En route to Nineteen Eighty-Four? Are the tunes of Orwell’s Nineteen Eighty-Four echoed in Twenty-Seventeen?

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Welcome to the 13th issue of Private Foundations: A World Review! As always my sincere thanks go to the 22 authors of the 2017 issue as well as to David Russell, Toby Graham, Anita Gaspar, Steve Meiklejohn, Steven Ferriday, and Laura Jose for their support throughout the production process.

In the 2017 issue we welcome four new jurisdictions, namely Barbados,1 the Cayman Islands,2 Estonia,3 and Samoa.4 As in previous years, the Review contains a General Section, where you will find articles that deal with transnational topics with a view to foundations in general, as well as a Jurisdiction-Specific Section, which, in contrast, contains articles linked to private or charitable foundations5 in a particular jurisdiction. Taxation issues are also always a popular topic in the Jurisdiction-Specific Section.6 With a view to the implementation of the initially civil law concept of private foundations in common law jurisdictions, I may draw your attention to the article from Jersey,7 which—with due reference to recent judgments of the Royal Court—discusses in detail whether foundations in Jersey draw upon jurisprudence in civil law countries, or whether they develop separately, drawing parallels to the law and practice in relation to trusts and companies. The article from Jersey is nicely complemented by an article in the General Section, which deals with common law foundations and their recognition in private international law, with a particular focus on the Swiss and German laws.8 Furthermore, we also learn how inheritance law may influence estate planning via trusts and foundations under both Swiss9 and Israeli law.10 Moreover, we gain an insight into the first practical experiences drawn since the relatively recent enactment of the Czech11 and the Hungarian12 private foundation laws.

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3. T Pursall, ‘Cayman Islands Foundation Companies’ (July 2017) 23(6) Trusts & Trustees, 642 ff.
Introduction

In only a year’s time the world of today has changed dramatically. This becomes even more evident if one recalls the latest terrorist attacks in Stockholm on 7 April 2017, in St Petersburg on 3 April 2017 and in London on 22 March 2017 which occurred at the time of writing this Editorial. After the attacks in Brussels on 22 March 2016, Nice on 14 July 2016 and Berlin on 19 December 2016, the attacks in London, St Petersburg and Stockholm have been the fourth, fifth, and sixth major attacks in Europe within a year and have all again claimed the lives of many innocent victims.

The attack in London has caused particular uncertainty as it occurred just days before the official application of the Brexit by British Prime Minister Theresa May. Brexit itself has caused great concern over the past year, as neither the UK, nor the European Union (EU), nor the rest of the world, can foresee the manifold consequences that Brexit will bring with it in the future. And Brexit will also touch upon foundations, as can be derived from the articles by Keiran Goddard of the Association of Charitable Foundations and Dr Maximilian Haag of P+P Poellath + Partners, Munich, our contributor from Germany. According to Keiran Goddard, an estimated loss of €200m EU funding to the sector, as well as many times that in infrastructure and service spend, will have to be taken into account. And Dr Haag points out with a view to German tax law that the existing German preferential tax rules for EU/European Economic Area (EEA)-based companies, foundations, and trusts will cease to apply to British entities and trusts and thus will have to be re-negotiated. Said consequences will most likely be only two of many.

Returning to these latest cruel attacks in London, St Petersburg and Stockholm, one immediately thinks that if perhaps more effective surveillance mechanisms were introduced, that future attacks might be prevented.

Speaking of surveillance and control, I first discussed the dangers that the internet poses to the privacy of individuals by registering, storing, and making available all kinds of information to an unknown public in my 2015 Editorial. In 2016 followed the question ‘(Where) Have You Already Been Registered?’ And yet again, in 2017 the main issue of concern, which is also evidenced by many articles in the 2017 Issue, with Filippo Noseda taking the lead, is this very trend towards increased surveillance, control, and consequently transparency. The surveillance, control, and transparency, that are discussed throughout the Issue, in particular concern two new legal regimes that are being introduced on a supra- as well as transnational level. These new mechanisms, which exert control and surveillance over the financial affairs of individuals, come at the price of a simultaneous restriction of the legitimate privacy of the individuals affected. Since this shift towards increased transparency no longer only concerns the interaction between private individuals, like for example on the internet, as we discussed two years ago, but is nowadays extended to the relationship between states and their own as well as foreign citizens, we may well ask ourselves today, whether the tunes of George Orwell’s Nineteen Eighty-Four are indeed echoed in

