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Trustees under the Financial Services Act: Quo Vadis?

Table of Contents

- I. Introduction
- II. Scope of Application of the (Draft) Financial Services Act
 - 1. Preliminary Considerations
 - 2. Financial Service Providers under the (Draft) Financial Services Act
 - 2.1 The Provision of Financial Services
 - 2.2 In Switzerland or to Clients in Switzerland
 - 2.3 On a Professional Basis
 - 3. Client Advisors under the (Draft) Financial Services Act
- III. Regulation of Trustee Services
 - 1. Preliminary Considerations
 - 2. Regulation of Trustee Services under the (Draft) Financial Services Act
 - 2.1 Meaning of Portfolio Management under the (Draft) Financial Services Act
 - 2.2 Trustees' Investment Powers under Trust Laws
 - 2.3 Result
 - 3. Regulation of Trustee Services under a Code of Conduct
- IV. Trustees as Clients of Financial Service Providers
 - 1. Preliminary Considerations
 - 2. Client Segmentation under the (Draft) Financial Services Act
 - 2.1 Institutional Clients
 - 2.2 *Per se* Professional Clients
 - 2.3 Retail Clients
 - 2.4 Dual Categorization of Private Investment Structures
 - 3. Trustees as Institutional Clients
 - 4. Trusts as *per se* Professional Clients or Retail Clients
- V. Conclusion

I. Introduction

The in-depth reform of Switzerland's financial market regulatory and supervisory framework is now well underway¹ and will take effect upon entry into force of the

Financial Institutions Act² and Financial Services Act³. Publication of the final versions of the Acts and their respective Ordinances is expected to occur this year, with entry into force now scheduled for 1 January 2020⁴.

Notwithstanding the significant and steady progress made in agreeing upon and clarifying the terms of the Acts as well as understanding their implications, the future reception of trustees under the Financial Services Act remains unclear for many professionals within the trust industry and financial industry at large.

This lack of clarity likely stems to some extent from the fact that trustees were not taken into account during the initial drafting phases of the Act, as the legislator included them in the regulatory framework in November 2015, when the procedure was already in process. It may also result from the foreign origin of the role of trustee, which

ment 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. See the Swiss Federal Council's media release here (in French): <https://www.admin.ch/gov/fr/accueil/documentation/communiqués/com-muniqués-conseil-federal.msg-id-43953.html>. The Federal Council presented the first versions of the (Draft) Financial Institutions Act and (Draft) Financial Services Act as well as their Dispatch to the Parliament on 4 November 2015. The Federal Council's media release pertaining thereto is available here (in French): <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-59331.html>.

² Referred to herein alternatively as the «Financial Institutions Act», «(Draft) Financial Institutions Act» or «D-FinIA».

³ Referred to herein alternatively as the «Financial Services Act», «(Draft) Financial Services Act», «D-FinSA» or the «Act». The latest versions of both the Financial Services Act and the Financial Institutions Act, as approved by the National Council on 13 September 2017, are available here (in French): <https://www.parlament.ch/centers/eparl/curia/2015/20150073/N22%20F.pdf>. The Council of States reviewed these amendments on 7 March 2018; the final wording of the approved amendments awaits publication.

⁴ The Acts went through a first review by both of the Parliament's Councils and respective Commissions. Upon approval of revised drafts of the Acts by the National Council on 13 September 2017, the Acts initiated their second parliamentary tour consisting in the reconciliation of differences process. For the time being, the Commission for Economic Affairs and Taxes of the Council of States has reviewed, amended and approved the Acts on 23 January 2018 and the Council of States gave its approval on final wording on 7 March 2018. The Acts will now be passed on to the Commission for Economic Affairs and Taxes of the National Council, then the National Council in plenary.

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¹ The in-depth reform was initiated on 28 March 2012, when the Swiss Federal Council gave a mandate to the Federal Department of Finance to prepare, in collaboration with the Federal Depart-

is governed by the rules of common law, equity, and the applicable substantive trust law and is, therefore, harder to apprehend for the Swiss legislator.

The purpose of this article is to explore and reflect on the different manners in which the Financial Services Act is likely to affect and shape the business carried out by trustees. It also aims at discussing possible interpretations of the legislation and suggesting further avenues for reflection.

After presenting the scope of application of the (Draft) Financial Services Act, with a particular emphasis on the regulation of financial service providers (section II.), we will examine the question of the regulation of trustee services in Switzerland, whether under the Financial Services Act or otherwise (section III.). We will then analyze the position of trustees under the Act in their capacity as clients of financial service providers (section IV.) before concluding (section V.).

II. Scope of Application of the (Draft) Financial Services Act

1. Preliminary Considerations

At the very heart of the (Draft) Financial Services Act lies the notion of *financial instruments*. It encompasses a wide array of financial products such as, but not limited to, securities, bonds, units in collective investment schemes, structured products and derivatives⁵.

The purpose of the Act is to govern specific services and activities, as detailed under its Art. 2, provided or carried out in relation to these financial instruments to protect the clients that are on the receiving end thereof. This regulatory protection blanket is meant, in turn, to contribute to the enhancement of the reputation and competitiveness of Switzerland's financial center⁶.

Art. 2 of the (Draft) Financial Services Act provides that it applies to (i) financial service providers, (ii) client advisers, (iii) producers of financial instruments and (iv) providers of financial instruments, irrespective of their form. Within the context of the provision of financial services, in other words, when clients are dealing with financial service providers, the extent of the regulatory protection afforded to them is determined by the Act's client segmentation provision⁷.

As regards trustees, the future regulation of financial service providers and their client advisers is of particular interest, as it may potentially influence the manner in which

trustees provide their services and the way in which they receive financial services.

Indeed, should trustees be deemed as providing financial services, as defined under the Act, they would need to comply with the Financial Services Act's educational, organizational and conduct of business rules. Furthermore, irrespective of their subjection to the Act, they are likely to find themselves receiving financial services in their capacity as clients of financial service providers. In this respect, the extent of the protection afforded to them will depend on which client segment they will belong to⁸.

As the notions of *financial service provider* and *client adviser* are central to this analysis, we shall briefly review them in the following.

2. Financial Service Providers under the (Draft) Financial Services Act

Under Art. 3 let. e D-FinSA, financial service providers are any persons who provide financial services on a professional basis in Switzerland or to clients in Switzerland.

The aforementioned provision entails the following: (i) the provision of financial services, (ii) the principle that the financial services must be provided in Switzerland or to clients in Switzerland and (iii) a minimum level of intensity at which the financial service provider must operate in order to fall in the scope of the Act.

