



## **Drilling down to the real owners – Part 2**

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### **Don't forget the Trust: Amendments Needed in FATF's Recommendations and in EU's AML Directive**

#### **Abstract**

This report analyses the current definitions of beneficial ownership of trusts in the global context (based on the FATF Recommendations on Anti-Money Laundering) and the registration requirements in the European Union (based on the EU Fourth Anti-Money Laundering Directive). It identifies loopholes in both regulations and suggests amendments to address them, in relation to: the scope of covered trusts, the registration authority, the effects of such registration, the conditions that may trigger registration (i.e. the governing law of the trust, the tax consequences, having a resident trustee, the number or professional status of the trustee, location of trust assets, etc.). The report explains the complexities of trusts and discusses how their proper registration can be ensured. It considers the potential number and roles of related parties within the ownership structure of trusts, the choice of governing law (between domestic and foreign), the available types of trusts and how they can be used for legitimate purposes as well as be abused to commit financial crimes (tax evasion, money laundering, defraud creditors, etc.). The Annex of the report offers an empirical overview, classification and detailed description of the scope of trust registration in more than 100 jurisdictions based on the Financial Secrecy Index 2015 Edition.

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## 1. Introduction

The Fourth EU Directive on anti-money laundering (2015) has comprehensive requirements on beneficial ownership registration for companies, although our [Part 1 report](#) identified some [loopholes](#) that may prevent its effectiveness. With regard to trusts, however, not only does the same EU Directive also have loopholes, but – much more problematic – **it does not even cover all trusts nor require disclosure of their information**, allegedly on account of [opposition from the U.K.](#) Not surprisingly, the UK 2015 law on beneficial ownership registration (partially copied by the [new U.S. rules](#) for customer due diligence for financial institutions) are also ineffective regarding trusts. The 2012 FATF Recommendations contain better provisions, although they should also be improved.

This lack of comprehensive and effective registration requirements **may mean that trusts become the preferred choice by tax dodgers, corrupt officials or money launderers** trying to avoid the new transparency measures applicable to companies. However, this is not just a hypothetical futuristic scenario. Trusts are already being abused for criminal activities. Their apparent “innocence” (they are hardly mentioned in news about corruption or other scandals) is the result of how effective they are in hiding the identity of wrongdoers, which makes it very hard for authorities to even try and investigate them. As the 2011 [World Bank Puppet Masters](#) report on legal vehicles and corruption says:

“Investigators interviewed as part of this study argued that the grand corruption investigations in our database failed to capture the true extent to which trusts are used. Trusts, they said, prove such a hurdle to investigation, prosecution (or civil judgment), and asset recovery that they are seldom prioritized in corruption investigations [...] Investigators and prosecutors tend not to bring charges against trusts, because of the difficulty in proving their role in the crime. Instead, they prefer to concentrate on more firmly established aspects of the case. As a result, even if trusts holding illicit assets may well have been used in a given case, they may not actually be mentioned in formal charges and court documents, and consequently their misuse goes underreported” (WB 2011: 45-46).

Trusts also appear in the recent Panama Papers. A [simple search](#) for the word ‘trust’ in the leaked documents published by the ICIJ shows more than 1600 results.

This report will proceed by introducing trusts in chapter 2, explaining what trusts are and how they can be abused. Chapter 3 portrays the current legal framework in the FATF and the EU anti-money laundering Directive, and chapter 4 analyses its weaknesses. Chapter 5 provides a conceptual proposal for addressing the slippery nature of trusts, while chapter 6 offers

concrete proposed language for amending both the FATF recommendations and the EU Directive. The Annex describes global cases of trusts registration in 102 jurisdictions based on the 2015 version of the Financial Secrecy Index.

## 2. Why are trusts special?

Trusts are usually considered legal arrangements to differentiate them from companies which are “legal persons”<sup>1</sup> (an entity that needs to incorporate and then may have rights and obligations under its own name, as if it were a natural person).

Trusts are usually associated in the popular imagination with family matters (a father putting assets into a trust to determine how assets will be distributed upon his death, or to ensure that the trustee managing the trust will take care of minors or incapable family members if the parent is unable to do so). However, trusts may also be involved in commercial undertakings such as for structuring of portfolio investments (pension funds for employees, mutual funds, investments in real estate through real estate investment trusts or REITs) and for asset securitization<sup>2</sup>. In some countries like Argentina, trusts are chosen when developing an apartment building or other real estate venues. In fact, trusts can be used to run a business like a company<sup>3</sup>. Furthermore, trusts have the potential to cause greater damage to society than companies do, for example when used to protect assets from legitimate personal creditors<sup>4</sup>. There is thus no robust

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<sup>1</sup> The 2012 FATF Recommendations’ Glossary explains: “Legal persons refers to any entities other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property. This can include companies, bodies corporate, foundations, anstalt, partnerships, or associations and other relevantly similar entities” while “Legal arrangements refers to express trusts or other similar legal arrangements” (page 118-119). This difference, that in the legal arrangement it is – generally, but not always – the trustee who engages in business relationships on behalf of the trust (but not the trust directly) is also described under Footnote 27 of the FATF’s Interpretative Note to Recommendation 10: “In these Recommendations references to legal arrangements such as trusts (or other similar arrangements) being the customer of a financial institution or DNFBP or carrying out a transaction, refers to situations where a natural or legal person that is the trustee establishes the business relationship or carries out the transaction on the behalf of the beneficiaries or according to the terms of the trust” (page 58).

<sup>2</sup> Langbein, “The Secret Life of the Trust: The Trust as an Instrument of Commerce”, *The Yale Law Journal*, Vol. 107, No. 1 (Oct., 1997), pp. 168-171.

<sup>3</sup> For example, the Delaware business trust statute allows a trust to be organized with all the attributes of a standard business corporation (Mattei, Ugu, “The Functions of Trust Law: a Comparative Legal and Economic Analysis”, University of California, Hastings College of Law, 1998). In addition, the reason why corporations (instead of trusts) are used for some types of business could simply be related to inertia (ibid.), although this was not the case in “the late nineteenth century, when business trusts were used as the holding companies through which industrial oligopolies and monopolies were assembled-- hence giving us the Sherman “Antitrust” Act of 1890” (ibid.).

<sup>4</sup> Since trusts divide ownership in such a way that assets may be in a limbo (ownerless) they may achieve a protection from creditors which is even greater than corporate limited liability. That is why trusts are usually abused for asset protection to defraud creditors and also for wealth concentration.

argument why trusts (and similar arrangements like foundations) should benefit from no effective registration of their beneficial owners.

While the use of trusts and their privacy are usually justified by invoking legitimate family matters (like in the example mentioned above of a father trying to protect minors or incapable persons), **trust structures and their attached secrecy (given the lack of proper registration) may be exploited for several other situations, including tax avoidance<sup>5</sup>, tax evasion<sup>6</sup>, money laundering, hiding proceeds of corruption<sup>7</sup> or defrauding creditors<sup>8</sup>**. These abuses are facilitated, amongst others, through very peculiar features of all or certain types of trusts.

## 2.1 Trusts' related parties (or roles)

Trusts are complex legal arrangements that divide ownership of assets into different "roles" or "parties". These roles usually — but not always — involve different people (natural persons or entities), like in the example above.

The original owner(s) of assets, who transfer them into the trust are called the "settlor(s)". Assets in the trust are managed (or simply held) by the "trustee(s)".

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<sup>5</sup> Trusts can be used to avoid inheritance tax, since all the children and grandchildren, etc. of a rich person may keep using an estate (as beneficiaries of a trust), without actually inheriting the assets and thus not triggering inheritance tax.

<sup>6</sup> For instance, Sam Wyly was sued by the IRS for USD 1.4 billion (and his sister-in-law for USD 834 million) for tax fraud using 13 offshore trusts which allowed them to hide stock holdings and evade trading limits (<http://www.bloomberg.com/news/articles/2016-05-11/sam-wyly-committed-tax-fraud-with-offshore-trusts-judge-says>; 17.6.2016).

<sup>7</sup> For example, former Ukrainian President Viktor Yanukovich became the secret owner of the state-owned Palace for the country's president using among other, trust structures to hide his ownership: <https://www.globalwitness.org/en/blog/anonymous-uk-company-owned-truncated/>; 17.6.2016.

<sup>8</sup> By creating a discretionary trust, for instance, the creditors of a trust's beneficiary would be unable to reach trust assets (by forcing the trustee to make a distribution in favour of the beneficiary). Here's an example of case law from Texas where creditors were not returned the money they had loaned to the beneficiary of a trust: "Where discretionary trusts are involved, the beneficiary has no right to trust income [or assets] until the trustee elects to irrevocably and unconditionally place it in the beneficiary's control." It follows that when such discretionary powers are granted to trustees of a spendthrift trust, assets of the trust are immune from claims of the beneficiary's creditors, who can stand in his shoes but no higher [...] In so doing, we announced that we were following "the longstanding rule of Texas law that a settlor should be allowed to create a spendthrift trust that shields trust assets from the beneficiary's creditors." (In re Bass, 171 F.3d 1016, 1028 (5th Cir. 1999)).

However, sometimes it is the trust itself (and not its trustee) which appears as the owner of real estate<sup>9</sup>, bank accounts<sup>10</sup>, or which is taxable<sup>11</sup>.

While trustees are the “legal owners<sup>12</sup>” of trust assets, they cannot use them as they want, but must follow the instructions determined by the settlor in the trust deed. In addition, trustees do not own trust assets in their own benefit, but in favour of the “beneficiary(ies)” named by the settlor. These beneficiaries will — supposedly— be allowed to receive the assets held in the trust sometime in the future and/or income during the life of the trust. When the trustee transfers some or all of trust’s assets or income to a beneficiary, this is called a “distribution”. At that point, this beneficiary becomes the (only) owner of the distributed assets (or income), and the settlor and trustee have no more right to the assets. Until such distribution, however, the beneficiary only has a contingent interest in the trust, but does not have access to the assets<sup>13</sup>. It will depend on what the settlor wrote in the trust deed (or on the trustee’s own discretion if the settlor created a “discretionary trust”) when —or even “if” — there will ever be a distribution to a specific beneficiary<sup>14</sup>.

