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1. INTRODUCTION

The fiscal privileges enjoyed by private foundations in Austria have recently become a topic of heated discussion once again. When Austria abolished the estate and gift tax, the question was raised of what was to be done about the capital transfer tax of 5% payable on the value of assets transferred into a private foundation and which was designed as a flat-rate estate and gift tax.

Upon the Austrian government's declaration that it intended to maintain this tax, donors turned to the public and claimed that in comparison to other taxpayers, they suffered tax discrimination. In response, the Austrian government decided to permit offsetting of the capital transfer tax against the corporate tax payable by the foundation. This was an unprecedented decision in Austrian tax history: that taxes which had been rightfully paid should be refunded. Moreover, in many cases, the payment of this tax had resulted in tax exemption of subsequent inheritance and gift transactions. Now, it would have been right and fair if normal taxpayers (who had also been subject to estate and gift tax in the past but had not been allowed to offset such tax against income tax) had held press conferences to complain about discrimination, too. Ultimately, the result of the intense debate was that the capital transfer tax rate applied to assets transferred into a private foundation was divided in half to 2.5%. By paying the capital transfer tax, the foundation acquires the right to accumulate capital gains on the disposal of relevant shareholdings, either tax-free or upon paying a reduced tax rate of only 12.5%. One tax case, in which disposal proceeds in the amount of EUR 600 Mio. were not taxed at all, was discussed in the media in the recent past. If the capital gains on this disposal had been subject to a corporate tax rate of 25%, the tax receipts would have exceeded the widely dreaded estate and gift tax had it still been in force.

This debate gives us reason to take a closer look at the issue of foundations und to question what fiscal and economic benefits taxation rules governing foundations in Austria have. It is obvious that these taxation rules result in considerable retortions from other countries, in particular from Germany, and create an image of Austria as a tax haven in the eyes of its EU partners. Now, the question is whether the supposed economic benefits of the tax advantages granted to foundations really make up for these inconveniences in the area of foreign policy.
When the Private Foundation Act and the accompanying rules were introduced in 1993, basically two arguments spoke in favour of their introduction.

- In inheritance proceedings where the heirs have no knowledge of economic matters, shareholdings held in large companies should not be divided, but remain under professional management;
- The tax framework should become attractive enough to re-attract capital invested abroad back to Austria and to prevent further capital outflows.

In many cases, the first argument cannot be completely refuted. However, to achieve this objective, the legislator only needs to create the appropriate civil law framework within the Private Foundation Act; there is no need for particular fiscal advantages.

The most important tax advantage enjoyed by private foundations is undoubtedly the tax exemption or reduced taxation of capital gains on the disposal of shareholdings. For the second argument to work, the same tax advantages would need to exist in other countries which are comparable to Austria in terms of legal security and political and monetary stability. The aim of this survey is to find out whether similar rules exist in other EU member states, Switzerland and Liechtenstein. After the empirical part of the survey, we will examine to what extent the fiscal disadvantages resulting from the non-taxation of capital gains on the disposal of shareholdings are compensated for by the beneficial effects, if any, on the national economy. For an overall assessment, the probability that asset management companies move abroad is of course significant, too. If it turns out that there is only a low probability that asset management companies move abroad (after all, other comparable countries are no lands of milk and honey either) and that the advantages for the Austrian economy are less significant than the tax advantages granted, Austria would have to reconsider this instrument as a whole.
For it is obvious that the “bad boy” image in fiscal matters that Austria increasingly enjoys in the European Union, an image enforced by the strict bank secrecy vis-à-vis tax authorities and the abolition of nearly all wealth taxes (while labour remains heavily taxed), does not pay in the long term. In particular the current economic crisis that will require a huge deployment of public funds (which, at the end of the day, will need to be financed by tax money) does not permit us to continue to pursue a beggar-my-neighbour policy, but obliges us to find new and common taxation standards in the EU.

2. AUSTRIA

2.1. Civil Law Framework

General Information

In Austria, there are in principle two different types of foundations: public benefit foundations and foundations for private purposes. Only the establishment of public benefit foundations is governed by the Federal Foundations and Funds Act (Bundesstiftungs- und Fondsgesetz) [1] and nine provincial foundations and funds acts. The Austrian Private Foundation Act (Privatstiftungsgesetz, PSG)[2] enabled the establishment of foundations for both private and public interest, charitable or religious purposes. Under this section, we will primarily cover the so-called private foundations.

The Private Foundation

A private foundation is a legal entity having a legal personality in its own right; it can exercise rights and assume duties. However, in contrast to other legal entities such as companies or associations, private foundations have neither a proprietor nor members. It is the private foundation itself that owns the assets donated. While public benefit foundations have to pursue exclusively public interests, this is not the case for private foundations, and the majority of Austrian private foundations do not pursue any purposes of common interest at all. In fact, the reason for setting up a private foundation is in general the provisioning for family members or other beneficiaries. There are of course also private foundations in Austria that pursue public utility purposes, but this is certainly not the case for the majority of private foundations.

The Establishment of the Private Foundation

Private foundations are set up by means of drawing up a declaration of establishment ("Stiftungserklärung") and come into being upon entry in the Company Register. The private foundation must be endowed with assets of at least EUR 70,000. At the time of establishment, this amount has to be effectively available.

The will of the founder (Stifterwille) is laid down in the declaration of establishment, and it is the responsibility of the Board of Directors (Stiftungsvorstand) to ensure und control that the purpose of the foundation set forth in the declaration of establishment is observed. The declaration of establishment consists of a foundation deed which has to be drawn up under Aus-

[1] BStFG, Federal Law Gazette 1975/11

[2] PSG, Federal Law Gazette 1993/694

trian law. The foundation deed must include some minimum information such as the endowment of the foundation with assets, the purpose of the foundation, the name of the founder, the beneficiaries, the name of the private foundation, its registered seat and the period for which it is established. The foundation deed has to be deposited with the Company Register and is accessible to the public. In many cases, the foundation deed is supplemented by a so-called appendix to the foundation deed (Stiftungszusatzurkunde) which is not accessible to the public and may contain more detailed information on the above-mentioned points, or additional rules. A foundation can be established for a definite or an indefinite period of time. Private foundations whose main purpose is the provisioning of natural persons can be set up for a maximum period of time of 100 years; however, the ultimate beneficiaries may decide to extend this period by another 100 years. The bodies which are entrusted with pursuing the purpose of the foundation are the Board of Directors (Stiftungsvorstand), the Auditor of the Foundation (Stiftungsprüfer) and, in specific cases, the Supervisory Board (Aufsichtsrat).[3]. Moreover, the founder may determine additional bodies for the protection of the foundation purpose. The responsibility of the Board of Directors is the external representation of the private foundation and, at the internal level, its management. In the exercise of its duties, the Board of Directors has to ensure that the purpose of the foundation is observed. The Board of Directors also has to keep the books of the private foundation. In this context, the provisions of the Company Law (Unternehmensgesetzbuch, UGB) have to be observed. Moreover, the report on the situation of the foundation must include information on the progress made in the pursuit of the foundation purpose. The Foundation Auditor has to audit the annual accounts including the report on the situation of the private foundation. An auditor's report is required by law. The publication of the annual accounts, however, is not mandatory.

The foundation documents also have to set forth how the distributions to the beneficiaries are to be effected. The Board of Directors has to ensure the implementation of these documents.

2.2. Tax Treatment of Private Foundations

As a legal person, a private foundation is in principle subject to corporate income tax. The fiscal treatment of payments to the beneficiaries is governed by income tax law. While the fiscal treatment of private foundations is governed by both corporate tax law and income tax law, a great number of special provisions exist. This situation ultimately results in a special tax status for the private foundation which entails considerable advantages. Moreover, there are special rules for endowments to private foundations which need to be considered, too. In the following, we want to describe the fiscal impact of donations to private foundations and explain what the regular taxation looks like at the level of both the private foundation and the

[3] A supervisory board has to be appointed if the private foundation employs more than 300 staff or if the number of employees with companies and cooperatives domiciled in Austria in which the private foundation has a substantial shareholding exceeds 300. Details are governed by Article 22 Private Foundation Act.

beneficiaries. Moreover, we will discuss the consequences that the liquidation of a private foundation may have in terms of taxation.

Fiscal Treatment of Endowments to a Foundation

When the estate and gift tax was abolished in Austria on 1 August 2008, the legislator also set up new rules for the fiscal treatment of endowments to private foundations. Donations by the founder or third parties to a private foundation are subject to a so-called foundation entrance tax (Stiftungseingangssteuer) of 2.5%. If a foundation is endowed with Austrian land, the foundation entrance tax is increased by 3.5 percentage points to 6% in total.

The foundation entrance tax applies if at the date of the donation, the donor (founder) is domiciled or usually resides in Austria or if the foundation has its registered seat or management there. In principle, the value of the donation minus debt and charges related thereto serve as the assessment basis for the foundation entrance tax. Donations of agricultural or forest property, Austrian land and premises are subject to a specific rule according to which the rateable value of these assets multiplied by three forms the tax assessment basis. The tax assessment basis for the donation of other assets to foundations is determined according to the provisions of the Estate and Gift Tax Act in connection with the Austrian Valuation Act (Bewertungsgesetz). This means that the following valuation rates are to be applied to assets which are typically bestowed upon foundations:
Shareholdings in companies such as participations in a partnership are to be reported at their current value. For securities and shareholdings in companies, the ordinary value (i.e. the value at which the securities or shareholdings could be sold) forms the assessment basis; if a market price can be determined, this price is relevant. If no market price exists, the value of the security or shareholding must be derived from historic data; if this is impossible, their value has to be determined on the basis of the expected development of earnings and capital. Capital investments which are subject to capital income tax (such as savings books) are to be reported at their nominal value. Other movable assets, cash or receivables need to be stated at their current value.

In the event of endowments causa mortis (in the context of foundations, this means that the foundation is established only upon death of the founder) or subsequent endowments upon the death of the founder, capital investments which are subject to capital income tax and shareholdings in companies (provided that the stake in the companies amounts to less than 1%) benefit from tax exemptions.

Current Taxation of Private Foundation

As a legal person, the private foundation is subject to corporate income tax. Due to special provisions, which are essentially set forth in Article 13 Corporate Tax Act (Körperschaftsteuergesetz), private foundations usually benefit from a more favourable tax treatment than companies (stock companies, limited liability companies). Although income from private

foundations is generally subject to a corporate income tax of 25%, many exceptions exist and lead to a situation in which particular types of income are not subject to any tax at all or are subject to a reduced tax rate (interim tax) of 12.5% only. The Austrian taxation rules for private foundations provide for another particularity which has far-reaching consequences: In contrast to corporations, private foundations can realise operating profits and other income; as a result, different accounting methods are used for the determination of profits. In practice, this means that the profits of the private foundation are only determined according to the accounting method of the “Betriebsvermögensvergleich” (comparison of the assets of a company in two subsequent years) or financial accounting, which is mandatory for corporations, if the private foundation has realised income from a trading activity. As a rule, private foundations rarely realise income from a trading activity; in most cases, the income of private foundations consists of income from capital assets, rent and lease or agriculture and forestry. For these types of income, however, a private foundation only needs to prepare a simple statement of revenues and expenditures (Einnahmen-Ausgaben-Rechnung) in order to determine taxable profits.

In most cases, income from capital assets makes up the largest part of the private foundations’ income. With regard to the fiscal treatment of income from capital assets, there are particularities for private foundations. As a general rule, equity income from domestic or foreign companies (basically profit distributions from stock corporations, limited liability companies or comparable corporations that may exist in other countries) is tax-exempt at the level of the private foundation. Income from bank deposits in Austria or abroad, income from debt securities issued by domestic entities and income from investment funds is subject to taxation also in the case of private foundations; however, private foundations benefit from a reduced tax rate of 12.5%. Only interest on loans, typical silent partnerships and donations by other private foundations (provided that these foundations does not act as founders), discounts earned, and payments by capital insurances with a maturity of more than ten years are subject to a tax rate of 25%.

Additional advantages exist for private foundations concerning the disposal of shareholdings. Here, a distinction has to be made between two different cases: If a shareholding in a company is sold within the one-year speculation period (period between the acquisition and the disposal), equity income related to this shareholding is subject to the regular rate of 25% independent of the size of the stake in that company. If the stake in the company exceeds 1%, and provided that the shareholding is sold after the one-year speculation period, the equity income related to the shareholding is subject to a reduced tax rate of 12.5% only. However, under particular circumstances, it is possible to avoid taxation at a reduced rate. If the shareholding in a company exceeds 10%, hidden reserves uncovered at the disposal of shareholdings can be transferred to other shareholdings that were acquired in the same financial year. If no shareholding was acquired in the year of the disposal, the private foundation may set up a tax-exempt reserve. Within a period of twelve months, this reserve may be transferred to such shareholding acquired, if applicable. If no shareholding is acquired within the twelve-

month period, the reserve has to be realised and is then subject to the reduced tax rate of 12.5%.

However, at the level of the beneficiaries, who are normally subject to a capital income tax of 25%, the above-mentioned reduced tax rate of 12.5% is taken into account; thus, the reduced 12.5% rate has the effect of an advance payment of capital income tax.