2.1 The Provision of Financial Services

The provision of financial services requires the establishment of a relationship between a financial service provider and a client within the context of which the first provides specific services to the second.

A comprehensive list of the services falling under the Act's definition of *financial service* is set out under Art. 3 let. d D-FinSA. It includes (i) the acquisition or disposal of financial instruments, (ii) the receipt and transmission of orders in relation to financial instruments, (iii) the administration of financial instruments (portfolio management), (iv) the provision of personal recommendations on transactions with financial instruments (investment advice) and (v) the granting of loans to finance transactions with financial instruments.

2.2 In Switzerland or to Clients in Switzerland

This element delineates the geographical scope of application of the (Draft) Financial Services Act for the provision of financial services. In this respect, the Act is meant

⁵ For a comprehensive list of the products falling under the definition of *financial instruments*, see Art. 3 let. b D-FinSA.

⁶ See Art. 1 para. 1 D-FinSA.

⁷ See Art. 4 D-FinSA.

⁸ Sections III. and IV. below review both these scenarios.

to apply to both Swiss and foreign financial service providers alike⁹.

A financial service provider «active in Switzerland» means any financial service provider established on Swiss soil, whether incorporated under Swiss law or domiciled in Switzerland, that provides its services to clients in Switzerland or abroad. Likewise, a foreign financial service provider incorporated abroad but effectively managed in or from Switzerland should be deemed «active in Switzerland». Within this context, it is the jurisdiction of the financial service provider, irrespective of the place of residence or incorporation of the client, that triggers application of the Financial Services Act.

A financial service provider providing financial services to «clients in Switzerland» refers to any financial service provider established abroad, meaning it is either incorporated under foreign law and managed abroad or domiciled abroad, that offers its services to clients domiciled or incorporated in Switzerland. Under this scenario, the jurisdiction of incorporation or domicile of the client, irrespective of the place of residence or establishment of the financial service provider, shall constitute the trigger for application of the Financial Services Act.

2.3 On a Professional Basis

Encompassed within the (Draft) Financial Services Act's definition of financial service providers is the requirement that their activities be carried out on a professional basis (*gewerbsmässig, à titre professionnel, a titolo professionale*). This condition aims at ensuring that only those who carry out a regulated activity meeting a minimum level of intensity, which thus qualifies it as a professional activity, fall under the scope of the regulation¹⁰.

The first version of the Financial Services Act, as drafted by the Swiss Federal Council, did not include any threshold establishing the professional basis criterion for the provision of financial services. The Act's implementing ordinance was thus to specify. The Swiss Parliament's National Council amended, however, the (Draft) Financial Services Act in this respect¹¹. The revised version now stipulates that financial services are provided on a professional basis from the moment the activity constitutes an independent economic activity that is designed to achieve regular revenues¹².

⁹ SWISS FEDERAL COUNCIL, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) (in French), 4 November 2015, p. 8147.

¹⁰ See on this point FABIANNE DE VOS BURCHART, «Trustees in Switzerland: The Office of Trustee under the (Draft) Financial Institutions Act», in GesKR 3/2017, p. 285.

¹¹ The Act as approved by the National Council on 13 September 2017 is available here (in French): <https://www.parlament.ch/centers/eparl/curia/2015/20150073/N22%20F.pdf>.

¹² Art. 3 let. e D-FinSA.

The Commission for Economic Affairs and Taxes of the Swiss Parliament's Council of States did not raise any objections to it during its last review of the Act, within the context of the Parliament's reconciliation of differences process¹³; this amendment will therefore remain in the final version thereof.

3. Client Advisors under the (Draft) Financial Services Act

According to Art. 3 let. f D-FinSA, client advisors are individuals who perform financial services on behalf of a financial services provider or in their own capacity as financial service providers.

As evidenced by the aforementioned provision, the notions of *financial services provider* and *client advisor* overlap when the financial services provider is an individual¹⁴. In such cases, the financial services provider is required to comply with both the educational requirements, conduct of business rules and organizational obligations applicable to financial service providers as well as with the Act's provisions applicable to client advisors¹⁵.

Client advisors, irrespective of whether or not they qualify as a financial services provider, may be under the obligation to enroll in a register of advisors¹⁶. Indeed, under the current version of the (Draft) Financial Service Act, the client advisors of financial service providers that are not subject to supervision in Switzerland¹⁷ as well as those acting on behalf of foreign financial service providers may carry out their activity in Switzerland only when entered into a register of advisors¹⁸.

¹³ The revised provisions of the Act as approved by the Commission for Economic Affairs and Taxes of the Parliament's Council of States on 23 January 2018 are available here (in French): <https://www.parlament.ch/centers/eparl/curia/2015/20150073/S3%20F.pdf>.

¹⁴ The Swiss Federal Council confirms this interpretation in its Dispatch, see SWISS FEDERAL COUNCIL, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) (in French), 4 November 2015, p. 8148.

¹⁵ SWISS FEDERAL COUNCIL, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) (in French), 4 November 2015, p. 8147.

¹⁶ See Art. 30 D-FinSA.

¹⁷ Per Art. 3 of the Financial Market Supervision Act («FINMASA») (SC 956.1). All client advisors acting on behalf of financial service providers incorporated or domiciled in Switzerland that are not required to be licensed, recognized or registered by the Swiss Financial Market Supervisory Authority («FINMA») will, therefore, need to enroll in the register of advisors.

¹⁸ See Art. 30 para. 1 D-FinSA.

III. Regulation of Trustee Services

1. Preliminary Considerations

While it is now clear that trustees must be authorized to carry out their activities upon entry into force of the Financial Institutions Act¹⁹, it remains open whether the Financial Services Act will regulate or not the services they provide, although the general inclination, both within the industry and throughout the legislative and regulatory bodies, leans towards exclusion from the reach of the Act.

The confusion surrounding trustees' status under the Financial Services Act likely results from the fact that they were included within the new regulatory and supervisory framework because of the similarities of their activities with those carried out by asset managers²⁰. The definition of the office of trustee under the Financial Institutions Act, which highlights the management and disposal functions exercised by trustees over the trust assets, evidences this view²¹. The Swiss Federal Council also regularly refers in its Dispatch to the portfolio management services rendered by trustees²².

Trustees may conceivably be considered as providing portfolio management services²³ to the beneficiaries of trusts depending on whether or not the manner in which they manage the separate fund entrusted to them falls under the definition of *portfolio management* under the Financial Services Act. In other words, should the management of trust assets amount to portfolio management as construed under the Financial Services Act, trustees may then be considered financial service providers²⁴. If not, the provision of trustee services should not be covered under the Act²⁵.

