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.