



THE TRUST AND OTHER COMPLEX STRUCTURES.

**Risks for
transparency,
tax evasion and
tax avoidance**



Norad

The trust and other complex structures. Risks for transparency, tax evasion and tax avoidance

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Prologue

More than eleven years have passed since the Latin American Network for Economic and Social Justice (LATINDADD) and the Inter-American Center of Tax Administrations (CIAT) joined forces to cooperate in the fields of taxation and fiscal transparency, promoting the exchange of experiences and the analysis of complex situations, in order to formulate proposals in said area of action.

The central action of the aforementioned cooperation lies in annual meetings with tax administrations and guests from finance ministries, intergovernmental organizations and civil society experts. As a result of these meetings, carried out under Chatham House rules, conclusions have been identified that gave rise to additional cooperation actions between CIAT and LATINDADD, to address needs and/or disseminate regional challenges and recommendations on possible ways to address them.

Within the framework of the XI Regional Meeting with Tax Administrations on International Taxation, which took place in Santiago de Chile in November 2022, and whose central theme was “Fiscal Transparency: the need for global cooperation to promote the fight against abuse tax in Latin America”, priority issues for tax administrations were discussed, which could be addressed through a joint initiative between CIAT and LATINDADD.

This meeting, which had the support of the Chilean Tax Authority, involved representatives of the tax administrations of Argentina, Bolivia, Costa Rica, Ecuador, Chile, El Salvador, Honduras, Guatemala, Jamaica, Panama, Uruguay, the Ministry of Economy of Argentina, the UN Development Financing office, leading tax experts, the Tax Justice Network of Latin America and the Caribbean (RJF-LAC), OXFAM, the Tax Justice Network (TJN), the Constituent Foundation XXI, the Financial Transparency Coalition (FTC) and the Independent Commission for the Reform of International Corporate Taxation (ICRICT). The feedback obtained allowed us to generate a list of proposals, which were carefully analyzed and prioritized by LATINDADD and CIAT. As a result of the aforementioned analysis, it was considered appropriate to address the development of a guide to interpret and detect complex structures or property chains that facilitate tax evasion and avoidance, as well as other financial crimes; with specific focus on the trust.

Why does the trust deserve special attention? According to what was discussed at the aforementioned meeting, this structure can be interpreted in different ways depending on the legislative tradition of each country and used with different levels

of intensity and for multiple purposes, making it difficult for countries to analyze property chains that transcend borders and facilitate, in many cases, opacity, consequently promoting tax avoidance or evasion. Therefore, we are convinced that this guide fills a gap in knowledge and sheds light on how to approach control strategies that allow us to address this type of risk.

Gonzalo Arias / CIAT

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Executive Summary

This guide aimed at tax authorities and other government agencies provides an explanation of the trust as a legal structure, its parts, the differences between Anglo-Saxon and civil tradition countries, as well as its legitimate and illegitimate uses. Although there are many legitimate uses of the trust (e.g. real estate development trust, pension funds or trusts to protect minors and vulnerable people, among others), this guide focuses on its illegitimate uses, related to illicit financial flows such as money laundering, sanction circumvention, corruption, tax evasion and avoidance, among many others.

The abuse of trusts for illicit or illegitimate activities is based on two fundamental elements: secrecy and the ability of trusts to isolate assets from creditors (especially the discretionary trust), as well as to avoid and evade taxes.

The first element has to do with trusts' secrecy, which is related to many factors. To begin with, there is usually no need to register or incorporate trusts to give them legal validity, a situation that prevents knowing: how many trusts operate in the world, who controls them, or what assets and income they hold. For example, commercial companies must usually report their balance sheets and financial statements, often in public registries. Furthermore, given the sophisticated structure of trusts, there are many parties involved (e.g., settlors, trustees, protectors, beneficiaries, etc.). This leads to many ways of exercising control, so it is usually difficult or impossible to know the identity of all the parties involved, especially if the aim is to determine the beneficial owner. This guide offers a description of how complex structures can be created, whether or not combined with other types of legal entities, to hide the true controllers and beneficiaries. The aforementioned information is accompanied by examples derived from real cases.

The second element has to do with the flexibility of the trust, which gives it a special capacity to isolate assets from the rest of society and which can be used to defraud, for example, creditors or tax authorities. This guide offers numerous real cases of how the trust was used to evade or avoid corporate income tax, personal income tax, wealth tax, inheritance tax, capital gains tax, among others.

Finally, this guide proposes two types of measures. Firstly, actions that authorities can undertake to obtain information (including free online sources) and ways to analyze the risk of complex structures, specifically regarding trusts. Secondly, this guide proposes measures so that the legal framework can both reduce the opacity of trusts, as well as prevent or mitigate the ability of trusts to avoid and evade taxes. The guide offers examples of successful cases in some countries.

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1. Introduction

1.1 Concept

The trust is a type of legal vehicle that is used to conduct business, concentrate wealth, protect assets, organize successions and inheritances, establish guarantees, etc. Trusts can also be abused for illegitimate purposes such as money laundering, tax evasion and avoidance, or fraud against creditors.

In its most classic and simple version, the trust consists of a vehicle or structure in which a settlor transfers assets (e.g., real estate, money) to be managed by a trustee, who will have fiduciary obligations to manage the trust assets for the benefit of the beneficiaries, according to the instructions of the settlor.

A graphic way of understanding the trust is to think of it as a way of dividing the “ownership” of the trust assets between: (i) the legal ownership of the assets and the right and obligation to manage them by the trustee, and (ii) the equity ownership to benefit from the trust income and capital by the beneficiaries. This separation can serve different purposes. In the classic example, a father of a family transfers the administration of the assets to a trusted person to manage and preserve them for the benefit of his minor children or vulnerable people to prevent these beneficiaries from misusing, wasting or losing the money, in case they received it in its entirety and directly. On the other hand, in a trust used as an investment fund, the trustee is responsible for managing the money and deciding the type of investment, while the investors would be the beneficiaries of the fund’s profitability. As analyzed later, this separation of property can also be exploited for tax avoidance and evasion, and for other crimes.

Depending on the jurisdiction or international standard, the trust can be considered a contract, a relationship, a legal agreement or an entity. This classification is not a mere doctrinal issue but has consequences on the level of transparency and information that will be available. Depending on the classification and jurisdiction, trusts will either need to be registered in order to have legal validity (as with most legal entities, such as commercial companies or foundations) or they may not be subject any transparency responsibility¹.

(1) For example, the Financial Action Task Force (FATF) in charge of anti-money laundering and counter-terrorism financing recommends legal entities under Recommendation 24, requiring, for example, the registration of information on beneficial owners, while trusts are regulated by Recommendation 25, merely requiring that the trustee retains the information and submits it to the authorities when they request it.

1.2 Comparison between Anglo-Saxon and Civil Law countries

The main difference between Civil Law and Anglo-Saxon countries in relation to the trust has to do with its use, flexibility and regulation, especially at the tax level. Although some speak of the origin of the trust in Roman law, many consider that the trust developed mainly in England, in the Middle Ages, and that it was later incorporated in some Civil Law countries, several centuries later.

In Anglo-Saxon countries the use of the trust is very common among the population. In countries like Australia, the trust is used like a commercial company, to carry out any type of business or undertaking. In these countries the use of the trust is very common also for non-commercial situations, so it is usually considered a private family matter. For example, the trust is used by the population for succession and inheritance issues in order to avoid the high costs and time required by a probate process. This “private” (non-commercial) use promotes arguments to subject it to less transparency compared to commercial companies. Trusts are also used as a way to define and control the organization of a family business, for example by putting the shares of the family holding company in a trust controlled by the founder and their family.

The most notable difference, however, may be the so-called “constructive trusts,” which are trusts created implicitly by law, considering that certain situations (e.g., a condominium, or delivering an asset to a person so that they keep it) leads to the creation of a trust. This differs from an “express trust,” in which the parties to the trust have the deliberate intention to create the trust, rather than it arising by law due to a given situation. This guidance relates only to express trusts. The Hague Convention on the Recognition of Trusts², the anti-money laundering recommendations of the Financial Action Task Force (FATF)³ and the recent regulations on transparency of beneficial owners approved in the countries also refer mainly to the express trust.

The widespread use of the trust in Anglo-Saxon countries has the consequence that their regulation is more sophisticated and complete, having specific taxation rules depending on the type of trust (e.g., taxes at the time of establishing the trust and every 10 years, imputation on the trustee of any trust income according to the type of trust, special tax for discretionary trusts’ income, etc.). Since in many Anglo-Saxon countries the foundation as a legal vehicle does not exist, the charitable trust is used instead, which usually has different rules and a special registry.

(2) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=59>

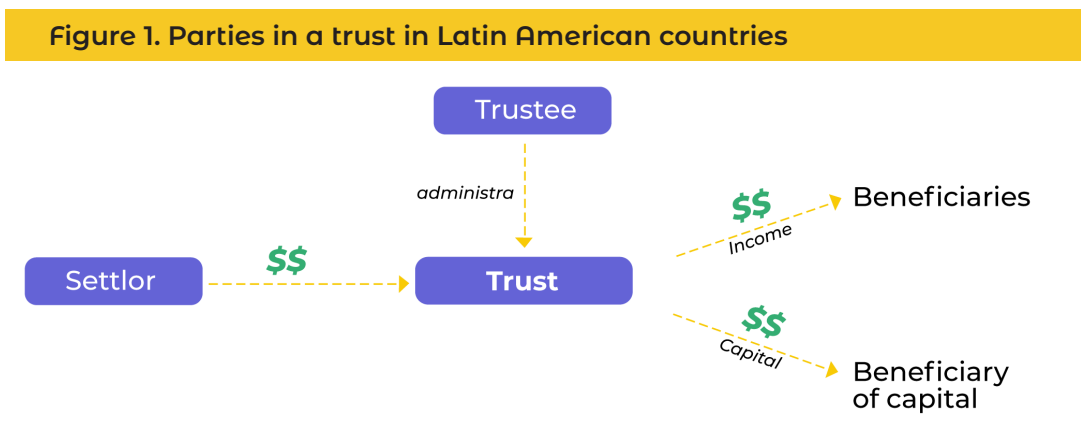
(3) <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>

In Civil Law countries, and especially in Latin America, the trust was implemented mainly for real estate development, with the purpose of preventing the bankruptcy of a construction company from affecting real estate ventures. The trust allows a construction project to be isolated from the fate or bankruptcy of the construction company. Since Civil Law countries as those in Latin America have less experience with this legal figure, the existing regulation and types of trusts are usually more limited. However, this situation can create risks, since any Latin American resident could be using or abusing an Anglo-Saxon trust from their country of residence. Currently, the use of public trusts by Latin American States has also become more common as a way to have a separate budget for specific projects.

1.3 The trust parties

One of the main differences between the trust in Civil Law and Anglo-Saxon countries are the parties to the trust, these being more complex in Anglo-Saxon trusts.

In trusts of many Latin American countries there are usually the three parties of a classic trust, although the beneficiary is separated into two sub-parties. The settlor (“Fiduciante”) (also called “fideicomitente”), who delivers the assets to the trustee (“fiduciario”). The latter must manage the assets and then deliver the income to the beneficiaries, while the remaining capital at the end of the trust is usually transferred to the “capital-beneficiary” called “fideicomisario”.

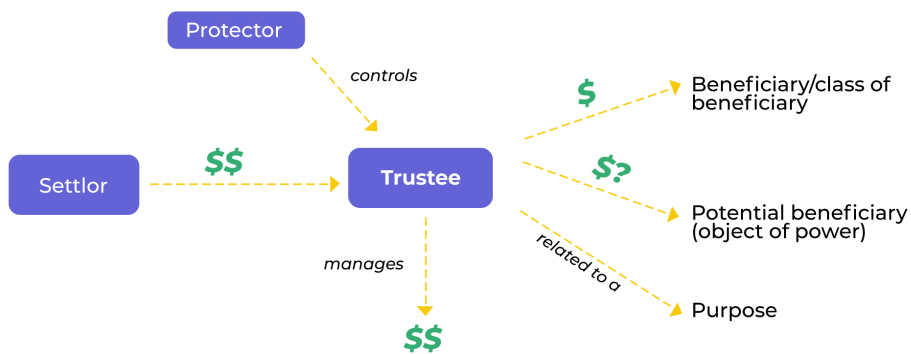


Source: Own

The main difference with the parties of the Anglo-Saxon trust is with respect to the beneficiaries, since “classes of beneficiaries” are common (e.g., the descendants of Mr. X or the victims of accident Y). Furthermore, it could be the case that there are no beneficiaries at all, but only “purposes” (e.g., having the shares of company Z) as in the “purpose trust”. Finally, the discretionary trust, which is usually one of the types of trusts most susceptible to being exploited for illicit purposes, as analyzed below, involves two more parties: the potential or discretionary beneficiary (also referred to in English as object of power) and the protector. In the discretionary trust, the settlor gives discretion to the trustee to decide, according to the instructions of the trust deed. It is likely that there are also secret instructions (that only the trustee knows) in another document called the “letter of wishes”.

The greatest risk to transparency and tax avoidance of discretionary trust is that, at least in theory or on paper, the trustee has discretion to determine how much money to distribute to a beneficiary, when to make the distribution, and even more important: whether each particular beneficiary will receive a distribution or none at all. This makes the beneficiary a “potential beneficiary” since it is not enough to be named as a (potential) beneficiary, but the distribution will depend on the discretion of the trustee. To control this extraordinary power of the discretionary trustee is that the “protector” is added, which is a figure who usually responds to the settlor to ensure that the trustee complies with the settlor’s instructions or wishes.

Figure 2. Parties of a trust in Anglo-Saxon countries



Source: Own

In classic examples, the parties to the trust are described as persons: the settlor is the father of the family who names his friend or lawyer as trustee, while the beneficiaries are his spouse and children. Although this configuration is possible, the parties do not always refer to different people. Depending on each jurisdiction, the same individual can fulfill more than one role (e.g., be both settlor and beneficiary). The more roles the same individual can have (or control), the greater the risk of making abusive use of the trust. For example, a trust could be used to give the appearance that an individual has disposed of assets (by transferring them to a trust), although the same individual continues to control or benefit from them. Likewise, the parties to the trust will not necessarily be individuals, but may be legal entities, creating further obstacles to transparency. This situation will be analyzed below.

1.4 Legitimate uses of a trust

Trusts are used for many purposes, including:

- **Real estate projects:** to prevent the bankruptcy of the construction company from damaging the real estate venture.
- **Financing:** used by countries as public trusts: to isolate assets and budget for a specific project, whether it is compensating the victims of a natural disaster, raising funds for an infrastructure project, etc.
- **Guarantee:** similar to an “escrow” account where a third party (the trustee) keeps the asset as collateral until the debtor fulfills the obligation, or until both considerations have been met.
- **Testamentary and succession:** allows the inheritance to be divided (especially in countries without forced heirs⁴). Likewise, it is used to preserve the family business or properties, to prevent them from being divided or sold due to division between different heirs. In Anglo-Saxon countries it is used to avoid the costs and time of the succession process (probate).
- **Pensions:** given the structure of the trust (differentiating between the obligations and rights of the trustee versus those of the beneficiaries), it is widely used as a way of organizing investment funds, as well as employee pension funds. The rights and responsibilities of the fund administrator (the trustee, or someone hired by them) are very different from the rights of

⁽⁴⁾ In countries with rights for forced heirs, for example the children or spouse are entitled to a portion of the inheritance by law.

investors or employee-beneficiaries⁵. Using the trust in this case also allows to isolate the funds from the fate of the employing company.

- Charity or protection of minors/vulnerable people or their education: in Anglo-Saxon countries where the “foundation” does not exist as a legal vehicle, trusts can be used for charitable purposes (charitable trust), to protect minor children or vulnerable people or to pay the education of children⁶.

1.5 Illegitimate uses of a trust

Trusts can be abused for illegal and illegitimate purposes, especially the discretionary trust. These abuses are differentiated depending on whether they exploit either secrecy or the protection of assets from third parties.

a) Secrecy

The lack of information about the existence of the trust, the trust assets or the parties involved in the trust can be exploited for the purposes of:

- Tax evasion.
- Money laundering.
- Corruption.
- Financing terrorism (especially pretending to be charities).
- Avoiding sanctions (e.g.: against Russian oligarchs due to the war in Ukraine).