After assessing the likelihood and desirability of the regulation of trustee services under the Financial Services Act, we shall briefly present and discuss a potential alternative form of regulation of trustee services in Switzerland.

2. Regulation of Trustee Services under the (Draft) Financial Services Act

2.1 Meaning of Portfolio Management under the (Draft) Financial Services Act

By way of a preliminary remark, it should be noted that there exists no established or prevailing definition of the notion of *portfolio management* under Swiss legislation or regulation²⁶. This activity is traditionally analyzed from the perspective of the legal relationships established between portfolio managers and their clients²⁷.

Pursuant to the terms of the Act²⁸, *portfolio management* consists of the management of financial instruments²⁹ for the benefit of clients. Legal scholars note that management activities generally entail modifying the nature and composition of a portfolio to ensure the achievement of maximum benefit or increase its importance in accordance with the client's objectives and desired level of security³⁰.

In its Dispatch on the Financial Services Act and Financial Institutions Act, the Federal Council further specified that portfolio management includes all activities entailing the investment of assets on behalf of clients carried out by the financial services provider under a power of attorney. It includes powers of attorney authorizing isolated transactions and situations in which transactions must be authorized beforehand by the client, notwithstanding the existence of a power of attorney³¹.

In light of the above, we understand that portfolio management, as construed under the (Draft) Financial Services Act, entails the management by a service provider of a portfolio of financial instruments belonging to and held in the name of a client, whereby the service provider is

¹⁹ See on this point FABIANNE DE VOS BURCHART, *op. cit.*, pp. 281–292.

²⁰ Indeed, comprehensive regulation of asset management activities carried out on a professional basis for the benefit of third parties is one of the primary objectives pursued by the in-depth reform. See SWISS FEDERAL COUNCIL, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) (in French), 4 November 2015, pp. 8103, 8115 and 8117.

²¹ Art. 16 para. 2 D-FinIA. For an analysis of this question, see FABIANNE DE VOS BURCHART, *op. cit.*, pp. 283–284 and 291.

²² See SWISS FEDERAL COUNCIL, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) (in French), 4 November 2015, pp. 8117, 8127, 8128, 8215, 8218, 8222, 8223 and 8235. The Swiss Federal Council even states, at p. 8218 of the Dispatch, that the office of trustee involves, in addition to portfolio management qualifications – subject to the Financial Services Act – specific knowledge of the applicable foreign law.

²³ Within the meaning of Art. 3 let. d no. 3 D-FinSA.

²⁴ Within the meaning of Art. 3 let. e D-FinSA.

²⁵ Indeed, the other types of financial services listed under Art. 3 D-FinSA, namely (i) the acquisition or disposal of financial instruments, (ii) the receipt and transmission of orders in relation to financial instruments, (iii) the provision of personal recommendations on transactions with financial instruments (investment advice) and (iv) the granting of loans to finance transactions with financial instruments are of limited to no relevance within the context of the activities typically carried out by trustees. For this reason, this article will not analyze these situations.

²⁶ See in this respect CLAUDE BRETTON-CHEVALLIER, *Le gérant de fortune indépendant*, Schulthess, Zürich, Genève, Bâle, 2002, p. 70.

²⁷ CLAUDE BRETTON-CHEVALLIER, *op. cit.*, in particular pp. 69–112; CARLO LOMBARDINI, *Droit bancaire suisse*, 2nd Edition, Schulthess, Zürich, Genève, Bâle, 2008, pp. 801–802, §§ 1–8 and ALEXANDRE RICHA, ALESSANDRO BIZZOZERO and MARINE HALDY, «La qualification juridique du contrat», in *Le mandat de gestion de fortune*, 2nd Edition, Schulthess, Zürich, Genève, Bâle, 2017, pp. 38–57.

²⁸ Art. 3 let. d no. 3 D-FinSA.

²⁹ For a full list of what constitute *financial instruments*, see Art. 3 let. b D-FinSA.

³⁰ CLAUDE BRETTON-CHEVALLIER, *op. cit.*, in particular pp. 69–112; CARLO LOMBARDINI, *op. cit.*, p. 801, § 3 and NICOLAS BÉGUIN and ALEXANDRE RICHA, «La description du contrat», in *Le mandat de gestion de fortune*, 2nd Edition, Schulthess, Zürich, Genève, Bâle, 2017, p. 1.

³¹ SWISS FEDERAL COUNCIL, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) (in French), 4 November 2015, pp. 8146–8147.

acting on the basis of a power of attorney granted to it by this client. The Act's Ordinance, currently still in the process of being drafted, should further specify this notion.

Finally, we note that this understanding is consistent with the definition of *portfolio management* under the European MiFID II Directive³², which provides that «portfolio management» refers to managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments³³.

2.2 Trustees' Investment Powers under Trust Laws

A closer look at the nature of trustees' management powers and the manner in which they are carried out may provide valuable insights for determining whether or not trustees will, or even should, be subject to the conduct of business provisions of the Financial Services Act.

In this respect, the powers exercised by trustees over trust assets are traditionally categorized as either *dispositive* or *administrative*. Trustees' dispositive powers are those which enable it to change the beneficial entitlements under the trust; they, therefore, relate to the distribution of the trust property to beneficiaries. A trustee's administrative powers, on the other hand, comprise its stewardship of the trust assets, of which the power of investment is generally considered the most important³⁴.

A trustee's power of investment is regulated first and foremost by the trust instrument and generally only residually by the provisions of the applicable substantive trust law, the latter providing essentially default investment rules intended to fill the gap left by the absence of contrary provisions decided by the settlor³⁵.

Leaving aside the terms of trust instruments, it may be stated that trustees' investment powers under most trust laws adapted to the changing nature of trust assets and their stewardship. Indeed, initially primarily used as land-holding vehicles, trusts are now used to hold a more

extensive variety of assets, including an increasing number of financial instruments³⁶, thus resulting in an overarching responsibility of trustees to adequately select and oversee trust investments³⁷. This evolution was in turn reflected in the corresponding trust law provisions, which underwent the influence of changing financial investment theories.

In legal doctrine, two phases or approaches are generally identified in this respect: when trustees were (and in some jurisdictions still are) subject to the old common law rule known as the «Prudent Man of Business Rule» and when they became subject to the «Prudent Investor Rule», which reflects modern portfolio theory³⁸.