Depending on the jurisdiction’s trust laws the same person cannot have more than one or two roles: for example, the settlor cannot also be a beneficiary (otherwise, someone would be benefitting from the separation of assets’ ownership while still being the only possible owner of those assets), or the settlor cannot be a trustee (otherwise, the original owner would still be controlling the assets), or the trustee cannot be a beneficiary (otherwise, he could manage assets in his own benefit and

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<sup>9</sup> For example, the U.S. State of Florida online property search (<http://www.miamidade.gov/propertysearch/#/>; 23.6.2016) shows that some properties are owned by trusts (i.e. Folio: 01-3113-057-0790 referring to a property in Miami, owned by “120 Multifamily Trust”).

<sup>10</sup> For example, Citibank’s Manual for Clients reads: “‘Trust Account’ means an account owned by a trust. In some cases, the trust must have its own Taxpayer Identification Number issued by the Internal Revenue Service (IRS)” (<http://www.citibank.com/us/geb/resources/pdf/cmanual.pdf>; 23.6.2016). The Royal Bank of Canada establishes “Formal Trust Account: This can be used when a trust has been created by way of a legal document such as a trust agreement or will, and the account will be established in the name of the trust” (<http://www.rbcroyalbank.com/business/accounts/bus-trust-account.html>; 23.6.2016). In addition, the OECD’s Common Reporting Standard for Automatic Exchange of Information states: “for example, if a trust [...] is listed as the holder or owner of a Financial Account, the trust [...] is the Account Holder, rather than its owners or beneficiaries (Commentaries to the CRS, page 200).

<sup>11</sup> For example, in San Marino: “A trust is a taxable entity [...]. The trust is liable for the taxable income of the trust” (2011 Global Forum Peer Review on San Marino, page 32), and in Ghana: “Trusts are considered separate taxable entities in Ghana [...]. Trusts are taxed as a ‘body of persons’ [...]. The income of trusts is taxable to both the trust and its beneficiaries with double taxation being relieved through credit of any tax paid by the trust to the beneficiary” (2011 Global Forum Peer Review on Ghana, page 29).

<sup>12</sup> In Civil Law countries like Argentina, the trustee’s legal ownership is considered an “imperfect ownership” (*dominio imperfecto*) because it is limited by the trust (Argentina’s Civil and Commercial Code, Art. 1703).

<sup>13</sup> The beneficiary will likely have some rights in case the trustee decides to keep the assets to himself, or somehow mismanages trust assets violating its fiduciary duties to the beneficiaries.

<sup>14</sup> For example, trusts in the Cook Islands, Belize or the U.S State of Nevada may last for more than 100 years, so a beneficiary may die before ever getting a distribution. Likewise, a discretionary trust allows the trustee to choose to make distributions only in favour of beneficiaries who are not bankrupt or who have no creditors, so a beneficiary with too much debt may never get a distribution.

affect the remaining beneficiaries). In contrast other jurisdictions - especially notorious tax havens - allow the same person to hold, at least in practice, all the roles (for instance, jurisdictions offering "asset protection trusts", where the only objective is to keep control of one's own assets while preventing creditors from reaching them).

## **2.2 Complex Trust Structures: Discretionary Trusts and Purpose Trusts**

To better help settlors achieve their legitimate or illegitimate goals, complex trust structures have been developed. For example, in order to prevent the identification of trust beneficiaries, discretionary trusts have been created. In these, the settlor appoints potential beneficiaries, but it is the trustee who has the discretion to choose, for instance, who will end up being a beneficiary<sup>15</sup>. In order to reduce the risks of (the appearance of) giving discretion to a complete stranger over his assets, the settlor may (i) write a "letter of wishes" telling the trustee how he/she should distribute assets, (ii) appoint a "protector" or "enforcer" (an additional trust party or role, who could be the settlor him/herself if the jurisdiction allows it) to tell the trustee what to do, or (iii) give power of attorney to another person (or to the settlor him/herself, if the jurisdiction allows it) to either veto or remove the trustee, to ensure that the settlor will retain control.

Purpose trusts, in contrast, have no beneficiaries whatsoever (on paper). The settlor may simply decide when the trust will terminate. On that date, trust assets will be considered "surplus funds" and will be transferred to whomever the settlor decided in the trust deed, including him/herself.

## **2.3 Ideal Scope: Types of trusts and trusts' related parties to be registered**

Based on the above, it is impossible to identify a type of trust that would not need registration: even a typical family trust created (in appearance) to take care of sick children or to decide who will inherit which asset could be exploited and abused for money laundering, tax evasion and other crimes<sup>16</sup>.

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<sup>15</sup> Discretionary trusts are useful not only to prevent identification of beneficiaries but also to protect assets from creditors. The trustee may decide not to make distributions to any beneficiary who is bankrupt or whose creditors may reach distributed assets.

<sup>16</sup> A father could create a trust and appoint all his children or a sick family member as beneficiaries. If such a trust were to keep benefitting from lack of registration and accounting requirements (as most trusts currently do), such father could use the trust to receive any income for any legitimate business (i.e. consulting services) without paying income tax (the father would not pay income tax because it wouldn't be his income on paper, and the trust wouldn't either because no one would find out about its existence). Those consulting services could in fact be covering for bribe payments that the father is receiving and putting in the trust, facilitating corruption. The trust could also be involved in money laundering, by either borrowing or lending money to drug smugglers to simulate a legitimate origin of funds, to hold real estate or shares of a company purchased



Moreover, from a regulatory perspective, any list of types of trusts used to determine registration or regulation would become obsolete the moment it is established, since tax planners and lawyers can create and invent new types of trusts that are not part of the existing list in order to circumvent regulations. Therefore, **all types of trusts should be required to register<sup>17</sup> all of their beneficial owners, at least in a closed register.**

Unlike a company owned by shareholders, parties to a trust each have limited ownership interests. The settlor does not own assets because they were transferred to the trustee, the trustee is merely the “legal owner in trust<sup>18</sup>” (but trust assets do not belong to him to do as he wants) and the beneficiary will only become an owner after a distribution takes place. Control will likewise depend on what the trust deed —or any secret document— says, including a letter of wishes, a power of attorney, a right to veto or remove a trustee, etc. Therefore, it is impossible to identify a priori the specific

**Unit Trusts**

Unit trusts are a special type of trust used for financing or collective investment. While they are still called “trusts” and their related parties have the same names (trustee, beneficiary, etc.), they are actually very different from a typical family trust where the father-settlor transfers assets and appoints his children as beneficiaries. Unit Trusts are similar to investment entities because investors (who are considered beneficiaries) provide capital in exchange for units or interests in the trust (like shares in a company or interests in a mutual fund). Therefore – unlike beneficiaries of a family trust – investors actually own something in the trust: the units. Similar to companies listed in a stock exchange, unit trusts may be subject to specific financial regulation and disclosure requirements, not covered by this paper.

parties that should be generally considered beneficial owners. Given this impossibility to even set thresholds (like the “more than 25%” of shareholdings to be considered the beneficial owner of a company)<sup>19</sup>, three possibilities remain:

- i. Not to identify any related party of a trust as a beneficial owner;

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with illegally obtained funds, etc. In fact, any criminal act that takes advantage of an anonymous entity (i.e. a shell company) could equally use a trust that (on paper) appears as a typical family trust (used to divide assets among children or to provide support for a sick person). In other words, pretending that “private family trusts” pose no risk would be the same as suggesting that as long as a shell company has among its shareholders a minor or sick person, then that shell company poses no risks to be abused for money laundering, tax evasion or a different crime. There is nothing in the appointment of beneficiaries or their age or sickness that renders a structure into a riskless entity. As long as there is no identification of its related parties, it may be abused.

<sup>17</sup> Registration does not mean who should have access to a trust information. This will be discussed below under “disclosure”.

<sup>18</sup> In some civil law countries like Argentina, the trustee is considered to have an “imperfect ownership” (see note 12 above).

<sup>19</sup> [Part 1](#) of this paper already criticized this high thresholds for being too high and easy to avoid.

- ii. To identify only the legal owner of trust assets: the trustee; or
- iii. To identify every related party and any other person with control as a beneficial owner.

Needless to say, the first option is the worst and should not be considered. If trusts can be abused to commit crimes and to escape law enforcement, not to require registration of their beneficial owners is not a solution since it would facilitate the frustration of law enforcement.

The second option, when saying “identify the trustee (legal owner) as the beneficial owner”, **is simply saying “identify a nominee as the beneficial owner”, which is precisely what the definition of beneficial ownership according to the FATF<sup>20</sup> prohibits**: it has to be the real owner or controller, not a person who only holds the title or offers to have assets under his name but in the benefit of others.

This option is partially chosen by the [UK 2015 law on beneficial ownership](#) (called “person with significant control” in the UK law) whenever a trust owns a company<sup>21</sup> — the UK law focuses on companies, not trusts. The UK approach (the first legal framework requiring registration of some trusts in a public registry) is, in principle, slightly better than the second option because – in addition to identifying the trustee - it also includes the residual condition: “any other person with significant control over the trust”. While strong sanctions are imposed in case of non-compliance, **it may be hard to apply this residual provision in practice**. This “other person” can be hidden in secret trust documents (and thus remain unidentified). On the other hand, even if all trust documents are provided to financial institutions following customer due diligence (CDD) to determine the beneficial owners of their clients, the law would be relying on junior or mid-level staff at a financial institution to know and understand complex structures described in a trust deed to determine who has what level of control. Therefore, however good the intentions, this provision is rather impractical for effectively identifying the beneficial owners of a trust.

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<sup>20</sup> The FATF 2012 General Glossary’s definition of “beneficial owner”, together with footnote 50 (page 110) imply that a nominee cannot be a beneficial owner, since the latter refers to “the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement”.

