Trusts under threat

The impact of the OECD's Common Reporting Standard on trusts at a time when they are under threat in a number of continental European jurisdictions

by Filippo Noseda

Abstract

- While the aim of the US Foreign Account Tax Compliance Act (FATCA) and the OECD's Common Reporting Standard (CRS) to eradicate tax evasion is legitimate, the provision of unlimited information to treaty partners who have decided to disregard trusts as a matter of public policy should be a reason of significant concern for any Anglo-Saxon jurisdiction seeking to enter into negotiations concerning the provision of automatic information.
- That some of the relevant jurisdictions are EU member states should raise further concerns, as there should be a legitimate expectation that member states will respect and, as far as possible, recognise, legal structures originating from other member states.
- Practitioners should adopt an activist approach and raise their concerns with their professional bodies and government representatives. In the case of the EU registers of beneficial ownership, assiduous lobbying by STEP, the Law Society and other professional organisations, as well as by activist practitioners, has already succeeded in diverting a major crisis. It is now time to focus efforts on the implementation of the CRS.

When I first studied trust law under Justice David Hayton TEP and Paul Matthews TEP in 2000, the make-up of the classroom reflected the wide interest in trusts across continental Europe. Italian, Swiss, French, Dutch and Belgian lawyers (among many others) were rubbing shoulders with English, American and Irish lawyers.

This interest was perhaps unsurprising, as continental European countries were lining up to ratify the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (the Hague Trust Convention). Italy did so in 1992 followed by Malta and the Netherlands (1996), Luxembourg (2004), Liechtenstein and San Marino (2006), Switzerland (2007) and Monaco (2008). Additionally, Belgium introduced in 2004 private international law rules modelled on the Hague Trust Convention.

Even France had a tradition of recognising trusts, with over 20 reported cases dating from the 19th century,[1] up to the famous Poillot case of 2004,[2] where the court of Nanterre confirmed that a discretionary beneficiary was not liable to wealth tax by reference to the whole of the trust fund (the tax authorities did not appeal).

It is useful to remind ourselves of the words used by the French judge in the Poillot case, as they clearly dispel the common myth that civilian courts do not understand trusts:

'The tax authorities contend that the receipt, by Mrs Poillot, of annual distributions from the trust "can be assimilated to a property right in respect of the trust assets, the valuation of which has been determined by the writing tax authorities" using a capitalisation index of 3 per cent of the declared income.

'However, this is insufficient to subject such income to any presumption of ownership in respect of the trust assets. In fact, the tax authorities have been unable to bring any evidence on the nature of consistency of the assets comprised in the trusts…

'The tax authorities have not brought any evidence that Mrs Poillot, as a beneficiary of the two trusts, has any right in rem which represents an asset in her estate, and which therefore would be capable of coming within the scope of wealth tax. On the contrary, the terms of the trust instrument deny any proprietary right or chose in action against the trusts or the trust assets and even confer discretion on the trustees in respect of distributions.

'It follows that – in the absence of any evidence that Mrs Poillot has any proprietary right against the trust – the tax authorities are unable to justify the assessment of Mrs Poillot to wealth tax in her quality as a beneficiary of the two US trusts in question.'[3]

Nevertheless, only a year later, the French Supreme Court held that a settlor of a US revocable trust had not departed from his assets at the time of the creation of the trust (so that French succession tax was due when the trust assets came to be distributed to his family on his death).[4]

In 2006, Italy announced the introduction of statutory rules dealing with the tax treatment of trusts – a first among civil-law countries. The new rules came into effect in 2007, at which point Switzerland also released its first official guidelines on the tax treatment of trusts.[5] Overall, the Italian and Swiss tax rules reflected a relatively benign approach towards the tax treatment of trusts, which was largely echoed in Belgium, where the local tax authorities issued a widely reported ruling confirming that a trust distribution to a Belgianresident discretionary beneficiary was not subject to tax.[6]

The Italian approach was particularly striking, as Italian lawyers and notaries took to drafting trusts without any foreign connections – other than the proper law of the trust (as Italy does not have a domestic trust law). Italian case law is awash with judgments upholding the validity of such 'domestic' trusts, mostly because trusts were seen as plugging various perceived gaps in the Italian Civil Code (and, possibly, as a 'fashionable' alternative to more traditional legal solutions).

The Legislative Backlash: A Look at Selected Jurisdictions

The collapse of Lehman Brothers in 2008, and the credit crunch that ensued,[7] brought widespread criticism of the perceived failings of Anglo-Saxon capitalism. Just one example among many, on

22 September 2009 the French newspaper Le Monde ran an article entitled: 'Is it the end of Anglo-Saxon financial capitalism?'[8]

France

Against this backdrop, on 29 July 2011, the French parliament introduced harsh rules on the tax treatment of trusts as part of its annual Budget.[9] The aim of the new rules was summarised by the Rapporteur to the Senate (Senator Marini) as follows:

'The tax treatment [of trusts] depends largely on a case-by-case analysis of the trust documents. In the absence of precise tax rules under French law, the use of irrevocable and discretionary trusts may therefore enable tax evasion: in particular, settlors or beneficiaries may maintain the control over the trust through complex arrangements or confidential letters allowed in certain countries, while giving the appearance of having disposed of their assets in the eyes of the French tax authorities. The proposed statutory measure seeks to remedy the inadequacies and the gaps under the current legislative rules.'[10]

In practice, the new French rules disregard trusts completely as far as gift and succession taxes are concerned.

The idea of disregarding trusts to prevent an individual (the settlor) from achieving an undue tax benefit by transferring assets to a trust under which they (or some close family members) may benefit is not new. Under the UK income and capital gains tax (CGT) legislation, the assets of a 'settlor-interested trust' are treated as belonging to the settlor for tax purposes,[11] as is also the case for 'grantor trusts' in the US.[12]

However, the French rules go a step further, in that (following the death of the settlor), they treat the trust assets as belonging to the beneficiaries, regardless of whether or not they have any vested interest in the trust property. In drafting terms, this is achieved by treating beneficiaries as 'deemed settlors' (bénéficiaires réputés constituants). In practice, this means that the death of any French-resident beneficiary triggers succession tax of up to 60 per cent by reference to the whole of the trust fund (or, in the case of a non-French resident beneficiary, by reference to any trust assets situated in France), even if the deceased beneficiary never benefited from the trust. Coincidentally, Belgium, too, has been looking to adopt the concept of 'deemed settlor' and tax beneficiaries, regardless of the nature of the trust.[13]

This problem was expressly acknowledged (and duly left unanswered) by the French commission tasked with reviewing the draft law: 'In practice, one may ask oneself how this rule will work in the (probably frequent) scenario of a plurality of beneficiaries, which will give rise to a plurality of "settlors by operation of law" [i.e. deemed settlors]. Applying the law literally, this will lead to succession tax of 60 per cent of the trust assets upon the death of each beneficiary, which in turn will lead to the creation of additional "settlors by operation of law".'[14]

> In practice, the death of any French-resident beneficiary will trigger succession tax of up to 60 per cent by reference to the whole of the trust fund

The practical implications of this rule are likely to be monstrous in most circumstances.