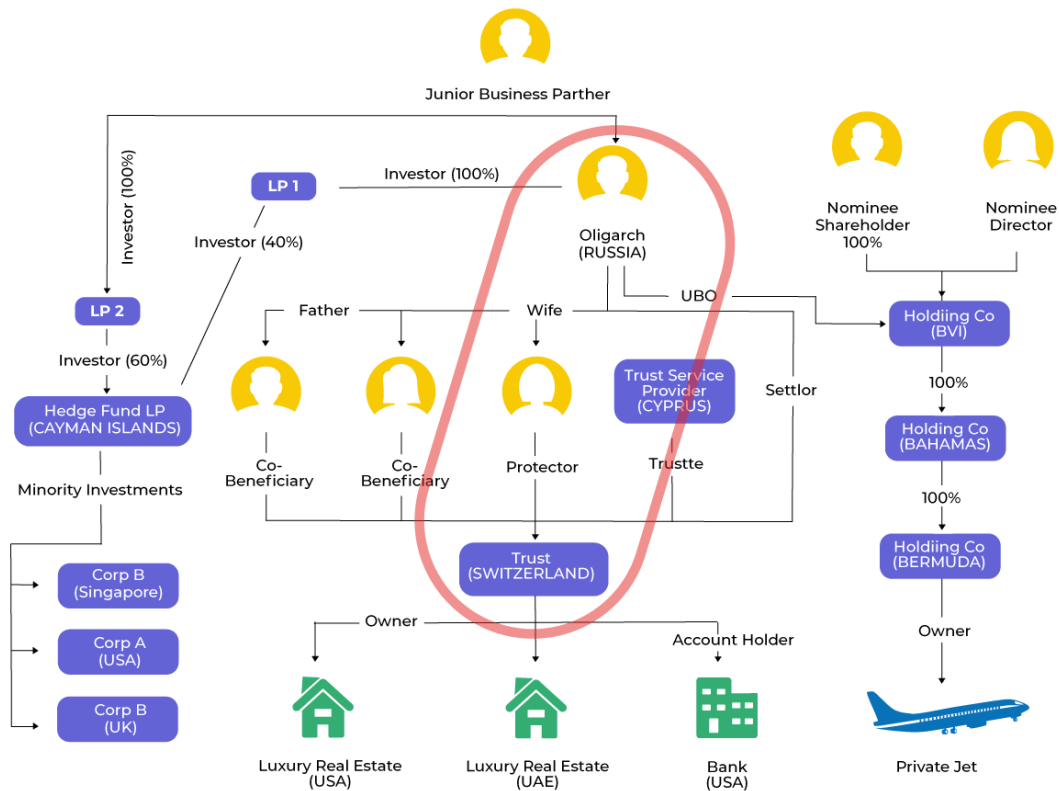
Examples of the use of trusts to avoid sanctions: In cases of malpractice, divorce, etc.: because the existence of the debtor’s wealth or properties is hidden

(5) In some investment funds, unit trusts are often used, by which the investors purchase “units” of the trust, similar to quota-parts of a conventional investment fund.

(6) <https://www.step.org/press-office/what-are-main-uses-trusts>

Trusts to escape sanctions

Since the Russian invasion of Ukraine, different media outlets have accused Russian oligarchs of using trusts to avoid sanctions. The same was warned by a statement from the REPO Task Force as well as by a Red Alert of typologies to avoid sanctions issued by the National Economic Crime Center of the United Kingdom. Similarly, the United States Office of Foreign Assets Control (OFAC) blocked \$1 billion from the Heritage Trust (of Delaware) that belonged to a Russian oligarch. In accordance, an ACAMS* article on trends and strategies to avoid sanctions also puts the trust as the axis of the structure, in the following fictitious diagram (we add the red circle to show the role of the trust):



Fuente: [Asociación de Especialistas Certificados en Antilavado de Dinero - ACAMS](#)

b) Protection of assets against third parties

The flexibility of trusts, especially the discretionary trust, to determine who will be a beneficiary, and when they will receive a distribution can be exploited for:

- **Wealth and inheritance tax avoidance:** the assets no longer belong to the taxpayer's personal wealth (so the wealth tax is not paid) and are kept in the trust, without being distributed to the heirs (so the inheritance tax is not paid either). Although the assets are no longer the property of the settlor, nothing prevents them from using and taking advantage of the asset, (e.g.: real state).
- **Personal income tax avoidance:** Distributions are organized to beneficiaries according to their annual income or their ability to neutralize income against losses in order to avoid paying personal income tax or to avoid falling into a higher marginal rate of said tax, affecting progressivity.
- **Capital gains tax avoidance:** the asset is not sold, but it is changed instead or the beneficiary of the trust is replaced.
- **Creditor fraud:** By instruction to the trustee, distributions in favor of beneficiaries with debts are prevented, in order to avoid the funds from ending up in the hands of creditors.
- **Violation of the legitimate rights of forced heirs:** A trust is established to avoid the legitimate interest of the heirs and at the same time any argument that refers to a foreign law that establishes such legitimate interest is considered invalid.

Discretionary Trust Abuse

The judge in the Pugachev ruling in the UK offers an excellent example of how abusing a discretionary trust, to give the appearance of having divested in some assets without doing so in practice, would work.:

“Suppose an unscrupulous person tries to “protect” one of his assets from creditors and the asset is a house... if the house is transferred to a discretionary trust in which the unscrupulous person is named as one of the discretionary or potential beneficiaries, the person can achieve several objectives. They can hide their relationship to the property by having the trustees listed in public records as owners. They can also claim that they do not have any right of ownership or usufruct over the asset and, since they are not the beneficial owner, a creditor who finds out about the existence of the asset will not be able to get hold of it....

The goal is not to lose control, but to hide it and protect it from creditors. Since the unscrupulous person would only be a discretionary beneficiary in this example, fiduciaries acting legally may well not carry out that person’s will at all and may refuse to distribute the assets back to the unscrupulous person... here it is where the concept of protector can come into play....

Acting as the protector, the unscrupulous person can prevent the trustees from distributing the money to anyone but themselves and can remove recalcitrant trustees who do not follow their instructions and replace them with trustees willing to do what the unscrupulous person wants. Viewed this way, perhaps the discretionary trust is not really discretionary at all; the unscrupulous person has retained effective control of the assets or, at least, can regain such control whenever he wants.”

Furthermore, the Akhmedov* divorce ruling describes how the husband continues to enjoy and use the assets in practice even though they were transferred to the trust: *“The husband has continued to enjoy these assets since their transfer to the trusts of Liechtenstein: a) He was granted the use of the Yacht while paying for its maintenance. b) More than US\$148.7 million of monetary assets have been paid from the Liechtenstein trusts to the husband personally.”*

* [2021] EWHC 545 (Fam)

1.6 Tax havens and abusive trust regimes

In countries where the trust is properly regulated, there are regulations aimed at obtaining its information, taxing its income and protecting the relationships between the parties that make it up. For this reason, some countries prohibit, for example, the trustee from also being one of the beneficiaries, since he could act fraudulently to benefit himself from the trust distributions, affecting the rest of the beneficiaries. It can also be prohibited for the settlor to be a trustee, since the settlor would be controlling the trust, losing the reason for the structure (in which one party gives the administration of the assets to another). Finally, some countries prohibit the settlor from being a beneficiary, especially if he is the only beneficiary, as this is distorting the function of the trust.

On the other hand, some tax havens or secrecy jurisdictions not only allow abusive trust clauses but also have regulatory stipulations that encourage abuses and violations of foreign laws. As described in the Tax Justice Network publication “Trusts: weapons of mass injustice?”⁷:

1.6.a) Abusive legal stipulations of the legal framework of certain tax havens

- **Non-recognition of foreign laws:** The legal framework establishes that a trust regulated or created according to local law (of the tax haven) cannot be invalidated for violating a foreign rule that affects any of the parties or assets (e.g., legitimate inheritance).
- **Non-recognition of foreign judgments:** The legal framework establishes that a trust regulated or created according to local law (of the tax haven) cannot be invalidated by a ruling from a foreign court that invalidates the trust or that requires the trustee to deliver trust assets to a particular person. This could be the case when a foreign court requires the surrender of trust assets for violating a foreign rule on inheritance or a case of fraud or tax evasion.
- **Extension of the duration of the trust and “decanting”:** In some countries, given that the trust assets are isolated from the rest of the estate, trusts have a duration period (e.g.: 30 years or until a beneficiary who is a minor reaches the age of majority). However, certain tax havens allow some types of trusts to last 100, 150, 1,000 years or indefinitely. In relation to this, even if the trust may last a short time, certain countries allow the trust to “decant” into a new one (transferring all of its assets to the new trust), thereby prolonging the life of the trust in practice.

(7) Andres Knobel, *Trusts: Weapons of Mass Injustice?* (2017) <www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf> [accessed 2 May 2022].

- **Restriction of anti-fraud actions:** Most countries allow civil anti-fraud actions, for example, if a person becomes insolvent (by transferring all their assets into a trust) after a debt becomes due. Anti-fraud action is usually applied within a reasonable period, also considering the moment before the debt became payable. To reduce the possibility of third parties attacking the trust and thus avoid losing the trust assets, some tax havens reduce the time in which the anti-fraud action expires (for example two years from when the trust was created), or require the third party to prove that the “main purpose” of creating the trust was to commit the fraud (it is not enough that it is only one of the settlor’s intentions). Some tax havens also require a higher standard of proof than that applied in criminal cases (e.g., beyond reasonable doubt).

- **Concept of fictitious or sham trust:** Although in certain countries a trust can be invalidated for being fictitious, for example, because the settlor never gave up control or benefit over the trust assets, in other countries such as the United Kingdom a trust can only be invalidated for being fictitious (sham) when the settlor and the trustee attempted to make the trust operate in a manner different from that stipulated in the trust contract. However, even in the United Kingdom, the concept of an illusory trust exists to indicate that the settlor retains control over the trust.

1.6.b) Abusive stipulations permitted in the trust contract

- **The settlor as the sole beneficiary or as all parties to the trust:** certain tax havens allow the same individual to be settlor, protector, trustee and/or beneficiary, or some combination, including the settlor being the sole beneficiary (self-settled trust). For example, in the divorce case of billionaire Akhmedov⁸ in the United Kingdom, he set up a discretionary trust in Bermuda where he was the settlor, protector, principal beneficiary and (although indirectly) the trustee, as he was the sole director of the company acting as trustee.

- **Flee clause:** obligation for the trustee to migrate the trust, the law that regulates it and/or appoint another trustee in another jurisdiction in the event of any “danger” such as a change in a law, a new tax, an investigation or a request for the exchange of information about the trust, etc.

(8) [2021] EWHC 545 (Fam)

- **Spendthrift or Forfeiture clause:** The spendthrift provision prevents the voluntary or involuntary alienation (e.g., an act of disposal such as a sale) of a beneficiary's interest in a trust, or directly contemplates automatically suspending or canceling the beneficiary's status as such, whenever a beneficiary attempts to transfer their interest in the trust, or their creditors attempt to access the asset, or if the beneficiary becomes bankrupt.

- **Anti-duress clause:** allows the trustee to ignore any request to distribute assets in favor of a beneficiary if the request comes from the settlor or beneficiary "under duress," for example because a court or tax authority requires the settlor or trustee to pay a debt. This clause "protects" the trustee so that he cannot respond to the request of the settlor or beneficiary. This clause is intended to ensure that the trust assets never end up in the hands of third parties.

2. Trust and the abuse of secrecy

The opacity of any legal vehicle (e.g., commercial company, foundation, trust, etc.) can be exploited to generate illicit financial flows such as money laundering, tax evasion, etc. This is achieved by concealing from authorities and public scrutiny either the existence of the trust, or the identity of the beneficial owners who control it, or data about the income and assets of the trust.

For example, the hearings⁹ of the Permanent Subcommittee on Investigations of the United States Congress chaired by Senator Levin in 2008 (on the investigations against the banks UBS and LGT of Liechtenstein) describe many cases of abuse and secrecy strategies. For example, Exhibit #104 titled “Tax haven bank secrecy tricks” mentions, among others, the use of “captive” trustees, straw men settlor, and bogus charitable trusts (fake charitable trusts).

The trust is especially opaque compared to other types of legal vehicles for the following reasons:

- No need to register the trust at the time of its creation,
- Difficulty in identifying the parties to the trust,
- Combination between trusts and other types of legal vehicles, or
- Complex structures of trusts for high net worth individuals

2.1 Secrecy regarding the creation of the trust

Most legal entities must register with a government authority in order to obtain legal validity or any of the benefits granted by law. For example, most legal entities must register to obtain legal status (to exist as a separate person from their founders). Otherwise, they cannot act in their own name or be owners of assets. Another benefit that registration can provide is limited liability, so that partners or shareholders do not respond with all their personal assets for the unpaid debts of the company but only up to the value of their investment.

On the other hand, in most countries (especially in Anglo-Saxon countries), trusts do not have to be registered in order to obtain legal validity. Trusts exist and create rights and obligations from the moment they are created, as long as they meet the basic conditions (e.g.: the three “certainties” about the intention to create the trust, the object and the subject matter¹⁰). Since in Anglo-Saxon countries the trust is

(9) <https://www.govinfo.gov/content/pkg/CHRG-110shrg44127/pdf/CHRG-110shrg44127.pdf>

(10) Case *Knight vs Knight* (1870) in the United Kingdom.

Based on the FATF anti-laundering recommendations, some jurisdictions require the trustee to advise third parties of their trustee status. For example, when opening a bank account, the trustee should disclose that he or she is acting in that capacity in relation to a trust. Without alerting third parties, it may be impossible to differentiate an individual acting in a fiduciary capacity from one acting in their own name and on their own behalf. For example, Mr. Smith would appear as the owner of a property or a bank account, without being able to know if he is the real beneficial owner (as would seem to be the case when looking at the record) or if he is the legal owner, but only as a trustee of a trust (a fact that can only be known if the trustee declares it).

This lack of registration of trusts to obtain legal validity implies it is not possible to know how many trusts exist in the world, much less who their parties are (e.g., settlor, beneficiary) or what or how much their assets and income are worth. Strikingly, this lack of information occurs even in countries like Australia where trusts are widely used for commercial purposes. This creates enormous risks, including tax evasion. According to the Australian Tax Administration, conservative estimates would put between AU\$672 and 1.2 billion in tax revenue lost annually due to trusts.¹¹

The risks of lack of information on trusts were highlighted in a report¹² commissioned by the Australian Tax Office (ATO). The report concluded that the opacity generated by the lack of registration of trusts and their documents allows taxpayers to falsify documents, change dates, or the status of the trust parties in order to avoid paying taxes or hide the beneficial owner:

A question of primary importance is whether income tax laws can be adequately applied to current sources of trust information.... The analysis demonstrates that, without more complete data on trusts, there is an inherent complexity in better determining the potential size of the active trust population in any financial year...in the context of a self-reporting system, this presents a unique and complex set of challenges for the ATO...

(11) <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/general-research/current-issues-with-trusts-and-the-tax-system/>

(12) De Silva, Ashton et al, Current Issues with Trusts and the Tax System: Examining the Operation and Performance of the Tax System in Relation to Trusts, with a Particular Focus on Discretionary Trusts Linked to High Net Worth Individuals (2019) <<https://iorder.com.au/publication/Download.aspx?ProdID=1-GJ16CAC-P1>> [accessed 6 June 2023].

The lack of trust registration and authentication requirements encourages opportunism and fraud by taxpayers. Allegations that trusts exist and have certain terms may be based on falsified documents and/or false allegations that constituent documents have been lost or destroyed. Distribution rights and/or the status of individuals as beneficiaries of trusts may be modified prior to tax audits in order to conform to prior years' tax returns.” (pp. 89-106, emphasis added by author).

Similarly, internal communications between enablers (e.g. lawyers, trust service providers) in the Pugachev¹³ in the United Kingdom show the same ease of changing documents retroactively or for the settlor/protector to modify any clause of the trust contract in the future:

“Attached is the trust deed that reflects the conversation we had. You can change this document at any time and Bill (the lawyer) tells us that you can basically do whatever you want later, but this is a good basis for the trust”

“-L: How easy is it to retroactively modify the trust deed in case we want to ‘tune it up’ later?”

-P: Very easy. Cl 13 gives full power to rewrite the deed with the consent of the Protector”

(13) <http://www.bailii.org/ew/cases/EWHC/Ch/2017/2426.html>

2.2 Lack of identification of all parties to the trust at the level of beneficial owners

2.2.1 Registration without reaching the beneficial owner

After knowing that the trust exists, the second element to consider is knowing who the parties to the trust are, until reaching a natural person. FATF Recommendation 25, which deals with transparency matters around beneficial owners, requires ensuring the availability of information on the beneficial owners of trusts. However, those countries that do not require beneficial ownership registration will unlikely request information on the parties to the trust up to the beneficial owner.

FATF Recommendation 25 was reformed in 2023 and contemplates the registration of beneficial owners in central registries, although this is not a requirement. However, many countries decided to require the registration of beneficial owners of trusts. According to the Tax Justice Network report¹⁴, by 2022 there were 65 jurisdictions that required informing the beneficial owners of at least some type of trust:

- The 27 members of the European Union.
- The United States and four territories (Guam, United States Virgin Islands, Puerto Rico and American Samoa) for business trust that must be registered with a Secretary of State, according to the law on the registration of beneficial owners (Corporate Transparency Act).
- 11 jurisdictions in Latin America and the Caribbean: Antigua & Barbuda, Argentina, Brazil, Colombia, Costa Rica, Ecuador, Paraguay, Peru, Dominican Republic, San Cristobal and Uruguay.
- 9 jurisdictions in Europe: Andorra, Gibraltar, Iceland, Liechtenstein, Monaco, Montenegro, Norway, United Kingdom and San Marino.
- 7 in Africa: Botswana, Morocco, Namibia, Rwanda, Seychelles, Tanzania and Tunisia.
- 5 in Asia (mainly in the Middle East): Lebanon, United Arab Emirates, Qatar, Sri Lanka and Turkey.
- 1 in Oceania: Nauru.

