



## “Trusts: Weapons of Mass Injustice?” A response to the critics

Andres Knobel

September 25th, 2017

On February 13<sup>th</sup>, 2017 we published a paper, “[Trusts: Weapons of Mass Injustice?](#)”<sup>1</sup> asking some deep and searching questions about the role trusts play in our societies, and proposing some radical remedies to some of the abusive roles that trusts have come to play. Our paper has already provoked two critical responses: an [editorial](#)<sup>2</sup> by *Trusts and Trustees* and a [paper](#) by Jersey Finance<sup>3</sup>.

Our initial paper was intended to start a debate on trusts, and to encourage societies and their governments to reflect on them rather than accepting the status quo. So we are delighted to see this engagement. (If *you* have comments on our paper or see comments behind a paywall, please email [andres@taxjustice.net](mailto:andres@taxjustice.net).)

We can’t address all comments in detail yet, but we will. For now, we offer this brief.

The main points of our original paper remain:

- **Opacity.** To tackle corruption, money laundering and tax evasion, all express<sup>4</sup> trusts (trusts where the settlor has the express intention to create the trust) should have to register their *beneficial* owners, and this information should be publicly available. The Financial Action Task Force (FATF) Recommendations<sup>5</sup> on Anti-Money Laundering already require companies, partnerships and foundations, including private foundations (the latter are extremely similar to trusts, in their control structure and tax planning purpose) to register in a government registry and have some basic information publicly available<sup>6</sup>. More and more countries<sup>7</sup> (including the EU) are now requiring companies, partnerships and foundations to register also their *beneficial* owners in an official registry. Some countries<sup>8</sup> are providing even free and online

access to this data in open format. In this context, excluding trusts (which may be equally engaged in illicit activities as any legal person may be) from beneficial ownership and registration requirements is not only unjustified, but also undermines the effectiveness of the above new transparency requirements for companies, partnerships and foundations.

- Legal abuses. Countries should be made aware of how some trusts allow abusive goals (tax avoidance, violation of inheritance laws, securing assets from legitimate creditors) and decide whether they want to keep those privileges, and how they want to react.

## **The debate**

The first broad comment comes from [Geoff Cook](#), the Chief Executive of Jersey Finance whose former role as Head of Wealth Management at HSBC Bank Plc will have given him long experience of trusts. He said:

“Compliance with that legislation should not be the subject of uninformed criticism”<sup>9</sup>.

Cook’s criticism rests on an assumption that is common with many criticisms of TJN outputs that come from tax havens like Jersey’s: that relevant international legislation is the legitimate yardstick for analysis. This is the body of global legislation that has allowed Jersey and many other tax havens to claim that they are transparent, well regulated and cooperative jurisdictions, when our Financial Secrecy Index, and on the ground research, shows clearly that this is not the case. Their yardstick is existing law: our yardstick is what good rules *should* be. Their perspective restricts the problem to the thorny question of legality: we come from an economic, political and even ethical perspective.

The fact that a law has been enacted provides no guarantee that it is *legitimate* (or even compliant with a country’s Constitution or international treaty obligations). Legislation can have loopholes, either as a result of lobbying by interest groups or because of poor work by legislators or regulators. Legislation can be deliberately crafted to attract abusive financial activities. But even if no special interests were involved, societies still have every right to question their current laws and ask if they are fit for purpose.

## **The focus on trusts**

Trusts are certainly not the only type of legal structure subject to abuse. Elsewhere, we have also analysed companies, partnerships and foundations. We carefully assess each in the [Financial Secrecy Index](#),<sup>10</sup> and have written [papers](#)<sup>11</sup> about their effective beneficial ownership registration.

Yet unlike these other structures, trusts are hardly ever the focus of registration and transparency advances. For example, the [EU’s 4<sup>th</sup> Anti Money Laundering \(AML\) Directive](#)<sup>12</sup> requires registration of beneficial ownership in a central register of all legal entities

(companies, partnerships and foundations) that are created or incorporated in an EU country, regardless of their commercial or non-commercial activity, as a precondition for their existence as legal persons.

Yet this is not true for many trusts (which are considered ‘arrangements’, not legal persons): registration is only required when they have tax consequences. [Discussions about the 5<sup>th</sup> EU AML Directive](#) (currently underway) propose public access to all legal entities, but only to some trusts. Why? Trusts can be just as abusive -- if not more so, as described below – as companies and other legal entities. So we should expect trust transparency measures to be at least as comprehensive.

We think there are two reasons for this special treatment.

First, because trusts are described as legal *arrangements* (as opposed to legal *entities*). Second, many current legal structures use the word “trust” in their name, giving the impression that these are private family matters, as in the original (praiseworthy) purposes of trusts that originated in the Middle Ages. But some of the commonest “trusts” these days, such as asset protection trusts, discretionary trusts, and purpose trusts, may serve abusive purposes, enabling users to escape the responsibilities of society that bind everyone else. Many such “trusts” shouldn’t be considered trusts at all: they are shams (and we don’t follow the UK and Jersey’s legal meaning of the term “sham”, see page 18 below). Trusts and “trusts” are often explicitly promoted to ensure secrecy, to prevent assets from reaching legitimate creditors, and to violate foreign laws. Commercial trusts are widely implicated in the global financial crisis and other ills.

Shouldn’t society at least question whether this very special treatment is worth keeping?

### **The criticisms of our paper.**

The main criticisms leveled against our paper can be summarised like this: TJN lacks hard data and examples needed to justify registration rules, which would be onerous and difficult to implement anyway -- and the abuses that occur could be handled by existing laws.<sup>13</sup> Many of these criticisms remind us of the general responses we’ve had to our campaign against tax havens, which rely heavily on dismissing evidence of damage and on asserting that the free movement of capital around the world provides economic benefits that override other concerns such as democracy, inequality and the rule of law.

In more detail, there are three main areas of complaint.

#### **1. On TJN’s overall “draconian” proposals**

- a. “TJN wants to effectively abolish trusts”<sup>14</sup>,
- b. TJN prefers taxpayers to support the vulnerable which is less effective than trusts<sup>15</sup>,
- c. They would make it impossible or difficult to use trusts for legitimate purposes<sup>16</sup> and might rule out most commercial trusts<sup>17</sup>
- d. Opposing trusts in their current form signals that TJN is anti-capitalism and antiinvestment<sup>18</sup>.

## 2. Opacity and trust registration.

- a. That there is little TJN analysis of the consequences of trust secrecy<sup>19</sup>,
- b. Requiring all parties to a trust be registrable is unworkable, disproportionate and burdensome<sup>20</sup>,
- c. Public registries will lead to extortion and kidnapping (that old chestnut)<sup>21</sup>
- d. Unlike our proposal for central registries, Jersey's system of licensed corporate service providers ensures accuracy<sup>22</sup>,
- e. Many trusts already must be disclosed, either because of company beneficial ownership regulations<sup>23</sup> or by anti-money laundering and other anti-abuse measures including the OECD's Common Reporting Standard for automatic exchange of information<sup>24</sup>.

## 3. Trust abuses, and abusive trusts

- a. Trusts are not the only type of entity subject to abuse<sup>25</sup>,
- b. Settlor control over the trust is not a bad thing and doesn't make it a sham trust<sup>26</sup> (by the Jersey definition)<sup>27</sup>,
- c. There is no data on scale of abuses and no examples of serious consequences<sup>28</sup>,
- d. Sham trusts are hardly weapons of mass injustice because TJN lists only a few tiny islands or U.S. States offering them
- e. Abusive trusts (e.g. involved in tax evasion) are just a few bad apples that no longer really exist because authorities have tackled them<sup>29</sup>,
- f. Trusts offer no asset protection against creditors because there are provisions against fraudulent transfers<sup>30</sup> (e.g. Statute of Elizabeth)<sup>31</sup>,
- g. Avoiding national laws such as forced heirship is a legitimate goal<sup>32,33</sup>,
- h. Tax avoidance is different from tax evasion so compliance with legislation should not be the subject of uninformed criticism<sup>34</sup>, and
- i. Wealth concentration has social benefits because many philanthropists have used trusts, foundations and similar structures to fund medical research and education<sup>35</sup>.