To conclude, we note that in Austria, taxation is still very favourable for private foundations. On the one hand, particular capital income is completely tax-exempt at foundation level, and on the other hand, another major part of capital income is subject to a reduced tax rate of 12.5% only, and, what is more, this tax is offset against the capital income tax when this becomes due. Moreover, due to the possible transfer of uncovered hidden reserves to newly acquired shareholdings, income from the disposal of shareholdings is de facto tax-exempt. In Austria, the combination of these rules leads to a very favourable fiscal treatment for private foundations, in particular when income is not immediately distributed to the beneficiaries, but retained in the foundation. As a result, private foundations are much better off in terms of taxation than natural persons who realise the same capital income and do not benefit from a private foundation interposed between them and the tax authorities. Also in comparison to corporations, the private foundation offers some advantages. While equity income from shareholdings is in principle also tax-exempt at the level of corporations, this does not apply to other types of capital income which remain taxable as a general rule and are subject to the regular corporate income tax rate of 25%. In addition, the rules governing the favourable treatment of equity income from shareholdings are much stricter than for private foundations.

Taxation of the Private Foundations Beneficiaries

Payments by the private foundation to the beneficiaries are considered as income from capital assets at the level of the beneficiaries and in principle subject to a capital income tax of 25%. The capital income tax is to be retained by the foundation upon distribution and paid to the tax authorities. The capital income tax is to be considered as a final tax. Under certain circumstances, the beneficiaries may claim in their tax declaration that only half of the average tax rate be levied on their income. Moreover, in many cases, the capital income tax rate of 25% is applied only if the beneficiary is fully tax-liable in Austria, i.e. if he is domiciled or usually resides in Austria. Payments to beneficiaries who are not fully tax-liable in Austria are often completely tax-exempt due to particular provisions in many double taxation agreements; as a result, no capital income tax is levied on the payments at the beneficiaries' level in Austria. The abolition of estate and gift taxes in Austria on 1 August 2008 has also resulted in significant changes with regard to the taxation of payments by foundations. Until 31 July 2008, payments of all kinds were subject to a capital income tax in the amount of 25%, whether these payments were distributions of profits or distributions of assets (Substanzausschüttungen). Only in the case of one revocation of a foundation, a tax relief in the amount of the value of the assets donated to the foundation as of the date of their donation (Stiftungs-

eingangswert) was at the request of the donor granted upon repatriation of the assets. In the past, these rules concerning the taxation of donations were (regardless of the type of the donations) often heavily criticised by donors, foundations and beneficiaries alike. Manifestly, these critical voices have been loud enough to bring about an amendment of the law. The new Gift Notification Act (Schenkungsmeldegesetz) stipulates that distributions of assets related to assets donated after 31 July 2008 remain tax-exempt as long as these distributions of assets are exceeding the balance sheet profit determined pursuant to company law plus retained profits (which are reflected in the revenue reserves and the hidden tax reserves related to the assets donated at the beginning of the fiscal year). Distributions of assets are only tax-exempt if a so-called evidence account for tax purposes (Steuerliches Evidenzkonto) is kept. For the tax exemption the distributions have to be covered by the evidence account

Fiscal Consequences of the Private Foundation's Liquidation

The Gift Notification Act has also resulted in a number of taxation changes in connection with the dissolution of private foundations. In principle, payments related to the dissolution of a private foundation are considered as income from capital assets and are therefore subject to capital income tax in an amount of 25%. However, if assets are repatriated to the donor upon the dissolution and provided that the donor has revoked the foundation, the taxable amount is reduced by the amount of the value of the assets donated to the foundation as of the date of their donation (the value of these assets is determined on the basis of the evidence account for tax purposes). However, the donor may only revoke the foundation if he has explicitly reserved the right to do so. The right to revoke the foundation must be laid down in the declaration of establishment.

In other respects, the general rules on the taxation of donations apply to payments in connection with the liquidation of private foundations. As a result, donations are in principle – independent of their nature – subject to capital income tax in the amount of 25%. If the donations consist of assets donated after 31 July 2008, distributions of assets remain tax-exempt as long as these are exceeding the balance sheet profit determined pursuant to company law plus retained profits (which are reflected in the revenue reserves and the hidden tax reserves related to the assets donated) and, once again, provided that an evidence account for tax purposes is kept at the beginning of the fiscal year and that the distributions are covered by the evidence account.

2.3. Conclusion

Austria remains very attractive as a country for private foundations that manage significant assets. This is attributable to two factors: On the one hand, it is relatively easy to establish a private foundation in Austria; and on the other hand, the fiscal framework is still very favourable. With the abolition of the estate and gift tax with effect on 1 August 2008 an important reason to establish a foundation ceased to exist. However, private foundations still offer advantages in terms of income taxation which cannot be denied. While the so-called foundation

entrance tax continues to apply upon the donation of assets to the benefit of the foundation, the initially fixed rate of this tax, which was meant to replace the estate and gift tax, was halved from 5% to 2.5%. In comparison to the advantages still offered by private foundations, the foundation entrance tax seems moderate indeed, and in practice, it will not prevent prospective founders from establishing a private foundation in Austria. Foundations seem to remain very attractive as they offer far-reaching advantages compared to those enjoyed by individuals or corporations. Given the tax-exemption of equity income from shareholdings at the level of the foundation in many cases and the reduced tax rate of 12.5% applicable to the majority of the remaining capital income, foundations offer considerable tax advantages if profits are retained in the foundation. In contrast, individuals realising the same income are in principle immediately subject to a capital income tax in the amount of 25%. At the level of foundation beneficiaries, the capital income tax has to be paid only upon effective receipt of payments; and any reduced tax rates levied at the level of the foundation are offset against the capital income tax to be paid by the beneficiaries. Moreover, in many cases, private foundations provide some possibility to achieve virtual tax-exemption for capital gains on the disposal of assets. This is not possible for individuals having realised comparable capital gains.

At the end of 2007, there were approximately 3,000 private foundations in Austria, with estimated assets of EUR 60 billion.[4]

[4] Der Standard, 18/12/2007, p. 17 et seq.

3. BELGIUM

3.1. Civil Law Framework

General

Foundations were introduced with the law of June 1921 under the term „institution for public utility“ exclusively for philanthropic, religious, scientific, artistic or educational purposes within the framework of the Association and Foundation Act (*Vereins- und Stiftungsgesetz* - VStG). The institution of the private foundation was not introduced until 2003.

Since 1921, 110,000 legal persons were formed under the Association and Foundation Act, out of which roughly 300 were foundations for public utility. More than one half of these were founded after 1980. The remaining legal persons are non-profit associations; current statistics on private foundations are not available[5].

The entire (book) value in the foundations amounts to approximately EUR 550,000,000, with 85% belonging to the top 15 foundations [6]. Expenses for subsidies, own programs and administration amounted to a total of approximately EUR 150,000,000 in 2001. 92% of total expenses are attributable to the top 15 foundations.

Establishment

The foundation can be established by a natural or legal person. Due to the objective prohibition of dividend distributions, the foundation may not create any material benefit for the founder, the managing directors or a third party. Material benefits may be granted to third parties if the granting of such benefits serves the purpose pursued or if the public utility purpose[7] is not undermined by doing so.

Belgium has stricter publication requirements than for example Liechtenstein; thus their significance is also lower. The concept of publicity serves to protect third parties, in particular the creditors of the foundation and the donors. “Large[8] “ foundations are subject to additional

[5] Cf. Theisinger (2006), p. 1.

[6] Cf. Develtere et.al. (2004), p. 8.

[7] Public utility purpose as defined by law: sustaining family members in need of provision, maintenance of an art collection, development aid for a region, preserving the family character of a business or the integrity of an inheritance.

[8] Large foundations are foundations with an average of 50 employees and that realise an income of more than EUR 6,250,000 and a net annual result of EUR 3,125,000.

control by means of an external audit. Private foundations with assets of more than EUR 25,000 must deposit their financial statements at the Belgian national bank.

Dissolution of a foundation is conducted under the control of the court; this rule intends to prevent the misuse of private foundations for personal interests. Dissolution of a foundation occurs by court decision and as a result of an application filed by the founder, its successor, the managing director or the public prosecutor's office pursuant to Article 39 of the Association and Foundation Act, irregardless of whether the termination was originally set forth to take place upon the expiration of a specified period of time or upon occurrence of specified circumstances (e.g. fulfilment of the purpose) [9].

Belgian law does not explicitly use the term of the "foundation", but the corresponding public constructions fulfil the characteristics of a foundation. A foundation is an institutionalised, private (even if it is in public ownership) and self-organised entity with legal personality that pursues non-profit purposes; it can distribute funds for specific purposes to the benefit of the public.

Prior to the establishment of the foundation, the government verifies whether requirements concerning the purpose of the foundation are met. A capital paid in of EUR 1 million is not a statutory requirement but is required by the Ministry of Justice. Usually, the registration of the foundation and the preparation and deposit of the foundation documents are made by a notary. The costs for publication amounted to EUR 139.03 in 2007; moreover, a one-time fee in the amount of EUR 25 has to be paid for the registration. For every foundation, a file which is forwarded to the Company Registry is opened at the Commercial Court. If real estate is entered into the foundation, this transaction must be entered in the Mortgage Registry; for this proceeding, a fee is charged. When these steps have been completed, the creation is published in the Belgian Official and Law Gazette.

Since the amendment of the applicable laws on 1 July 2003 the Belgian legislation recognises private foundations. Previously, only what was called the "institution for public utility" (now "public utility foundation") existed. Pursuant to Article 27 Association and Foundation Act, a public utility foundation is characterised by philanthropic, philosophical, religious, scientific, artistic, educational or cultural goals. A foundation is not permitted to make profit for itself although engagement in economic activity is not prohibited if the profits largely serve the non-profit goal of the original foundation purpose. The main motive for allowing the establishment of private foundations was, on the one hand, to achieve certification of securities (analogous to the Dutch "administrative office") [10], and, on the other hand, to facilitate provision for families with disabled children. When the foundation is set up, the principle according to which the foundation assets must not serve the interests of the founder is to be observed.

[9] Cf. Theisinger (2006), p. 5.

[10] Cf. ibid, p. 13.

The founder has no influence on the administration of the assets nor a share in the foundation assets, but receives a right of (co-)determination. Provisions can also be made to ensure that after achievement of the foundation purpose, part or all of the total assets go back to the founder(s). In accordance with Article 28 of the Association and Foundation Act, the private foundation must have its registered seat in Belgium. If the registered seat is moved abroad, this automatically results in the foundation being wound up if the legal system of the country into which the foundation's registered seat is to be moved does permit such a transfer.

The deposit of assets with the foundation is considered a gift if no or only minor consideration is given. In this context, it has to be noted that under the law of succession, gifts may have considerable consequences with regard to the bequest.

The foundation's statutes must already contain provisions for the use of the foundation assets upon dissolution. In any case, the assets must serve a purpose which is not related to personal interest. In case that the donor is to receive the originally endowed asset upon achievement of the purpose, this must also be stated in the foundation statutes.

Disclosure Requirements

In general, the strict reporting requirements in accordance with Article 32 Association and Foundation Act must be adhered to. The obligation to keep books and to prepare annual financial statements depends on the size of the foundation. If two of the following thresholds are exceeded, the strict regulations with regard to accountability and control mechanisms are applicable:

- Annual average of 5 employees
- total income of more than EUR 25,000
- Assets according to annual financial statement of more than EUR 1,000,000

Foundations that do not meet these requirements are subject to a simplified system. Private foundations with an income of or exceeding EUR 25,000 must deposit their balance sheets with the Belgian national bank[11].

Types of Foundations

- **Foundations of public utility (instelling van openbaar nut)**

This is the oldest form of foundation. It distinguishes itself from the private foundation in particular through its goal of pursuing a philanthropic, philosophical, religious, scientific, artistic, educational or cultural purpose. While supervision of public utility foundations is not obligatory, the tax authorities make inquiries into the nature of the non-profit activities and dona-

[11] Cf. Kocks (2007), p. 687 et seq.

tions and examine whether the major part of the income is given to charitable institutions. The stricter approval process further distinguishes this type of foundation from the private foundation.

- **The Belgian „administrative office“**

This private foundation for the certification of securities was created on the basis of the Dutch model.[12] It enables ownership rights to securities to be divided with the result that the assets and membership rights to one and the same security are in multiple hands. This so-called administrative office is involved in the process and issues the certificates. Thus, the securities are uniformly managed and offer management a protection mechanism against hostile company takeovers. This type of private foundation has been particularly criticised because the requirement of an ideal purpose is not met with the administrative office, which is operated according to economic principles.

- **Foundations not subject to the Association and Foundation Act**

This category includes foundations for the benefit of public education with the main task of granting scholarships. University foundations or foundations under administrative law are also included in this group.

In Belgium, foundations with an artistic, religious or scientific purposes („public utility foundations“) cannot be established unless their capital amounts to EUR 1 million. Private foundations do not have to meet this minimum capital requirement, nor are they subject to the strict supervision provisions that exist for public foundations.[13]

3.2. Tax Treatment of Foundations

3.2.1. Taxation upon establishment

Registration fee

A one-time fee of EUR 25 is charged upon registration. Taxation of the transfer of assets to foundations depends on the nature of the transaction from a legal perspective.

- An acquisition tax of 10% in Flanders and 12.5% in Wallonia and Brussels Capital is levied on **real estate transfers without consideration**. The tax is based on the purchase price. The transfer of movable goods against consideration is not taxable. The transfer of real properties located outside Belgium is subject to the flat fee of EUR 25.

[12] Cf. ibid, p. 690.