(14) Andres Knobel and Florencia Lorenzo, Trust Registration Around the World, 2022 <<https://taxjustice.net/wp-content/uploads/2022/07/Trusts-FATF-R-25-1.pdf>> [accessed 8 November 2022].

2.2.1.1 Not all parties must be registered

FATF Recommendation 10 on customer due diligence and its Interpretative Note constitute the basis for determining who are the parties to the trust that must be identified:

- Settlor
- Trustee
- Protector (if it exists)
- Beneficiaries or classes of beneficiaries
- Any other individual with effective control over the trust

Many jurisdictions took this rule to determine which parties must be identified as beneficial owners of trusts, such as the European Union (Art. 3.6.ii of the Anti-Money Laundering Directive).

However, some countries, especially in Latin America, do not need to explicitly identify all parties to the trust as required by FATF rules (e.g. Paraguay or Uruguay)¹⁵. This can result in secrecy, even if the country has a simpler type of local trust (e.g., one that only admits settlor, trustee and beneficiaries). Since anyone can create, manage or benefit from a foreign trust (or local trust, if the country's law allows it to be created), countries should require the registration of all parties to the trust. Mainly, the party that is usually omitted is the "protector" (a typical party of discretionary trusts) which does not necessarily exist in Latin American regulations (although any resident of the region could be related to a discretionary trust). One way to resolve this loophole is to add the phrase "or any other individual who has effective control over the trust" and establish guidelines specifying that a "protector" would be covered by that general rule.

On the other hand, countries like Argentina require all parties to be explicitly identified. AFIP Resolution 3312/2012 (in its updated version) establishes:

"The settlors, trustees, beneficiaries, protectors and similar who act in trusts in the country and abroad, when these are human persons, will also be considered as beneficial owners... The obligation to report the chain of participations must be fulfilled also in the event that the settlors, trustees, beneficiaries, protectors and similar are legal persons or other contractual entities or legal structures. In this case, the beneficial owner of the same must also be informed."

(15) See reports from Paraguay and Uruguay on the Financial Secrecy Index published in 2022.

2.2.2 Registration of the trust parties applying thresholds

In the case of the beneficial owners of legal entities such as commercial companies, the FATF Rules apply a cascade rule where the option of establishing thresholds is suggested, e.g.: any individual who has more than 25% of the shares of the company. Although in the case of trusts the FATF and the Global Forum establish that thresholds should not be applied, some countries establish them, for example: requiring the identification of only beneficiaries who are entitled to more than 25% of the income or assets of the trust, instead of identifying all beneficiaries, regardless of their rights.

2.2.3 Complex parties: nominal and economic settlors, and indirect beneficiaries

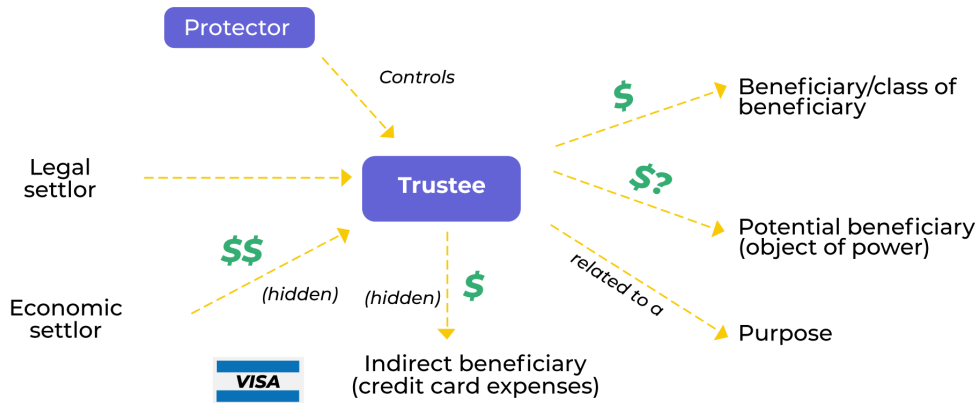
Most countries that follow FATF rules require identifying all parties involved in trusts. In this case, the use of the plural (e.g., trustees) is necessary in the event that there is more than one, especially in the case of beneficiaries and trustees.

Although the plural would in principle cover any “type” of party, it would be convenient to establish the explicit requirement of two more types of parties: settlors (legal and economic) and indirect beneficiaries. On the one hand, some tax havens, for example, differentiate between the legal settlor, a type of front man or nominal settlor who appears in the trust contract, as opposed to the economic settlor, who is the true owner of the assets transferred to the trust.

On the other hand, in 2022, the OECD, reformed the standard for the automatic exchange of banking information¹⁶ (the Common Reporting Standard or CRS), added the indirect beneficiary among the beneficial owners of trusts (page 93). This figure refers to those people who, without explicitly appearing as beneficiaries in the trust contract, receive indirect (and simulated) distributions. For example, credit card payments or education expenses, which are disguised as trust expenses.

(16) Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard (2022) <<https://www.oecd.org/tax/exchange-of-tax-information/crypto-asset-reporting-framework-and-amendments-to-the-common-reporting-standard.pdf>> [accessed 6 June 2023].

Figure 3. Complex parts of the trust: legal and economic settlers, and indirect beneficiaries



Source: Own

2.2.4 Indirect mechanism for appointing parties to the trust

The hearings of the Permanent Subcommittee on Investigations of the United States Congress, chaired by Senator Levin in 2008, mention an opacity strategy of the Liechtenstein LGT bank, which consisted of the beneficiaries being “the shareholders of the last layer of an entity that would control the foundation.” Private interest foundations are essentially very similar to trusts in their effects and uses, as well as in the parties¹⁷. In this way, the beneficiaries would not be mentioned in the foundation’s statute nor could they be known, unless one knew what the last layer of control over the foundation is and who the shareholders of that last entity are. The Subcommittee document described:

“LGT established the Luperla Foundation... To hide the Lowys’ participation, LGT used a series of tricks to maintain the secret. First, LGT did not include the name Lowy in any of Luperla’s official documents...the only name on the founding documents was that of its attorney, Joshua H. Gelbard...Third, LGT and the Lowys designed a unique mechanism to hide the fact that the Lowys were the beneficiaries of the Luperla Foundation. The key to the plan was a Delaware corporation called Beverly Park Corporation, controlled by the Lowys...Beverly Park has a complex chain of ownership that ultimately ends in the Frank Lowy Family Trust. The president and director of Beverly Park since its creation is Peter Lowy. Luperla’s key mandate states that the foundation’s beneficiaries would be named by the company in which Beverly Park last held shares. This meant that Luperla had no official

(17) The founder of the foundation would be equivalent to the settlor, the board of directors would be equal to the trustee, and finally there are the beneficiaries. The main difference with the trust is that foundations are considered legal entities and must be registered

beneficiaries at the time it was incorporated or in the following years, except, of course, the financial beneficiaries named in the LGT founding documents. This ingenious set-up allowed the Lowys to deny with a straight face that they were beneficiaries of the foundation, while simultaneously controlling the Delaware corporation that would ultimately be used to name those beneficiaries” (p. 48, emphasis added)

2.2.5 Confusion over control of the trust

In principle, the settlor loses control over the trust and the trust assets as long as the trustee acts in accordance with the instructions established in the trust contract. However, the settlor may retain control over the trust and decisions as permitted by law, or by taking advantage of the opacity of the trust, the identity of the parties or their rights and obligations.

For example, the settlor could maintain control if:

- He/she is also the trustee, or controls it through family relationships, o coerción.
- He/she is also the protector, or controls it through family relationships, friendship or coercion.
- Retains the right to veto the decisions of the trustee.
- Retains the right to remove the trustee, or to appoint more trustees to modify the majorities.
- He/she is the main shareholder or director of the entity that acts as trustee of the trust (E.g. private trust company).
- He/she has the right to revoke the trust.

2.2.6 Trusts involved in complex structures

Trusts may be involved in complex structures, for example combining trusts with legal entities or multi-layered structures. Although in general it is not prohibited nor is justification required to create complex structures, these can be exploited to hide the beneficial owner. Complex structures can cause an individual to avoid being registered as a beneficial owner or confuse who has true control. Other objectives of complex structures have to do with protecting assets by isolating them from the fate of the rest of the structure, maintaining control over the business, etc.

2.2.6.1 Combination of trusts with legal entities to generate opacity

One of the simplest ways to generate secrecy and hide - legally - the beneficial owner is to combine trusts with legal entities in the corporate structure.

Legal entity as party to a trust

Most laws or standards do not establish who must be identified in the event that a party to the trust, e.g. the beneficiary, is a legal entity. Alternatively, the regulations may require that certain standards be applied according to the type of legal vehicle.

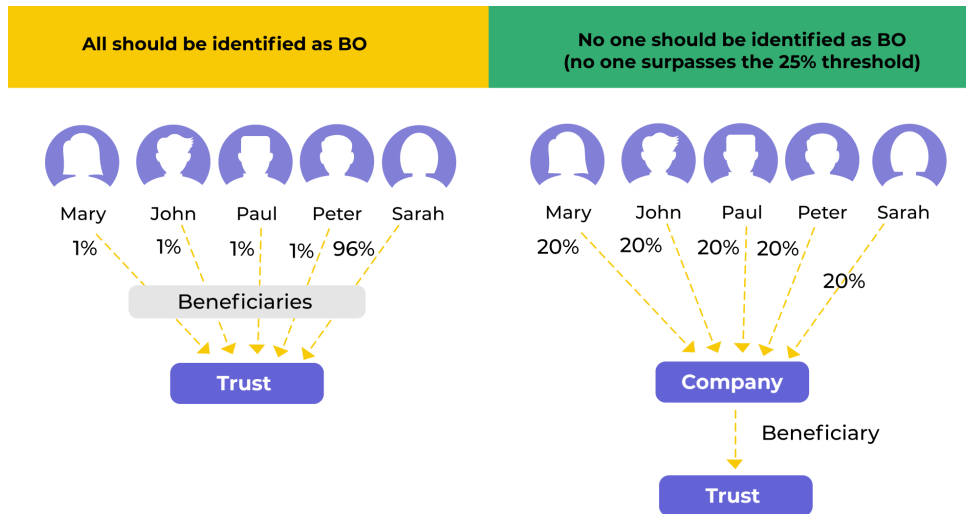
The main way to generate secrecy is to take advantage of the different rules applied by the FATF (and most countries that follow it) depending on the type of legal vehicle. In particular, it is about taking advantage of the high thresholds that are used to determine the beneficial owner of companies. In essence, the FATF rules for companies require identifying individuals who have a “controlling” ownership either directly or indirectly, establishing as a threshold parameter “more than 25%” of the shares (which is adopted by many countries, especially in Europe, although Latin American countries usually apply lower thresholds¹⁸). When no individual passes the share ownership threshold, FATF rules require identifying whoever has control by other means, or otherwise identifying a senior manager¹⁹.

As the following figure shows, opacity can be generated by interposing legal entities as parties to the trust. In this case, instead of identifying all individuals who have some interest or right in the trust, no matter how minimal (thresholds should not apply for trusts), only those individuals who exceed the threshold established in the local definition of beneficial owners for companies will be identified.

(18) For example, Costa Rica and Uruguay use a threshold of 15%, Paraguay and Peru 10%, Colombia 5%, and Argentina and Ecuador do not apply thresholds and any individual who has at least one share must be identified as beneficial owner.

(19) The FATF rules in Recommendation 10 and its Interpretative Note on due diligence require that when no one passes the established threshold (e.g. 25%) whoever has “control by other means” must be identified, and if still no one is identified, then a senior manager must be registered. Although the rules are clear, it is difficult to determine who has control “by other means” unless the company statute gives some individual the right to veto. On the other hand, influence due to family relationships or threats may be impossible to prove or determine. Consequently, in most cases, if there is no individual who passes the threshold, only the “senior manager” is identified (in other countries such as the United Kingdom, it is not necessary to identify anyone and it is reported that the entity does not have beneficial owners).

Figure 4. Legal entities as part of the trust to avoid identifying the beneficiaries



Source: Knobel, “Transparency of asset and beneficial ownership information”, FACTI Panel

Trust as beneficial owner of a legal entity

It is very common for a trust to hold an underlying company so that it acts as the owner of the trust assets, instead of leaving the assets in the name of the trustee. Since the trust has 100% of the shares in the underlying company, the trust “should be” the beneficial owner of the underlying company. However, as only natural persons can be beneficial owners, the question is who should be identified as the beneficial owner of the trust and ergo of the underlying company.

An organic solution would be to apply trust rules and, consequently, identify all parties to the trust (without applying thresholds). However, some countries (e.g. the United Kingdom) deviate from this rule and instead require only the identification of any individual with the right to exercise or who effectively exercises significant influence or control over the activities of the trust (Rule V of identification of the trust beneficial owner, UK Summary Guide for Companies on Registering Beneficial Owners²⁰).

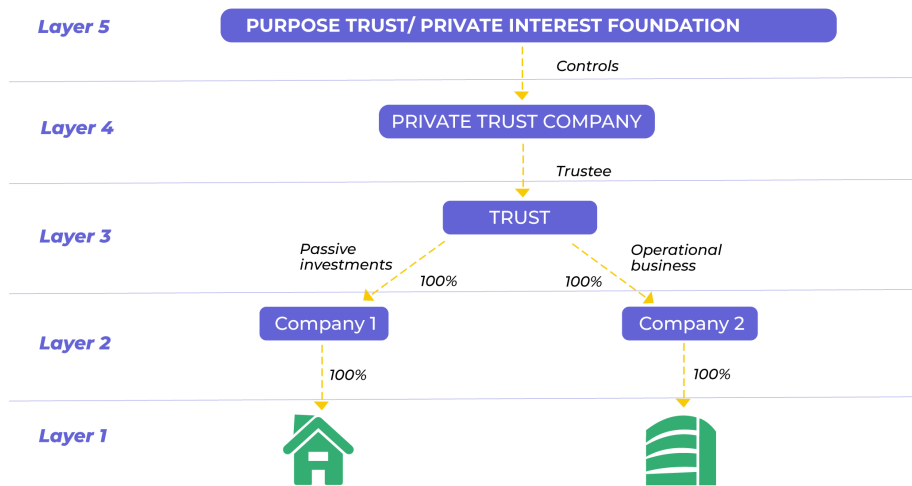
2.2.6.2 Five-layer trust structure for large estates

In Chapter 4 of the book *Capital without Borders*, Brooke Harrington describes the following five-layer structure used by high net worth individuals. Similarly, a report

(20) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621568/170622_NON-STAT_Summary_Guidance_4MLD_Final.pdf

commissioned by Australia’s tax administration concluded that “five-layer trust chains are common.”²¹

Figure 5. Complex structure of a five-layer trust



Source: Own, based upon the book “Capital without borders”

Starting from the bottom, the assets (e.g. real estate, yachts, private planes) or shares in a business (e.g. the family company) are usually in the hands of companies to take advantage of the benefit of limited liability. In this case the entity is the owner of the assets. (In contrast, a trust may not be recognized in a foreign country, so the trustee would be considered its absolute owner, instead of a mere legal owner with a limited fiduciary ownership²²).

The third layer is the trust itself, with all its parties, to use the flexibility, for example, to change or control the trustee, and to add or remove beneficiaries or decide on distributions in their favor.

The fourth layer is the trustee, which in this case is a legal entity (e.g., a commercial company). In this way, different objectives are achieved. On the one hand, problems are avoided in the event of the death or incapacity of a natural person as the trustee. Likewise, it is possible to limit the liability of those who have shares (and control) of the corporate trustee, since common corporate limited liability would apply. In addition, it is easier to control the decisions of the corporate trustee, by having control over the shares of the corporate trustee or being a director.

