



## TRUST SERVICES, S.A.

*Fiduciary and Corporate Services to  
Professional Firms, Institutions and Individuals since 1981*

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# OFFSHORE PILOT QUARTERLY

*Views and News on Matters Offshore*

### ***Dramas in the Bahamas***

The Financial Action Task Force (FATF) on money laundering, representing the Organisation of Economic Co-operation and Development (OECD), has expressed its satisfaction with the significant progress made by nearly all of the 15 jurisdictions placed on its blacklist since June of last year. However, the FATF, in welcoming the reaction and the promulgation of fresh money laundering legislation, is now concerned to see its implementation. 7 of the 15 jurisdictions were singled out for praise: the Bahamas, the Cayman Islands, the Cook Islands, Israel, Liechtenstein, the Marshall Islands and Panama. Each of the 7 jurisdictions is now being asked to submit implementation plans to the FATF for its review. These developments should be seen in a positive light and should be welcomed by responsible jurisdictions. But perhaps the FATF can help the UK with its money laundering problems as well? In the last issue of the Offshore Pilot Quarterly, the case of Sani Abacha, the deceased and disgraced dictator of Nigeria, was featured in relation to the apparent case with which his illicit monies flowed through the UK banking system. The UK's National Criminal Intelligence Service (a Home Office Agency) has revealed that fewer than 1 in 4 of the UK's 554 banks (a similar total to that of the Cayman Islands) had reported suspicious transactions in 1999. What is more, 78 per cent of the reports filed came from just 10 banks. The head of the National Criminal Intelligence Service has attributed the poor results to complex legislation which also has loopholes.

He also felt that policing standards were not up to par, commenting that he had "some reservations about the ability of law-enforcement agencies to carry out these specialist inquiries that need certain skills". If industrialised nations such as the UK have these problems, what pace of progress can one reasonably expect from less-developed countries? But facts are so often unimportant; it is always perceptions that count. As Mark Twain once observed in regard to reputation: "Once you have a reputation for being an early riser you can sleep in to noon every day."

Changes in the offshore corporate law in the Bahamas at the beginning of this year have created alarm in some quarters which is more in keeping with an amateur drama society. So much so that whilst in January last year, 3,368 International Business Companies (IBCs) were formed, only 781 were registered this January. One estimate suggests that an initial fiscal shortfall of about \$20 million could stem from the changes. The social costs, especially due to unemployment, can only be guessed at. The new law, inter alia, requires the identity of beneficial owners of IBCs in the Bahamas to be filed at the respective Registered Offices and for details of the directors to be recorded with the Registrar of Companies. Both requirements would most certainly not be seen as radical in either Panama or most other offshore centres. Conversely, and although on a tangent, the concept of brass plate banks (not staffed but represented by professionals, such as lawyers) which is allowed in the Bahamas, is considered

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to be imprudent by many offshore centres, including Panama. If there is a significant change in the IBC law it is that bearer shares – including those already issued – have now been banned. What has probably created much of the apprehension is not so much the reality but the perception (that word again) that the Bahamas has displayed too great an eagerness to co-operate with the OECD following the blacklist battering it has sustained. The withdrawal of bearer shares in the Bahamas will cause a stir and much will be written and said about the subject but those OECD bureaucrats who express triumph clearly cannot see that a hindrance, at best, has been created. This change is not a shattering blow to offshore confidentiality: shareholders, just like directors, can be nominees, so privacy can be achieved via an alternative route. The Chinese say that when the wall starts collapsing, 10,000 people rush to push it down. But the Bahamas is not Berlin and confidentiality is alive and well.

Meanwhile, perhaps the FATF could buy a few alarm clocks for those OECD members who are sleeping in to noon on the strength of their reputations.

### ***Flexing Muscles in Brussels***

Hypocrisy and harmony have joined forces as far as the OECD's approach to foreign tax regimes is concerned. Even Senator Hilary Rodham Clinton has written to the new US Treasury Secretary, Paul O'Neill, on the subject. She accuses the OECD of protectionism and regards its approach as a fundamental violation of sovereignty. Her views run counter to those of former President Clinton's administration as espoused by the former Treasury Secretary, Larry Summers, and his deputy, Stuart Eizenstat. Senator Clinton has referred to the centuries-old exploitation of lesser-developed countries by some of those nations which comprise the OECD and which, now that they are faced with tax competition, wish to invoke bully-boy tactics in retaliation. This contemptuous view is shared by Andy Quinlan, President of the Center for Freedom and Prosperity. He refers to "evil

bureaucrats" and he has already been thrown out of a meeting in Barbados at which OECD representatives attempted to placate the concerns of those Caribbean islands whose financial services are vital to their economic survival. This 6-foot, 250 lb. former amateur football player, has thrown his considerable weight behind helping the besieged jurisdictions and he has enlisted the aid of the prestigious Heritage Foundation, a conservative Washington think tank.

Whilst these offshore skirmishes and recriminations continue, there are clearly strains within the European Union over the question of harmonising taxes between member states. There is no mechanism in the European Union's rule book for getting every member to agree on a common taxation policy and, consequently, individual member states have adjusted their tax rates and concessions according to their own best interests. This has led to tax-cutting competition within the European Union and there are indications that the existing disagreements could become extremely unpleasant. The European Union Commission wants member states wishing to cut taxes to give their fellow members advance notice, but this implied pre-approval has little chance of acceptance. It should not be forgotten that the power to tax is at the very core of democratic accountability. In 17<sup>th</sup> century England the problem with state finances and parliament came, you might say, eventually to a head. The head in question belonged to King Charles I who lost his. Governments today may not seek solutions with an axe, but they will fight to protect national interests. This nationalism flies in the face of the OECD's arguments (backed by its European Union members) that offshore centres are the ones creating unfair fiscal imbalances. One cannot help but draw a parallel with some of the recent and enormous money laundering fiascos which have emanated onshore, not offshore, and yet the villain of the plot – as is the case with taxes – is still seen as being offshore.