14. Haag (n 6).
Twenty-Seventeen in the sense of ‘Big Brother is Watching You’.

**Automatic exchange of information**

Twenty-Seventeen will most likely see two landmark developments concerning financial transparency: in 2017 the first exchanges of tax information under the Organization of Economic Co-operation and Development’s (OECD) Automatic Exchange of Information (AEOI) will take place and in addition the public Ultimate Beneficial Owner Registers (UBO Registers) according to Articles 30 and 31 of the 4th Anti-Money Laundering Directive of the EU are to be implemented by the EU Member States.

With the publication of the Common Reporting Standard (CRS) on 23 February 2014, the OECD has specified the framework for a global automatic exchange of information in tax matters, whereby the transnational exchange of information itself is based on the adoption of a multilateral agreement, the Convention on Mutual Administrative Assistance in Tax Matters (‘Multilateral Convention’) to which the CRS is annexed. The CRS Multilateral Competent Authority Agreement is based on Article 6 of said Multilateral Convention and operationalizes the automatic exchange of information under the CRS.

The Multilateral Convention generally needs to be translated into national law and as from 2017 onwards, tax relevant information will be automatically exchanged with the other Contracting States to it, based either directly on the provisions of the Multilateral Convention, or activated on the basis of bilateral agreements, depending on the provisions of the national laws.

Commitments to exchange information already in 2017 have been made by so called 53 ‘Early-Adopter States’, which mainly encompass the Member States of the EU and the EEA. In 2018, an additional 47 jurisdictions have committed to follow suit.

Under the CRS, financial institutions, like for example banks, trustees, or even trust companies themselves will report tax relevant data of account holders and beneficial owners as well as other financial data, such as investment income from interest and dividend payments, income derived from specific insurance products, proceeds of the disposal of financial assets as well as specific year-end account information. In addition, said financial institutions will also report tax-relevant data of the so-called ‘controlling persons’ of legal entities, such as companies and foundations and also of trusts, whereby ‘controlling persons’ are defined as shareholders, founders, settlors, protectors, beneficiaries, trustees, and foundation board members.

The scope of the OECD Multilateral Convention covers a wide range of tax information, whereby the Contracting States are entitled to make reservations to the information to be exchanged. Under the CRS the reportable financial information has been reduced and the Contracting States have agreed on reducing the scope of application to income, wealth, profit, capital, and withholding taxes. Inheritance and gift taxes, VAT, issue and sales taxes and any social security contributions are thus excluded from the CRS.

Tax authorities are obliged to preserve confidentiality and to comply with data protection requirements for the data received according to their domestic laws. In accordance with the speciality principle, reportable financial information shall only be transmitted and disclosed to state authorities in charge of assessment, collection, enforcement, and prosecution of taxes falling under the scope of the AEOI. Exceptions may apply in cases of money laundering, corruption, and terrorist funding. The redistribution of exchanged information to third party states is prohibited. In addition, information rights

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of reportable persons and legal entities that are account holders, apply. The protection of the right to privacy and the protection of personal data—as set out in Article 8 of the EU Charter on Fundamental Rights—are furthermore important concerns for the European External Action Service (EEAS) as a European public administration.24

Ultimate beneficial owner registers

The second milestone regarding transparency in 2017 is the introduction of Ultimate Beneficial Owner Registers by the 4th EU Anti-Money-Laundering Directive,25 which was adopted by the European Parliament on 20 May 2015 with an implementation deadline by the EU Member States by 26 June 2017.26 On 5 July 2016, in response to terrorist attacks in Europe and to the Panama papers, the European Commission published proposals to amend the 4th Anti-Money Laundering Directive as well as to bring the transposition date forward to 1 January 2017.

The corresponding provisions are incorporated in Articles 30 and 31 of the Directive. The Directive aims at two UBO Registers—one for corporate and other legal entities (Article 30) and one for trusts and other types of legal arrangements, having a structure or functions similar to trusts (Article 31) in order to prevent the use of the EU’s financial system for the purposes of tax evasion, money laundering, and terrorist financing by enhancing transparency in order to combat the misuse of legal entities.27 Article 30 of the 4th Anti-Money Laundering Directive consequently obliges corporate and legal entities incorporated in a Member State to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held.