## TJN's responses

### In general...

Our critics often try to throw labels at us: "socialists," anti-capitalists, and so on. These are just dog-whistle words designed to rally support among their followers. Our focus is on criminality and the *corruption of* capitalism.

What is more, tax havens and trusts are central ingredients in high-energy, Anglo-Saxon financial globalisation, facilitating and accelerating illicit financial flows around the world, and generating [a range of other harms](#).

### Transparency and trust registration

Trusts are seen as different from legal entities (which have separate legal personality) because they cannot *directly* own assets. A trust is more like an agreement, or an arrangement (in theory, a trust can be established on the basis of a verbal declaration and a

handshake.) This is used to argue for trusts not being held to the same transparency standards as companies.

Technically, it isn't the trust itself that owns the assets, but the trustee, who is the *legal* owner. But in practice this distinction has little effect.

Trust assets are legally owned by the trustee but only under strong constraints: they do not belong to the trustee's *personal* assets (the trustee is not allowed to use them for his or her own benefit, nor can the trustee's personal creditors claim against the trust assets). So the assets *effectively* belong to the trust, as if it were a separate entity like a company. In fact, trusts in many cases have tax identification numbers and are subject to tax, just like companies. Trusts can directly own bank accounts, and case law (and news articles) often refer to "the trust owning a house or shares in a company"<sup>36</sup>.

In fact, in an EU court ruling in September 2017 (ECJ 646-15) the court concluded that trusts are to be considered legal entities when it comes to benefiting from EU's Freedom of Establishment available to legal entities. (This ruling allowed the trust in question to avoid paying UK capital gains tax.)

As the court said: "that concept of 'other legal persons' extends to an entity which, under national law, possesses rights and obligations that enable it to act in its own right within the legal order concerned, notwithstanding the absence of a particular legal form . . . the assets placed in trust form a separate fund of property, distinct from the property of the trustees... the trust and its trustees constitute an indivisible whole. That being the case, such a trust should be considered to be an entity which, under national law, possesses rights and obligations that enable it to act as such within the legal order concerned."<sup>37</sup>

So if trusts are considered legal entities when it comes to avoiding taxes, or benefiting from freedom of establishment, they should equally be required to register their beneficial owners in all cases, as the EU 4th AML Directive requires from all EU legal persons.

Does the fact that a trust is involved in purely commercial matters change anything? No.

Companies, partnerships and foundations have to register regardless of their activities, so there should be no difference between commercial and non-commercial trusts when it comes to their registration. Such distinctions would be immediately exploited for abusive ends.

Even the FATF 2014 Guidelines on Beneficial Ownership recommend trust registration:

*a centralised registry of trusts to which disclosure must be made of the information pertaining to all trusts (including information on the settlor and beneficiary) could be an effective mechanism as it would provide timely information on the trust and (if kept accurate) could provide competent authorities with access to necessary information for disclosure and international cooperation. Centralised trust registries would also ensure that beneficial ownership information is freely available to competent authorities across jurisdictions in a timely manner, without tipping off a trust under investigation<sup>38</sup>.*

## **Current mechanisms (e.g. automatic exchange of information) or AML already allow trust identification**

As we show in our reports, and in the footnote here, the OECD's Common Reporting Standard (CRS) does not guarantee that trusts will be properly disclosed<sup>39</sup>.

Corporate service providers and banks often don't comply with Anti-Money Laundering (AML) procedures, as shown by the Panama Papers, or this [blog](#)<sup>40</sup>. So beneficial ownership information already held by a government authority is the only way to ensure that information will be available and that persons subject to investigations will not be tipped off.

## **“Requirement that all parties be registrable is unworkable, disproportionate and burdensome”<sup>41</sup>**

If someone introduces a risk to society, that person should bear the risk, not the rest of society. Trusts have more complex ownership and control structures than companies (that usually only have shareholders or members) so it may be difficult to know who is in control: trusts can involve settlors, protectors or enforcers, trustees, beneficiaries, classes of beneficiaries, or purposes. Settlers or beneficiaries may retain powers to control the trustee, through a protector, a letter of wishes, veto rights, etc. Trust documents are unlikely to be disclosed. The simplest and best rule to match benefits with accountability is to require registration of all the parties to the trust (settlors, protectors, trustees, etc.).

The UK's approach (that is, when a trust has significant control over a UK company) is that the registry identifies only the trustee “and any other person in control”. But this is far weaker: society or regulators need to invest time and resources to read and understand all trust documents to determine who is really in control, and they may easily get it wrong, especially if some trust documents remain hidden.

Are our proposals “unworkable”? No. In fact, we are nearly there already.

Private foundations are usually offered in civil law countries as a tax/estate planning alternative to trusts<sup>42</sup>, suggesting they have similar effects. However, private foundations are legal entities, so under FATF Recommendations, they must be registered. The EU 4<sup>th</sup> AMLD requires foundations (as legal entities) to register their beneficial owners (Art. 30), and their beneficial owners are similar to those of the trust: settlor or founder, protector, trustee or foundation council, beneficiaries or classes of beneficiaries, and any other person with effective control over the foundation/trust (Art. 3.6.2.c).

Why is it possible to register foundations, with very similar beneficial ownership or control structures to trusts, but impossible to do this for trusts? In fact, some countries, like Germany<sup>43</sup> already require registration of trusts' beneficial owners and Gibraltar already has a form<sup>44</sup> that should be used to register the beneficial owners of trusts that are within scope.

Furthermore, FATF Recommendation 25<sup>45</sup> (and Interpretative Note to Recommendation 10) already require trustees to have all the relevant information on the settlor, other trustees,

protector, beneficiaries, classes of beneficiaries and any other person with control over the trust. So relevant beneficial ownership information is *already* required to be collected. The only missing step – and it’s a simple, workable one – is to require that this information which the trustee already has, is registered with a government authority.

### **Relying on corporate service providers**

Jersey asserts that it’s best to rely on licensed corporate service providers to hold the information, making a natural person expressly responsible and accountable for ensuring the accuracy of registered beneficial ownership information.

We agree with this requirement – as long as it is *in addition* to public registries of beneficial owners. Relying only on the corporate service provider alone is too risky: after all, many clients want to stay hidden, and they will choose the corporate service provider who will help them, so the incentives for corporate service providers are terrible. They may also tip off clients. Jurisdictions eager to drum up offshore business would also have strong incentives not to enforce statutory sanctions too. A mention of just one corporate service providers – Mossack Fonseca, of Panama Papers fame – should dispel any remaining doubts.

Even Jersey’s supposedly effective system raises questions. In the “Essam” case, for instance, a man (Essam), told Jersey corporate service providers that his wife (Rouzin) was the beneficial owner of companies, even though evidence suggested the opposite: he “provided finance to the Companies both directly and by his negotiation of loans to the Companies from banks, which he personally guaranteed. He was also granted a power of attorney to act on Rouzin's behalf in relation to (among other things) the Companies”<sup>46</sup>. On divorce, however, Essam claimed that he was the real beneficial owner after all, and his wife was merely a nominee.<sup>47</sup> The Court, ruling that his wife was the beneficial owner, said:

*“There is a public interest – a very strong public interest – in the Island being able to demonstrate that it has the ability to identify the beneficial owners of companies, or the beneficiaries under trusts.”<sup>48</sup>*

Against a scenario where the whole world moved towards Jersey’s system (instead of public registries), we would argue the following: it is far easier to verify that beneficial ownership information is *indeed* available in a public register, rather than trying to ensure that every country is spending enough resources and political capital to confirm that corporate service providers are doing their job. But, why choose between one or the other, when we can have both?

Even developing countries like Costa Rica<sup>49</sup> are establishing beneficial ownership registries where technology is applied to (preventively) cross-check the reported information against other official databases (such as to verify the accuracy of addresses, national identification numbers, etc.). Tax authorities, e.g. in Argentina<sup>50</sup> and the UK<sup>51</sup> and are also starting to use big data to process large pools of data and identify more red flags and cases that require extra checks.

## Publicity and kidnappings

This argument is an old chestnut that has long been used by tax havens in an attempt to justify their secrecy. While kidnappings and crime are real problems in many countries, the argument is without merit, for several reasons.