[13] Cf. http://www.efc.be/cgi-bin/articlepublisher.pl?filename=BG-SE--G-3.html

- **Deposits against consideration**, such as the transfer of shares to a foundation – "administrative office" – are subject to a one-time fee of EUR 25. The consideration of the donors consists in the certificates issued by the foundation.
- In the case of **deposits without consideration**, clarification must be made on whether or not the transfer is a gift. In contrast to a gift, there is no "donative intent" (*animus donandi*) in connection with a deposit without consideration on the part of the donor. In the regions of Wallonia and Brussels Capital, a general fee of EUR 25 is charged on the deposit without consideration of both movable and immovable goods.

Gift tax

The gift tax makes a clear distinction between the donor's assets and the assets of the foundation[14]. The foundation is thus liable for the payment of the gift tax. In Flanders, the tax rate for gifts to private foundations is 7%. Gifts from an association or a public utility foundation are charged with a flat fee of EUR 100.

Gifts to public utility foundations are taxed at 6.6% in Wallonia and Brussels Capital and at 7% in Flanders (Article 140 of the Belgian Transaction Tax Act). It is possible to avoid the gift tax by means of certifying the gift abroad, making hand to hand gifts or including a retraction clause in the foundation statutes when establishing the foundation. Such a clause ensures that upon achieving the foundation's purpose, the assets go back to the donor.[15]

Pursuant to Article 33 Association and Foundation Act, any gift of more than EUR 100,000 must be approved by royal resolution. This amount is adjusted annually. The general formal requirements are also valid for gifts.

The donor may deduct gifts of a value exceeding EUR 25 from his or her taxable income if the foundation serves a purpose that falls in the scope of Article 110 in connection with Article 104 of the Belgian Income Tax Act. This is for instance the case for foundations with cultural activities or serving the purpose of scientific research[16].

Inheritance tax

Legacies of foundations are subject to inheritance tax, which is based on the value and the composition of the bequest. As a rule, the tax rate for third parties is applies. In Flanders, a tax rate of 8.8% is levied upon legacies of public utility foundations and private foundations according to Article 59 of the Belgian Inheritance Tax Law.

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[14] Cf. ibid, p 16.

[15] Cf. ibid, p. 16.

[16] Cf. Kocks (2007), p 688.

Legal persons engaged in a non-profit activity, legal estates and associations are subject to an annual tax rate of 0.17% in lieu of inheritance tax if their assets amount to more than EUR 25,000.

In connection with the establishment of a foundation upon death, the inheritance regulations of “reduction” and “restitution/allowance” are to be considered. Endowments may not amount to more than fifty percent of the assets if the endower leaves behind one child; one third if the endower leaves behind two children and one fourth in the case of three or more children. Relating to spouses endowments may correspond to the full amount to the assets.

3.2.2. Current taxation

Taxation of the Foundation

Pursuant to Article 150, an annual amount of 0.17% is to be paid, as a tax compensation for the inheritance tax, on the entire property of the foundation (with the exception of securities that the foundation holds in own trading companies). In accordance with Article 220 of the Belgian Income Tax Act, the foundation is subject to taxation for legal persons with its income. The tax assessment basis is composed of the following forms of income:

- **Income from imoveable assets**

if the real property is used commercially, the net rental is to be taxed on the amount that exceeds the indexed cadastral income. The net rental corresponds to the gross rental less the rental costs (flat rate of 40% for developed properties or 10% for non-developed properties). The applicable tax rate amounts to 20 %[17]. If the real property is not used commercially, only land and building tax is levied.

- **Income from moveable assets and capital**

is subject to withholding tax at source which has the effect of final taxation for the recipient (15% or 25% depending on the type of income).

- **Income from „diverse sources“ and „non justified payments“**

This includes the added value realized in the sale of properties, which is taxed at a rate of 16.5% or 33%. A tax of 309% may be levied for payments the recipients of which are not disclosed to the financial authorities; these payments also include unjustified salaries and remuneration payments.

Taxation of the administrative office

In accordance with Article 181 of the Income Tax Act, different rules may apply to foundations that are operated as administrative offices; these are treated as legal persons for tax

[17] Cf. ibid, p. 696

purposes if certain conditions are met. In this case, the foundation must comply with the regulations on certification and pursue its activity without the aim of making profit; moreover, the dividends must be directly assigned to the certificate holders based on the size of their shares.[18]

Application of corporate taxation

In the case of extensive commercial activity of the foundation, its income may be subject to corporate tax of 33.99% applicable to domestic companies.

Certification

Dividends held in the foundation assets in the framework of the activity of securities certification are not included in the tax assessment base as these are directly attributed to the certificate holders in accordance with the principal of fiscal transparency. In this case, the issuer of the certificates pays the final withholding tax at source levied on the dividends directly to the tax authorities.

For certificate holders, the income from the disposal of certificates is tax-exempt (in the case of companies). The same applies to private persons; however, under certain conditions, their income from the disposal of certificates may be subject to taxation under the category of "Miscellaneous income".
Income from certificates is considered as dividends at the level of a company; as a result of arrangements for parent and subsidiary companies, it is tax-exempt to the extent of 95%.

3.2.3. Dissolution

Dissolution of a foundation occurs upon application by a founder or its legal successor, the managing director, the public prosecutor's office in accordance with Article 39 Association and Foundation Act after a court decision, regardless of whether or not the termination was originally provided for upon expiration of a period of time or occurrence of certain circumstances (e.g. fulfilment of the purpose). [19].

The dissolution occurs when the conditions defined in the statutes are met or through court decision if the foundation is no longer able to perform its activities. The court appoints liquidators to distribute the assets. If this is not possible, the government is responsible for undertaking a distribution that comes closest to the original purpose of the foundation. However, the statutes should contain a provision which precisely defines the proceedings in the event of dissolution.

[18] Cf. ibid, p. 697.

[19] Cf. ibid, p. 692 et seq.

The distribution of assets to the donors results in no taxes levied; it is merely a form of ownership transfer subject to a general fee of EUR 25. If the foundation is subject to corporate tax, a tax of 10% will be levied on reserves paid out to donors upon dissolution.

3.3. International Context

The Belgian International Private Law is based on the company seat theory, which means that the legal capacity of a foundation is judged in accordance with the law of the country in which the registered office is located. In determining which domestic law is applicable, not the registered seat set out in the statutes is relevant, but the place where the business activity is actually performed. A foundation relocated from abroad to Belgium is strictly subject to Belgian law.

In Belgium, abroad-based foundations are subject to the same reporting regulations and supervision as foundations established under Belgian law[20]. Tax advantages are listed in Article 104, which apply under the following conditions:
The beneficiary must have legal capacity under Belgian law.
The foundation may not be aimed at profit-making (neither for the benefit of the founder nor for that of its members).
The foundation must engage in special activities: scientific, cultural, environmental activities or activities for the benefit of developing countries, disabled, elderly or needy people or victims of natural disasters.
The general management costs or administrative costs may not exceed 20% of the total foundation resources. Public approval is granted for 3 years at a time.

3.4. Conclusion

Generally, it can be said that the private foundation in Belgium is not yet developed very far. The statutory regulations in the Association and Foundation Act are not always precise and clear.[21] (For Kocks&Partners2006, it was not possible to comprehensively evaluate the actual importance of private foundations).

- Given to the strict reporting and supervisory regulations and the right of third parties to inspect the files of foundations, Belgian foundation law does not offer the same global conditions as Liechtenstein. Private foundations primarily serve the certification of securities.

[20] Cf. ibid, p. 694.

[21] Cf. Theisinger (2006), p. 19.

- In the event of a transferral of assets to a foundation, a creditor may engage in oblique or indirect action (*action oblique* / *indirekte vordering*), which allows a creditor to exert, in the name of its debtor, the rights of the debtor if the debtor refuses to exert them.
- In general no major tax advantages for establishing a foundation exist.
- While earnings realised by public foundations are tax-exempt, capital income and gains from the disposal of companies or shareholdings are subject to taxation.
- Individual donors may deduct their contributions up to a maximum of 10% of their total net income or, in absolute terms, up to a maximum of EUR 250,000. Corporate donors may deduct a maximum of 5% of their gross income but may not exceed the maximum limit of EUR 500,000.
- Limitations and requirements/preconditions
  According to applicable law, the government must supervise all public utility foundations with assets exceeding EUR 10,000. A draft law suggests that this amount be increased to EUR 100,000.

The government supervision includes:

- Approval of statutes
- Annual financial statements and budgets must be published (in the Belgian State Gazette)
- Endowments exceeding EUR 10,000 are subject to approval by the government
- The government has the right to determine whether a foundation still fulfils its purpose
- The Belgian Ministries of Finance and Justice control and/or supervise the foundations and may apply sanctions (including their liquidation).

In Belgium, there is a strong protection of creditors and heirs in connection with the transfer of the donor's assets to a foundation. There are no mixed foundations (foundations pursuing a purpose other than a public utility purpose to an extent of more than 50%).

4. GERMANY

4.1. Civil Law Framework

The German foundation is, as the foundation in many other countries, an institution that can be traced back to the Middle Ages and by means of which assets of the founder are transferred to a foundation in order to maintain these assets permanently and to use the income generated by them for a defined legal purpose.
The majority of German foundations are established under private law and predominantly serve public utility purposes. There are also foundations created under public law (this is often the case of museums). The legal basis can be found in private law, which is regulated in the German Civil Code (Bürgerliches Gesetzbuch, BGB).

4.1.1. Establishment of a Foundation

A foundation is established with a foundation deed and upon recognition by the public authority responsible for the supervision of foundations (Stiftungsbehörde). A distinction can be made between two types of establishments.

Establishment of a Foundation during the lifetime of the Founder

The foundation is established with the written and binding declaration of the founder who has unlimited contractual capacity and the detailed description of the assets to be transferred. The foundation must have statutes in which

- the name,
- the registered seat,
- the purpose,
- the assets, and
- the composition of the board of directors

are stated. The foundation statutes constitute the legal basis of the foundation. While the BGB does not stipulate any minimum capital, the ability to sustainably meet the purpose of the foundation must be ensured. The majority of relevant authorities require a minimum capital endowment of EUR 25,000 or more; this amount may vary from one federal state to another.

Establishment of a Foundation as a Result of Death

Assets may also be transferred to a foundation by means of a testament. The testament must contain all necessary details on the endowment.

4.1.2. Foundation Purpose

The foundation purpose is a centrepiece of a foundation. Neither the foundation's executive bodies nor the founder may act in opposition to the foundation's purpose. The respective supervisory authority examines whether the foundation purpose is observed. Therefore, the foundation purpose as laid down in the statutes must be described as precisely as possible. In order to benefit from tax advantages granted to public utility foundations (but not to other types of foundations), foundations must meet particular requirements as to the foundation purpose. These advantages are described further below.

Private Utility Foundation

According to the German Civil Code, foundations may be established for any purpose that does not endanger public welfare.

The foundation purpose must be defined on a permanent basis, which does not mean that it has to apply forever. For example, a private utility foundation may be transformed into a public utility foundation at a later date.

The foundation statutes may also include a range of purposes which are not related to each other.

Public Utility Foundation

The public utility purpose of a foundation must be precisely worded in the statutes. Otherwise, the requirements for public utility foundations are not met and the foundation is not eligible for tax advantages. Moreover, the statutes have to describe how the purpose of the foundation is to be fulfilled. The tax exemptions only apply if the foundation meets the requirements concerning the purpose, as set forth in the German Fiscal Code (Abgabenordnung, AO).

4.1.3. Governing Bodies of the Foundation

The board of directors is the executive body of the foundation and is responsible for its management and representation. The founder can establish other bodies in addition to the board. These other bodies may also have rights and obligations which must be defined in detail to ensure that the founder's will is consistently pursued. The founder himself may be a member of one of the foundation's bodies and act in this capacity. The room for manoeuvre of the different bodies is however limited by the foundation purpose.

4.1.4. Supervision

The public supervisory authorities are responsible for protecting the foundation from itself and its executive bodies. The supervisory authority may not be the same as the recognising authority. It sees that the board of directors and the other foundation bodies comply with applicable law and observe the provisions set forth in the foundation statutes.

For example, the government supervisory authority may annul a resolution taken by the founder in its capacity as foundation body if this resolution contravenes the original foundation purpose. As a matter of nature, in such cases, the authority has to examine whether its measure is consistent with the principle of proportionality.

4.2. Tax Treatment

4.2.1. Private Utility Foundations

Foundations that do not serve a public utility purpose do not benefit from any tax advantages.

Tax Treatment of Foundation Endowments

- **At the level of the Foundation**

If a foundation is established causa mortis, inheritance tax applies to endowments; if it is set up inter vivos, gift tax is levied. These endowments are subject to taxation in the unfavourable tax class III.

The only exception to this rule is the family foundation. Here, the income of the foundation is considered as income of the beneficiaries for tax purposes. As a result, the foundation income may be attributed to tax class I. This favourable treatment does not apply to later donations to the foundation, which are subject to the unfavourable tax class III.

Inheritance and/or gift tax are levied on the basis of the following tax rates:

Endowments up to and including (amounts in Euro)	Rate Tax class I	Rate Tax class II	Rate Tax class III
52,000	7	12	17
256,000	11	17	23
512,000	15	22	29
5,113,000	19	27	35
12,789,000	23	32	41
25,565,000	27	37	47
above 25,565,000	30	40	50

The currently applicable inheritance tax law distinguishes between 3 inheritance tax classes; tax class I is the most favourable, tax class III the least favourable.

