

UNIVERSITY OF KENT

TRUST REGISTRATION: AN
UNFORTUNATE INEVITABILITY?

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I. Introduction

In the context of recent concerns about tax avoidance,¹ terrorist financing and money laundering, the potential misuse of the trust form is particularly pertinent. Traditionally, the trust has been viewed as an autonomous institution capable of conveying a significant degree of privacy on its users. In acknowledging its essentially private nature, the Organisation for Economic Co-operation and Development (OECD) notes that trusts “enjoy a greater degree of privacy and autonomy than other corporate vehicles”;² although it is also true that the OECD has received fierce criticism for referring to the trust as a ‘corporate vehicle’ which “reveals a fundamental error in the appreciation of trusts”.³ Nonetheless, given present concerns regarding the misuse of the trust form, the question is inevitably raised: should trusts be more rigorously regulated? The recent paradigm shift of policy-makers as to the appropriate boundaries of privacy⁴ have rendered one of the fundamental principles of English trusts law, namely that trusts are ‘veiled’,⁵ to be called into question. With various jurisdictions already requiring trust registration, would it be practical for such measures to be introduced into England and Wales, the ‘mother’ jurisdiction of the trust,⁶ and what would this mean for the onshore industry of such an historic institution?

The Fourth Anti-Money-Laundering Directive (4th AMLD),⁷ the EU’s latest attempt to resolve issues regarding money laundering and the financing of terrorist activity, came into force on 26th June 2015⁸ and must be implemented by June 2017. The 4th AMLD declares that Member States of the EU “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”,⁹ which will include the identity of the settlor, trustee(s), protector (if any), (class of) beneficiaries and any other natural person exercising control over the trust.¹⁰

¹ Garside, Watt and Pegg, ‘The Panama Papers: How the World’s Rich and Famous Hide Their Money Offshore’ *The Guardian* (3rd April 2016).

² OECD, ‘Behind the Corporate Veil, Using Corporate Entities for Illicit Purposes’ (2001) 25.

³ Goldsworth, ‘Trusts and The Misuse of Corporate Vehicles for Illicit Purposes: the OECD’s View Examined’ (2001) 7(9) *Trusts and Trustees*, 15.

⁴ Riches, ‘Are Transparency and the Registration of Trusts Necessary?’ (2013) 19(3&4) *Trusts and Trustees*, 343.

⁵ Hague Conference on Private International Law, Proceedings of the Fifteenth Session, II *Imprimerie Nationale, The Hague* (1985) 60.

⁶ Riches, ‘Are Transparency and the Registration of Trusts Necessary?’ (2013) 19(3&4) *Trusts and Trustees*, 347.

⁷ Directive (EU) 2015/849 of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing.

⁸ EUR-Lex, Document 32015L0849 <<http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=celex:32015L0849>> accessed 31st January 2016.

⁹ 4th AMLD, Art.31(1).

¹⁰ *Ibid*, Art.31(1)(a)-(e).

Those trusts which generate tax consequences are required to be registered in a central register, whereas trustees of those that do not generate tax consequences will need to ensure that the relevant information can be accessed in a timely manner by the competent authorities. These measures are the minimum requirements as regards trusts and some Member States might choose to require further information to be registered or made available. Nonetheless, the new legislation will bring “the end to the anonymity that trusts currently afford”¹¹ as a result of direct state interference with and regulation of the express trust, in a manner similar to the regulation of companies.

One of the driving forces behind the new EU legislation was the recommendations published by the Financial Action Task Force (FATF).¹² Recommendation 25 of the 2012 report suggested that “countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries”.¹³ Trust registration is, however, not a new phenomenon. There are examples of trust registration already in existence in the UK, such as the mandatory registration of charitable trusts¹⁴ and the requirement for trusts that generate income and capital gains tax to make themselves known to the HMRC.¹⁵ The Foreign Account Tax Compliance Act (FATCA) of America requires, amongst other things, that foreign trusts which are deemed to be financial institutions in America must register with the Inland Revenue Service (IRS) and report their accounts.¹⁶ In addition, there are a number of jurisdictions across the globe where trust registration is already a requirement: in India, private trusts containing immovable property need to be registered;¹⁷ in Liechtenstein, all trusts which are set up for a duration of 12 months or more require registration;¹⁸ and in Australia, all trusts are required to be registered regardless of whether they earn income.¹⁹ Similarly, mandatory trust registration

¹¹ Palin, ‘EU Legislation Threatens Trust Anonymity’ *Financial Times* (21st February 2014).

¹² Jones, ‘The Five Things You Need to Know about the Fourth Money Laundering Directive’ (*LexisNexis, Financial Services*, 22nd December 2014) <<http://blogs.lexisnexis.co.uk/fs/the-five-things-you-need-to-know-about-the-fourth-money-laundering-directive/>> accessed 3rd February 2016.

¹³ FATF, ‘International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, the FATF Recommendations’ (2012) FATF, Paris, 22.

¹⁴ Charities Act 2011, s.30.

¹⁵ Gov.UK, ‘Trusts and Taxes’ <<https://www.gov.uk/trusts-taxes/trustees-tax-responsibilities>> accessed 29th March 2016.

¹⁶ Hodgson, ‘FATCA Implications for Trustees’ (2014) STEP, 5. Following the Finance Act 2013, UK trusts which are deemed to be financial institutions are required to provide HMRC with particular information, which will then be passed onto the IRS in the US, see ss.222(1)(a) and (2)(a).

¹⁷ Gothard and Shah, *The World Trust Survey* (Oxford University Press, 2010) 277.

¹⁸ OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Review Report, Phase 1, Legal and Regulatory Framework, Liechtenstein* (OECD Publishing, 2011) 34.