1. It makes no legal, moral or political sense for a rich country to try and prevent unlawful activity (kidnapping, in this case) in a poor country by facilitating trust secrecy that enables a different kind of unlawful activity (e.g. tax evasion, corruption, money laundering, etc.) in that country.
2. Why should rich western countries protect developing countries' elites from their own societies, by facilitating secretive and abusive trusts? Our willingness to protect their often looted wealth (see examples under the next section) is a major contributor to the appalling governance and conditions in their home countries in the first place. The trade-off between improved accountability and miniscule additional kidnapping risk is immensely one-sided.
3. Nobody is forcing disclosure here – wealthy folk can still keep their assets out of the public domain by holding them under their own name. If they want to access the benefits and privileges allowed by trusts, in exchange they must be accountable to society, which requires transparency. This is just like corporations, which have obligations (including transparency) that come alongside the privileges they confer.
4. Wealthy people in developing countries (where kidnappings can be a serious problem) are generally known to be wealthy, even though no beneficial ownership registries exist. Taxi drivers will usually be able to reel off a rough list of the country's ten richest people. Criminal gangs generally have ways to find out a lot more, even if just by walking around rich neighborhoods or expensive private schools. They don't need public registries.
5. Would Jersey like to provide evidence that publishing beneficial ownership details of trusts causes more kidnappings? In some Scandinavian countries, people's income is public, but they don't seem too concerned about kidnappings. In countries such as the UK where beneficial ownership information about companies is publicly available, we aren't aware of a single case where public registries have provoked any kidnapping.
6. Tax information leaks in rich countries too: nobody would dream of using it as an argument that we should prevent tax authorities in rich countries from accessing information about their citizens' wealth holdings and income.

However, sometimes the problem with publicity is not kidnappers finding out, but beneficiaries. TJN Director John Christensen recently participated in a discussion in Jersey that went along these lines:

-Charles (not his real name): Well, John, you have to understand that if a grandfather wants to leave some money to a grandchild but doesn't want that grandchild to know that they're mentioned, then surely they have a right to secrecy.



-Christensen: "Charles, how did we move from talking about trusts to talking about wills?"

A will can do the job Charles describes perfectly well. The additional indiscriminate asset protection functions that trusts provide are wholly unnecessary here.

### **Apparent "lack of evidence"<sup>52</sup>**

Another common technique used by tax havens and deniers of illicit financial flows goes like this: "civil society organizations cannot quantify exactly how much money is held offshore, or how much is related to illegal or illegitimate activities, so it's all unreliable and wrong and should be discarded".

First, the Tax Justice Network (in its Financial Secrecy Index, for instance) identifies loopholes in legal frameworks (e.g. banking secrecy, no trust registration), and that is enough for us: criminals can use these holes to remain hidden, and the whole point of the holes is that people like us can't find them. If people aren't using them now, they may do. If it exists, it is already problematic.

Second, precisely because of the lack of transparency, nobody can know how many trusts exist in the world, who their settlors and beneficiaries are, or how many assets they control, or be able to know whether either of them is involved in any illegal activity. One of the few places where statistics exist is Jersey.

Jersey finance, the official arm of the offshore centre, said: "Over £1 trillion of assets are held in Jersey trusts and other asset-holding vehicles, of which £400 billion are held in private trusts and roughly £600 billion in corporate asset vehicles.<sup>53</sup>" Anecdotally, Jersey practitioners [are on record](#) as having said that "over 90 percent of their trust business concerns discretionary trusts", which as we described are highly problematic and structurally open to abuse. The problems are large: the fact that there isn't precision is beside the point.

Third, instead of finding trusts being used by human rights activists to protect themselves against evil dictators or to protect women against "unjust Shari'a laws<sup>54</sup>", the cases we found had very different, even opposite characteristics. They involve the use of trusts (as well as other structures) in major tax evasion and grand corruption scandals (some of which we mentioned in the paper - we added more cases of "hard evidence"). We certainly do not believe that the use of trusts in all of these criminal schemes was a random choice.

-Sam and Charles Wyly: offshore trusts used to commit tax fraud by shielding more than \$1 billion in family wealth (USA)<sup>55</sup>.

-Formula 1's Bernie Ecclestone (UK): while the tax affairs of Ecclestone's family trust appear to have been settled in an agreement with UK tax authorities in 2008, after a bribery probe in Germany involving the trust, the UK tax authorities declared the settlement void and demanded £1 billion<sup>56,57</sup> in taxes and penalties.

-Art Dealer Guy Wildenstein: trust-based financial scheme described as "the longest and the most sophisticated tax fraud in contemporary France"<sup>58</sup>.

-Portillo (former President of Guatemala): embezzlement and money laundering, where the money in a Swiss bank was held by a Liechtenstein trust<sup>59</sup>.

-Asif Ali Zardari and his late wife, Benazir Bhutto (former President of Pakistan): corruption involving the Rockwood House - known in Pakistan as Surrey Palace, where the opaque sale included as purchasers three Isle of Man firms owned by two local trusts<sup>60</sup>.

-Pinochet (former Chilean dictator): money laundering where for example, Cayman's Espirito Santo Bank took a number of steps that helped to keep the existence of the Pinochet accounts secret, for example most accounts were opened in the name of offshore entities, Trilateral International Trading and the Santa Lucia Trust<sup>61</sup>.

-Montesinos (former president of Peru): corruption involving the Hudson Trust (\$4 million in assets) and the Blue Ridge Trust (\$2 million)<sup>62</sup>

-Diepreye Alamieyeseigha (Former Governor of Delta State, Nigeria): corruption, where on the advice of UBS bank he settled a Bahamiana trust—the “Salo Trust”—for the benefit of himself and his family, thanks to which he didn't declare the account in the required Nigerian Declaration of Assets<sup>63</sup>.

-Sheik Hamad bin Jassim bin Jaber al-Thani (Foreign Secretary of Qatar): a Jersey bank found strange payments by British Aerospace (BAE) into the exotically named Havana and Yaheeb trusts (the beneficiary was Sheik Hamad). Investigators believed they had evidence to link this directly to a large BAE arms contract with Qatar. But apparently after diplomatic pressure, Jersey's attorney-general announced that he was dropping the investigation saying that continuing action against Sheik Hamad was not 'in the public interest'<sup>64</sup>.

Beneath these very high-profile cases lie a much larger number of cases involving less wellknown wealthy individuals, and beneath this layer lies a much larger number of cases again, where the abuses simply don't get uncovered.

The World Bank's “Puppet Masters” Report<sup>65</sup> suggest that despite all the cases found in the report, the use of trusts for illegal purposes is likely underestimated because authorities hardly ever bother to investigate them knowing that it is very difficult to pierce their secrecy and legal structures.

### **Just a few bad apples?**

Tax havens, when they are exposed facilitating wrongdoing, typically resort to the “few bad apples” defence. Even if that were true, these egregious cases would be sufficient to warrant their registration (as well as for legal entities). Companies have to register, and in more cases provide beneficial ownership information, not because they *are* involved in illegal activities, but to prevent it. Why would trusts be treated differently?

Similarly, most airplane travellers aren't terrorists, but would it make sense to stop security screening because terrorists are “just a few bad apples?” The less security, the more terrorist activity there will be. Likewise, the more secrecy, the more the bad apples will flourish.

Another criticism suggests that since only a few small islands offer abusive trust regimes, this is hardly a “mass” problem<sup>66</sup>. This is a puzzling argument. For one thing, the very nature of tax havens is precisely to offer secrecy provisions (and tax avoidance strategies) to nonresidents, not to their tiny local populations. In fact, they often immunize or “ring-fence” themselves from the damage caused by the structures that they offer, by prohibiting, for example, “exempted entities” or “international business entities” from operating or owning assets in their territories. Even if the Cook Islands were the only place offering trusts, the fact that any person in the world could benefit from them, would reverberate around the globe. It’s not a matter of how many places offer them, but in how many countries trusts can have abusive consequences.