Disagreements over income, corporate and capital gains tax within the European Union will intensify this year. In 1999 Ireland drew first blood by reducing its corporate profits tax to 28%. Germany has since promised to drop its corresponding rate to 25% over the next few years. The gauntlet has been picked up by France, Italy, Portugal and others. But the coup de grace is Ireland's fresh proposal to bring its corporate profits tax rate even further down to 12.5% by the beginning of 2003. Only Irish eyes are smiling over this but it should be appreciated that with most of Western Europe's monetary policy controlled by the European Central Bank, control over taxation is one of the few important tools left for individual member states wanting to lure investment and encourage business. Sound familiar? Europe's concern is shared by offshore centres in sunnier climes – except that loss of the tax competitive advantage threatens their very financial foundations. Ironically, many of the Caribbean offshore centres affected are vassals of the UK which now finds itself enmeshed in the tax harmonisation controversy. Now Frits Bolkestein, the European Union's Commissioner for the internal market, has presented a paper on tax policy in which he advocates not trying to harmonise tax systems and goes further by saying that, in his view, a "reasonable degree" of tax competition would be good.

It is the Year of the Snake in China. And so it also seems to be in Belgium with all the verbal, as well as written, wriggling and squirming which is going on at the European Union headquarters in Brussels. The European Union's recent summit in Nice, after 330 hours of negotiation, only confirmed the diversity of opinions held by the 15 member states. Not surprisingly, the 15 members were unable to agree that matters such as taxation should be taken out of the hands of national governments and placed under the voting control of the European Union. This is not surprising in any event because the European Union's main institutions – the Commission, the Council of Ministers and the European Parliament are

unpopular and have been charged with inefficiency and lack of transparency.

One former governor of the Bank of England once told an economic adviser: "Let me tell you that you are not here to tell us what to do but to explain to us why we have done it." So it seems with member states of the European Union as they continue to tussle over taxes and look to the Commission to convince the public that parity and not partisanship is the order of the day. No wonder many offshore politicians and practitioners are outraged over the onshore approach to their tax policies.

### *The Breach Boys*

Surfing is a great sport, whether it's on a surfboard or keyboard. But it can be dangerous. Websites are shopping windows for a company, but they are nothing more than icing, rather than the cake, for the site visitor. Let's not forget that Hollywood's production of *Gladiator* featured vast sets of ancient Rome with a cast of thousands but which were, for the most part, produced by digital deception. Slickness without substance, like icing on its own, is not very nourishing. This can lead to bad choices and, unfortunately, too many people fall prey to incompetent practitioners – especially when the subject is a matter of life and death. In this case I'm talking about wills, trusts and foundations. The administration of trusts, for example, is a veritable minefield for the uninitiated. Asset protection trusts look to external threats, but what about the internal one: the bad trustee? It might be right to agree with the legal historian, Francis Maitland, that the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence has been the development of the trust idea during the last 800 years, but with development has come complexity which demands trained trustees. As a wistful soul in Casablanca once realised, the fundamental things still apply as time goes by, so regardless of the myriad layers of administration, a trustee is charged with the duty of preserving the assets of the trust and acting in the best interests of the beneficiaries. Those



without any formal trustee training embark on a perilous journey indeed and those who employ them may well rue the day. It is my opinion that the risks become greater offshore where, firstly, many of those administering trusts are marketeers and not managers and, secondly, regulation is patchy. Even some of the more advanced offshore centres (Jersey in the Channel Islands comes to mind) are now only coming to grips with the regulation of trust companies.

If it is important enough to settle a trust, then it should be equally important to make sure that you choose the right trustee. Unless you have implicit faith in your professional adviser who is recommending a trustee, you should make a personal visit. It is true that opinions should be heard, but they should be weighed as well. Those positive or negative signals you get after an initial meeting are all-important. So are some of the questions you should ask, such as: "What are your qualifications and how much experience do you have?" You, as a layman, can be forgiven for thinking that a bare trustee is someone partial to nudity and that an express trust is quicker to form, but if the trustee you select agrees with you, then your assets

(especially after your demise) could be at risk – as could your trustee by committing breaches of trust. Here are some of the more common breaches which amateur trustees should be aware of:

- (a) Making an unauthorised investment.
- (b) Paying trust funds to the wrong person.
- (c) Taking an unauthorised fee or profit.
- (d) Improper exercise of a discretionary power.
- (e) Failure to supervise agents of the trustee.

So be careful when you are surfing the internet. Surfin' USA is fine, but don't trade the Beach Boys for the breach boys and if you do make that trip in search of the right trustee, remember that it's the people, not the place, that counts; that it's not plush carpets, but professionalism, that matters. And remember those questions about qualifications and experience I mentioned earlier? When asked, they have been known to remove the smile from the faces of some cordial offshore trust company executives because neither a website nor Hollywood can help with those answers.

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*Engaging an offshore representative is an important decision and we advise all persons to seek appropriate legal and tax advice from professionals licensed to render such advice before making offshore commitments.*

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