In addition this information is to be held in each Member State in a central register, for example a commercial register, companies register or a public register. The information on the beneficial ownership shall be accessible to competent authorities and Financial Intelligence Units (FIUs) without restriction and without alerting the entity concerned, to obliged entities within the framework of customer due diligence (‘Obliged Entities’) and any person that can demonstrate a legitimate interest, whereby the latter may only access the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held. The Member States shall ensure that the FIUs and competent authorities are able to provide the information to the competent authorities and FIUs of other Member States. The Member States may also provide for an exemption to the access to all or part of the beneficial ownership information on a case by case basis in exceptional circumstances, where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable.

Likewise, according to Article 31, the trustees of any express trusts (and other types of legal arrangements having a structure or function similar to trusts) governed under the law of a Member State, are required to obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust, which includes the identity of the settlor, the trustees, any protector, the beneficiaries or class or beneficiaries and any other natural person exercising


26. For a more detailed discussion cf Niegel (n 16).

effective control over the trust. The information on trusts shall also be held in a central register but only if a trust generates tax consequences. This trust register will grant unrestricted access to competent authorities and FIUs without alerting the parties to the trust concerned. Also the Trust Register may allow access to Obliged Entities within the framework of customer due diligence and the Member States shall ensure that the competent authorities and FIUs of a Member State are able to provide the information to the competent authorities and FIUs of other Member States.

This final text of the 4th Anti-Money Laundering Directive as of 20 May 2015 makes a clear distinction between legal entities that engage in business and interact with third parties and trusts, and most likely also foundations, which are regarded as a private planning tool. 28 Whereas there is a general obligation to place the information on legal persons in the public domain, the access to the beneficial ownership information of trusts is more restricted. 29

The implementation of the Directive by the EU Member States is a task which requires the Member States to by themselves interpret the freedom given to them in Articles 30 and 31 and create a corresponding national law of implementation. This however might lead to delays as well as different implementation laws throughout the EU due to different interpretations and approaches by the Member States, 30 with ones being stricter or more lenient than others.

En route to Nineteen Eighty-Four?

In the light of the cruel terrorist attacks over the past year alone, nobody will call into question the necessity of the implementation of neither the OECD’s Automatic Exchange of Information in Tax Matters, nor of the EU’s Public Registers, if further victims thereby can be spared, as both legal regimes, among others, also aim at fighting money-laundering, terrorist financing, and other crimes.

In the very words of the OECD:

“transparency in relation to the international financial system has thus become the focus of growing political attention in recent years as an important means of preventing money-laundering, terrorist financing, tax evasion, bribery, corruption and other crimes. This issue was further magnified as a result of the data leaks that occurred immediately prior to the G20 Finance Ministers’ meeting in April 2016.” 31

Speaking at an evidence session for the UK’s All Party Parliamentary Group on Responsible Tax on 14 June 2016, Pascal Saint-Amans, the Director of the Center for Tax Policy and Administration at the OECD, however pointed out that some key countries are opposed to the idea [of UBO Registers] and that the quality of data in registers is not yet up to the necessary level. 32

But already in October 2016, the OECD Secretary-General Report to G20 Finance Ministers, once again reiterated:

“the importance of having access to information on beneficial ownership of legal entities and arrangements is recognized across agencies and across countries of all sizes, as without it, the ability of governments to fight financial crimes, corruption, money laundering,
terrorist financing and tax evasion is greatly undermined.  

As regards the 4th Anti-Money Laundering Directive, the EU has in the meantime also taken up work on the 5th Anti-Money Laundering Directive. On 25 November 2016/13 December 2016, the Presidency released a Compromise Text on the Amendments to the 4th Anti-Money Laundering Directive and on 9 March 2017 a Report on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (Draft European Parliamentary Resolution) was published. The proposed amendments strongly deviate from the text of the 4th Anti-Money-Laundering Directive and go into the direction of allowing unrestricted public access to both the share ownership and trust beneficiary registers. If this proposal were implemented, ultimate asset ownership will be available throughout Europe, as Richard Hay alerts.

