See also FINMA Circular 2011/1, «The activity of financial intermediary under the AMLA», margin nos. 142–153.

48 The financial intermediaries subject to anti-money laundering legislation under Art. 2 para. 2 AMLA.

49 The financial intermediaries subject to anti-money laundering legislation under Art. 2 para. 3 AMLA.

50 As defined under section II. above.

51 See in this respect Art. 17 para. 1 D-FinIA.

52 The terms «within Switzerland» mean that the trustee is established on and carries out its activities exclusively on Swiss soil. The term «from Switzerland» means that the trustee is established on Swiss soil but carries out its activities abroad.

53 Art. 9 para. 1 D-FinIA.

54 Art. 9 para. 2 D-FinIA, in combination with Art. 18a D-FinIA.

55 Swiss trustees will be under an obligation to take on the form of a sole proprietorship, a commercial enterprise or a cooperative, see Art. 17 para. 1 D-FinIA.

56 Swiss trustees will need to be listed in the commercial register, see Art. 17 para. 2 D-FinIA. Entrance intp the commercial register shall occur after the authorization has been issued, see Art. 4 para. 2 D-FinIA.

minimum share capital[57], adequate collateral or professional liability insurance[58], risk management and internal control systems[59], equity obligations[60], a minimum number of qualified and experienced managers[61], proper business conduct[62] and corporate governance rules[63].

IV. The (Draft) Act and Foreign Trustees

1. Preliminary Considerations

In the absence of a domestic trust law, Switzerland's trust industry inevitably displays strong ties with foreign jurisdictions and legislations. As we shall see below, the fact that trust assets are held in custody, administered, managed or disposed of in Switzerland does not necessarily imply that they are controlled by a Swiss trustee[64]. Indeed, foreign trustees may set themselves up or break down their functions to carry out part of their activities in, within or from foreign jurisdictions[65].

As opposed to Swiss trustees, foreign trustees[66] have their central hubs and registered offices[67] in foreign jurisdictions. They are either incorporated or domiciled abroad. Their interactions with Switzerland are limited and circumscribed[68].

The question here is when the exercise by foreign trustees of certain prerogatives in Switzerland[69] is likely to trigger a regulatory response.

In this respect, there are three manners in which foreign financial institutions may carry out activities in Switzerland: through a Swiss-based branch, through a Swiss-based representation or on a traditional offshore basis. Only the first two are relevant within the context of this analysis, as the exercise of activities on an offshore basis[70] does not subject foreign entities exercising them to Swiss prudential regulation and supervision[71].

In the section below, we shall briefly discuss the regulatory consequences attached to the establishment of a Swiss-based branch or representation by a foreign trustee. We shall then review two additional scenarios which could result in foreign trustees being subject to the provisions of the Financial Institutions Act.

2. Branches of Foreign Trustees

A foreign trustee establishes a branch in Switzerland if it employs persons on a permanent and professional basis and these persons either carry out the activity of trustee[72], conclude transactions, or manage client accounts in or from Switzerland in the name of the foreign trustee[73].

The establishment of a branch by a foreign trustee will subject both the foreign trustee and the branch office to certain provisions of the Financial Institutions Act. Moreover, the supervisory authority of the foreign institution must display a willingness to cooperate with the Swiss supervisory authority.

---

57 The minimum share capital for Swiss trustees will amount to CHF 100'000 and will need to be maintained at all times, see Art. 19 para. 1 D-FinIA.

58 Swiss trustees will need to have adequate collateral or take out professional liability insurance, the minimum amounts of which will be set by the Federal Council, see Art. 19 para. 1bis and 2 D-FinIA. The Commission for Economic Affairs and Taxes of the National Council suggests however to limit it to professional liability insurance, excluding the adequate collateral option.

59 See in this respect the requirements set out under Art. 8 para. 2, Art. 10 para. 7 and Art. 18b D-FinIA.

60 Regarding equity, Swiss trustees will need to hold an amount equivalent to at least 1/4th of the corporation's full annual costs; this amount is however capped at CHF 10 million, see Art. 19a D-FinIA.

