Editorial

A world of glass: transparent, but also fragile: trustwise

Johanna Niegel*

This Special Issue is only made possible through the help of many people to whom I wish to extend my sincerest thanks at the very beginning of my editorial—the international authors and correspondents, Toby Graham, Tony Molloy, Anita Gaspar, Emma Thomas, Rebecca Stubbs, Steve Meiklejohn and Roger Frick.

Private Foundations 2015 is again proof for both the continuing international expansion and increasing versatility of private foundations. In 2015, we may welcome our first contributors from the Czech Republic1 and Hungary,2 where private foundations and trusts were only recently introduced, as well as from Turkey.3 We furthermore explore cases in which to use a foundation,4 the structuring possibilities with foundations for African high net-worth individuals5 as well as the latest legal developments in the Russian Federation.6 We examine the different models of charitable foundations in Italy7 and learn that the European foundation project8 was put on hold in autumn 2014.

Two of the many excellent articles in the present Issue have made me particularly reflective. They are the articles by H.S.H. Prince Michael von und zu Liechtenstein9 and by Eric J. Snyder.10

It is indeed true that modern communication systems have opened infinite possibilities for mankind. At only a fingertip, all kind of information is readily available on an international scale, in particular via the Internet. The introduction of the Internet in this respect can indeed be compared to the invention of printing.

Seen from a strictly technical point of view, the Internet is basically nothing more than a global communication network allowing almost all computers

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worldwide to connect and exchange information. The present Internet dates back to the Arpanet of 1969, a project of the Advanced Research Project Agency (ARPA) of the US Ministry of Defence. The aim of the project was to interconnect computers of universities and scientific institutions. Only in the 1990s was the Internet then made available for commercial purposes whereby it gained public accessibility, transcending the use by universities.

In 2014, the access to the Internet has reached an almost universal coverage with around 40 per cent of the world population, amounting to over three billion people. Only 20 years ago, in 1995, it was still less than one per cent.11

The Internet has not only led to the birth of new business sectors, but has particularly revolutionized the communication habits and use of the media in both the professional and private spheres.

Long gone are the days when the Internet resembled an encyclopaedia or news service in digital form. As nowadays more and more people make private information available on the Internet via social networks, inter alia for reasons of self-presentation or self-portrayal, the Internet is no longer only a technical network of computers, but in fact has turned into a mass network of individuals. But this basic fact is not evident as the individual users remain unseen behind their computers. And since a user does not even have to leave his home or office to use the Internet, the online presence of others, who are in fact uninvolved third parties, is blanked out.

What people seem to forget, when they willingly and indeed eagerly make their private information available on the Internet is, that this information remains stored there forever. In our days, specialist companies meanwhile take care of deleting a person’s digital presence upon death. And, what is even more dangerous, is, that, already upon publication of information, one has lost control on where this information ends up. Due to the fact that the individual users are anonymous, one is not able to develop a concise idea of the concrete circle of people to whom the electronic information is in fact being made available, nor how this information will actually be used by these people.

As H.S.H. Prince Michael von und zu Liechtenstein puts it in his article, modern man holds the view of ‘I don’t mind people knowing because I have done nothing wrong and have nothing to hide.’ But this very attitude in itself constitutes the great danger. It initiates the deprivation of individuals of any right to privacy.12

In addition, as society itself meanwhile is of the opinion, that electronic information, including all private information, has become a kind of res communis omnium, a thing of the entire community, and through that also a matter of universal competence, the danger of depriving individuals of any right to privacy, becomes all the greater.

12. M von und zu Liechtenstein (n 9).
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Consequently, if we regard electronically available information as sort of res communis omnium, such information, to make a reference to international law, may be used by all, but is not capable of ‘appropriation’. But where does the right to know and to use information end, and where does the ‘appropriation’ of such information, its abuse to be exact, begin?

As with so many things in law, we need to distinguish between the kind of information that is made available online and the kind of use that it undergoes. General information of common knowledge that is published online may indeed be regarded as sort of res communis omnium, because its use is anyway limited in the sense that such general information can hardly be abused. But private information that is made available online, can be abused very easily and consequently must underlie different rules. One might argue that people are aware of a possible abuse and thus consent to it by putting private information online. But can one really consent to a possible abuse whose extent cannot be clearly assessed?

The ‘appropriation’ of private electronic information clearly begins as soon as we encounter an imbalance between the legitimate and lawful interest of third parties to know and to use private electronic information, and the legitimate and lawful interest that private information remains private and is only used by third persons for the original purposes pursued by the user who put it online. The problem in this respect is that the term ‘legitimate and lawful right to know and to use’ is, in the meantime, construed by many quite flexibly and extensively. Likewise, the original intentions of the user when putting the information online may also be hard to ascertain.

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It will be up to the national as well as international lawmakers to fill up a remaining legal vacuum, which is due both to a lack of regulation on an international level and the difficult enforcement of the national laws owing to the international structure and the anonymity of the Internet. Many fact patterns are at the interface of related national laws and give rise to the application of national conflict of law rules. Furthermore, the use of the Internet is developing at a pace, which often cannot be followed by the national legislative and judicial authorities.

