

The Swiss trust

A missed opportunity

Par Luc Thévenoz le 20 September 2023

The Federal Council has just announced that it does not wish to pursue work on the creation of a trust under Swiss law. The final say will rest with the Federal Assembly, which could refuse to shelve the 2018 motion, but such a refusal is unlikely. Why did this project fail ? Was it unnecessary ?

One might have feared that the introduction of the trust as an institution of Swiss private law, enshrined in the Code of Obligations without being a contract, would be rejected as too alien to our legal order. The results of the public consultation show that this is not the case. The majority of those who expressed an opinion on the civil aspects of the draft were in favor of the principle. There are, of course, some critical voices, but they are fairly evenly divided between expressions of skepticism in principle and calls for a bolder, more liberal trust.

Predictably, it was the tax aspect that killed the 2022 draft. The Federal Council considered that it would be politically impossible to introduce the trust into Swiss substantive law without enshrining in tax legislation a regime that provides greater legal certainty and better respects the principles of legality and ability to pay.

The mountain has given birth... to a mountain. A working group convened by the Federal Department of Finance had identified seven options, each with two variants. No consensus was reached on any of the options (their discussion takes up 15 pages of the explanatory report !). In the end, the administration opted for the most penalizing solution for irrevocable discretionary trusts, irrespective of whether they are subject to Swiss or any other law. A large majority of the opinions expressed in the consultation rejected the proposed solution, with business organizations clearly indicating their refusal to support the proposal for a Swiss trust at the cost of such an upheaval in the taxation of trusts.

Is it possible to do better on the tax front ?

Other approaches than those submitted to the Federal Council are conceivable. They are based on the principle that taxes on income, wealth, gifts and inheritance only apply to settlors and beneficiaries subject to Swiss tax. For the latter, the creation of a trust (regardless of the law governing it) should be possible without any major tax consequences. More specifically, for a settlor and beneficiaries domiciled in Switzerland, the creation of a trust should, over the long term, create neither significant additional costs nor tax advantages. Models to this effect have already been sketched out and discussed, but not in Berne. These should now be explored with

a view to formulating proposals that are acceptable to the Confederation, the cantons and the parties concerned. It's possible, but it requires political will, which for the moment seems to be lacking.

Does the Federal Council's decision, if followed by Parliament, render useless the four years of work whose outcome looks set to be shelved ? No. Even if a tax solution has yet to be invented, it is now clear that the addition of the trust to the institutions of Swiss private law is acceptable and does not infringe any fundamental principle. What's more, any fears that Switzerland might run into difficulties with the FATF or the Global Forum on Transparency and Exchange of Information for Tax Purposes have not materialized. Moreover, the obligation for all trustees to identify and document the beneficial owners of a trust, which appeared in art. 529j of the preliminary draft law on trusts, is in substance to be found in art. 16 of the very recent preliminary draft law on the transparency of legal entities (K. Villard, cdbf.ch/1300/), which dispenses with the creation of a public register for trusts.

Will the brake on Swiss trusts at least serve to promote family foundations and allow maintenance foundations, as called for in the Burkart motion "Strengthening Swiss family foundations by abolishing the ban on maintenance foundations" ? The motion seeks only to amend art. 335 para. 2 CC. Without reform, the taxation of private foundations remains a major disincentive. In its report proposing the abandonment of the Swiss trust project, the Federal Council confirms its rejection of the Burkart motion. In its report, the Federal Council confirms its rejection of the Burkart motion : "The objective it pursues is not likely to win a majority at the present time, particularly in view of its effects in the tax field".

The fact remains that Swiss law still does not offer the Swiss an adequate range of instruments for structuring and passing on wealth over the long term. Our very liberal private international law allows recourse to the vehicles offered by many other legal orders, but these solutions are not within the reach of most of those who might wish to use them, and they come up against penalizing taxation. The Federal Council's decision to halt work on the Swiss trust is not a burial, but an invitation to begin a more global reflection on the missing instruments.

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