<sup>21</sup> Section 790C, “SCHEDULE 1A: References to people with significant control over a company, Part 1: “This Part of this Schedule specifies the conditions at least one of which must be met by an individual (“X”) in relation to a company (“company Y”) in order for the individual to be a person with “significant control” over the company [...]. 6. The fifth condition is that— (a)the trustees of a trust or the members of a firm that, under the law by which it is governed, is not a legal person meet any of the other specified conditions [25% of shares or voting rights] (in their capacity as such) in relation to company Y, or would do so if they were individuals, and (b )X has the right to exercise, or actually exercises, significant influence or control over the activities of that trust or firm.”, available here: <http://www.legislation.gov.uk/ukpga/2015/26/schedule/3/enacted>

The third solution therefore is the only option consistent with the definition of a beneficial owner. Even if people who have no control over the trust are identified, it is easier for authorities to disregard them than to try and find the (unidentified) real owners once the information is needed.

Interestingly, this third option is not only promoted by civil society organizations, but it is part of the OECD's Common Reporting Standard (CRS) for automatic exchange of financial account information, which will be implemented by more than 90 jurisdictions (including all EU Members). Explicitly, the OECD Commentaries to the CRS<sup>22</sup> (where "controlling person" means beneficial owner) state:

"In the case of a trust, the term 'Controlling Persons' means the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising ultimate effective control over the trust. The settlor(s), the trustee(s), the protector(s) (if any), and the beneficiary(ies) or class(es) of beneficiaries, must always be treated as Controlling Persons of a trust, regardless of whether or not any of them exercises control over the trust. [...] In addition, any other natural person(s) exercising ultimate effective control over the trust (including through a chain of control or ownership) must also be treated as a Controlling Person of the trust. With a view to establishing the source of funds in the account(s) held by the trust, where the settlor(s) of a trust is an Entity, Reporting Financial Institutions must also identify the Controlling Person(s) of the settlor(s) and report them as Controlling Person(s) of the trust. For beneficiary(ies) of trusts that are designated by characteristics or by class, Reporting Financial Institutions should obtain sufficient information concerning the beneficiary(ies) to satisfy the Reporting Financial Institution that it will be able to establish the identity of the beneficiary(ies) at the time of the pay-out or when the beneficiary(ies) intends to exercise vested rights" ([Commentaries to the CRS<sup>23</sup>](#), pages 198-199).

This broad concept of beneficial ownership in relation to a trust accurately reflects the slippery and highly complex ownership features of trusts and therefore should be seen as the point of departure of any serious attempts to bring them into regulatory and law enforcement nets.

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<sup>22</sup> <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/common-reporting-standard-and-related-commentaries/>; 17.6.2016.

<sup>23</sup> <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/common-reporting-standard-and-related-commentaries/>; 17.6.2016.

## 2.4 Foreign Trusts

If all countries required BO registration of their domestic law trusts (trusts created under, or governed by their domestic law), there would be no need to register foreign law trusts (trusts created according to, or governed by the laws of a foreign jurisdiction). Since domestic law trusts are hardly ever required to register (see the [2015 Financial Secrecy Index](#) and the Annex below for more details), countries should equally require BO registration from foreign law trusts that have any connection point to their territories - for instance, because any of the trusts' related parties are resident in such country or because trust assets are located there.

## 2.5 Disclosure of trusts' beneficial ownership information

While civil society organizations agree that beneficial ownership information of companies should be publicly accessible, there is some disagreement regarding trusts. **There is no disagreement on the requirement to register full beneficial ownership information on trusts** (and have this available to authorities), **but some disagreement relates to whether the general public should have access to it.**

**Except for information on minors and incapable or sick persons (which should not be public as long as a judge or authority confirms that the person is in fact still a minor or sick or incapable),** we see no difference between trusts and companies, so all beneficial owners should be equally accessible by the public. Otherwise, **why would trusts' related parties benefit from an effective shield against liability from the consequences of their actions (including potential crimes) and also from no need to register?** Public registration is justified also because no one is obliged to create a trust as most, if not all, legitimate uses of trusts could be achieved by using other vehicles (such as companies or partnerships) or wills (for inheritance purposes).

In extraordinary cases that —somehow— could only be resolved using a trust, and upon having a judge or similar authority verifying this particular situation, public access could be restricted, but only on a case by case basis and as long as the situation that justifies such restriction prevails.

### 3. Current legal framework in FATF and EU Fourth AML Directive

#### 3.1 Definition of “beneficial owners” of trusts

The FATF 2012 Recommendations and the EU Fourth AML Directive<sup>24</sup> contain an almost identical basic definition of who the beneficial owner(s) are in the context of a trust. The common first step as laid down in the FATF 2012 recommendations entails to identify and verify:

“the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries<sup>31</sup>, and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership);” (FATF 2012: 61, 10.C.5.b.ii.i).

Footnote 31 on “beneficiary(ies) of a trust”: “For beneficiary(ies) of trusts that are designated by characteristics or by class, financial institutions should obtain sufficient information concerning the beneficiary to satisfy the financial institution that it will be able to establish the identity of the beneficiary at the time of the payout or when the beneficiary intends to exercise vested rights.” (FATF 2012: 60, FN 30).

Unlike the cascading tests applied when identifying the BOs of companies, trusts need no cascade **because all the related parties have to be identified from the beginning.**

#### 3.2 Subject to Registration

While the FATF provisions are relevant for obliged entities<sup>25</sup> subject to anti-money laundering regulation, the Fourth UE AML Directive refers to registration requirements for trusts.

Article 31 of the Fourth EU AMLD reads:

“1. Member States shall require that trustees of any express trust governed under their law obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust. That information shall include the identity of: (a) the settlor; (b) the trustee(s); (c) the protector (if any); (d) the beneficiaries or class of

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<sup>24</sup> Art. 3.b of the EU Directive states: “in the case of trusts: (i) the settlor; (ii) the trustee(s); (iii) the protector, if any; (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;”.

<sup>25</sup> For example, financial institutions or other designated non-financial business and professions, such as real estate agents or corporate service providers, when performing customer due diligence processes to ensure that they are not enabling money laundering.

beneficiaries; and (e) any other natural person exercising effective control over the trust. [...]

4. Member States shall require that the information referred to in paragraph 1 is held in a central register when the trust generates tax consequences. The central register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the parties to the trust concerned. It may also allow timely access by obliged entities, within the framework of customer due diligence in accordance with Chapter II [...].

## **4. Flaws in Current Legal Framework and Proposed Solutions**

### **4.1 Definition of “beneficial owner” of trusts**

Shortcomings in the definitions of the following terms exist both in the FATF and the Fourth EU AMLD:

#### **4.1.1 Natural person**

While the residual definition refers to “any other natural person”, it should be made explicit that “beneficial owners” always refer to natural persons (and not to nominees, agents, proxies or equivalent). In addition, the definition should specify what happens when an entity (i.e. a company) is a related party of the trust (i.e. the settlor or trustee). For those situations, and based on our [Part 1 paper](#), all the beneficial owners of such companies should be identified as beneficial owners of the trust. Complex structures should not benefit from such complexity by allowing fewer people to be registered.

#### **4.1.2 Plurals**

A common problem prevalent in both the FATF and EU Fourth AMLD refers to the lack of plurals. Since a trust may have more than one settlor or protector, BO definitions should refer to “settlor(s)” and “protector(s)”, just as it (already) refers to “trustee(s)” and “beneficiary(ies)”. Otherwise, this ambiguity could be exploited to register only one of possibly many settlors or protectors. Plurals for all related parties of a trust is already prescribed by the OECD’s Commentaries to the CRS for automatic exchange of information (see the end of point 2.c) above).

#### **4.1.3 Persons mentioned in the trust deed or other trust documents**

Since trust structures and combination of related parties may be very complex, in order to avoid any loophole, the definition should say that any person mentioned in any document related to the trust (i.e. trust deed, letter of wishes, power of attorney, etc.) should be considered a “beneficial owner”, regardless of any power, right or actual benefit. For example, all potential beneficiaries of a discretionary trust should be identified, regardless of any distribution taking place.

## 4.2 Registration

Registration loopholes for trusts in the Fourth EU AMLD (Art. 31) become salient when compared to comprehensive registration requirements for companies, one article above (Art. 30).

### 4.2.1 Ambiguity on scope of covered trusts

Article 30 (companies)	Article 31 (trusts)
1. Member States shall ensure that corporate and other legal entities <b>incorporated within their territory</b> are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held.	1. Member States shall require that <b>trustees of any express trust governed under their law obtain</b> and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust [...].

For the trust scope to be comprehensive, Article 31 should refer to “all trusts” instead of to “any express trust”. “Express” trusts should otherwise be defined. In addition, it is not clear if the scope is for (i) express trusts governed under the laws of an EU country (meaning an EU domestic law trust), or (ii) an express trust whose trustees are governed under the law of a EU country (which may refer to trustees resident in —and thus governed under— an EU country). For instance, having a resident trustee is the condition that triggers trusts’ registration in some countries<sup>26</sup>, regardless of the law that governs such trust. Based on Art. 30 and — at least the Spanish<sup>27</sup> versions of Art. 31 of the Directive— it seems that the first interpretation is valid (what matters is the law governing the trust, not the residence of the trustee). However, given that the English version will very likely be referred to in a global context, eliminating this ambiguity would be useful.

Nevertheless, **it may be impossible to enforce this provision under the first interpretation (if the scope refers to EU domestic law trusts) in case the trustee is not resident.** Suppose a trust governed or created under the laws of the UK. How could the UK compel the trustee (of such UK trust) to hold updated beneficial ownership information if the trustee is not resident in the UK but in Panama or Germany?

As suggested in Chapter 6 below, these problems could be addressed by widening the scope of covered trusts to all (i) trusts governed by the law of an EU country,

<sup>26</sup> For example in Australia, Canada, India, Ireland, Japan, Korea, New Zealand and the Philippines (see Annex below).