Not only that, but the trust legislation of many supposedly ‘onshore’ countries contain many matters of great concern. New Zealand provides a good example. As our paper mentioned (page 42):

“New Zealand provides all the advantages of traditional offshore financial centers, but is primarily recognized as a mainstream onshore financial center”<sup>67</sup>

A New Zealand government ‘Inquiry into Foreign Trust Disclosure Rules’ published in June 2016, following the Panama Papers scandal which unearthed many New Zealand trusts, concluded that New Zealand is used as a trust jurisdiction for a variety of reasons: low registration and disclosure requirements; a tax exemption regime that removes incentives or justifications for any audits; and unusual rules about determining the trust’s tax residence status, which allow arbitrage with different jurisdictions with different classification systems”. In these cases, shedding even a little light creates self-exclusion of ‘bad apples,’ as this [blog](#)<sup>68</sup> described: When Australia complained about opacity back in 2006 and New Zealand began to require special disclosure procedures where the settlor was Australian, new trust registrations declined and as of 2016, there are no trusts with Australian settlors. Then, after new disclosure obligations for all foreign trusts (not just those with Australian settlors) were put in place, only one third (3000 trusts) complied, suggesting that 67 percent of foreign trusts decided to leave New Zealand.

### **Abusive Trusts and “Trusts”**

We start by making a distinction between what is *legal*, and what is *legitimate* (in the eyes of reasonable people, or the eyes of society.) When the Duke of Westminster used a trust to avoid billions of pounds of inheritance tax in the UK,<sup>69</sup>) he was not behaving illegally. Asset protection trusts, which prevent creditors from getting what they are owed, aren’t “illegal” unless badly crafted. The key question for us is whether these rules and structures should be tolerated.

Tax havens deliberately craft trust legislation to facilitate *illegitimate* and abusive goals (“abusive” here is a broad term: in short we mean benefiting private persons at the cost of the rest of society, when this wasn’t really intended by societies’ laws). Do societies really need the following outcomes (which is precisely how tax haven trusts are promoted by tax planners):

- *“protective trusts which may provide for the diminution or termination of the rights of a beneficiary upon his becoming insolvent or upon any of his property becoming liable to the attached by his creditors,*
- *to hold shares in companies indefinitely and to permit the management of those companies to be carried out by the directors without any power of intervention being exercised by the trustees<sup>70</sup>”?*
- *“Privacy, confidentiality and anonymity: the trust instrument does not have to be filed with any public body in Jersey and information relating to the trust is not accessible by the general public<sup>71</sup>”,*
- *“no consideration should be given to any rule of foreign law. (...) the court should ignore foreign law claims based on, firstly, a lack of recognition of the trust, secondly, infringement of forced heirship rules and thirdly, a personal relationship with the settlor, for instance, such as husband and wife. (...) foreign judgements with respect to trusts shall not be enforceable”<sup>72</sup>?*

These, for us, are abusive trust laws and facilities. And any reasonable person who believes in democracy or personal responsibility ought to agree.

### **Asset protection trusts**

Asset protection trusts usually combine discretionary trusts with spendthrift provisions (see Sections 3.2, 3.3 and 4 in our trust paper). Assets have been transferred from the settlor, but not yet distributed to nor vested in the beneficiaries, and in the meantime they are in an ‘ownerless limbo’: on paper those assets do not belong to the personal assets of any of the trust parties: settlor, trustee or beneficiary. Yet the trust parties may, in some cases, use, control and enjoy those assets. A discretionary trustee could make sure that no beneficiary who owes money to creditors will get a distribution, keeping the assets out of the creditors’ hands.

As a Harvard Law Review paper<sup>73</sup> described:

*Trusts can also pass use and enjoyment of wealth on to beneficiaries while shielding the wealth from the beneficiaries' creditors and from judgments in divorce. "If you don't own it," the saying goes, "nobody can take it away from you." All of these benefits can be coupled with essentially complete control allocated according to the grantor's wishes. (...) This makes the total package effectively indistinguishable from property owned outright in terms of the benefits provided, but without important downsides property ownership entails, such as greater exposure to taxes, creditors, and vengeful ex-spouses.*

### **“Asset protection trusts can be penetrated.”**

Certainly, asset protection trusts can be penetrated in *some* circumstances – as we explained in Section 3.2.2 of our paper. The Statute of Elizabeth, or Fraudulent Conveyance provisions, mean that creditors get some protection if the settlor makes a transfer into a trust in order

to escape a debt – in this case, the courts should treat the transfer into the trust as a fraud and consider it didn't take place. Yet countries regulate this differently, and tax havens seeking to drum up abusive trust business will make it either very difficult (by shortening the statute of limitation to start a legal claim), or almost impossible (by requiring proof 'beyond reasonable doubt' that the only goal of the trust was to defraud others), to prove or invoke fraudulent transfer.

In the US, trusts are sometimes suggested as an alternative to insurance: you create your asset protection trust well in advance, before a creditor exists, so that when there's a claim it's already too late (or legally impossible) to show fraudulent transfer.<sup>74</sup> In the US these schemes have proven effective even when victims of murder, or sexual abuse against a minor, tried – unsuccessfully – to access the criminal's interest in a trust. It has also shielded assets against tax authorities<sup>75</sup>.

As one American lawyer put it: "it is widely acknowledged that one of the essential ingredients of an asset protection plan is to build obstacles that a creditor must overcome before collecting on a claim. The multiple lawsuits and related time and considerable expense that would accompany pursuit of a claim against a DAPT (Domestic Asset Protection Trust) present a considerable obstacle to creditors and with no guarantee of success" <sup>76</sup>.

Certainly, authorities have on occasion been able to pierce these trusts. For example, in the Arline Grant case<sup>77</sup> involving offshore trusts created by her husband, the U.S. Internal Revenue Service (IRS) exploited a mistake she made and showed that she had control over the trust, finally winning the case after a long legal battle. But does it make sense to have a system that will take years even for the well-resourced IRS to win a case, and then only because the defendant made a mistake?

As our critics point out, many person involved in illegal activities are unlikely to invoke the provisions of an asset protection trust if that would reveal their criminal behaviour. For illegal activities, trusts mainly offer mainly secrecy: providing the hope that they will never be discovered.

However, a Jersey case involving Sheikh Fahad Mohammed Al Sabah, the former head of the Kuwait Investment Authority in London who defrauded a Spanish company of hundreds of millions of dollars, is revealing. In theory, it should be possible to penetrate an asset protection trust by someone who's the victim of criminal activity by the settlor. Yet when the Spanish group, GT, tried to collect in Jersey on an \$800 million judgment against Fahad, it was unsuccessful because the money was in the trust and that alone seemed to be sufficient. The fact that the very same Sheikh (who embezzled the money) settled the trust, controlled it and was even a beneficiary, was deemed irrelevant. Among the arguments the court made was this extraordinary one:

*The Court found that Sheikh Fahad did not retain dominion and control, even though numerous transactions were made at Sheikh Fahad's request and no such request was ever refused. In this regard, the Court stated, "In our judgment trustees who consider a discretion in good faith ... cannot be said to be under the substantial or effective control*

*of the requesting settlor ... it cannot be sufficient simply to show that, in practice, trustees have gone along with a settlor's wishes [because this result could be] consistent with the trustees having exercised their fiduciary responsibilities properly [by] having decided that each request of the settlor was reasonable and in the interests of one or more beneficiaries."*<sup>78</sup>

Note here two things. First, this Jersey tax haven court appears to have bent over backwards to try and defend and protect what looks to any reasonable person like a sham trust: the settlor (debtor) clearly had control over the trust. The court took the worrying view that even if a trustee does exactly what the settlor instructs, this isn't settlor control, but a mere coincidence in opinions about how to manage the trust.

The second point is that the trust *still* couldn't be penetrated, even though the person guilty of embezzlement was the settlor and a beneficiary). So even a 'fraudulent conveyance' attack based on facts of embezzlement couldn't penetrate this trust. The law firm Jeffrey M. Verdon concluded:

*"Even though Sheikh Fahad had defrauded GT out of \$800 million, the Court refused to let these 'bad facts' color its judgment, especially regarding GT's public policy and unjust enrichment arguments—which I believe speaks volumes about judicial attitudes, in general, towards trust settlers in these trust-friendly jurisdictions"*<sup>79</sup>.