61 A minimum of one or two qualified managers, see Art. 9 and Art. 18a D-FinIA.

62 The proper business conduct requirement applies to the trustee itself, the persons responsible for its administration and management and its qualified participants, see Art. 10 D-FinIA.

63 Swiss trustees will need to establish appropriate corporate governance rules and be organized in a way that they can fulfill their statutory duties, see Art. 8 para. 1 D-FinIA.

64 As described under section III. above.

65 Such as for tax purposes or because of the location of certain trust assets or domicile of beneficiaries.

66 It is important to underline that the categorization as trustee shall be determined based on the definition set out in the Financial Institutions Act, as reviewed under section II. above, irrespective of the foreign trustee's effective categorization as a trustee in its home jurisdiction.

67 Art. 48 para. 1 D-FinIA defines «foreign financial institutions» as financial institutions that have their registered office abroad.

68 See section IV., subsection 4.2 below, which briefly analyzes the regulatory consequences that apply when a foreign trustee has stronger connections with Switzerland than with its home jurisdiction.

69 The terms «in Switzerland» mean that the trustee is established abroad but carries out activities on Swiss soil.

70 The exercise of activities on an offshore basis means that a foreign-based institution carries out activities on Swiss soil without setting-up a Swiss-based permanent establishment, such as a branch or a representation office.

71 It may, however, subject them to other legal or regulatory requirements.

72 The terms «activity of trustee» were added to Art. 48 para. 1 let. a of the (Draft) Financial Institutions Act by the Commission for Economic Affairs and Taxes of the Council of States, which published its revised version of the Act on 3 November 2016. This modification was approved by the Council of States on 14 December 2016. Prior to inclusion of these terms, it is safe to say that foreign trustees carrying out the activity of trustee through a Swiss-based branch would have fallen out of the scope of the Financial Institutions Act. The meaning of the term «activity of trustee» should be further specified in the implementing ordinance to the Financial Institutions Act; we believe the meaning should be aligned with the definition of trustee as set forth under Art. 16 para. 2 D-FinIA.

73 See the definition of a branch at Art. 48 para. 1 D-FinIA, more specifically let. a, d and e as regards foreign trustees. We exclude herein portfolio management for collective investment schemes or occupation schemes (let. b), as these activities fall under the scope of those carried out by portfolio managers and managers of collective assets, as well as securities trading (let. c), as this activity falls under the scope of those carried out by securities firms.

More specifically, the foreign trustee will be required to comply with a set of personal[74], financial[75], organizational[76] and regulatory[77] requirements. It must also request and obtain an authorization from the supervisory authority[78], although the Federal Council may sign international treaties allowing financial institutions from the treaty states to open a branch without requiring authorization from the supervisory authority if both sides recognize the equivalent nature of the respective regulation of financial institutions' activity and supervisory measures[79]. At the branch level, certain personal[80] and organizational[81] requirements will also need to be fulfilled.

As regards the foreign supervisory authority, it should not raise any objections to the establishment of the branch. Additionally, it should undertake to notify the competent supervisory authority immediately if any circumstances arise that could seriously prejudice the interests of the investors or clients[82] and provide the supervisory authority with administrative assistance[83]. The granting of an authorization to the foreign trustee may also be contingent upon a guarantee of reciprocity with the states in which it or the foreigners with qualified participations have their place of residence or registered office[84].

74 The foreign trustee will need to demonstrate that it has qualified personnel to operate a branch in Switzerland, Art. 49 let. a no. 1 D-FinIA.

75 The foreign trustee will need to demonstrate that it has adequate financial resources to operate a branch in Switzerland, Art. 49 let. a no. 1 D-FinIA, and authorization may be contingent upon the posting of collateral if so required for the protection of investors or clients, Art. 52 D-FinIA.