<sup>27</sup> “Los Estados miembros requerirán que los fideicomisarios de un fideicomiso explícito sujeto a su legislación obtengan y...”. The German version appears to be even more ambiguous: “Die Mitgliedstaaten schreiben vor, dass die Trustees eines unter ihr Recht fallenden Express Trusts angemessene”. This language could leave open the interpretation that only trustees who at the same time a) are a trustee resident in or governed by the laws of a EU member state, and b) manage a trust governed under the laws of the same member state, are under obligations to comply with the obligations of this article.

and (ii) trusts (regardless of their governing law) that have any connection point to an EU country, such as having a resident settlor, protector, trustee, beneficiary, or assets in the territory of the EU. Likewise, registration should not depend on the trustee but the trust’s existence should be dependent on proper registration.

Furthermore, while the Directive suggests that legal arrangements similar to trusts are also covered<sup>28</sup> it should explicitly prescribe that provisions on trusts are equally applicable to a fideicomiso, fiducie, Treuhand, waqf, etc.

**4.2.2 Scope limited to “Tax Consequences”**

Article 30 (companies)	Article 31 (trusts)
3. Member States shall ensure that the information referred to in paragraph 1 is held in a central register in each Member State, for example a commercial register, companies register as referred to in Article 3 of Directive 2009/101/EC of the European Parliament and of the Council ( 1 ), or a public register [...].	4. Member States shall require that the information referred to in paragraph 1 is held in a central register when the trust generates tax consequences [...].

While Art. 30.3 requires BO information to be registered in central registries for all companies (those mentioned in Art. 30.1), Art. 31 prescribes trusts’ BO information to be held in a central registry only if the trust generates tax consequences. **Not only is the term “tax consequences” not defined, but this is an irrelevant criterion to prevent money laundering.** The latter could take place even if no taxes are due or if all taxes have actually been paid. In fact, while an EU trust may not have any tax consequences in the EU, it could still generate tax consequences somewhere else, such as in a developing country. By limiting registration to situations which affect only EU tax revenues, exchange of information with developing countries would be hampered and therefore be in breach of Art. 208 of the Lisbon Treaty<sup>29</sup>, which requires EU member states to consider the implications for combating poverty worldwide of all EU policies.

The proposed solution would be to remove the condition of tax consequences for the registration of trusts.

**4.2.3 Access beyond authorities and obliged entities**

Article 30 (companies)	Article 31 (trusts)
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<sup>28</sup> Art. 3.6.c: “in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point (b)”.

<sup>29</sup> Council of the European Union 2012: Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union (6655/7/08REV 7, 12.11.2012), Brussels, in: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206655%202008%20REV%207; 11.6.2014>.



<p>5. Member States shall ensure that the information on the beneficial ownership is accessible in all cases to: (a) competent authorities and FIUs, without any restriction; (b) obliged entities, within the framework of customer due diligence in accordance with Chapter II; (c) <b>any person or organisation that can demonstrate a legitimate interest.</b></p>	<p>4. [...] The central register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the parties to the trust concerned. It may also allow timely access by obliged entities, within the framework of customer due diligence in accordance with Chapter II [...].</p>
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The rules for access to the registries differ considerably in case of companies (Art. 30) and of trusts (Art. 31). For companies, Art. 30.3 (see point above) suggests public registries as a valid alternative to restricted access, and even in cases of restricted access requires as a minimum (Art. 30.5) access by any person or organisation with a legitimate interest. Although “legitimate interest” is not defined in the Directive, one possible interpretation of the scope of this term may be provided by a previous document by the EU Parliament which had expressed in December of 2014 that:

“Any person or organisation who can demonstrate a ‘legitimate interest’, such as investigative journalists and other concerned citizens, would also be able to access beneficial ownership information such as the beneficial owner's name, month and year of birth, nationality, residency and details on ownership”<sup>30</sup>.

While fully public registries are arguably the only option for ensuring reliable data quality for all types of entities and arrangements (both for society and also for authorities needing to administer the central registries<sup>31</sup>), the “legitimate interest” clause for companies may extend access to some registry information to journalists and civil society organizations. In contrast, Art. 31 on trusts limits access to authorities and obliged entities performing customer due diligence, such as banks.

The proposed solution would be to abolish any restriction to public access to beneficial ownership information of both companies and trusts. All information should be in an open data format (to allow for cross-checking and analysis). While public access may be limited to reduced data (name, the month and year of birth, the nationality and the country of residence of the beneficial owner, as well as the nature and extent of the beneficial interest held) based on Art. 30.5 of the EU Directive, authorities (including foreign ones) and

<sup>30</sup> <http://www.europarl.europa.eu/news/en/news-room/20141216IPR02043/Money-laundering-Parliament-and-Council-negotiators-agree-on-central-registers>; 30.5.2016.

<sup>31</sup> [https://financialtransparency.org/wp-content/uploads/2016/05/BO-legitimate-interest-two-pager\\_Final.pdf](https://financialtransparency.org/wp-content/uploads/2016/05/BO-legitimate-interest-two-pager_Final.pdf); 30.5.2016

obliged entities should be allowed access to the full data: day of birth, place and country of birth, address, TIN when available, key data of, or a copy of the ID that was used for verification, the documentation that goes with the economic stake of the beneficial owner.

## **5. Conceptual Proposals**

### **5.1 BO registration in public registries (i.e. commercial registries), regardless of registration with tax authorities**

A few countries require registration of some types of trusts with their tax authorities under certain circumstances (see Annex). For example, registration is required if the trust has attributable income (Malta<sup>32</sup>), if the trust carries on a business (Cyprus<sup>33</sup>), or – among many others – when the trust may be chargeable for tax (UK<sup>34</sup>). This is already problematic, since money laundering or hiding proceeds of corruption may take place regardless of taxes being owed, and even if all due taxes have been paid. Moreover, compliance with such registration in practice is voluntary, especially if a trust is still allowed to exist and operate (especially abroad) regardless of whether such registration took place or not. If caught unregistered, a person or trust would at the most be subject to a monetary fine. Lastly, even if a trust was reported to tax authorities, that information is usually kept confidential because of fiscal or tax secrecy, so any creditor of the trust's related parties or foreign authority would never (or hardly ever) find out about such a trust's existence. For this reason, registration with a public registry (i.e. commercial registry) is the best option for foreign authorities, obliged entities performing customer due diligence or any creditor who may want to find out about the existence of a trust.

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<sup>32</sup> 2012 Global Forum Peer Review on Malta, page 32.

<sup>33</sup> 2012 Global Forum Peer Review on Cyprus, page 30.

<sup>34</sup> 2011 Global Forum Peer Review on the UK, page 35.

## 5.2 BO registration in public registries as a condition to exist and operate

If trusts had to register in a public registry in order to prove their existence, registration would be ensured, as is the case with companies. If trusts had to register only limited information (i.e. the trustee, but not its BOs), that registration would be of limited use.

Therefore, trusts should not be considered to exist (and thus unable to operate in any way such as holding

assets, conducting business, etc.) nor be enforceable under domestic law and courts, unless all the relevant BO information has been registered in a central registry and ideally, relevant parties thereof published. In other words, if there is no identification of all relevant BOs (all the settlors, trustees and beneficiaries, and any other natural person mentioned in trust documents or having control over the trust) either because the trust or trustee does not provide this information or because they do not cooperate to verify the information that had already been provided, then:

- trusts should not be allowed to be created/to exist (existing registered trusts – if any, since so far there are very few existing registries – should be “inactivated”, so that they cannot operate but their information would still be available – otherwise, those who do not provide information would benefit from their lack of cooperation);<sup>35</sup> and

- regulated entities subject to AML/CDD (i.e. banks) should not be allowed to open accounts or perform transactions on their behalf or in their favour, and they should close those accounts that already exist.

## 5.3 Scope: Registration of Domestic Law trusts and Foreign Law trusts with any connection point (not only if trustee is resident)

Countries where registration of trusts is applicable, usually require registration of either trusts which are governed under their domestic laws<sup>36</sup> (domestic law trusts), or trusts (regardless of the governing law) that are managed by a resident

### Registration of Companies

Companies usually need to register in order to exist, or at least to obtain the limitation of liability. This is an excellent incentive to ensure registration. In addition, a company usually needs to show its incorporation certificate in order to contract with someone else or operate (i.e. to open a bank account).

<sup>35</sup> Already existing trusts and trustees that do not provide BO info, should be sanctioned and blacklisted by UN sanction mechanisms because of a high risk of criminal and terrorist activities, and not be allowed to operate. Their registration info, however, should not be struck off the register, in order to ensure the availability of records and thus accountability in case they have been involved in any wrongdoing.

<sup>36</sup> For example: Belize, Cook Islands, Curacao, Dominican Republic, France, Marshall Islands, Saudi Arabia, Seychelles, South Africa, St Kitts and Nevis, Uruguay (see Annex below).

trustee<sup>37</sup>. In some other cases (i.e. France, Argentina) other connecting points, such as a resident settlor or beneficiary or assets located in that jurisdiction may trigger registration.

**5.3.1 Registration of domestic law trusts**

If a country requires BO registration of all trusts created or governed by its laws (domestic law trusts), it is helping all other countries by ensuring that legal structures (trusts) allowed by its own legal system will be less likely to be used for criminal actions in any country (since the information on the trust’s related parties would be available to authorities). This is somehow “altruistic” since a domestic law trust may have no connection to a jurisdiction (no asset, settlor, trustee or beneficiary in that jurisdiction) other than the law which governs such trust. However, if such registration is only required with tax authorities (to prevent a fine or sanction), such registration requirement would be rather symbolic: it would be impossible for tax authorities of any country to find out that somewhere in the world a trust has been created under its laws (let alone enforce its reporting). In fact, if the trust’s related parties and assets have no relationship to the jurisdiction whose laws govern the trust, neither of them would be subject to tax in that jurisdiction. In that case, tax authorities would have very little interest in enforcing registration (of trusts and persons who are not liable to tax there).

**Domestic Law Trust vs Resident or Domestic Trust**

While “domestic law trust” means a trust governed by the law of X jurisdiction, a “resident trust” (or “domestic trust”) will mean whatever a jurisdiction defines. For instance, the UK considers a trust to be resident if “(i) all the trustees are UK resident or (ii) if some trustees are UK resident and the settlor was resident when the assets were transferred”<sup>1</sup>. The U.S. considers a trust to be domestic if “(i) a court within the United States is able to exercise primary supervision over the administration of the trust (court test); and (ii) one or more U.S. persons have the authority to control all substantial trust decisions (control test)”<sup>2</sup>.

