MASTER THESIS

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„Private Foundations in Austria, Liechtenstein and Switzerland as a Legal Instrument of International Wealth Planning“

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Table of Contents

Introduction

'Let me tell you about the very rich" (with undisguised envy).

"They're very different from you and me.'

F. Scott Fitzgerald

'Yes' (taking a long pull from a thick Havana and pausing longer for dramatic effect).

"They have more money.' [1]

Ernest Hemingway

According to the World Wealth Report submitted by Capgemini 'while HNWI wealth growth was a modest 4% in 2015, HNWI wealth continued to hit new record highs'[2]. Europe's HNWI population and wealth both grew in 2015 by 4,8% to 4,2 million and US$ 13.6 trillion respectively.[3]

The number of ultra-high-net-worth individuals (UHNWI) with $30m or more in net worth increased in 2016 by 3,5% to 226, 450 individuals holding wealth of $27trn.[4]

The number of UHNW individuals is predicted to grow even in the situation of global political and economic instability and is forecasted to reach 299,000 people by 2021, compared to 226,450 in 2016[5]. UHNW wealth will accordingly rise to $35.7trn by 2021.[6]

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[1] David Maude, *Global Private Banking and Wealth Management: The New Realities* (John Wiley&Sons, Ltd. 2006) xi (Source: Conversation anecdotally reported to have taken place in a Paris cafe in the 1920s. In fact, Fitzgerald wrote the first phrases in a 1926 short story, 'The Rich Boy', and Hemingway replied a decade later in an article, 'The Snows of Kilimanjaro', published in Esquire. (And Hemingway's glib retort was borrowed from Mary Colum, an Irish literary critic.)

[2] Capgemini, *Capgemini Financial Services Analysis* 2016, World Wealth Report (2016) https://www.capgemini.com/experts/thought-leadership/world-wealth-report-2016 accessed 1 August 2017

[3] ibid

[4] Wealth X, *World Ultra Wealth Report 2017,* (Wealth X, 2017) 1

Numerous advisors, planners, lawyers and managers are involved in the process of managing that wealth providing legal, financial and tax advisory services to the wealthy clients shaping the industry of wealth management, ‘darling of the financial service industry’.[7]

There are a number of reasons why people would involve professionals to manage their wealth.

Uneasy issue for the wealthy population has become the global trend of the governments to examine private wealth and its flows implementing laws on bank secrecy, transparency, disclosure of information and tax avoidance.

In the changing fiscal times, many countries have adopted measures like Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS), as well as national laws on controlled foreign corporations (CFC Rules) aimed at wealthy individuals attempting to hide their assets. The CRS comes into force in 2017-2017 in most countries will come into effect across most countries throughout 2017-18 and will largely influence the process of exchange of information between countries.[8]

Therefore, it goes without saying that the tax advisory services are of great significance, as they help to preserve the assets. Sophisticated structure can eliminate or diminish particular taxes with full compliance with the national and international tax regulations.

Another motive to address the advice of wealth managers is the protection of beneficiaries, family members and a smooth transfer of wealth into the hands of next generation. Where the successors are not capable of running the business the right wealth management can eliminate the risks of bad decisions, family disputes or fragmentation of wealth.

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[5] ibid 1
[6] ibid 1
[7] Maude (n 1) xi
[8] Wealth X, *World Ultra Wealth Report 2017,* (Wealth X, 2017) 1

Wealth managers can create value for the clients by safeguarding their assets from the attacks of the creditors. It is never too late to protect your wealth before any lawsuit arises.

Professionals of the wealth management industry have at their disposal various exceptional instruments to satisfy evolving needs of the most whimsical clients. Wealth can be structured through foundations, trusts, life insurance, holding companies, establishments and family limited partnerships.

The leak of the Mossack's clients list has highlighted the weakness of offshore wealth management industry which is currently under strong pressure and evidenced the shift towards onshore services.

The past few years we have seen the recovery of interest in onshore estate planning solutions especially in the instrument of private foundations set up within a trusted jurisdiction with the solid and reliable banking system and political and economic stability.

The primary emphasis of this master thesis is the examination of the legal structure of private foundations in Austria, Liechtenstein and Switzerland which serve as the classical models of private foundations for other European countries and offshore jurisdictions implementing laws on private foundations.

The aim of this master thesis is to investigate the role of private foundations of Austria, Liechtenstein and Switzerland for the wealth management purposes through revealing their benefits and controversial issues as well as the common applicable tax rules.

At the time of writing of this master thesis the national legislation on private foundations of chosen jurisdictions, studies and statistical reports as well as scientific articles were drawn on.

This thesis is divided into four main chapters. The first chapter discusses historical overview and modern challenges of the private wealth management imposed on it by new economic realities. The second chapter gives a brief overview of the corporate structures used by wealth managers including foundations, trusts, establishments (Anstalt) and insurance instruments. The third main third part of the writing introduces the legal regulation of the private foundations in the chosen jurisdictions. The final chapter addresses the practical assessment of the private foundations in terms of Russian CFC Rules. It investigates how CFC Rules can be avoided by using private foundation, thus giving certain flexibility to the founder and beneficiaries.

1. International Wealth Planning: historical overview and modern challenges

1.1 Theoretic Aspects and Historical Overview of the Modern International Wealth Management

Wealth management was always the 'darling of the financial service industry'[9]. During 1980-1990 the industry was run by very 'traditional and sleepy'[10] wealth managers, who 'were able to prosper simply by showing up, being there and standing relatively still'.[11] At that period wealth managers did not put a lot of effort to attract wealth by offering their clients clear strategies or custom-fitted solutions. Therefore, in 1999 nearly every bank was offering wealth management services to its wealthy clients and they were prospering.[12]

But the financial crisis of 2000–2002 changed the industry beyond recognition and abandoned many wealth manage.[13] In spite of the fact that the crisis took its toll on many wealth managers, the industry remains stably attractive and in the next year a new generation of wealth advisors come to the industry to offer the clients new products and exceptional services.

'Today, with the recovery in financial markets, many players are refocusing on wealth management, and growth initiatives are firmly back on management agendas. The industry's profile has never been higher'.[14]

The number of HNW continues to grow. In contrast to recent years, the majority of the world's wealth increase in 2015 was more due to the creation of new wealth (such as income growth) than the performance of the existing assets, as many stock and bond markets have remained fairly flat or even fell.

