By registered mail
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Zurich, 30 April 2022

Draft bill for the introduction of a Swiss trust

Dear Federal councillor
Dear Ladies and Gentlemen

First of all, we should like to thank you for giving us the opportunity to provide our comments regarding the draft bill of 12 January 2022 on the introduction of a Swiss trust (the **Draft**).

Many of our clients are affected by the civil law and tax provisions which are proposed. While we welcome in principle the effort to introduce the trust into Swiss legislation, we nevertheless have major concerns as to the impact that the new rules could have in practice. In the following we would like to comment on selected points of the Draft.

1. Tax provisions

1.1. General remarks

1 Trusts have been a reality for Switzerland for a very long time. Many of Switzerland's international residents have links to foreign trusts, be it as settlors, protectors or as beneficiaries. Switzerland also harbours many trustees.

Notwithstanding this highly practical relevance, there are currently no rules in Swiss tax legislation that explicitly address trust. The tax treatment of trusts is therefore based on general legal and tax principles. The current tax practice has been largely influenced by an administrative circular letter that was issued in 2007. While the practice adopted by the various cantons is not entirely harmonized, the circular letter has had a major impact on the daily tax practice as it provides for valuable guidance. Its rules are not perfect (tax rules seldom are), but they work to a large extent and generally in a very satisfactory manner.

2 In the last 15 years, the Swiss tax authorities have gained a lot of experience and know-how in this area. The authorities as well as tax professionals have demonstrated that they are able to deal with complex situations involving trusts and foreign (common-law) jurisdictions. It is also noteworthy that there is very little Swiss case law (and thus hardly any disputes) on the matter. In other words, taxpayers, tax authorities and tax advisors have coped very well with trusts in the current legal environment.

1.2. Need for action and guiding principles

3 Uncertainties remain though, and they almost always concern irrevocable discretionary trusts. It might therefore make sense – in principle – to address those uncertainties by creating explicit legal provisions. However, we believe that the guiding principles of any new law in the matter should be that:

i. it does not lead to a tax hike compared to the status quo (principle of tax neutrality), and

ii. it is not detrimental but favourable to Switzerland's attractivity as a location for international businesses and persons who want to establish themselves in the country (principle of maintaining or even increasing the overall attractivity of Switzerland on an international level).

1.3. Main concerns with the Draft

4 The Draft includes certain tax provisions that in our opinion need to be urgently amended as they violate the aforementioned guiding principles. Furthermore, the new rules would not be meant to apply only to Swiss law trusts, but generally to any trust with a Swiss connection. Thus, the importance of creating very targeted and sensible rules is paramount.

1.3.1. Assimilation of irrevocable discretionary trusts to foundations and residence rules

5 The Draft assimilates irrevocable discretionary trusts to foundations (new art. 10*a* para. 3 of the federal direct tax act and new art. 6*a* para. 3 of the federal tax harmonization act). Unlike under the current practice, such trusts would therefore become taxpayers in their own right. The same provision further provides that such trusts would become tax residents and thus subject to Swiss taxes if at least one beneficiary is a Swiss tax resident. If the beneficiaries cannot be identified, then the trust may become a Swiss resident if the settlor is or was a Swiss resident.

6 Under current rules, a settlor who is not (yet) a Swiss tax resident may create an irrevocable and discretionary trust abroad, prior to moving to Switzerland. If upon settlement of the trust, the settlor has effectively given up economic control and benefit over the trust, then the trust's assets and income would no longer be considered his for Swiss tax purposes. Therefore, when such settlor would move to Switzerland, he would only be taxable on his own personal wealth and income (but not on the trust assets). Under the proposed rules, the trust would somehow "follow" the settlor into the country and become subject to Swiss taxes (like a foundation). The rules proposed by the Draft therefore effectively create a new tax base. This constitutes a tax hike, which should be rejected.