The argument used by the Court was that "the trust funds in question were 'clean assets,' i.e., assets that were validly contributed to the trust well before GT became a creditor of Sheikh Fahad [and thus] fraudulent transfer was not at issue"<sup>80</sup>. Yet had Sheikh Fahad not used a trust and instead held the money under his own name, it wouldn't have mattered how or when he had got it: he would have had to pay his debt with any money he held, including both 'clean' and 'embezzled' money.

This is an excellent example of what we mean by an abuse, and it clearly illustrates why our proposal to disallow 'ownerless limbo' is the right one. If the settlor has legitimate creditors, trust assets should be considered as belonging to the settlor, until there's a distribution. In this case, GT would have been able to obtain what they were owed.

Why should societies keep allowing this to happen? What is the public good being protected here? This isn't a case where an entrepreneur invests in a project that fails, but his personal assets are protected by the company's limited liability. Nor is it a case where a criminal's personal assets are held in a family business (e.g. a shell company): in that case, GT could have at least obtained the Sheikh's shareholdings in the shell company, then either sell those shares or liquidate the company to recover the assets. But no: the trust completely blocked this avenue of accountability and redress.

Again, why would a society want to protect this?

## **People who are actually vulnerable**

Trust supporters usually claim that trusts exist (as in the original conception) to protect vulnerable people. However, no law requires trust beneficiaries to be vulnerable. They may be so, but they may also be debtors or criminals who embezzled money (e.g. the Sheikh case). Besides, if countries were actually interested in protecting vulnerable people (and they should be), they should make protection of vulnerable people accessible, and not dependent on having a trust in their benefit. In other words, knowing how trusts may be abused, it's far better protection for societies to seek to protect vulnerable people in different ways. Notwithstanding this theoretical argument, we understand that many countries do not guarantee generalised protection, so vulnerable people may need *some* additional protection, even if it's just the legal patch offered by a trust.

But even so, all we are saying is that a trust's asset protection should only be ensured when for example a judge confirms that there *is* a genuinely vulnerable trust beneficiary, thus obtaining an exception from the general laws of civil responsibility. Even then, the protection should be limited to the basic needs of that vulnerable person: it should not be unlimited or indiscriminate. If this vulnerable person has legitimate creditors, all other trust assets (those *not* needed to guarantee his or her basic needs) would enjoy the normal protections of private property but not of an impenetrable asset protection trust.

## **It's the defenders of trusts who are the anti-capitalists**

Capitalism involves enjoying and protecting one's private property – but also giving it up as necessary when debts are owed. That's fine with us. We also aren't questioning the basic concept of companies having limited liability, which has evolved as a central institution of capitalism. (Limited liability can lead to unfair situations, which need addressing, but that's out of the scope of this discussion.)

One of our core criticisms of trusts, such as asset protection trusts, is that they can confer indiscriminate immunity from liability, as the Sheikh's case above shows. This goes way beyond private property and limited liability. You can carefully set up a trust, put your assets in it ahead of time (when no creditors exist), then a few years later rack up debts – then skip out on those debts. Users can enjoy their assets without paying for the consequences of their actions. This goes against some of the most fundamental principles of capitalism. It is the defenders of trusts who are, in a sense, the anti-capitalists.

In the corporate world, trusts have been used to isolate assets from banks' balance sheets, again severing or reducing lines of accountability, and enabling reckless behaviour at taxpayers' expense. This kind of activity also poses great problems for capitalism.

Our proposal regarding access to trust assets would not necessarily apply to all trusts, and we are not asking for trusts to be abolished: they have many great uses. For example, for unit trusts (where beneficiaries already have units, reachable by their personal creditors) or in a typical trust where beneficiaries' interests are not discretionary but already vested (and already reachable by their personal creditors), we aren't suggesting any change. It is only the

“ownerless” assets of asset protection trusts that need a fix, and again, only if there are creditors needing payment.

### **Wealth concentration and escaping tax**

Private property already allows wealth concentration. We don't object to that *per se*, though at current levels of inequality – with eight people owning as many assets as half of the world's population<sup>81</sup> -- it generates massive societal problems. Their donations to charities and good causes hardly dent the problems.

For example the Guardian<sup>82</sup> described that in the UK, “the lists of major aristocratic landowners in 1872 and in 2001 remain remarkably similar. Some of the oldest families have survived in the rudest financial health. In one analysis, the aristocratic descendants of the Plantagenet kings [who ruled England uninterrupted from 1154 to 1399<sup>83</sup>] were worth £4bn in 2001, owning 700,000 acres”. The same article added “the primary means of squirrelling away substantial assets so as to preserve them intact and deliver a healthy income for aristocratic descendants without bothering the taxman is the trust. Countless peers with major landholdings and stately homes have put all their assets into discretionary trusts, thereby evading both public scrutiny and inheritance tax”.

We object to people enjoying their wealth without having to make that wealth available to legitimate creditors. We also object to people escaping paying taxes: inheritance taxes, for instance, which are often escaped via trusts, in ways that aren't necessarily illegal (or too hard to prove in court that it's illegal.)

Why would countries have inheritance taxes, then allow these trust facilities for mostly wealthy people to avoid those taxes? Philanthropy is helpful, in principle, but it is woefully insufficient and should not replace a fair tax system.

### **Tax “avoidance,” tax cheating**

The widely used term “tax avoidance” is highly problematic.

By definition, tax avoidance is not illegal, though by definition it also involves breaking the *spirit* of the law (as opposed to tax evasion, which is illegal, by definition).

Next, there is a difference between what is *legal* and what is *legitimate* in the eyes of society. Even if a tax scheme falls demonstrably within the realm of legality, that doesn't make it legitimate. Legitimacy hinges partly on legality, but also on economic questions and on democratic and political questions. Does this tax haven scheme, or this trust, have the effect of engineering an unproductive transfer of wealth away from ordinary people towards a powerful multinational or towards a billionaire? Reasonable people would regard these schemes as illegitimate, whatever their legality.

A red flag in this area is the cost and complexity of a tax scheme. If tax minimisation were not only legal, but also legitimate (moral or acceptable) and thus good for society, why would the law make it so difficult and expensive to achieve it, and require lawyers and accountants to create?



Furthermore, some laws themselves aren't necessarily legitimate. To take an extreme example, many Nazi laws, or racial laws under Apartheid, rendered certain activities *legal* but certainly not legitimate. Again, economic, political and democratic considerations must be used. One of the basic arguments of our paper is that trust laws around the world have evolved into something illegitimate. If societies really wanted to allow trusts to avoid inheritance tax, why have inheritance tax in the first place? In that case, it shouldn't be called 'inheritance tax', but rather 'tax on the absence of trust creation'.

Another important red flag here is public outrage: such as with cases involving major multinational companies like Starbucks, Facebook, Google, using tax haven schemes, or with the Duke of Westminster, avoiding taxes through a trust. A [public survey](#) by Christian Aid in 2014 found, for instance, that when shown the statement "Tax avoidance by large companies is morally wrong, even if it is legal," 85 percent of people agreed, while only six percent disagreed.

Does this mean that everyone should be paying as much taxes as possible? No. The problem with tax avoidance is not "paying little tax instead of a lot of tax". The problem is engaging in conduct or achieving an outcome that is supposed to be subject to tax (e.g. selling a house, inheriting assets and using them, having an income, etc.), without paying the corresponding tax. To put it bluntly, if there is a tax on cigarettes and a man decides not to smoke, he isn't avoiding the cigarette tax, or at least not in a questionable way. He is not engaging in the taxable conduct or outcome. But if the man smokes the cigarette but hires expensive lawyers, and incorporates offshore entities or creates a trust to pretend on paper that he is not smoking, when in practice or in effect he *is* smoking, that is questionable tax avoidance.

To summarise: multinational corporations avoid taxes, typically using tax havens, and wealthy individuals avoid their taxes, typically using trusts<sup>84</sup>. These activities are sometimes legal, sometimes not, and often of indeterminate legality. Our argument is that these activities are never legitimate. If countries were coherent, they would either get rid of all taxes (income tax, inheritance tax, etc.); or if countries are to keep those taxes, they should stop allowing multinational companies and wealthy individuals to avoid taxes that everyone else has to pay, only because they can afford expensive lawyers to create legal vehicles and schemes, including trusts.