Note 1: Global Forum Peer Review on the UK of 2011, page 34.

Note 2: Global Forum Peer Review on the U.S. of 2011, page 44.

In other words, when a country requires registration of all domestic law trusts, this becomes effective and enforceable only if such registration is required in a public registry for the trust to exist or operate anywhere in the world.

<sup>37</sup> For example: Australia, Canada, India, Ireland, Japan, Korea, New Zealand and the Philippines (see Annex below).

### **5.3.2 Registration of foreign law trusts triggered by a connection point**

If a country requires registration only of trusts with a connection point to its territory (other than the governing law of the trust), it is in a way protecting only itself (but not other countries). There may be no information on trusts created under its own laws where the related parties (settlor, trustee, beneficiaries) and assets are resident or located abroad. However, nothing would prevent those trusts from operating (or being abused) anywhere in the world.

Registration would be triggered only when it is relevant for the respective country, for instance to raise tax revenues. In such a case, it would require registration of any trust, only if the trustee is resident, or if the settlor or beneficiary is resident, or if assets are located there. As explained above, if registration is only required with tax authorities, there will be little incentive to comply (other than to avoid a sanction if caught). The ideal scenario is to require registration of all BOs in a public registry for the trust to be allowed to operate in the country, to ensure that such a trust and its related parties will not be engaging in tax evasion, avoidance, money laundering or other crimes.

Since no country in the world requires registration of all domestic law trusts (point 5.3.1 above) in a public registry, all countries would be wise at the very least to require registration of any trust that has a connection point to it. Otherwise, it will never find out about trusts whose assets or related parties may be involved in financial crimes in the respective jurisdiction<sup>38</sup>.

Countries apply different connection points, if they apply any, to trigger registration of trusts. As will be explained below, only a comprehensive list of connection points is effective.

#### **5.3.2.1 Resident Trustee**

The most common connecting point is the resident trustee. This makes sense in theory, since the trustee is supposed to manage the trust and know the trust's related parties. If the trustee is resident in a jurisdiction, authorities of that jurisdiction will supposedly be able to enforce laws against him. However, jurisdictions do not always contain comprehensive regulations on resident trustees:

##### **i. Any/all Trustees**

For example, the UK requires registration, among other conditions, only if all trustees are resident there<sup>39</sup>. This is easily avoidable by appointing some foreign

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<sup>38</sup> In order to avoid duplication, a country should not require registration when all the relevant BO information of a trust is already publicly available in another jurisdiction.

<sup>39</sup> If only some trustees are resident in the UK, the trust would still be UK resident if the settlor was resident when providing the funds (Global Forum Peer Review on the UK of 2011, page 34.)

trustees (so that not “all” are resident there). The solution to this would be to require registration when any trustee is resident in the jurisdiction.

## **ii. Main Trustee**

South Africa<sup>40</sup>, for instance, requires registration of foreign law trusts when the main trustee is resident in South Africa. This is easily avoidable by appointing a trustee with management over the trust abroad. The solution is to require registration when any trustee (or person managing the trust, regardless of its name) is resident in the jurisdiction.

## **iii. Professional Trustee**

Uruguay requires registration of foreign law trusts only when the trustee is considered a “professional trustee”. This would be the case when the trustee “acts on a regular basis, in a professional capacity, where regular basis means establishing five or more non-financial trusts in a given calendar year”<sup>41</sup>. This is easily avoidable by having a professional trustee who only establishes up to four non-financial trusts per year. Even if the number of established trusts were not applicable and any “professional trustee” were required to register a trust (regardless of how many trusts he establishes or manages), this would easily be avoidable by appointing a non-professional trustee (someone who does not work as trustee but offers to do it as a favour, i.e. a friend, family member or lawyer). In order to get real management by a professional trustee, the non-professional trustee could get “non-binding advice” by a professional trustee or expert (that he would still always follow) to avoid being managed by a professional trustee on paper, but not in reality.

The solution is to require registration when any trustee or person managing the trust (or providing binding or non-binding management advice) is resident, regardless if such trustee or person is professional, obtains any income for such advice or management, etc.

### ***5.3.2.2 Other related parties (settlor, beneficiary, protector) and assets***

Some jurisdictions require registration whenever a related party is resident there or when assets are located there. However, they tend to focus only on settlors and beneficiaries. The solution is to include all related parties to the trust: any settlor, protector, enforcer, trustee, beneficiary or person mentioned in the trust deed or with control or management over the trust, as well as any asset located there (not only real estate).

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<sup>40</sup> Global Forum Peer Review on South Africa of 2012, page 31.

<sup>41</sup> Global Forum Peer Review on Uruguay of 2011, page 29.

### 5.3.3 Summary of Conceptual Proposals

<b>Case</b>	<b>Loophole/Problem</b>	<b>Solution</b>
Registration with Tax Authorities (only)	-Usually only if trust or related parties are subject to tax, but not to tackle money laundering, corruption, etc. -Little incentive to comply (only to avoid sanction in case of being caught). -Unenforceable if only relationship to tax authorities is governing law of the trust (but no asset or related party is resident there). -Even for trusts that do register, fiscal secrecy prevents awareness (and thus access) by foreign authorities, creditors, NGOs, journalists, etc.	Registration with a public registry (i.e. commercial registry) required for the trust to exist and operate (open a bank account, hold assets, be enforceable by law and courts).
Registration of Domestic Law trusts (only)	It helps other countries but does not protect jurisdiction from foreign law trusts.	Register also any foreign law trust with any connecting point to the jurisdiction.
Registration of Foreign Law trusts with comprehensive connecting points (only)	It protects the country, but does not prevent domestic law trusts from being abused (for tax evasion, money laundering, etc.) abroad.	Register also any domestic law trust.
Selective connecting points (see below):	Since no country registers BOs of trusts in a public registry, some trusts will remain unregistered (those with un-covered connecting points – see below for some cases).	Any connecting point (any resident settlor, trustee, protector, beneficiary, asset, etc.) should trigger registration in public registry.
i) only if all trustees are resident	Appoint at least one non-resident trustee.	Any resident trustee should trigger registration.
ii) only if main trustee is resident	Appoint a non-resident as the main trustee or person managing the trust.	Any resident trustee or person managing the trust should trigger registration.
iii) only if resident trustee is professional	Appoint professional trustee (below threshold to be considered technically-legally a professional) or a non-professional trustee, who could still get non-binding (and secret) advice from a professional trustee or expert.	Any resident trustee or person managing the trust or providing binding or non-binding advice, regardless if the trustee is professional or obtains a fee.

## 6. Proposed amendments

### 6.1 2012 FATF Recommendations

The 2012 FATF Recommendations should be amended in the General Glossary and in the interpretative note to recommendation ten as follows:

Current Text	Proposed Alternative
<p>“GENERAL GLOSSARY<sup>42</sup></p> <p>Beneficial owner refers to the natural person(s) who ultimately<sup>50</sup> owns or controls a customer<sup>51</sup> and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.</p> <p>FN 50: Reference to “ultimately owns or controls” and “ultimate effective control” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.</p> <p>FN 51: This definition should also apply to beneficial owner of a beneficiary under a life or other investment linked insurance policy.”</p>	<p>“GENERAL GLOSSARY<sup>43</sup></p> <p>Beneficial owner refers to the natural person(s) who ultimately<sup>50</sup> owns or controls a customer<sup>51</sup> and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. <b>A beneficial owner must always be a natural person (not a legal person), and must refer to the actual and real owner, and not to a nominee, agent, proxy or equivalent.</b></p> <p>FN 50: Reference to “ultimately owns or controls” and “ultimate effective control” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.</p> <p>FN 51: This definition should also apply to beneficial owner of a beneficiary under a life or other investment linked insurance policy.”</p>
<p>INTERPRETIVE NOTE TO RECOMMENDATION 10 (CUSTOMER DUE DILIGENCE)</p> <p>[...]</p> <p>C. CDD FOR LEGAL PERSONS AND ARRANGEMENTS</p> <p>[...]</p> <p>(b) Identify the beneficial owners of the customer and take reasonable measures to verify the identity of such</p>	<p>INTERPRETIVE NOTE TO RECOMMENDATION 10 (CUSTOMER DUE DILIGENCE)</p> <p>[...]</p> <p>C. CDD FOR LEGAL PERSONS AND ARRANGEMENTS</p> <p>[...]</p> <p>(b) Identify the beneficial owners of the customer and take reasonable measures to verify the identity of such persons, through the following information [...]:</p>

<sup>42</sup> 2012 FATF Recommendations, Page 110, available here: [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); 23.6.2016.

<sup>43</sup> This definition is the same as the one used in the [Part 1](#) paper on companies. ;23.6.2016.



Current Text	Proposed Alternative
<p>persons, through the following information<sup>44</sup> [...]:</p> <p>ii) For legal arrangements:</p> <p>(ii.i) Trusts – the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries<sup>31</sup>, and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership);</p>	<p>ii) For legal arrangements:</p> <p>(ii.i) Trusts<sup>1</sup> – the identity of the settlor(<b>s</b>), the trustee(s), the protector(<b>s</b>) (if any), the beneficiaries or class of beneficiaries<sup>31</sup>, <b>any other person mentioned in the trust deed or related document (regardless of any distribution, right, power or interest)</b>, and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership);</p> <p><b>Footnote 1: Trusts refer to any domestic law or foreign law trust, fideicomiso, fiducie, Treuhand, waqf or equivalent.</b></p>
<p>(ii.ii) Other types of legal arrangements – the identity of persons in equivalent or similar positions.</p>	<p>(ii.iii) Other types of legal arrangements – the identity of persons in equivalent or similar positions.</p> <p>[current (ii.ii) on “other types of legal arrangements” would be (ii.iii)]</p> <p>[INSERT:]</p> <p>(ii.ii) to the extent that there is doubt under (ii.i) as to whether the person(s) identified are the beneficial owner(s) <b>and the trust or trustee do not cooperate to clarify the information, or where the trust or trustee do not provide identity information of all natural persons meeting the criteria under (ii.i) above, financial institutions shall terminate the business relationship with the client and refrain from executing any transactions.</b></p>

<sup>44</sup> 2012 FATF Recommendations, Page 61, available here: [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); 23.6.2016.