In my opinion, there is no denying that the French rules (which on the face of it were designed to prevent tax evasion by settlors) are actually designed to subject trusts that have any French connection to punitive taxation.

It is noteworthy that the French rules effectively turn the legal analysis operated by the French courts on its head. This, and the fact that the new law was passed at the height of the credit crunch (when the world was discussing the apparent failings of the Anglo-Saxon model), casts a long shadow over the French parliament's true intention – more political statement than legal analysis, in my view. After all, the parliamentary commission that was tasked with reviewing the draft law acknowledged that: 'Our tax law taxes the possession of property (in the case of wealth tax) and (in the case of gift and succession tax) the transfer of ownership.'

It is difficult to see how the idea of 'deemed settlors' can be reconciled with the concept of transfer of property. Instead, the whole French approach seems to be based on a deep-rooted suspicion of trusts and the Anglo-Saxon system that they represent.

This suspicion permeates public statements made by the French government since the introduction of the new tax rules. Thus, a press release issued by the office of the French Prime Minister on 24 April 2013 contains the following statement about trusts:[15]

'The Prime Minister presented today a draft law concerning the fight against tax evasion and serious economic and financial criminality… An aggravating factor is represented by the most serious cases of fraud, notably tax fraud committed by organised gangs, as well as those perpetrated using bank accounts and entities held abroad, such as nominee agreements or trusts. The level of punishment is increased to seven years of jail and a fine of EUR2 million. To fight against these cases, the authorities will be able to rely on so-called "special investigative techniques", such as surveillance, infiltration or police custody of four days…'

The recent Guernsey case of In Re B; B v T (where the beneficiaries tried to prevent the trustees from disclosing information to the French tax authorities in respect of the trust fund following the death of the settlor in 2001)[16] is a clear example of the heavyhanded approach taken by the French authorities. The decision of the Guernsey Court of Appeal (which granted the trustee's request to disclose information) informs us that the French authorities had ordered the Guernsey trustees to appear at a pre-indictment hearing in relation to the alleged offences of 'possession of stolen goods and complicity in tax evasion' and 'aggravated money laundering'.

Belgium

Unfortunately, other countries seem to be following in France's footsteps, such as Belgium, which recently passed a law on the transparent tax treatment of 'wealth structures' as part of the Finance Act 2015.[17] Like their French equivalent, the Belgian rules treat certain beneficiaries as 'deemed settlors', thus perpetuating the lookthrough approach across multiple generations.[18]

The rationale of the new rules is explained in a ten-page document issued on 1 June 2015 as part of Belgium's Finance Bill for 2015.[19] The Belgian government concluded its report to parliament by outlining the proposed legislative measures by reference to the solutions adopted in neighbouring countries:

'The problem of offshore structures is not limited to Belgium. An increasing number of countries are taking steps to increase the level of transparency/look-through. This is the case notably for the Netherlands (Law of 17 December 2009), France (Law 2011–900 of 29 July 2011 and Decree dated 14 September 2012) and even Luxembourg (§11 Steuer-Anpassungsgesetz Zurechnung).

'The look-through approach is also contained in the EU Savings Directive, the scope of which has been extended to "interposed" legal persons and other legal structures established in favour of individuals as beneficial owners.

'A first hint of the Belgian approach was presented in an action plan for 2012–2013 of the College for the Fight Against Tax and Social Fraud. Since 2009, the enquiry commission looking at substantive cases of fraud has recommended to "extend the scope of enquires on tax havens to trusts" (House of Representatives, 7 May 2009, Parliamentary enquiry on tax fraud, Rapport 52 0034/04, Recommendation 87).

'The previous government intended to put in place specific provisions applicable to these structures to enable tax to be levied in the hands of the beneficiaries… The current government has decided to implement an express tax regime effective from 2016 that takes inspiration from our neighbours in the Netherlands.

'The proposed system has been conceived to harmoniously balance the legitimate interests of the Treasury and those of the taxpayers. This means that the new system will allow the taxman to levy tax where tax would otherwise be avoided because of the interposition of the chosen legal structure; on the other hand, the system of transparency should not catch persons who are not the beneficial owners [of the structure] and also avoid the result that certain items of income become subject to (economic) double taxation. Accompanying measures will be implemented to stimulate the correct reporting.

'In this regard, the intention is not to prohibit such legal structures, but merely to neutralise the tax advantages by introducing a look-through approach so as to fill the existing vacuum relating to untaxed "floating" assets.'

The final version of the law was adopted on 10 August 2015 and it is noteworthy that the new law takes a different approach for trusts (complete look-through) as opposed to companies and foundations (where look-through taxation may be avoided by showing that the relevant company/ foundation is subject to at least 15 per cent income tax in the country where it is established).[20]

> In Italy, in practice, any trust under which the settlor or a beneficiary has a say is likely to be treated as interposed for tax purposes, with devastating effects in tax-compliance terms

Italy

Even traditionally benign jurisdictions seem to be stiffening in their approach towards trusts. Italy falls into this category.

Italy was the first civil-law jurisdiction to ratify the Hague Trust Convention (with effect from 1992) and in 2007 it was also the first continental European country to enact express statutory rules dealing with the tax treatment of trusts.

The Italian Finance Act 2007 introduced the novel idea of taxing trusts as akin to companies. Accordingly, under the rules introduced in 2007, trusts are treated as separate tax subjects (along the lines of companies), whereby their residence is determined primarily by reference to their place of effective administration (like companies).

In addition, double taxation is prevented by exempting distributions from tax in circumstances where the underlying income has already been taxed in the hands of the trustees (which is reminiscent of participation exemption).