Broadly speaking, trustees subject to the «Prudent Man of Business Rule» could invest trust assets in accordance with a list of permitted investments deemed secure and suitable for the protection of the trust fund. Legal scholars note that «this approach suited the circumstances of the nineteenth century and the earlier part of the twentieth, but that the changes in economic conditions after the Second World War, notably inflation and the increasing sophistication and expansion of investment markets throughout the world, meant the selection of investments from a list was no longer a feasible means of affording suitable prudent protection for the trust property»³⁹.

In many jurisdictions, this triggered a shift to the so-called «Prudent Investor Rule», under which a trustee can invest in any kind of asset⁴⁰, provided, in general, that the investment portfolio is sufficiently diversified and that the trustee exercise its duty of care in selecting investments⁴¹. Some trust laws, such as the UK Trustee Act 2000, subject the trustee's investment discretion to a duty to obtain and consider proper advice beforehand⁴². Final-

³² Full name: «Directive 2014/65/EU of the European Parliament and Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU», available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN>. One of the objectives of the in-depth reform of Switzerland's regulatory and supervisory framework is to adapt it to and ensure its equivalency with EU regulations.

³³ Art. 4 para. 1 no. 8 MiFID II.

³⁴ JOHN MOWBRAY, LYNTON TUCKER, NICHOLAS LE POIDEVIN, EDWIN SIMPSON and JAMES BRIGHTWELL, *Lewin on Trusts*, Eighteenth Edition, Sweet & Maxwell, London, 2008, p. 984, § 29-08 and PAOLO PANICO, «Trustee investment powers in international trust law», in *Trusts & Trustees*, Volume 15, Issue 2, April 2009, p. 96.

³⁵ PAOLO PANICO, *op. cit.*, p. 103 and M. W. LAU, *The economic structure of trusts*, Oxford University Press, New York, 2011, pp. 27–29. See also Art. 1(b) of the Uniform Prudent Investor Act of the United States or Art. 6(1)(b) of the UK Trustee Act 2000.

³⁶ On the differences between classical and modern trusts, see: M. W. LAU, *op. cit.*, p. 3.

³⁷ PAOLO PANICO, *op. cit.*, p. 96.

³⁸ See on this topic: PAOLO PANICO, *op. cit.*, pp. 96–103; JOHN H. LANGEVIN, «The Uniform Prudent Investor Act and the Future of Trust Investing», in *Yale Law School Faculty Scholarship Series*, 1996, Paper 486, p. 642; *Commentary to the Principles of European Trust Law*, 1999, Art. V. Paragraph (1), p. 52 and ROMAN CINCETTI, *Der Common Law Trust*, Schulthess, Zürich, 2017, pp. 144–145, §§ 247–248.

³⁹ JOHN MOWBRAY, LYNTON TUCKER ET AL., *op. cit.*, pp. 1271–1272, § 35–40. See also M. W. LAU, *op. cit.*, p. 5.

⁴⁰ See Art. 24(1) of the *Trusts (Jersey) Law 1984*, which states that «[...] a trustee shall in relation to the trust property have all the same powers as a natural person acting as the beneficial owner of such property», Art. 30 of the *Trusts (Guernsey) Law 2007*, which states that «[...] a trustee has, in relation to the trust property, all the powers of a beneficial owner», Art. 3(1) of the *UK Trustee Act 2000* and Art. 4(1)(a) of the *Singapore Trustees Act*, which both state that «[...] a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust» or Art. 4(1) of the *Bahamas Trustees Act*, which states that «[t]rustees shall have the full powers of investment and of changing investments of individual beneficial owners absolutely entitled [...]».

⁴¹ PAOLO PANICO, *op. cit.*, p. 99.

⁴² Art. 5 of the *UK Trustee Act 2000*. See also Art. 6 of the *Singapore Trustees Act*.

ly, most trust laws have repelled the *delegatus non potest delegare* maxim⁴³, thus enabling trustees to appoint investment advisors or investment managers freely. In practice, many professional trustees make use of their power to delegate investment decisions.

Irrespective of whether they are subject to the «Prudent Man of Business Rule» or the «Prudent Investor Rule», the power granted to trustees to choose investments remains a fiduciary power and as such confers no benefit on its holder: it must be exercised with a single eye to the benefit of the beneficiaries⁴⁴. Therefore, although trustees are the legal owners of the trust assets and may have the power to manage them as if they were beneficially entitled to them, their management powers remain limited by the fact that they are accountable to the beneficiaries of the trusts.

2.3 Result

In comparing the management powers granted to portfolio managers under the (Draft) Financial Services Act with those conferred upon trustees under various trust laws, we note that, although they present several similarities, their sources are entirely different. Indeed, trustees act in their capacity as legal owners of the managed assets, whereas portfolio managers work on the basis of a power of attorney. This situation entails that trustees do not take orders from to the beneficiaries of trusts and cannot be removed from office at will, unlike portfolio managers⁴⁵.

Based on the foregoing, we are of the opinion that trustees cannot be construed as providing portfolio management services as defined under the (Draft) Financial Services Act and therefore should not, upon entry into force of the Act, be required to comply with the educational, organizational and conduct of business requirements applicable to financial service providers.

The fact that the substantive trust laws of many established trust jurisdictions have, as demonstrated above, been influenced to varying degrees by modern financial investment theories reinforces this opinion; notions such

as *suitability* and *diversification* are indeed not unknown to modern trustees⁴⁶.

Should trustees active on Swiss soil be subject to the Act, their investment powers would consequently fall under three, potentially conflicting, sets of rules: those found in the trust instrument, the provisions of the applicable substantive trust law and the requirements of the Financial Services Act.

Whereas the articulation of the terms of the trust instrument with the provisions of the applicable trust law should not present any issues, the same cannot be said of the compatibility of these «trust provisions» with the provisions of the Financial Services Act.

In case of conflict, compliance with the terms of the trust instrument may result in a violation of the Act's regulatory provisions, failing inclusion therein of any regulation governing conflicts of rules. Such a situation would open the door to potential enforcement or criminal proceedings against the trustee⁴⁷. On the other hand, compliance by the trustee with its obligations under the Act could result in a violation of the terms of the trust instrument, thus putting it at risk of liability under the applicable trust law for breach of either its fiduciary duties or duties of care and skill.

In comparing the position of trustees with that of soon-to-be regulated financial service providers⁴⁸, we note that the latter enter into contractual agreements with their clients, the terms of which are generally subject to the rules of agency law⁴⁹. Agency law applies to a variety of professional relationships, including many unrelated to the provision of any form of financial service. Therefore, further detailed regulation under the Financial Services Act of the manner in which financial service providers are to furnish their services offers tangible added value, since agency law, unlike trust law, has not incorporated or been directly influenced by financial investment theories. The superposition of conflicting norms is consequently very low, if not wholly absent.