76 The foreign trustee will need to demonstrate that it is sufficiently organized to operate a branch in Switzerland and that the business name of the branch can be entered in the commercial register, Art. 49 let. a nos. 1 and 3 D-FinIA.

77 The foreign trustee will need to demonstrate that it is subject to appropriate supervision that includes the branch, Art. 49 let. a no. 2 D-FinIA.

78 See Art. 48 para. 1 D-FinIA.

79 Art. 48 para. 3 D-FinIA.

80 Fulfillment of the proper business conduct requirement will apply at the branch level, Art. 49 let. c no. 1 and Art. 10 D-FinIA. The proper business conduct requirement will, as for Swiss trustees, apply to the branch itself, the persons responsible for its administration and management and its qualified participants, see Art. 10 D-FinIA.

81 The branch will need to demonstrate that it fulfills the organizational and effective place of management requirements set out under Art. 8 and 9 D-FinIA and that it has a set of regulations that accurately describes the scope of business and defines the administrative or operational organization corresponding to its business activity, Art. 49 let. a no. 1 D-FinIA.

82 This requirement is very specific to agency relationships. It is unclear for the time being who the trustee's «investors or clients» will be.

83 Art. 49 let. b nos. 1 to 3 D-FinIA.

84 Art. 50 D-FinIA.

3. Representations of Foreign Trustees

A foreign trustee establishes a representation in Switzerland if it employs persons on a permanent and professional basis and those persons act in or from Switzerland in another manner than a branch. This includes for instance forwarding client[85] orders to or representing the foreign trustee for marketing or other purposes[86].

A foreign trustee wishing to operate a representation office in Switzerland will be required to fulfill the proper business conduct requirement[87] and demonstrate that it is subject to appropriate supervision[88]. As with branches, it will have to request and obtain an authorization from the supervisory authority[89], although the Federal Council may sign international treaties allowing financial institutions from the treaty states to open a representation without requiring authorization from the supervisory authority if both sides recognize the equivalent nature of the respective regulation of financial institutions' activity and supervisory measures[90].

As regards the foreign supervisory authority, it should not raise any objections to the establishment of the representation[91]. The granting of an authorization to the foreign trustee may also be contingent upon a guarantee of reciprocity with the state in which it has its registered office[92].

4. Foreign Trustees under Particular Set-Ups

4.1 Preliminary Considerations

It is safe to say that the trust industry at large is as versatile and chameleon-like as the trust itself[93]. How foreign trustees can organize themselves, structure their activities or carry out their functions are matters governed by the applicable foreign trust laws and regulations. The Swiss legislator has no say with regard to these matters. It does, however, control how they will be received in Switzerland and what regulatory consequences will flow from them.

85 Here again, it is unclear at this time who the trustee's «clients» will be.

86 Art. 54 para. 1 D-FinIA.

87 Art. 55 para. 1 let. c and Art. 10 D-FinIA. Compare with Art. 49 let. c no. 1 D-FinIA, which sets that requirement at the branch level, not at that of the foreign financial institution.

88 Art. 55 para. 1 let. a D-FinIA. Compare with Art. 49 let. a no. 2 D-FinIA, which additionally requires that the supervision include the branch.

89 See Art. 54 para. 1 D-FinIA.

90 Art. 54 para. 3 D-FinIA.

91 Art. 55 para. 1 let. b D-FinIA. Compare with Art. 49 let. b nos. 1 to 3 D-FinIA, which additionally requires that the foreign supervisory authority notify and assist the Swiss supervisory authority.

92 Art. 55 para. 2 D-FinIA. Compare with Art. 50 D-FinIA applicable to branches, which also includes the states where foreigners with qualified participations have their place of residence.

93 For more on this point, see section II., subsection 1. above.

We shall briefly review below two situations involving foreign trustees which may result in them falling, perhaps unintentionally, within the scope of the (Draft) Financial Institutions Act. The first pertains to foreign trustees effectively managed in Switzerland. The second takes an interest in the (quite frequent in the offshore world) situation in which a company is interposed between a trust and the assets.