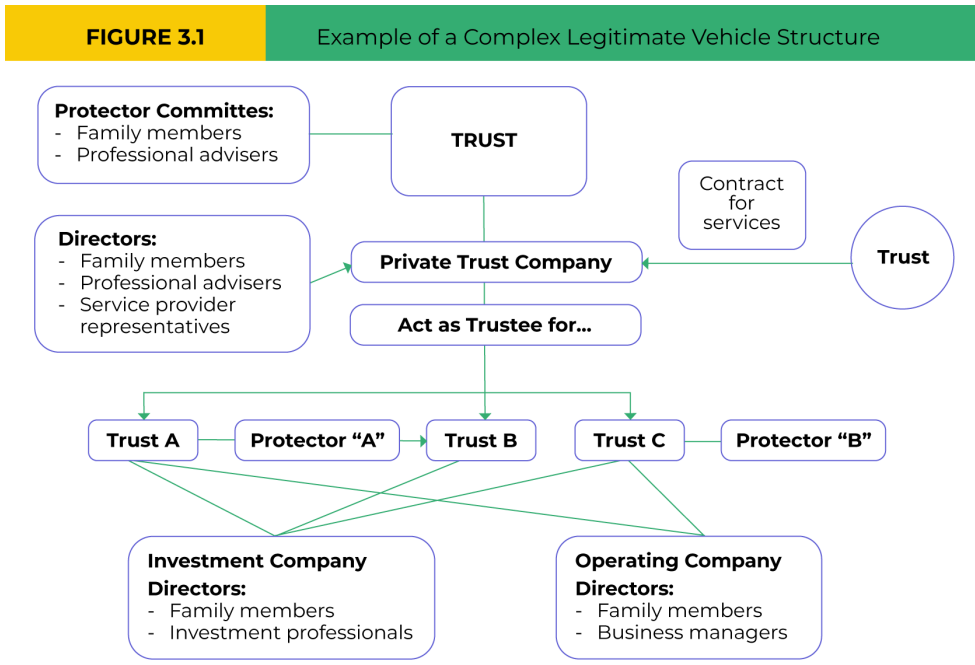
(21) <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/general-research/current-issues-with-trusts-and-the-tax-system/>

(22) The fiduciary domain is limited because the fiduciary only has ownership, but the trust assets that are in their name are not considered to belong to their personal assets, but must be administered in favor of the beneficiaries, according to the indications of the settlor.

The final layer consists of a purpose trust or private interest foundation, controlled by the family or settlor, to have even more control over the corporate trustee and consequently over the decisions of the trust and the underlying assets.

For example, the famous 2011 report on High Corruption Cases from the Stolen Asset Recovery Initiative (StAR) formed by the World Bank and the United Nations Office on Drugs and Crime (UNODC)²³ had a structure of trusts similar to that described by Harrington. Demonstrating that these structures are not illegal, the Report described it as a complex but legitimate structure.

Figure 6. Complex structure of a trust proposed by an intermediary



Source: “Puppet Masters”, 2011, StAR.

(23) mile Van der Does de Willebois and others, The Puppet Masters. How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It, 2011 <<https://star.worldbank.org/sites/star/files/puppetmastersv1.pdf>> [accessed 8 May 2022].

2.3 Secrecy about trust assets

Even if the existence of the trust and its parts is known, it may be impossible to know the assets and income of the trust, especially in the absence of publication of financial statements (unlike what happens with companies). For example, in the UK's most expensive divorce (the 2021 Akhmedov case²⁴), the judge described that there were no apparent reasons for creating and transferring assets between trusts other than to hide his ex-wife's assets and make them difficult to access.:

"In March 2015, H then sought to transfer his shares in Avenger and other companies to a Bermuda discretionary trust.... This was an attempt ... to conceal H's involvement in the companies that owned the luxury goods – and by extension to conceal such assets, including the M.V. "Luna" – as a result of the threat of W [the wife's] lawsuits...

I cannot discern any other plausible reason for these new transfers of the monetary assets and the yacht to new Liechtenstein trusts other than the intention to make it difficult for the wife to discover the whereabouts of the assets (even if she was able to discover details about the original structures), and/or make it difficult to obtain compensation due to the interposition of new layers of transactions between Cotor and the new structures." (emphasis added)

2.4 Summary of secrecy strategies

In conclusion, there are many ways to create secrecy or at least confuse the authorities about who benefits and controls the trust.

- Parties that must not be identified up to the beneficial owner. Many parts of the trust can be created (e.g., the protector, the economic settlor, the potential beneficiary or the indirect beneficiary) that are not covered by local regulations, so they would not have to be registered. Likewise, many individuals will escape reporting if the regulations do not require identifying the beneficial owner of each party to the trust, or if thresholds are established in the beneficial ownership definition of trusts (e.g. identifying the beneficiary who is entitled to more than 25% of the trust income – which goes against the FATF rules for trusts).

(24) [2021] EWHC 545 (Fam)

- **Legal entities as parties to the trust.** Secrecy can be generated by interposing legal entities as parties to the trust and thus taking advantage of the high thresholds in the definition of beneficial owners of companies. In this way, there would be no identification of any individual who owns less than the applicable threshold (e.g., 25%) of the shares of the company that is a party to the trust.

- **Indirect control over the trustee's decisions.** There are many ways in which an individual can control the trustee and hence the trust:

- o The settlor could be the trustee himself (as an individual).
- o The settlor could be or control the protector, who in turn controls the trustee.
- o The settlor (or the protector) could reserve the right to veto decisions, the possibility of removing the trustee, the possibility of adding trustees (to win by majority) or of revoking the trust.
- o The settlor could be the owner, controller or director of the corporate trustee (e.g. a private trust company).

- **Flexibility to be added as a beneficiary or receive indirect distribution.** Through control over the trustee and taking advantage of trusts' flexibility, the settlor could be added in the future as a beneficiary (so as not to appear in the trust agreement) until he/she receives the distribution (he/she would then be removed, just in case). No one would find out about the change, especially in countries where there is no need to register the trust, the parties to the trust or update the data. Another option would be for the trust to make an indirect distribution, paying the settlor's expenses (e.g., their credit card) although passing them off as legitimate expenses of the trust.

2.4.1 Real-life examples of trusts involved in complex structures:

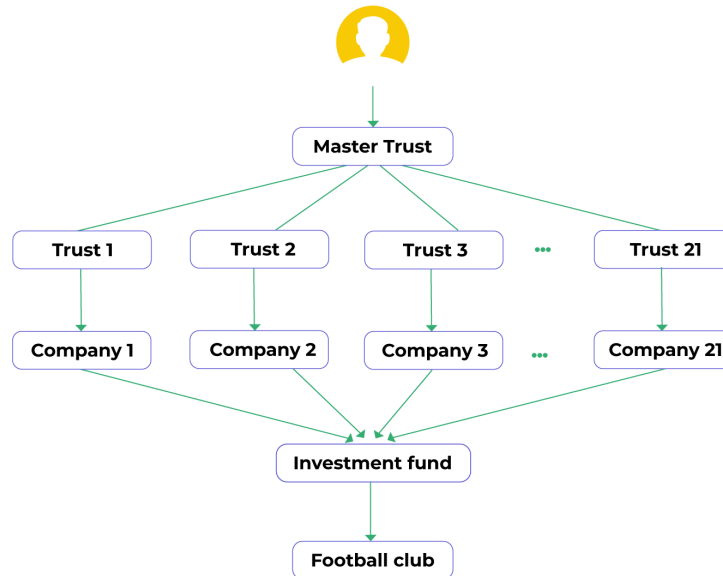
2.4.1.1 Acquisition of English football clubs hiding the beneficial owner

An Al Jazeera hidden camera investigation reveals a strategy proposed by a facilitator to acquire football clubs in England. In essence, the strategy consists of taking advantage of the secrecy generated by investment funds and trusts.

Starting from the bottom, the football club will be acquired by an investment fund, which will have at least 21 companies as investors holding equal shares. The minimum number of 21 is important because in the UK, investment funds must inform investors that own at least 5% of the fund. By creating 21 companies, none

will pass the 5% threshold (each will hold approximately 4.9% of the fund). To ensure even more opacity, the strategy also proposes that each company be owned by a different trust. Finally, the beneficial owner will control the 21 trusts (and the underlying companies) through a master trust.

Figure 7. Structure to hide the owner of football clubs



Source: Knobel et al, “Trust registration around the world”, Tax Justice Network, July 2022 (based upon Al Jazeera’s description of the investigation).

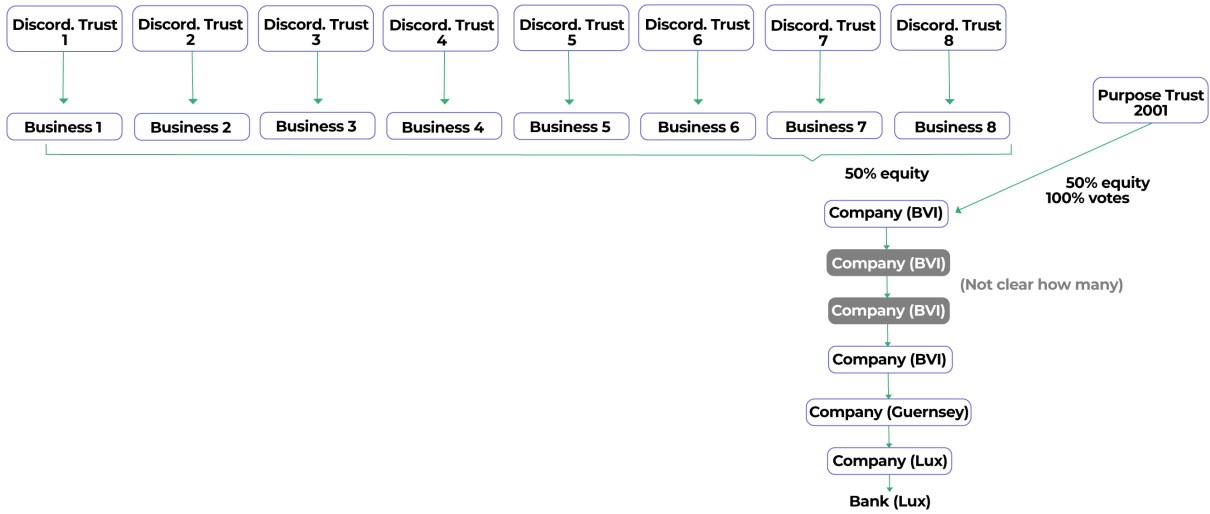
2.4.1.2 Control over a Luxembourg bank

According to a Bloomberg²⁵ article, a Luxembourg bank under suspicion due to its particular clients had the following control structure. Although the reason for such a structure is unknown, it is likely that opacity or control is the primary goal.

The figure illustrates, starting from the bottom, that the bank is owned by a Luxembourg company, which is owned by a Guernsey company, and then by an unknown number of British Virgin Islands companies. Finally, voting control over this pyramidal structure rests with a purpose trust, which also holds 50% of the shares. The remaining 50% of the shares with economic rights (as the political rights are held by the purpose trust) are divided between 8 companies, each of which is owned by one of the 8 discretionary trusts.

(25) <https://www.bloomberg.com/news/features/2020-11-19/prince-andrew-helped-da-vid-rowland-and-banque-havilland-woo-sketchy-clients#xj4y7vzkg>

Figure 8. Control structure of a Luxembourg bank



Source: Knobel, “Complex ownership structures”, Tax Justice Network, February 2022 (based upon Bloomberg’s article).

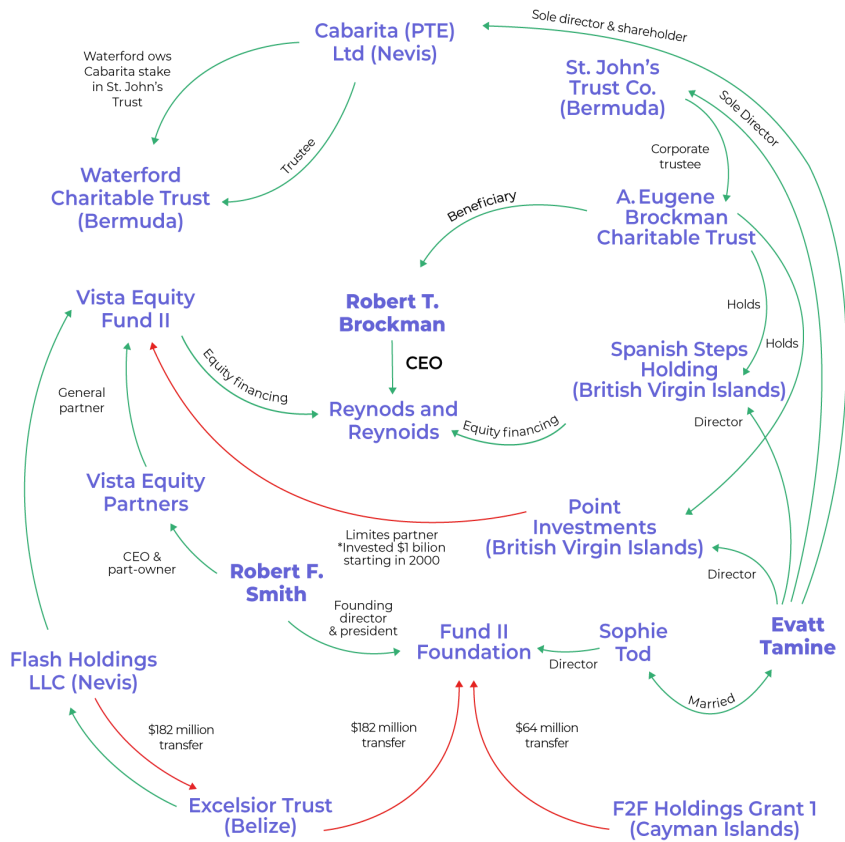
2.4.1.3 Largest tax evasion case in the United States against an individual

A Bloomberg article provided the following figure about the investment fund and trust structure set up by Brockman, in the largest US income tax evasion accusation case against an individual (for \$2 billion).

According to the complaint²⁶ from the United States Department of Justice (DoJ), among the strategies of the scheme were changing the name of the trust to call it “charitable” and moving assets to a purpose trust with an invented charitable purpose to avoid questions from the bank and authorities about the beneficial owners.

(26) <https://www.justice.gov/opa/press-release/file/1327921/download>

Figure 9. Structure of personal income tax evasion scheme



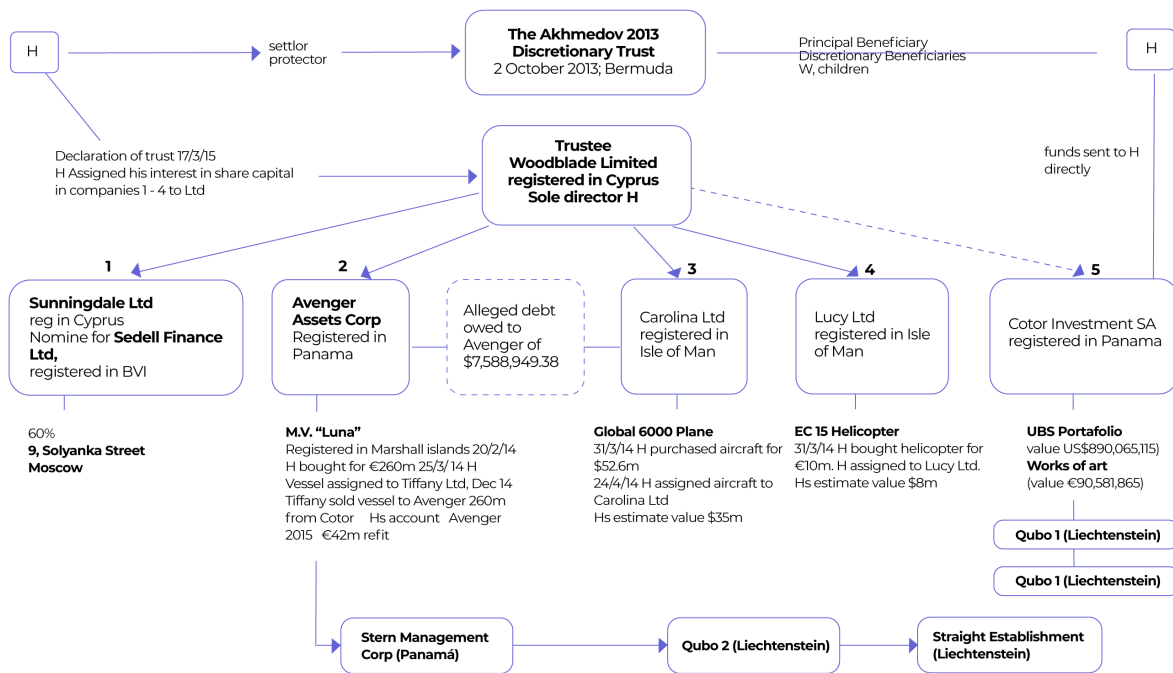
Source: Bloomberg.

2.4.1.4 UK's most expensive divorce

The UK divorce ruling²⁷ against Akhmedov illustrates the following structure (simplified, compared to new trusts created later). Apparently one of the reasons for the structure was to protect the assets from being accessed by his ex-wife. As can be seen from the figure, the head of the structure consists of a discretionary trust in which the husband has the role of settlor, protector, main beneficiary and sole director of the corporate trustee.

(27) <https://www.judiciary.uk/wp-content/uploads/2018/04/Akhmedova-v-Akhmedova-full-judgment.pdf>

Figure 10. Control structure of the UK’s most expensive divorce case



Source: Divorce ruling.