Degree of relationship	Tax class	Tax allow-ance
Spouses	I	307,000
Children, step children, children of deceased children	I	205,000
Grandchildren, parents and grandparents (in the event of inheritance)	I	51,200
Parents, grandparents (except in the event of inheritance), sibling, nephews, nieces, step-parents, parents-in-law/children-in-law, divorced spouses	II	10,300
Domestic partners	III	5,200
Other	III	5,200

Furthermore, in individual cases, other exemptions may apply. However, every 30 years, the foundation is subject to notional inheritance taxation which offsets any tax advantages it may have benefited from. Loopholes for creative taxpayers are very limited; these may establish several family foundations to optimise tax allowances.
Real estate transfer tax may be due on the transfer of real estate. In most cases, however, family foundations are set up without consideration and therefore not subject to real estate transfer tax.

- **At the level of the founder**

For founders, hidden reserves may be revealed upon withdrawing of assets, which would have consequences with regard to earnings tax.

- **Regular Tax Treatment of the Foundation**

The income of private foundations is subject to the full corporate tax rate of 15% and the solidarity surcharge of 5.5% of the corporate tax. Moreover, notional inheritance taxation on family foundations takes place every 30 years in order to ensure that the foundation assets are not parked for generations without inheritance tax being levied on them.
Payments to beneficiaries as well as the deduction of the substitute inheritance tax (Ersatzsteuer) do not reduce the corporate tax assessment base.

Taxation of Payments to Beneficiaries and upon liquidation

- **At the level of Beneficiaries**

Payments by the family foundation to the beneficiaries are subject to personal income taxation as income from capital. As part of the corporate tax reform 2008, the half-income tax rule

was replaced by the final withholding tax as of 1 January 2009. Income (capital income and capital gains) is now taxed at a uniform final withholding tax rate of 25% (plus solidarity surcharge).

- **Upon liquidation**

Acquisition upon liquidation of the foundation is considered a gift inter vivos. In this case, as in the establishment of a foundation, family foundations benefit from tax advantages (see "Tax Treatment of Foundation Endowments").

4.2.2. Public Utility Foundation

The meaning of "public utility" is defined in German law: To be considered as a public utility foundation, a foundation's activities must be exclusively and directly aimed at altruistic promotion of public welfare. Support of a foreign public must result in positive impacts on the German general public.

Tax Treatment of Foundation Endowments

The transfer of assets in connection with the establishment of a public utility foundation is exempt from inheritance and gift tax as well as from real estate transfer tax.
At the foundation level, assets may be recorded at their book value if the donation is tax-deductible as a special expense at the level of the donor. For the donor, the transfer of assets has the advantage that he does not have to reveal hidden reserves as would have been the case in the event of a withdrawal of these assets.
The donor may, within certain limits, record the endowment to a public utility foundation as a special expense.

Regular Tax Treatment of the Foundation

Public utility foundations are exempt from corporate tax and value-added tax (for general welfare, events or youth welfare) or subject to a reduced value-added tax rate of 7% (for other services). Moreover, public utility foundations are exempt from tax on land and buildings.

5. FRANCE

5.1. General

In international comparison, the number of foundations is relatively low in France. Moreover, these foundations only have a comparatively small amount of assets at their disposition. Among the roughly 1,200 existing foundations, approx. 500 are foundations for public utility (*fondation reconnue d'utilité publique*), 70 are business foundations (*foundation d'entreprise*) and 1,530 are foundations operating under the aegis of other foundations *(fondation abritée par une fondation reconnue d'utilité publique*); in contrast, there are approx. 800,000 associations in France. The small number of foundations is explained, among other things, by the tax system which provides only few incentives for the establishment of a foundation. The institution of the foundation was not designed for the purpose of asset management[22].

Foundations are governed by the Act 87-571 of 23 July 1987 on the development of patronage (*Loi du 23 juillet 1987 sur le développement du mécénat*), which was recently changed by the Act 2003-709 from 1 August 2003 as well as by the related application decree 91-1005 from 30 September 1991.

5.2. Establishment

If explicitly stated, the following provisions refer to public utility foundations. Foundations can be established by natural full age persons or by one or several legal persons, either by means of an endowment or a transfer of assets to the foundation. In most cases, an association is set up in the first place, which is then replaced by a foundation. Also foreign natural and legal persons can set up a foundation in France, unless otherwise provided by their national law.

According to French law, the founder has to pursue a particular purpose when endowing the foundation with assets. This purpose may be to directly realise income or to use the funds for a specific aim. Moreover, the founder is obliged to provide sufficient funds to effectively pursue the purpose of the foundation.

The public utility status and the assets of the foundation are subject to approval by the state regulatory authorities. The control of the foundation is in principle the responsibility of the Ministry of the Interior, which is assisted by other ministries concerned.

[22] Cf. Hellio et al (2007), p. 885.

Endowments inter vivos are effected by means of a gift. To become effective, the gift must be certified by a notary according to the general rules governing gifts.
If a foundation is established *causa mortis*, the testator bequeaths particular assets to the foundation to be established for public utility purposes. The assets, rights and funds are transferred to the foundation exclusively for public utility purposes and without the aim of profit-making[23]. The definition of "public utility" is very broad and includes philanthropic, educational, scientific, social, humanitarian, sport- or family-related or environmental purposes. However, when the purpose of the foundation benefits solely the family of the founder or where it is political or religious in nature (in the sense of serving a political party or religion), it can no longer be deemed a public utility purpose.

The organisational structure of public utility foundations consists of an administrative board (*conseil d'administration*) or a supervisory board (*conseil de surveillance*) working together with a board of directors (*directoire*). The foundation statutes need to be approved by the Ministry of the Interior. In addition to these bodies, a foundation needs to have sufficient funds to pursue its purpose. The recognition of the foundation is established by means of a decree by the *Conseil d'Etat* and published in the *Journal Officiel*[24].

5.3. Types of foundations

5.3.1. Public Utility foundation (fondation reconnue d'utilité publique)

Given their public utility, these foundations may claim public subsidies. Subject to approval by the regulatory authorities, the foundation can receive endowments as long as these are made without consideration. The foundation becomes a legal person upon publication of its establishment.

In principle, foundations benefit from the same tax advantages as organisations with non-profit purpose or public utility associations.
Private persons may deduct 66% of their donations to public utility foundations from income tax, but not more than 20% of their taxable income. Companies can deduct 60% of their donations, but not more than 5‰ of their revenues. Excess amounts can be carried forward for five financial years, if applicable.

To the French tax authorities, not the registered seat, but the place where the foundation carries out its activities is relevant. These have to be performed in France, at least partly. The same rule applies to donations to foundations based abroad that carry out a small part of their activities in favour of a limited number of persons in France. Here, the tax deductibility depends on whether the foundation is recognised as a public utility foundation under the

[23] Cf. ibid, p. 888.

[24] Cf. ibid. p. 897 et seq.

rules of the country where it is based; moreover, its activities have to be carried out in France (at least partly). This poses a problem with regard to EU law, because donations to foundations based in another European Union Member State receive a less favourable tax treatment than donations to foundations carrying out activities in France.

Under French tax law a usufructuary is subject to wealth tax on the total of his or her assets. A temporary transfer of a usufruct to an institution serving the common interest results in a reduction of the wealth tax payable, because the value of the property can be deducted from the assessment basis for the wealth tax during the period for which the usufruct is transferred.

Heirs and donees may endow a public utility association, a public utility foundation, the State or regional and local authorities with a part of the assets received by them. The value of the assets donated is not subject to estate tax. However, a gift tax deduction cannot be cumulated with an income tax deduction. As regards donations to foundations based abroad, an application for a tax exemption can be made at the Ministry of Finance provided that such exemption is laid down in a double taxation agreement[25].

The assets of the foundation are subject to a reduced corporate tax rate. Pursuant to the Finance Act 2005, income referred to in Art. 219 realised by public utility foundations is entirely exempt from corporate tax. To be eligible for tax exemption, the foundation must pursue a non-profit purpose. Income from rent and lease, agriculture and forestry or securities is subject to a tax rate of 10% instead of the standard rate of 33%, whereas income realised in the framework of a business activity is subject to the standard corporate tax rate. Public utility foundations benefit from the reduced corporate tax rate and a tax allowance in the amount of EUR 50,000.

Income from a business activity poses some problems from a tax law perspective even if the business activity is carried out in pursuit of the foundation purpose, as it can result in a change in the legal status of the foundation. Foundations with income from a business activity are in principle subject to trade tax, corporate income tax and value-added tax. They may claim a tax allowance in the amount of EUR 60,000 provided that the foundation is managed without consideration and that the non-business activity clearly outweighs the business activity.

Gifts and legacies for the benefit of a foundation, with the exception of gifts from hand to hand (*don manuel*), are subject to a register fee in the amount of 35% for the portion of the gift or legacy under and up to EUR 23,000; any exceeding amount is subject to a 45% register fee.

[25] Cf. European Tax Handbook (2006), p. 251 et seq.

5.3.2. Particular types of foundations

The business foundation (fondation d'enterprise)

By their nature, business foundations are very similar to public utility foundations: They also pursue a public utility purpose and do not intend to make any profits; moreover, endowments to a business foundation are also irrevocable. The duration of a business foundation is limited at the outset. However, it must be set up for a minimum period of five years subsequently extendable for at least another three years. Business foundations only pursue short- and medium-term objectives.

They are established by one or several companies which endow the foundation with an amount defined in the foundation statutes. The minimum capital resources of a foundation are EUR 150,000. Any adjustments to the specified amounts require a change in the foundation statutes and, as a result, an approval by the relevant public authority. The foundation acquires its legal capacity upon the publication of its establishment in the *Journal Officiel*. The business foundation is not allowed to receive any gifts unless these gifts are made by the staff of a company which has co-founded the foundation[26].

The Act 87-571 stipulates in Art. 19-8 which sources of financing are permissible. Permissible sources are in particular endowments by the founders, subsidies by the state and regional or local authorities, remunerations for services provided or income related to these services (such as interest received).

Business foundations are dissolved either as a result of time lapse or a unanimous decision of the founders (provided that the endowments guaranteed at the establishment were effectively made). The state authorities may also revoke their approval.

In principle, business foundations are subject to the same tax rules as public utility foundations. Upon the establishment of a foundation, companies may deduct 60% of their endowments to the foundation; however, the total amount deducted must not exceed 5‰ of the company revenues. Payments by the company staff are tax-deductible to the extent of 66%; the deductible amount is limited to 20% of their taxable income pursuant to Art. 200 *Code Général des Impôts.*

As regards the taxation of foundation assets, business foundations with a non-profit purpose are subject to a reduced corporate tax rate of 25%; the corporate tax rate for income from rent and lease, agriculture and forestry and securities is only 10%.

[26] Cf. Hellio et al (2007), p. 901.

Foundations operating under the aegis of other foundations (*fondation sous égide*)

In its Art. 5, the law on the development of patronage sets forth the advantages granted in the event of the establishment of a trust structure comparable to that of the Anglo-Saxon trust. Pursuant to this law, foundations pursuing public utility purposes may receive endowments to support another foundation (*foundation sous égide*) having the same purpose but which are not recognised as serving the public interest. In this case, the funds of the foundation are administered by another institution (*foundation abritante*).

Foundation with special status (fondation à statut particulier)

Such as the business foundation, this type of foundation is a legal person governed by private law and subject to the provisions on public utility foundations. The *fondation du patrimoine* is one example for this foundation.

5.4. Dissolution

If a foundation is endowed with irrevocable funds, it is considered as established on a permanent basis. In this case, the founders cannot reserve the right to reclaim their endowments in the event of dissolution. Liquidation proceeds may not be distributed among the founders, if applicable[27].

Public utility foundations cannot change their legal form (in particular, they cannot be transformed into a public utility association).

5.5. The International context

The foundation is deemed to be based in the country where it has its registered seat. The registered seat may in principle be transferred to another country if an adequate agreement exists between this country and France.

[27] Cf. ibid, p. 903.

6. LIECHTENSTEIN

6.1. Introduction

Foundations play a major role in the financial centre Liechtenstein. Foundations in Liechtenstein have also entered into the public consciousness again recently as a result of the tax evasion cases discovered in Germany at the beginning of 2008, as Liechtenstein foundations also played a key role in many of these cases. This survey is intended to provide an overview of the requirements under civil law and the tax treatment of foundations in Liechtenstein.

6.2. Civil Law Framework

The basis according to civil law for foundations in Liechtenstein is set out in the Persons and Companies Act (Personen- und Gesellschaftsrecht, PGR). A foundation within the meaning of the Persons and Companies Act is a special-purpose fund raised to the status of legal person and which has its own legal personality. The fund is then no longer the property of the donor, but rather becomes the capital of the foundation which is called a collective person (Verbandsperson) in Liechtenstein. Just as in Austria, in contrast to corporations or associations, the foundation has no owners or members. In creating the foundation, the endowment is dedicated to a special purpose. With respect to this purpose, a general distinction is made in Liechtenstein between church-related foundations, charitable and family foundations. Mixed forms are also possible; however this report only deals with the family foundation. The purpose of the foundation is the realization of the founder's will set out in the foundation deed and the foundation statutes. A family foundation is an entity in which the foundation assets permanently serve the purpose of covering the costs of raising, educating, outfitting or supporting one or more members of one or several specified families, or similar purposes. The foundation's beneficiaries are the persons who benefit from the realization of the foundation's purpose. The founder himself may also be a beneficiary.