Furthermore, in two recent resolutions,[21] Italy's Supreme Court clarified that gift tax is triggered at the time of the establishment of the trust (rather than on distribution), which in itself underpins the 'separateness' of a trust.

It should be noted that in Italy trusts enjoy widespread acceptance by the courts, as trusts have been seen as a useful way to overcome perceived shortcomings in the Italian Civil Code. Thus, there are numerous instances of trusts over Italian assets created by Italian settlors for Italian beneficiaries and with an Italian trustee, where the only foreign element is represented by the proper law of the trust (as Italy does not have a domestic trust law).

However, in a circular letter issued on 27 December 2010 (when Italy was in the depths of a recession and had just finished counting the spoils of the most recent tax amnesty), the Italian tax authorities abruptly pulled the handbrake by outlining various scenarios under which they would seek to treat a trust as a 'fictitious interposition' (effectively a sham). In practice, any trust under which the settlor or a beneficiary has a say is likely to be treated as interposed for tax purposes, with devastating effects in tax-compliance terms.

According to the Italian tax authorities, trusts are treated as 'fictitious interpositions' in the following scenarios (this is a non-exhaustive list):

– trusts where the settlor has the express power to terminate the trust at any time on their own initiative for their own benefit or the benefit of third parties;
– trusts where the settlor has the express power at any time to appoint themselves as beneficiary;
– trusts where the trustee cannot make decisions without the settlor or beneficiaries' consent;
– trusts where the beneficiary has an express power to compel the trustee to distribute a share of the trust assets;
– trusts where the settlor has the express power, during the life of the trust, to change the beneficiaries; and
– trusts where the settlor has an express power to assign trust assets or to give out loans.

Switzerland

Switzerland is often perceived as an offshore jurisdiction. However, when the Swiss government considered the formal recognition of trusts, thought was also given to the potential ramifications for Swiss taxpayers. Thus, an early version of the Swiss government's explanatory memorandum to the Bill on the ratification of the Hague Trust Convention contained the following statement:

'[There are] possible public policy concerns: in Switzerland, the trust concept is often met with scepticism. It is often perceived as a means to hide the real ownership position and as a tool for tax evasion, money laundering and the violation of succession law provisions'.[22]

While this statement does not appear in the final version of the Swiss government's explanatory memorandum, the guidelines on the tax treatment of trusts issued by the Swiss tax authorities following the ratification of the Hague Trust Convention by Switzerland contain the following policy statement:[23]

'Usually, the settlor will be resident abroad. However, he may be resident in Switzerland… If the settlor is resident in Switzerland at the time of the creation of the trust, the trust (whether it is revocable or irrevocable) will generally have to be treated as transparent, with the result that the trust assets and the trust income are attributed to the settlor.'

Spain

Trusts have attracted less debate in Spain than in other countries. However, on one occasion the Spanish Supreme Court had to consider the validity of a testamentary trust and its interaction with the Spanish forced heirship rules.[24] The estate in question was governed by Arizona law (which does not have any forced heirship rules) but the court decided to deny effect to the deceased's testamentary trust on the basis that the claimant had provided insufficient evidence on the content of Arizona law.

The Spanish tax authorities have taken a similar approach. In a binding ruling of 2010,[25] they held: 'The applicant would like to understand whether the income that is generated by the trust will be subject to taxation before any distribution to the beneficiaries. To this end, we repeat that there is no recognition of the trust concept in our legal system. Therefore, any income generated by the trust which is the subject matter of this ruling will have to be treated as attributable directly to the settlor.'

In the same ruling, the Spanish tax authorities confirmed the look-through approach would extend to succession taxes. That this approach also applies to discretionary trusts was confirmed in a 2012 article written by a senior official of the tax authorities.[26]

Inadequacy of New Continental European Rules

The inadequacy (and inequity) of the approach taken by an increasing number of continental European jurisdictions is best illustrated via examples.

Example 1

Imagine that X, an Italian-resident individual, decided to establish an Italian-resident trust for the benefit of his children. Under Italian law, the new trust will be treated as a separate tax subject and X will pay gift tax when he funds the trust. In addition, the trust will be subject to corporation tax in relation to its income. Now, imagine that X moves to France years later. The French approach is to treat trusts as tax-avoidance/evasion vehicles and therefore to disregard them. This means that X will have to pay French income and wealth tax on the whole of the trust fund and that his estate will be subject to French succession tax, although the settlor/trustees have already paid gift and income tax in Italy.

Example 2

A similar problem arises where the settlor in our example was resident and domiciled in the UK at the time of creating the trust. Subject to a very limited number of exceptions, in the UK the creation of a trust generally triggers an immediate inheritance tax charge of 20 per cent (entry charge), coupled with a 6 per cent charge every ten years (ten-yearly anniversary charge), or a pro-rata charge of up to 6 per cent of the value of the trust assets in the case of distributions between two ten-yearly anniversaries.

In addition, by moving to France, the settlor will have to pay income tax as if the trust did not exist and, on death, French succession tax of up to 60 per cent will become due on the whole of the trust fund leading to a combined charge of up to 80 per cent (20 per cent entry charge in the UK plus French succession tax of up to 60 per cent) or more (if one also takes into account exit charges).

Example 3

A wealthy US individual (since deceased) was advised in the 1960s to establish a trust for estate-planning and family-governance purposes. The trustee is a trust company in New York. The current class of beneficiaries includes two surviving children and eight grandchildren of the late settlor, all of whom were born and bred in the US. In 2008, one of the grandchildren (aged 17) moved to France to study art. As his parents are independently wealthy, he never received distributions from the trust. The French beneficiary was involved in a car accident.

Under the French rules, the total value of the trust fund (valued at USD120 million) is subject to French succession tax at up to 60 per cent, although the French beneficiary never received a distribution and the settlor never had any connection with France.

> Continental European governments should approach trusts without prejudices, by recognising their effects while providing for safeguards to tackle scenarios where trusts might be used by taxpayers with tax evasion in mind

These simple examples show the inadequacy of tax rules that are based on the presumption that all trusts serve a tax avoidance (or, in the words of the French Rapporteur, 'tax evasion') purpose. Instead, continental European governments should approach trusts without prejudices, by recognising their effects while providing for safeguards to tackle scenarios where trusts might be used by taxpayers with tax evasion in mind.