These European developments come after the UK had introduced public registers of people with significant control in respect of UK companies and limited liability partnerships that may be accessed by anyone and after France had introduced a fully public register on trusts on 10 May 2016, which was later declared unconstitutional by the French Constitutional Court.

Concluding, when one considers the two legal mechanisms introduced by the OECD and the EU to surveil and control the financial affairs of individuals, one can truly say with a reference to George Orwell’s novel Nineteen Eighty-Four that ‘Big Brother is indeed watching you’. To be more precise, actually, ‘Big Brothers are watching you’, as the surveillance of the financial affairs of individuals has meanwhile reached a supra- as well as transnational level.

If one speaks about implementing surveillance and control, one must first define the purposes and then consequently ask who, what or which behaviour exactly must be surveilled and then judge both the measures introduced as well as their the effectiveness according to these standards.

In the words of the OECD:

“as the world becomes increasingly globalised and cross-border activities become the norm, tax administrations need to work together to ensure that taxpayers pay the right amount of tax to the right jurisdiction. A key aspect for making tax administrations ready for the challenges of the 21st century is equipping them with the necessary legal, administrative and IT tools for verifying compliance of their taxpayers. Against that background, the enhanced co-operation between tax authorities through AEOI is crucial in bringing national tax administration in line with the globalised economy.”

In comparison, the objective of the 4th Anti-Money Laundering Directive is to prevent the use of the EU’s financial system for the purposes of money laundering and terrorist financing by enhancing transparency in order to combat the misuse of legal entities.

Considering these purpose statements, both regimes are certainly apt to fight illegal motives and behaviour and might even prevent future terrorist
attacks, as suspicious activity is likely to be detected at an earlier stage. For this they deserve support.

But each coin is known to have two sides: While fighting illegal motives and crime, the AEOI in combination with the UBO Registers will at the same time also encroach heavily on the legitimate privacy interests of legally compliant citizens, whereby in following years the legitimate privacy of citizens will be limited to an even greater extent. As already mentioned before, 53 jurisdictions shall start exchanging information in 2017 and another 47 will exchange data in 2018, at which time the AEOI will at least encompass a 100 jurisdictions.40

It is unavoidable, that with their introduction, these two legal regimes must perform a balancing of interests so that they can achieve their stated purposes. But at the same time, such control mechanisms, must within themselves adhere to a cost–benefit analysis41 as well as to the standard of proportionality and include an appropriate checks and balances system. With a view to the latter they indeed take into account information rights, privacy and data protection as well as a prohibition to redistribute information.42 This is of essence in order to uphold the trust in them and their necessity by the individuals affected by them.

However, Edward Buckland’s concern43 that in the implementation of the Financial Action Task Force’s (FATF) Recommendations, many countries have in fact opted to go further than the Recommendations actually require, should give us cause for thought also with a view to such new ventures. What is particularly worrisome with a view to the UBO Registers is the tendency to now provide unrestricted access. This in particular, as one must not underestimate the power of the media and the internet at the same time. With the fast and easy dissemination of information via the internet, even an innocent list of millionaires44 might serve as an incentive for committing a crime such as kidnapping, other acts of violence or blackmail, especially if the public is being made aware of what a particular person might be ‘worth’45 or how he/she is interlinked. These issues are addressed by Article 30 para 9 of both the 4th EU Anti-Money Laundering Directive as well as the Draft European Parliamentary Resolution.46

Thus, the question of previous years, whether information really should be regarded as a ‘res communis omnium’, ie a thing of the entire community, and through that also as a matter of universal competence,47 remains valid. Twenty-Seventeen will be the year in which it will be seen how the new legal regimes will be