The foundation deed (Stiftungsurkunde) must be drawn up as a written document and must bear the founder's signature certified by a notary. The foundation deed regulates the internal organization of the foundation. The following points must be provided for in the foundation deed:

- Name of the foundation
- Domicile the foundation
- Purpose or object of the foundation
- Amount of the foundation capital
- Members of the foundation's board of trustees

- Manner in which board of trustee members are to be appointed
- Use of assets in the event the foundation is dissolved

The foundation deed may also contain further regulations on the foundation's organization.

The foundation only has legal capacity through its executive bodies. The board of trustees (Stiftungsrat) is the executive body of the foundation and represents the foundation in external affairs and is responsible for administering the internal matters. The exact extent of the powers result from the statutory provisions and regulations set out in the foundation deed, the statutes and the by-laws. Foundations in which the majority of the executive or representative bodies' members are non-Liechtenstein nationals must appoint a representative in Liechtenstein. This representative must be a Liechtenstein national permanently domiciled in Liechtenstein; moreover, he or she and must be authorized to represent the foundation without the assistance of another person in dealing with the public authorities. This person is to be entered in the Public Register. For foundations that pursue a trade that is conducted in a commerical manner, it is mandatory to appoint an auditing body (Revisionsstelle). All other foundations may, but do not have to appoint an auditing body. The auditing body is responsible for auditing the foundation‘s balance sheets, inventory, profit and loss statement and other accounting with regard to compliance, reliability and accuracy and in order to ensure that they accurately represent the situation and business results of the foundation. In addition, foundations can appoint additional bodies and correspondingly define their rights. For example, a so-called Kollator, who is authorised to appoint beneficiaries, may be appointed. It is also customary to appoint so-called advisory board members (Beiräte) to exercise control over the trustees or who are authorised with certain powers for investing foundation assets. Generally, the foundation bodies are liable for damages caused to the foundation by them as a result of intent or negligence.

The minimum amount of capital for a foundation is EUR 30,000 (or CHF 30,000 or USD 30,000). The assets must be immediately transferred to the foundation when the foundation is established on the basis of the details set out in the foundation deed. As a general rule, the foundation is not established until it is entered in the Public Register. There is no obligation of entering a family foundation in the Public Register. However, the foundation documents of family foundations must be deposited with the Public Register.

In practice, as a result of the rule according to which family foundations only have to deposit their documents, family foundations in Liechtenstein benefit from extensive anonymity.

Foundations are not required to keep books nor are they required to publish balance sheets as long a they do not pursue a trade in a commercial manner.

The foundation may be wound up by legal rescission, dissolution of the foundation in accordance with its statutes or by means of changing its legal form.

Current efforts are underway to extensively reform foundation law in Liechtenstein. While existing draft laws provide for extensive changes, the principle of anonymity, which was regularly criticised in the past, should not be substantially modified.

6.3. Tax Treatment of Foundations

Foundations themselves enjoy very extensive tax advantages regarding foundation endowments, the regular taxation of foundation income, the distribution of income to the beneficiaries or in the case that the foundation is wound up.

Tax treatment of foundation endowment

A foundation fee is charged upon creation of a foundation. For foundations that pursue a trade in a commercial manner, this fee amounts to 1% of the capital. An application can be filed for a capital amount of more than CHF 5 m to have the fee reduced to 0.5%. For a capital amount of more than CHF 10 m, the fee can be reduced to 0.3%. For other foundations the fee amounts to 2‰ of the capital. The minimum amount is set at CHF 250.00; the maximum amount is CHF 250,000.

Regular taxation of foundations in Liechtenstein

- **Capital tax**

Foundations in Liechtenstein are subject to capital tax on the declared capital and the reserves, regardless of the foundation purpose. This tax is very moderate; the annual tax burden for the following amounts of assets can be seen in the table below.

Up to CHF 2 m	1 ‰
From CHF 2 m to 10 m	¾ ‰
More than CHF 10 m	½ ‰

For the sake of completeness, mention is made that the annual minimum burden amounts to CHF 1,000.

- **Earnings tax**

Earnings tax is levied on the annual net earnings; these are all profits including capital gains and liquidation profits from which business-related expenses are deducted. The tax amounts

to a minimum of 7.5% and a maximum of 15% of the net earnings[28]. It increases by a further 1% to 5% if the distributions amount to more than 8% of the taxable capital.

Foundations that only have their seat in Liechtenstein, but which do not maintain an office and do not pursue any business or commercial activity there are however exempt from income taxation.

Taxation of beneficiares of the foundation

No taxes are levied on distributions to beneficiaries who have neither a domicile nor an ordinary residence in Liechtenstein.

Tax consequences in the event of liquidation of a foundation

There are no particular tax consequences connected with the liquidation of a foundation in Liechtenstein.

The tax treatment of a Liechtenstein foundation from the point of view of the Austrian tax authorities

The above-stated provisions are the domestic law in Liechtenstein. However, as a large part of foundations in Liechtenstein have foreign founders or foreign beneficiaries, inter-country regulations (or the regulations applicable in countries in which the founders and/or beneficiaries reside) are also of importance in this context. An overview of tax consequences for Austrian founders and beneficiaries in connection with the establishment of a foundation in Liechtenstein follows. As Liechtenstein is one of the few countries in Europe that is considered a tax haven, it comes as no surprise that Austria has not concluded any double taxation agreement with Liechtenstein.

As a general rule, Liechtenstein foundations are also recognised by the Austrian tax authorities. However, in many cases, the Austrian tax authorities examine whether a foundation is recognised as a legal person under the laws and regulations of Liechtenstein or whether the assets of the foundation may be attributed to the founder from a tax perspective. In this case, the profits of the foundation would be considered as taxable income at the level of the founder.[29][30]. This often happens in connection with the so-called foundation with mandate agreement (Stiftung mit Mandatsvertrag). This type of foundation is a speciality of Liechtenstein. By means of a mandate agreement, which is normally concluded between the founder and a

[28] Article 77 Tax Act. The tax rate amounts to half as many percent of the net profits as the net profits percent of the capital subject to tax, at least 7.5% and a maximum of 15%.

[29] Foundations recognised by the Austrian tax authorities are referred to as non-transparent foundations, while foundations the assets and income of which are assigned to the founders are referred to as transparent foundations.

[30] For the criteria that must be met in the case of a non-transparent foundation, see Hosp (2008).

Liechtenstein fiduciary, the creation of a foundation can be laid down by contract. Moreover, the mandate agreement regulates the delegation of the bodies, the day-to-day administration of the foundation and similar matters. Thus, in this situation, the founder can exercise factual control over the foundation without having to act as an executive body of the foundation. As a consequence, the foundation profits are attributed to the founder for tax purposes pursuant Sections 21 et seq. of the Austrian Federal Fiscal Code (Bundesabgabenordnung) according to which the beneficial ownership prevails over the legal ownership .

As of 1 January 2008, a foundation entrance tax in the amount of 25% is levied on an Austrian founder upon creation of a foundation in Liechtenstein. The lower foundation entrance tax rate of 2.5% levied on Austrian private foundations does not apply in that case because no administrative and enforcement assistance agreement was concluded between Austria and Liechtenstein. As regards the regular taxation of foundation profits, the Austrian tax authorities recognise the so-called non-transparent foundation; as a result, the profits of these foundations are, as a general rule, not subject to taxation in Austria. The case of transparent foundations is different. Here, the profits are generally attributed to the founder from an economic perspective and hence taxed in accordance with Austrian income tax regulations. In the case of non-transparent foundations, a 25% income tax rate at the level of the beneficiary is levied on payments to the beneficiary in Austria.
With regard to foundations created (or assets dedicated) on or after 1 August 2008, the distributions of assets (Substanzausschüttungen) are tax-exempt (as are distributions of assets by Austrian private foundations according to Austrian regulations). The same regulations are applicable if distributions are paid to the beneficiaries as part of the winding-up of a Liechtenstein foundation.

6.4. Conclusion

The Liechtenstein foundation has fallen in international disrepute – even more so as a result of the tax evasion cases discovered in Germany at the beginning of 2008. An examination of legal provisions shows that the Liechtenstein foundation does in fact provide extraordinary advantages. It enables pure family foundations to continue to remain largely anonymous externally. The foundation can be established very easily and supervision of these foundations remains weak. Establishing a foundation is not associated with any significant costs or duties, and regular income from foundations with a relationship outside Liechtenstein are virtually tax-exempt with the exception of a very moderate capital tax. In addition to this capital tax, taxes which largely correspond to the tax burden of an Austrian private foundation continue to be levied on Austrians who establish a foundation in Liechtenstein. Despite this, the Liechtenstein foundation remains very attractive from a tax-related point of view. Although a reform of foundation law is being drafted in Liechtenstein, it can be assumed that the general terms will not be significantly changed.

Therefore, it also comes as no surprise that as of 12 September 2008, there were 1.565 registered foundations and 45.839 so-called deposited foundations (hinterlegte Stiftungen) in Liechtenstein[31]. No official figures on the assets held by these foundations exist, however the figure of CHF 100 billion occasionally batted around does not seem in any case too high[32].

[31] http://www.llv.li/llv-gboera-oera-amtsgeschaefte-hinterlegung_im_oeffentlichkeitsregister.htm

[32] Eiselsberg (2008), p. 43 et seq.

7. LUXEMBOURG

7.1. General

The Luxembourgian Income Tax Act (memorial A No 76; respective valid version in *Le Code Fiscal Luxembourgois Vol.II*) is based on the German Income Tax Act. The final withholding tax at source is provided for in Art 146 et seq. *Loi de l'Impôt sur le Revenu, L.I.R*, which states that domestic income from dividends, shares of profit, and bonds is subject to final withholding tax at source in addition to any additional tax it may be subject to depending on the amount of the profit distributions (of the borrower). Other domestic[33] earnings from equities, capital shares, participation certificates and shareholdings are also subject to final withholding tax[34].

The final withholding tax at source in the amount of 20% is levied on income from capital assets, that is, domestic capital income from shareholdings (dividends). Interest income is subject to a 10% final withholding tax at source. In accordance with the EU Savings Tax Directive of 2005, the initial tax rate, which amounts to 15%, is progressively raised to 20% and 35%[35]. Profit distributions to holders of controlling equity stakes in a company are tax-exempt if this company is fully tax-liable and domiciled in Luxemburg and does not present the characteristics of a holding company.

The Luxembourgian foundation law is closely tied to the non-profit association (*association sans but lucratif*) law. The Act of 21 April 1928 for Associations and Foundations, hereafter "Foundation Act" (*Gesetz vom 21. April 1928 über die Vereine und die Stiftungen ohne Gewinnzweck*) was amended on 22 February 1984, on 4 March 1994, on 1 August 2001 and on 19 December 2002. Currently, approximately 150 foundations with legal personality exist in Luxembourg. The majority of these foundations are active in the areas of education and in social projects[36]. Pursuant to the will of the Luxembourgian legislators, the Belgian provisions concerning the application of the Foundation Act and Belgian case-law is also applicable to Luxembourg. Pursuant to Article 27 Foundation Act, a foundation must use its profits to pursue a philanthropic, social, religious, scientific, artistic, educational, athletic or touristic purpose. In contrast to Belgium, Luxembourg only recognises foundations that serve the public interest or so-called public utility purposes; there are no foundations for private benefit.

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[33] Domestic capital income is all earnings of a natural person domiciled in Luxembourg, a private company domiciled or headquarted in Luxembourg, or a Luxembourgian public corporation.

[34] Cf. Knist (1996), p. 17.

[35] Cf. Fort (2007), p. 32.

[36] Cf. Beissel/Gabriel (2007), p. 1140.

7.2. Establishment

Pursuant to Art 27, anyone may use his assets, either in full or in part, to establish a foundation through a deed or testament and upon approval by Grand-Ducal Decree[37]. The certified declaration of foundation establishment is presented to the Ministry of Justice for approval. Upon receipt of the approval, the establishment is published in the Luxembourgian Official Gazette, the *Mémorial, Recueil des Sociétés et Associations*, and is also entered in the commercial and company register. Moreover, the members of the administrative board must present and publish the annual financial statements and a budget.

The administrative board constitutes the only statutory body of a foundation. The founders may determine the content of the foundation statutes. The foundation statutes include the use of the foundation's assets in the event of dissolution. The Foundation Act does not stipulate a minimum amount of capital; however, in general practice a minimum initial capital of EUR 25,000 is required. If the foundation statutes do not state otherwise, the foundation is established for an indeterminate period of time.

7.3. Existing foundation

The exclusion of the aim to make profit does not mean that the foundation may not own any funds. Funds are required in particular for the pursuit of the set foundation purpose; also ancillary economic activity is permitted as a rule if the profits are exclusively used for the foundation purpose.[38] The foundation Act explicitly limits the ownership of real property; foundations may only own land or buildings insofar as these are required to achieve the foundation purpose.

Gifts may be made to a foundation during a person's lifetime (*inter vivos*) or upon death (*causa mortis*).

The Tax Act has not taken up the definition of "foundation" included in the Foundation Act. Art. 12 and 25 of the Corporation Tax Act stipulate that contributions in cash and in kind in the framework of the establishment of a foundation are exempt both from capital tax as well as from the registration fee. This is only valid in the case of legally recognised foundations in accordance with the Foundation Act.

Foundations are in principle liable to corporate income tax, wealth tax and trade income tax. Corporate tax exemptions exist for foundations directly performing church-related, charitable or public utility activities. The same requirements for exemption are also valid for wealth tax and trade income tax. As a general rule, only the income earned on commercial activity or assets is taxed, while the foundation in itself remains tax-exempt. This partial taxation only

[37] Cf. ibid., p 1142.