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[9] Maude (n 1) xi
[10] ibid xi
[11] ibid xi
[12] ibid xi
[13] ibid xi
[14] ibid xi

For the purpose to meet the evolving needs of clients, wealth management has become increasingly broad and complex.

'There is no generally accepted standard definition of wealth management – both in terms of the products and services provided and the constitution of the client base served'[15] – the most general definition would be 'financial services provided to wealthy clients, high-net-worth individuals and their families'.[16]

Robert J. McCann, President of the UBS Wealth Management Americas, provided a succinct definition of wealth management at one of the industry conference:

> *[**Wealth management**] 'addresses every aspect of a client's financial life in a consultative and a highly individualised way. It uses a complete range of products, services and strategies. A wealth manager has to gather information both financial and personal to create an individualised series of recommendations, and be able to make those recommendations completely tailored to each client'.*[17]

Private banking is a narrower concept, which forms more exclusive, segment of wealth management. 'At least until recently, it largely consisted of banking services (deposit taking and payments), discretionary asset management, brokerage, limited tax advisory services and some basic concierge-type services, offered by a single designated relationship manager'.[18]

Private banking developed in response to the increasing sophisticated client demands; their willingness to be more actively involved in the management of their wealth; desire of financial services players to expand their services to satisfy the need of demanding clients; and, more generally, as a result of inconsistency of mass-market retail financial services and the needs of wealthy clients.

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[15] Maude (n 1) 1
[16] ibid 1
[17] ibid 2
[18] ibid 1

Therefore, wealth management is a broader area of financial services than private banking in sense of **client segments** and **product range.**[19]

Private banking's clients are high-net-worth individuals (HNWIs) 'those having investable assets of US$1 million or more'[20] or ultra-high-net-worth individuals (UHNWI) who are 'defined as having a net worth of at least US$30 million'[21]. Wealth management provides its services to clients with the asset minimum of $100 000.[22]

The product range of wealth management is broader and focuses on both sides of the client's balance sheet. "Wealth management has a greater emphasis on financial advice and is concerned with gathering, maintaining, preserving, enhancing and transferring wealth."[23] Wealth management includes *brokerage services, core banking-type products (current accounts, time deposits and liquidity management), lending products (margin lending, credit cards, mortgages and private jet finance), insurance and protection products (property and health insurance, life assurance and pensions), asset management, advice in all shapes and forms (asset allocation, wealth structuring, tax and trusts, various types of planning (financial, inheritance, pensions, philanthropic), a wide range of concierge-type services (including yacht broking, art storage, real estate location, and hotel, restaurant and theatre booking).*[24]

Thus, the relationships which wealth manager has with the client can be described as 'holistic', 'comprehensive' and 'all-inclusive', as they cover all areas of a client's financial situation. Deep and broad intimate knowledge of a client's values and priorities enables the wealth manager to develop and implement custom-fit solutions with a particular emphasis on estate planning and planning services ahead for future generations, as well as tax

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[19] ibid 2
[20] Capgemini, *Global HNWI Population and Wealth Expanded, but at a Slower Pace* (2015) <https://www.worldwealthreport.com/Global-HNWI-Population-and-Wealth-Expanded> accessed 1 August 2017
[21] ibid
[22] Maude (n 1) 2
[23] ibid 2
[24] ibid 3

advisory services and alternative investments in order to reach the main objective of wealth preservation and wealth transfer.[25]

International wealth management is sometimes characterized as the practice of placing assets in jurisdictions with bank secrecy laws in order to avoid detection by taxing authorities in an individual's home country. 'Banking secrecy may provide legitimate benefits in the form of security, privacy, intra-family dynamics, and politics.'[26] But financial activity of 'undeclared funds' can draw attention of authorities and raise the question of tax evasion if the income was not reported. The latest loud scandals only prove unpleasant outcomes of such actions.

The significant difference within wealth management should be made between **onshore** and **offshore**. Onshore services are provided to the clients within the country of their residence. Offshore services, on the other hand, are addressed to the clients who wish to manage assets booked in a country where the client has no legal residence or tax domicile for such reasons as: privacy, flexible legal system, tax considerations, unavailability of desired products and services onshore; mistrust for domestic economic and political situation. 'Indeed, some clients treat their offshore account(s) primarily as a 'repository'.[27]

The onshore/offshore distinction is important because these two types of services are different in terms of client requirements, dynamics, product and services and profitability. Offshore private banks have to earn the trust of the clients by providing highly professional services and excellent reputation. Onshore private banks in this regard shall focus on local branches, close ties with the clients, clear and convenient services.

Although the reasons why a lot of investors transfer assets offshore remain more or less the same, the provider side is changing considerably. Actually, many banks with offshore activities are involved in thorough portfolio analyses. Their goals are essentially threefold:

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[25] ibid 3

[26] William Jennings, Stephen Horan, William Reichenstein, *Private Wealth Management: A Review* (The Research Foundation of CFA Institute Literature Review 2010) 25

[27] Maude (n 1) 5

minimization of regulatory risks, size and growth potential, and focus on their core business.[28]

The amount of wealth held offshore has increased by '6.1% in 2012 to $8.5 trillion, with Western Europe the predominant source and Switzerland the most popular destination. Switzerland is expected to remain the largest single offshore center globally, with about 25% of total offshore wealth by the end of 2017, compared with 26%in 2012. Singapore, in second place, is expected to increase its share from 10% to around 12%'.[29]

'Private wealth booked in offshore centers grew by about 3% in 2015 to almost $10 trillion. A key factor was the strong repatriation of offshore assets by investors in developed markets.'[30]

'Offshore wealth is projected to increase moderately over the next five years, reaching $11.2 trillion by the end of 2017.'[31]

The offshore centers for the purpose of wealth management will remain viable and ongoing because wealth management clients will be always looking for diversification, along with broad private-banking possibilities, professional expertise, first-rate service, flexibility, and jurisdictions with relatively high level of economic and political situation. Nevertheless, the offshore wealth management industry remains under strong pressure, especially from tax authorities in the U.S. and Western Europe. In changing fiscal times, many European countries adopted measures to share citizens' bank-accounts and tax information through financial transparency programs, like Foreign Account Tax Compliance Act (FATCA) and