### **Forced heirship**

Forced heirship rules in many countries were created to protect a person's family (spouse and children), even if the consequences weren't always fair (such as extramarital children).

We don't support or oppose forced heirship. However, if societies decided to have them (including Jersey), and keep them (e.g. in Argentina this was recently modified, but it is still applicable), the idea of tax havens offering non-residents the option to violate foreign laws is no cause for celebration. Besides, tax haven trusts generally aren't used to protect women and children, but instead in divorce cases typically to protect the wealthy husband who wants to keep assets away from his former wife<sup>85</sup>. They are usually weapons of injustice.

## Sham Trusts

A technical note on the meaning of sham trusts. Note 43 (page 32) of our trust paper acknowledges that in the UK, and apparently in Jersey too, “sham” has a particular meaning: when the settlor and trustee don’t intend to operate according to what it is written in the trust deed. The concept we use, however, is much closer to the U.S. concept<sup>86</sup> used for tax purposes, related to the substance test: if the settlor is a beneficiary and/or indirectly controls how the trust is administered or who gets a distribution, we cannot say that a trust exists – because how is that any different in practice from the settlor owning the assets directly?

<sup>1</sup><http://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB2017.pdf>; 21.8.2017.

<sup>2</sup> <https://academic.oup.com/tandt/article-abstract/23/4/363/3811980/Trusts-Weapons-of-Mass-Injustice-or-Instruments-of?redirectedFrom=fulltext>; 21.8.2017.

<sup>3</sup> <https://academic.oup.com/tandt/article-abstract/doi/10.1093/tandt/ttx098/4004853/Review-by-Jersey-Finance-of-Trusts-Weapons-of-Mass?redirectedFrom=fulltext>; 21.8.2017.

<sup>4</sup> Express trusts are those where the settlor has the express intention to create the trust, and is different from trusts inferred by the law from the conduct of parties.

<sup>5</sup>See FATF Recommendation 24 and its Interpretative Note: [http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf); 21.8.2017.

<sup>6</sup> Interpretative Note to FATF Recommendation 24 states: “All companies created in a country should be registered in a company registry... The minimum basic information to be obtained and recorded by a company should be: (a) company name, proof of incorporation, legal form and status, the address of the registered office, basic regulating powers (e.g. memorandum & articles of association), a list of directors; and (b) a register of its shareholders or members, containing the names of the shareholders and members and number of shares held by each shareholder and categories of shares (including the nature of the associated voting rights). The company registry should record all the basic information set out in paragraph 4(a) above. The company should maintain the basic information set out in paragraph 4(b) within the country, either at its registered office or at another location notified to the company registry” (page 86). As for other legal entities: “In relation to foundations, Anstalt, and limited liability partnerships, countries should take similar measures and impose similar requirements, as those required for companies, taking into account their different forms and structures” (page 89). The [2014 FATF Guidelines on Beneficial Ownership](#) specify “This information held by the company registry should be made publicly available” (page 13).

<sup>7</sup> Other than EU countries: Brazil, Costa Rica, Ukraine, Uruguay and plans in many other countries (Argentina, Ghana, Mexico).

<sup>8</sup> For example, the UK, Denmark, Ukraine.

<sup>9</sup> Idem Note 2.

<sup>10</sup> [www.financialsecrecyindex.com](http://www.financialsecrecyindex.com); 21.8.2017.

<sup>11</sup> For example: [https://www.taxjustice.net/wp-content/uploads/2013/04/TJN2016\\_BO-EUAMLD-FATF-Part1.pdf](https://www.taxjustice.net/wp-content/uploads/2013/04/TJN2016_BO-EUAMLD-FATF-Part1.pdf); 21.8.2017, [https://www.taxjustice.net/wp-content/uploads/2017/04/TJN2017\\_BO-Registry-ChecklistGuidelinesApr.pdf](https://www.taxjustice.net/wp-content/uploads/2017/04/TJN2017_BO-Registry-ChecklistGuidelinesApr.pdf); 21.8.2017 or <https://www.taxjustice.net/wp-content/uploads/2017/06/Technology-and-online-beneficialownership-registries-June-1-1.pdf>; 21.8.2017.

<sup>12</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL\\_2015\\_141\\_R\\_0003&from=ES](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_141_R_0003&from=ES); 21.8.2017.

<sup>13</sup> Jersey Finance: “the Tax Justice Network paper makes a far from convincing case for regulating trusts through measures that are in many respects unworkable and disproportionate. Its paper lacks the hard data needed to justify such rules, apart from select footnoted figures and anecdotes. Its examples of abuses are few and often seem to relate to cases that reflect the failures of the US and other tax authorities (...) The adverse consequences of a trust, according to the paper, is that it ‘worsens inequality, facilitates endless crimes and market abuses, and undermines democracy’.<sup>27</sup> Examples of those endless crimes and market abuses are largely absent from its pages, and some could be dealt with by enforcing existing laws”

<sup>14</sup> Jersey Finance: “The Tax Justice Network paper wants to effectively abolish trusts in order to deal with the problems that it says they create. But this review has shown that those problems are greatly exaggerated, and that trusts bring considerable benefits to individuals and society all around the world. The measures which the paper advocates would damage the interests of people whose lives have benefitted enormously from the actions of individuals who create trusts to carry out legitimate functions which can never be replaced effectively by government measures.”

<sup>15</sup> Jersey Finance: “the report says that it would be better for taxpayers to support the vulnerable in ways that are unlikely to be as effective as trusts which enable parents, relatives, or others to bear the burden of providing appropriately tailored support from their own means”

<sup>16</sup> Jersey Finance: “the Tax Justice Network paper advocates some draconian measures that would make it difficult, if not impossible, to use trusts for entirely legitimate purposes”

<sup>17</sup> Jersey Finance: “It is not clear whether the paper would rule out all or most commercial trusts”

<sup>18</sup> Jersey Finance “the paper’s charge that trusts ‘undermine democracies and economic systems’ 31 raises interesting questions about what approach the Tax Justice Network would favour. Capitalism depends on the freedom of people—wealthy and not so wealthy—to own assets and invest their money legitimately. In the absence of that freedom, investment must come from government sources with all their faults”

<sup>19</sup> Jersey Finance: “Although the secrecy involved in trusts is described in the paper as one of the main dangers of their use, there is little analysis of the consequences of such secrecy”

<sup>20</sup> Jersey Finance: “The requirement that all persons connected to a trust should be registered is unworkable, disproportionate, costly, and burdensome. As outlined earlier in this review, the classes of beneficiary are difficult to define. There are unborn beneficiaries and beneficiaries who may not even be conceived (from second marriages, for example). For charitable trusts and purpose trusts, the beneficiaries may simply be unknown”

<sup>21</sup> Jersey Finance: “Jersey is also strongly opposed to the paper’s third proposal of making such registers public, on the grounds of an individual’s right to confidentiality on financial matters. If made public, wealthy individuals in many parts of the world could be exposed to undue risk of extortion or even kidnapping. In the case of public information about minors, those risks may be even greater and it is not clear what such disclosure would add.”

<sup>22</sup> Jersey Finance: “there are serious problems about the accuracy of the information held on central registers unless it is subject to robust verification. The UK Government’s register of beneficial ownership for UK incorporated companies is based on self-reporting, for example. People misusing companies for the purposes of criminal activity are unlikely to comply with the requirements of such an approach. And at a time when public spending is under pressure, the capacity of central registry staff to verify the information will be very limited. (...) Research commissioned by Jersey Finance has shown that the central register model used by Jersey since 1989 can be much more effective in recording accurate information than self-reporting. Professor of International Relations at the University of Cambridge, Jason Sharman, found that to be effective, a centralized registry needs its data to be verified by licensed corporate service providers incentivized to ensure that it is accurate.<sup>26</sup> In Jersey, that verification is carried out by corporate service providers who are subject to strict regulation requiring them to know and robustly monitor the ultimate owners of every company and trust registered on the Island.”