7 Furthermore, under current rules, a Swiss resident beneficiary of an irrevocable discretionary trust would only be taxable with respect to the trust if he receives distributions from it. Under the new rules, the trust would also become a Swiss taxpayer, solely because the beneficiary is a Swiss resident. As a consequence, the trust would be subject to Swiss taxation, irrespective of distributions made to Swiss beneficiaries. This, too, constitutes a tax increase, which should be rejected.

8 The Draft further provides for a new residence rule (new art. 10*a* para. 4 of the federal direct tax act and new art. 6*a* para. 4 of the federal tax harmonization act): If a double tax convention provides that the irrevocable discretionary trust (which now qualifies as a foundation) is a resident of another country (typically because its place of effective management, i.e. the trustee, is located abroad), then the trust's income and wealth shall be allocated to the settlor (who may be a Swiss tax resident). The legal nature of that provision may be controversial. It is especially not entirely clear whether it is meant to be a "tax treaty override" provision (the validity of which would be doubtful at best). In

essence, it has however the same goal: allocate a non-resident's income and wealth to a Swiss resident, since the treaty would otherwise preclude it from being taxed in Switzerland. The mechanism resembles the one applied by countries who have CFC (controlled foreign corporation) rules. Foreign CFC rules may allocate the income of Swiss-based companies to non-residents (typically to parent companies). Switzerland usually considers this type of rules to be a violation of a double tax treaty's spirit as they may lead to unsolvable double tax conflicts. It is surprising that Switzerland now proposes to adopt precisely such a mechanism when it comes to the taxation of trusts. This provision therefore also violates the principle of tax neutrality and should be rejected.

1.3.2. Liability for the trust's taxes

9 The Draft's new art. 55 para. 5 of the federal direct tax act foresees that the Swiss resident settlor or Swiss resident beneficiaries are held jointly and personally liable for the Swiss taxes of the irrevocable discretionary trust. For some reason, the Draft does not propose to include a similar provision in the federal tax harmonization act.

10 Given that neither the settlor nor the beneficiaries have any control over a trust that is irrevocable and discretionary, this new clause foresees a causal liability (*Kausalhaftung, responsabilité causale*) which is completely independent from personal fault and/or control by the beneficiary over the trustee's behavior. It especially also applies where for example a beneficiary has not received any distribution from the trust. In that light the proposed provision seems highly unfair as persons are held liable for somebody else's noncompliance which may be completely outside their control. As a bare minimum, the personal liability should be limited to the amount of distributions effectively received from the trust.

1.4. Summary on the proposed tax rules

11 The approach chosen by the draft (assimilation to a Swiss foundation which may become a Swiss tax resident solely by virtue of the settlor's or a beneficiary's Swiss residence) leads to a substantial broadening of the tax base by creating new taxpayers and by taxing their income and wealth. It constitutes a major tax increase compared to the status quo and should therefore be rejected.

12 The Draft also considerably increases the complexity of the legal and compliance questions faced by persons who have an international background and

envisage to set up residency in Switzerland. Not only would they bring "their" trust with them, but the income in question could also be double taxed in dual residence scenarios.

13 Furthermore, the tax rules included in the Draft would not only apply to Swiss trusts, but they would apply to any trust with a Swiss connection. Many individuals and families who live in Switzerland and who come from common law countries have a trust "somewhere in their family". So do many persons coming from Asia or from the Middle East. They would all become subject to the new rules (at least if they move to Switzerland after the Draft becomes law). That means that any relocation of such persons to Switzerland would come with very substantial tax (and compliance) costs associated with "their" trust. Under current rules, this is not the case. It goes without saying that the tax consequences of the Draft would therefore deter many persons from coming to Switzerland in order to live here or do business in the first place. Thus, the Draft's tax rules jeopardize Switzerland as a place for international relocations of persons and businesses.