4.2 Management in Switzerland

The (Draft) Financial Institutions Act defines foreign financial institutions as those that have their registered office abroad[94]. On the other hand, one of the defining elements of a domestic financial institution is that its effective place of management is in Switzerland[95].

This gives rise to the question of whether a financial institution incorporated abroad but effectively managed, either predominantly or exclusively, from Switzerland should best be considered a foreign financial institution (thereby giving primacy to its place of incorporation) or as a Swiss financial institution (thereby giving primacy to its place of management).

As pertains to other financial institutions, Swiss financial market regulation has settled that, when they differ, the criterion of the effective place of management of an entity should prevail over that of its place of incorporation when determining its regulatory status[96].

Consequently, a trustee incorporated abroad but effectively managed in Switzerland, or that carries out its operations predominantly or exclusively in or from Switzerland, will likely be under the obligation to incorporate under Swiss law and therefore be subject to the regulatory provisions governing domestic trustees[97].

4.3 Trusts and Underlying Companies

In a world where the vehicles used for business are becoming ever more complex, trusts, the use to which trusts are put and the structures that they are asked to maintain have also become more sophisticated. Trusts increasingly find themselves part of a complex corporate structure[98]. Indeed, in most overseas trust situations there will likely be an offshore company interposed between the trust and the underlying asset[99], because the trust does not provide trustees with limited liability and for this reason is now in a neutral tax setting less frequently seen. In order to obtain limitation of liability to the assets of the trust, the trust property and its management will be incorporated. The trustees as owners of the issued shares will appoint themselves or their nominees as directors of the corporation[100].

Questions consequently arise as to the regulatory status of the corporation underlying the trust and holding the assets, assuming that it is either incorporated in Switzerland or effectively managed from Switzerland. More specifically, it begs the question of whether the corporation would qualify as a Swiss trustee[101], despite not being designated as such in the trust instrument, on the grounds that it manages and controls the trust, or if it would qualify as a branch of the foreign trustee[102], despite being a separate legal entity with separate legal personality.

The answers to these questions will depend on the specific arrangement of the controlling foreign trustee. Should the foreign trustee exercise his office predominantly or exclusively through corporations either incorporated in Switzerland or effectively managed from Switzerland[103], the foreign trustee himself should be deemed effectively managed in Switzerland[104]. He will therefore be required to incorporate under Swiss law and will be subject to the provisions governing Swiss trustees[105]. If, however, the foreign trustee exercises his office only partly through companies incorporated in Switzerland or effectively managed from Switzerland, the company managing the assets could be deemed a *de facto* branch of the foreign trustee. Both the corporation and the foreign trustee would thus be required to comply with the regulatory provisions governing the establishment of a branch in Switzerland.

As a general rule, the regulator will seek to determine if a regulated activity is carried out in, within or from Switzerland. This assessment will be carried out on the basis of the facts of a given situation without regard to the legal arrangements set up by the parties[106]. It would indeed be surprising if the interposition of a corporation between the trustee and the trust assets, where the corporation would act as an extension of the trustee, could

---

94 Art. 48 para. 1 D-FinIA.

95 Art. 9 para. 1 D-FinIA, see section III. above.

96 See for instance Art. 1 para 2 of the FINMA Foreign Banks Ordinance («FBO-FINMA») (SC 952.111) pertaining to foreign banks effectively managed in Switzerland; Art. 38 para. 2 SESTO relating to foreign securities dealers effectively managed in Switzerland and Art. 29a para. 2 of the Collective Investment Schemes Ordinance («CISO») (SC 951.311) on foreign managers of collective assets effectively managed in Switzerland.

97 As set out under section III. above.

98 Andrew Mold and Jonathan Hilliard, «How to side-step valid trust and corporate structures», in Trusts & Trustees, Volume 20, Issue 9, November 2014, p. 891.