[38] Cf. ibid., p. 1147.

applies if that the commercial activity is performed as on an ancillary basis; this means that the profits related to this activity may only be used to pursue the foundation purpose.

Thus, income from a business activity is subject to income taxation. The profit is determined by means of comparing the assets of a company in two subsequent years on the basis of the annual financial statements. Depreciations, amortisations and write-offs and provisions as well as operating expenses are deductible. Contributions out of tax-exempt private assets are deemed part of the foundation capital; however, the profit for tax purposes is reduced by the amount of such deposits. Conversely, so-called private withdrawals are to be added to the profits for tax purposes. Contributions as well as private withdrawals are to be stated with their current value on the respective date.

The assets used for the business activity are subject to wealth tax of 0.5%. For tax purposes, donations to foundations are treated as income (as described above). As a general rule, donations, gifts and contributions to foundations may not be deducted from taxable income. Pursuant to Art 109 Income Tax Act, however, these may be considered eligible for deduction as special expenses within the meaning of Art 112 Income Tax Act. Certified registered donations are subject to a register entry fee in the amount of 6 percent.

Payments by a foundation to a third party are subject to gift tax [39].

7.4. Alternatives to the foundation

There are no special foundation forms in Luxembourg. Similar legal institutions exist, however, namely trusts and the Luxembourgian fiduciary contract (*contrat fiduciaire*). These legal entities may, in addition to public utility purposes, also serve purely financial or economic interests; thus, they are similar to a private law foundation, at least with regard to the purpose. Luxembourg has approved their legal recognition with its law of 27 July 2003.

In recognising these alternative forms, Luxembourg recognises in particular the dichotomy of the basis of ownership. The beneficiary (in most cases the founder of the trust) is granted rights which are similar to ownership rights; these rights stand independently and in addition to the ownership rights transferred to the trustee (the administrator of the trust). Thus, the beneficiary may for instance claim that a third person (with no ownership rights) or, in the event of solvency, the liquidator return the trust property to him. From a legal perspective, the trustee is treated as an owner; the trust assets and the private assets are considered as two separated properties.

In contrast to the trust, the trustor forfeits his basis of ownership in full in the case of a Luxembourgian fiduciary contract. The law exclusively applies to fiduciary contracts in which the

[39] Cf. Fort (2007), p. 36 et seq.

trustee is a financial institution, a securities company, an investment company, a pension fund or an insurance enterprise. In Luxembourgian legal practice, however, the law also applies trustees that are natural persons.

Transfers of trust property without consideration are subject to gift tax; the applicable tax rate depends on the degree of relationship. No additional special regulations exist. If the founder of a trust or the trustor himself is the economic beneficiary of the trust/fiduciary contract, the profit is taxed at his level in accordance with fiscal transparency. In the case of a third-party beneficiary, taxations depends on the respective structure of the trust or fiduciary contract; here, the profit may be considered as an "independent legal estate" pursuant to Section 159 Income Tax Act and is then accordingly treated for tax purposes. [40]

7.5. Dissolution

If a foundation is no longer in a position to perform its purpose, its dissolution may be decided and a liquidator can be appointed. The liquidation proceeds are exempt from corporate tax. Dissolution profit from the foundation business activity is to be taxed pursuant to Article 55 et seq.

7.6. International context

Luxembourgian legislation applies, on the basis of French and Belgian law, the so-called company seat theory: Abroad-based foundations with legal capacity are recognised as legal persons also in Luxemburg. It is permissible to move a foundation's seat from Luxemburg into another country.

[40] Cf. Beissel/Gabriel (2007), p. 1159.

8. NETHERLANDS

8.1. Civil Law Framework

General

Foundations (*stichting*) are set up in many fields of society, not only in non-profit areas but also in connection with enterprises (a foundation may own a company, e.g. in the case of pension funds). Foundations may also be part of corporate structures or other forms of organisation including public and private elements. Foundations have always been regarded as special-purpose funds. The first legal provisions for foundations under private law date from 1956. These rules could however not be applied to all types of foundations.
In 1976, the then existing law was replaced by the *Burgerlijk Wetboek* (Civil Code), Book 2, in which a foundation is defined as a legal person. As a legal person, the foundation has no members and intends to use the funds endowed to it to pursue the foundation purpose as set out in the foundation statutes. The purpose may not consist in the execution of payments to founders or foundation bodies. In the Netherlands, foundations are comparatively flexible; they are not subject to any government supervision. However, there are current considerations to subject foundations to stronger supervision and to require publication of annual balance sheets. Foundations must be entered in the commercial register; in March 2006, there were a total of 153,641 foundations in the Netherlands[41].

Establishment

As a general rule, a foundation is established with a notarial deed. Legal persons, thus also foundations, are in principle established for an unlimited period of time; a time limit may however be laid down in the foundation statutes. Any person having capacity to contract may establish a foundation, also foreign legal or natural persons.

In the Netherlands, establishing a foundation is very simple due to a lack of public supervision; it only requires entry in the commercial register. After publication, an annual fee has to be paid to the chamber of commerce. The founder is not required to endow the foundation with a particular amount of assets.

A foundation may also be established *causa mortis* (in the event of the founder's death) on the basis of a public testament. In this case, the foundation becomes the heir or legatee. In practice, however, a foundation is usually established *inter vivos* (during the founder's lifetime).

[41] Cf. Volders/de Vries (2007), p. 1164 et seq.

The rules, governing bodies and registered office are set out in the foundation statutes. Another important element in the foundation statutes is the purpose and a detailed description of the main activities. The purpose is subject to some restrictions in that it may not consist in the execution of payments to the founders or members of the foundation's executive bodies (benefits which are immaterial or social in nature are however permissible).

A foundation is allowed to make profits and may operate a commercial enterprise[42]. In many cases, foundations have a supervisory board comparable to the supervisory board of a capital company. If a foundation has 50 or more employees, a workers' council has to be set up.

In principle, there are no mandatory rules as to the capital formation, which means that no capital contribution is required upon establishing a foundation. However, the regional court *(Rechtbank)* can file to have the foundation wound up if the assets are insufficient to achieve the purpose. Within the foundation, capital is accumulated through grants, donations, legacies, as well as through subsidies and profits from a company.

8.2. Foundation Forms

General

There are no specific regulations in the Netherlands concerning the management of foundation assets or their taxation. The Foundation for Cultural and Social Initiatives was established by the Dutch Foundation for the Promotion of Notarial Science (*Stichting tot Bevordering der Notariële Wetenschap*), the *Prins Bernhard Cultuurfonds*, the Royal Trade Association of Notaries (*Koninklijke Notariële Beroepsorganisatie*) and the Dutch Bar Association (*Nederlandse Orde Van Advocaten*) to ensure that certain provisions regarding the social or cultural nature of foundations be adhered to. In addition, the *Centraal Bureau Fondsenwerving* establishes guidelines and makes relevant information available to the public. Foundations established in accordance with these guidelines and which are active in the charitable, cultural, scientific, and other public utility areas receive a quality label.

As other legal persons, foundations are generally required to keep books and to prepare balance sheets and a profit and loss statement.

Special Foundation Forms

- **Dependend Foundations**

Assets can be placed in more than one foundation, which means that activities associated with risk are placed in a separate foundation which is also called a support foundation or a cooperation foundation.

[42] Cf. ibid, p. 1170.

- **Civic Foundations**

This type of foundation especially serves non-profit and charitable purposes.

- **Family Foundations**

The introduction of the family foundation in Dutch law has basically resulted in an exception concerning the prohibition of benefits to family members of the founder. Assets are paid into a foundation as part of asset planning; the foundation manages these assets for the holders of share certificates. What is particular about this foundation form is that no inheritance or gift taxes are levied on the assets endowed to the foundation. The foundation files an annual tax declaration over the services provided. After 60 years, the foundation ceases to exist de jure.

Private fund foundations, which are similar to family foundations, exist in parts of the Kingdom such as in the Dutch Antilles and Aruba.

- **Company-related Foundations**

In the Netherlands, it is quite common to include foundations in groups of companies. By means of establishing a foundation, the voting rights associated with and the beneficial interest in shares can be separated (in the case of a trusteeship). This permits companies listed on a stock exchange to create special protective constructs or to enable preferred participation. What is particular in this context is that the statutes of company-related foundations may stipulate that some resolutions by the board of directors require the approval of another foundation, with the advantage that the existence of such provision is not public.

- **Trust Company**

The trust company (Stichting Administratiekantoor) is used to separate legal ownership from economic activities. The trust company can be involved in the certification of shares.

- **Investment Funds and Pension Funds**

In the context of Dutch foundation law, pension funds represent an interesting construct as they do not comply with two fundamental principles of foundations: First, pension funds have members and second, they make payments.

- **Government Foundations**

The government also uses the legal form of foundation, in which government bodies may be directly or indirectly involved. Due to a variety of rules on subsidies, such foundations may depend on government bodies.

Dissolution of Foundations

The foundation statutes can be modified if this is provided for in the foundation statutes. The same rule applies to a change of the legal form, a merger or a division of the foundation, which may represent grounds for dissolution.

Normally, a foundation is dissolved upon a resolution of the board of directors. The grounds for dissolution can be set out in the foundation statutes. The statutes must include a provision on the distribution of the foundation assets. Special procedures involving a liquidator are also provided for.

If in the framework of dissolution, a payment is made to a company which is liable to corporate tax, the payment is to be included in the profits of this company. If a payment is made to a natural person, it is to be included in income under *Box 1*. In all other cases, the payment must be allocated to *Box 3* (capital income tax). Acquisitions are subject to gift tax if no exceptions apply.

International Context

As a general rule, the registered office of the foundation must be located in the Netherlands. In accordance with the European Court of Justice ruling concerning the SEVIC System AG from 13 December 2005, this is contrary to the freedom of establishment. It is thus possible, legally and in practice, to relocate the registered seat of a foundation based in the Netherlands within the European Economic Area.

8.3. Tax Treatment of Foundations

Dutch tax law generally distinguishes between foundations established for public utility purposes and foundations set up to operate a business. If a foundation pursues public utility purposes, the endowments are subject to reduced taxation with regard to inheritance and gift tax and capital transfer tax[43]. Since 1 January 2006, a general exemption has been in place. As a result, donations to the foundation may be deducted for purposes of income and corporate tax. If the foundation operates a business, it is subject to corporate tax.

Regular Taxation

- **Inheritance, Capital Transfer and Gift Tax**

Inheritance, capital transfer and gift tax are, as a general rule, based on the market value of the foundation. If the foundation is created by more than one person, the founders are considered a single person. This prevents the splitting of gifts to avoid capital transfer or gift tax. Along these same lines, if several donations are made within a calendar year, these donations are treated as a single donation for tax purposes.

At the level of a natural or legal person who acquires a foundation as a result of an inheritance, capital transfer or donation, acquisitions of non-public utility foundations are taxable in

[43] Capital transfer tax has to be paid on a donation or legacy if the donor or legator was domiciled outside the Netherlands at the time of his death or at the time the donation was made. The assessment base is the value of assets in the Netherlands after deduction of liabilities in the Netherlands.

the highest tax bracket; in 2007, the tax rate for this bracket was between 41% (for the portion up to EUR 22,051) und 68% (for the portion exceeding EUR 881,722).
Public utility foundations in the Netherlands are foundations pursuing church-related, charitable, cultural, and scientific or public utility purposes; such foundations are not subject to the highest tax rate but are generally tax-exempt since 1. January 2006[44]. Since 2008, these foundations must obtain permission from the Finance Ministry which examines the foundation with regard to its size, the purpose, administrative costs and accounting. Donations to foundations which are recognised by the government may be deducted for tax purposes from the personal income (in the case of donations by private persons) or corporate income (in the case of donations by companies).
Foreign foundations are treated as Dutch foundations in accordance with EU law if they meet the requirements of "public utility". The tax exemption also applies in connection with a change of the legal form, mergers and divisions of foundations operating in the public utility area.

- **Personal Income Tax**

As a legal person, the foundation is not subject to personal income taxation. It can, however, become liable to personal income taxation if it is considered to be a "transparent" foundation (*transparance fiscal*). In the case of a transparent foundation, one person can have disposal right to the assets as if these were that person's own assets; which means that income and assets are accordingly attributed to that person for tax purposes. With regard to corporate tax liability of foundations, the Supreme Court seems to be more hesitant in general[45].

- **Corporate Tax**

If a Dutch foundation operates a business for the purpose of making profit, it is subject to corporate tax. Subsidised foundations may however generate operating surpluses; as long as these surpluses are used according to the subsidy guidelines, these institutions are not deemed to intend to make profits.

If a foundation is partly subject to corporate tax, an exemption may be considered, however, depending on the activities and amount of profit generated. Subjective exemptions are subject to the fulfilment of certain requirements; in the case of pension insurance companies, for instance, tax-exemption may apply if the company's exclusive purpose is the provision for employees, invalids, old-age, children, etc. Furthermore, companies that pursue a charitable or public utility purpose (at least 90% of their activity) are exempt from corporate tax[46]. Foreign charitable institutions are also tax-exempt if they meet these requirements.

[44] Until 31 December 2005, a tax rate of 8 percent was applied to public utility foundations.

[45] Cf. Volders/de Vries (2007), p. 1206.

[46] Cf. ibid, p. 1209.