14 The proposed tax rules included in the Draft would deal a terrible blow to any effort of Switzerland to be attractive to foreigners and to international businesses. The new rules should therefore be redesigned in order to comply with current administrative practice. Alternatively, no new rules at all should be proposed with the effect that the current administrative practice be upheld. Any project short of that should be rejected altogether.

2. Civil law: inheritance and matrimonial property law

2.1. General remarks

15 While the Swiss foundation is an excellent instrument for charitable purposes, it is not suitable for estate planning and asset preservation. The use of a trust can however be an effective way to achieve estate planning objectives. Trusts are frequently used in estate planning to benefit and provide for the distribution of assets to the heirs of the settlor and in cases where someone wants or needs to set up financial care for young children or long-term planning and care for dependents with disabilities. Furthermore, it may protect an estate from beneficiaries who may not be adept at money management. Accordingly, clients have to resort to foreign jurisdictions to make use of trusts for such purposes. In light of the uncertainties when dealing with foreign law trusts, it might

be perceived as advantageous for the clients and the courts to introduce a Swiss trust law.

16 With regard to inheritance and matrimonial property law, we as practitioners welcome the content of the preliminary draft ("Draft"). In the present position paper, reference is made only to those provisions for which, in our view, further examination appears desirable. Hence, we would like to highlight selected aspects with regard to some provisions in the Draft (hereinafter referred as p-CO and p-CC) which should be clarified to allow for a successful introduction into the existing context of inheritance and matrimonial property law. The new provisions of inheritance law which will enter into force on 1 January 2023 will be referred to as p-CC.

17 The following comments are intended to meet the needs of legal practitioners insofar as some provisions will hardly be suitable in practice and appear unclear, even if they would be desirable in the result.

18 The legal institution of a trust is new in Swiss law and will raise questions in practical application. The clearest possible formulations should therefore facilitate its applicability and not delegate the legislative mandate to the judiciary.

2.2. Analysis of the Draft

Art. 529*a* p-CO

19 Art. 529*a* p-CO defines the trust and regulates the formal requirements. According to art. 529*a* para. 2 p-CO, a trust may be established either by written declaration or by a disposition of property upon death (see also art. 493 p-CC; "testamentary trust"; "Erbtrust"). It is to be welcomed that the Draft provides for such clarification regarding the form of establishment of a trust, so that it is compatible with the *numerus clausus* of the types of testamentary dispositions and takes into account the fact that trusts are an estate planning tool.

20 The Draft provides for the application *mutatis mutandis* ("sinngemäss") of the provisions on the establishment of a foundation by testamentary disposition ("testamentary foundation"; "Erbstiftung", art. 81 para. 1 CC).[1] Accordingly, the testator may establish a trust and express his wish to settle assets into trust by

1 Explanatory report, p. 87 f.

two different deeds, namely by a written declaration and/or testamentary dispositions (last will or inheritance contract, both defined in the Draft in German "Trusturkunde"; in English "trust deed").[2]

21 In our view there are some ambiguities with regard to (i) the *essentialia negotii*, which need to be included in the deed of a testamentary trust for the valid establishment of a trust, and (ii) the decisive criteria which determine the effectiveness of the trust. The relevant questions arise in the context of art. 529*b* p-CO which deals with the establishment and legal effectiveness of the trust. As a preliminary note, it appears that some of these uncertainties seem to be based on the differences between a trust and a foundation. In particular, the distinction in the law of foundations between establishment ("Errichtung") and legal personality (see art. 52 CC) is not applicable to a trust, since a trust has no legal personality. However, similarly to the law of foundations, the Draft and Explanatory report distinguishes between establishment of the trust ("Errichtung") and coming into effect of the trust ("gültig werden" [3]; "Rechtswirksamkeit";[4] art. 529*b* p-CO).