99 Mr. Justice Mostin in the case Hope v. Krejci and Others, [2012] EWHC 1780 (Fam), section 12.

100 Introduction to the Principles of European Trust Law, 1999, p. 6.

101 As defined under section III. above.

102 As defined under section IV., subsection 2. above.

103 Traditionally, foreign trustees appoint themselves or nominees as directors of underlying companies.

104 As set out under section IV., subsection 4.2 above.

105 See section IV., subsection 4.2 above.

106 See Christian Bovet, «Jurisprudence administrative récente», in Journée 2004 de droit bancaire et financier, Luc Thévenoz and Christian Bovet (Ed.), Schulthess, Geneva/Zurich/Basel, 2005, p. 111.

result in an exemption from compliance with an otherwise applicable regulatory and supervisory regime.

V. The Regulatory Pyramid

Upon entry into force of the Financial Institutions Act, Swiss as well as foreign trustees active on Swiss soil will need an authorization from the competent supervisory authority to carry out their activities[107].

The (Draft) Financial Institutions Act provides however for a pyramidal regulatory framework, marking thereby a departure from Switzerland's traditional sectoral approach to financial market regulation. This regulatory pyramid and its inherent authorization chain[108] will enable regulated financial institutions sitting at the upper-end of the pyramid to carry out, in addition to the activities for which they will have been authorized, the activities of certain financial institutions sitting below them on the pyramid. Under the (Draft) Financial Institutions Act, banks, securities firms, and fund management companies will therefore be authorized to carry out the activity of trustee without requesting an additional authorization[109].

Two points deserve to be highlighted in this respect. The authorization chain will not exempt banks, securities firms and fund management companies wishing to carry out the activity of trustee from complying with the obligations unique to this business[110]. It will only exempt them from the requirement of formally obtaining an additional authorization[111]. Secondly, the Federal Council's Dispatch specifies that the authorization chain only partially integrates the activity of trustee. It states that only banks and securities firms «active on a global scale, and therefore subject to similar authorization requirements», will be exempted from the obligation of requesting an additional authorization[112]. These limitations stem from the fact that a foreign law necessarily governs the office of trustee. The Federal Council's wording is, however, obscure, to say the least.

It is indeed hard to determine, as regards Swiss banks and securities firms, if this sentence entails that only those active in trust jurisdictions[113] on a cross-border basis[114] and which are, as a result, subject to trustee licensing abroad will be exempted from the obligation to request an authorization to act as a trustee in Switzerland or not. Furthermore, the regulatory situation in Switzerland of a financial institution active in a jurisdiction which does not provide for a duty to hold an authorization, either altogether[115], under certain circumstances or for particular types of financial institutions[116] is unclear. Will the requirement to request and obtain an authorization to carry out the activity of trustee then apply in Switzerland, notwithstanding the financial institution's global presence? In addition, the Federal Council does not refer to fund management companies in its statement. Uncertainties therefore remain as regards the extent to which they would benefit from the authorization chain if they do not have a global presence.

The question of whether or not these limitations should apply is beyond the scope of the current study. If the condition to be active on a global scale and subject to similar authorization requirements is upheld, it would appear that the obligation to hold an additional authorization in order to carry out the activity of trustee should not apply when Swiss financial institutions comply, internally, with defined and relevant regulatory requirements and this compliance has been validated by a recognized independent regulatory authority.