## 6.2 EU Fourth AML DIRECTIVE

### 6.2.1. BO Definitions in Articles 3.6.b and 31.1

The Fourth EU AML Directive definition of BO of trusts in Arts. 3.6.ii and 31.4<sup>45</sup> should be amended as follows:

Current Text	Proposed Alternative <sup>46</sup>
Article 3 <sup>47</sup> For the purposes of this Directive, the following definitions apply: [...]	[...]
(6) 'beneficial owner' means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:	(6) 'beneficial owner' means any natural person(s) <sup>1</sup> who ultimately <sup>2</sup> owns or controls the customer <sup>3</sup> and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:
	<p><b>FN 1: A beneficial owner must always be a natural person (not a legal person), and must refer to the actual and real owner, and not to a nominee, agent, proxy or equivalent.</b></p> <p><b>FN 2: Reference to "ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.</b></p> <p><b>FN 3: This definition should also apply to beneficial owner(s) of a beneficiary under a life or other investment linked insurance policy."</b></p>
[...] (b) in the case of trusts:  (i) the settlor; (ii) the trustee(s); (iii) the protector, if any; (iv) the beneficiaries, or where the individuals benefiting from the legal	[...] (b) in the case of trusts:  (i) the settlor( <b>s</b> ); (ii) the trustee(s); (iii) the protector( <b>s</b> ), if any; (iv) the beneficiaries, or where the individuals benefiting from the legal

<sup>45</sup> EU Fourth AML DIRECTIVE, Page 14 and 25, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&rid=1>; 23.6.2016.

<sup>46</sup> The proposed definition of beneficial owner is the same as the [Part 1](#) of this series of papers.

<sup>47</sup> EU Fourth AML DIRECTIVE, Page 14, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&rid=1>; 23.6.2016.

<b>Current Text</b>	<b>Proposed Alternative<sup>46</sup></b>
<p>arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates;</p> <p>(v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;</p> <p>[...]</p>	<p>arrangement or entity have yet to be determined, the class<sup>1</sup> of persons in whose main interest the legal arrangement or entity is set up or operates;</p> <p>(vi) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;</p> <p>[current (v) on "any other natural person..." would be (vi)]</p> <p>[INSERT:]</p> <p><b>(v) any other person mentioned in the trust deed or related document (regardless of any distribution, right, power or interest);</b></p> <p><b>Footnote 1: "For beneficiary(ies) of trusts that are designated by characteristics or by class, the trust deed or related document should provide sufficient information concerning the beneficiary so that any person would be able to establish the identity of the beneficiary at the time of the distribution or when the beneficiary intends to exercise vested rights."</b></p>
Article 31 <sup>48</sup>	
<p>1. [...] That information shall include the identity of:</p> <p>(a) the settlor;</p> <p>(b) the trustee(s);</p> <p>(c) the protector (if any);</p> <p>(d) the beneficiaries or class of beneficiaries; and</p> <p>(e) any other natural person exercising effective control over the trust.</p>	<p>1. [...] That information shall include the identity of:</p> <p>(a) the settlor<b>(s)</b>;</p> <p>(b) the trustee(s);</p> <p>(c) the protector<b>(s)</b> (if any);</p> <p>(d) the beneficiaries or class of beneficiaries; and</p> <p>(e) <b>any other person mentioned in the trust deed or related document (regardless of any distribution, right, power or interest);</b></p> <p><b>(f)</b> any other natural person exercising effective control over the trust.</p>

<sup>48</sup> EU Fourth AML DIRECTIVE, pages 25-26, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&rid=1>; 23.6.2016.

### 6.2.2 Scope of trusts subject to the Fourth EU AML Directive

Provisions in Article 31.1<sup>49</sup> regarding “trustees of express trusts governed under their laws” should be clarified to avoid ambiguities and ensure enforcement is possible.

<b>Current Text</b>	<b>Proposed Alternative</b>
<p>1. Member States shall require that trustees of any express trust governed under their law obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust [...].</p>	<p>1. Member States shall <b>ensure</b> that <b>(i) all trusts<sup>1</sup> created according to or governed by their law or having their ultimate court of appeal in their jurisdiction, and (ii) all foreign law trusts that are connected to their territories (either because at least one related party<sup>2</sup> to the trust is resident within their territory or because any trust asset is located within their territory)</b>, are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held.</p> <p><b>Footnote 1: The word “trust” shall include a fideicomiso, fiducie, Treuhand, waqf or equivalent.</b></p> <p><b>Footnote 2: a resident related party includes any resident: settlor, protector, trustee, beneficiary or person mentioned in the trust’s related documents or with effective control or providing binding or non-binding advice to the trust managers. All trustees should be registered, regardless of their number, professional capacity or fees charged.</b></p>

### 6.2.3 Scope of access to BO information on trusts

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<sup>49</sup> EU Fourth AML Directive, pages 25-26, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&rid=1>; 23.6.2016.

Central registries of trusts' BO information should be publicly accessible (Article 31.4<sup>50</sup>). Extraordinary situations should be dealt with in a case by case basis.

<b>Current Text</b>	<b>Proposed Alternative</b>
<p>4. Member States shall require that the information referred to in paragraph 1 is held in a central register when the trust generates tax consequences. The central register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the parties to the trust concerned. It may also allow timely access by obliged entities, within the framework of customer due diligence in accordance with Chapter II. Member States shall notify to the Commission the characteristics of those national mechanisms.</p>	<p>4. Member States shall require that the information referred to in paragraph 1 is held in a central <b>public</b> register <del>when the trust generates tax consequences</del>. The central register shall ensure timely and unrestricted access by competent authorities, <del>and</del> <b>FIUs and the general public</b>, without alerting the parties to the trust concerned. <del>It may also allow timely access by obliged entities, within the framework of customer due diligence in accordance with Chapter II. Member States shall notify to the Commission the characteristics of those national mechanisms.</del></p> <p><b>The general public referred to above shall access at least the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held.</b></p> <p><b>Member States may provide for an exemption to the public access referred to above where a judge or similar authority confirms that the beneficial owner is (still) a minor or otherwise incapable. Other exemptions may be determined by a judge or similar authority in extraordinary circumstances, on a case by case basis, when the creation of the trust is the only solution to a specific situation but public access to that specific person's information should be prevented.</b></p> <p><b>4'. To the extent that there is doubt under paragraph 4 as to whether</b></p>

<sup>50</sup> EU Fourth AML Directive, page 26, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&rid=1>; 23.6.2016.

Current Text	Proposed Alternative
	<p><b>the person(s) identified are the beneficial owner(s) and the trust or trustee do not cooperate to clarify the information, or where the trust or trustee do not provide identity information of all natural persons meeting the criteria under paragraph 1 above, trusts should not be allowed to register in the central (public) registry.</b></p> <p><b>Unregistered trusts should not be allowed to operate (i.e. hold bank accounts, engage in business transactions, hold or purchase assets, be enforceable under domestic laws and courts, etc.) within the territory of the EU. Existing registered trusts that do not update information, if any, should be "inactivated": while their available information will be kept, they will be unable to operate within the territory of the EU as if they were unregistered trusts.</b></p>

## **ANNEX: Empirical Overview of trust registration requirements in 102 countries<sup>51</sup>**

The following section is based on the [Financial Secrecy Index](#) (FSI) 2015 Edition on Trusts. The FSI applies the "lowest common denominator" principle to ensure that no loopholes are available (rating and classifying jurisdictions according to their least transparent feature). So for example, if a jurisdiction requires only some types of domestic law trusts to register (but not all of them), that jurisdiction will be considered as not having registration of (all) domestic law trusts. For this reason, jurisdictions in the last (red) category may prescribe registration of some trusts but they require neither that **all** domestic law trusts nor that **all** foreign law trusts with a resident trustee be registered with a public authority.

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<sup>51</sup> Based on the [Financial Secrecy Index](#) 2015 Edition, see: <http://www.financialsecrecyindex.com/jurisdictions/database>; 23.6.2016.

## I. Overview of conditions that trigger trust registration

Registration with any authority of all domestic law trusts and/or all foreign law trusts with a resident trustee<sup>52</sup>:

<b>All Domestic law trusts and all foreign law trusts domestically managed</b>
Czech Republic, Hungary, San Marino
<b>All foreign law trusts domestically managed (Domestic law trusts cannot be created)</b>
Italy, Monaco
<b>Only domestically managed trusts (both foreign and domestic law trust<sup>53</sup>)</b>
Australia, Canada, India, Ireland, Japan, Korea, New Zealand, Philippines
<b>(Domestic law trusts cannot be created), but No registration of domestically managed foreign law trusts)</b>
Andorra, Aruba, Belgium, Brazil, Cyprus, Denmark, Estonia, Finland, Greece, Iceland, Latvia, Macao, Macedonia, Maldives, Montenegro, Netherlands, Norway, Poland, Portugal (Madeira), Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland
<b>Domestic law trusts but No registration of domestically managed foreign law trusts</b>
Belize, Cook Islands, Curacao, Dominican Republic, France, Marshall Islands, Saudi Arabia, Seychelles, South Africa, St Kitts and Nevis, Uruguay
<b>Foreign law trusts domestically managed but no registration of domestic law trusts</b>
Chile
<b>Neither domestic law trusts nor foreign law trusts domestically managed have to register</b>
Anguilla, Antigua & Barbuda, Austria, Bahamas, Bahrain, Barbados, Bermuda, Bolivia, Botswana, British Virgin Islands, Brunei, Cayman Islands, China, Costa Rica, Dominica, Gambia, Germany, Ghana, Gibraltar, Grenada, Guatemala, Guernsey, Hong Kong, Isle of Man, Israel, Jersey, Lebanon, Liberia, Liechtenstein, Luxembourg, Malaysia (Labuan), Malta, Mauritius, Mexico, Montserrat, Nauru, Panama, Paraguay, Samoa, Singapore, St Lucia, St Vincent & Grenadines, Taiwan, Tanzania, Turkey, Turks & Caicos Islands, United Arab Emirates (Dubai), United Kingdom, US Virgin Islands, USA, Vanuatu, Venezuela

## II. Details of conditions that trigger trust registration (of either all domestic law trusts and/or all foreign law trusts with a resident trustee), country by country

<sup>52</sup> Analyses based on the [Financial Secrecy Index](http://www.financialsecrecyindex.com/jurisdictions/database) 2015 Edition, see: <http://www.financialsecrecyindex.com/jurisdictions/database>; 23.6.2016.