Art. 529*b* p-CO

22 According to the explanatory report, the minimum requirements (*essentialia negotii*) for the establishment of a trust are set out in art. 529*b* para. 1 p-CO. Accordingly, the trust deed must include the following: (i) the expression of the will of the settlor to establish a trust and (ii) to settle assets into the trust, (iii) the appointment of the trustee, (iv) the designation of the beneficiaries, and (v) the rules for the trust's administration.[5]

23 Pursuant to the Draft, if a trust is established by testamentary disposition, it is specified that there is however no need for the settlor to appoint a trustee (art. 529*b* para. 2 p-CO). If the trust deed does not foresee the appointment of the trustee, then the trustee can be appointed by the court.[6]

24 The determination of the *essentialia negotii* of a trust established by disposition upon death is of high importance. In our view, in case of a testamentary trust, it is from a Swiss inheritance law perspective problematic that the trust deed (i.e.

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2 Explanatory report, p. 88.
3 See e.g. explanatory report, p. 63.
4 See marginal note of art. 529*b* p-CO, see art. 529*b* para. 5 p-CO.
5 Explanatory report, p. 88.
6 Explanatory report, p. 89.

the last will or the inheritance contract) must not set out the appointment of the trustee (art. 529*b* para. 2 p-CO), who may be an appointed heir ("eingesetzter Erbe") or legatee ("Vermächtnisnehmer").[7] It is alien to the system that the testator can delegate the appointment of an heir or legatee to a court. We would like to highlight the following considerations in this regard:

a. As the trust assets are transferred to the trustee only as a separate patrimony (see art. 529*n* para. 1 p-CO; "Sondervermögen"), the legal position of a trustee is more like a *fiduciary heir* or *fiduciary legatee*. The actual heirs or legatees (with a right or a mere expectation) are in fact the beneficiaries.

b. There could well be a case where the testator foresees that his children (legal heirs) shall act as trustees with regard to a certain amount of the estate in favour of their children (grandchildren of the testator). In such constellation, it is not justifiable that the establishment of a trust would be denied just because the children have not explicitly been named as appointed heirs or legatees. Hence, also legal heirs can be trustees. Similar to foundations, a trust can in our view also be established by a charge burdened upon the heirs (art. 482 CC; "Auflage").

c. It is in our opinion indispensable that the testator determines the trustee and sets out clearly to whom the estate assets shall be transferred to be held in trust for the beneficiaries. The appointment of the trustee (resp. the heir or legatee) in case of a testamentary trust by a court (art. 529*b* para. 2 p-CO) is incompatible with the principle that a disposition of property upon death is strictly a personal right ("Grundsatz der Höchstpersönlichkeit").[8] Moreover, the establishment of a trust by a settlor without naming or determining a trustee in the context of estate planning is hardly imaginable and if so, it would raise doubts as to whether the testator really intended to set up a trust. The initial appointment of a trustee belongs in our opinion to the *essentiala negotii*.

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7 See Explanatory report, p. 63, p. 88.

8 STAEHELIN, in: Geiser/Wolf (ed.), Basler Kommentar Zivilgesetzbuch II, 6th ed., Basel 2019, art. 483 margin no. 6 (cited: BSK CC II-AUTHOR); BSK CC II-HUWILER, art. 484 margin no. 29.

d. Another question is whether a successor trustee, if he has not been determined by the testator in his testamentary dispositions, may be appointed by the court. In our view such a delegation is a defensible approach as the initial transfer of the succession (property) from the testator to the (initial) trustee has taken place and it merely concerns the replacement of an administrator. It must be noted that such judicial power is also being discussed by scholars in connection with executors.

e. The lack of appointment of a trustee in the trust deed of a testamentary trust seems further problematic with regard to the issuance of an inheritance certificate (art. 559 CC). Such certificate can only be issued if all heirs are known. If not all heirs are known it becomes necessary to appoint an estate administrator (art. 554 para. 1 sec. 3 CC). To relieve the authorities and courts it would be recommendable to require the trustee to be named in the trust deed.