The OECD Joins the Assault

Once upon a time in America: FATCA

As continental Europe was coming to terms with the credit crunch, bringing with it a debate on the alleged 'failings' of Anglo-Saxon capitalism (and by extension, Anglo-Saxon legal structures in general), the US was intent on putting an end to banking secrecy following the arrest of Brad Birkenfeld (a former UBS employee) on 7 May 2008 and the publication of the Levin Report on 17 July 2008.[27]

The US efforts culminated in the enactment of the Foreign Account Tax Compliance Act (FATCA), which seeks to eradicate tax evasion through the introduction of an information reporting system enforced through a 30 per cent withholding tax on US-source income for non-compliance.

In a nutshell, in order to avoid the 30 per cent withholding tax, foreign financial institutions must register with the US Internal Revenue Service (IRS), and also provide an undertaking that they will report any financial account held abroad by a US taxpayer.[28]

The main FATCA legislation deals with financial accounts held both directly and through 'foreign entities' (such as companies, partnerships and trusts).[29] Where a financial account is held through a foreign entity, disclosure is limited to 'substantial US owner(s)' of such an entity,[30] defined as follows:[31]

'The term "substantial United States owner" means – (i) with respect to any corporation, any specified United States person which owns, directly or indirectly, more than 10 per cent of the stock of such corporation (by vote or value),

(ii) with respect to any partnership, any specified United States person which owns, directly or indirectly, more than 10 per cent of the profits interests or capital interests in such partnership, and
(iii) in the case of a trust –
(I) any specified United States person treated as an owner of any portion of such trust under [the grantor trust rules],32 and
(II) to the extent provided by the Secretary in regulations or other guidance, any specified United States person which holds, directly or indirectly, more than 10 per cent of the beneficial interests of such trust.'

The FATCA rules are very complex,[33] one complexity being that the secondary legislation provides that a foreign trust may itself be a 'foreign financial institution', thus requiring a distinction between trusts that are foreign financial institutions (FFIs) and trusts that are 'non-financial foreign entities' (NFFEs).[34] However, while the requirements for disclosure are slightly different, in both cases FATCA makes reference to the domestic US tax rules for trusts. Therefore, if a trust is treated as an FFI, interests in the trust are only treated as 'reportable US financial accounts' provided the following conditions are met:
a US taxpayer is treated as the owner of all or a portion of the trust for income tax purposes under the grantor trust rules, whereby the FATCA regulations clarify that, if a person is treated by the grantor rules as the owner of only a portion of the trust, then they are treated as grantor only in respect of that portion;[35]

– a US taxpayer is entitled to a mandatory distribution from the trust ('fixed-interest trust'); or
– a US taxpayer receives a discretionary distribution from the trust, but only if such person receives a distribution in the calendar year. In this case, the information to be reported includes the name of the US beneficiary, their address, taxpayer identification number and the amount of any distributions.

If, by contrast, a foreign trust is classified as an NFFE, disclosure depends on whether the trust has a 'substantial US owner' in accordance with the definition contained in the main FATCA legislation.

As mentioned above, the main FATCA legislation provides that a beneficiary of a trust is a 'substantial owner' of a trust if he or she 'holds, directly or indirectly, more than 10 per cent of the beneficial interests of such trust to the extent provided by the secretary in regulations or other guidance'.

To this end, the regulations issued by the US tax authorities show both adherence to the US tax treatment of trusts, as well as a degree of pragmatism. First, the regulations show adherence to the US tax treatment of trusts in that they confirm that disclosure of beneficiaries is only an issue where the trust assets cannot be attributed to the settlor for US tax purposes: 'A trust that is treated as owned only by US persons under [the grantor trust rules] is not required to treat any of its beneficiaries as substantial US owners.'[36] Contrast this with the position taken under the OECD's Common Reporting Standard (CRS), which is discussed further below. Second, the regulations show a degree of pragmatism in that they introduce a de minimis exception.[37]

Otherwise, the rule of the game consists in determining whether a US beneficiary of a foreign non-grantor trust has at least a 10 per cent beneficial interest in the trust.[38]

Applying these rules, disclosure of financial data to the IRS (which in the case of trusts does not relate to a 'financial account' but to an 'equity interest') is due in the following circumstances, notably by a:

– US settlor where they are treated as owning all or a portion of the trust under the so-called 'grantor trust' rules, i.e. in most circumstances involving a US settlor with any retained benefit or powers, or a revocable or retained life interest trust with a non-US settlor. [39]
– US beneficiary where they hold a fixed interest in trust assets, if this interest exceeds 10 per cent of trust assets or USD50,000.[40]
– What about discretionary trusts? In this case, under the domestic FATCA rules (which reflect the US income tax rules), financial reporting in respect of US beneficiaries is only due if such persons receive a distribution in the relevant tax year.[41] Discretionary beneficiaries who do not receive a payment thus do not generally need to be reported (the same argument applies to contingent beneficiaries).
–

The US tax rules are very complex, but the point to take away is that there is a direct correlation between reporting under FATCA and a settlor or beneficiary's US tax liability. This is because all that FATCA seeks to do is to prevent the evasion of tax that is due under the domestic tax rules by imposing automatic exchange of information, failing which a 30 per cent withholding tax applies.

The link between exchange of information and tax liability was also at the heart of article 26 of the OECD Model Convention with Respect to Taxes on Income and on Capital (which provided the standard for information upon request). Article 26 provides for the exchange of: 'such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States…'

However, the CRS championed by the OECD turns this principle on its head.

Here come the OECD, CRS and IGAs: beyond mere enforcement of domestic tax laws

Although FATCA is aimed at FFIs, it remains a domestic piece of legislation, albeit with extraterritorial reach (as is typical with many US laws). To give effect to the obligations of FATCA abroad, a number of foreign countries have entered into intergovernmental agreements (IGAs) with the US. Interestingly, however, what the IGAs do is much more than enable the extension of FATCA to foreign financial institutions.

Instead, they incorporate terminology that appears to be borrowed from the OECD's CRS, which, while developed on the back of FATCA, makes use of antimoney laundering definitions derived from the work of the Financial Action Task Force (FATF).

FATF is described on its own website as 'an intergovernmental body established in 1989 by the ministers of its member jurisdictions [with the objective] to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is thus a "policy-making body" that works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.'

Therefore, most of the IGAs concluded with the US do away with the term 'substantial US owners' (which, as we have seen, refers to specific taxpayers under US domestic tax law) and instead use the term 'controlling persons', a term used in the OECD's CRS to define 'beneficial owners' in accordance with the recommendations made by the FATF.