3. Regulation of Trustee Services under a Code of Conduct

Although the regulation of trustee services under the Financial Services Act appears unlikely and even undesirable, complete exclusion from any form of regulatory

⁴³ This formal common law position prohibits delegation. The case of *Turner v Corney (1841)* summarizes it well: «[T]rustees who take on themselves the management of property for others have no right to shift their duty onto others; and if they employ agents, they remain subject to the responsibility towards [the beneficiaries] for whom they have undertaken the duty». For trust law provisions repelling this maxim, see Art. 27 of the Singapore Trustees Act, Art. 11 of the UK Trustee Act 2000, Art. 25 of the Trusts (Jersey) Law 1984 or Art. 9 of the Uniform Prudent Investor Act of the United States. See also Commentary to the Principles of European Trust Law, 1999, Art. V. Paragraph (4), p. 54.

⁴⁴ JOHN MOWBRAY, LYNTON TUCKER ET AL., *op. cit.*, pp. 1281–1282, § 35–62.

⁴⁵ See on this topic FABIANNE DE VOS BURCHART, *op. cit.*, p. 291.

⁴⁶ For the notion of *suitability*, see Art. 5(1)(b) and Art. 6(1) of the Bahamas Trustees Act or Art. 4(3)(a) of the UK Trustee Act 2000. For the notion of *diversification*, see Art. 5(1)(c) of the Bahamas Trustee Act, Art. 4(3)(b) of the UK Trustee Act 2000 or Art. 3 of the Uniform Prudent Investor Act of the United States.

⁴⁷ See Art. 90 and Art. 92 D-FinSA.

⁴⁸ See section II., sub-section 2. above.

⁴⁹ If Swiss law applies to the agreement, it shall be governed by Art. 394 to 406 of the Swiss Code of Obligations («SCO») (SC 220).

oversight over the quality of trustees' services may not be desirable either, in light of the client protection objective pursued by Swiss financial market regulation. One cannot, therefore, exclude recourse to alternative regulatory means.

The dual supervisory system to be established in the near future could offer one such alternative⁵⁰. Indeed, upon entry into force of the Financial Institutions Act, the prudential supervision of trustees⁵¹ as well as portfolio managers⁵² will be shared between the supervisory authority, the Swiss Financial Market Supervisory Authority (FINMA), and one or several supervisory organizations, which will be authorized by FINMA. The latter will be in charge of granting trustees and portfolio managers the necessary authorizations to carry out their activities, whereas their day-to-day supervision will be entrusted to their supervisory organization⁵³.

The everyday supervision to be exercised by a supervisory organization is currently formulated in broad terms⁵⁴ and awaits further specifications⁵⁵. It will, however, include ensuring on-going compliance with the regulated entity's authorization requirements, as set out under the Financial Institutions Act, and possibly compliance with its anti-money laundering obligations⁵⁶.

Should trustees not be deemed financial service providers under the Financial Services Act, the manner in which a trustee service provider will conduct itself in its primary role will not be regulated or overseen by either FINMA, its auditor, or its supervisory organization. The regulation of trustees would diverge on this point from the regulation of other financial institutions, such as most notably, portfolio managers⁵⁷.

Indeed, as portfolio management falls within the ambit of the Financial Services Act⁵⁸, portfolio managers will not only be regulated and supervised by their supervisory organization for compliance with their applicable authorization requirements and, possibly, anti-money laundering obligations, but also by their respective auditors and FINMA as regards the manner in which they provide their services to clients⁵⁹.

One option could be for FINMA or the supervisory organization(s) to adopt and enforce a code of conduct aimed at ensuring a tailored, high-level, regulation of trustee services. In this manner, the quality of the services rendered by trustees active in Switzerland would be subject to light-touch regulation and supervision by FINMA or their supervisory organization(s), and any breaches of these rules of conduct could open the door to regulatory enforcement measures.

Such a code of conduct would ideally be drafted in broad terms to ensure its compliance with industry best practices, all the while avoiding to the extent possible any contradictions with more detailed provisions of different applicable substantive trust laws. It should also expressly reserve application of any conflicting trust instrument or mandatory applicable trust law provision.

IV. Trustees as Clients of Financial Service Providers

1. Preliminary Considerations

The upcoming regulation of the office of trustee under the Financial Institutions Act has a flip-side to it, which should materialize when regulated financial service providers attempt to categorize their trustee-clients according to their obligations under the Financial Services Act.

Indeed, should trustees, as is very often the case in practice, decide to call upon the services of portfolio managers or investment advisors to assist them in the investment of trust assets, the latter will be under an obligation to categorize their client as either a retail client, *per se* professional client or institutional client⁶⁰.

The level of protection afforded to each category of clients is meant to increase with the inexperience of the client and decrease the more sophisticated the client is. The level of sophistication of trustees active on Swiss soil may, however, prove difficult to establish and a «one size fits all» approach hard to implement, as evidenced by the currently unclear categorization of trusts and trustees under the (Draft) Financial Services Act.

⁵⁰ Art. 57 para. 1 D-FinIA.

⁵¹ As defined under Art. 16 para. 2 D-FinIA.

⁵² As prescribed under Art. 16 para. 1 D-FinIA.

⁵³ Art. 57 para. 1bis D-FinIA and new Art. 43a of the Financial Market Supervision Act («FINMASA») (SC 956.1).

⁵⁴ New Art. 43b para. 1 FINMASA, which provides that a supervisory organization will be responsible for ensuring that the regulated entities comply with the financial market acts applicable to their activities. An updated list of the financial market acts will be provided under new Art. 1 para. 1 FINMASA, which will include the Financial Institutions Act but not the Financial Services Act.

⁵⁵ See in particular new Art. 43b para. 2 FINMASA.

⁵⁶ According to the letter of the law, see new Art. 12 let. a *cum* new Art. 2 para. 2 let. abis of the Anti-Money Laundering Act («AMLA») (SC 955.0), supervision of a trustee's anti-money laundering obligations will fall within the competence and sphere of responsibility of FINMA. We are however of the opinion that FINMA is likely to delegate the day-to-day supervision of trustees' anti-money laundering obligations to the supervisory organization(s), see in this respect new Art. 43a para. 3 and 4 AMLA and FABIANNE DE VOS BURCHART, *op. cit.*, p. 290.