More specifically, we understand that:

i) Swiss-based banks, securities firms and fund management companies holding a foreign authorization to act as trustee in a trust jurisdiction[117] should be exempted from the requirement of requesting and obtaining an additional authorization in Switzerland;
ii) Where foreign regulation does not provide for the obligation to hold an authorization to act as trustee, the obligation to hold an additional authorization in Switzerland should be upheld;
iii) Where a Swiss-based bank, securities firm or fund management company has a subsidiary abroad holding an authorization to act as trustee in a trust ju-

---

107 Art. 4 para. 1 D-FinIA.
108 Set out under Art. 5 D-FinIA.
109 Art. 5 para. 1 to 3 D-FinIA.
110 Such as, in particular, the requirement that the entity's management possess the necessary qualifications and professional experience to carry out the activity of trustee, as provided under Art. 18a para. 3 D-FinIA.
111 Swiss Federal Council, Dispatch on FinSA and FinIA, p. 8218.
112 *Ibid.*, p. 8218.
113 The terms «trust jurisdictions» are used here to refer to those jurisdictions which have enacted a domestic trust law.
114 The term «cross-border» encompasses both traditional offshore business transacted by Swiss-based institutions with foreign clients and scenarios involving the provision of services to foreign clients by foreign-based subsidiaries, branch offices, etc. of the Swiss financial institutions. See FINMA, Position Paper on Legal and Reputational Risks in Cross-Border Financial Services, 22 October 2010, p. 5. On this topic, see also Shelby R. du Pasquier and Philipp Fischer, «Cross-border financial services in and from Switzerland – Regulatory frameworks and practical considerations», in GesKR 2010, pp. 436–461.
115 Such as, most notably, in the United Kingdom.
116 Such as banks, which are subject to stringent regulatory requirements.
117 Under this scenario, the Swiss-based bank or securities firm would carry out activities on foreign soil through an «extension» which is devoid of any separate legal personality, such as through its employees carrying out offshore business, through a representation or through a branch. It would be legally bound by its «extension's» actions and would therefore hold itself the relevant foreign authorization.

risdiction[118], the obligation to hold an additional authorization in Switzerland should be upheld. Indeed, under this scenario, the foreign-authorized entity is organizationally and functionally independent from the Swiss-based financial institution. The latter therefore does not fully benefit from the foreign subsidiary's pool of knowledge, qualifications and experience, or from its financial safeguards. These elements are however central to the exercise of any given regulated activity;

iv) Where the foreign regulatory and supervisory framework is not deemed equivalent to the Swiss one, the obligation to hold an additional authorization in Switzerland should remain in force.

Finally, the authorization chain established under the (Draft) Financial Institutions Act will include the branches and representations of foreign financial institutions. This entails that the branches and representations of foreign financial institutions sitting at the upper end of the regulatory pyramid will be authorized to act as branches and representations of certain foreign financial institutions sitting below their parent entity on the pyramid[119].

VI. The Supervision of Trustees

1. Preliminary Considerations

The in-depth reform of Switzerland's financial market regulatory and supervisory framework encompasses significant changes for both the impending regulated entities and the Swiss authorities. In order to enable a smooth transition, the (Draft) Financial Institutions Act includes transitional provisions governing the implementation of its requirements. Before looking into these provisions, we shall briefly present the supervisory framework applicable to trustees.

2. The Supervisory Framework

The Swiss legislator elected to establish a dual supervisory system for both portfolio managers and trustees.

Upon entry into force of the Financial Institutions Act, two supervisory entities will thus share the prudential supervision of trustees: the supervisory authority, *i.e.* the FINMA, and one or several supervisory organizations[120]. The FINMA will be in charge of granting the authorization to trustees[121] whilst the supervisory organization to which the trustee is affiliated[122] will be in charge of the day-to-day supervision of the regulated entity[123]. The supervisory organization will itself be authorized by the FINMA[124].

As trustees are currently supervised as regards compliance with their anti-money laundering obligations, the reform raises the question of their supervision in this respect upon entry into force of the Financial Institutions Act. The supervision of trustees' anti-money laundering obligations is currently carried out either by an authorized independent self-regulatory organization or by the FINMA[125]. Upon entry into force of the Financial Institutions Act and the granting of authorizations to trustees to carry out their activities, the supervision of trustees for anti-money laundering purposes will be the exclusive responsibility of the FINMA[126]. The FINMA is however likely to delegate the day-to-day supervision of trustees to their respective supervisory organization(s). The trustees' anti-money laundering supervisory framework is therefore likely to be identical to their prudential supervisory framework.