It is worth noting that the IGAs and CRS were subject to intense lobbying from the international banking community, which was keen to align both systems because of the huge information technology investment it was making. Therefore, their goal was to be able to use a single system for both IGAs and the CRS. Also, banks dogged with past tax-evasion issues have been keen to be seen to back governments' initiatives unconditionally (and uncritically) to deflect some of the criticism levelled at them, as was evident in Brady Dougan's testimony on behalf of Credit Suisse before the US Senate's Permanent Investigations Subcommittee on 25 February 2014.[42] Mr Dougan made a clear effort to defend his bank's record: 'Credit Suisse has strongly supported FATCA at every opportunity… While Credit Suisse embraced FATCA, other banks opposed it… In addition, Credit Suisse supports full information exchange beyond FATCA, including the OECD's efforts towards a global standard for automatic exchange of information.'

It is not entirely clear why the US government agreed to enter into IGAs that materially depart from the domestic provisions of FATCA. It seems certain the wider definitions used under the CRS are likely to generate more information than the domestic FATCA rules. It is possible the US government saw an opportunity to sign up to the CRS without the need to obtain the consent of the US Senate; this is because domestic US law draws a distinction between international 'treaties', which require the consent from the Senate, and 'executive agreements', which the government can sign of its own accord.[43]

While one can only speculate on whether the US Senate would ever vote to adopt the CRS, it is noteworthy that previous US governments hindered work by the OECD on 'harmful tax competition' on the basis that it would have encroached on the sovereignty of the US – a position that was made public in 2001 (that is, long before the LGT and UBS scandals) by the then US Treasury Secretary Paul O'Neill in a statement still available on the US Treasury's website.[44]

Whether the current US administration consciously took the decision to incorporate CRS 'through the back door' (i.e. without the need of US Senate intervention) is a matter of pure speculation. What matters is that the IGAs have partially modified the nature of FATCA.

The Problem with the OECD's Approach: Lessons from the Discussions on Adoption of the EU's Fourth Anti-Money Laundering Directive

Few people would disagree that information relating to an account held by an individual is likely to be foreseeably relevant to that individual's tax liability. The same applies to an account held indirectly through an offshore company or partnership.

However, when it comes to trusts, the wide definition of 'controlling person' contained in the CRS (as well as the IGAs) seems to go further than is required for the purposes of ascertaining tax liability.

Thus, in a rather illogical definition that transcends the FATF definition of 'beneficial owner',45 the CRS commentary states that: 'in the case of a trust the term "Controlling Person" 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 beneficiary(ies) must always be treated as Controlling Persons of a trust, regardless of whether or not any of them exercise control over the trust.'

This paragraph raises fundamental issues:
- Where does the reference to protectors originate from? In most jurisdictions, the existence of a protector is irrelevant for the tax treatment of the trust.
- Why are settlors and beneficiaries 'Controlling Persons' in all circumstances, i.e. regardless of their tax profile?

> Many may think that the CRS and FATCA are effectively the same thing. However, the use of almost identical terms and an almost identical structure masks the fact that FATCA and the CRS are also very different in various respects

These questions and the use of an illogical definition ('always Controlling Persons irrespective of control') show a high degree of suspicion towards trusts, reminiscent of the approach taken by, for example, France and Belgium. This is a far cry from FATCA, where automatic exchange of information is linked to the existence of a tax liability under the domestic US tax rules. In this context, it is noteworthy that FATCA does not contain any mention of protectors (as protectors are generally irrelevant for the tax treatment of a trust, although they may determine whether a trust is a 'US trust' or a 'foreign trust' under the 'control test' contained in the US tax legislation).[46]

Unfortunately, most uninformed readers may be led to think that the CRS and FATCA are effectively the same thing. This is because the CRS borrows heavily from FATCA and is, to a large extent, a copy of FATCA.[47]

However, the use of almost identical terms and an almost identical structure masks the fact that FATCA and the CRS are also very different in various respects. In particular, the introduction of anti-money laundering concepts into the CRS means the CRS is not concerned with information that is directly relevant for the tax position of a taxpayer of one country with financial assets in a different country.

This is a huge departure from the current OECD framework. Article 26 of the OECD Model Convention with Respect to Taxes on Income and on Capital refers to the exchange of information that is 'foreseeably relevant' for the application of the relevant convention or for the administration or enforcement of domestic tax laws. Instead (unlike FATCA), the CRS (and the IGAs) provides for an indiscriminate collection and dissemination of information concerning taxpayers, which is potentially irrelevant for their tax position under the domestic laws of their country of residence.

It must be noted at this juncture that the draft commentary published by the OECD appears to suggest (at page 178) that, in the case of discretionary trusts, information exchange is only necessary in the event of distributions: 'A beneficiary who may receive a discretionary distribution from the trust only will be treated as a beneficiary of a trust if such person receives a distribution in the calendar year or other appropriate reporting period (i.e. either the distribution has been paid or made available).' An at the beginning of August seems to support that position (at paragraph 214).[48]

However, there is nothing in the Model Competent Authority Agreement[49] to suggest such a limitation. Indeed, (unlike the FATCA legislation) the Model Competent Authority Agreement does not contain any reference to trust beneficiaries. Instead, the CRS (which in the OECD's expectations would be annexed to any automatic information exchange agreement) contains a very wide definition of 'equity interest':[50]

> 'In the case of a trust that is a Financial Institution, an "Equity Interest" is considered to be held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. A Reportable Person will be treated as being a beneficiary of a trust if such Reportable Person has the right to receive directly or indirectly (for example through a nominee) a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust.'

This definition echoes that of 'beneficial interest' provided by the secondary FATCA legislation, save that the OECD work does not contain any de minimis provision, nor any reference to the size of interest that is relevant for CRS purposes. Indeed, it would appear that the defined term 'equity interest' is not used anywhere in the Model Competent Authority Agreement, nor in the CRS (which refers more generally to 'equity or debt interest'). This is likely to give rise to confusion, as s1(2) of the Model Competent Authority Agreement provides that: 'Any capitalised term not otherwise defined in this Agreement will have the meaning that it has at that time under the law of the jurisdiction applying the Agreement, such meaning being consistent with the meaning set forth in the Annex [i.e. the CRS].'