¹⁹ Law Commission, ‘Court Jurisdiction, Trading Trusts and Other Issues, Review of the Law of Trusts Fifth Issues Paper’ (2011) New Zealand, Issues Paper 28, 9.24.

was proposed 30 years ago during the drafting of The Hague Trusts Convention;²⁰ unsurprisingly, the “English reaction to the proposed registration of trusts was one of concern”²¹ and the proposed registration was therefore not implemented in the Convention. Such examples illustrate, however, that trust registration is already occurring on an international scale and perhaps, therefore, it was only a matter of time before express trust registration occurred in the UK, whether obligated by the EU or not.

It has been said that the development of the trust was “the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence,”²² and the privacy of the trust form is seen to be of fundamental importance to its widespread use; yet there is no doubt that growing concerns regarding the illicit use of the trust device are well-founded, with the period from the 1990s symbolising a so-called ‘black era’ for trusts in terms of their general perception by the public.²³ Nonetheless, the trust form has “all sorts of legitimate uses”²⁴ and there are a number of jurisdictions in which there is no trust registration requirement: the Bahamas,²⁵ Bermuda,²⁶ Jersey,²⁷ and the Cayman Islands have no register of trusts nor central reporting requirements²⁸ and are well-known for having low-tax and being lightly regulated.²⁹ Whilst the new EU legislation undoubtedly pursues a legitimate purpose in attempting to prevent money laundering and terrorist financing, one must ask, given the availability of flexible offshore trust jurisdictions³⁰ and the fact that more than half of world trade passes through tax havens,³¹ whether the new legislation will achieve its aim of diminishing the illicit use of the trust form or will simply move it further offshore.

²⁰ Hague Convention on the Law Applicable to Trusts and on Their Recognition 1985 (Hague Trusts Convention).

²¹ Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (Bloomsbury Publishing, 2002) 339.

²² Maitland, *State, Trust and Corporation* (Runciman and Ryan eds, Cambridge University Press, 2003) 52.

²³ Riches, ‘Are Transparency and the Registration of Trusts Necessary?’ (2013) 19(3&4) *Trusts and Trustees*, 347.

²⁴ *Ibid*, 363.

²⁵ Gothard and Shah, *The World Trust Survey* (Oxford University Press, 2010) 58.

²⁶ *Ibid*, 91.

²⁷ *Ibid*, 384.

²⁸ Law Commission, ‘Court Jurisdiction, Trading Trusts and Other Issues, Review of the Law of Trusts Fifth Issues Paper’ (2011) New Zealand, Issues Paper 28, 9.28.

²⁹ Palan, Murphy and Chavagneux, *Tax Havens: How Globalisation Really Works* (Cornell University Press, 2013) 21.

³⁰ Although the ‘Panama Papers’ predominantly concerned offshore companies, their publication effectively illustrates the flexibility and privacy of offshore jurisdictions; see Garside, ‘A World of Hidden Wealth: Why we are Shining a Light Offshore’ *The Guardian* (3rd April 2016).

³¹ Shaxson, *Treasure Islands: Tax Havens and the Men Who Stole the World* (Random House, 2012) 8.

This essay will seek to answer a number of questions as to how the new legal framework will operate; the potential impact of trust registration on the onshore trust industry and whether the benefits of the new measures will outweigh the costs, whilst illustrating the inevitability of trust registration, or at least more stringent trust regulation, as a result of the contemporary international atmosphere. Section II of this essay will seek to outline the details of the current law on trust registration, the new regulatory framework and the global attitude towards transparency of financial institutions. Section III will consider the different functions of registration in other areas of law; and will particularly compare the regulation of trusts and companies whilst also considering the role of the state. The remaining sections will then consider the benefits, disadvantages and inevitability of trust registration and the potential ramifications of such measures on the onshore trust industry.

II. The Legal Framework

There has been international pressure, primarily from the United States, to ensure adequate and harmonised anti-money laundering (AML) rules since the 1980s.³² Particularly following the events of 11th September 2001, and in more recent years the terror attacks across Europe, “public attention to the matter is...greater than ever”.³³ The European Commission has acknowledged that, following the Paris attacks in November 2015, EU institutions and national Governments need to take further urgent action³⁴ to prevent legitimate financial institutions from being used to facilitate the financing of terrorist activity and money laundering. The market for money laundering, defined as the “process of disguising the unlawful source of criminally derived proceeds to make them appear legal”,³⁵ has boomed in recent years. With the FATF estimating that the amount of cash laundered world-wide is somewhere “between hundreds of billions and a trillion US dollars per year”,³⁶ the motivation behind preventative measures is clear. Following the evolution of money laundering and

³² Simmons, ‘International Efforts against Money Laundering’ in Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) 246.

³³ Doyle, ‘Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law’ (2002) 24(2) *Houston Journal of International Law*, 280.

³⁴ European Commission, ‘Action Plan to Strengthen the Fight against Terrorist Financing’ (2016) *European Agenda on Security*, 1.

³⁵ Unger and Busuioc, *The Scale and Impacts of Money Laundering* (Edward Elgar Publishing, 2007) 15.

³⁶ FATF and MENAFATF, ‘Money Laundering Through the Physical Transportation of Cash’ (2015) FATF, Paris, 3.

terrorist financing typologies, the underlying regulatory landscape must adapt accordingly,³⁷ with the 4th AMLD representing the latest supranational attempt to curb such harmful practices and the express trust comprising the most recent victim to the call for increased transparency.

The 4th AMLD, which will replace the 3rd AMLD³⁸ due to concerns that it had been “implemented inconsistently throughout the European Union”,³⁹ must be implemented by Member States of the EU by June 2017.⁴⁰ The European Commission, however, has requested that Member States commit to implementing the Directive by the end of 2016.⁴¹ Such urgency demonstrates the present atmosphere across Europe and illustrates what has been described as “a deep global consensus to act against terrorist financing”.⁴² The new AML framework will consist of both the new Directive and a new Fund Transfers Regulation.⁴³ Whilst the 3rd AMLD extended AML controls to trust and company service providers,⁴⁴ the new Directive significantly furthers the levels of control to affect *all* express trusts. Article 31 of the 4th AMLD requires that “trustees of any express trust...obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust”,⁴⁵ including the identity of the settlor, trustee(s), protector, beneficiaries or any other person exercising control over the trust.⁴⁶ Such information must be accessible by the competent authorities⁴⁷ and must be held in a central register when the trust generates tax consequences.⁴⁸ For ease of exposition this essay will primarily refer to the new obligations imposed upon all express trusts as ‘trust registration’, even though only those trusts generating tax consequences will require central registration.