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[28] ibid 5

[29] Brent Beardsley, Jorge Becerra, Bruce Holley, Daniel Kessler, Matthias Naumann, Tjun Tang, Anna Zakrzewski, *Global Wealth 2013: Trend in Offshore Wealth* (bcg.perspectives May 30, 2013) https://www.bcgperspectives.com/content/articles/financial_institutions_growth_trends_offshore_wealth_global_wealth_2013/ accessed 1 August 2017

[30] Brent Beardsley, Bruce Holley, Mariam Jaafar, Daniel Kessler, Federico Muxi, Matthias Naumann, Tjun Tang, Andre Xavier, Anna Zakrzewski, *Global Wealth 2016:Navigating the New Client Landscape, Global Wealth Markets: A slowdown in Growth* (bcg.perspectives 2016) https://www.bcgperspectives.com/content/articles/financial-institutions-consumer-insight-global-wealth-2016/?chapter=2#chapter2 accessed 1 August 2017

[31] Brent Beardsley, Jorge Becerra, Bruce Holley, Daniel Kessler, Matthias Naumann, Tjun Tang, Anna Zakrzewski (n 24)

the Common Reporting Standard (CRS), aimed at wealthy individuals attempting to hide their assets.

The leak of the Mossack's clients list, Panama Papers, is 'the biggest leak in the history of data journalism' (E.Snowden)[32] has proved that the offshore wealth management industry is going through difficult times. Andrew Haslip, Verdict Financial's Head of Content in Asia-Pacific for Private Wealth Management wrote, '[T]he leak is not likely to significantly impact the offshore wealth management sector. Offshore wealth managers have been dealing with the decline in client anonymity for quite some time, and the Panama Papers are simply the biggest leak to date. Ever since automatic disclosure became the standard in the wake of the financial crisis, the industry has been transitioning away from client anonymity as an impetus for investing offshore'.[33]

Nevertheless, a great number of (U)HNWI holds and manages their wealth offshore as a result of comparatively high tax rates in most European countries and weak domestic investment opportunities.

Panama Papers will for cause a wave of investigations of the richest and most influential people in the world, but they are unlikely to lead to a dramatic change in the offshore wealth management industry.[34]

'Western Europe is one of the most mature wealth management markets'[35], which is the home for wealthiest holding a significant part of the 'old' wealth, which is usually has been being made two or three generations and largely held in property and small family businesses. As a general rule such "old' wealth does not strive to accumulate new assets but rather preserve existing ones. Thus, the clients of this region, conservative ones, will be mostly interested in private banking services and smooth transfer of wealth to the next

[32] David Lenok, *What Do the Panama Papers Mean for Offshore Wealth Management* (Wealth Management.com 4 April 2016) http://www.wealthmanagement.com/high-net-worth/what-do-panama-papers-mean-offshore-wealth-management accessed 1 August 2017
[33] ibid 4
[34] ibid 4
[35] ibid 20

generation. A challenge for private banks and wealth managers with clients in this region is to develop legal and financial instruments to profit from this wealth. [36]

The numbers for Russia have significantly slowed down in 2015. The growth in 2015 was more than two times slower compared to the index of 2014 because of the outcomes of lower product prices, international sanctions, and the conflict with Ukraine.[37] On the other positive side, 'the Russian central bank's efforts to ease monetary policy and reduce interest rates allowed private wealth in the country to grow more substantially than in other regional markets'.[38] But unstable political situation and a lack of services aimed at long-term wealth preservation and wealth transfer, have resulted in the offshore shift of wealth.

[36] Maude (n 1) 20-21.
[37] Brent Beardsley, Bruce Holley, Mariam Jaafar, Daniel Kessler, Federico Muxi, Matthias Naumann, Tang Tjun, Andre Xavier, Anna Zakrzewski (n 25).
[38] ibid.

1.2 Trends and Challenges of the Modern International Wealth Management

Europe still remains one of the major holders of world individual wealth. The rates of the financial assets owned by individuals have been constantly increasing at 4.3% per annum since 2010.[39] As a result 'wealth managers are currently valued at price-to-earnings multiples of 10-12x, higher than their corporate and investment banking counterparts at 6-8x'.[40] This sector remains attractive for the established players as well as for the owners of a newly created wealth, drawing new professionals into the industry.

Nevertheless, as every industry in the modern world the wealth management has to face certain challenges to meet the requirements of the modern market. One of the current challenges for the wealth management has been associated with 'a regulatory focus on client protection and stability of the financial system'[41] and new regulations on full tax transparency and automatic data exchange.

The European wealth management industry has to be ready for a change of service provision paradigm. 'A clear understanding of the industry forces at play, a focused strategy and efficient execution will be critical for success'.[42]

So satisfy the emerging needs of the wealthy clients there appeared a large number of family offices over the last 20 years. The wealthy families are seeing the virtue of setting up the family office. It is made to answer the need of the families that wish to transfer the wealth to future generations; to preserve family assets from splitting up, thus, consolidating them; to solving family disputes; and to boost wealth management efficiency. Family offices have become popular in recent years due to the desire of clients 'for greater control

[39] Claude Kurzo, Dr. Stefan Jaecklin, *The Future of European Wealth Management* (Oliver Wyman Report, Insights November 2014) 5
[40] ibid 5
[41] ibid 5-6
[42] ibid 5

over their investments and fiduciary affairs, as well as lifestyle management'[43]. The desire to have more control was dictated by the 2008-2009 financial crises after which families became concerned about their financial situation.

Today such investment vehicle as family offices is growing in numbers. Anyway, it is difficult to estimate the real numbers as far as there is no clear definitions of a family office, 'but there are at least 3,000 single family offices in existence globally and at least half of these were set up in the last 15 years'.[44]

According to the World Wealth Report 'while HNWI wealth growth was a modest 4% in 2015, HNWI wealth continued to hit new record highs'.[45] Europe's HNWI population and wealth both grew in 2015 by 4,8% to 4,2 million and US$ 13.6 trillion respectively.[46]

Family offices are predicted to play even a bigger role in the future of the wealth management since they offer custom-fit solutions to the clients. Such services are rather costly and therefore family offices target at the families holding wealth worth at least US$100m.