With a view to the above balancing of interests, lawmakers for the future development of the Internet will thus not only need to provide more effective as well as universally accepted checks and balances, but also adjust definitions of the terms ‘use’, ‘legitimate’, ‘lawful’ as well as ‘interest’ of the parties concerned, taking into account that these may be based on very subjective interpretations by the users. Such concise legal definitions will finally allow for drawing the line between the legitimate and lawful use and the abuse of private electronic information.

And, as of recently, lawmakers will not only need to provide for a balancing of merely private interests, but also of governmental interests and private interests.

Whereas governments during the childhood of the Internet tended to underestimate its addictive power and also were considered Internet-illiterate with a view to its use and application, this trend has noticeably reversed since the introduction of the New Economy of the late 1990s. Governments, fuelled through atrocious international terrorist attacks, have embarked on the way of not only controlling and blocking the exchange of electronic information but also, meanwhile themselves making full use of the electronic information so readily available online and for their own purposes. This growing influence of the state is welcomed on the one hand as an increase in legal certainty but is criticized on the other as a
constant progress in the direction of a surveillance
state, where information is considered a ‘res publica’,
an affair of the state, and every individual and citizen
is made a potential suspect.13

A detrimental consequence of the above develop-
ments has already become evident—which is the loss
of mutual trust in interpersonal relationships. This
applies not only the relationships between private
persons, but even more the relationships between
governments and individuals. And this is exactly
where private foundations and trusts come into play.

Both private foundations and trusts as fiduciary
relationships are based on interpersonal trust and
not only between the founder and the beneficiaries
on the one side and the trustee on the other.
Mutual trust is also required between the dramatis
personae of the private foundation or trust and gov-
ernments that the integrity of private foundations and
trusts be guaranteed and the legitimate and lawful
interests in setting up and maintaining such struc-
tures are safeguarded.

The international developments are clearly leading
to an automatic exchange of information in tax mat-
ters between most major financial centres and econo-
mies. This will most likely also include easier access to
beneficial ownership information but might also
entail public beneficial ownership registers in some
jurisdictions. With the increasing transparency cre-
ated by the OECD Common Reporting Standard
(CRS), authorities will be given the necessary infor-
mation at hand to check where the real economic
benefit of the structure accrues.

If one closely monitors the developments in par-
ticular with a view to the international exchange of
information as well as the corresponding reactions
thereto, one somehow gets the impression that both
private foundations and trusts in their entirety are
beginning to be regarded by many as generally
unlawful.

The revelation of the so-called sham structures14 is
certainly fully justified with a view to prevent money-
laundering, tax evasion, tax fraud and other illegal
purposes. But not every private foundation or trust
can be a potential suspect. Especially, as the days,
when a foundation was considered a stand-alone
entity used for camouflage are long gone.15 And
there clearly are legitimate as well as lawful uses of
private foundations and trusts, such as estate plan-
ing, asset protection, protection against spendthrift
or disgruntled family members, to name just a few.
Consequently, international trusts and foundations
should with a view to the favor fondationis, a maxim
that is followed by many international jurisdictions, at
least be granted the benefit of doubt.

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But where does this recent negative perception of
private foundations and trusts come from and where
is it leading? Apart from sensational media coverage,
one of the reasons for the prevailing mistrust against
foundations and trusts may perhaps also lie in the fact
that foundations and trusts were taken over trans-
ationally. Private foundations stem from civil law,
whereas trusts are a product of common law.
Through the reception of private foundations, in
common law countries and of the trust in civil law
countries, ‘system-alien’ concepts were taken over16
which most likely has led to legal, conceptual as well
as factual problems and misunderstandings in their
implementation and use. As a consequence of the

15. ibid ‘On Foundations and Chameleons’, 504.
above, inter alia banks have become more and more reluctant to deal with private foundations and trusts, thereby shattering the trust of international clients in long-established lawful planning instruments which again manifests itself in a decreased international diversification of their assets. This, in turn, will certainly also show consequences on the national as well as international economies.

Just as with the use and abuse of the electronic media in the private sphere as laid out above, it will be an important task of the international governments participating in the automatic exchange of information in tax matters to clearly stipulate the prerequisites for such automatic exchange, in particular with a view to defining, perhaps also re-defining, as well as safeguarding the legitimate and lawful interests of both sides.

And it will be in turn the task of the international advisers to make their clients aware of the fact that their structures may be scrutinized and to responsibly advise them how their legitimate and lawful interests in setting up and maintaining private foundations and trusts can still be lawfully realized in a transparent and fast changing legal environment. In this context, international advisers will be more and more called upon to familiarize themselves with the applicable rules to ensure that they can indeed advise clients on compliance with the requirements of the law.

As we have seen above, both interpersonal relationships as well as legal systems are based on trust. If this trust is lost, both prove to be frail and vulnerable. Trust in the advantages of transparency will be lost as soon a regulatory framework becomes unpredictable. And such unpredictable regulatory framework for this very reason might sooner or later miss its aim.

Transparency in combination with trust in its accurate and purposeful implementation under the guarantee of the legitimate and lawful interests of all parties involved is indeed a solid foundation. It is vital that both private individuals as well as governments begin to re-orientate themselves back towards it.

With this final observation, I leave you to enjoy Private Foundations 2015.

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