Therefore, the CRS:
- defines a term that is not used in the Model Competent Authority Agreement (which the CRS is supposed to supplement);
- does not explain the context in which the defined term is to be used (unless 'equity interest' has the same meaning as 'debt or equity interest in the financial institution');[51] and
- although the commentary to the Model Competent Authority Agreement and the CRS, and the implementation handbook, contain a discussion concerning the difference between settlor-interested trusts and fixed-interest/discretionary trusts, it is not clear how that discussion relates to the main agreement itself, leading to potential confusion in practice and enabling 'trust-adverse' countries to demand unlimited exchange of information.

Given the complexity of FATCA and the CRS, there is a concern legislators in the countries concerned may have not fully appreciated the implications of an indiscriminate exchange of information.

Like the FATF, the OECD is not comprised of representatives of legislative bodies, but rather of officials appointed by governments. As such, they arguably represent their own interest (it is ironic that OECD officials do not seem to pay income tax, unlike those millions of people that they wish to police),[52] as well as the interest of the executive arm of government that appointed them.

There is, therefore, a serious concern that the genesis of the CRS is marred by a democratic deficit, which the transposition of the CRS into domestic legislation and bilateral treaties may be unable to cure (as the CRS jargon makes it unfortunately too complex for most laymen to understand).

The risk of a democratic deficit underpinning the adoption of the CRS is amplified by the breathtaking pace of developments, as is evident from the introduction to the CRS commentary:

> 'The OECD has a long history of working on all forms of exchange of information... In particular, since 2009 much progress has been made by the OECD, EU and the Global Forum on Transparency and Exchange of Information for Tax Purposes on improving transparency and exchange of information on request.
>
> 'More recently, political interest also focused on the opportunities provided by automatic exchange of information.
>
> 'On 19 April 2013 the G20 finance ministers and central bank governors endorsed automatic exchange as the expected new standard. The G20 decision followed an earlier announcement by five European countries of their intention to develop and pilot multilateral tax information exchange based on the Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA, developed between these countries (France, Germany, Italy, Spain and the UK) and the US (the 'Model 1 IGA'). On 22 May 2013, the European Council unanimously agreed to give priority efforts to extend automatic exchange at EU and global level and welcomed ongoing efforts made by the G8, G20 and OECD to develop a global standard.
>
> 'On 12 June 2013 the European Commission adopted a legislative proposal to extend the scope of automatic exchange of information in its directive on administrative cooperation. On 19 June 2013, the G8 leaders welcomed the OECD Secretary General report 'A Step Change in Tax Transparency', which set out concrete steps that need to be undertaken to put a global model of automatic exchange into practice. G8 leaders agreed to work together with the OECD and in the G20 to implement its recommendations urgently. On 6 September 2013 the G20 Leaders committed to automatic exchange of information as the new global standard and fully supported the OECD work, with G20 countries, aimed at presenting such a single global standard in 2014. In February 2014, the G20 finance ministers and central bank governors endorsed the Common Reporting Standard for automatic exchange of tax information contained in Part II of this document. By May 2014 over 60 jurisdictions had committed to swiftly implement the Common Reporting Standard, including translating it into domestic law. Further, 44 jurisdictions have agreed to a common timetable for the implementation of the Standard.'

In the case of trusts, the need for a balanced approach taking into account different (potentially opposing) interests became abundantly evident during the debate concerning the introduction of national registers on beneficial ownership in the EU. In March 2014, Members of the European Parliament recommended the introduction of public registers giving details of settlors and beneficiaries, as well as any other controlling persons.[53]

> FATCA and the CRS are here to stay, but it is not too late to fine-tune the CRS' approach to trusts so as to obtain a balanced solution that takes into account the different interests

After intense lobbying by various professional bodies (including the Law Society of England and Wales and STEP), the final version of the new rules (contained in the Fourth Anti-Money Laundering Directive provides a more balanced solution. According to the compromise version of article 30(4) of the new Fourth Anti-Money Laundering Directive: 'Member states shall require that the information in paragraph 1 is held in a central register when the trust generates tax consequences.'

This is in line with the 'foreseeable relevance' test in article 26 of the OECD Model Convention with Respect to Taxes on Income and on Capital and the approach underpinning FATCA, and shows the importance of a democratic debate about the scope and limits of automatic exchange of information.

A Practitioner's Call to Arms

FATCA and the CRS are here to stay. The political stakes are simply too high to suggest an alternative approach to exchange of information at this stage. However, a comparative analysis of recent developments, the appreciation of the differences between FATCA and the CRS, and the lessons learnt from the Fourth Anti-Money Laundering Directive suggest it is not too late to fine-tune the CRS' approach to trusts so as to obtain a balanced solution that takes into account the different interests.

Why the tax rules of continental European countries should recognise trusts

Continental European countries must accept that trusts play an important part in the Anglo-Saxon legal fabric.

Within the EU, recognition of trusts is dictated by the fact that four EU member states (the UK, Ireland, Cyprus and Malta) are common-law jurisdictions whose legal systems depend widely on trusts.

The use of trusts is often imposed in these countries by operation of law (e.g. on the death of an individual, in the case of co-ownership, etc) and concepts such as usufructs (which are alien to common law) are given effect in common law using trust constructs ('interest in possession' and 'life interest' trusts).[54] Also, as the concept of 'patrimony' is unknown in the common-law world, trusts are used, for example, to protect the interest of minors.[55]

Due to the EU membership of a number of common-law countries, various EU directives and regulations now make express reference to trusts.

It is submitted that the proper functioning of the common market requires the recognition of the effects of trusts within the EU, at least where the settlor and/or the beneficiaries are based in an EU member state that has a domestic law of trusts. It is further submitted that the fundamental EU freedoms (freedom of movement of people and capital) require a similar result.

Even leaving aside EU law, the blanket policy statements on which the new rules in a number of countries are based (trusts and foundations as instruments of tax evasion, coupled with blacklists) have been superseded by the CRS. Indeed, how can a taxpayer evade tax using a trust based in a CRS country, given the extent of information provided under the CRS?

What trust law jurisdictions can do to ensure the effective recognition of trusts in the context of CRS

In 1998, the OECD published a report to 'address harmful tax practices in the form of tax havens and harmful preferential tax regimes in OECD member countries and non-member countries and their dependencies'.56 That report contained the following key factors in identifying tax havens:

– No or only nominal taxes.
– Lack of effective exchange of information.
– A lack of transparency.
– No substantial activities.