Key trends of the modern wealth management:[47]

Market Landscape Trends: the amount of private wealth in emerging markets will considerably accrue. Meanwhile the private wealth in developed markets will not change dramatically, and core source of wealth appears business activity. In mature Western

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43 Urs Frey, *EY Family Office Guide: Pathway to Successful Family and Wealth Management;* (Ernst&Young GmbH, 2013) 3 <http://familybusiness.ey.com/pdfs/ey-family-office-guide-single-final.pdf> accessed 1 August 2017

44 ibid.

45 Capgemini, *Capgemini Financial Services Analysis* 2016, World Wealth Report (2016) https://www.capgemini.com/experts/thought-leadership/world-wealth-report-2016 accessed 1 August 2017

46 ibid

47 Brent Beardsley, Jorge Becerra, Bruce Holley, Daniel Kessler, Matthias Naumann, Tjun Tant, Zakrzewski Anna, Wealth Management in 2020: A Call to Action (bcg.perspectives 30 May, 2013) https://www.bcgperspectives.com/content/articles/financial_institutions_growth_wealth_management_2020_global_wealth_2013/ accessed 1 August 2017

markets the gain of wealth will be observed in the UHNW sector, while in the HNW sector, 'Generation X' will outpace the baby-boom generation with respect to money in motion'[48].

In the future traditional borders between wealth management, asset management, and investment banking will become more blurred. The major wealth managers will be involved into investment banking to create strong bonds with the clients in developing economies.

In this regard family offices are predicted to be flourishing as the local segment matures and UHNW families will proceed to transfer the assets from first-generation to next generations of business owners.

Client Trends: Wealthy clients diversify in their descent, financial goals, and investment behavior. 'An understanding of exactly what each client expects from a wealth manager will be paramount'.[49] The traditional role of advisors as well as product specialists and advice they offer will change. True professionals will need to be involved into collaboration with the wealth managers and clients, making a sustainable focus on client's demand. Client-centric wealth management aims to learn and read the wishes of the clients and subsequently to transfer information into improved advice. Therefore, an important indicator of the high competence will be the ability to administer numerous experts and to operate functions uninterruptedly, controlling clear role and responsibilities assignment, current and potential interests of the client.

And it has become obvious that 'traditional value propositions are fading'[50]. The financial crisis 2008-2009 has ruined the fundamentals of client trust[51]: the modern omnipresent mass media endangers the transparency and integrity of wealth advisors. The clients will be seeking for the new values such as impartial highly professional advice, global investment and tax efficiency.

[48] ibid
[49] ibid
[50] ibid
[51] ibid

To attract new clients and retain established ones modern wealth managers have to provide excellent and truly global advice complemented by first-class expertise and manage multiple booking centers of the clients. Wealth managers will be more often operating outside of their national markets. Such services are not new for wealth management, but still will be a great benefit for the clients.

Eventually the cost of wealth managers will grow with cost-to-income ratios of 60 percent.[52] In this regard Swiss wealth managers particularly can face severe cost challenges because of the advice complexity, which is inevitably associated with managing multiple booking centers. To avoid the increasing costs wealth managers will customize services by intensifying demand management, consolidating locations, offshoring assets, outsourcing their services.

Business Economics Trends: Political pressure to create regulations on detecting and prevention of tax avoidance schemes will add costs and complexity. Such governmental actions combined with banking regulations and customer protection measures have already build obstacles for the clients and their wealth managers, likewise adding complexity and cost disadvantages for clients with multinational allocation of assets.

The European wealth managers will have to modify their strategies as retrocession payments on investment products are being prohibited or will be prohibited in Europe.[53] The industry will have to adapt to a new situation and to work out a clear substitute strategy for the clients as well as to adjust their pricing models in order not to lose these revenues.

[52] Brent Beardsley, Jorge Becerra, Bruce Holley, Daniel Kessler, Matthias Naumann, Tjun Tant, Zakrzewski Anna, (n 40)
[53] Brent Beardsley, Jorge Becerra, Bruce Holley, Daniel Kessler, Matthias Naumann, Tjun Tant, Zakrzewski Anna (n 47)

2. Corporate Law Aspects of Private Wealth Management

2.1 Corporate Structuring in PWM

Wealth managers have at their disposal various corporate instruments to satisfy the clients' needs. Asset protection tools vary on the basis on their legal recognition and tax treatment from one jurisdiction to another. Wealth managers and their clients choosing the corporate instrument evaluate them across three dimensions: control, asset protection and taxation[54]. The European wealth managers primarily use trusts, foundations, insurance contracts, establishments (Anstalt), private funds etc.

Trust

Typically the instrument of Anglo-Saxon trust is not legally recognized in civil law countries. The history of continental Europe lacks the tradition of trust relationship. At the same time it is well known to the history of England or other Anglo-Saxon countries, where the assets were transferred by the settlor to the trustee in the times of crusades etc. to serve in favour of the settlor's family during his absence and in case of death in a suitable manner. In terms of problematic lack of existence of trust structure the assets are managed other way in continental Europe. Therefore, Europeans would choose the concept of the well-known foundation. A trust is used above all when the trustworthy thereby either family members or to assist him or her in particular. The trust has, like the foundation, own peculiarities, but the purpose is common - the asset protection.

Liechtenstein was the first civil law jurisdiction that adopted the original concept of Anglo-Saxon trust (*ger. Treuhänderschaft*) and enshrined it in Liechtenstein Law on Companies (*ger. PGR- Personen- und Gesellschaftsrecht*) of 1926 and two years later in 1928 introduced the Law on Trust Enterprises (Business Trust), which serves as a legal code

[54] Francesco A. Schurr, *Trusts in the principality of Liechtenstein and Similar Jurisdictions, Aspects of Wealth Protection, Beneficiaries' Rights and International Law* (Schriften des Zentrums für liechtensteinisches Recht (ZLR) an der Universität Zürich, Band/Vol. 4, 2014) 5

applicable to the private trusts. The main purpose was to transfer the instrument from the common law system and ‘to attract investors from the Anglo-American cultural and legal background’[55].

The legal concept of the trust under the Liechtenstein law and the core elements of the legal status of the settlor, the trustee and the beneficiaries remain in consistence with the rules established for the Anglo-Saxon trusts.

> *‘A trustee within the intendment of this law is a natural person, firm or legal entity to whom another (the settlor) transfers movable or immovable property or a right (as trust property) of whatever kind with the obligation to administer or use such property in his own name as an independent legal owner for the benefit of one or several third persons (beneficiaries) with effect towards all other persons’*[56].