³⁷ Jones, ‘The Five Things You Need to Know about the Fourth Money Laundering Directive’ (*LexisNexis, Financial Services*, 22nd December 2014) <<http://blogs.lexisnexis.co.uk/fs/the-five-things-you-need-to-know-about-the-fourth-money-laundering-directive/>> accessed 3rd February 2016.

³⁸ Implemented in the UK by the Money Laundering Regulations 2007.

³⁹ Hutton, ‘Fourth Anti-Money Laundering Directive’ (*Criminal Law and Justice Weekly*, 3rd July 2015) <<http://www.criminallawandjustice.co.uk/features/Fourth-Anti-Money-Laundering-Directive>> accessed 2nd February 2016.

⁴⁰ 4th AMLD, Art.67(1).

⁴¹ European Commission, ‘Commission Presents Action Plan to Strengthen the Fight Against Terrorist Financing’ (Press Release) Strasbourg, 2nd February 2016.

⁴² *Ibid.*

⁴³ Böszörményi and Schweighofer, ‘A Review of Tools to Comply with the Fourth EU Anti-Money Laundering Directive’ (2015) 29(1) *International Review of Law, Computers and Technology*, 65.

⁴⁴ S.15, Art.3(7), Art.36.

⁴⁵ 4th AMLD, Art.31(1).

⁴⁶ *Ibid.*, Art.31(1)(a)-(e).

⁴⁷ *Ibid.*, Art.31(3).

⁴⁸ *Ibid.*, Art.31(4).

The new Directive is a measure pursuant to Art.114 Treaty on the Functioning of the EU and as such the UK is bound to implement it, though it should be acknowledged that the long-term commitment to such measures may alter drastically depending on the result of the June EU Referendum. Nonetheless, the UK Government has confirmed its commitment to implementing the new measures, despite the Prime Minister's concerns that trusts should be exempt from the EU money laundering rules as it is inappropriate to subject trusts to the same regulatory requirements as companies.⁴⁹ The Cabinet Office has announced that trustees will be required to obtain information identifying the individuals mentioned in Art.31, that such information will be made available to the competent authorities and that there will be a central register containing information of those trusts that generate tax consequences;⁵⁰ although the timescale of implementation is not yet clear. Whilst the Directive acknowledges that the information required shall include the identity of the individuals mentioned above, one can presume that it is not limited to it; similarly, the Directive does not specify what information is required to identify the relevant individuals. Whether Member States will choose to require more information to be registered, such as about the trust as a whole or the assets in the fund, and what information will be considered adequate in identifying the individuals, is not yet clear, and may vary depending on the jurisdiction.

As well as the present attempts to curb money laundering and terrorist financing practices, there are also further EU proposals which attempt to counter tax avoidance, which will no doubt be seen as of fundamental importance following the recent publication of the 'Panama Papers'. A draft Directive was published in January 2016⁵¹ and one of the key elements is a general rule "aimed at transactions designed to defeat the object of tax provisions".⁵² As Matthews acknowledges, however, one of the three key characteristics of the trust form is its ability to avoid cumbersome rules and regulations, such as tax provisions.⁵³ The proposed Directive further demonstrates the present European atmosphere and the pressure for the increased transparency of financial institutions which have led to the inevitable increase of trust regulation in the UK, despite the Prime Minister's concerns.

⁴⁹ Coates and Griffiths, 'Cameron Fought to Protect Trusts from EU Crackdown' *The Times* (7th April 2016).

⁵⁰ Cabinet Office, HM Revenue & Customs, Prime Minister's Office, 'UK Implementation of the G20 High Level Principles on Beneficial Ownership Transparency' (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476748/UK_implementation_of_the_G20_High_Level_Principles_on_Beneficial_Ownership_Transparency_.pdf>, ss.3-5.

⁵¹ STEP, 'New EU Package of Proposals against Tax Avoidance' *STEP, Industry News* (28th January 2016).

⁵² *Ibid.*

⁵³ Matthews, 'The Place of the Trust in English Law and in English Life' (2013) 19(3&4) *Trusts and Trustees*, 246.

One of the reasons that express trust information will be required is “to ensure a level playing field among the different types of legal forms”.⁵⁴ This may be in part due to the recognition of the trust form in a number of civil law jurisdictions following The Hague Trusts Convention⁵⁵ and the increasing development of trust-like forms, such as the French *fiducie* and the Italian *trust interno*. Whilst the trust industry is growing in size, scope and form, so is the concern regarding the misuse of the trust form. The mistrust of the trust, however, extends well beyond the civil law jurisdictions in which it is a relatively novel, if incompatible concept;⁵⁶ Australia, a common law jurisdiction requiring trust registration, effectively demonstrates the international nature of the concerns which underlie the new EU legislative framework. However, the 1st AMLD⁵⁷ was published as early as in 1991, and it might be considered to be surprising that provisions concerning the registration of express trusts were not introduced earlier, particularly given the extent of their mistrust in civil jurisdictions.

III. The Theory of Registration

A. The Various Functions of Registration

There are a variety of functions of registration which are exhibited in a number of areas of law. One can compare the various purposes of registration in a more general context, in order to establish the underlying function of trust registration and how the new measures will alter the internal nature of trust governance by the introduction of an external role for the state. The increased regulatory alignment of the trust and company, as a result of the new measures, evidences the constantly changing nature of social and political life⁵⁸ and indicates the present prioritisation of transparency over the protection of privacy.