A company is free to opt for non-exemption in its tax declaration in order to record hidden reserves to finance investments. Investment reserves may be recorded for a period of three years.
Deductible donations exceeding EUR 227 are deductible to the extent of 10% of the profits.

- **Earnings Tax**

Earnings realised by a foundation from shareholdings in Dutch companies are subject to earnings tax. Earnings tax has the effect of final taxation and cannot be offset against any corporate tax due. The Earnings Tax Act provides for earnings tax reduction or an exemption for legal persons which are not subject to corporate tax and may therefore claim a refund of earnings tax paid.

- **Real Estate Transfer Tax**

A 6% real estate transfer tax is generally levied on properties and rights to properties located in the Netherlands. Real estate tax exemptions may apply to donations. If a foundation receives Dutch properties as a donation, it does not have to pay real estate transfer tax. In this case, the applicable gift or transfer tax is not less than any property transfer tax that may be due. An acquisition in accordance with inheritance law is not considered an acquisition.
Mergers, reorganisations or changes in the legal person are also exempt from real estate transfer tax.

- **Value-added Tax**

As an enterprise, the foundation is subject to value-added tax. Exceptions exist for foundations that are financed by government subsidies or that do not demand any consideration for their services.

Taxation of the Donors

Donations to charitable foundations may be deducted from personal income tax (in the case of natural persons) or corporate income tax (in the case of legal persons). Donations are by definition made without consideration. Such donations are considered as a transfer of assets from the donor to the donee. In a further step, the tax authorities examine whether the donor has retained the power of disposal over the donated asset or not. Donations in kind may also be made, for example, of artworks (paintings, etc). Since the modification of the law effective 1 January, donations to foundations based abroad are subject to the same tax rules as donations to Dutch foundations. Expenses that have already been reported as business expenses or other income-related cost are not recognised as donations.

9. SWITZERLAND

9.1. Civil Law Framework

The Swiss foundation is regulated in the Swiss Civil Code (*Zivilgesetzbuch*, ZGB), in Articles 80 to 89. Civil law is federal law and thus the legal framework for foundations under civil law is the same in the whole of Switzerland:

Switzerland considers a foundation to be assets dedicated by a donor for a specific purpose. A foundation deed, which documents the founder's will to establish a legally independent foundation, is required to establish a foundation. The Swiss Civil Code permits the following forms of foundation:

- Public utility foundation (*gemeinnützige Stiftung*)
- Personnel provision foundation (*Personalvorsorgestiftung*)
- Family foundation (*Familienstiftung*)

A public utility foundation requires an official letter of recognition from the tax authorities for this form to be recognised for tax purposes. The personnel provision foundation is the form under which the second pillar of Swiss old-age provision (*berufliche Alters-, Hinterlassenen- und Invalidenvorsorge*, BVG) is generally organised. The family foundation is limited to the maintaining, promoting the education of and outfitting of close family members; accordingly (and unlike in Austria), the foundation may not pay any amounts to the donor or his or her family members.
It is the Swiss *Unternehmensstiftung* (corporate foundation) or, in a subform, the *Holding-Stiftung* (holding foundation) that is most comparable to the Austrian private foundation. Whether this construction is in fact permissible under civil law or not is a legally disputed issue. In its decision dated 18 May 2001 (BGE 127 III 337), the Federal Court of Switzerland ruled that an economic foundation purpose was permissible and that corporate foundations could thus be established.

All foundations are subject to regulatory supervision. The authorities may not change the foundation purpose but may dissolve the foundation if the purpose becomes obsolete. The founder himself is not permitted to dissolve the foundation nor is he allowed to change the foundation purpose arbitrarily; he may however limit the time for which the foundation is to be established from the beginning or give the *Stiftungsrat* (administrative board) room for manoeuvre as regards the detailed definition of the foundation purpose.

9.2. Tax Treatment

In Switzerland, direct federal taxes are governed by federal law via the Federal Act on Direct Federal Tax (*Bundesgesetz über die direkte Bundessteuer, DGB*), whereas direct cantonal taxes are regulated by cantonal laws. For municipal taxes and church tax, tax rates which are based on the cantonal base rate apply. The Tax Harmonisation Act (*Steuerharmonierungsgesetz*) ensures that the definitions of tax subjects and the assessment bases are at least not essentially different.
Foundations that are exclusively and irrevocably of public utility are exempt from direct taxes as are personnel provision foundations. In principle, corporate foundations are taxed as other legal persons.

In the following, we will explain what the taxation of a corporate foundation in the canton of Zug /Zug capital looks like. Within Switzerland, Zug is considered a tax haven and is thus suited as a competitive model to the Austrian private foundation.

Fiscal Treatment of Foundation Endowments

For tax purposes, the endowment of a non-public utility foundation is regarded as a gift (inheritance) in Switzerland. Inheritance or gift tax only exists at cantonal level. Inheritance tax is only levied in the canton of Schwyz, whereas in the canton of Zug, direct succession and spouses (domestic partners) are exempt from inheritance and gift tax. Tax rates range between 10% and 20% depending on the amount of the assets received. The case of foundations is particular insofar as the tax liability depends on the degree of the donor's relationship to the beneficiary. For direct succession and partners, the rate is zero at all; non-related persons have to pay the full rate. As regards distant relatives, different reduced rates depending on the relationship apply. Moreover, the municipalities may levy additional taxes of up to 100% of the cantonal tax. Thus, in comparison to the foundation entrance tax (*Stiftungseingangssteuer*) of 2.5% in Austria, the tax regime in the canton Zug is only more favourable for close relatives.
The above-stated regulations are valid for donors domiciled in Zug. If the donor resides in Austria, the fiscal consequences depend on applicable double taxation agreements. Austria has signed no double taxation agreement concerning gift tax with Switzerland. As a result, the donor has to pay a foundation entrance tax in Austria for the endowment of the foundation abroad. At present, the Austrian foundation entrance tax is generally 2.5%; however, it should be noted that the tax rate may increase to 25% if no comprehensive administrative assistance and enforcement treaty exists with the country in question (Section 2 (1) No. 3 of the Austrian Foundation Entrance Tax Act (*Stiftungseingangssteuergesetz*). As the administrative assistance provisions in the double taxation agreement concluded between Austria and Switzerland (Articles 26/26a) are not comprehensive to the extent required, Austria-based donors generally have to pay the 25% tax rate on endowments to Swiss-based foundations. Therefore, creating a foundation in the canton Zug from Austria is unattractive from a fiscal perspective.

Regular Taxation of the Foundation

On foundations which do not pursue a public utility purpose, a special corporate tax rate of 4.25% is levied on the federal level (tax allowance of CHF 5,000). Tax exemptions (in the form of an investment allowance or "*Beteiligungsabzug*") exist for investment income realised in connection with shareholdings equal to or exceeding 20% and shareholdings equal to or exceeding CHF 2,000,000 of the registered/share capital of another company.
As a result of this allowance, a part of the foundation profits, which is proportional to the amount of the shareholding, is tax-exempt. The same applies to capital gains generated by a disposal of shareholdings.
Dividends distributed to the foundation are subject to a 35% withholding tax; the foundation may however claim a refund. As a consequence, all capital income from shareholdings is tax-exempt at the level of the foundation.

In the canton Zug, the base tax rate is 4% (tax allowance of CHF 10,000). On the basis of this base tax rate, the rates of the canton Zug (0.83%), the municipality Zug (0.63%), and the protestant church community (0.095%) are determined. In total, this leads to a tax rate of 6.22%.

However, at cantonal level, foundations can benefit from advantages granted to so-called domiciled management companies (*Domizilgesellschaften*). These are companies which are not engaged in business in Switzerland, but only perform management activities there.
In this case, all profits from shareholdings are tax-exempt at foundation level. Other income is subject to the tax rates stated above. Concerning real properties, it should be taken into account that in the canton of Zug no speculation periods apply; as a result, capital gains from the disposal of real estate are subject to taxation.

Furthermore, at cantonal level, there is a so-called net asset tax (*Nettovermögenssteuer*) or capital tax. This tax is, however, so low that it is negligible in economic terms.

Thus, profits in connection with shareholdings (including capital gains) realised by a foundation established in the canton of Zug and which exclusively bundles large shareholdings in companies are ultimately tax-exempt. While foundations are not subject to the 12.5% rate applicable in Austria, there are some other fiscal aspects that should be taken into account (taxation of payments to beneficiaries or taxation upon liquidation).

Taxation of payments to beneficiaries or in the event of liquidations

According to prevailing opinion, payments by corporate foundations of liquidation proceeds or assets to beneficiaries are subject to personal income tax at the level of the beneficiaries in Switzerland (in some cases these payments may also be subject to gift tax). The highest marginal tax rate in the canton capital Zug amounts to 25.5% including direct federal tax. If the beneficiary resides in Austria, the payment is only subject to taxation in Austria pursuant

to the double taxation agreement concluded between Switzerland and Austria. Pursuant to the Austrian Income Tax Act (as amended by the Gift Notification Act) the payments are income from capital assets (Section 27 (1) No. 7 Income Tax Act), but nonetheless subject to the special tax rate of 25% (Section 34 (8) Income Tax Act).

9.3. Conclusion

The legal framework under civil law for corporate foundations in Switzerland is similarly liberal as that of Austria, however the legal framework under civil law is more uncertain and only based on case-law. As long as this situation does not change, foundations in Switzerland can be established for practically any economic purpose. Such foundations do not have to be entered in the commercial register and enjoy extensive freedom as regards the appointment of executive bodies. They are, however, subject to public supervision and must comply with specific accounting rules.

Foundations are not subject to taxation of income in connection with profits and capital gains related to shareholdings in companies. It should however be noted that gift tax is levied upon establishment of the foundation, on endowments to the foundation, in the event of liquidation or on payments to beneficiaries. For persons domiciled in the canton of Zug, the overall burden is comparable to that of the Austrian private foundation. For persons residing in Austria the combination of the Zug gift tax and the Austrian income tax is prohibitive; therefore, the Zug foundation model is not really suitable for persons domiciled in Austria. As an alternative foundation location, only the canton of Schwyz can be considered as it levies no inheritance and gift tax. If a donor is successful in relocating his or her domicile to Schwyz/Schwyz, he can benefit from a perfect tax situation.

10. UNITED KINGDOM

10.1. General

What comes closest to the Austrian private foundation in the United Kingdom is the *trust*. This survey describes the most frequent forms of the *private family trust* as the legal form that is the most similar to the private foundation we know.

The persons involved are the *trustee*, the *beneficiary*, and the *settlor*. The settlor is the person who endows money, investments, land or buildings or other assets, such as paintings, to the trust. This may happen when the trust is formed or at a later point in time.

A trust is established by means of a *trust deed*. This may also be based on a final will. The *trustee* manages the assets endowed while the beneficiaries benefit in one form or another from these assets.

In the UK, there are different forms of trusts, such as:

- bare trusts
- interest in possession trusts
- discretionary trusts
- accumulation and maintenance trusts
- mixed trusts
- settlor-interested trusts
- non-resident trusts
- special trusts

10.2. Bare Trust

This trust form is also referred to as *simple trust*. In this form of trust, the beneficiary has immediate and full right of disposition to the assets and the income earned. The rights of the trustee under the name of which the assets are held are very limited. The trustee has no active obligations either.

Taxation

The beneficiary is personally taxed, that is, he or she is taxed as if the *bare trust* did not exist. The beneficiaries must declare income earned in their personal income tax declaration.

Also in the event that the trustee takes care of the payment of the taxes on behalf of the beneficiary, it is the beneficiary who is tax-liable.

10.3. Interest in Possession Trust

In this form of trust, the beneficiary, in this case also called the *income beneficiary*, is entitled to receive the income generated by the trust. The trustee must give the entire income of the trust (after deduction of expenses incurred and taxes paid by him) to the income beneficiary. It is possible that the beneficiary is entitled to receive these payments for his entire life, in which case he is referred to as a *life tenant*.

The income beneficiary has however no claim to the trust's capital. In most cases, the capital is destined for another beneficiary and intended for payments at a future date (which is usually determined in advance). Such a beneficiary is called a *remainderman* or a *capital beneficiary*. *Interest in possession trust*, the trustee has more rights than in the bare trust. For instance, he may also make payments to the beneficiary out of the trust capital.

Taxation

The trustee is tax-liable for all income earned, in particular:

- Rental and trading income is subject to a base rate of currently 22%.
- Dividend income realised in the UK is subject to the regular dividend tax rate of currently 10%; the tax credit associated with the net dividend reduces the taxes to be paid be the trustee.
- Income from savings (such as interest) is subject to a reduced rate of currently 20%. Income which is already subject to final taxation at source is accordingly deducted from the tax assessment basis.

The beneficiaries receive the payments after deduction of the taxes and fees that the trustee has paid out of the income. The income is used for certain purposes and the trustee's expenses need to be covered, too.

Payments to the beneficiaries are subject to the regular tax rates; however the beneficiaries receive a tax credit for taxes paid by the trustee.

In the event that a beneficiary is in the lowest bracket or tax-exempt at all, he may have a part or all of the taxes paid refunded. There are however no tax credits for dividend taxes. If a beneficiary is in a higher tax bracket, he or she must make additional tax payments.

Only very few *interest in possession trusts* are taxed at special rates. However, in some cases special rates may apply, for instance when a company buys back own shares from the trustees or where the trust involves *vulnerable beneficiaries* (these are beneficiaries that need special protection).