3. The (Current) Transitional Regime

As presently drafted, the transitional provisions grant existing trustees six months[127] to report to the FINMA[128]. They will need to request an authorization within three years from the date of entry into force of the Act[129], following prior reorganization of their respective set-ups[130] and affiliation with a recognized supervisory organization[131]. The (Draft) Financial Institutions Act

---

118 Under this second scenario, the foreign subsidiary of the Swiss-based bank or securities firm would have a separate legal personality. The Swiss institution would not be legally bound by its actions, as the subsidiary would carry out its activities independently from those of its parent entity, and it is the subsidiary that would hold the relevant authorization.

119 Swiss Federal Council, Dispatch on FinSA and FinIA, p. 8218.

120 Art. 57 para. 1 D-FinIA.

121 Art. 70 para. 2 D-FinIA.

122 Art. 6 para. 1bis D-FinIA.

123 See Art. 57 para. 1bis D-FinIA and new Art. 43a para. 1 and Art. 43b FINMASA.

124 Art. 57 para. 1bis D-FinIA and new Art. 43c *et seq.* FINMASA.

125 See Art. 12 let. c AMLA.

126 See the new Art. 12 let. a AMLA and Art. 2 para. 2 let. abis AMLA.

127 See Art. 70 para. 2 D-FinIA.

128 The initial Draft Financial Institutions Act presented to Parliament by the Swiss Federal Council on 4 November 2015 provided that trustees were to obtain their authorizations from an authorized supervisory organization (Art. 57 para. 1 D-FinIA of 4 November 2015). The revised Draft Financial Institutions Act, as approved by the Commission for Economic Affairs and Taxes on 15 August 2017 (still the latest draft available today), now provides that trustees will need to obtain their authorizations directly from FINMA, whereas their ongoing supervision will be entrusted to the supervisory organization to which they are affiliated (Art. 57 para. 1 and 1bis D-FinIA of 15 August 2017). For more on this topic, see Patrick Schleiffer/Patrick Schärli, «Supervision of Portfolio Managers and Trustees - Update», CapLaw - Swiss Capital Markets Law, 2017-7.

129 See Art. 70 para. 2, Art. 2 para. 1 let. b and Art. 4 para. 1 D-FinIA.

130 In order to comply with the applicable regulatory requirements set out under the Financial Institutions Act, see sections III. and IV. above.

131 Art. 6 para. 1bis D-FinIA.

also requires affiliation with a recognized self-regulatory organization for anti-money laundering purposes until they are duly authorized to carry out their activities[132]. Self-regulatory organizations are likely to transition towards becoming supervisory organizations. This means that trustees affiliated with the first will automatically be affiliated with the second if and once their self-regulatory organization is authorized as a supervisory organization.

Trustees beginning their operations after entry into force of the Financial Institutions Act, but before a supervisory organization[133] has been authorized, will need to fulfill the applicable authorization requirements at the outset and report to the FINMA upon commencing their activities. However, they will need to request an authorization either one year after entry into force of the Financial Institutions Act or within one year of a supervisory organization being authorized by the FINMA[134]. Until then, they will be allowed to carry out their activities provided they are affiliated with a recognized self-regulatory organization for anti-money laundering purposes[135].

While it is safe to assume that the transitional periods cited above will apply to Swiss trustees, the (Draft) Financial Institutions Act does not indicate whether they will also apply to foreign trustees with branches, *de facto* branches or representations in Switzerland. In the absence of any indication to the contrary, the above transitional periods should also apply to foreign trustees and their Swiss-based establishments.

VII. Conclusion

The definition of trustee outlined in the (Draft) Financial Institutions Act understandably falls short of grasping the full scope of the trustee's office as understood under the common law. It is at best a practical compromise that will enable Swiss authorities to establish a framework of rules to govern the interactions between trustees on the one hand and its financial market on the other. In this connection, three observations regarding the prudential regulation of trustees may be added here.