<sup>53</sup> All domestic law trusts should have to register, not only those with a resident trustee as a connection point.

## **All Domestic law trusts and all foreign law trusts domestically managed**

### **CZECH REPUBLIC**

In 2015 the Global Forum wrote that pursuant to tax laws, domestic trusts would have to register with tax authorities and provide identity of settlors, trustee and beneficiaries - if they are determined<sup>54</sup>. Regarding foreign law trusts, the Global Forum divides them into those which have a Czech trustee and are managed within the Czech Republic and those which have a Czech trustee but are managed outside of the Czech Republic, although it concludes that both have to register with tax authorities<sup>55</sup>. There is yet no other registration requirement, although a Registry of Trust is underway<sup>56</sup>.

### **HUNGARY**

Domestic law trusts may be managed by professional trustees or by non-professional trustees. Non-professional trustees need to register the trust (including information on the settlor, beneficiary and trustee) with the Registry of Trust Relationships kept by the Central Bank. In contrast, trusts managed by professional trustees need not register. It is the professional trustee who needs to obtain a license from the Central Bank, but no information on the trust has to be provided to authorities. However, pursuant to tax laws, all trusts contracts have to be registered with the tax authorities by the trustee<sup>57</sup>. Regarding foreign law trusts managed by resident trustees, the Global Forum writes that general registration, licensing and tax regulations would be applicable because of the substance of activities of the trustee, regardless of the law under which the trust was created<sup>58</sup>. Therefore, based on tax laws, all trusts would need to register. Nevertheless, it is not clear what information the trust contract contains and given that these new provisions on trust registration are from 2014 there is no experience in practice.

### **SAN MARINO**

The Global Forum wrote: "A trust is required to be registered in a Trust Register, which is maintained by the Office of the Trust Register, part of CBSM. Art 7 of the Trust Act obliges the trustee to draw up a certificate of trust to be authenticated by a notary public. This certificate should contain information on the trustee, protector, settlor and beneficiaries. The notary public must file this certificate with the Office of the Trust Register, where it is transcribed into the Register"<sup>59</sup>. Regarding foreign law trusts, "The administration of a trust by a San Marino

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<sup>54</sup> 2015 Global Forum peer review on Czech Republic, page 54-55.

<sup>55</sup> Ibid., pages 54-57.

<sup>56</sup> Ibid., page 54.

<sup>57</sup> 2015 Global Forum peer review on Hungary, page 45-49.

<sup>58</sup> Ibid., page 49.

<sup>59</sup> 2013 Global Forum peer review on San Marino, page 37.



resident trustee makes the trust fiscally resident in San Marino and taxable in San Marino. As in the case of domestic trusts, the resident trustee of a foreign trust must draw up a certificate of trust to be authenticated by a notary public containing, among others, the details of the trustee, protector, settlor and beneficiaries (Articles 7 and 56 of the Trust Act). The notary public must file this certificate with the Office of the Trust Register, where it is transcribed into the Register"<sup>60</sup>.

**All foreign law trusts domestically managed (Domestic law trusts cannot be created)**

### **ITALY**

The Global Forum reported in 2011: " A trust is deemed to be resident of Italy if its registered office is in Italy; its administrative office is Italy; or the main purpose of its business is conducted in Italy. [...] As a relevant arrangement for tax purposes, a trust must be registered"<sup>61</sup>. Therefore, the general treatment of trusts as taxable entities under Italian corporate income tax indicates that there is a registration requirement of foreign law trusts administered by trustees resident in Italy.

### **MONACO**

The Global Forum reports: "legal acts constituting or transferring trusts in or to Monaco must be registered with the tax authorities. Registration entails payment of a registration fee proportional to the trust's assets. Information contained in the founding act is therefore available from the tax authorities on the basis of the applicable foreign law."<sup>62</sup> Lowtax.net reports: "Monaco law also allows for a trust to be administered from but not registered in Monaco.[...] The trust deed must be registered with the result that information relating to the beneficiaries, settlors and property settled under the trust are easily verifiable matters." (Lowtax.net). However, given that the trust deed's requirements depends on the foreign law requirements, there may be no identification of beneficiaries or other related persons.

**Only domestically managed trusts (both foreign and domestic law trust)**

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<sup>60</sup> Ibid., pages 40-41.

<sup>61</sup> 2011 Global Forum peer review on Italy, page 34.

<sup>62</sup> 2013 Global Forum peer review on Monaco, page 38-39.

## **AUSTRALIA**

According to the Global Forum: "Registration is required if the trust has a business name or if the trust/trustee requires a licence for business activities."<sup>63</sup> In addition, for tax purposes resident trusts must file tax returns and foreign trusts are obliged to file tax returns if they have Australian source income<sup>64</sup>. The Global Forum specifies residency of trusts: "Under section 95(2) of the ITAA 1936, a trust is considered resident in Australia if at any time during the income year a trustee is a resident of Australia or the central management and control of the trust is in Australia."<sup>65</sup>

## **CANADA**

While there is no statutory registration requirement, a trust must file a tax return if it is resident in Canada<sup>66</sup>. Residency of the trust is "determined on a case by case, but is generally considered to reside where the trustee, executor, administrator, heir or other legal representative who manages the trust or controls the trust assets resides"<sup>67</sup>. Therefore, both foreign and domestic law trusts administered in Canada must file a tax return and as such are registered with a public authority.

## **INDIA**

According to the Global Forum, except for private trusts holding immovable property, there is no registration requirement for private trusts<sup>68</sup>. In addition, "Registration requirements apply also to charitable trusts and wakfs" (ibid.: 45). However, all trusts are required to file tax returns: "ITA s.139(1) requires all persons in India who have income over a certain threshold to submit an annual tax return. Trusts are considered to be associations of persons under the ITA and are assessed for tax on any income above a threshold of INR 160 000 (EUR 2,238). The relevant tax assessment form requires information on the names and addresses of the author/ founder/ trustee/ manager and the person who has made substantial contribution to the trust. It does not require identification of the beneficiaries."<sup>69</sup>

In principle, the obligation refers only to domestically managed trusts, both local and foreign: "The tax return requirements are the same for trusts created under the laws of other jurisdictions that are administered in India or have a trustee resident in India, Section 6(4) of the ITA defines residency of "persons" (which includes trusts) for the purposes of the ITA very broadly as incorporating every person except where during that year the control and management of his affairs

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<sup>63</sup> 2011 Global Forum peer review on Australia, page 30.

<sup>64</sup> Ibid., pages 8, 20, 34.

<sup>65</sup> Ibid., page 20.

<sup>66</sup> 2011 Global Forum peer review on Canada, page 32.

<sup>67</sup> Ibid.

<sup>68</sup> 2013 Global Forum peer review on India, page 44.

<sup>69</sup> Ibid., page 46.

is situated wholly outside India"<sup>70</sup>. In addition, "A PAN [a Permanent Account Number] is in practice compulsory for all domestic trusts and foreign trusts being managed from India. Information on settlors, trustees and beneficiaries of the trust must be provided together with the application for a PAN."<sup>71</sup> Furthermore, the Global Forum reported that according to an additional amendment to the law: "[...] should a foreign trust be administered from India, any transfer of assets to the trustee from abroad would have to be declared to the authorities: no person can receive foreign contributions without being registered under the Foreign Contribution (Regulation) Act."<sup>72</sup>

In addition, "In the case of oral trust, the trustee needs to provide information on the purpose of the trust, trustees, beneficiaries and trust property to the assessing officer within three months of its creation so as to be treated as a trust created through a written instrument, and therefore be eligible to a taxation at a rate other than maximum marginal rate (s.160(v)). Further, from 2013, the Indian resident trustee of a foreign trust is obliged to include in his/her income tax return information on the settler, beneficiaries and other trustees of the trust."<sup>73</sup>

### **IRELAND**

The Global Forum claims that for all trusts administered by Irish resident trustees trust tax returns must be filed, while some of those trusts for which tax information was filed and which involve additional non-resident trustees, may ultimately not be liable to Irish income tax<sup>74</sup>. An analysis of the underlying passage in the law suggests that following a request by a tax inspector (Taxes Consolidation Act 1997, ss. 890.1) trustees are under obligation to submit a list of all persons to whom income is belonging which the trustee is receiving, including the amounts. It is likely that this request is a standing regulation for all regulated trustees. This legal passage is interpreted by the Global Forum as including in the tax return information on settlors, beneficiaries and trustees<sup>75</sup>.

### **JAPAN**

While there is no registration obligation in order to create a valid trust, tax obligations require trustees resident in Japan who are administering foreign and domestic trusts to submit annual statements of trust identifying settlors, beneficiaries and trustees<sup>76</sup>.

### **KOREA**

The Global Forum reported: "[...] persons handling trust matters must submit the particulars of the trust concerned to the revenue authorities by the end of the

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<sup>70</sup> Ibid., page 47.

<sup>71</sup> Ibid., page 48.

<sup>72</sup> Ibid., page 47.

<sup>73</sup> Ibid.

<sup>74</sup> 2011 Global Forum peer review on Ireland, pages 26-27.

<sup>75</sup> Ibid., page 27.