f. It seems further unclear whether the nature of the trust (discretionary trust or fixed interest trust, see art. 529*d* p-CO) must be defined in the initial trust deed. Such directions should in our view need to come from the testator directly as they concern the disposition of his property and the designation of the entitlement of the beneficiaries. If the nature of the trust is not considered to be a minimum requirement of the initial trust deed, we suggest at least to include in the Draft a catch-all provision, according to which a testamentary trust shall be qualified e.g. as a discretionary trust if the trust deed does not provide for another qualification.

g. It is essential to clearly state in the Draft when the testamentary trust becomes effective. According to art. 529*b* para. 5 p-CO, a trust only becomes effective ("rechtswirksam") once the trustee has provided consent in writing and ownership of the assets has been transferred to the trustee. Transfer of ownership shall occur in line with the provisions of inheritance law.[9] In Swiss inheritance law, we know the concept of universal succession, where the heirs become joint owners upon the death of the deceased. Single ownership shall only be assumed by each heir upon execution of a partition agreement or a de facto partition. Hence, it is not clearly stated in the Draft which event is decisive for the trustee to become the owner of the trust fund and the trust itself to become effective.

9 Explanatory report, p. 88.

h. Where the trustee is a legatee, transfer of ownership is taking place at the time of the distribution of the legacy (art. 562 para. 2 CC). Since disputes among heirs may last several years until the estate is divided, it seems less useful to refer to the partition of the estate for the trust to become effective. Furthermore, since the Draft refers to foundations and testamentary foundations become effective upon death, it would be consistent to let the trust become effective as well with the demise of the testator. The trustee however can only start to act once the trust assets have been transferred to him resp. the patrimony has been segregated.

i. In this context, further questions arise with regard to the requirement of the trustee to consent in writing for the trust to become effective (art. 529*b* para. 5 p-CO). If the ownership were transferred upon death, the written consent should be deemed if the trustee has not disclaimed the inheritance within the three-month time limit of a disclaimer (art. 567 para. 1 CC).

25 With regard to art. 529*b* para. 6 p-CO, it is to be welcomed that the Draft expressively reserves the statutory provisions protecting the rights of the settlor's spouse, registered partner and heirs. According to the Explanatory report, this reservation refers in particular to the Civil Code provisions regarding additions to the property acquired during marriage (art. 208 CC), the duty to inform (art. 170 CC), statutory entitlement (forced heirship) and adding to the estate (art. 470 et seq. CC), abatement (art. 522 et seq. CC), duty to provide information (art. 607 para. 3 CC, art. 610 para. 2 CC), and hotchpot duty (art. 626 et seq. CC).[10] Hence, the contributions to the trust resp. the trustee are relevant for matrimonial property and inheritance law and will be taken into consideration to determine the entitlement of the spouses and heirs.

Art. 529*c* p-CO

26 With regard to art. 529*c* p-CO, the Explanatory report states that the *nasciturus* may be designated a beneficiary.[11] *E contrario*, one could conclude that a *nondum conceptus* might not be a validly designated beneficiary. With regard to a testamentary trust, which often aims to support the family or the "clan" of the settlor and not only his living or conceived heirs we consider the possibility to designate a *nondum conceptus* as beneficiary legitimate and important. As long

10 Explanatory report, p. 90; see also p. 110.
11 Explanatory report, p. 90.

as it is possible to determine the beneficiary at the time of distribution of the benefits, designation of a *nondum conceptus* as beneficiary seems compatible with the principle that a disposition of property upon death is the execution of a strictly personal right ("Grundsatz der Höchstpersönlichkeit").

Art. 529*h* p-CO

27 Where the trust has more than one beneficiary, the trustee shall act impartially and take due account of their different interests (art. 529*h* para. 3 sec. 3 p-CO). This provision is of particular importance in case of a testamentary trust and where the trustee is also a beneficiary (see art. 529*c* para. 2 p-CO). The duties of the trustee in context of a testamentary trust will be analysed under art. 529*i* p-CO.