Therefore, the settlor and the trustee have settled the trust and are bound by the will of the settlor upon the transfer of assets in order to hold and administer such assets in his own name as the legal owner for the benefit of beneficiaries. The trust is created in written form between the settlor and the trustee. Such agreement created for the period longer than 12 months is to be recorded in the Public Register within first 12 months after the creation of the trust, where the trustee or one of the trustees is a resident or domiciled in Liechtenstein.[57]

The Art. $932a^2$ of the Law on Companies regulates the establishment of the Trust Enterprise (*ger. Treuunternehmen*), which can be with or without legal personality. But in practice, the Trust Enterprises without legal personality are rare. The creation of Trust Enterprise facilitates the pursuit of commercial or non-commercial activities as the estate planning or

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[55] ibid 6
[56] Liechtenstein Company Law 1926 Art. 897
[57] ibid. Art. 900

the trade with assets. Unlike the Liechtenstein foundations the Trust Enterprises are always to be entered into Public Register.

The instrument of trust was introduced as an alternative option to foundations for the pursuing of the purpose of managing family assets for the benefit of family members of certain families (Express Family Trust) allowing to safeguard the interests of the whole family and its future generations.

Apart from Liechtenstein, the trust-like instruments were implemented in France, Malta, and recently Hungary and the Czech Republic. Switzerland has not implemented its own Anglo-Saxon trust law, but nevertheless, the country remains the largest trust administration centers in the world and the significance of this question is high as the professionals admit flexibility and suitability of trusts for wealth management and asset planning. July 1, 2007 Switzerland has signed and ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition, harmonizing its domestic law with the rules of the Convention, which resulted in the recognition of trusts, as well as the principle of a separated protected fund owned by a trustee which is separate from the rest of his legacy.

Establishment (Anstalt)

Establishments (Anstalt) can also be an important estate planning vehicle. The legal instrument of Establishment is known to Germany, Austria, Liechtenstein and Switzerland. But the Private Law Establishment is a form of legal entity unique to Liechtenstein legal system. The Liechtenstein legislator defines the Establishment as:

> *'a legally autonomous, organized, permanent undertaking dedicated to economic or other objects and entered in the Public Register, which has holdings of material and possibly personal resources'*[58]

[58] Liechtenstein Company Law 1926 Art. 534

The Establishment gained popularity due to its flexibility, as it can be designed as a one-person company, foundation or corporation, and tax benefits which are attributed to the Establishments.

The Establishment is required to be entered in the Public Register. It comes into existence and acquires legal personality only upon entry in the Public Register.[59]

Under the provision of Liechtenstein Company Law the Establishment may have members and divided into parts with provided minimum capital, or no members and undivided capital. [60]

The minimum capital contribution paid in cash or in-kind capital contribution is 30.000 CHF/EUR/USD if it is not divided into parts or 50.000 CHF/EUR/USD if the capital is to be divided into shares or consist of securities. In practice, the Establishments are formed without members with undivided capital.

The Establishment may pursue commercial or non-commercial purpose. It is often used for asset management, equity participations, copyright and patent rights.

The articles or regulations of the Establishment may determine the beneficiaries or the manner in which they shall be identifies, as well as the way in which the beneficiaries may participate in the Establishment. The information concerning beneficiaries is usually contained in the regulations of the Establishment as it is not required to be deposited in the Public Register and thus the anonymity is retained.

Life Insurance

Life insurance was never viewed as an independent and separate instrument of wealth management and wealth advisors do not often recognise its value, but it 'can do very well

[59] Liechtenstein Company Law 1926 Art. 538
[60] ibid Art. 540

delivering investment advisory services'[61] and be a plentiful source of income. Nevertheless, life insurance has always played an important role in delivering wealth management services. Therefore, life insurance is probably not the most efficient instrument, but certainly deserves attention as a very simple and beneficial one.

Life insurance is an essential tool of wealth planning in terms of passing on wealth to the next generations. Life insurance contract gives the clients more flexibility and confidence in financial, tax and legal questions letting them reach maximum of the goals of assets protection, estate transfer and additional financial benefits as well as certainty that they can spend their money and there will be something left for the future.

Tax efficiency is the further motive for the concluding of the life insurance contract. Upon death the estate can be transferred in a tax efficient manner as benefit paid to the beneficiaries of the life insurance contract is in many jurisdictions tax free.

As a rule the contributions made by the policy holder are not included into his taxable base upon his death nor subject to a gift and estate tax. In addition to that, life insurance can make value through its transferring to the beneficiaries of the policy holder regardless time limit, expenses or challenges, which are generally attributed to testaments. Wealth managers also advice to use life insurance to pay taxes on inheritance after the death of the policy holder.[62]

The instrument of life insurance is a unique and advanced tool to fill the gaps in the wealth management structure and to create a really unassailable stronghold for protection of assets. Life insurance can be useful and rather beneficial in covering small issues which cannot be solved by the more profound wealth structures as foundations, trusts or establishments.

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61 Russ Alan Prince, *Life Insurance: The Often Missed Opportunity For Wealth Management Accounting Practices*, (Forbes 28 April 2015) https://www.forbes.com/sites/russalanprince/2015/04/28/life-insurance-the-often-missed-opportunity-for-wealth-management-accounting-practices/#6d8f6b0e17b0 accessed 1 August 2017

62 Hanna Shaw Grove, Life Insurance and wealth Management, (Financial Advisor Magazine, 2006) < http://www.fa-mag.com/news/article-1449.html?section=2> accessed 1 August 2017

Working with the insurance companies wealth managers can offer a more substantial product and satisfy its clients' needs more fully.

2.2. Legal Concept of Private Foundations

Foundations have first appeared in Mediaeval Europe for charitable purposes. 'They were the first instance of 'legal persons', a concept that lies at the basis of Western corporate law'[63]. The concept of family or private foundation which serves private purposes was developed in Europe over the centuries.

The law on foundations is not harmonized in Europe; therefore, there is no clear definition for the private foundation as well for the foundation in general. In spite of the substantial distinctions of the foundation law in the *civil law jurisdictions*, the distinctive features of the private foundations, based on the findings of the legal comparative studies, are the following:

- Organizational independence (usually foundations have full legal personality);
- Full transactional capacity;
- No formal membership;
- Endowment provided by the founder;
- Determined foundation's purpose fixed in statutes;
- Pursuit of a specific purpose.