10.4. Discretionary Trust

The trustee has more discretionary power as to the use of income generated by the trust assets. Even if he has received instructions on who the beneficiaries should be, he can decide on the amount to be paid, which beneficiaries or groups of beneficiaries are to receive the payment, how often, and on the terms of the payments.

It is in his discretion to distribute or retain income realised. If the trust income is not distributed to the beneficiaries, it becomes part of the trust assets.

Taxation

The trustees are subject to taxation at special rates for the income earned. Dividends and similar other income are to be taxed at the dividend trust rate (32.5% since 2004-2005), and further income is to be taxed at the rate applicable to trusts (40% since 2004-2005). Since 2005-2006, the first GBP 500 of the trust income are, depending on the nature of the income, either subject to a basic rate of currently 22%, a reduced rate of 20%, or the normal dividend rate of 10%. (Before 2005-2006, this amount was subject to a special rate.)

The income received by the beneficiaries has already been subject to a 40% deduction which is the rate currently valid for trusts. The payments are thus treated as if they were made after deduction of tax. If, however, the beneficiaries are base-rate taxpayers or are not tax-liable at all, they may have the tax refunded. If they are subject to a higher tax rate than the 40% applied, no further tax will be due.

If the trustee is authorised to retain income, he can transform the income into capital. If this capital is then paid out in later years, it is no longer considered a distribution of income, but capital paid out, which is not subject to taxation.

Since 2004/2005, particular regulations apply to beneficiaries deserving special protection; these are persons who are mentally or physically disabled or persons who are under the age of 18.

10.5. Accumulation and Maintenance Trust

The beneficiaries have a claim to the assets (or at least to the income from the assets) only after they have reached a certain age (age of 25 at the latest). In the meantime, the trustees

may either use the income to maintain the beneficiary or retain the income generated in the trust.

Taxation

During the period in which the income is retained in the trust (accumulation period), both the trustee and the beneficiaries are subject to taxation (as in the case of a *discretionary trust*).

If the oldest beneficiary is over a certain age – usually 25 – and the accumulation period is not over yet, the trust is treated like a *mixed trust* for tax purposes.

When the accumulation phase has ended, the applicable tax rules depend on what is going to happen with the trust. If the trust is to be dissolved and the trust assets are to be transferred to the beneficiaries, the trustees may have to pay *capital gains tax* on the profits earned as of that date.

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10.6. Tax Pool

The managers or trustees of *discretionary trusts* or *accumulation and maintenance trusts* must make sure that the taxes have been paid before they distribute income to the beneficiaries.
The tax pool is composed of taxes that have been paid by the trustee at the rate required (trust or dividend-trust rate) and of taxes paid at the standard rate applicable to the first GBP 500 of income. The tax credits, such as for dividends, are not included in the tax pool. When the trustees distribute income to the beneficiaries, the tax pool is reduced by the amount of the tax credit on this portion of income.

If the taxes in the pool do not completely cover the tax credit for the beneficiaries, the trustee must come up with the remainder himself.

10.7. Mixed Trust

Most trust forms may also be combined, such as, for example, an *interest in possession trust* with a *discretionary trust* or an *accumulation and maintenance trust*. These trusts are then called *mixed trusts*.

Trustees as well as beneficiaries in a *mixed trust* always pay the tax rates stipulated for the respective portion of income.

Some other forms of mixed trusts exist: In the *settlor-interested* trust, the *settlor* keeps some particular rights, for instance as to the income generated. In *non-resident trusts*, all or some of the trustees do not live in the UK. The *special trusts* are founded for charitable purposes as well as for pension funds, investment funds or employee provision funds.

10.8. Trusts and Capital Gains

Trustees are subject to taxation for all profits that exceed a specific tax-exempt amount; the applicable tax rate depends on the form of the trust. The beneficiaries do not make any payments to the tax authorities with respect to the trust profits, but cannot claim any tax refund on payments made by the trustees either.

Annual tax exemption for trusts is half the amount of the exemption granted to an individual. Only under certain conditions, for example when a trust serves to benefit a disabled person, the trustee is subject to the same tax exemption as an individual.

If a settlor has several trusts, the annual tax exemption is correspondingly limited, proportionally based on the number of settlements formed since 6 June 1978 and which are still in existence.

11. SUMMARY AND CONCLUSIONS

From among the western European countries examined, only some countries offer conditions for private foundations which are as favourable in terms of taxation as those existing in Austria. These countries are Switzerland (only some cantons – particularly the canton Schwyz) and Liechtenstein. Neither country belongs to the European Union. Some member countries of the EU such as Cyprus, Ireland and some Eastern European member countries generally offer low corporate tax rates with the result that current taxation similar to that for Austrian private foundations can be achieved there.

However, in order to understand the functioning of private foundations, it is essential to look at foundation taxation from two different perspectives and to consider to what extent payments to the foundation and out of private assets are subject to taxation, (e.g. through inheritance and gift tax) and to what extent distributions of foundations to private persons are subject to taxation.

In Austria, the tax rate for payments to a foundation is only 2.5%, while distribution of foundation profits is subject to final taxation of 25% (deducted the interim tax of 12.5 paid at the level of the foundation). From among the western European countries examined, something similar can only be found, as already mentioned, in Switzerland and Liechtenstein. All other countries only allow such advantages for public utility foundations.

Of course, one can realise even better tax results in tax havens such as Panama, for example. However, donors who transfer significant assets to such places must also take into account other circumstances, such as the stability of the political system, the stability and safety of the financial sector, the reliability of the legal system, and how easy the assets may be accessed to, etc. Thus, many tax havens are excluded as locations despite the minimal tax burden.

Also in European territories, there are tax havens and countries with low corporate tax rates (tax-exemption of non-realised profits) and countries that do not levy any inheritance and gift tax (e.g. Estonia). However, with regard to these countries, potential donors should also weigh the above-mentioned stability criteria. If stability criteria and tax advantages are considered as two factors that cannot be looked at separately, then there is no doubt that Austria, along with Switzerland and Liechtenstein, is at the top of the most attractive locations for foundations that do not pursue a public utility purpose. In combination with impermeable bank secrecy, this naturally results in frustration on the part of neighbouring countries, which are forced to watch capital outflow to Austria.

It is obvious that the Austrian regulations for foundation are not exactly in the spirit of the European Union; but even from a mercantilist perspective, it is questionable whether the Austrian “beggar my neighbour” policy really brings about the many economic advantages that could justify such regulations.

Let us review once again all the arguments that were used to justify the current rules for foundations. Most recently, these arguments were again brought forward by donors that saw no advantages in the elimination of the inheritance and gift tax:

- **Private foundations ensure 400,000 jobs in Austria.**

Empiric research proves that it does matter to the fate of a company where the group has its headquarters. Especially the more valuable jobs are created around the headquarters; research and development is also frequently located there. Decisions to close parts of companies are easier to make when they concern locations abroad rather than domestic locations. The controlling owners and managers often live where the group management is domiciled and are integrated into society there; and nobody likes being regarded as an ice-cold job killer in his own community.
This all speaks in favour of maintaining group headquarters in a country or attracting new headquarters. The truth, however, is simply that foundations as a rule are not group headquarters but only asset managers. If a foundation is located in Switzerland and its owner is domiciled in Austria, then the owner will manage the company by means of exerting influence in the companies' supervisory boards in Austria rather than from Switzerland. In Switzerland, the foundation ensures only the jobs of a few law and tax consultant offices.

- **Foundations generale new capital inflows to Austria**

This argument is founded and not founded at the same time. There are numerous examples in which foreign company assets were contributed to Austrian foundations in order to save inheritance tax. The contribution of shareholdings however did not bring any real capital. German jobs at Thyssen were not transferred to Austria. With respect to the Thyssen case, the authors ignore whether the shareholdings have been transferred to an Austrian custodian bank or not; for the foundation, this is of no significance anyway. A private foundation may own securities and real estate anywhere in the world; the endowment to the foundation is only a purely technical accounting procedure and does not imply any physical transfer of assets. What is true is that in terms of taxation, the capital income is attributed to the foundation and that Austria consequently realises some tax revenues.

- **Thanks to the legislation on foundations, Austrian money invested in shareholdings abroad goes back to Austrian and a transfer of money abroad is prevented**

Only a few examples are known to the authors where funds invested in shareholdings in abroad-based foundations have actually been repatriated to Austria (e.g. the case of Wlaschek). The key motives for establishing a private foundation are, in economic terms, the tax exemption of proceeds from the disposal of major shareholdings and the non-existence of inheritance tax (or the possibility to circumvent the order of succession). Now, if someone

has a significant shareholding including important non-realised (reinvested) profits and this person wants to realise these profits in a tax-saving manner, then transferring the amount to an abroad-based foundation does not help him because the endowment would be considered as a realisation of profits and therefore be subject to capital income tax. Nor would relocating his domicile abroad serve him, because in accordance with Section 31 (2) Income Tax Act, the profits would be considered as realised upon the relocation of his domicile. In fact, in order to save taxes, he would have to transfer the shareholding to an abroad-based foundation *before* the value of the shareholding significantly increases and then leave it there on a permanent basis. Only a few Austrians have opted for this model.
With the Gift Notification Act (*Schenkungsmeldegesetz*) an increased entrance tax rate has been introduced for endowments to foreign foundations in cases where no administrative assistance agreement has been concluded with Austria.
If Austria was primarily concerned about preventing Austrian capital owners from moving their money to Swiss-based foundations, the legislator, instead of introducing tax advantages for foundations, could have achieved a comparable effect by adjusting applicable Austrian international tax law.

- **The rules for foundations result in no loss of tax revenues for Austria**

It is true that the transfer of capital from abroad to an Austrian private foundation results in capital income being taxable in Austria; it is also true that Austria continues to realise tax revenues as long as Austrian capital is not transferred to foreign foundations.
Yet, as mentioned above, there were only a few cases in which capital was repatriated to Austria. The amount of assets transferred to Austrian foundations by persons domiciled abroad was of greater significance. And, as regards the amount of capital that *would* have left Austria if the favourable rules for private foundations had *not* existed, it is impossible to make any estimation. Thus, the question whether existing provisions lead to tax losses for Austria or not cannot be answered in a well-founded manner.
The fact remains that in terms of tax savings, Austrian foundations benefit from extensive tax advantages: If we assume that the total assets of Austrian foundations amount to EUR 60 billion and that profits of 10% per year are realised on these assets (average value per year including capital gains from the disposal of shareholdings since the introduction of the rules), the tax savings realised thanks to the offsetting of the interim tax of 12.5% amount to a total of EUR 750 million[47]. This is as much as approximately six times the yearly amount of the recently abolished inheritance and gift tax or one third of the overall amount of the yearly wage tax reduction planned for 2009.

[47] Dividends remain tax-exempt in foundations as with corporations; their amount is difficult to estimate.

OUTLOOK

After the end of the current financial and economic crisis, it will become clear that the billons that were distributed to support the economy and save companies also have to be earned somewhere. Not all bailout packages for banks and companies will have the desired effects. As a consequence, the governments will have to call upon the taxpayer – not only in Austria, but in all European and in many other countries all over the world. The neoliberal deregulation model was a major contributing factor to tax relief of financial capital, and certain financial products have turned out to be accelerators of the crisis. It is difficult to imagine that the invoice is only to be presented to wage-earners and consumers. It will be a European responsibility to make it more difficult to avoid taxation on large asset holdings. The necessary measures will be:

- the abolition of tax havens in Europe including the Channel Islands;
- the introduction of a European-wide tax on financial transactions;
- the introduction of principles of international tax law that limit operating expenses for companies in tax havens;
- the abolition of the banking secrecy which is a protection against tax authorities;
- the abolition of individual regulations that aim at withdrawing capital from other member countries (to be achieved by means of a stricter code of conduct);
- the abolition of specific “tax havens“ such as the institution of the Austrian private foundation;
- harmonisation of the direct taxation system with minimum requirements for tax rates and other elements of tax systems. For instance, it is not acceptable that Austria levies no tax at all on legal transactions without consideration, while these transactions are subject to taxation in the remaining EU-15. Austria, by exempting such transactions, is creating a new tax haven. Nor is it acceptable that Austria and some new member countries do not recognise any wealth-related taxes except for land tax and that some countries make corporate tax a trifle tax.

Direct taxes are a significant basic condition of competition in a common economic area. Such basic conditions should not be the object of competition themselves. The unanimity rule which applies to most tax matters and which enshrined in the Constitutional Treaty has been an obstacle to far-reaching harmonisation measures. However the pressure by the obvious is growing:

- On the one hand, companies become increasingly active on a transnational basis, and they are not eager to apply fundamentally different profit determination rules for each permanent establishment they may have in the different countries of the EU. Compliance

costs due to legal fragmentation are far too high and the global competition emposed by American or Chinese companies that do not face this problem will further increase the pressure.

- Once the crisis is over the Member States and the European Union itself will have to consolidate their budgets. As a result, tax regimes will have to levy more taxes. The fetish toward the stock exchange and the financial sector has lost its cult-like status, hence a whole ideology is undergoing a setback. Those who claim the predominance of the State over the market and who have become aware of the importance of the real economy are now raising their voices and require that the virtual finance sector recognises its part of responsibility and make its contribution in cleaning up the mess. If individual measures undertaken are questioned with the argument that capital is very mobile and will always be in a position to avoid taxation anyway, it is the general framework enabling this tax avoidance that needs to be changed.

As things stand today, it seems illusionary to hope for a change of this general framework. However, history teaches us that attitudes sometimes change quicker than one may expect - especially in times of crisis.

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