<sup>23</sup> Trust & Trustees Editorial: “The second point which needs to be noted is that property nowadays is almost inevitably held through companies, rather than by trustees directly. Increasingly, disclosure of beneficial interests in companies is required as a matter of law, an entirely sensible and just provision given the protection afforded

- by limited liability. So a requirement of disclosure of ultimate beneficial ownership of a company will necessarily involve disclosure of trust arrangements”
- <sup>24</sup> Trust & Trustees Editorial: “It is only the case of assets held not through companies but by the trustees directly, and where those assets are held for the benefit of individuals, in circumstances where it is essential to the arrangement that the individuals have confidence that resort to a court will protect their rights, that the Report’s proposals could have any practical effect. Such cases must be rare, and the starting point for any rational discussion would be to identify where they exist and to ascertain whether or not they might more appropriately dealt with through existing measures such as anti-money laundering and other anti-abuse measures, including Common Reporting Standards and the like”
- <sup>25</sup> Jersey Finance: “It is sadly the case that some people and organizations may misuse trusts, as they will with any other structure including companies, partnerships, charities and small businesses”.
- <sup>26</sup> Jersey Finance: “The paper also appears to suggest that if powers are reserved to the settlor, a sham trust exists. However, many jurisdictions permit settlors to reserve some powers without negating the construction of a trust. This maintains flexibility for a settlor compared with outright gifts—if circumstances change, settlors can make appropriate changes. Under Jersey Law, there is a prescribed range of powers that can be reserved to a settlor which would provide the settlor with the flexibility to make such changes: for example, the power to vary or amend the terms of the trust or its governing law, to appoint or remove trustees or beneficiaries or to give directions as to the assets of the trust, including who is to manage or advise upon them and what is to be bought or sold”
- <sup>27</sup> Jersey Finance: “The paper gives a lengthy list of examples of the characteristics of sham trusts, but this does not reflect the legal definition of a sham trust. In Jersey, this says that a sham trust is created when there is a common intention between the settlor and the trustee that the true position is otherwise than that set out in the trust instrument. The trust can be set aside where this is so, which rules out many of examples in the paper’s list, such as the settlor being the unique beneficiary or retaining control of the trust’s assets”.
- <sup>28</sup> Jersey Finance: “The Tax Justice Network paper includes a list of eight abusive regimes around the world which it says permit sham trusts. They include the tiny Cook Islands in the South Pacific (population 21,000) and Nevis in the Caribbean (population 11,100). The US is on the list because of the trust regimes in Alaska, Delaware, Nevada, and South Dakota. The shortness of the list, the absence of data on the scale of their alleged abuses, and the lack of examples of the potentially adverse serious consequences suggests that sham trusts are hardly weapons of mass injustice”.
- <sup>29</sup> Trust & Trustees Editorial: “The abuses that are anecdotally touched on trusts are drawn from a world which has already ceased to exist or cases where effective enforcement action has been taken to combat the abuse. One example is the case of Charles and Sam Wyly”
- <sup>30</sup> Jersey Finance: “But the assets are not entirely protected from creditors: as is the case with most jurisdictions including Jersey, if assets are transferred to trustees—in whole or part—with intent to defraud creditors, the trust may be set aside. The same is true if assets are transferred with the intention of defrauding future creditors to whom the settlor is not currently indebted but knows that future liabilities will not be met as a result”.
- <sup>31</sup> Trust & Trustees Editorial: “The Report gives much attention to the so-called asset protection trusts but contains a very little analysis of the anti-abuse provisions already available in trust jurisdictions. Based on the tried and tested Statute of Elizabeth, a disposition will be set aside if there was an intent to defraud. Given that a transfer to a trustee will necessarily be at an undervalue, and will be treated as one of the badges of fraud, proof of intention to defraud creditors will usually not be difficult where it in fact exists—indeed, transfer to a trust from which the settlor can benefit logically should be more open to attack than an absolute transfer to a third party without notice for consideration
- <sup>32</sup> Jersey Finance: “A good example of the legitimate uses of trusts is the avoidance of the forced heirship provisions which apply in jurisdictions with rigid religious or legal inheritance laws. They may specify that assets must be left, in whole or part, to particular individuals such as the oldest male child, or prohibit their distribution to female children. Assets held in trust can be distributed as the settlor desires, a practice more relevant in modern societies where the nuclear family is not the norm and family structures are often complicated”

<sup>33</sup> Trust & Trustees Editorial: “Many such forced heirship provisions are debatable if not controversial. From a western perspective, Shari’a rules which provide that female heirs can only receive one-half of what male heirs receive seem unjust. More broadly, those accustomed to the common-law notion of freedom of testamentary disposition may find the constraints of forced heirship unattractive if not preposterous. Certainly forced heirship regimes do little to contribute to national prosperity, a matter to which we shall return. In a similar vein, matrimonial property allocations are frequently matters of debate and by no means admit of only one possible answer as to what is and appropriate approach. It is not immediately clear why a country should be required to defer to the laws of others, rather than apply its own law, in such cases. A situation where the law applied is not that of the jurisdiction generally, but a special law applicable to international structures, is in a different category”

<sup>34</sup> Trust & Trustees Editorial: “To place the Duke of Westminster in the same category is surprising and muddles tax avoidance and tax evasion. The tax treatment of discretionary trusts is a matter for the UK parliament. Compliance with that legislation should not be the subject of uninformed criticism”

<sup>35</sup> Jersey Finance: “Another accusation made by the paper is that family trusts involved in wealth concentration seem to offer no social benefits. This claim can easily be contradicted by the activities of the very many philanthropists who have used trusts, foundations, and similar structures to fund medical research, education, health services, housing, and international development at home and abroad—sometimes for centuries (...) From the Victorian era, these include Sir Henry Wellcome, George Peabody, and Andrew Carnegie— the Wellcome Trust is now worth more than £20 billion and is the world’s largest medical research charity funding research into human and animal health. In the modern era, the Sainsbury family trusts, the Bill & Melinda Gates Foundation, and Germany’s Robert Bosch Foundation finance socially beneficial work in many sectors that governments cannot afford to fund.”

<sup>36</sup>For example:

<https://forms.justice.govt.nz/search/Documents/pdf/jdo/13/alfresco/service/api/node/content/workspace/SpaceSStore/f019e32c-6c3e-4f82-817b-25db0fbe2cb2/f019e32c-6c3e-4f82-817b-25db0fbe2cb2.pdf>; 21.8.2017.

<sup>37</sup> “That concept of ‘other legal persons’ extends to an entity which, under national law, possesses rights and obligations that enable it to act in its own right within the legal order concerned, notwithstanding the absence of a particular legal form, and which is profit-making. In this case, it is apparent from the documents submitted to the Court that, in the first place, under the national law concerned, the assets placed in trust form a separate fund of property, distinct from the property of the trustees, and that the trustees have the right and the obligation to manage those assets and to dispose of them in accordance with the conditions laid down in the trust instrument and in national law. (...) The activity of the trustees in relation to the trust property and the management of its assets are therefore inextricably linked to the trust itself and, therefore, the trust and its trustees constitute an indivisible whole. That being the case, such a trust should be considered to be an entity which, under national law, possesses rights and obligations that enable it to act as such within the legal order concerned. It follows that an entity such as a trust which, under national law, possesses rights and obligations that enable it to act in its own right, and which actually carries on an economic activity, may rely on freedom of establishment”, available in: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d6b09327e8c20a4f29979c99caab72bb5f.e34KaxiLc3qMb40Rch0SaxyMbx90?text=&docid=194425&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=507375>; 21.8.2017.

<sup>38</sup>Page 35: <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficialownership.pdf>; 21.8.2017.

<sup>39</sup> See for example: <https://www.taxjustice.net/wp-content/uploads/2013/04/TJN-141124-CRS-AIE-End-of-BankingSecrecy.pdf>; 21.8.2017 and <https://www.taxjustice.net/wp-content/uploads/2013/04/OECD-CRS-ImplementationHandbook-FINAL.pdf>; 21.8.2017. As regards the CRS not requiring all trust disclosure, there are three main points. Briefly: i) the CRS covers only financial account information, so any hard asset (e.g. gold, art, cash) held in a safe deposit box or a freeport, or real estate, luxury cars, etc. will not be covered; ii) trusts must identify beneficial owners only if they are considered financial institutions or, as account holders, if they are considered passive entities (income from royalties, interests, etc.). In other cases, they don’t. iii) not all countries, especially developing countries, will be able to receive automatic exchanges from financial centres.