2.4.2 Examples of trusts used to hide assets, control or avoid sanctions

2.4.2.1 The Pugachev case in the United Kingdom

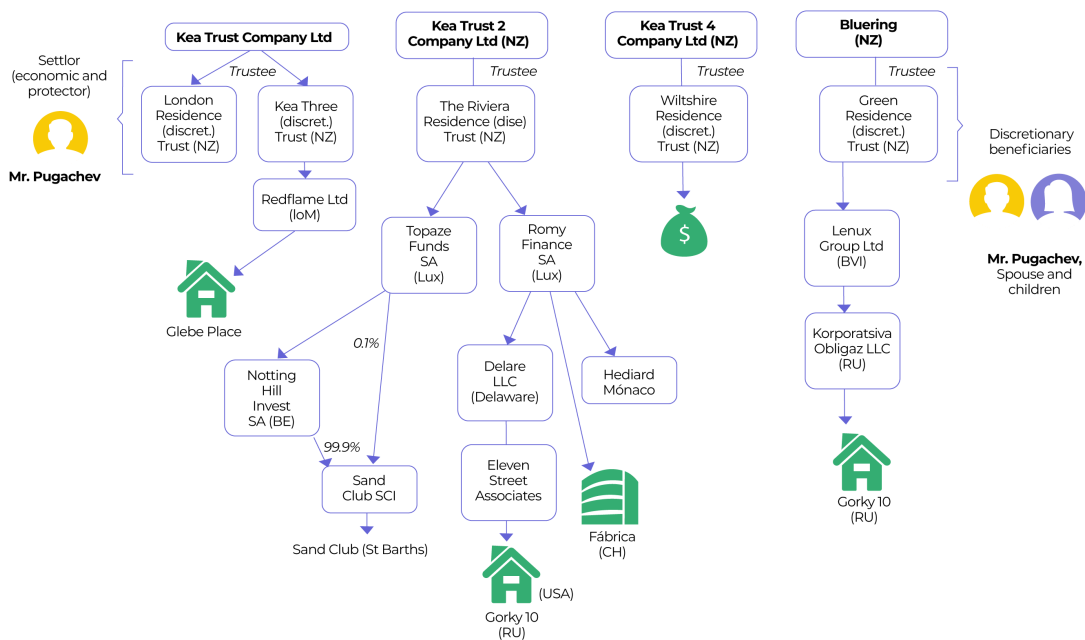
This case²⁸ involves a Russian oligarch, Pugachev, who attempted to hide his assets from his creditors by transferring them to five discretionary trusts and pretending to have divested from them. However, the judge ruled against him, concluding that “Mr. Pugachev’s intention in establishing the five trusts was to retain control of the assets, but to use them as a pretext to deceive third parties by hiding his control. No other natural person involved in the establishment of the trusts (nor [...]) had an intention independent of that of Mr. Pugachev. Therefore, if the interpretation of the true effect of the deeds is erroneous, such that, from a legal point of view, they would have the effect of depriving Mr. Pugachev of his beneficial ownership of the trust assets, then they are a sham and not must be given effect.”

As described in the figure below, this case involved five discretionary trusts where Mr. Pugachev was the protector and one of the discretionary beneficiaries. Although the trustees stated that they had established the trust as (nominal) settlors, the judge concluded that Mr. Pugachev was the economic settlor (as he was the original owner of the trust assets).

(28) <http://www.bailii.org/ew/cases/EWHC/Ch/2017/2426.html>

Pugachev, a Russian national, had residences in England and France, but the five trusts used were from New Zealand and had different companies as trustees. Likewise, the trusts had underlying companies from different jurisdictions including the British Virgin Islands, Luxembourg, Isle of Man, Delaware, Russia and Belgium and then had ownership of various assets, including real estate, companies and a mine.

Figure 11. Control structure in the Pugachev case



Source: Own based upon the Pugachev trial.

2.4.2.2 Swiss Bank accounts in favor of Indian beneficiary

The Tharani²⁹ case from India is about a trust, which owned an underlying Cayman Islands company, which had a bank account in Switzerland with around 24 million US dollars. Following the Swiss-leaks disclosures, the Indian tax authority learned that the Indian taxpayer was a beneficiary of the trust. The taxpayer claimed not to know who was behind the trust or who had created it. The judge ended up ruling against the taxpayer for her attitude of secrecy, lack of cooperation, actions to destroy evidence (as soon as it became known that the Indian government received the information, the Swiss account was closed and the Cayman Island company was dissolved), as well as “common sense” about the use of tax havens. The judge concluded:

(29) <https://itatonline.org/archives/wp-content/uploads/Renu-Tharani-Black-Money.pdf>

It is inconceivable that a beneficiary of [approx. USD 24 million] in a trust does not know who has created that trust.... [this] must be examined in light of real life probabilities and the taxpayer's own act, in delaying the investigation...

No reasonable person can accept the taxpayer's explanation. The taxpayer is not a public figure like Mother Teresa [of Calcutta] so that an unknown person, with complete anonymity, is going to establish a trust to give her USD 24 million, and in any case, the Cayman Islands is not known for philanthropists who operate from there. If the Cayman Islands is known for anything, it is for an environment conducive to hiding unaccounted wealth and money laundering.

2.4.2.3 Change of beneficiaries before the war in Ukraine to avoid sanctions

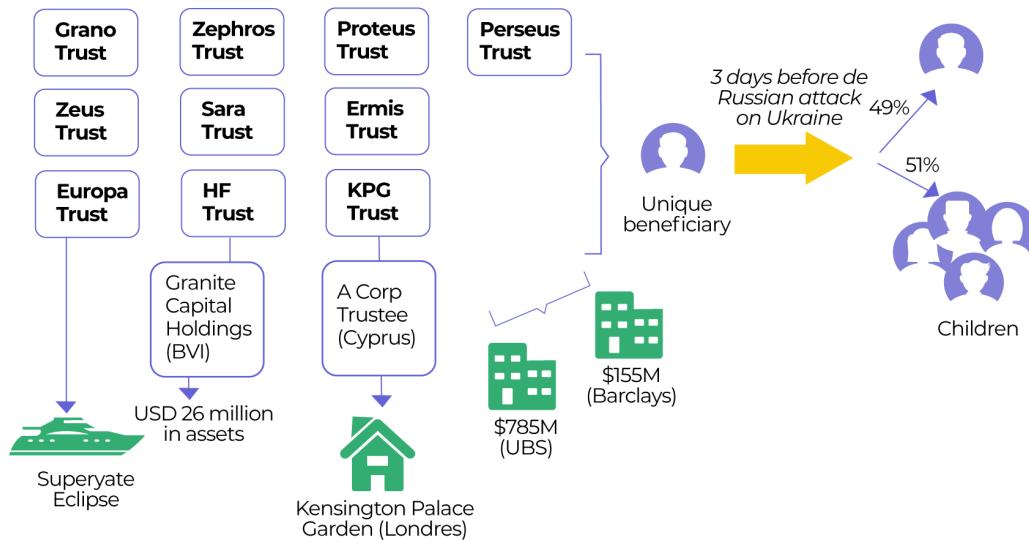
According to articles in British Newspaper The Guardian of January 6³⁰ and January 30³¹ of 2023 (based on a data leak), three days before Russia's attack on Ukraine in February 2022, Abramovich changed his rights as beneficiary of 10 trusts he had in Cyprus and Jersey, ceasing to be the sole beneficiary and naming his seven children as beneficiaries with either 100% or 51% of the rights of the trusts. According to the newspaper, Abramovich retained only 49% of the beneficiary rights. This was considered by some as a strategy to avoid sanctions imposed against Russian oligarchs, since sanctions usually consider an asset as property of a sanctioned subject if he has at least (or more than) 50% of the property.

The following figure illustrates the strategy and some of the assets described by the British newspaper:

(30) <https://www.theguardian.com/world/2023/jan/06/roman-abramovich-trusts-transfer-leak-russia-sanctions>

(31) <https://www.theguardian.com/world/2023/jan/30/barclays-ubs-roman-abramovich-trusts>

Figure 12. Abramovich's control structure and change of beneficiaries



Source: Own, based upon the newspaper articles.

2.4.2.4 South Dakota Trustee that operates and accepts transactions with high-risk Latin American clients

In April 2023, the United States financial intelligence unit (FinCen) imposed a fine of USD 1.5 million on Kingdom Trust Company for deliberately violating financial regulations. Kingdom Trust had high-risk Latin American clients (for example from Argentina, Uruguay and Panama) for whom it operated suspicious transactions without having the means to prevent money laundering (in certain cases, a single employee had to manually review thousands of daily transactions). For example, according to FinCen’s Consent Order³², Kingdom Trust partnered with Consulting Group with the objective of helping Latin American brokers who were unable to open bank accounts in the United States (without consulting or warning about the reasons why) allowing these to perform transfers to foreign entities for more than USD 4,000 million but with minimal controls.

(32) https://www.fincen.gov/sites/default/files/shared/FinCEN_KTC_Consent%20Order_FINAL_508_042523.pdf

3. The trust as a tool to avoid and evade paying taxes

The previous section described how opacity regarding the existence of the trust, its income or its parts can allow tax evasion as well as other illicit acts, since the information is kept hidden from the tax authority.

This section analyzes the trust structure that would allow avoiding taxes, even when the entire existence of the trust is known.

3.1 The trust to avoid the wealth tax: The Eurnekian case in Argentina

One of Argentina's billionaires, Eduardo Eurnekian, was sued by the Argentine tax administration because he stopped paying the personal property tax (wealth tax) by transferring money from the sale of companies to two trusts, one from the Cayman Islands and another from Bahamas. The Court of Appeals confirmed³³ in 2003 the first instance ruling because it considered that Eurnekian never really disposed of the assets since they could only be donated after his death, and because during his life, Eurnekian would control the trustees and could decide on the destination of the trust assets. In other words, during Eurnekian's life, he not only retained control but there would also be no other beneficiaries. Specifically, one of the judges in the House ruling described:

"It is also beyond dispute that the entire amount [715 million pesos] was transferred to two entities incorporated abroad: the so-called Citi Trust Limited incorporated in the Cayman Islands and the so-called ITK Trust Company Limited established in the Bahamas, which had to act as fiduciary administrators or trustees..."

In accordance with these stipulations [of the trust contract] - identical in both cases - the respective trustees could only, during the lifetime of settlor (that is, Eduardo Eurnekian), manage the funds in accordance with the instructions of a committee made up of people whom the trustee himself could appoint or remove at any time and at his discretion. The only donation entrusted was to take place in the event of Eurnekian's death. During his life, the funds were susceptible to any destination that could be indicated through the committee that he appointed or removed without any limitation. That is to say, then, that the accused never handed over the assets he had supposedly donated. The trustees or beneficiaries of the pseudo-donation could only come into possession of the assets like any heir or legatee: upon the death of the settlor"

(33) <http://biblioteca.camdp.org.ar/fallos/eurne.pdf>

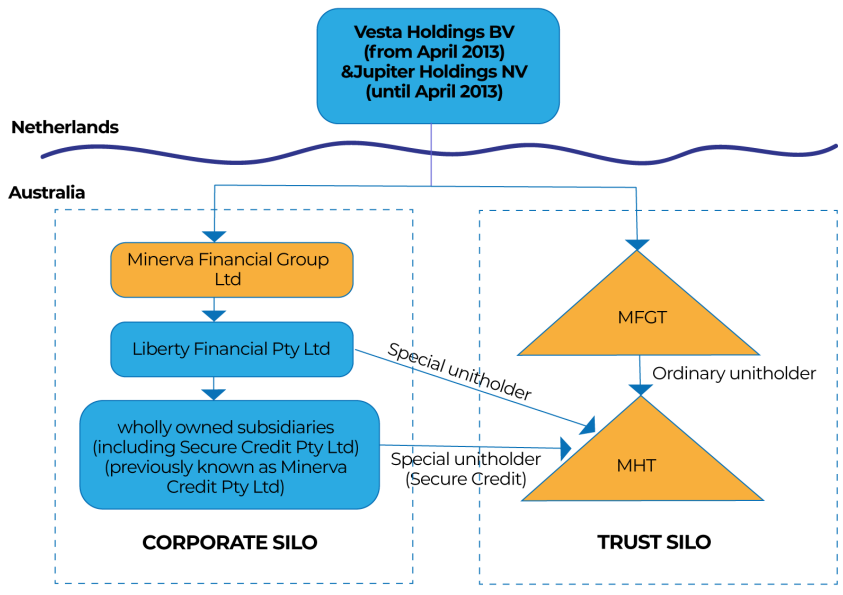
3.2 The trust to avoid the inheritance tax: the case of the Duke of Westminster in the United Kingdom

According to an article³⁴ in The Guardian newspaper, in 2016 the Duke of Westminster managed to avoid the 40% inheritance tax, given that the almost £9bn worth of estates were in a trust, and therefore would not be directly “inherited”. Although in England there is a tax of 6% on trust assets every 10 years, there are different exceptions and legal loopholes which cover agricultural properties and businesses.

3.3 A discretionary trust to reduce withholding taxes: The Minerva case in Australia

In Australia’s 2022 Minerva³⁵ ruling, as indicated in the following figure, the judge considered that the anti-abuse rule was applicable given that the trustee always used his discretion to make payments through the “Trust silo” option (with a 10% withholding tax), instead of choosing to make payments through the “Corporate Silo” (which would have a 30% withholding tax). Given that no commercial reason was proven, it appeared that the sole purpose of the structure was to reduce the tax burden. Strikingly, the judge did not consider that the establishment of the complex structure itself was susceptible to the anti-abuse rule.

Figure 13. Complex structure to reduce withholdings



Source: Minerva Financial Group Pty Ltd and Commissioner of Taxation [2022] FCA 1092 (16 September 2022).

(34) <https://www.theguardian.com/money/2016/aug/11/inheritance-tax-why-the-new-duke-of-westminster-will-not-pay-billions>
 (35) [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/1092.html?context=1;query=\[2022\]%20FCA%201092;mask_path=](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/1092.html?context=1;query=[2022]%20FCA%201092;mask_path=)

3.4 A trust to evade taxes : The Arlene Grant case in the United States

The Arlene Grant ruling³⁶ in the United States refers to an 84-year-old widow who declared that she had no control over the trusts (such as to be able to repatriate the funds and pay a million-dollar debt to the United States tax administration). Given the woman's age, and considering that her husband had established the trusts in Jersey and Bermuda without the woman being heavily involved, the court accepted the woman's argument that she did not have enough control over the trusts to repatriate the funds. However, years later the US tax authorities learned that the woman had managed to obtain deposits of USD 200,000 from the trusts, but transferred to bank accounts in the name of her children, although destined for expenses that she directed. With this evidence, the US tax authorities returned to the court, who considered that Arlene was in contempt of court and was ordered to repatriate the funds.

3.5 Trust to evade the labor income tax for individuals in the United Kingdom

Lord Hodge, Member of the Supreme Court of Scotland explained³⁷ in 2017 this tax avoidance scheme related to the Rangers Football Club case which consisted, as the following figure shows, of redirecting the income of highly paid employees to a remuneration trust for the purpose of reducing their income tax and social security contributions:

"The employing company made a cash payment to the remuneration trust on behalf of an employee and recommended that the trustees of the remuneration trust reallocate the sum to a sub-trust. The employing company requested that the income and capital of the sub-trust be applied in accordance with the employee's wishes. The trustees of the compensation trust had the discretion to grant these requests but, without exception, they did so...

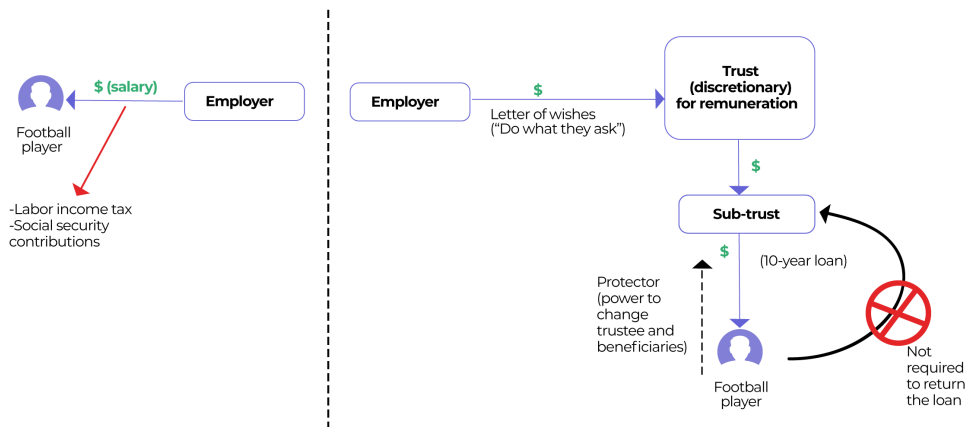
The footballer would receive a loan of the sum paid to the sub-trust (which would be greater than if he received the sums as salary because in that case he would have to pay income tax and social security) ...Both Rangers and the footballer anticipated that the loan would not be returned after 10 years, but would be extended or renewed...