Since then, most offshore jurisdictions have signed up to the OECD standard of information encapsulated in article 26 of the OECD Model Convention with Respect to Taxes on Income and on Capital and, as a result, entered into a number of tax information exchange agreements (TIEAs) on this basis. In addition, they have also committed to adopting the CRS, some as early as 2017, with others following suit in 2018.[57]

In light of this full endorsement of automatic exchange of information for tax purposes, policy statements such as those that underpin the tax rules in France and other continental European countries no longer have any justification whatsoever, in my view.

Therefore, when negotiating access to information with treaty countries, trust law jurisdictions should ensure that the other country has a coherent approach to the tax treatment of trusts that is based on sound legal analysis, rather than on generic policy statements dictated by suspicion and prejudice.

Better still, offshore jurisdictions should engage the services of lawyers who are conversant with trusts, as well as the local tax rules in the other country, so as to enhance the level of understanding when it comes to dealing with trusts.

In this context, trust law jurisdictions should be aware of the perils of providing indiscriminate information to countries that do not intend to recognise the effects of trusts, whether as a matter of civil law (e.g. Spain), or by imposing a prohibitive tax burden on any family wishing to use trusts as part of their legitimate estate planning (e.g. France and Belgium).

Until then, trust law jurisdictions should insist on applying a restrictive definition of 'equity interest' when it comes to trusts, so as to exchange information only in the case of settlor-interested trusts and fixedinterest trusts, but not discretionary trusts (or trusts under which the settlor has not retained any interest). Similarly, serious thought should be given as to whether the identity of any protector should be disclosed, at least where there are doubts whether the protector is relevant for the tax profile of the trust in the other jurisdiction. This approach is in line with the solution under FATCA, which (in the case of trusts) has found its way into the OECD commentary.

Recent Italian developments provide a good example of how things can go wrong when offshore jurisdictions approach information exchange in good faith. Jersey and Guernsey signed TIEAs with Italy in 2012, and the Isle of Man followed in 2013.

However, at the time of writing, these jurisdictions remain on Italy's blacklist for the purposes of determining the tax residence of trusts (see the discussion above about Italy's deeming provisions).

This means Italian settlors and beneficiaries of, say, a Jersey, Guernsey or Manx trust who may wish to take advantage of Italy's current voluntary disclosure programme will not have access to the preferential regime applying to whitelisted jurisdictions.

Ironically, civil-law jurisdictions Switzerland and Monaco (which held out until the very last minute before declaring that they would apply the standard contained in article 26 of the Model Convention with Respect to Taxes on Income and on Capital in relation to Italy), succeeded in getting themselves onto Italy's whitelist at the 11th hour, making a mockery of those jurisdictions that signed up to the very same standard years before.

Trust law jurisdictions, especially small ones with little bargaining power, should approach negotiations with bigger continental European jurisdictions with a degree of caution and ensure that a bilateral IGA would bolster, rather than undermine, their trust industry.

Finally, special consideration should be given to the interaction of the CRS with trust and foundation laws that limit the beneficiaries' access to information, e.g. under the Cayman STAR trust regime or the Jersey and Guernsey foundations laws. In these cases, governments should consider the implications of providing information to the government of the countries where the beneficiaries are resident in circumstances where the beneficiaries may not be aware of the existence of the trusts, the extent of their entitlement, or any financial information relating to the affairs of the trust/foundation. In these cases, there is a serious danger of exposing such beneficiaries to tax litigation or even dawn raids that would catch them completely unprepared, with potentially disastrous consequences.

Conclusions

These are unprecedented times for private clients. As the genesis of the Fourth Anti-Money Laundering Directive demonstrates, there is still room for a debate to ensure the adoption of a balanced approach that takes into account both the legitimate concerns of sovereign states faced with historic tax evasion and the global fight against terrorism, and the legitimate concerns of families seeking to organise their affairs efficiently and privately.

Unfortunately, the complexity of the new rules, the 'copy and paste' approach adopted by the OECD and the democratic deficit at the heart of the new rules make it extremely difficult for clients and their advisors to make their voices heard.

Of particular concern to practitioners should be the fact that (as clearly reflected in the introduction to the OECD commentary) the CRS initiative has been pushed through by governments (rather than parliaments) in an era when executive and legislative powers are often at loggerheads when it comes to defining the scope of privacy. A couple of recent examples of this debate include the following:

the US debate following the revelations of mass surveillance by Edward Snowden (which led to the reform of the National Security Agency through the enactment of the USA Freedom Act on 2 June 2015);[58] and

– the UK government's announcement during the 2015 general election campaign of a potential exit from the European Convention on Human Rights.

Unfortunately, the complexity of the CRS rules represents a huge obstacle to an open debate, as policymakers and professionals alike struggle to come to terms with the exact meaning of what is being proposed.

Nevertheless, private client practitioners and interested governments must act now and it is hoped that this article will aid the debate.