The definitions of the foundations in the different European states can be deceptive sometimes.

For example, the pursuit of public purposes by charitable foundations does not always mean that they cannot make private distributions or part of the activities of the private foundation can be intended to fulfill pure charitable purpose. 'The notion of acceptance of any legal purpose for the establishment of the foundation very often conceals certain

[63] Paolo Panico, *Private foundations and trusts: just the same but different?* (Trust and Trustees Vol. 22, 1 February 2016) 132

restrictions on private distributions to the founder or to the family or as regards enterprise purpose foundations.'[64] Such restrictions can be designated in statutory law directly or indirectly.

A lot of the jurisdictions in Europe have already implemented the law on private purpose foundations. Among them are Austria, Liechtenstein, Switzerland, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Italy, Latvia, Malta, the Netherlands and Sweden.[65] The introduction of private-benefit foundations on a legislative level is necessitated by strong, current demand in the economy. But in most of these countries the structure of private foundation has not gained popularity and remains legally weak instrument, which is rarely used for private wealth management purposes.

A wave of private foundations statutes can be explained by the apparent benefits which a private foundation can bring in terms of wealth management:

- Private Foundation is a corporate entity and holds title to its assets;
- Private Foundation has no Beneficial Owners;
- Private Foundation may preserve assets and capital for the next generations;
- Private Foundation supports family members defraying the costs of education, maintenance or housing through regular payments to family members even after the death of a founder;
- The next generations can inherit assets when they are too young and unable to manage them; in this case a foundation holds the assets until successors become able to manage family's estate.
- Private Foundations provides the greatest control over assets and decision-making process. For example, the disabled person or someone who lost his mental capacity can

[64] Dr.Dr. Klaus Hopf, Priv. Doz. Dr. von Thomas Hippel, Dr. Helmut Anheier, Dr. Werner Ebke, Dr. Ekkehard Reimer, Dr. Tobias Vahlpahl, *Feasibility Study on a European Foundation Statute: Final Report* (Max Planck Institute for Comparative and International Private Law Centre for Social Investment at the University of Heidelberg 2009) 60

[65] ibid

be deprived of certain rights. The estate and the business of such a person will be then passed over to and administered by courts or state authorities. Assets endowed to the foundation will be managed according to the will of such person through by-laws.

- Private Foundation preserves assets from fragmentation, for example, the private foundation may hold held art collections, so that the collection is kept together and not sold.
- Private Foundation is a suitable instrument to promote philanthropic, scientific or humanitarian purposes and to involve family members into carrying out such public purpose activities;
- Private Foundation protects the assets of a founder against political, economic and fiscal uncertainties.

In some of the European jurisdictions the concept of family foundation as a subtype of private-purpose foundation has been introduced. Family foundation promotes the interests of the members of a designated family. But only a few countries allow family foundations without any restrictions. The allowed ‘any lawful’ purpose very often have certain restrictions in regard to family foundations. In the Netherlands in Italy the restrictions apply to needy members of the family, the family foundations in Denmark extend only on close relatives or in Austria they are established for a given period of time.[66]

As a common rule the laws on private foundations in Europe contain restrictions on the distributions, ‘in the sense that no private benefits (distributions made without adequate compensation) may be provided to the founder or to the members of the board of directors’[67]. In this regard, the Austrian private foundation is exclusion as it allows distributions to the founder. Other possible exceptions to this rule are the distributions upon liquidation of a foundation or split-interest endowments (planned giving) that assign the legal rights to certain assets to the beneficiaries and prohibit the donator to revoke the gift.

[66] ibid 60-61
[67] ibid 60

Another type of a private purpose foundation is an *"enterprise purpose" foundation* which has its aim to preserve and sustain a company. The concept is only accepted in a few countries: Sweden allows the establishment of the foundation for the pure preservation purposes; or Denmark, which offers a combination of a public-benefit foundation and an enterprise purpose foundation. In Switzerland the legislator allows the establishment of corporate foundation (*ger. Unternehmensstiftung*) and its subform - the holding foundation (*ger. Holding-Stiftung*), although there is no legal definition or provisions for the corporate foundation under the Swiss Law.[68]

In Germany such foundations are not allowed as according to the law on foundations the assets have to follow with the purpose for which the foundation is established. Austria adheres to the same rules. It becomes even more problematic when a foundation pursues enterprise purpose and public benefit purpose at the same time.

In general, private foundations can be grouped under three distinct models[69]. A 'classic' model was built upon the German tradition of family foundation and represented by private foundations under Austrian, Lichtenstein and Swiss law. The second type was developed in Dutch United Provinces. The third one is a result of experiments to implement a structure similar to trust in common law offshore jurisdictions but familiar to the clients from the civil law tradition.

The classical Liechtenstein family foundation together with the Austrian and Swiss analogue of private foundation has developed on the basis of the German tradition with a higher degree of flexibility and was followed in Panama introducing Private Interest Foundations under the law of 1995.

It should be noted that classic model of the private foundation was heavily influenced by the trust law. As a result, the classic model can be characterised as 'a trustlike device that

[68] ibid 60
[69] ibid 61

allows the founder to retain a more prominent role than a trust settlor and at the same time restricts the rights and powers vesting in the beneficiaries in a more effective way than under ordinary principles of trust law'.[70]

The main difference between the private foundation and trust lies in the legal regime. Private foundation is granted legal personality that owns the assets itself and which is used for the ownership of various assets movable or immovable. Private foundation is authorised to buy and hold any kind of assets and enter into agreements in its own name. Whereas a trust is an 'equitable obligation binding trustee to deal with trust property over which he has control, for the benefit of the beneficiaries'[71]. The assets in the trust are owned by the entrusted trustee.

Private foundation is a useful and advantageous tool of asset protection as it provides provisions restricting legal claims against the founder. Both private foundation and trusts are used for inheritance purposes as a substitute to wills. But they can be challenged if the legislator grants such rights to the heirs.

One of the core benefits of a private foundation is that it is not subject to the rules against perpetuities and accumulations. Liechtenstein trust can also enjoy such benefits if it has been established under foreign law.