Art. 529*i* p-CO

28 Art. 529*i* p-CO regulates the accountability of the trustee and beneficiaries' right to information. According to art. 529*i* para. 3 sec. 2 p-CO, the trustee can refuse to provide information to a beneficiary if such information would jeopardize the legitimate interests of other beneficiaries – such refusal may e.g. be based on confidentiality grounds.[12] Furthermore, the trust deed may restrict beneficiaries' information rights.[13]

29 According to art. 529*b* para. 6 p-CO, the heirs' rights and duties to provide information (art. 607 para. 3 CC, art. 610 para. 2 CC) are being reserved.[14] Hence, the relevance of art. 529*i* p-CO is not entirely clear in an inheritance law context.

Art. 529*t* p-CO

30 The trust deed may allow the settlor, the trustees or protectors to add or exclude beneficiaries (art. 529*t* para. 1 p-CO). This might cause uncertainties with regard to the principle that a disposition of property upon death is the execution of a strictly personal right ("Grundsatz der Höchstpersönlichkeit"). In our opinion, in case of a testamentary trust, the testator must designate

12 Explanatory report, p. 97.
13 Explanatory report, p. 97.
14 Explanatory report, p. 90.

beneficiaries personally. To be in line with inheritance law, it is also required that the testator sets out whether new beneficiaries can be added or removed. If so, it is necessary that the testator specifies the criteria, since the appointment or removal of heirs cannot be globally delegated to the trustee or protector.

Art. 528 para. 3 p-CC

31 It is to be welcomed that art. 528 para. 3 p-CC clarifies against whom the action for abatement shall be brought. As in the case of establishment of a foundation or a foreign trust, settlements into a trust shall be subject to abatement where the testator has exceeded his or her testamentary freedom (art. 522 et seq. CC; art. 528 para. 3 p-CC; art. 493 p-CC).[15]

32 It is not entirely clear whether such action for abatement is also possible to challenge settlements into a trust which are incompatible with obligations entered into under a contract of succession (see art. 494 para. 3 CC; art. 529*a* para. 2 p-CO).

33 Moreover, qualification of establishment of a trust or later settlements into an existing trust is likely to cause difficulties with regard to art. 527 CC. According to the Explanatory report, such settlement may be either subject to:

a. art. 527 sec. 1 CC, if the settlement is not subject to the hotchpot duty;
b. art. 527 sec. 3 CC, if the settlement is qualified as a gift that was either freely revocable or made in the five years prior to the settlor's death;
c. art. 527 sec. 4 CC, if the settlor intended to circumvent limitations on his testamentary freedom by alienating assets.[16]

34 With regard to art. 527 sec. 1 CC, the hotchpot duty must first be analysed. Several questions around art. 626 CC are being controversially discussed in academia. These questions will be of high relevance for the qualification of a disposition of assets into a trust as either being subject to the hotchpot duty (art. 626 para. 2 CC) or to abatement (art. 527 sec. 1 CC).

15 Explanatory report, p. 110.
16 Explanatory report, p. 110.

a. Art. 626 para. 2 CC does only apply in case of intestate succession ("*Intestaterbfolge*"), i.e. where the testator does not alter the inheritance shares. In case of a testamentary trust, the settlor has to settle the assets by appointing the trustee as heir ("*Erbeinsetzung*") or legatee.[17] According to the prevailing doctrine, art. 626 para. 2 CC applies to descendants (i.e. legal heirs) whose inheritance shares remain unchanged, even if there are also appointed heirs.[18] Hence, even though the testator may establish a testamentary trust, he may thereby not necessarily alter the inheritance shares of his descendants, i.e. the beneficiaries. Hence, art. 626 para. 2 CC might potentially still apply where a trustee is an appointed heir. Generally, it would be favourable to clarify how distributions from a trust to beneficiaries who are descendants are to be dealt with in the context of hotchpot. This would also allow for legal certainty regarding the order of abatement.