⁵⁷ The establishment of a level playing field for the various financial market participants is, however, one of the primary objectives pursued by the in-depth reform. See Swiss Federal Council, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA) (in French), 4 November 2015, most notably pp. 8102 and 8285–8286.

⁵⁸ Art. 3 let. d no. 3 D-FinSA.

⁵⁹ Art. 90 para. 1 D-FinSA.

⁶⁰ Art. 4 para. 1 D-FinSA.

After presenting the different categories of clients, with a particular look into the binary categorization of private investment structures established for high net worth individuals, we shall analyze how the Act may categorize trustees or trusts.

2. Client Segmentation under the (Draft) Financial Services Act

2.1 Institutional Clients

Institutional clients are the most financially savvy and often possess knowledge and experience comparable to those of financial service providers⁶¹. This category, a sub-category of the broader professional client class, includes (i) regulated financial institutions, (ii) regulated insurance companies, (iii) foreign clients subject to similar regulation as the two aforementioned types, (iv) central banks and (v) national and supranational public entities with professional treasury management⁶².

As institutional clients are considered sufficiently knowledgeable, experienced and financially secure in understanding and bearing the risks associated with the receipt of financial services, the client protection provisions of the (Draft) Financial Services Act do not apply to them⁶³.

Notwithstanding the above, institutional clients may declare that they wish to be treated only as *per se* professional clients⁶⁴ and therefore be granted the more extensive protection afforded to the latter category⁶⁵. Through such a request, an institutional client will be considered as «opting-in» to the Financial Services Act's *per se* professional client protection framework.

2.2 *Per se* Professional Clients

Professional clients form a broader category, of which institutional clients make up the upper-end⁶⁶, and include additionally (i) public entities with professional treasury management, (ii) occupational pension schemes and other institutions whose purpose is to serve occupational pensions with professional treasury management, (iii) companies with professional treasury management, (iv) large companies⁶⁷ and (v) private investment structures with

professional treasury management established for high net worth individuals⁶⁸.

Non-institutional (*per se*) professional clients are to benefit, to a certain extent, from the (Draft) Financial Services Act's protective provisions, but they may forsake some of them by making an express declaration to that effect⁶⁹.

Professional clients which are not institutional clients may declare that they wish to be treated as retail clients⁷⁰ and therefore be granted the full and more extensive protection afforded to the latter⁷¹, thereby «opting-in» to the Financial Services Act's retail client protection framework.

Alternatively, certain types of *per se* professional clients, namely occupational pension schemes and other institutions whose purpose is to serve occupational pensions with professional treasury management and companies with professional treasury management, may declare that they wish to be treated as institutional clients⁷² and therefore not be granted protection under the Financial Services Act. In such a case, a *per se* professional client will be considered as «opting-out» of the Financial Services Act's applicable client protection framework.

2.3 Retail Clients

Retail clients consist of all clients which are not professional clients, whether *per se* or institutional⁷³. This category is to benefit, by default, from the full extent of the (Draft) Financial Services Act's client protective provisions⁷⁴.

Notwithstanding the above, certain types of retail clients, namely high net worth individuals and the private investment structures established for high net worth individuals⁷⁵, may declare that they wish to be treated as *per se* professional clients⁷⁶ and therefore be granted the less extensive protection afforded to the latter category⁷⁷. Through such a request, a client will be «opting-out» of the Financial Services Act's retail client protection framework in favor of the one established for the benefit of *per se* professional clients.

⁶¹ SWISS FEDERAL COUNCIL, Dispatch on the Financial Services Act (FinSA) and Financial Institutions Act (FinIA), 4 November 2015, p. 8161.

⁶² Art. 4 para. 4 *cum* Art. 4 para. 3 let. a to d D-FinSA.

⁶³ Art. 22 para. 1 D-FinSA, which excludes application of Art. 8 to 21 D-FinSA to institutional clients.

⁶⁴ Art. 5 para. 3 D-FinSA.

⁶⁵ As briefly described under sub-section 2.2 directly below.

⁶⁶ Art. 4 para. 3 and 4 D-FinSA.

⁶⁷ The notion of *large company* is currently defined under Art. 4 para. 5 D-FinSA as any company which fulfills two of the following three criteria: (i) a total balance sheet of CHF 20 million, (ii) a turnover of CHF 40 million, (iii) own capital of minimum CHF 2 million.

⁶⁸ Art. 4 para. 3 let. e to h D-FinSA.

⁶⁹ Art. 22 para. 2 D-FinSA.

⁷⁰ Art. 5 para. 2 D-FinSA.

⁷¹ As briefly described under sub-section 2.3 directly below.

⁷² Art. 5 para. 1 *ter* D-FinSA.

⁷³ Art. 4 para. 2 D-FinSA.

⁷⁴ Art. 22 D-FinSA *a contrario*.

⁷⁵ The notion of *high net worth individual* is currently defined under Art. 5 para. 1 D-FinSA as any individual who validly declares that he (i) has the necessary knowledge to understand the investment risks as a result of his academic background and professional experience or of a comparable experience in the financial sector, and possesses a fortune of at least CHF 500'000, or (ii) has a fortune of at least CHF 2 million.

⁷⁶ Art. 5 para. 1 D-FinSA.

⁷⁷ As briefly described under sub-section 2.2 directly above.

2.4 Dual Categorization of Private Investment Structures

Of particular interest here is the fact that the client segmentation provisions of the (Draft) Financial Services Act mention private investment structures established for high net worth individuals on two occasions: they are at one point categorized as *per se* professional clients⁷⁸, at another as retail clients to whom are granted the option to «opt-out» of the Financial Services Act's client protection framework afforded to retail clients in favor of the lighter one provided for *per se* professional clients⁷⁹.

The initial draft of the Financial Services Act, as presented by the Swiss Federal Council to the Parliament⁸⁰, did not include any mention of such structures, which were, by default, to fall under the residual category of retail clients, unless they consisted of corporate entities with professional treasury management, in which case they were to fall under the category of *per se* professional clients. The Commission for Economic Affairs and Taxes of the Parliament's Council of States amended the Act in the course of its first review⁸¹ to include this dual categorization. These amendments were subsequently approved by the Council of States⁸².

We offer the following explanation for this differential treatment of private investment structures under the (Draft) Financial Services Act: according to the letter of the Act, private investment structures established for high net worth individuals which have professional treasury management must be categorized as professional clients⁸³, whereas those which do not possess professional treasury management must be categorized as retail clients⁸⁴. Under current financial market regulation, professional treasury management is deemed to exist if the entity entrusts at least one person with proven professional qualifications and experience in the financial sector with the responsibility for managing the financial resources of the entity on an on-going basis⁸⁵.