1. Béraudo and Tirard, Les trusts anglo-saxons et les pays de droit civil (2006)
2. Evelyne Poillot v The Director of Fiscal Services of Hauts de Siene Nord, Tribunal de Grand Instance de Nanterre, 4 May 2004
3. Author's translation
4. In re Tardieu de Maleissye, No.05–18268, 15 May 2007
5. Circular Letter 30, 22 August 2007, Swiss Tax Conference (the umbrella organisation that brings together the heads of the cantonal tax authorities)
6. Décision anticipée No.900.329, 22 December 2009
7. For a timeline of the 2007-2008 financial crisis see news.bbc.co.uk/1/hi/business/7521250.stm
8. 'Est-ce la fin du capitalisme financier de type anglo-saxon? Six économistes répondent'
9. Loi No.2011-900 du 29 juillet 2011 de finances rectificative pour 2011
10. www.senat.fr/rap/l10-620-1/l10-620-122.html#toc630
11. Section 86 Taxation of Chargeable Gains Act 1992 and s624 Income Tax (Trading and Other Income) Act 2005; see also s720 Income Tax Act 2007
12. Sections 673–679 Internal Revenue Code
13. See below
14. Author's translation
15. Author's translation
16. Court of Appeal, 11 July 2012
17. 10 August 2015 – 'Loi Programme', title 4, chapter 1, 'Le régime de taxation applicable aux constructions juridiques visées à l'article 2, § 1er, 13o, du Code des impôts sur les revenus 1992', accessible online at: www.ejustice.just.fgov.be/mopdf/2015/08/18_2.pdf#Page6
18. 'Deemed settlors' are defined in the Belgian Finance Act 2015 as 'such direct or indirect heirs of the settlor following his death, unless they can demonstrate that neither they, nor their own heirs, may benefit at any time and in any way, from the legal structure'
19. 'Projet de loi programme', issued on 1 June 2015, available at: www.dekamer.be/FLWB/PDF/54/1125/54K1125001.pdf
20. Accessible online at: www.etaamb.be/fr/2015003277.html
21. Italian Supreme Court, Civil Section, VI-T, Ordinance No.3886, dated 25 February 2015
22. Explanatory memorandum dated 16 September 2004, paragraph 1.4.5
23. Tax guidelines no.30, paragraph 5.1.1 (author's translation)
24. Judgment No.338/2008, 21 April 2008
25. Consulta Vinculante V1016–10, 14 May 2010
26. Plácido Martos Belmonte, Spanish General Directorate for Taxes, 'Tratamiento fiscal de un trust discrecional constituido en el extranjero por un residente en España. Derecho comparado y possible aplicación del regime de atribución de rentas del impuesto sobra la renta de las personas fisicas', Cronica Tributaria, No.142/2012 (77–94); www.ief.es/documentos/recursos/publicaciones/revistas/cron_trib/142_Martos.pdf
27. US Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Tax Haven Banks and US Tax Compliance, available at: www.hsgac.senate.gov//imo/media/doc/071708PSIReport.pdf
28. The term used under FATCA is 'specified US persons' and includes US citizens or US-resident aliens for tax purposes, privately owned domestic corporations, domestic partnerships, and domestic trusts and estates
29. Sections 1471–1474 Internal Revenue Code
30. Section 1471(c)(1) Internal Revenue Code
31. Section 1473 (2)(A) Internal Revenue Code
32. Sections 671–679 Internal Revenue Code, which provide for a number of circumstances in which any trust income is attributed to the settlor and other persons treated as substantial owners by the US tax legislation (e.g. a person with a general power of appointment that would enable them to vest the corpus or income of the trust in themselves)
33. A commentator described them as follows: '[FATCA is] a leviathan. And it breathes fire. Its size is monstrous: while the statute itself is relatively short, the final Treasury regulations are 544 pages long. Moreover, they are painstakingly detailed and excruciatingly technical, a bewildering maze of rules, sub-rules, sub-sub-rules, cross-references, exceptions, exceptions to exceptions, and so on. They are daunting even to the most knowledgeable experts.' (Peter Cotorceanu, 'FATCA and Offshore Trusts: The First Nibble', 139:4 (2013) Tax Notes 409–20)
34. The same commentator mentioned in the previous footnote aptly summarises this point in 'FATCA and Offshore Trusts: A Second Bite of the Elephant', 140:10 (2013) Tax Notes 1007–26
35. Definition 31 contained in the FATCA regulations: '(31) Grantor trust. A grantor trust is a trust with respect to which one or more persons are treated as owners of all or a portion of the trust under sections 671 through 679. If only a portion of the trust is treated as owned by a person, that portion is a grantor trust with respect to that person.'
36. FATCA regulations §1.1473–1(b)(4)(ii)
37. FATCA regulations §1.1473–1(b)(4)(i)
38. FATCA regulations §1.1473–1(b)(3)
39. Sections 671–679 Internal Revenue Code, and FATCA regulations §1.679–2
40. FATCA regulations §1.1473–1(b)(3)
41. FATCA regulations §1.1471–5(b)(1)(iii) and §1.1471–5(b)(1)(3)(iii)
42. A video of the full hearing is available online at: www.c-span.org/video/?318003-1/hearing-offshore-tax-evasion-panel-1
43. 'Treaties and Other International Agreements: the Role of the United States Senate', www.senate.gov/reference/common/faq/Treaties.htm
44. www.treasury.gov/press-center/press-releases/Pages/po366.aspx
45. 'Beneficial owner 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'
46. Regulation §301.7701–7 and §7701 Internal Revenue Code
47. This is perhaps unsurprising, as previous OECD initiatives on tax evasion turned out to be rather toothless and it was only following the harsh response from the US in the wake of the LGT and UBS scandals that the OECD work found a new lease of life. Thus, terms such as 'financial institution' and 'financial account', and acronyms such as 'FFI' and 'NFFE', can be found both under FATCA and the CRS
48. www.oecd.org/ctp/exchange-of-tax-information/implementation-handbookstandard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf
49. Also known as the 'CAA'
50. Definition C(4) of the CRS
51. E.g. Definition C(1)(a) of the CRS: 'The term "Financial Account" means an account maintained by a Financial Institution, and includes… in the case of an Investment Entity that is a Financial Institution solely because it manages an Investment Entity described in subparagraph A(6)(b), an equity or debt interest in the Financial Institution.'
52. According to the OECD's website, 'emoluments are exempt from taxation in most member countries of the Organisation, including France' and staff members also benefit from generous household and family allowances: www.oecd.org/careers/salariesandbenefits.htm
53. European Parliament legislative resolution of 11 March 2014 on the proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM(2013)0045) – C7–0032/2013 – 2013/0025(COD)) (Ordinary legislative procedure: first reading), accessible at: bit.ly/ep_leg_res
54. Filippo Noseda, 'For or against the registration of trusts – Why it matters: balancing regulatory concerns and the right to privacy', Private Client Business (2014), volume 3, pages 137–141
55. In England and Wales, the law (sections 1(6) and 19 Law of Property Act 1925) provides that a child may not hold a legal estate in land, and, while a child may own chattels, in practice any valuable assets (e.g. bank accounts) are generally owned by their parents or legal guardian as trustee for the child
56. Harmful Tax Competition: An Emerging Global Issue: www.oecd.org/tax/transparency/44430243.pdf
57. For a list of jurisdictions that have committed to adopting the CRS, visit the OECD's website: www.oecd.org/tax/transparency/AEOI-commitments.pdf
58. The legality of the previous rules concerning the bulk collection of metadata (contained in the USA Patriot Act) is still at the centre of a legal battle before the US courts, as technically those rules remain in force for another 180 days following the enactment of the USA Freedom Act. In the latest instalment, on 28 August 2015 the Court of Appeal for the District of Columbia lifted an injunction against the US government and remanded the case to the district court (see judgment USCA #14-5004, at www.cadc.uscourts.gov/internet/opinions.nsf/ED64DC482F286F1785257EAF004F71E8/$file/14-5004-1570210.pdf