First, the trustee is perceived as a certain type of asset manager[136]. There are however fundamental differences between the office of trustee and that of an asset manager. Indeed, where an asset manager will exercise his or her activities on the basis of a contractual relationship, a trustee carries out his or her activities within the framework of the applicable trust law. This entails that a client may revoke an asset manager's powers and remove him or her from office at any time. Trusts, on the other hand, are, in many cases, irrevocable and the trustee cannot be removed from office at will. Although the trustee is accountable towards the beneficiaries of the trust, he does not act upon their instructions and is not subject to them, unlike asset managers. Briefly put, the trustee does not have *clients*. This is where the unique features of trust relationships, where a same item of property is subject to two types of property ownership[137], can be problematic from a regulatory perspective. Finally, the trustee's primary responsibility is not the management of assets; it is to take custody of the assets held in trust to hold them for later distribution to the beneficiaries or to fulfill the purpose of the trust. A trustee's powers to manage the assets are only the corollary of his or her primary custodian duties, which brings us to our second point.

If so authorized by the applicable trust law and the trust instrument, a trustee may delegate the management of part or all of the trust assets to a professional asset manager. The grounds for settling a trust and appointing a professional trustee[138] are indeed different from the grounds for appointing a professional asset manager[139]. The definition of trustee as currently outlined in the (Draft) Financial Institutions Act fails to take into account any separation between the trusteeship and the management functions, although it is frequently encountered in practice.

Finally, there are no limitations under trust law pertaining to the nature of the assets which may be held in trust. Anything of value can be transferred to a trustee, such as financial instruments, works of art, aircrafts, vessels, intellectual property rights, commercial businesses or real estate, to name but a few. The cross-industry nature of trusts is not addressed in the definition of the office of trustee and appears to have been overlooked. The question of whether or not a trustee acting in connection with trusts holding primarily real estate or works of art should effectively be regulated under financial market regulation, and subject to the oversight of the financial market supervisory authority, remains open.

---

132 See Art. 70 para. 2 D-FinIA.

133 Under Art. 6 para. 1bis D-FinIA and new Art. 43a *et seq.* FINMASA.

134 The National Council and the Council of States have not yet come to an agreement on this point.

135 Art. 70 para. 3bis D-FinIA.

136 Trustees were included in the D-FinIA because of their similarities with asset managers; a comprehensive regulation of asset management activities carried out on a professional basis for the benefit of third parties is one of the main objectives pursued by the in-depth reform. See Swiss Federal Council, Dispatch on FinSA and FinIA, most notably pp. 8103, 8115 and 8117.

137 The «legal ownership», protected by common law and vested in the trustee, and the «equitable ownership», protected by equity and vested in the beneficiaries.

138 Such as, but not limited to, estate planning, transaction structuring, wealth preservation, asset pooling or to provide support to a person who is unable to manage his or her own financial affairs.

139 Such as, but not limited to, better return on investment and access to specialized financial market knowledge.

Beyond the perspective of financial market regulation, the inclusion of trustees in the Financial Institutions Act is evidence of two important and global trends taking place within the trust industry. The first is that the purposes fulfilled by trusts, and therewith the activities carried out by trustees, are evolving. Indeed, originally, trusts were almost exclusively used to hold land; the beneficiaries of the trust often lived on said land and looked after it. The trustee was generally a friend or a family member acting as little more than a bare stakeholder. With the emergence and development of the financial markets, trusts are now increasingly used to hold financial assets, which require active management to maintain or increase their value. The office of trustee therefore evolved from that of a bare stakeholder to that of an active asset manager. Secondly, and as a result of the aforementioned evolution, the office of trustee is professionalizing itself. The vast majority of trust jurisdiction has indeed already set certain requirements which govern the exercise of the office of trustee. Switzerland will follow suit upon entry into force of the Financial Institutions Act.