This understanding is thus in line with the client categorization existing under certain financial market acts, that provide for clients with more professional operations, as evidenced by the professional management of their treasury, to be considered more sophisticated than those who do not possess such professional operations⁸⁶.

The categorization of private investment structures established for high net worth individuals under the (Draft) Financial Services Act is of interest here because trusts may fall under their definition. This point is further analyzed below⁸⁷.

3. Trustees as Institutional Clients

In accordance with Art. 4 para. 3 let. a and Art. 4 para. 4 D-FinSA, financial institutions⁸⁸ as defined in the Financial Institutions Act are to be considered institutional clients. As the Financial Institutions Act will regulate trustees fulfilling the applicable criteria, they should qualify as institutional clients upon entry into force of the Acts. Regulated trustees will therefore not be covered by the protection blanket offered by the conduct of business rules of the Act when benefiting from investment advice or asset management services.

Exclusion from the Financial Services Act's client protection provisions is however directly correlated with an entity's expertise in financial matters. Indeed, should an institutional client, which is itself, by definition, entrusted with the custody, administration or management of its own clients' assets, elect to outsource to a service provider certain or any decisions pertaining to the management or investment of assets, the primary responsibility towards the end-client will still lie with the outsourcing entity. This entity would therefore need to retain the requisite skill-set in house, as well as the necessary competence and experience to select, instruct and monitor the service provider adequately.

Questions consequently arise as to whether or not all soon-to-be regulated trustees will effectively possess the requisite knowledge and experience to justify their categorization as institutional clients.

Although the potentially extensive management and investment powers conferred upon trustees by trust instru-

⁷⁸ Art. 4 para. 3 let. h D-FinSA.

⁷⁹ Art. 5 para. 1 D-FinSA.

⁸⁰ The Federal Council presented the (Draft) Financial Institutions Act together with the (Draft) Financial Services Act and their 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>.

⁸¹ See the versions of the Acts as amended and approved by the Commission for Economic Affairs and Taxes of the Council of States on 3 November 2016 and as presented to the Council of States here (in French): <https://www.parlament.ch/centers/eparl/curia/2015/20150073/S1%20F.pdf>.

⁸² See the versions of the Acts as approved by the Council of States on 14 December 2016 here (in French): <https://www.parlament.ch/centers/eparl/curia/2015/20150073/S1%20F.pdf>.

⁸³ Art. 4 para. 3 let. h D-FinSA.

⁸⁴ Implied under Art. 5 para. 1 D-FinSA.

⁸⁵ See in particular FINMA Circular 2008/3 «Public deposits with non-banks», margin no. 25 and FINMA Circular 2008/5 «Securities dealers», margin no. 16.

⁸⁶ See in particular Art. 10 of the Collective Investment Schemes Act («CISA») (SC 951.31).

⁸⁷ See section IV., sub-section 4 below.

⁸⁸ Art. 4 para. 3 let. a D-FinSA currently refers to «financial intermediaries», not «financial institutions». The notion of *financial intermediary* is borrowed from the AMLA. It is, in our opinion, used erroneously within the context of the Financial Services Act and Financial Institutions Act, as it implies the execution of financial intermediation activities as carried out by AMLA-regulated entities. The notion of *financial institution* is more suitable, as it refers to prudentially regulated financial market participants, which is what Art. 4 para. 3 let. a D-FinSA aims to address.

ments and substantive trust laws could speak in favor of their categorization as institutional clients, it is important to remember that a trustee's primary role is not the management of assets. This is evidenced by the fact that many professional trustees elect to delegate this function. Indeed, the primary reasons for settling a trust and appointing a trustee, which can include purposes such as estate planning, transaction structuring, wealth preservation, asset pooling or providing support to a person who is unable to manage his or her own financial affairs, fall beyond the scope of mere asset management services, the latter only being a corollary of the trustee's position as legal owner of the trust assets.

The fact that it is doubtful that all trustees holding an authorization to carry out their activities following entry into force of the Financial Institutions Act will effectively possess the same knowledge and experience as other institutional clients only supports their exclusion from this category.

Notwithstanding the above considerations, it is useful to reiterate that, should trustees ultimately fall into the institutional clients' segment of the Financial Services Act, they will retain the right to «opt-in» to the more protective regime applicable to *per se* professional clients upon request⁸⁹.

4. Trusts as *per se* Professional Clients or Retail Clients

As stated above, private investment structures established for high net worth individuals should be categorized as either *per se* professional clients or retail clients, depending on whether or not their treasury is professionally managed⁹⁰.

The notion of *private investment structure* is borrowed from the Swiss legislation governing collective investment schemes⁹¹, which included it in 2015. According to legal scholars, it holds the same meaning as the formerly employed notion of *asset holding vehicle*⁹². Within the context of the Collective Investment Schemes Act, these types of structures or vehicles are construed as extensions of the high net worth individuals for the benefit of whom they were established. They are therefore to be catego-

rized identically⁹³, unless their operations are sufficiently sophisticated to justify professional management of their treasury or when their services constitute a regulated activity requiring an authorization from FINMA, in which case they are to be categorized as qualified investors⁹⁴, or as regulated qualified investors, respectively⁹⁵.

The notion of a *private investment structure*, like that of *asset holding vehicle* that came before it, is not defined under Swiss legislation and regulation. Legal scholars consider that it includes structures such as trusts, domiciliary companies, and family offices⁹⁶.

The fact that trusts, which are legal relationships and thus do not possess separate legal personality, find themselves categorized alongside corporate entities is evidence of what one legal scholar referred to as the «reification of trusts», namely, the process by which certain statutory provisions allow trusts to acquire some of the features of corporate entities⁹⁷. The Swiss legislator, knowingly or not, followed this approach when it proceeded with recognizing some of the trust's distinctive legal effects under its domestic legislation⁹⁸ upon entry into force of the Hague Trusts Convention⁹⁹. In many circumstances, people indeed casually believe that they are dealing with «a trust», yet under the traditional English model, they may only deal with the trustee personally¹⁰⁰.

Although under current legislation and regulation, the integration of trusts within the definition of private investment structures is not problematic, upon entry into force of the Financial Services Act the aforementioned assimilation will result in a collision between the categorization of trustees as institutional clients and that of trusts as

⁸⁹ As provided under Art. 5 para. 3 D-FinSA.

⁹⁰ See section IV, sub-section 2.4 above.

