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.