(36) <https://casetext.com/case/united-states-v-grant-42>

(37) <https://www.supremecourt.uk/docs/speech-171214.pdf>

The footballer would be appointed “protector” of the sub-trust and would therefore have powers to change both the trustee and the beneficiaries of the sub-trust. The footballer would receive a standardized letter of wishes to sign, asking that the income and capital of the sub-trust be held and applied in accordance with his wishes and that, upon his death, the trust fund be held for a specific family member.”

Figure 14. Mechanism of labor income tax and social security evasion



Source: Own based upon the description of the case

3.6 Fraudulent agreement between charities and trust beneficiaries to take advantage of exemptions in Australia

A report commissioned by the Australian tax administration explained a fraud that involved an agreement between entities subject to low or no taxation (e.g. charities, tax-exempt entities, failing companies) to receive distributions from the trust without paying tax. Then they would redistribute the money to the true beneficiaries of the trust, after charging a “fee”³⁸

3.7 Series of trusts to reduce the tax base in the United States

The website of the United States Tax Administration (IRS) warns about the abuse of trust schemes to evade taxes, which consist³⁹ mainly of:

(38) <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/general-research/current-issues-with-trusts-and-the-tax-system/>

(39) <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-facts-section-i#:~:text=Abusive%20trust%20arrangements%20typically%20are,expenses%20paid%20by%20the%20trust.>

- Reduction or elimination of taxable income.
- Deductions for personal expenses paid by the trust.
- Depreciation deductions for an owner's personal expenses paid by the trust.
- Deductions for depreciation of the owner's personal residence and furniture.
- Subsequent increase in the value (stepped-up basis) of the assets transferred to the trust.
- The reduction or elimination of self-employment taxes.
- The reduction or elimination of taxes on gifts and inheritances.

Likewise, the IRS warns about another evasion scheme that consists of “trusts being distributed in vertical layers, each of which distributes income to the next layer. The objective of this stratified distribution of income is to reduce taxable income to minimum amounts.”⁴⁰

(40) <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-talking-points>

4. Other structures to hide the beneficial owner and escape taxes

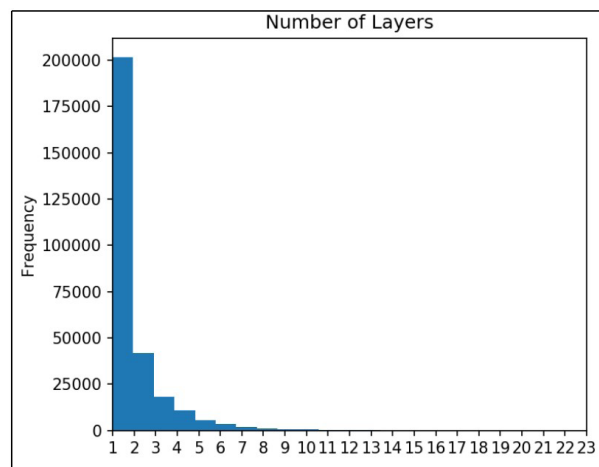
There are other structures and strategies that can hide the beneficial owner or assist in tax evasion, avoidance or fraud as described in the Tax Justice Network report⁴¹ on complex structures and the risks of determining the beneficial owner.

4.1 Complex structures to hide the beneficial owner

4.1.1 Multi-layered structure

The simplest strategy is based on creating the greatest number of layers up to the beneficial owner. To determine and verify the beneficial owner, it will be necessary to corroborate the legal owners of each layer. For example, a study⁴² in the United Kingdom revealed that there were structures with up to 23 layers until reaching a natural person.

Figure 15. Histogram of the number of layers in UK companies until reaching a natural person



Source: Knobel, A. and Seabarron, O., “Exploring UK companies’ legal ownership chains to detect red flags and verify beneficial ownership information: Part 1”, Tax Justice Network, 2020.

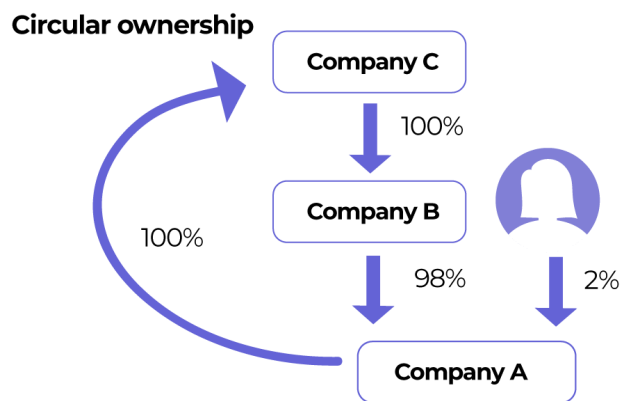
(41) Andrés Knobel, ‘Addressing the Secrecy Risks of Complex Ownership Chains: Another Tool to Improve Beneficial Ownership Verification’, Tax Justice Network, 2022 <<https://taxjustice.net/2022/02/16/addressing-the-secrecy-risks-of-complex-owner>>

(42) Andres Knobel and Oliver Seabarron, ‘Exploring UK Companies’ Legal Ownership Chains to Detect Red Flags and Verify Beneficial Ownership Information: Part 1’, Tax Justice Network, 2020 <<https://taxjustice.net/2020/07/06/exploring-uk-companies-legal-ownership-chains-to-detect-red-flags-and-verify-beneficial-ownership-information/>> [accessed 11 January 2023].

4.1.2 Circular structure or without beneficial owner

A complex, multi-layered structure could be hiding a circular structure in which there is no natural person (no beneficial owner), where company A owns B, and in turn B owns A. Another example would be the case where an individual has control of a company despite owning a very small percentage of it, since the rest of the structure is circular, as the figure below demonstrates.

Figure 16. Circular structure

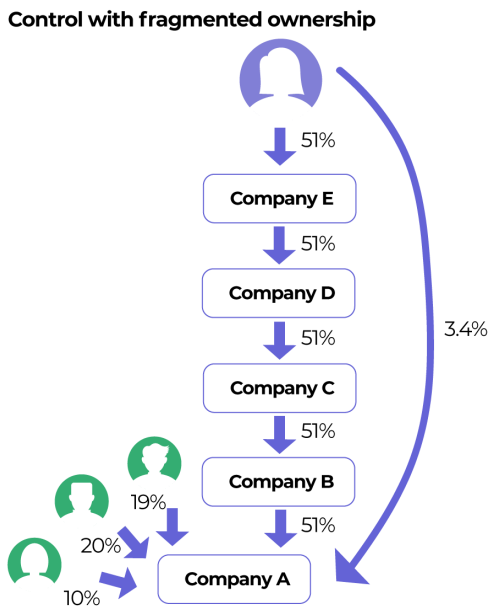


Source: Knobel, “More beneficial ownership loopholes to plug”, Tax Justice Network.

4.1.3 Pyramidal structure

A complex structure could hide a pyramidal structure in which the beneficial owner controls the entity through the pyramid structure, owning control or a majority of the votes (e.g. 51%) of each entity in the company chain. However, if the chain is not fully known, the beneficial owner could remain hidden within his pyramidal control and instead declare that he is not the owner due to having indirect ownership well below the threshold (e.g. of only 3.4 % as described in the following figure).

Figure 17. Pyramidal structure



Source: Knobel, “More beneficial ownership loopholes to plug”, Tax Justice Network.

4.2 Short but sophisticated structure to hide the beneficial owner

As described in the previous section, the longer the structure, the greater the risk that some of the links in the chain cannot be made transparent. This section refers to cases in which concealment occurs even with one or two layers until the beneficial owner.

4.2.1 Tax haven entity without transparency or exchange of information

If a layer of the chain is an entity in a tax haven in which the legal owners do not need to be registered or updated, or in which there is no public access to information nor a mechanism to exchange information with that country, it will not be possible to corroborate the information of the beneficial owner (or determine it, if it was not declared).

4.2.2 Opaque or exotic entity (unknown by the local legal framework)

It may happen that an entity in the chain is a particularly opaque structure (e.g.: a discretionary trust, as seen above), or that the legal framework does not contemplate its complete identification (e.g.: the legal framework only asks to identify the settlor, trustee and beneficiary, but not the protector), or directly that the entity is exotic and that the local legal framework does not know how to treat it or what data to request, for example the case of the Anstalt from Liechtenstein, the Protected Cell Company from Seychelles or the Delaware Series LLC.

4.2.3 Use of front men (nominee shareholder)

Although the use of unfamiliar structures (e.g. Anstalt) or very complex structures (e.g. many layers) may stir suspicion, one of the most direct ways of creating opacity lies in the use of front men or nominee shareholders, which, being an individual, gives the appearance of being the beneficial owner. This front man can be a professional nominee, an informal front man such as a family member or friend, a front man through coercion (e.g. mafias that abuse victims) or directly through identity theft or rental, as in the case of students offering their passport in exchange for receiving some money.

4.3 Complex relationships to hide the beneficial owner or the payment of taxes

In certain cases, concealment occurs through not only vertical structures but also through contracts, relationships and horizontal financial instruments that allow the beneficial owner to hide or avoid taxes.

4.3.1 Control without ownership through contracts and financial instruments

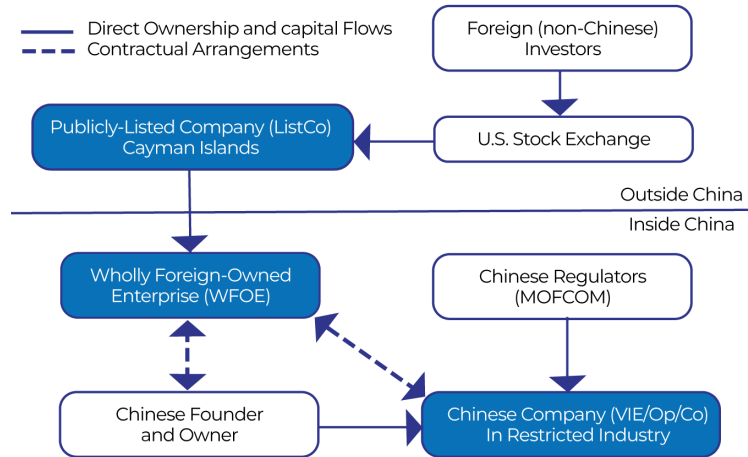
An interesting case represents an article⁴³ for foreign investors warning about the structure used to invest in strategic Chinese companies, circumventing restrictions (supposedly it was limited to local citizens). The same structure could be used to gain control and benefits without ownership. As the article explains and the following figure describes, the way to maintain control⁴⁴ consists of:

- A money loan agreement with a collateral of shares, where company WFOE transfers an interest-free loan and receives the assets as collateral and liabilities of company VIE.
- A financial instrument (call option) that gives company WFOE the right to acquire the shares of company VIE at a predetermined price.
- A power of administration in favor of company WFOE, with the right to vote on company VIE, participate in meetings and send shareholder proposals.
- An agreement for technical services and asset licensing, where company WFOE is the exclusive service provider of company VIE, which justifies that company WFOE receives all the income of company VIE.

(43) Brandon Whitehill, Buyer Beware: Chinese Companies and the VIE Structure (2017) <https://www.cii.org/files/publications/misc/12_07_17%20Chinese%20Companies%20and%20the%20VIE%20Structure.pdf> [accessed 24 June 2020].

(44) Knobel, Andres, 'Beneficial Ownership Definitions: Determining "Control" Unrelated to Ownership', 2020 <<https://taxjustice.net/wp-content/uploads/2020/11/Beneficial-ownership-definitions-loopholes-regarding-control-unrelated-to-ownership-final.pdf>> [accessed 18 April 2023].

Figure 18. Control y benefits without ownership



Source: Whitehill, B., “Buyer beware: Chinese companies and the VIE structure”, Council of institutional investors, 2017.

4.3.2 Chain of control and contracts to reveal a simulation of the origin of funds

In Chile’s Walmart case, the Paradise Papers leak revealed⁴⁵ that payments that had been declared as third-party loans with the benefit of deduction of interest and other expenses, actually corresponded to an intra-group capitalization that included back-to-back loans with a financial institution to give the appearance of relationships with third parties. As described in an article by CIPER Chile: “instead of being invested directly in a company incorporated in our country to buy, from there, the shares of D&S..., what the giant supermarket did was different. First, through two group companies – one founded in the Virgin Islands (BVI II) and another in Delaware (SARHCO II) – it established a trust in Panama in which it deposited, in successive operations, the aforementioned US\$1.9 billion. Later, these companies signed an agreement with HSBC through which the newly created trust became collateral for a loan that Walmart’s parent company in Chile, Australes Dos, requested that same day...”

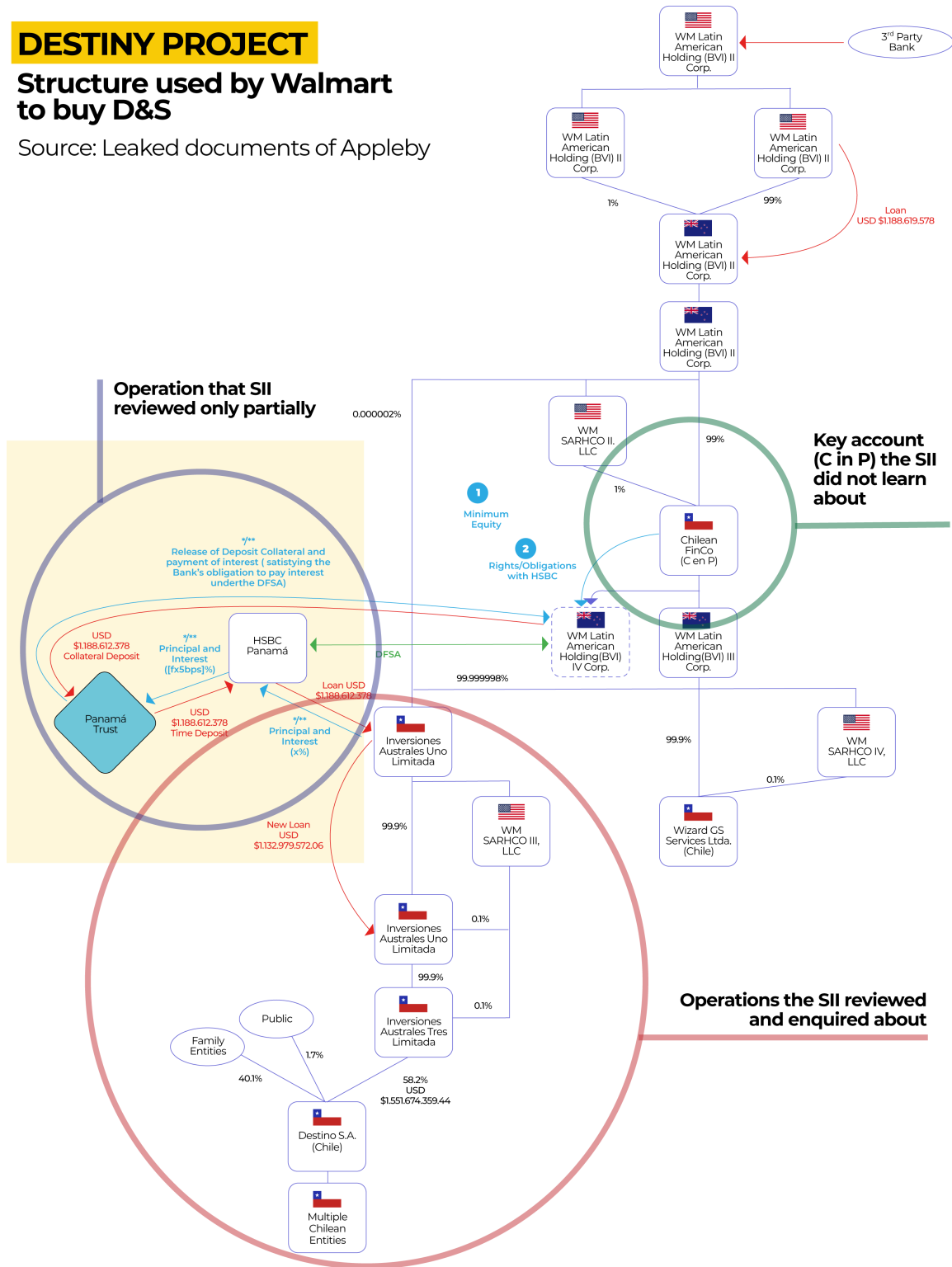
(45) <https://www.ciperchile.cl/2017/11/10/papeles-del-paraiso-filtraciones-refuerzan-postura-del-sii-en-millona-rio-juicio-contra-walmart/>

Figure 19. Control structure and ownership of Walmart in Chile

DESTINY PROJECT

Structure used by Walmart to buy D&S

Source: Leaked documents of Appleby



Source: "Paradise Papers": leaks reinforce the SII's position in the million-dollar lawsuit against Walmart, CIPER Chile, 2017

5. Steps to identify and analyze a complex structure

5.1 Obtaining information

The first step is to obtain information with the objective of knowing, to the extent possible and necessary, the ownership and control structure up to the beneficial owner (upwards), as well as the subsidiaries and underlying assets (downwards), and relationships or contracts with other parties (towards the sides).