One purpose of registration is to promote the liquidity of the market and the ease with which commodities can be transferred. For example, ‘listing’ a company results in its being able to issue shares on the London Stock Exchange (LSE), enabling it to access one of the most dynamic and liquid markets for trading shares. Whilst listing ought to be distinguished from trust registration in that there is no mandatory listing requirement for companies that do

⁵⁴ 4th AMLD, Art.17.

⁵⁵ Art.11.

⁵⁶ Matthews, ‘The Place of the Trust in English Law and in English Life’ (2013) 19(3&4) *Trusts and Trustees*, 245.

⁵⁷ Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering.

⁵⁸ Bevir, *A Theory of Governance* (University of California Press, 2013) 1.

not wish to sell shares on the LSE, nonetheless, listing effectively demonstrates the process of registration as an attempt to promote the liquidity of and access to the market. Similarly, land registration is a “feature of a society where individuals own and trade land as a capital asset and so need their ownership to be easily proved and efficiently transferable”.⁵⁹ In fact, the development of land registration was influenced greatly by the ease with which stock could be transferred; in 1857, the Royal Commission on Land Transfer and Registration expressed its desire to enable land owners “to deal with land in as simple and easy a manner...as they can now deal with...stock”.⁶⁰ Unlike the voluntary process of listing a company, land registration is required by the Land Registration Act 2002,⁶¹ as a result of which it is possible for title to be “traded almost entirely through the manipulation of paper”.⁶²

Another function of registration is that, in many areas of law, it is a means of certifying validity. Legal title following the transfer, grant or creation of a legal estate derives from the act of registration and a transfer of land ownership is not valid until the disposition has been registered.⁶³ Similarly, charitable trusts have had mandatory registration requirements since 1960,⁶⁴ and, likewise, companies also require registration in order to be valid.⁶⁵ In addition, registration also functions as a means of security. Land registration as a mechanism of securing ownership has existed in one form or another for centuries: primitive methods of recording land as property existed in Ancient Greece, in order to establish the permanence of property.⁶⁶ As such, the process of registration establishes an owner’s status as owner whilst securing various rights against third parties.

B. The Function of Trust Registration

It appears, however, that a number of the functions of registration found in other areas of the law, are inapplicable to the registration of trusts. Given that there is no market for the transfer of beneficial trust ownership, such as that with land or stock ownership, it is unlikely that the

⁵⁹ Cooke, *The New Law of Land Registration* (Bloomsbury Publishing, 2003) 3.

⁶⁰ The Royal Commission on Land Transfer and Registration, *Registration of Title* (1857) 23-4 as cited in Gray and Gray, *Land Law*, (5th edn, Oxford University Press, 2007) 61.

⁶¹ S.4.

⁶² Pottage, ‘The Measure of Land’ (1994) 57(3) *The Modern Law Review*, 362.

⁶³ The transfer, grant or creation of a legal estate becomes void if the requirement of registration is not complied with, see Land Registration Act 2002, s.7(1).

⁶⁴ Garton, *Moffat’s Trusts Law, Text and Materials* (6th edn, Cambridge University Press, 2015) 943; see now Charities Act 2011, s.30.

⁶⁵ Companies Act 2006, Part 2, s.7(1)(b) and ss.9-13.

⁶⁶ Bresson, *The Making of the Ancient Greek Economy: Institutions, Markets and Growth in the City-States* (Princeton University Press, 2015) 227.

function of registration in promoting the liquid market and facilitating the transfer of ownership will apply to the trust form. Unlike charitable trusts, companies and land ownership, the valid existence of an express trust will not derive from the act of registration and a failure to register an express trust will not render it void. There are, however, severe penalties which may be applied following a breach of the new Directive, such as a public statement identifying the person and the nature of the breach;⁶⁷ an order requiring the person to desist from that conduct;⁶⁸ a temporary ban against any person discharging managerial responsibilities⁶⁹ or an administrative fine of at least EUR 1,000,000.⁷⁰ It should also be emphasised that Member States are entitled to impose further administrative sanctions in addition to those mentioned above.⁷¹

The purpose of registration as ensuring security has multifaceted significance in relation to the trust form, as registration will not only secure the existence of the trust and firmly establish the rights of the beneficiaries, but one of the primary objectives of the new regime is the wider security of society and the ‘defence of the realm’ in light of the recent terror attacks.⁷² Trust registration is simply the latest attempt to ensure the safety and security of society and, in that context, similarities can be found between the function of trust registration and that of the register of sex offenders, where the major justification is to protect the public.⁷³ Security also has a further dimension, as it reflects the changing governance structures of the UK and the prioritisation of protection over privacy. As Dean acknowledges, apparatuses of security are an essential component of government and the exercise of power;⁷⁴ the state is increasingly security orientated, which in turn justifies its increased involvement in and regulation of financial institutions, in contrast with earlier protection of their privacy.

⁶⁷ 4th AMLD, Art.59(2)(a).

⁶⁸ Ibid, Art.59(2)(b).

⁶⁹ Ibid, Art.59(2)(d).

⁷⁰ Ibid, Art.59(2)(e); or where the entity concerned is a credit institution or a financial institution, a maximum administrative pecuniary sanctions of at least EUR 5, 000, 000, see Art.59(3)(a); although note that the wording of the section is somewhat unclear, given the proposed “maximum” sanction of “at least” EUR 5, 000, 000.

⁷¹ Ibid, Art.59(4) which includes the right to impose pecuniary sanctions exceeding the amounts mentioned above.

⁷² Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, SAGE, 2010) 246.

⁷³ Agan, ‘Sex Offender Registries: Fear without Function?’ (2011) 54(1) *The Journal of Law and Economics*, 207.

⁷⁴ Dean, *The Signature of Power: Sovereignty, Governmentality and Biopolitics* (SAGE, 2013) 46.