b. It seems not entirely clear in which order the abatement shall take place: According to art. 532 CC, abatement applies first to testamentary dispositions and thereafter to dispositions *inter vivos* in reverse chronological order until the statutory entitlement has been reconstituted. This article is currently under revision.[19] The draft for the revised inheritance law provides for property which passes to heirs under intestate rules to be abated first. Thereafter, dispositions of property upon death and dispositions *inter vivos* are subject to abatement (art. 532 para. 1 p-CC).[20] Art. 532 para. 2 p-CC further stipulates the order of abatement for dispositions *inter vivos* ([i] dispositions made under marriage agreements or property agreement, [ii] freely revocable dispositions and payments from restricted pension plan, in equal ratio; [iii] further dispositions, starting with the most recent ones).

35 In addition to the abovementioned uncertainty regarding the hotchpot duty, it is to regulate whether the heir's inheritance shares are being altered by establishment or later settlements into a trust or by amending the schedule of beneficiaries (adding or removing beneficiaries) (see art. 532 para. 1 sec. 1 and sec. 2 p-CC). In addition, it would be favourable if the message of the federal council would address how to deal with irrevocable and revocable trusts with regard to art. 527 CC and art. 532 p-CC.

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17 Explanatory report, p. 63.

18 See overview of discussion in BSK CC II- FORNI/PIATTI, art. 626 margin no. 7.

19 BBl 2018 1537 et seq.

20 BBl 2018 1537, 5908.

2.3. Summary

36 As stated above, the introduction of a Swiss trust law may be welcomed. However, there are some relevant uncertainties with regard to inheritance law and matrimonial property law. In particular, the *essentialia negotii* of a testamentary trust and the decisive criteria which determine the effectiveness of the trust appear to be issues of high relevance. In this context, it appears to be problematic that appointment of a trustee is not an *essentialia* negotii of a testamentary trust (art. 529*b* para. 2 p-CO). There are some further issues which are generally related to the principle that a disposition of property upon death is a strictly personal right ("Grundsatz der Höchstpersönlichkeit"). In addition, there are uncertainties with regard to hotchpot duty and abatement. It seems difficult to introduce the Draft into the existing framework if the highlighted issues are not being resolved.

3. Civil law: other aspects

3.1. General remarks

37 Art. 529*j* para. 6 p-CO provides that the trustee must keep all documents in such a way that they can be accessed at any time in the country of his seat or domicile. It has been suggested that at least one trustee (be it a natural or a legal person) should be Swiss. The reason for this suggestion is to avoid possible conflicts of law and to facilitate the enforcement of the tracing right provided for in art. 529*q* p-CO. It must be noted, however, that such a requirement may trigger undesirable complications. For example, in the event of a change of trustees, there would also be a requirement to change the proper law of the trust.

38 Art. 529*h* p-CO provides a list of duties of care and loyalty of the trustee. On the basis of the Swiss legal system's lack of familiarity with the concept of equity, this list should be expanded to include a broader spectrum of obligations in order to reduce the legal uncertainties that may arise from such a general list.

39 The Draft provides for various ways of transferring trust assets. According to art. 529*s* para. 4 p-CO, the assignment of assets and liabilities can take place under art. 181 CO. As explicitly stated in the Draft, such a transfer of assets also includes the rule stated by art. 181 para. 2 CO. According to the latter article, the former owner of the assets is jointly and severally liable for the liabilities

arising from the transferred assets for a duration of three years. This period of joint and several liability starts at the time of the transfer of the assets, if the claim is due, or at the time the claim becomes due, if it occurs later.