The steps to follow will depend on:

- The existing information available to authorities, originating in any type of source that is relevant (e.g.: free and paid sources, public sources or subject to tax secrecy, local and international sources, etc.).
- The ability to carry out mutual assistance actions with institutions at the domestic and international level.
- Personal and institutional relationships with local and international authorities and actors.
- The contact of the taxpayer/investigated person and the danger of them finding out about the investigation
- Time, available resources and institutional capacity.

The easiest and fastest way would be to request all the information directly from the taxpayer and then verify the information according to data from other authorities and agents (e.g., financial institutions). However, assuming that there is a danger in alerting the taxpayer or that there is a lack of powers or personal and institutional relationships to obtain information quickly from other authorities or agents, this section offers steps and sources to obtain this information.

Suppose “Entity A” is being investigated. These are the steps to follow:

1. Determine the nationality and type of entity. The first step is to determine the nationality of the structure to know in which country to look for information, since most legal entities must register in their country of incorporation. The type of entity will determine which registration will be applicable. For example, if it is a commercial company, the commercial registration will be applicable. If it is a foundation or cooperative, it is likely that there is a special registry for foundations, etc.

However, if it is a trust, there is a high probability that the only country that has data about it is the country in which the trustee or administrator resides, so it will be necessary to know such data.

***Sources:** Although the Internet is a generic source, there are reports from both the Financial Action Task Force (FATF) as well as peer reports from the Global Forum that describe the type of entities available in each jurisdiction and whether there is any registration for them. The data is mainly in Chapter 7 or the description of Recommendations 24 and 25 of the Mutual Evaluations⁴⁶ of the FATF (or of regional organizations related to the FATF such as GAFILAT, Moneyval, etc.) or in Section AI of the Global Forum Peer Reports⁴⁷. This analysis is also carried out by the Tax Justice Network in its Financial Secrecy Index⁴⁸, also explaining whether there is any legal loophole.

2. Obtain information about the entity in the corresponding registry. On the Internet (e.g.: Wikipedia) there is usually a list of the websites of each country's commercial registry. Many of these registries have paid or free services to obtain information about registered entities, including their address, business purpose, registration date, etc. The most important data, which will not always be available, is information on shareholders or partners and beneficial owners. This information may be free or paid, or there may be a need to send a request by mail or make the request in person.

The necessary information may be available directly on the registry's website, or it may be necessary to consult the statutes and founding documents, although they will not have updated information (but refers to the original and founding partners). To obtain updated data, it will be necessary to search the annual returns, lists of shareholders, financial statements or other available documents.

3. Obtain information from other online sources. Either because the corresponding registry does not offer the information, or to corroborate it, information could be sought in the official bulletin or gazette (in which the constitution of companies or their modifications must be published). It is also possible to perform a generic search on the Internet (e.g.: Google) as well as take advantage of global (e.g.: Orbis) or national paid databases (e.g.: Nosis in Argentina). Finally, it may be useful to search leaks' databases, including those available on the Consortium of Investigative Journalists (ICIJ) sites⁴⁹ or OCCRP's Aleph site⁵⁰, or the Open Corporates database⁵¹ or the Open Ownership registry⁵².

(46) <https://www.fatf-gafi.org/en/publications/Mutualevaluations/Assessment-ratings.html>

(47) https://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews_2219469x

(48) <https://fsi.taxjustice.net/>

(49) <https://offshoreleaks.icij.org/>

(50) <https://aleph.occrp.org/>

(51) <https://opencorporates.com/> (52) <https://register.openownership.org/>

(52) <https://register.openownership.org/>

In the case of listed companies, some data could be available on the stock exchange or financial regulator, e.g. The Securities Exchange Commission (SEC) in the United States has the “Edgar” system⁵³ with information on regulated entities. Likewise, the GLEI⁵⁴ usually has information on the parent and “children” companies that are listed or involved in the financial system that must obtain a legal structure identification (Legal Entity Identifier or LEI).

For non-profit organizations in the United States, there is information available about the organization and the beneficiaries of distributions on Form 990, according to Pro Publica.

CIAT, with the support of the German Cooperation (GIZ) and the International Tax Compact (ITC), developed in 2017 an initiative called “access to public information of tax interest”, which makes sources of public information of interest to tax administrations available for control of tax compliance. This initiative provides access to public information sources and provides data that allows users to better understand any source before accessing it. For example, whether or not the information has a cost, the organization that manages it, the data necessary to access it, the data that could be obtained if accessed, whether or not the information is published and the procedure for accessing it, among others. This system is available in 4 languages and incorporates a robot that ensures the availability of links to more than 400 published information sources.

4. Obtain information from other local authorities. Another way to obtain information or corroborate what is found is to request it from other government authorities that may have the information. For example: the financial intelligence unit (based on suspicious transaction reports issued by obligated entities), the central bank or banking supervisor (if they have a database of bank accounts), asset registries (if they have real estate, automobiles, vessels, etc.) in the event that the entity is the owner and is registered in one of them. However, local exchange between authorities may be hindered if the legal framework establishes certain restrictions, for example, on the basis of tax, stock market, banking secrecy, etc. In such a case, it may be necessary to sign a memorandum of understanding that allows the exchange of information between local authorities, for the purposes and according to authorized procedures.

5. Obtain information from other foreign authorities. A more complex way in time and resources, but which may be necessary, is to make a request for information “upon request”, as long as the requirements and forms are met, and as long as there is an international treaty with the jurisdiction that allows the information exchange. The main legal sources for the exchange of information are the Convention on Mutual Administrative Assistance in Tax Matters, the Tax Information Exchange Agreements (TIEA) or treaties to avoid double taxation. These authorities may have the data directly or request it from a resident third party to provide it.

If it is not possible to make the request for tax purposes, an attempt could be made to ask the financial intelligence unit to make the request through the Egmont Group (only if there is a link with money laundering or terrorist financing). Due to the specialization principle that governs international cooperation agreements, this would not solve the problem of access to information by the tax administration. Unless a clause is contemplated that allows the use of information for other purposes and the state receiving the request authorizes such use (e.g.: if the FIU requests information justifying a case with indications of money laundering, it should be able to share this information if there is enough evidence that it will be used to treat a case of tax evasion).

6. Obtain information from third parties. Another source of information, although with a greater risk that the entity under investigation will find out and hinder the investigation, consists of requesting the information from third parties, mainly from obligated entities such as financial institutions, and if applicable, from lawyers, accountants or notaries, among other professionals. The obligated entities have the responsibility to determine the beneficial owner and other data through due diligence measures related to compliance and the fight against money laundering.

7. Obtain information of the entity under investigation. The last source of information to consider, given the risk of revealing the existence of the investigation, would be to request the information directly from the taxpayer under investigation.

8. Ownership chain. The previous steps should be repeated for each link in the chain, until the complete structure is determined or corroborated, reaching the beneficial owners. It would also be possible to evaluate the ownership chain “downwards”, to know the subsidiaries in which Entity A is a partner or shareholder, as well as the underlying assets.

9. Relationships and contracts. In addition to Internet searches, information about contracts and relationships could be obtained from evidence available from other authorities, e.g.: State Procurement Office, and mainly by analyzing transactions or bank transfers to determine who may be the potential clients, suppliers or related parties.

10. Information about beneficial owners. When reaching the details of the beneficial owners, information about them should be sought in the civil registries (to corroborate the data and their family relationships), information that they publicly disclose on social networks, or information held by obligated entities (e.g. powers of bank account administration, forms on who is the beneficial owner of the account and its details, changes to the bank account, identity of who sends instructions, etc.).

5.2 Analysis of information and risk

Once the ownership and control structure is known to the greatest extent possible, it is necessary to analyze the risks or reasons for such structure.

Ideally, the authority would have a source of typologies (e.g. CIAT database⁵⁵ or the Egmont Group or the United Nations Office on Drugs and Crime or UNODC), to compare the structure of the entity against other held in the typologies database. Otherwise, the database could be created from newspaper articles, jurisprudence, etc. It could also be created, if there is information on all the companies, carrying out a statistical analysis of the entities, to know the proportion or average of layers to reach the beneficial owner, their nationality, number of beneficial owners, etc.

Assuming there is no access to any source of typologies, databases or statistical analysis, the tax official could undertake the following steps.

1. Understand the reason for the structure. The main thing would be to know the reason for the structure. If there is no danger in the investigation and there are powers to do so, the taxpayer could be asked to explain the reason for that

(55) Base de Casos Transnacionales de Erosión de la Base Imponible.

2. Opacity risk level. Assuming that information cannot be requested from the taxpayer or that the explanation was not satisfactory, the level of risk of opacity could be analyzed according to the number of existing layers to reach beneficial owner and the nationality of the layers and the beneficial owners, mainly considering whether there are agreements to exchange information with other countries or public information registries.

***Sources:** In addition to the national list of tax havens or non-cooperative jurisdictions, the FATF gray and black lists, the ratings of peer reports from the Global Forum, sources from civil society organizations could be considered, such as as the Financial Secrecy Index or the AML Index.

3. Level of tax risk. In case the objective of the structure is to obtain a tax benefit, whether due to evasion, avoidance or fraud, it should be considered whether there is a risk of treaty shopping depending on the nationality of certain entities in the chain, the possibility of triangulation (e.g.: if there is an entity in a jurisdiction with little commercial sense), or analyze the Country by Country Report, the Local File and Master File (from BEPS Action 13) to see the jurisdictions where there are few employees or where billing does not coincide with the shipment of the merchandise, etc.

4. Generic risk. The list of natural person shareholders and beneficial owners could be compared with sanctions lists (e.g., United Nations, United States), lists of people disqualified from practicing, adverse news on the Internet, status of politically exposed person, etc. This type of public information can be found in the DIP System from CIAT, for which some countries reported sources that contain lists of this type.

5. Front man risk. It should be analyzed whether the beneficial owner is actually a front man, by considering the number of entities that he owns or controls or directs as a director, compared to his declared income, declared assets, domicile, age, education, profession, etc.

6. Inconsistencies. Suspicions could be analyzed according to the type of contract, the name of the entity versus its purpose, the number of employees, gas and electricity consumption (to rule out the possibility of shell companies), the commercial reason for the transactions, etc. The Tax Justice Network publication on beneficial ownership verification⁵⁶ offers more ideas on ratios and risk analysis in its annex.

(56) Andres Knobel, 'Beneficial Ownership Verification: Ensuring the Truthfulness and Accuracy of Registered Ownership Information', SSRN Electronic Journal, 2019 <<https://www.ssrn.com/abstract=3320600>> [accessed 3 September 2019].

5.3 Specific analysis for Trusts

Although all the above would also apply to trusts, it would be relevant to analyze and try to obtain the following information:

- **Trust agreement and letter of wishes.**
- **Powers of the settlor and protector.** Mainly in relation to revoking the trust, right to veto over the decisions of the trustee, ability to remove the trustee or appoint new trustees to achieve another majority.
- **List of beneficiaries and distributions.** Compare the list of beneficiaries, against the distributions actually made, in order to identify indirect beneficiaries who received assets or resources but are not listed in the contract.
- **Instructions of the settlor and action of the trustee.** Analyze whether the trustee always follows the settlor's instructions or if the settlor is the one who makes the decisions directly, despite it being a discretionary trust in which the trustee should have the power to decide. For example, if the trustee always consults or seeks the settlor's approval before making a decision. This is especially important if the settlor is no longer a beneficiary or protector, but nevertheless continues to make decisions or transfer money from the trust as if it were their own.
- **Financial capacity of the settlor.** This would allow to detect whether it is a nominal settlor (front man) or the true economic settlor.
- **Identity and relationship of the beneficiaries with the settlor.** Analyze changes in beneficiaries and whether there is a justification for being a beneficiary (e.g. relatives of the settlor) versus strangers with no family or friendship relationship. For example, artificial intelligence can provide information by processing data from social networks.
- **Suspicious changes in the parties.** Analyze whether suspicious changes in beneficiaries were generated, for example before the imposition of sanctions against the settlor or a beneficiary.

- **Tax and banking information.** Analyze forms and sworn statements before authorities and mainly before financial institutions to see who was named as the beneficial owner. Although the true beneficial owner does not appear in the trust (or appears only as a settlor), it may happen that the same individual declares him or herself as the beneficial owner of the trust or of some asset or property before a bank in order to prove their solvency or contribute assets as collateral for a loan. Consider communications between lawyers and other corporate service providers to see who they consider to be the beneficial owner.

5.3.1 Sources of information about trusts

The sources of information for trusts would be the same as those mentioned in point 5.1. However, as explained in this guide, trusts tend to be subject to fewer reporting regimes so it may not be very easy to obtain information, especially from public sources. Therefore, the following strategy could be followed.

- **Connection points.** A first step would be to determine the connection points of the trust in different countries. The most important piece of information is the identity and residence of the trustee, since this is usually the administrator, and also has the obligation to maintain information about the parts of the trust, the assets, etc. Other relevant connection points may be the law governing or regulating the trust (e.g. a trust created and regulated under New Zealand law) or the location of the assets, mainly from bank accounts, since financial institutions are also required to obtain data from their clients (in this case, the trust) by due diligence and know-your-customer regulations.

- **Information request.** Having determined the location of the trustee and the bank accounts, the authority could make a request for information to the country in question, so that the foreign authority requests the information directly from the trustee or the financial institution.

- **Trust registries.** The next source may be the registry of trusts or beneficial owners. To do this, it will be necessary to know if the country of residence of the trustee or the country whose law regulates the trust establishes a registry of trusts and their beneficial owners. Both the Financial Secrecy Index and the Tax Justice Network publication on Trust Registries around the world describe which countries and under what circumstances have records of trusts and in some cases, also of beneficial owners. Very few countries provide information on financial beneficiaries of trusts online and free of charge, such as Denmark

or Ecuador. However, if any authority manages a registry of beneficial owners of trusts (such as the United Kingdom, Argentina, Costa Rica or Uruguay), it may be possible to obtain the data through a request for information between authorities, as described above.

- **Disclosure databases.** Disclosure databases, especially the ICIJ or OCCRP mentioned above, may have sensitive data about certain trusts.

- **Automatic exchange of banking information (CRS).** The automatic exchange of banking information under the Common Reporting Standard (OECD's CRS) provides for the exchange of information about trusts, in cases where the trust is considered a reporting financial institution, as well as when the trust is considered a bank account holder. In such cases, the authority may receive information about the parties to the trust through automatic exchange of information. The Tax Justice Network publication on the CRS57 standard (pp. 26-29) describes under what circumstances and what trust data is exchanged by automatic information exchange.

(57) Andres Knobel and Markus Meinzer, "The End of Bank Secrecy"? Bridging the Gap to Effective Automatic Information Exchange - An Evaluation of OECD's Common Reporting Standard (CRS) and Its Alternatives (24 November 2014) <<http://www.taxjustice.net/wp-content/uploads/2013/04/TJN-141124-CRS-AIE-End-of-Banking-Secrecy.pdf>> [accessed 3 May 2022].

Analysis of hidden and indirect actions to determine who is the beneficial owner

Singapore's La Dolce Vita Fine Dining* ruling illustrates the means of proof that can be used to determine who is the beneficial owner. In this case, they were trying to determine whether Ms. Zhang was still the beneficial owner and holder of bank accounts so they could be seized, given that she had transferred the money to a trust. In order to conclude that Ms. Zhang remained the beneficial owner of the accounts, the judge found that:

- She identified herself as the beneficial owner on the account opening forms and promised to alert the bank of any change (but never alerted of a change)
- She made money transfers from the accounts (when she was supposedly no longer the beneficial owner), including transfers to buy an apartment (through a complex corporate structure)
- The alleged new beneficial owner never objected or demanded justifications for Ms. Zhang's money transfers, until 7 years later.
- Ms. Zhang's rush to transfer money from accounts upon learning of the seizures (why would she want to transfer money from accounts she didn't consider her own?)
- Communication from her lawyer to the bank, indicating that she continued to "maintain" the accounts.

* [2022] SGHC 278

6. Regulation proposals

This section refers to regulatory proposals so that the legal framework facilitates the work and resources of authorities when dealing with trusts and other complex structures.

6.1 Measures against the opacity of trusts and complex structures

- Registration of trusts as a legal validity requirement
- Registration of the parties of the trust as a legal validity requirement
- Prohibition and de-recognition of discretionary trusts. Requirement to register changes for legal validity.
- Registration of beneficial owners without applying thresholds, at least in the case of combined structures.
- Registration of the entire ownership chain. Use of definitions and thresholds that cover all elements (control, ownership and benefits), and forms of control, ownership and exposure (e.g. financial instruments)
- Rules for disclosure of tax planning schemes and concealment of the beneficial owner (BEPS Action 12 and OECD Model to avoid the CRS).

