

Protection of assets by trustees, new challenges from technology and politics

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Abstract

The Trustee's duty to protect trust or foundation assets includes among others the protection of privacy coupled with the protection against political risks. New technologies, a hypocritical interpretation of transparency and social media may jeopardize privacy. Trustees have to find solutions to protect this privacy. The risk of confiscation of private assets in order to cover public debt can also endanger assets settled into trusts or foundations. A proper selection of jurisdictions combined with proper drafting will be key.

The role of the trustee of both trusts and foundations is to manage assets and values according to the settlor's wishes in the interest of the beneficiaries. It is therefore the primary duty of the trustee to preserve wealth and assets and to provide income in order to fulfil the purpose of the trust.

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The trustee has a number of duties such as a general duty of care, obviously, and in many instances a duty of diversification in order to spread the risk. There is also a duty to protect privacy. Protecting privacy will be the first part of this article and the second will deal with a political risk along with a threat to private assets.

There is also a duty to protect privacy

Protecting privacy

Financial privacy is at risk in various ways:

High-reaching as well as additional reporting duties have the inherent risks of leaks. The security of data within taxation departments and other public administration offices is not necessarily convincing.

It is also jeopardized by the increasing interest of the media in the private affairs of people, especially if they are presumed to be wealthy, important, flashy, or in any other way vulnerable.

Financial privacy is one of the most important elements of wealth protection. There was a reason why our ancestors buried their valuables in the forest in times of danger.

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Two events in the last two years have shaken the world's foremost power, the USA. The actual events were not that important but the signals they gave are shattering. The events were on the one hand Wikileaks and on the other the revelations by Edward Snowden. The two persons responsible, Julian Assange in the case of Wikileaks and Edward Snowden are sought for prosecution but find 'friendly' states worldwide offering asylum to them. Apart from the fact that both committed a criminal act and revealed certain information which caused huge damage to some innocent individuals and also

damaged the reputation of the most powerful Western country, what is really shocking is that Wikileaks shows how carelessly confidential information was handled by certain US institutions and to what an extent highly important information was transferred by and stored on electronic media. A second shock which surfaced from the NSA affair was the way governments, and not only the US Government, were spying on their own citizens. In my opinion, it is not so surprising that there was spying on other Heads of State and government officials since this is something that has always existed. It is part of the duty of States to protect their external security. But Europe is not much better in the disregard of the personal sphere of citizens. Data storage of all telephone calls, for instance, has become a common practice.

There is a certain hypocrisy at play here: governments of the more influential States are extremely sensitive when data are stolen and this is also understandable but on the other hand they are furthering data theft in foreign institutions and especially thefts violating financial privacy.

A trustee can hardly do his job professionally in today's world without the use of electronic data processing and without communication by electronic mail. This, however, causes potential danger to the financial privacy of the trust or foundation, its settlors and beneficiaries. Trust companies therefore have to be extremely careful how and to what extent they use electronic communication and data processing. Protective measures are of essence.

A trust office is certainly not a super power but it is nevertheless still likely to be a target for a number of attempted data thefts. Very prominent last year was the case of the 'Offshore Leaks', as it was known, and just recently 'China Leaks'. Originators of data thefts can be authorities and officials of one's own country or of foreign countries misusing their competences. It can also be the media as we have seen in the Murdoch case in the UK where journalists tapped private phones. It can be criminals but also relatives having certain expectations. What can also not be excluded are human mistakes occurring for example within a bank or a trust office itself by sending out a huge

amount of data to the wrong e-mail addresses. We frequently hear of such cases happening mostly in the public domain but there is also a risk of banks sending statements to the wrong e-mail addresses. In the context of the trust business, such mistakes can be fatal.

What can a trustee do to fulfil his duty to protect the financial privacy of his clients? We very well know that all e-mails can be intercepted and we also know that once an e-mail has been sent, this information is stored forever.