In regard to the difference between private foundation and establishments, establishment (*ger. Anstalt*) is a modified form of foundation. Establishment differs from the private foundation in the way that Establishment acquires its legal capacity only after registration in the registry and is allowed to pursue unlimited commercial activity. Private foundation has also the right to engage in commercial activity outside Liechtenstein but limited to provision of coverage to foundation's maintenance. The main goal of the creation of Establishment should be asset management, and benefit from commercial activity shall be

[70] Paolo Panico, *Private foundations and trusts: just the same but different? (*Trust and Trustees Vol. 22, (1 February 2016) 134
[71] Underhill and Hayton, Butterworths, *Law Relating to Trusts and Trustees (*Lexis Nexis, 18th edn. 2010)

reflected in the external statute and entails the obligation to appoint an auditor and file reports.

In terms of legal theory Establishment as it is understood under the Liechtenstein law, occupies an intermediate stage between the joint-stock company and the foundation. However, from a practical point of view the Establishment is the light version of an ordinary company. Therefore, most of the domiciliary and holding companies created in Liechtenstein with tax planning objectives, are registered as Establishments.

3. Legal Regulation of Private Foundation

3.1 Liechtenstein Family Foundation

The Principality of Liechtenstein has been for decades one of the main acknowledged European centres providing highly professional financial and banking services to private wealthy clients and businesses. Liechtenstein was established in 1719 and became fully sovereign in 1806. It has a very long tradition of serving the needs of national and international clients. Liechtenstein wealth managers have an access to internationally proven financial services and institutions in Switzerland.

Recently, the global market of financial services was challenged by implementation of Know-Your-Customer rules and rules to fight money-laundering and international terrorism. The Principality of Liechtenstein has stand and adopted a number of measures to provide existing and potential clients with the high level of quality and has gained international recognition and respect. Such events have also largely have caused a trend of shifting away from offshore tools structures towards onshore solutions.

As a result, Liechtenstein can guarantee substantive level of confidentiality and discretion in regard to financial arrangements in Liechtenstein and efficient competitive solutions due to its political, economic situation and convenient location in the financial heart of Europe for those who want to use advantageous structures of establishments (Anstalt), private foundations and trusts.

The Principality of Liechtenstein before the outbreak of World War I was economically very closely connected with the Donau-Monarchy.[72] Thus on the 18th of December 1812 in Liechtenstein entered in force Civil Code of Liechtenstein (*ger. ABGB – Allgemeines bürgerliches Gesetzbuch*), which was much Austria-orientated. The First World War and difficult economic situation in old Austria finally caused abdication from Austria and

[72] Martin Melzer, *‚Das österreichische Privatstiftungsrecht und das neue liechtensteinische Stiftungsrecht im Vergleich‘* (Dr. iur. Thesis, University of Vienna 2009) 1

convergence with Switzerland.[73] This had led to the introduction of the provisions on the foundations in Liechtenstein Company Law (*ger. PGR - Personen- und Gesellschaftsrecht LGBl 1926/4*), which to a large extent had a lot of adoptions from Swiss law.[74]

In the course of the amendment of 1963, among other things, the existing obligation to register non-registered foundations was replaced by the deposit obligation. Last but not the least, the company law reform of the 1980 and its effect on the law on foundations are worth mentioning. This mainly involved a restriction of commercial activities for the foundation.

In addition to the advantages of the location of Liechtenstein as a financial center, the flexibility of the Liechtenstein foundation law and the possibilities offered to the founder including the right to anonymity, the success of the Liechtenstein Foundation is probably due to the stability of the legal and geopolitical situation. In addition to this background and the great importance of the legal form of the Foundation, it is also remarkable that the government decided in 2005 to implement the reform of the Liechtenstein reform, which was initially only planned as a partial revision.

A government change in 2005 also brought a change in the "direction of the march" regarding the revision of the Law on Foundations, away from partial revision within the limits of Art 552 to 570 Company Law, to total revision with independent system beyond the systematic limits of Art 552 to 570 Company Law.

On April 1, 2009 a revised Liechtenstein law on foundations launched the foundation practice, which since that time was largely developed by court decisions.

The family a foundation of Liechtenstein is seen as the classical model of private foundation, which has made a significant contribution to the economic success of Liechtenstein. Such countries as Panama and Austria adopted the approach of Liechtenstein. Only two years after the implementation of a new law on foundations there were approximately 40,000 foundations in Liechtenstein; around 100 billion Swiss francs

[73] ibid 1
[74] ibid 2

administered by the Liechtenstein banks were assigned at that time to pure or mixed family foundations. [75]

Under the Liechtenstein law family foundation is a special endowment of assets which forms legally and economically independent legal person established by the unilateral decision of the founder. Family foundations acquire legal personality without registering in the public register. Although, they may be registered in the public register, there is no legal obligation to do so.[76] In practice many of the private-purpose foundations are not registered in the Public Register, as they acquire legal personality upon their formation. Nevertheless, foundations only need to send a notification of establishment to the Public Register which guarantees a high degree of confidentiality. Liechtenstein family foundation does not have any members or shareholders.

A private purpose foundation within the meaning of Art. 552 § 2 Para. 4, wholly or predominantly pursues private purposes.

The Liechtenstein Law on Foundations provides for two types of private-purpose foundations- the Pure Family Foundation and Mixed-Purpose Family Foundation:

- pure family foundations are those which 'exclusively serve the defrayal of costs of upbringing or education, provision for or support of members of one or more families or similar family interests'[77];
- mixed family foundations 'which predominantly pursue the purpose of a pure family foundation but which additionally also serve common-benefit or other private-benefit purposes'[78]. In order to qualify as a mixed family foundation, the proportion of a family purpose shall exceed the other supplementary purposes. Otherwise, such foundation will fall under the definition of common-benefit foundation and lose its family foundation status. Therefore, if the common-benefit

[75] Markus Wanger, *The Liechtenstein Foundation Art. 552 §1-41 PGR:A commentary for Professionals and practitioners (*Wagner Trust Company Ltd., 2011) 13
[76] ibid 26
[77] Liechtenstein Company Law 1926 par.2 Art. 552
[78] Liechtenstein Company Law 1926 par.2 Art. 552

purpose prevails or cannot be identified, the government can appoint the state supervision of the foundation.

