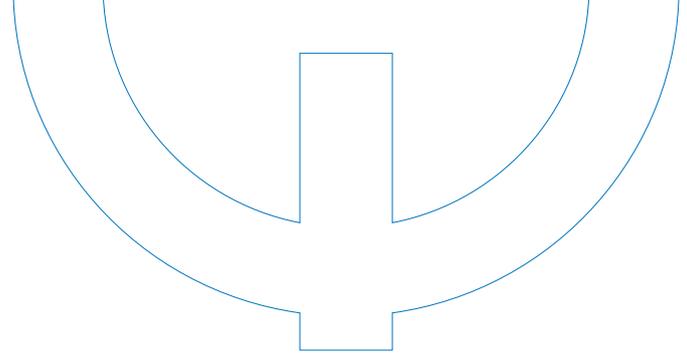


# unique

The newsletter of **aQUIVER**



## editorial



Diogenes, the ancient Greek philosopher, is famously known for two things. The first one was that he did not have to worry about the upkeep of his house; he literally lived in a ceramic jar. The second one was that he is considered, along with Antisthenes, the founder of “cynicism”, the cynic school of philosophers, advocating frugality and simplicity in life.

In literal terms, cynicism means “dog-like” and it has been contemporarily construed that cynics have a strong bite like dogs. In the wise words of Bernard Shaw, the power of accurate observation is commonly called cynicism by those who have not got it. In the, even wiser, words of Oscar Wilde, a cynic is someone who knows the price of everything and the value of nothing; so very true.

Of course, the establishment of a specific price for a service or a product is a complex process. In our article in page 3, we belabour on the aspects of transfer pricing; that is, fair pricing in transactions between related parties. However, what is most interesting to consider is the price of Euro against foreign currencies. The common European currency has sailed south of the parity level with the US dollar and devalued by nearly 15% compared to the rouble reaching an all-time low for the past five years; I presume the sanctions are not really that successful. It is unclear, if not doubtful, whether the Euro will appreciate in the near-term, given the limited appetite of the ECB in tightening monetary policy more aggressively and given the impact of sharp energy prices, the rising inflation (which nearly broke the 10% barrier in Europe in July) and the still disrupted supply chains in European economy. During this near-term though, a beautiful equilibrium has been achieved, making the (inexpensive) Euro an ideal tool for central European countries like Germany and, to a lesser extent, France to grow their exports and increase their current account surplus. At the same time, the loss of the value of the Euro allows southern European countries to continue selling off real estate at bargain prices to Arab sheikhs, Israeli fintech billionaires and Chinese magnates who perceive the (cheap) Euro as a modern version of the Italian lira or the Greek drachma and not as a contemporary Deutsche mark. And all this while ECB bankers continue to trouble themselves on how to save their common currency.

Coming to a full circle, and thereby going back to where this article started, one can not help but muse at the irony that the father of Diogenes was the equivalent of a central banker at his time; it is doubtful however that he was facing similar problems back in the day.

Have a pleasant reading

Pericles

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# Cyprus launches a register for ultimate beneficial owners

Cyprus has finally implemented the register of ultimate beneficial owners, in full conformity with the European Union's Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849).

The Register is maintained by the Registrar of Companies and Official Receiver, who is the competent authority to keep the beneficial owners register concerning companies and other legal persons.

The register was initially scheduled to be launched as early as January 2020 but difficulties and discussions over the way data should be accessed and revealed, have deferred that date.

The obligation to register a beneficial owner will apply to any legal entity, except for trusts that have no tax obligations in the Republic of Cyprus. The management of an entity must ensure the registration of the ultimate beneficial owner information.

## Definition of "Ultimate Beneficial Owner"

An ultimate beneficial owner of a company is defined as the natural person with more than 25% of direct or indirect ownership of shares or voting rights, except for publicly listed companies.

For trusts, the beneficial owners are the settlor, the trustees, the protector, the discretionary beneficiaries and potential beneficiaries, or any other natural person exercising ultimate control over the trust. No idea on how one can ascertain a "potential beneficiary"; doubt anybody else has any idea either.

If an ultimate beneficial owner cannot reasonably be designated, one or more natural persons with a senior management position should be designated instead.

Each entity must register at least one ultimate beneficial owner.



## Who will have access

Access will be **restricted** (emphasis added) to the competent regulators and supervisory authorities (being a large island, Cyprus has plenty of those), the Police, the Customs Department, the Tax Department and the Unit for Combating Money Laundering and Terrorist Financing (MOKAS). Ultimately, it will be accessible to any person or organisation that can demonstrate a legitimate interest, as set out in Fifth Anti-Money Laundering Directive, in the context of combating money laundering or terrorist financing and the access is limited to the name, month and year of birth, nationality, country of residence and the extent of the ultimate beneficial owner 's interest. I guess the word restricted is somewhat relative.

# Cyprus introduces transfer pricing legislation

Cyprus has introduced a detailed transfer pricing legislation, marking a new era in the country's company taxation system. The legislation is in effect from 1 January 2022 and it incorporates the transfer pricing guidelines of the Organisation for Economic Cooperation and Development (OECD).