C. The Trust and the Company: Regulatory Alignment

The ultimate objective of the new legislation is to enhance the regulation of the trust form, amidst the background of concerns regarding tax avoidance and security, to ensure the transparency of financial institutions on a supranational scale. Registration constitutes a regulatory mechanism, namely one of a “diverse set of instruments by which governments set requirements on enterprises and citizens”.⁷⁵ Whilst companies have previously been subject to more stringent regulation than the trust form, and this remains the case in the sense that new legislation has imposed yet further regulatory requirements on companies,⁷⁶ the 4th AMLD will result in trusts being regulated in a similar way to companies and for a similar purpose; although, as acknowledged above, two of the functions of registration which relate to companies are inapplicable to the trust form. Waters correctly predicted the increased regulation of trusts and eventual trust registration, acknowledging in 2007 that “the call for the public registration of trusts in the way that companies are registered is likely to become more strident as non-common law jurisdictions consider the introduction of domestic trusts”.⁷⁷ Corporate governance has evolved in line with public thought to reflect the need for greater transparency;⁷⁸ similarly, trust governance is developing to reflect the same ideals and to achieve a similar purpose.

Sitkoff considers that the fiduciary obligation is the principal means of trust governance.⁷⁹ It appears, however, that the neoliberal ideology which emerged during the 1970s⁸⁰ and entailed a withdrawal of the state, is being reversed in favour of further state regulation, resulting in a transformation to external trust governance which extends well beyond the fiduciary obligation. There is a complex and continuous process of interpretation, conflict and activity that produces constantly changing patterns of governance⁸¹ and internal trust governance is diminishing through the increased role of the state in the trust industry, which may pose problems for transparency and legitimacy.⁸²

⁷⁵ OECD, *The OECD Report on Regulatory Reform: Synthesis* (1997) Paris, 6.

⁷⁶ Following the Small Business, Enterprise and Employment Act 2015, companies will be required to create a register with information regarding ‘People with Significant Control’ and this information will be available on a public register by April 2017.

⁷⁷ Waters, ‘The Future of the Trust - Part II’ (2007) 14(1) *Journal of International Trust and Corporate Planning*, 10.

⁷⁸ Tomasic, ‘Company Law Modernisation and Corporate Governance in the UK - Some Recent Issues and Debates’ (2011) 1 *Victoria Law School Journal*, 61.

⁷⁹ Sitkoff, ‘Trust Law, Corporate Law, and Capital Market Efficiency’ (2003) 28 *The Journal of Corporation Law*, 108.

⁸⁰ Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 2.

⁸¹ Bevir, *A Theory of Governance* (University of California Press, 2013) 207.

⁸² *Ibid*, 141.

The relationship between the trust and the state is a complex one, particularly when compared with the state and the company, whose relationship has generally been viewed as relatively straightforward. For example, The Bubble Act 1720 ensured that, without state permission to set up a corporation, it would be deemed illegal and void. Similarly, for concession theorists, who consider the existence of a company to derive from a concession by the state, the relationship between a company and the state is evident: the company is a manifestation of the will of the state⁸³ and so the state's role in corporate governance is wholly justified. The trust form, on the other hand, has often been seen as distinct from the state and was primarily related to the Chancery courts. Despite the trust form's long history, the first piece of legislation relating specifically to the trust was only enacted in 1852,⁸⁴ reflecting the historically autonomous nature of the institution as a construct of the Chancery court with minimal state intervention. It has been said that the degree of autonomy that the trust form affords allows settlors to construct the internal governance structure that they wish⁸⁵ with little external involvement from the state. Such a level of autonomy, however, is no longer a characteristic of the trust form and, whilst the "boundaries between state and civil society are always blurred",⁸⁶ the trust is distinct from the company and the convergence of regulation of the two may be inappropriate. The new external governance of the trust represents a vast change from the autonomy and privacy that the trust form was allocated just over a century and a half ago; the state is taking a more active role in regulating the trust form in an attempt to achieve transparency and security, at the expense of the privacy that the trust form traditionally conveys.

IV. The Potential Benefits and Inevitability of Trust Registration

A. The Potential Benefits

There are a number of potential benefits that may arise from mandatory trust registration and there is no doubt that the new measures pursue a legitimate purpose. The question will be, however, whether the benefits are significant enough to outweigh the disadvantages. One of the purposes of land registration is that it increases the "security of land ownership by

⁸³ Dignam and Lowry, *Company Law* (8th edn, Oxford University Press, 2014) 405.

⁸⁴ Trustee Act 1852; although note the earlier Statute of Uses 1535.

⁸⁵ Waters, 'The Trust: Continual Evolution of a Centuries-Old Idea' (2007) 14(4) *Journal of International Trust and Corporate Planning*, 215.

⁸⁶ Bevir, *A Theory of Governance* (University of California Press, 2013) 68.

enlisting the power of the state to enforce ownership rights”.⁸⁷ This function of land registration can be considered similarly in the context of trust registration. At present, with the exception of protectors, who are relatively rare in onshore trusts,⁸⁸ it is the role of beneficiaries to hold trustees to account and invoke the jurisdiction of the court to supervise a trust.⁸⁹ The new legislation, however, could allow for an external regulatory body⁹⁰ to be responsible for the monitoring and enforcement of trustee obligations,⁹¹ removing much of the burden from beneficiaries. This would particularly benefit those beneficiaries who are unaware of their status as a beneficiary and so are unable to enforce their rights. The new legislation, therefore, may result in more efficient administration of the settlor’s intentions and the monitoring of the trustee’s obligations, although such a possibility cannot be verified until the measures have been fully implemented.

Trust registration may also be beneficial by providing the opportunity to educate trustees so as to ensure that they fully understand their duties⁹² and that beneficiaries fully understand their rights, thus ensuring that trusts are managed correctly.⁹³ As discussed below,⁹⁴ trusts can be created without the knowledge of the parties involved and trust registration could help to ensure that trustees fully understand the nature of their fiduciary duties as well as any consequences following a breach, and that beneficiaries understand the remedies available to them.