We also know that every firewall can be hacked and a number of cases have already happened. A huge industry mostly sponsored by governments all over the world specializes in finding ways of hacking information. Western countries do it but especially the number of people in Russia and China who are active in this domain are staggering. Illegal data collection becomes a big industry sponsored by governments worldwide.

The only real protection is that the trustee should carefully check what information he puts on his electronic data processor. A solution would be to never register the names of settlors and beneficiaries on the computer. It is also advisable to have a computer system which is not connected to any other system. E-mails should be handled from separate stations. It is true that this reduces efficiency but privacy in cases of trust is more important than high speed.

Define very clearly which communication can be done by electronic mail and which must be entrusted to post mail. Sometimes it is shocking how carelessly certain law firms and trust offices put names and information on e-mails. They can be intercepted.

Protecting data

There is another element of data security—cyber attacks. In the macro area, this will be a future form of war and we had to note in the past a few cases of cyber attacks of one country on another. However, such attacks can also affect private companies, including a trust office. Cyber attacks are not necessarily directed at big institutions such as governments, utilities,

and banks. Criminals or persons doing it 'for fun' can also target trust offices.

Potential indiscretion by clients

There is another danger which comes from the new media and especially the social media. Many people are very careless as to how they put information on themselves, their families, or friends on social media such as Facebook. This can also affect confidential information on trusts, foundations, or other structures for wealth preservation. This is something the trustee cannot control directly and it is therefore essential that the trustee is in good contact with the beneficiaries and makes them aware of the dangers that may result by making too much information public. It is consequently also necessary to define which of the members of the beneficial class and also at what age they can get which information. Here we come back to the role of the trustee as it has existed for centuries: To know his clients, their families, and their needs in depth and to be considered by them as a trusted advisor.

Never in history has privacy in general and specifically financial privacy been so frail as today. The excessive use and misuse of a wonderful new processing and communication system is dangerous. The duty to protect privacy is thus more important than ever and we must not forget that financial privacy is a human right. Financial privacy is not an issue of taxation and not an issue of rich people or criminal funding but primarily an issue of personal freedom.

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Financial privacy is a human right

Political risk for assets

This is a warning that should be given to trustees holding assets in the Eurozone. Property rights have

always been an important basis for the economic development and the social progress of the Western world.

In principle, private property was acquired, sometimes over generations, by a combination of work, which includes creativity and assumption of entrepreneurial risk on the one hand and a renunciation of consumption on the other. It is what we can call savings. We also know that private savings are essential for a sustainably healthy economy. They are used as capital for the economy.

The practice of most governments has been to spend way beyond their means and they still continue to run deficits. This has led to the present sovereign debt crises. A slogan, first adopted by left-wing politicians was 'let the rich pay'. This idea has in the meantime evolved. During the Cyprus crisis, the EU first suggested that 20 per cent of all bank deposits in Cyprus above a threshold of 100,000 Euros should be used to save the two bankrupt banks. This confiscation would have also hit the deposits at solvent banks. A clear breach of any law. The Cyprus Parliament fortunately decided against it. The bankrupt banks were wound up and then only the depositors at the bankrupt banks were the losers.

As it was, this idea did not die. A few months ago, it was taken up by the IMF's Ms Lagarde who suggested that 10 per cent of private savings, again over a certain threshold, could solve the problem of public debt. The German Bundesbank continued with this and recently proposed that the 'rich' in insolvent countries should pay a 'once-only' asset tax on cash, securities, and real estate. Yet again this asset tax would only apply over a certain threshold so as not to lose the support of the majority of the population.

It may be doubted that such asset taxes would remain 'once-only' as governments continue to run deficits. It can also be assumed that the 'once-only' asset tax would be in excess of 10 per cent. The figure of 10 per cent might be seen as the feeler in this respect.

It will be the duty of and a challenge for any trustee to try to protect the trust's or foundation's assets. Will

it be possible to legally protect trust and foundation property against these measures which contradict all principles of the rule of law and would normally be

considered as illegal? The right structure, the right practice, and the selection of jurisdiction will certainly be key.

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