41. D Russell and T Graham (n 32).
42. The Draft European Parliamentary Resolution (Report of 9 March 2017 on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (COM(2016)0450 – C8-0265/2016 – 2016/0208(COD)), n 36, makes reference to the following: Moreover, with the same aim of ensuring a proportionate and balanced approach and to guarantee the rights to private life and personal data protection, Member States should provide for exemptions to the disclosure of and to the access to beneficial ownership information in the registers, in exceptional circumstances, where the information would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence, or intimidation. This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the right to respect for private and family life (Art 7 of the Charter), the freedom to conduct a business (Art 16 of the Charter).
45. ibid.
46. In the Draft European Parliamentary Resolution (Report of 9 March 2017), note 36, Art 30 para 9 reads as follows: ‘In exceptional circumstances to be laid down in national law, where the access referred to in point (b) of paragraph 5 and paragraph 5a would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable, Member States may provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis. Member States shall ensure that these exemptions are granted upon a detailed evaluation of the exceptional nature of the circumstances, with the evaluation accessible to the Commission upon request. Exemptions shall be reassessed at regular intervals to avoid abuse. When an exemption is granted, this has to be clearly indicated in the register. The rights to an administrative review of the exemption decision and to an effective judicial remedy shall be guaranteed. Member States shall publish annual statistical data on the amount of exemptions granted and reasons stated and report the data to the Commission. Exemptions granted pursuant to this paragraph shall not apply to credit institutions and financial institutions, and to the obliged entities as referred to in point (3)(b) of Article 2(1) that are public officials.’
implemented and function. This in particular also with a view to pending amendments and how the two will correlate with each other.\textsuperscript{48}

The impact of the new regimes on private foundations is already palpable. Tim Prudhoe and Robert W Henoch point out the difficulties in respect of obtaining (and maintaining existing) banking facilities.\textsuperscript{49} In addition Kateřina Ronovská and Vlastimil Pihera stress that foundations and also trusts are used for private estate planning tools, rather than for illegal motives and report with a view to foundations in the Czech Republic that settlors are not interested in having the conditions for the operation of their foundations made publically available. Settlors are afraid to let others see into the complexity of family situations and fear the personal safety of beneficiaries or their children, who could easily become targets of criminal acts inspired by (sometimes incorrect) assumptions about their property situation. In their view, a perception is nowadays being created that the mere existence of structures like trusts and foundations constitutes—regardless of anything else—a social risk. And that, inevitably, undermines their legitimacy.\textsuperscript{50}

The protection of the right to privacy and the protection of personal data—as set out in Article 8 of the EU Charter on Fundamental Rights—are important concerns for the EEAS as a European public administration. Cross-border cooperation and agreements to deliver effective data protection are therefore of essence for the EU to maintain its values and uphold its principles.\textsuperscript{51}

In addition, the European Data Protection Supervisor (EDPS), among others, supervises the EU administration’s processing of personal data to ensure compliance with privacy rules, handles complaints and conducts inquiries, works with the national authorities of EU countries to ensure consistency in data protection as well as monitors new technologies that might have an impact on data protection.\textsuperscript{52}

On 2 February 2017, a month before publication of the Draft European Parliamentary Resolution on 9 March 2017, the EDPS concluded the following with a view to the then proposed amendments to the 4th EU Anti-Money Laundering Directive\textsuperscript{53}:

“The Commission is proposing new amendments to the AML Directive, in order to put it up to speed with technical and financial innovation and new means to perform money laundering and terrorism financing. At the same time, the Proposal aims at improving the transparency of the financial markets for a number of purposes that we identify, among others, in the fight to tax evasion, protection of investors and fight against abuses of the financial system.

We have reviewed the Proposal and we consider that it should have:

Ensured that any processing of personal data serve a legitimate, specific and well identified purpose and be linked to it by necessity and proportionality. The data controller performing personal data processing shall be identified and accountable for the compliance with data protection rules.

Ensured that any limitation on the exercise of the fundamental rights to privacy and data protection be provided for by law, respect their essence and, subject to the principle of proportionality, enacted only if necessary to achieve objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Ensured a proper assessment of the proportionality of the policy measures proposed in relation to the purposes sought, as emergency-based measures that are
acceptable to tackle the risk of terrorist attacks might result excessive when applied to prevent the risk of tax evasion.

Maintained into place safeguards that would have granted a certain degree of proportionality (for example, in setting the conditions for access to information on financial transactions by FIUs).

Designed access to beneficial ownership information in compliance with the principle of proportionality, inter alia, ensuring access only to entities who are in charge of enforcing the law.”

With this statement, I leave you to your own thoughts and hope that you will enjoy Private Foundations 2017!

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