⁹¹ See Art. 6a para. 1 of the Collective Investment Schemes Ordinance («CISO») (SC 951.311).

⁹² VAÏK MÜLLER and JULIEN DIF, *Guide pratique de la commercialisation des placements collectifs en Suisse*, Schulthess, Genève, Zürich, Bâle, 2016, p. 88 and ANOUCHKA ZURITA and OLIVIER SIERRO, *Placements collectifs et distribution: Les structures d'investissement privées et la modification de l'art. 6a al. 1 OPCC*, published on 17 November 2014 by the Center for Banking and Financial Law (CDBF) of the University of Geneva, <https://www.cdbf.ch/920/>.

⁹³ See now repelled FINMA Circular 2008/8 «Public advertising – Collective investment schemes», margin no. 19. Before entry into force on 1 January 2015 of the revised version of CISA, high net worth individuals were categorized as «qualified investors», see Art. 10 para. 3 CISA *cum* Art. 6 CISO and now repelled FINMA Circular 2008/8 «Public advertising – Collective investment schemes», margin nos. 10–19, whereas now they are categorized as «retail clients» that may declare in writing that they wish to be deemed «qualified investors», see Art. 10 para. 3^{bis} CISA *cum* Art. 6 and Art. 6a CISO.

⁹⁴ Art. 10 para. 3 let. a and b CISA.

⁹⁵ Art. 10 para. 3 let. c and d CISA.

⁹⁶ VAÏK MÜLLER and JULIEN DIF, *op. cit.*, p. 90 and ANOUCHKA ZURITA and OLIVIER SIERRO, *op. cit.*

⁹⁷ PAOLO PANICO, «Private foundations, trusts and the liability of service providers», in *Trusts & Trustees*, Volume 16, Issue 6, July 2010, p. 398. See also on this topic M. W. LAU, *op. cit.*, pp. 59–104, who speaks of the «firm-like qualities of a non-firm».

⁹⁸ See in this respect Art. 284a para. 2 of the Debt Enforcement and Bankruptcy Act («DEBA») (SC 281.1), which speaks of the «seat» of a trust, as well as Art. 149b para. 2 let. a of the Swiss Private International Law Act («SPILA») (SC 291), which refers to the «place of business» of a trust, and Art. 149b para. 3 let. b SPILA, which speaks of the «registered office» of a trust.

⁹⁹ 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>.

¹⁰⁰ PAOLO PANICO, *op. cit.*, p. 397.

either *per se* professional clients or retail clients. Indeed, the Act does not specify whether the trust or the trustee should prevail.

We understand however that, should the trustee be regulated and authorized by FINMA pursuant to the Financial Institutions Act, it will be categorized as an institutional client. On the other hand, where the trustee is not subject to authorization it will likely be categorized as a retail client, as many non-professional trustees do not have professional treasury management.

V. Conclusion

The lingering uncertainties surrounding the treatment of trustees under the Financial Services Act opens a debate on broader issues within the trust industry: the first concerns the part financial market regulation is meant to play with respect to the services rendered by trustees; the second touches upon the latter's role and responsibilities.

The objectives pursued by financial market regulation are multifold. In Switzerland, they primarily include client and market protection, and, alternatively, sustaining the reputation and competitiveness of the jurisdiction's financial center and ensuring market stability¹⁰¹. The question here is whether the new regulatory and supervisory framework will meet these goals as regards trustees and, in particular, whether the beneficiaries¹⁰² of trusts stewarded by trustees subject to Swiss regulation will be better off overall than before.

By conditioning exercise of the office of trustee on authorization, the regulator will ensure that certain safeguards, such as minimum capital adequacy, professional indemnity insurance, and competence, are in place before a trustee is permitted to carry out its functions. This is undoubtedly a step in the right direction in terms of achieving the objectives pursued by Swiss financial market regulation. However, in much the same way that a driver's license does not guarantee considerate driving and compliance with traffic rules, an authorization to act as trustee does not guarantee the quality of the services provided. The client protection objective is therefore only partially met.

Whether further regulation is necessary or desirable is nonetheless a legitimate question given the fact that the substantive trust laws of many foreign jurisdictions are quite specific when it comes to regulating the manner in

which trustees carry out their functions. This question should be answered affirmatively for two reasons.

First, by regulating trustee services in Switzerland through, for instance, adoption of a code of conduct, the jurisdiction would be setting its own minimum standards as regards the quality of the services to be rendered. Consequently, any professional trustee presenting itself as a Swiss trustee would benefit from the Swiss quality label, irrespective of the reputation of the jurisdiction chosen by the settlor, whose substantive trust law governs the trust. Without infringing on the requirements set by such a trust law, the adoption of Swiss standards would make Swiss trustees less dependent upon the standards set abroad. From Switzerland's perspective, the promulgation of a Swiss code of conduct would also mark its independence from foreign norms and contribute to promoting the jurisdiction as a trust-friendly location, thus further enhancing not only Swiss trustee «client protection» but also the reputation and competitiveness of the Swiss trust industry as a whole.

Second, regulation of the quality of the services rendered by trustees in Switzerland, in whatever form, would enable the competent regulatory body to take action in the event of breach by the trustee of any of its regulatory obligations, irrespective of any proceedings initiated by the beneficiaries of a trust. Such action by the regulator could even support any claims subsequently made by beneficiaries before the competent courts.

The other issue raised by the treatment of trustees under the Financial Services Act touches upon the role and responsibilities fulfilled by trustees, as evidenced by the fact that it is unclear, as of today, whether one deals in Switzerland with a trustee directly or with «a trust».

In this respect, one basic principle of trust law is worth keeping in mind: trustees are under the obligation to segregate trust assets from their personal assets, in particular to ensure that their personal creditors cannot attach the separate fund. When dealing with third parties however, trustees put themselves directly on the line, not the trust assets. Indeed, trustees deal in their own names and at their own risk but may subsequently indemnify themselves out of the trust fund, provided they acted in compliance with their duties. The liability incurred by trustees is a personal liability.

Based on the foregoing, it is erroneous to purport to deal with «a trust», as the trust, in the absence of legal personality, cannot legally bind itself. It is our opinion that the role played by trustees and the responsibilities which they bear deserve to be fully recognized under the Financial Services Act.

¹⁰¹ See on this topic FABIANNE DE VOS BURCHART, *op. cit.*, p. 283.

¹⁰² Trustees do not have «clients» *per se* but are accountable to the beneficiaries of trusts. The beneficiaries are therefore those who would benefit the most from the regulatory framework's client protection provisions.