6.1.1 Trusts

6.1.1.1 Registration of trusts as a legal validity requirement

First, to ensure compliance with any disclosure requirements, trusts should be required to register with a government authority as a requirement to obtain legal validity. In other words, a trust that is not registered could not own property or sign contracts. In the case of an unregistered trust, the trustee would be considered the holder and owner with absolute control over the trust assets, considering that the assets are part of the trustee's personal wealth (with the settlor and beneficiary losing all rights over the assets).

6.1.1.2 Registration of parties to the trust as a legal validity requirement

Any party (e.g. settlor, beneficiary, trustee, etc.) that is not registered would be considered without any rights. In other words, the registration of each party would have a "constitutive" effect, the rights existing only from the moment of their registration.

6.1.1.3 Prohibition and de-recognition of discretionary trusts. Requirement to register changes for legal validity

Given the risks to transparency and tax avoidance, the discretionary trust should be prohibited, preventing the incorporation of companies or the acquisition of assets if a discretionary trust exists in the chain of ownership.

An alternative to prohibition or de-recognition consists of giving constitutive effect to the registration of the parties and their rights. In other words, a discretionary trust could not make a distribution of 10% of the trust to Ms. A, if she and her 10% ownership rights were not previously registered.

6.1.1.4 Registration of beneficial owners without applying thresholds, at least in the case of combined structures

When a legal entity is part of the trust, e.g. a corporate beneficiary, the beneficial owner rules should be applied to determine the beneficial owners of the “corporate beneficiary” without applying thresholds, considering that any individual is a beneficial owner for having at least one share or voting right over the “beneficiary” entity of the trust.

6.1.2 Complex structures in general

6.1.2.1 Registration of the entire ownership chain

The entire chain of ownership and control should be registered (either digitally or as a drawn diagram), indicating all entities and ownership and control percentages until reaching each natural person (not just the beneficial owners). In other words, if Company A has a single beneficial owner with 70% of the shares, the control structure should also illustrate and reveal what happens to the remaining 30% (justifying why no one else meets the corresponding threshold).

6.1.2.2 Use of definition and thresholds that cover all elements (control, ownership and benefits), and forms of control, ownership and exposure (e.g. financial instruments)

In order to be able to carry out preventive analysis and look for patterns and alert systems, the definition of beneficial owners should be expanded to cover any individual who has either control, ownership or benefits (as is the case in

Colombia⁵⁸), applying the lowest possible threshold or ideally no threshold at all (as happens in Argentina⁵⁹ and Ecuador⁶⁰). Likewise, any direct or indirect exposure to control or economic benefits through financial instruments should be considered property or benefit (e.g., call options, debt convertible into shares, etc., as required by regulations in the United States⁶¹).

6.1.2.3 Disclosure rules for tax planning schemes and concealment of the beneficial owner (BEPS Action 12 and OECD Model to avoid the CRS)

Based on BEPS Action 12, the European Union DAC Directive 6 and the OECD´s Model of Mandatory Disclosure Rules, countries should implement disclosure rules for schemes seeking to conceal the beneficial owner, even if they are not related to attempts to avoid information exchanges according to the CRS. In other words, intermediaries (e.g. lawyers, corporate service providers) should disclose to authorities (e.g. registries of beneficial owners or tax authorities) any scheme to conceal the beneficial owner, the way in which it operates, as well as the list of clients who purchased the scheme.

6.2 Measures against tax evasion and avoidance

- Publish lists and guides on abusive schemes
- Consider that the income or assets of the trust belong to the settlor or beneficiary, regardless of distributions.
- Apply taxes at the time of creating the trust and subsequently
- Disclosure rules on tax avoidance and evasion

6.2.1 Trusts

6.2.1.1 Publish lists and guides on abusive schemes

Continuing with the IRS example, countries should publish guides⁶² describing the characteristics of abusive schemes, along with penalties and frequently asked questions, as shown in the following figure in which the IRS demystifies the effectiveness of abusive schemes:

(58)<https://fsi.taxjustice.net/country-detail/#country=CO&period=22>

(59)<https://fsi.taxjustice.net/country-detail/#country=AR&period=22>

(60)<https://fsi.taxjustice.net/country-detail/#country=EC&period=22>

(61)<https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>

(62) <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-talking-points>

Figure 20. Excerpt from the US Tax Authority’s guide on abusive trust schemes

- False Claims Used to Promote Abusive Trust Arrangements:
 - o **False Claim** – Establishing a trust Will reduce or eliminate income taxes or self – employment taxes.
 - o **Truth** – The transfer of assets to a trust will give the donor no additional tax benefit. Taxes must be paid on the income or assets held in trust, including the income generated by property held in trust. The responsibility to pay taxes may fall to the trust, the beneficiary, or the transferor.
 - o **False Claim** – You can transfer your income into a trust, thus eliminating income taxation on that income.
 - o **Truth** – Income remains taxable to the individual who earns it. Lucas v. Earl. 281 U.S. 111(1930)

Source: Website of Tax Authority of the US (IRS) on “Abusive Trust Tax Evasion Schemes - Talking Points”

6.2.1.2 Consider that the income or assets of the trust belong to the settlor or beneficiary, regardless of distributions

The Tax Justice Network proposes⁶³ that trust assets should not be in “ownerless limbo,” but rather should be considered the property of the settlor until the assets have been distributed to the beneficiaries (or they have the right to receive them). While this measure seeks to avoid cases of asset protection in which assets are considered isolated from the rest of society, the same measure could be applied in the event that the income or trust assets are not subject to taxes or manage to evade payment of taxes.

Similarly, the United States considers “grantor trusts” to be trusts where the settlor retains control, either because the trust is revocable or because the settlor can decide on the distributions or investments of the trust. In such a case, the trust is disregarded as a separate structure and all income is taxed on the settlor directly⁶⁴.

(63) Knobel, Trusts: Weapons of Mass Injustice?

(64) <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers#:~:text=If%20a%20trust%20is%20a,is%20taxed%20to%20the%20grantor.>

Similarly, in France there is a “presumption that the beneficiary is a settlor” in order to prevent inheritance tax avoidance (if assets remain in trust and are never distributed across generations). As explained by the French treasury⁶⁵, regardless of whether the assets are in an asset accumulation trust, the tax would be applied when the settlor dies and every time a beneficiary dies, since the anti-avoidance measure that “presumes the beneficiary as settlor” is applied (bénéficiaires réputés onstituents)⁶⁶.

6.2.1.3 Apply taxes at the time of creating the trust and subsequently

An alternative or complementary action to the previous measure is to apply the tax (as an anti-avoidance measure of inheritance or estate tax) at the time the trust is established and the assets are transferred, as it happens with donations. Another complementary measure is to apply a tax with certain frequency. For example, in the United Kingdom⁶⁷ for certain types of trusts, for values exceeding a non-taxable minimum of £325,000, a 20% tax is applied at the time the trust is created and a 6% tax every 10 years.

6.2.1.4 Disclosure rules on tax avoidance and evasion

Based on BEPS Action 12 and the European Union DAC Directive 6, countries should implement mandatory disclosure rules for schemes aiming to engage in tax avoidance or evasion activities, by which intermediaries (e.g. lawyers, accountants, suppliers of fiduciary and corporate services) as well as taxpayers must report on the way in which the scheme acts and obtains tax benefits.

(65) <https://bofip.impots.gouv.fr/bofip/7886-PGP.html/identifiant%3DBOI-DJC-TRUST-20220330> (66) Knobel, Trusts: Weapons of Mass Injustice?

(66) “Article 792-0 in the General Tax Code (CGI) establishes taxes on accumulation trusts upon the death of the settlor and, subsequently, if applicable, upon the death of the “beneficiaries considered as settlors.” (I-C § 110). This taxation of the assets that remain in the trust occurs at each change of beneficiary (for example, when the children of the initial beneficiary become beneficiaries in place of their parent, after the latter’s death)” as described in: <https://bofip.impots.gouv.fr/bofip/7886-PGP.html/identifiant%3DBOI-DJC-TRUST-20220330>

(67) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754210/The_Taxation_of_Trusts_A_Review.pdf tions-and-answers#:~:text=lf%20a%20trust%20is%20a,is%20taxed%20to%20the%20gran- tor.

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Knobel, Andres, and Markus Meinzer, “The End of Bank Secrecy”? Bridging the Gap to Effective Automatic Information Exchange - An Evaluation of OECD’s Common Reporting Standard (CRS) and Its Alternatives (24 November 2014) <<http://www.taxjustice.net/wp-content/uploads/2013/04/TJN-141124-CRS-AIE-End-of-Banking-Secrecy.pdf>> [accessed 3 May 2022]

Knobel, Andres, and Oliver Seabarron, ‘Exploring UK Companies’ Legal Ownership Chains to Detect Red Flags and Verify Beneficial Ownership Information: Part 1’, Tax Justice Network, 2020 <<https://taxjustice.net/2020/07/06/exploring-uk-companies-legal-ownership-chains-to-detect-red-flags-and-verify-beneficial-ownership-information/>> [accessed 11 January 2023]

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Annex. Summary of the registration of trusts in the world

According to the Tax Justice Network publication, of 140 jurisdictions evaluated by the Financial Secrecy Index, 120 jurisdictions have at least some type of registration with some authority, for example with the tax authority if the trust is subject to taxes⁶⁸. Positively, this implies that most jurisdictions have a legal infrastructure and an authority with experience in trust registration. On the other hand, if we consider only the number of jurisdictions that require the registration of all trusts created under local law and foreign trusts administered by a local trustee, the number drops to 15 jurisdictions⁶⁹. This means that in most countries there are many legal loopholes that allow many types of trusts to avoid registration.

Scope

Effective trust transparency would require covering any trust created under local law, as is the case with most legal entities (e.g., companies incorporated in Argentina must register in that country). This would ensure that all trusts that exist have been registered.

However, international standards (e.g. the OECD or the FATF) usually use another criterion when requiring the availability⁷⁰ of information on trusts: **that there be a local administrator or trustee**. If all countries were to use this criterion for registration, there would at least be the expectation that all trusts are registered. (Actually, making registration dependent on the presence of a local trustee is not as effective because no one may know that a particular trust exists or that the trustee is located in that country.) However, the situation is even more complex because not all countries use the same criteria for registration.

According to the Tax Justice Network report⁷¹, the most common criteria for registering trusts are having a local party (especially the trustee), establishing relationships with a regulated entity, being regulated or created under local law, possessing real estate or registrable property, or be subject to taxes.

(68) Knobel and Lorenzo, Trust Registration Around the World.

(69) The 15 jurisdictions, according to the Tax Justice Network, are: Argentina, Cyprus, Colombia, Costa Rica, Czechia, France, Hungary, Liechtenstein, Nauru, Dominican Rep., Saint Kitts and Nevis, San Marino, Seychelles, Tanzania and Uruguay.

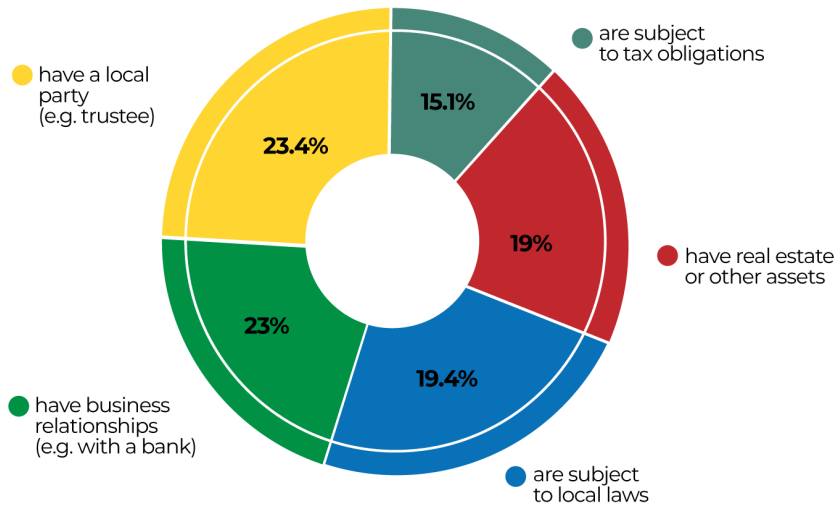
(70) "Availability" does not necessarily imply registration, but rather that the authorities can access the information, for example by requesting it from the trustee.

(71) Knobel and Lorenzo, Trust Registration Around the World.

Figure 1. Conditions to request the registration of trusts

Triggers

Trusts have to register when they:



Source: Knobel et al, "Trust Registration around the world in 2022", Tax Justice Network

However, regardless of the criteria used, there are usually exceptions (e.g. certain types of trusts such as charitable trusts or pension funds are exempt from registration). Additionally, there may be highly sophisticated rules to determine which trusts must be registered, as is the case in the United Kingdom.

UK rules for registering beneficial owners of trusts*

Trusts must register their beneficial owners and their assets with the tax administration if:

- The trust is subject to one of six types of tax: income tax, capital gains tax, stamp duty land tax, stamp duty reserve tax, tax on land or building transactions (in Scotland) or land transaction tax (in Wales),
- The trust acquired real estate or established professional relationships with an obligated subject (in accordance with the 5th Anti-Money Laundering Directive of the European Union approved in 2018), or

- The trust is considered a “UK trust” because (i) all the trustees are resident in the United Kingdom, or (ii) because the majority of the trustees are resident in the United Kingdom and the settlor was resident in the United Kingdom at the time of creating the trust. This last case operates unless one of the following exceptions applies.
- Exceptions: death trusts, insurance policies and compensation payments, employee share plan trusts, real estate, charitable or charitable trusts, pension plans registered in the United Kingdom, trusts whose beneficiary is a disabled person, historic pilot trusts, financial and capital markets, professional services and commercial agreements, approved maintenance funds for historic buildings, public authorities, trusts imposed by the legislator or by court order.

*** Source: UK Financial Secrecy Index report released in 2022.**

Authority and effect of trust registration

For effective transparency (without legal loopholes), registration should give legal validity to the trust to encourage them to register, for example with the commercial registry or the special registry for trusts. Otherwise, registration could be considered voluntary since the authorities will not know that the trust exists in the first place.

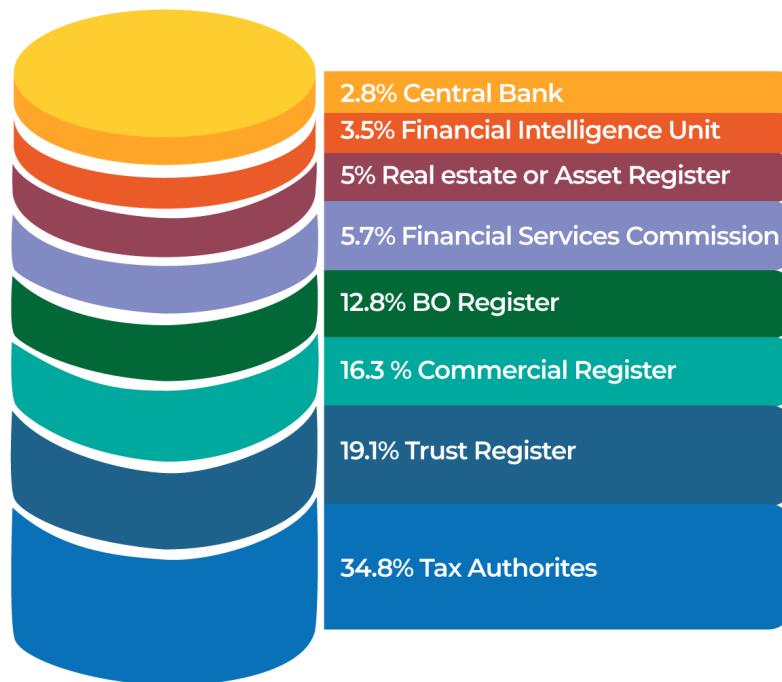
According to the Tax Justice Network’s Financial Secrecy Index, there are some countries that require registration to give legal validity or to not be sanctioned with the penalty of nullity, such as: Barbados (for purpose trusts), France, Puerto Rico, Rep. Czech or Saint Kitts.

The effect of registration is usually related to the authority that maintains the record. If the registration is done for example with the tax administration (in case the trust is subject to taxes), the trustee may decide not to register it, depending on how high the fines or sanctions will be and how likely it is that the authority will detect the lack of registration.

According to the Tax Justice Network report⁷², the most common authorities for registering trusts are the tax administration, a special trust register, the commercial register, the register of beneficial owners, the financial services commission, the property register real estate, the financial intelligence unit or the central bank.

Figure 2. Authorities in charge of trust registration

Authorities in charge of trust registration



Source: Knobel et al, "Trust Registration around the world in 2022", Tax Justice Network

(72) Knobel and Lorenzo, Trust Registration Around the World,.