- <sup>40</sup><https://www.taxjustice.net/2017/05/30/anti-money-laundering-requirements-solve-fake-residency-concerns/>; 21.8.2017.
- <sup>41</sup> Id. Note 3.
- <sup>42</sup> For example: <http://sterlingoffshore.com/foundations/private-foundations-vs-offshore-trusts/>; 21.8.2017
- <sup>43</sup> See Art. 3.3 and Art. 21 of the new beneficial ownership law in Germany: <http://dip21.bundestag.de/dip21/btd/18/115/1811555.pdf>; 21.8.2017.
- <sup>44</sup> [https://uboregister.egov.gi/Downloads/Ubo2\\_Trust.pdf](https://uboregister.egov.gi/Downloads/Ubo2_Trust.pdf); 21.8.2017.
- <sup>45</sup> [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf); 21.8.2017.
- <sup>46</sup> <https://www.ogier.com/publications/arrangements-to-deceive-as-to-beneficial-ownership-will-not-be-upheld-altamimi-v-al-charmaa-2017>, 18.8.2017.
- <sup>47</sup> <https://www.ogier.com/publications/arrangements-to-deceive-as-to-beneficial-ownership-will-not-be-upheld-altamimi-v-al-charmaa-2017>, 18.8.2017.
- <sup>48</sup> Idem.
- <sup>49</sup> During the Global Forum's beneficial ownership seminar in Mexico City, September 12, 2017, Costa Rica presented their electronic platform for beneficial ownership registration and all the cross-checks that will take place. <sup>50</sup><http://blogs.perfil.com/contadorlocane/2017/07/14/gran-hermano-a-full-que-es-y-como-funciona-el-big-dataanalytics-de-la-afip/>; 21.8.2017.
- <sup>51</sup><http://www.telegraph.co.uk/tax/return/taxman-unleashes-snooper-computer-information-does-have/>; 21.8.2017.
- <sup>52</sup> Id. Note 2 and 3 (in Note 3 referred to as "hard data")
- <sup>53</sup> From Evaluating the economic, financial and fiscal linkages between Jersey and the United Kingdom, A report by Capital Economics for Jersey Finance, Oct 2016: <https://www.jerseyfinance.je/media/PDFResearch/JERSEY'S%20VALUE%20TO%20BRITAIN%20-%20SUMMARY%20REPORT.pdf>; 21.8.2017.
- <sup>54</sup> Id. Note 2: "From a western perspective, Shari'a rules which provide that female heirs can only receive one-half of what male heirs receive seem unjust".
- <sup>55</sup> <http://www.wsj.com/articles/judge-says-businessman-sam-wyly-hid-wealth-offshore-1462976141>, 18.8.2017
- <sup>56</sup> <http://www.telegraph.co.uk/news/uknews/law-and-order/11621126/Ecclestone-fights-1-billion-tax-bill.html>; 21.8.2017.
- <sup>57</sup> <https://www.ft.com/content/24b3e88c-e4b3-11e6-8405-9e5580d6e5fb>; 21.8.2017.
- <sup>58</sup> [https://www.nytimes.com/2016/10/21/arts/design/wildenstein-tax-trial-ends-with-art-dealers-fate-in-tribunalshands.html?\\_r=2](https://www.nytimes.com/2016/10/21/arts/design/wildenstein-tax-trial-ends-with-art-dealers-fate-in-tribunalshands.html?_r=2), 18.8.2017.
- <sup>59</sup> <http://star.worldbank.org/corruption-cases/node/18456>, 18.8.2017.
- <sup>60</sup> <https://www.theguardian.com/world/2008/sep/22/pakistan>, 18.8.2017
- <sup>61</sup> [https://www.google.com.ar/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwitlJ3jzN\\_VAhXFpAKHbO7APEQFggmMAA&url=https%3A%2F%2Fwww.hsgac.senate.gov%2Fdownload%2Fsupplementalreport\\_us-accounts-used-by-augusto-pinochet-march-2005&usg=AFQjCNFhR6fUq21RzZS0EMTKzcoceyXOag](https://www.google.com.ar/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwitlJ3jzN_VAhXFpAKHbO7APEQFggmMAA&url=https%3A%2F%2Fwww.hsgac.senate.gov%2Fdownload%2Fsupplementalreport_us-accounts-used-by-augusto-pinochet-march-2005&usg=AFQjCNFhR6fUq21RzZS0EMTKzcoceyXOag), 18.8.2017
- <sup>62</sup><http://larepublica.pe/17-10-2010/montesinos-pretendio-retirar-dinero-de-sus-fideicomisos-en-luxemburgo>, 18.8.2017
- <sup>63</sup> <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf>, 18.8.2017.
- <sup>64</sup> <https://www.theguardian.com/politics/2002/jun/02/uk.armstrade>, 18.8.2017
- <sup>65</sup> Id. Note 1, page 12.
- <sup>66</sup> Id. Note 3, page 5.

- <sup>67</sup><http://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB2017.pdf>; 21.8.2017 (page 42)
- <sup>68</sup> <https://www.taxjustice.net/2017/07/13/post-panama-papers-sunlight-new-zealand-trusts/>; 21.8.2017.
- <sup>69</sup> Id. Note 1, page 31.
- <sup>70</sup> <http://www.misickstanbrook.tc/turks-caicos-islands-enacts-trusts-ordinance/>, 18.8.2017
- <sup>71</sup> [https://www.careyolsen.com/sites/default/files/CO\\_JSY\\_T%26PW\\_An%20overview%20of%20the%20types%20and%20uses%20of%20Jersey%20law%20trusts\\_3.17\\_0.pdf](https://www.careyolsen.com/sites/default/files/CO_JSY_T%26PW_An%20overview%20of%20the%20types%20and%20uses%20of%20Jersey%20law%20trusts_3.17_0.pdf), 18.8.2017
- <sup>72</sup> <https://www.ogier.com/publications/the-use-of-trusts-in-jersey>, 18.8.2017.
- <sup>73</sup> “Dynasty Trusts and the Rule against Perpetuities”, Harvard Law Review, Vol. 116, No. 8 (Jun., 2003), pp. 2588-2609
- <sup>74</sup> <http://www.yalelawjournal.org/article/jurisdictional-competition-for-trust-funds-an-empirical-analysis-of-perpetuities-and-taxes>; 21.8.2017.
- <sup>75</sup> Id. Note 1, pages 56-58.
- <sup>76</sup> Bove, A.A. 2017 - Asset Protection in the United States: What's the Attraction? in IFC Review 2017/18 The Definitive Guide to Global Wealth Management and International Financial Centres <sup>77</sup> Id. Note 1, pages 56-58.
- <sup>78</sup> <http://jmvlaw.com/recent-decision-concerning-asset-protection-trusts/>; 21.8.2017. <sup>79</sup>
- Idem.
- <sup>80</sup> <http://jmvlaw.com/recent-decision-concerning-asset-protection-trusts/>; 21.8.2017.
- <sup>81</sup> <https://www.oxfam.org/en/pressroom/pressreleases/2017-01-16/just-8-men-own-same-wealth-half-world>; 21.8.2017.
- <sup>82</sup> <https://www.theguardian.com/news/2017/sep/07/how-the-aristocracy-preserved-their-power>; 21.8.2017.
- <sup>83</sup> <https://www.theguardian.com/lifeandstyle/2011/aug/13/great-dynasties-plantagenets>; 21.8.2017.
- <sup>84</sup> For example, a recent article started describing “Many British citizens who moved overseas a few decades or more ago were commonly advised to move their assets into discretionary trusts – mostly in Gibraltar, BVI’s or Bahamas - with little thought for UK tax liabilities. This was understood as a sophisticated manner to shelter assets from UK inheritance tax or even to avoid income tax and capital gains tax on their earnings” (<https://www.lexology.com/library/detail.aspx?g=19355385-be68-431a-b34e-a6cb63a5de74>; 21.8.2017.).
- <sup>85</sup> <https://www.nytimes.com/2016/11/30/magazine/how-to-hide-400-million.html>; 21.8.2017.
- <sup>86</sup> <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-law-andarguments-section-i>; 21.8.2017.