There are a number of potential abuses of the trust form, and the new legislative framework legitimately attempts to hinder some of the most damaging, particularly given the current concerns for international security. McCall has suggested that it is not healthy to have a system in which those accountable can choose the anonymity afforded by the trust structure,⁹⁵ and the new legislation would ensure that trustees are unable to hide behind the

⁸⁷ Miceli, Sirmans and Kieyah, ‘The Demand for Land Title Registration: Theory with Evidence from Kenya’ (2001) 3(2) American Law and Economics Association, 275.

⁸⁸ Collins, Kempster, McMillan and Meek, *International Trust Disputes* (Oxford University Press, 2012) 7.09; see also *Davidson v Seelig* [2016] EWHC 549 (Ch) which recently clarified the *locus standi* of protectors in seeking the removal and appointment of trustees.

⁸⁹ *Ibid*, 7.10.

⁹⁰ Although, it may be argued that this would oust the jurisdiction of the court.

⁹¹ Law Commission, ‘Court Jurisdiction, Trading Trusts and Other Issues, Review of the Law of Trusts Fifth Issues Paper’ (2011) New Zealand, Issues Paper 28, 9.52.

⁹² *Ibid*, 9.53.

⁹³ *Ibid*, 9.55.

⁹⁴ See p.19.

⁹⁵ McCall, ‘The Trust as an Enemy of the People’ (2013) 19(3&4) *Trusts and Trustees*, 339.

privacy of the institution, thus in turn ensuring that those who misuse the trust form for illicit purposes are held accountable.

B. The Inevitability of Trust Registration

The increased transparency of financial institutions is occurring on a global scale, with the 28 EU Member States bound by the new Directive, a number of jurisdictions considering the adoption of the FATF recommendations and international initiatives such as the FATCA and Common Reporting Standard (CRS). All such initiatives suggest that further trust regulation, despite the Prime Minister's concerns regarding the suitability of the new measures,⁹⁶ is inevitable in the UK.

FATCA, enacted in the US in 2010, requires "foreign financial institutions to report financial information about accounts held by specified United States persons"⁹⁷ and, as announced in February this year, US domestic entities will also be required to declare foreign assets exceeding US \$50,000.⁹⁸ The introduction of the measures was a bold, unilateral action by the US intended to provide transparency into the offshore accounts of US taxpayers,⁹⁹ consistent with the general global priority of transparency and the underlying function behind the new express trust registration requirement. The long-term success of FATCA, however, will depend upon whether the US can convince other countries to adopt a similar system or go so far as to join with the US in the development of a multilateral FATCA system.¹⁰⁰ Already, the US FATCA "has spawned a growing number of offspring".¹⁰¹ In 2011, an EU Directive was introduced regarding co-operation on taxation matters and contained a requirement for the automatic transfer of information available to tax authorities from one Member State to another.¹⁰² Like FATCA, this 2011 EU Directive is moving in the direction of automatic global information reporting,¹⁰³ a drastic evolution in international governance

⁹⁶ See n49.

⁹⁷ Grinberg, 'Beyond FATCA: An Evolutionary Moment for the International Tax System' (2012) Georgetown Law, Working Draft, 3.

⁹⁸ STEP, 'US Domestic Entities Required to Declare Foreign Assets Above USD50,000' *STEP, Industry News* (25th February 2016).

⁹⁹ Harvey Jr., 'Offshore Accounts: Insider's Summary of FATCA and Its Potential Future' (2012) 57(3) Villanova Law Review, 472.

¹⁰⁰ *Ibid*, 472.

¹⁰¹ Lowe, 'Cross-border Tax Investigations and the OECD's Tax Information Exchange Regime' (2015) 21(9) *Trusts and Trustees*, 4.

¹⁰² Council Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, s.11, Art.8.

¹⁰³ Morse 'Ask for Help, Uncle Sam: The Future of Global Tax Reporting' (2012) 57(3) Villanova Law Review, 541.

and one that the UK cannot avoid. Similarly, at a national level, the UK had published its own Crown Dependencies and Overseas Territories Agreement, which shares some qualities with FATCA, and as a result of the Finance Act 2013, the “agreement reached between...the United Kingdom and the...United States of America to improve international tax compliance and to implement FATCA”,¹⁰⁴ is now part of UK law. The legislation means that UK financial institutions, including trusts which meet the requirements of a ‘financial institution’, are required to provide HMRC with the requisite information which will then be passed on to the US IRS.¹⁰⁵

There are multiple examples which combine to suggest that the obligatory registration of express trusts is not necessarily a large step on from the current legal framework: with a number of jurisdictions requiring trust (or trust-like form) registration, such as the French *fiducie* and the requisite registration of trusts in Australia;¹⁰⁶ many international initiatives encouraging common reporting, information availability and the transparency of financial institutions; existing obligations imposed on trust services providers under the 3rd AMLD and the requirement that trusts generating income tax and capital gains tax consequences make themselves known to HMRC. It appears that UK trust registration, or at least enhanced trust regulation, is inevitable in the UK whether obliged by the EU or not.

V. The Potential Disadvantages of Trust Registration

Despite the number of potential benefits, and international influences, there are serious disadvantages that may arise under the new legislative framework: these disadvantages outweigh any potential benefits. Much of the value of the trust form rests upon the private nature of the arrangement and the flexibility it entails.¹⁰⁷ It has already been mentioned that trusts have historically been seen as an institution which conveys a high degree of autonomy upon the settlor and Waters considers the flexibility available to the settlor in designing the governance of the trust to be of considerable importance.¹⁰⁸ He goes on to argue that the most

¹⁰⁴ Finance Act 2013, s.222(1).

¹⁰⁵ HM Revenue and Customs, ‘Implementation of the International Tax Compliance (United States of America) Regulations 2014, Guidance Notes’ (2015) 7.