## Introduction

Transfer pricing is the way tax law allocates income to related parties, whether these are individuals, companies or permanent establishments. The introduction of this piece of legislature serves as a backstop for the total lack of guidance that perplexed tax advisors for over 20 years.

## Applicability

The new transfer pricing rules apply to transactions between related parties, legal persons and individuals. For legal entities, the law provides detailed rules as to the meaning of the term "related parties", with the rule of thumb being that when one legal entity participates in the share capital of another legal entity through the direct or indirect holding of share of at least 25 per cent, the two parties are considered to be related.

## Requirements

The law provides for two types of requirements for tax residents in Cyprus. The first one is to submit a summary information table which includes intercompany transactions, general information about the group, the profile of the business and the transfer pricing method used. The second requirement is to prepare a transfer pricing study to justify compliance with the arm's length principle subject to a small size exemption. The small size exemption applies when the controlled transactions cumulatively, per category, do not exceed € 750,000 per tax year.



## Transfer pricing study

A key requirement of the law is to prepare a transfer pricing study. As the law explicitly incorporates the OECD guidelines, any transfer pricing study has to cross-reference the OECD guidelines, which currently are more than 700 pages long and updated regularly. Plenty of bed-time reading.

## Deadlines

The Transfer Pricing Study and the summary information table for a particular year should be prepared no later than the due date for submitting the taxpayer's Income Tax Return (TD4) for that year.

# Quis custodiet ipsos custodes?

It is common practice in the establishment of trusts for the settlor to appoint a protector, the latter being vested with the unfettered authority to oversee the trustees' actions. Two recent trust cases, one in Bermuda, the other one in Jersey, provide a useful and competing view on the scope of such authority. We will look at the latter.

## Background

The Royal Court of Jersey handed down its judgment in *Re Piedmont and Riviera Trust* in October 2021. This case involved an application by the trustees to the Court for direction on a number of matters. One of the issues was the extent of the role of the protector in the decisions of the trustees; was the extent expected to be a narrow or a wide one?

## Narrow vs wide view

The view of the Court was that the protector should have a broad extent in his involvement with the trust. He is to act in good faith in the best interests of the beneficiaries and, in pursuing this duty, the protector must have regard to the relevant facts and reach a decision which a reasonable protector could arrive at; the important thing being that it has to be his own decision. It is the role of the court to exercise a limited 'review only' function because it fulfils a judicial supervisory role (in terms of lawfulness and reasonableness) and does not act as a substitute neither of the trustee nor of the protector. The protector is appointed to a fiduciary office by the settlor and, had its role been confined to a narrow 'review only' function, equivalent to that of the court, its office would be effectively redundant.

## Jersey vs Bermuda

The Court considered in a postscript the recent decision of the Supreme Court of Bermuda which, interestingly enough, reached the exactly opposite conclusion. However, the Court declined to change its view for a number of reasons, such as the fact that a role restricted to a rationality review would leave the protector powerless to an undesirable extent and the fact that the appointment of a protector by the settlor envisages a far-reaching role that extends beyond the systematic consent to all but the most blatantly irrational decisions of the trustees.

## Protector role in decisions for distribution

The Court did point out that, in the context of a requirement for protector consent in the case of a distribution, a protector's discretion lay within a narrower remit than that of a trustee. It was noted by the Court that the protector is not the trustee and, as such, it is for the trustee and only for the trustee to reach such a decision on a distribution and not for the protector to impose it. As a result, a protector might often find itself having to consent to a decision of a trustee, on the basis that it is in the interests of the beneficiaries to do so, even though this would not have been the decision that the protector would have reached had it been the trustee itself. The Court also commented that it would expect the trustee and the protector to hold comprehensive, open and honest deliberations.

## Protector's entitlement to information and documents

In this specific case, and whilst considering whether to consent to the trustees' decision, the protector had requested a detailed explanation of the trustees' reasons for their decision, which the trustees did not initially provide. This raised the question of what information and documentation ought trustees supply to a protector.

The Court took the view that a protector owed fiduciary duties to the beneficiaries and in order to fulfil those duties, he must have access to such documents and information as were reasonably necessary for him to do so. To the extent that it is the trustees who were in possession of such information and documents, it was their duty to supply them to the protector and such duty might be enforced by the Court on the application of the protector.

## Practical implications

The Court noted that, should the 'narrower view' be favoured, it might occasion a number of practical predicaments such as instances of offshore trusts where the trustees are regulated, professional advisors in such a jurisdiction, unbeknownst to the settlor, and the protector a trusted personal friend. The role of the protector would therefore be pivotal to imposing supervision on the exercise of the trustee's power.

<sup>1</sup> In the matter of the Piedmont Trust and the Riviera Trust [2021] JRC 248 | <sup>2</sup> Par. 79 of the judgment. | <sup>3</sup> Re the X Trusts [2021] SC (Bda) 72 Civ