<sup>76</sup> 2011 Global Forum peer review on Japan, page 49.

month following the quarter during which the trust agreement is concluded. This obligation covers all trust arrangements managed by a trustee resident in Korea, even when no beneficiaries, settlors or assets are located in Korea."<sup>77</sup>

### **NEW ZEALAND**

All trusts administered in New Zealand (both domestic and foreign law trusts) are required to be disclosed by the resident trustee<sup>78</sup>. However, the information disclosed about foreign trusts is limited to its name and trustee contact details (ibid.). More information is available via tax returns in situations in which settlors of trusts are residents of New Zealand or New Zealand source income flows to the trust.

### **PHILIPPINES**

"The Civil Code does not require a trustee to register a trust with the government."<sup>79</sup>. However, "[...] Section 65 of the NIRC [National Internal Revenue Code] provides that trustees and all persons acting in a fiduciary capacity must file an income tax return for the person, trust or estate for which they act. Details of the settlor or beneficiaries do not have to be included on this return"<sup>80</sup>.

**Domestic law trusts but No registration of domestically managed foreign law trusts**

### **BELIZE**

As for foreign trusts, while there is no obligation to register, according to the Global Forum, " In practice, the interpretation of section 105(1) of the IBTA [the Income and Business Tax Act] which defines receipts that are taxable under Business Tax covers the receipts of a trustee of foreign trusts. Every trustee (including the trustee of a foreign trust) will have to file a return showing the receipts of the trust, which will be taxable as the income of the trustee"<sup>81</sup>. However, "The level of compliance of registered agents providing trustee services in Belize with the ownership information keeping requirement is unknown. [...] the IFSC did not carry out sufficient inspections of service providers including those covered by the Trust and Company Service Providers (Best Practices) Regulations, 2007"<sup>82</sup>.

Regarding domestic trusts in Belize, the Global Forum reports that "Following the amendment of the TA [The Trust Act] in October 2013 (No. 16 of 2013), the registration of domestic trusts is now mandatory. [...] Domestic trusts that had

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<sup>77</sup> 2012 Global Forum peer review on Korea, page 44.

<sup>78</sup> 2011 Global Forum peer review on New Zealand, page 44.

<sup>79</sup> 2013 Global Forum peer review on the Philippines, page 44

<sup>80</sup> Ibid., pages 44-45.

<sup>81</sup> 2014 Global Forum peer review on Belize, page 58

<sup>82</sup> Ibid.

been created but had not been registered so far were given six months from the commencement of the amended Act (October 2013) to apply for registration. Any domestic trust not registered after this transition period shall cease to be a valid and enforceable domestic trust under the laws of Belize (s. 63 B (5))<sup>83</sup>. The registration is made with The Registrar of the Supreme court<sup>84</sup>. As for International trusts, they have to register with the Registrar of International Trusts in Belize within 90 days of the date of creation of the trust<sup>85</sup>.

### **COOK ISLANDS**

In 2015 the Global Forum described that domestic law trusts could be either domestic trusts or international trusts. It appears that international trusts are domestic law trusts whose beneficiaries are not resident in Cook Islands. Domestic trusts need not register, but must file annual tax returns which would have information regarding the settlor, beneficiaries and trustees<sup>86</sup>. However, it is not clear if the trust would still need to file tax returns if it had not taxable income (for instance, because it only holds property). International trusts need not file tax returns, but need to register. While the law says that the trust deed (of an international trust) 'may' be attached, the Global Forum writes that in practice the online registration requires the inclusion of the trust deed. Otherwise the registration will be rejected<sup>87</sup>.

### **CURACAO**

Domestic trusts are required to register the trust deeds with the trade register of the Curaçao Chamber of Commerce and Industry (Cifa-curacao.com; Ekvandoorne). This would include information on the settlor, beneficiary and trustees<sup>88</sup>.

### **DOMINICAN REPUBLIC**

Registration is required for fideicomisos (art 17, Law 189-11).

### **FRANCE**

This section concerns predominantly the French Fiducie. The Global Forum wrote in 2013: "All fiducies must be registered in order to be valid."<sup>89</sup>

### **MARSHALL ISLANDS**

The creation of Trusts is under the exclusive control and at the discretion of the Registrar of Trusts, the Majuro International Trust Company (MITC). [...] All Marshall Islands trusts must be registered with the Register of Trusts. The office of a Marshall Islands trustee is the registered office of the trust (ss. 160 and 164,

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<sup>83</sup> Ibid., pages 53-54.

<sup>84</sup> Ibid., page 53.

<sup>85</sup> Ibid., page 55.

<sup>86</sup> 2015 Global Forum peer review on Cook Islands, pages 40-41.

<sup>87</sup> Ibid., pages 42-44.

<sup>88</sup> 2015 Global Forum peer review on Curacao, page 59.

<sup>89</sup> 2013 Global Forum peer review on France, page 15.

TA).<sup>90</sup> However, given that the MITC is currently inactive, the GF reports there are currently no Marshall Islands trusts or licensed trustees in existence in the Marshall Islands (ibid). As for foreign law trusts, "There is no express requirement relating to the filing of information relating to the beneficiaries and settlors of a foreign trust established outside of the Marshall Islands with the Registrar under the TA [Trust Act]"<sup>91</sup>.

### **SAUDI ARABIA**

The Global Forum explains that for a waqf to be valid it has to obtain a court order by filing the deed establishing the waqf which contains information on the nad'r (trustee) and, if identifiable, the beneficiaries. Then the waqf has to be registered with the Waqf Administration, by filing the waqf deed and identifying the waqif (settlor), nad'r, assets and beneficiaries. There are no provisions on registering domestically managed foreign law trusts<sup>92</sup>.

### **SEYCHELLES**

Registration is required for international trusts created under Seychelles domestic law. However, no ownership information has to be filed, but only a declaration that states that "the settlor is not a resident of the Seychelles; the trust property does not include any immovable property situated in the Seychelles; and the trust qualifies as an international trust"<sup>93</sup>.

### **SOUTH AFRICA**

While the Trust Property Control Act (TPCA) contains some registration requirements, it only applies to trusts with property in South Africa. However, tax laws do contain registration provisions which apply to all domestic law trusts (created under South African law). In addition, some foreign law trusts are also subject to tax laws' registration requirements: trusts deriving South African income and trusts where the main trustee is resident in South Africa<sup>94</sup>.

### **ST. KITTS & NEVIS**

The Global Forum reported in 2014 regarding St. Kitts that "ordinary (domestic) or exempt (international) trusts may be registered under the Trusts Act (CAP 5:19). [...] All of the provisions in the Trusts Act are applicable for both ordinary and exempt trusts established in St. Kitts, regardless as to whether the settlors or beneficiaries reside outside the Federation, or whether the assets are located outside the Federation. A trust will not be recognized by law unless it is provided with a certificate of registration by the Registrar (s. 4(4))."<sup>95</sup> As for Nevis: "Pursuant to the Nevis International Exempt Trust Ordinance, international trusts

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<sup>90</sup> 2012 Global Forum peer review on Marshall Islands, page 30.

<sup>91</sup> Ibid., page 31.

<sup>92</sup> 2012 Global Forum peer review on Saudi Arabia, pages 28-30.

<sup>93</sup> 2013 Global Forum peer review on Seychelles, pages 43-44.

<sup>94</sup> 2012 Global Forum peer review on South Africa, pages 29-31.

<sup>95</sup> 2014 Global Forum peer review on St. Kitts and Nevis, page 47.

are exempt from taxes and duties and must be registered." (ibid.: 49). As regards foreign law trusts, the Global Forum explains that they may choose to register: "a foreign trusts that wishes to become registered under the Nevis International Exempt Trust Ordinance as an international trust must register as a 'qualified foreign trust' first [...]. The authorities of St. Kitts and Nevis have indicated that most 'qualified foreign trusts' make an application for entry on the register for international trusts"<sup>96</sup>.

### **URUGUAY**

Domestic law trusts (including foreign-administered trusts created under Uruguayan law) "must be registered in the Private Acts Registry within the Properties Section of the Ministry of Education and Culture (art 6, Trusts Law; s.1, Trusts Decree)"<sup>97</sup>. However, foreign law trusts administered in Uruguay which have a non-professional trustee are not required to register<sup>98</sup>. As the definition of a general trustee (non-professional trustee) allows the establishing of up to 4 trusts per year (ibid), this gap appears to be relevant. Regarding professional trustees, the Global Forum explains that trustees need to register and hold information about the settlor, but it is not clear if this information has to be filed with authorities<sup>99</sup>. Lastly, the Global Forum writes that, except for guarantee trusts which are tax exempt, trustees are responsible for registering the trust with tax authorities. However, it is not clear if any ownership information has to be provided<sup>100</sup>.

**Foreign law trusts domestically managed but No registration of domestic law trusts**

### **CHILE**

Regarding foreign law trusts administered in Chile, any trustee or trust administrator is obliged to report to the tax authorities whenever he/she becomes a trustee or administrator of a foreign law trust. According to the Global Forum, "Chile introduced a new obligation in 2013 for any resident trustee to fill in a declaration disclosing identity information of the persons related to the trusts they manage, and reinforced the obligation in 2014 [...] in order to ensure that all foreign trusts with a resident trustee or administrator in Chile are known to the authorities [...]. Both resolutions require all persons who are taxpayers in Chile as well as foreigners domiciled or resident in Chile that act as trustee or administrator of a foreign trust to make a declaration when they take up their duties."<sup>101</sup>

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<sup>96</sup> Ibid., pages 49-50.

<sup>97</sup> 2015 Global Forum peer review on Uruguay, page 48.

<sup>98</sup> Ibid., page 50.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid., page 49.

<sup>101</sup> 2014 Global Forum peer review on Chile, page 36.

According to the Global Forum, "The declaration must also disclose, with respect to settlor(s), beneficiary(ies) and trustee(s): their name; country of residence, registration or origin; and Chilean or foreign tax identification number.[...] From 2015, with respect to settlor(s), beneficiary(ies) and trustee(s), the declaration must also include the exact domicile of these persons (in addition to their country of tax residence)"<sup>102</sup>. Given that the 'general tax obligations' are applicable to fiduciaries<sup>103</sup>, it is reasonable to assume that all the required details to be included in the tax declaration of foreign trusts are similar to those of fiduciaries.

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid., page 39.