¹⁰⁶ Australian Taxation Office, ‘Trusts - Registering and Reporting for Tax’ (10th September 2015) <<https://www.ato.gov.au/General/Trusts/Trusts---registering-and-reporting-for-tax/>> accessed 8th March 2016.

¹⁰⁷ Law Commission, ‘Court Jurisdiction, Trading Trusts and Other Issues, Review of the Law of Trusts Fifth Issues Paper’ (2011) New Zealand, Issues Paper 28, 9.57.

¹⁰⁸ Waters, ‘The Trust: Continual Evolution of a Centuries-Old Idea’ (2007) 14(4) Journal of International Trust and Corporate Planning, 255.

valued characteristic of the trust form, particularly from the perspective of wealthy clients, is the degree of autonomy that the trust allows.¹⁰⁹ One can see potential, therefore, for a number of disadvantages to arise from the mandatory registration of trusts as a result of the diminished autonomy and the increasing value placed on an external governance structure as opposed to the traditional internal governance of the fiduciary obligation.

It is common for wealthy individuals to place their funds into trusts regulated by the law of territories which are supposed to offer special advantages in terms of confidentiality;¹¹⁰ as such, mandatory registration requirements may negatively affect the appeal of the UK trust industry. The measures may cause trust-users to move offshore where the regulation is less stringent and their privacy can be assured, and, as a result, the new legislative framework will not effectively achieve the aims that it seeks to accomplish. There is existing concern that offshore locations are able to offer more beneficial fiscal advantages, favourable asset protection trust legislation,¹¹¹ less stringent regulation and more lenient tax regimes, and these concerns will merely be exacerbated by the new legislation and the proposed Directive on tax avoidance. The UK, US and EU will continue to strive for further regulation, whereas offshore 'tax havens' will increase their appeal by offering the privacy, autonomy and light-touch regulation that was once available onshore, as evidenced by the recent scandal following the publication of the 'Panama Papers'. Whilst the new legislation pursues a legitimate purpose, an unappealing onshore trust industry may hinder any attempt to prevent money laundering, terrorist financing and tax avoidance given the availability of various flexible offshore trust jurisdictions.

There are further concerns regarding the potential misuse of trust information. Similar concerns in the context of public information relating to companies eventually led to restrictions on the public availability of such information.¹¹² Whilst the relevant trust information will not be publicly available, such fears remain significant. For those trusts that do not generate tax consequences (and so will not be held on the central register), the identity of the settlor, trustee(s), protector, (class of) beneficiaries and any individual exercising effective control over the trust¹¹³ will be available to EU Financial Intelligence Units (FIUs)

¹⁰⁹ Ibid, 215.

¹¹⁰ *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [1] (Lord Walker).

¹¹¹ Garton, *Moffat's Trusts Law, Text and Materials* (6th edn, Cambridge University Press, 2015) 330.

¹¹² See for example, Criminal Justice and Police Act 2001, as a result of which directors could apply to have their personal information removed from the memorandum.

¹¹³ 4th AMLD, Art.31(1).

and the competent authorities,¹¹⁴ as well as obliged entities¹¹⁵ where, as a trustee, the trustee forms a business relationship.¹¹⁶ Whilst the central register of trust beneficial ownership of those trusts that do generate tax consequences will no longer be available to the public, as originally intended, the information will nonetheless be available to FIUs and the competent authorities, and it may allow timely access to obliged entities within the framework of customer due diligence.¹¹⁷ It is worth acknowledging, however, that the list of individuals constituting ‘obliged entities’ is substantial¹¹⁸ and, although the information will not be available to the public, the number of those who may have access to the central register is significant. Trusts are often used as a result of their discretion, both in terms of the trustee’s management and the settlor’s intention, and in recent years, there have been concerns raised regarding the potential kidnapping of trustees and beneficiaries as a result of their position in relation to a trust;¹¹⁹ whether justified or not, there can be no question that the new registration requirements will further exacerbate this issue by rendering the identity of trustees and beneficiaries available to a large number of individuals.

There are additional issues pertaining to registration requirements found in other areas of law, as acknowledged above, which raise further concerns for trust registration. It has been suggested that the process of becoming a listed company has become burdensome and expensive,¹²⁰ and the obligations which need to be satisfied in order for a company to become, and to remain, listed have been found too demanding by a number of small businesses.¹²¹ Similarly, it has been suggested that land registration may entail an excessive cost in comparison with the benefits arising.¹²² The Scottish Law Commission, when considering the introduction of trust registration, acknowledged that, whilst it could foresee a number of potential advantages, it was reluctant to add a further formality and expense to the

¹¹⁴ Ibid, Art.31(3).

¹¹⁵ See n.118 for an explanation of ‘obliged entities’.

¹¹⁶ Ibid, Art.31(2).

¹¹⁷ Ibid, Art.31(4).

¹¹⁸ According to 4th AMLD, Art.2(1), obliged entities include: credit institutions; financial institutions; auditors, external accountants and tax advisors acting in the exercise of their professional activities; notaries; trust or company service providers; estate agents; other persons trading in goods to the extent that payments are made or received in cash in an amount of EUR 10, 000 or more and providers of gambling services.

¹¹⁹ Mack, ‘Kidnapping - Trustees Held to Ransom?’ (*The Cayman Islands Journal*, 2nd June 2010) <<http://www.compasscayman.com/journal/2010/06/02/Kidnapping-%E2%80%93-trustees-held-to-ransom-/>> accessed 16th February 2016.

¹²⁰ Kay, ‘The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report’ (2012) Department of Business, Innovation and Skills, 2.17.

¹²¹ Ibid, 2.17.