40 This three-year period of joint and several liability does not seem to be appropriate, as it is not in line with current practice in the world of trusts. Changes of trustees and the resulting transfer of the trust fund are frequent, and it would be inappropriate to hold the former trustee jointly and severally liable for three years following the transfer or, even worse, for three years following the due date of the claim. We therefore recommend that the rule contained in art. 181 para. 2 CO be explicitly excluded from art. 529*s* para. 4 p-CO.

3.2. Litigation and legal remedies

41 The procedural rules of the Draft envisage a jurisdiction clause in the trust deed, failing which the courts at the location of the defending party or at the location of the trustee will have jurisdiction (art. 39*a* p-Code of Civil Proceedings). This is a fair proposal, which should encourage settlors and trustees to include an exclusive jurisdiction clause in the trust deed.

42 Art. 529*w* p-CO provides the option of an arbitration clause binding on the settlor, the trustee, the protector and the beneficiaries. There is no reservation as to unborn beneficiaries, which has to be welcome for the sake of clarity, consistency and exclusivity of the arbitration process.

43 In a civil law jurisdiction such as Switzerland, the recourse to arbitration should be encouraged as it would enhance the resolution of trust disputes by qualified professionals with the required expertise and experience in trust matters and maintain confidentiality.

44 However, the legal remedies provided by art. 529*v* p-CO under the heading "*Interventions du tribunal*" are not satisfactory as far as applications for directions are concerned. These applications are frequent in the common law courts where judges are asked to issue orders or provide guidance when the legitimacy or appropriateness of a trustee's decision or action are doubtful. According to the Draft, such applications will be subject to summary proceedings or, as the case may be, arbitration in the presence of an arbitration clause.

45 In both cases, the remedies are unlikely to work properly. One has to expect that Swiss courts will entertain such applications with great reluctance. In

general, in Switzerland, judges do not make decisions for those to whom the law or contract has entrusted the right and duty to make such decisions (with the exception, in a totally different context, of the courts of protection). Arbitration appears to be similarly ill-suited for this purpose. The complexity and time needed for starting an arbitration process are not compatible with urgent applications. This is likely to remain a major flaw of the Swiss trust legal remedies.

46 Art. 529*g* para. 3 p-CO is not clear. Is the trustee liable only to creditors or creditors and/or beneficiaries in this clause? Beneficiaries are not creditors. In certain circumstances should this liability be limited to the trust assets? According to the provision, liability may be excluded, but should this be limited to gross negligence, fraud and willful misconduct?

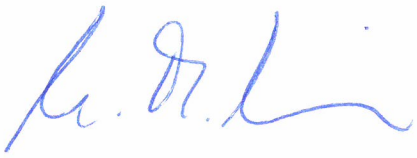
47 According to art. 529*e* para. 2 p-CO, the settlor cannot transfer his rights as settlor to a third party to act on his behalf. This is not the case in other jurisdictions, where a settlor can appoint an attorney under a power of attorney to act if he loses mental capacity. This is not an obligation but may be an attractive option for settlors.

48 In addition, we notice that purpose trusts are excluded from the Draft. These are useful structures in the modern trust law industry in the context of private trust companies, which have become more popular. Although we agree that purpose trusts should be not allowed to be used instead of charitable foundations, additional thoughts should be given to situations in which a limited use of purpose trusts may be appropriate.

4. Concluding remarks

49 We thank you again for providing us with the opportunity to comment on the Draft. Whereas the civil law provisions would benefit from some limited improvements as set out above, the proposed tax provisions are clearly a major concern and create the risk of causing great harm not only to the Swiss trust industry but to the entire financial sector, or even larger parts of the economy. Considering that the current tax practice and specifically the circular letter have generally proved to be satisfactory, we do not see an absolute need for the introduction of new rules. Clearly, should the proposed tax rules be maintained as they are, the whole Swiss trust project should be rejected.

Yours faithfully



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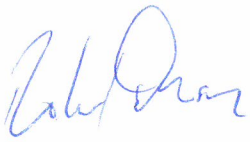
Philippe Pulfer



Robert Desax