¹²² Feder and Feeny, ‘Land Tenure and Property Rights: Theory and Implications for Development Policy’ (1991) 5(1) *The World Bank Economic Review*, 149.

constitution of a valid trust;¹²³ although this differs slightly from the present context as they were operating under the assumption that creation would only be valid on registration. Similarly, the New Zealand Law Commission recently published an extensive document evaluating the potential introduction of trust registration. In concluding that trust registration was not the appropriate course of action,¹²⁴ the New Zealand Law Commission acknowledged that the “initial registration of the hundreds of thousands of existing trusts is likely to be a complex and costly process and may not be worthwhile”,¹²⁵ whilst going on to express further concern for compliance costs¹²⁶ and the potential need for a registration fee.¹²⁷ The logistical problems caused by the new legislative framework could cause hugely damaging administrative issues whilst further complicating the role of the trustee.

Whilst a failure to comply with the new legislation will not undermine the existence or creation of an express trust, it can be seen to undermine a number of significant principles of English trusts law. It is a well-known fact that the word ‘trust’ is not required in order to create an express trust¹²⁸ and it is possible to create an express trust even though the settlor did not understand that this was the effect of their action.¹²⁹ Traditionally, it is for the court to determine objectively whether the requisite intent to create an express trust can be found, however, the new legislation will drastically undermine the flexibility of trust creation by potentially imposing severe penalties for a failure to register. Whilst legal existence will not derive from the act of registration itself, whether the courts will still be able to “infer an intent to create a trust from the circumstances of the case”¹³⁰ without the enforcement of the severe sanctions outlined in the Directive remains to be seen, and may well depend on the extent of the implementation by the UK. The Directive applies only to express trusts and so will not affect resulting and constructive trusts, but the non-exhaustive list of sanctions mentioned earlier¹³¹ significantly tarnish the traditional flexibility of the creation of express trusts.

¹²³ Scottish Law Commission, ‘Discussion Paper on the Nature and the Constitution of Trusts’ (2006) Discussion Paper No.133, 4.12.

¹²⁴ Law Commission, ‘Review of the Law of Trusts: A Trusts Act for New Zealand’ (2013) New Zealand, Report 130, 18.1.

¹²⁵ Law Commission, ‘Court Jurisdiction, Trading Trusts and Other Issues, Review of the Law of Trusts Fifth Issues Paper’ (2011) New Zealand, Issues Paper 28, 9.58.

¹²⁶ *Ibid*, 9.59.

¹²⁷ *Ibid*, 9.58.

¹²⁸ *Re Kayford Ltd* [1975] 1 WLR 279, [282] (Megarry J).

¹²⁹ *Paul v Constance* [1977] 1 WLR 527.

¹³⁰ Virgo, *The Principles of Equity and Trusts* (2nd edn, Oxford University Press, 2016) 88 (forthcoming).

¹³¹ See p.11.

There can be no doubt that trust registration and the new information disclosure requirements entail a number of significant disadvantages. The new legislation will taint the autonomy, flexibility and privacy of the trust whilst potentially causing serious harm to the appeal of the onshore trust industry. It is also worth acknowledging that there are a huge variety of trusts that can be used for a vast number of purposes and “companies and family trusts occupy different parts of the financial and economic world”;¹³² as such, the blanket registration and information disclosure requirements for all express trusts may be an inappropriate solution to the problem.

VI. Conclusion

In the modern landscape of threat, “money is seen to be a deadly weapon”¹³³ and there is valid concern that the trust form is being used to facilitate money laundering, tax avoidance and the illicit financing of terrorist activity. Globally, pressure is increasing for financial transparency, enhanced regulation and the obligatory registration of trusts; as a result of which, trust and company regulation is becoming more closely aligned. The combination of new EU legislation, recommendations by the FATF, changing theories of governance, and the “plethora of supranational initiatives that have developed in the context of private wealth holding structures,”¹³⁴ reflect the evolving external governance of financial institutions and indicate the inevitable further regulation and registration of the trust in England and Wales.

There is no doubt that there exists a wide scope for potential abuses of the trust form; there is justifiable concern that the trust will be used to “conceal the existence of assets...perpetrate fraud...[and settlors] may transfer assets into an offshore trust in order to keep them out of reach of creditors”¹³⁵ whilst avoiding compliance with legal rules.¹³⁶ Such concerns are legitimate and the new legislative framework will attempt to hinder some of the most damaging activities, such as money laundering and terrorist financing. Similarly, a number of significant benefits may arise as a result of mandatory trust registration: the effective enforcement of trustee duties; security; transparency; the opportunity to ensure that

¹³² Herbert, ‘Reality and Perception in Tax Avoidance and Mitigation’ (2013) 19(3&4) *Trusts and Trustees*, 360.

¹³³ De Goede, *Speculative Security: The Politics of Pursuing Terrorist Monies* (University of Minnesota Press, 2012) 4.

¹³⁴ Riches, ‘Are Transparency and the Registration of Trusts Necessary?’ (2013) 19(3&4) *Trusts and Trustees*, 343.

¹³⁵ OECD, ‘Behind the Corporate Veil, Using Corporate Entities for Illicit Purposes’ (2001) 25-26.

¹³⁶ Anderson, ‘Words and Concepts: Trust and Patrimony’ in Burrows, Johnston and Zimmermann (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013) 363.

those involved understand their role and the ability to maintain a strong relationship with other jurisdictions. But the drawbacks are more significant: the new legislation may undermine the principle of privacy; tarnish the autonomy of the institution; hinder the ease and flexibility with which trusts can be created, and substantially affect the appeal of the onshore trust industry – and the new measures may well fail in their objective as a result of the availability of flexible offshore jurisdictions, as demonstrated by the recent ‘Panama Papers’. The trust form is distinct from the company, so the convergence of their regulation is misguided. Increased regulation and mandatory registration of the trust form may be inevitable in England and Wales, the ‘mother’ jurisdiction of the trust,¹³⁷ but that does not vitiate the truth that the new measures will significantly tarnish the integrity of the institution alongside the privacy it traditionally conveys and usefully upholds. Express trust registration is unfortunate, but inevitable.

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