The family foundation is considered to be the most common structure in Liechtenstein to protect, manage and preserve the family estate, and to maintain and support family members and also pursue charitable purpose.[79]

The minimum requirement for capital endowment is CHF/EUR/USD 30,000.00.[80]

Family foundation can only pursue commercial activities if it is in line with the achievement of its public-benefit purpose or 'it is permitted on a special statutory basis'[81]. Carrying on business activities is also permissible for the attainment of the private purpose if it is dictated by the necessity of efficient assets management. If the family foundation carries commercial activity on the basis of special law it is obliged to register in the Commercial Register. The private foundation that carries on commercial activities shall draft the annual balance sheet and submit it to the tax authority in Liechtenstein.

Liechtenstein foundations have to comply with strict legislation on money laundering and terrorist financing as well as Know-Your-Customer requirements. The KYC-requirements ensures that the foundation is not being used for illegal purposes and does not serve as 'an instrument to finance dubious groups or international crime.'[82] Under the provisions of Liechtenstein Company Law the foundations that are not subject to the registration, nevertheless, have to deposit within 30 days after formation notification at Office of Land and Public Registration. Such notification shall be confirmed as correct by an attorney or legal representative under Art. 180a PGR, licensed to practice in Liechtenstein. The notification inter alia shall include the information on legal attorney or legal representative, as well as the identified by the founder or identifiable beneficiaries on the basis of the

[79] Markus Wanger (n 59) 14

[80] Markus Wanger , Liechtenstein: Foundations and Trusts in Liechtenstein (Wanger Law and Trust Company Ltd, 6 December 2010) http://www.mondaq.com/x/116802/Trusts/Foundations+and+Trusts+in+Liechtenstein accessed 2 August 2017

[81] Law on the Amendments of the Persons and Companies Act (Liechtenstein Law Gazette 2008) §2

[82] Markus Wanger (n 59) 13-14

criteria laid down in the Deed of Foundation. The confirmation of the notification shall not be issued if the purpose of the foundation is illegal or immoral or the foundation is subject to registration in the Commercial Register.

The family foundation comes into existence upon signing of a Deed of Foundation. This deed requires written and notarized form and shall be signed by the founder or his indirect representative or trustee. The signatures of the founder or indirect representative need authorization.

The establishment of the foundation shall include the founder's will to establish the foundation with a general description of the purpose, designation of the corporate name and the domicile of the foundation, the asset endowment, rules for foundation board in regard to asset allocation in case of liquidation of foundation, as well as the address of the founder or the indirect representative. The designation of beneficiaries can be provided in the Supplementary Deed of Foundation, the existence or possibility of issuing of which has to be specifically specified in the Deed of Foundation. Such Supplementary Deed of Foundation shall also be signed by the founder or his representatives and their signatures shall be authenticated. As a matter of practice it is reasonable to issue those documents separately as the Deed of Foundation is usually submitted to third parties which can cause the disclosure in sensible information.

The founder can stipulate the right to issue regulations which include additional provisions on the execution of and/or internal instructions on the management of the foundation. Such regulations can be issued by the founder himself as well by the Foundation Board or another executive body. The legislator provides that in case of contradictions the regulations issued by the founder have prevailing power over other regulations.

The founder of the Liechtenstein Foundations can be one or more natural or legal persons. The foundation established mortis causa can only have one founder. The founder can be designated as beneficiary of the foundation.

The family foundation can also be established through the indirect representative, who in this case shall be deemed to be a founder.

The founder can reserve for himself the right to amend and to revoke the foundation but only of the founder is a natural person. The founder's rights can be neither transferred nor inherited. 'The legislator deflected his first conception allowing the founder to reserve founder's rights in order to restrict potential abuse of the foundation in connection with any detriment to creditors'[83].

The beneficiary under the provisions of the Liechtenstein Law on Foundations

> *"is deemed to be the natural person or legal entity that with or without valuable consideration in fact, unconditionally or subject to certain prerequisites or conditions, for a limited or unlimited period, with or without restrictions revocably or irrevocably, at any time during the legal existence of the foundation or on its termination derives or may derive an economic benefit from the foundation".*[84]

The legislator differentiates between *beneficiaries with a legal claim* and *beneficiaries without legal claim*.

Beneficiaries with a legal claim:

- *Entitled beneficiary* is entitled to a legal right to benefit from the foundation assets or income by the Deed of Foundation, Supplementary Deed of Foundation on regulations issued by the foundation organs.
- *Prospective beneficiary* of the Liechtenstein foundation acquires the right the right to benefit from the foundation assets or income upon occurrence of condition precedent or at the time moment stipulated in the foundation documents.

[83] Markus Wanger (n 67)
[84] Law on the Amendments of the Persons and Companies Act (Liechtenstein Law Gazette 2008) §5

Beneficiaries without legal claim:

- *Discretionary beneficiary* is designated by the founder and is eligible for a beneficial interest at the discretion of the Foundation Board or other foundation organ appointed for this purpose. They only acquire a legal claim if a valid decision on the actual dividend is passed.
- *Ultimate beneficiary* is determined in the Deed of Foundation or Supplementary Deed of Foundation as a person who obtains foundation assets remaining after the liquidation of the foundation. If the ultimate beneficiary was not specified by the founder and cannot be identified the remaining assets shall pass to the Principality of Liechtenstein. In case of revocation of the foundation by the founder, the founder himself will be considered to be the ultimate beneficiary.

The new law on foundations of 2008 introduced a great number of changes among which is the changes into information rights of beneficiaries. Before 2008 the beneficiaries were also granted the right to information, but it was not strictly regulated to what extent the beneficiaries could interfere into the foundation matters and on which grounds such access could be restricted or denied. Under the new provisions of law on foundations 'insofar as his rights are concerned, the beneficiary is entitled to inspect the foundation deed, the supplementary foundation deed and possible regulations'[85]. It was also stipulated that 'this right must not be exercised in dishonest intent, in an abusive manner or in a manner in conflict with the interest of the foundation or other beneficiaries'[86]. But by virtue of exception the access can be denied in order to protect beneficiary.

The tendency of the case law on right to information of beneficiaries was more focused on restriction of the beneficiary rights especially in terms of time. But the recent Supreme Court decision of 5 September 2015 'may inspire and encourage even more disgruntled

[85] Law on the Amendments of the Persons and Companies Act (Liechtenstein Law Gazette 2008) §9
[86] ibid

beneficiaries to consider gathering information from foundations in court'[87]. The Supreme Court held that in case of collision of beneficiaries' and foundation board in respect of confidentiality, the right to supervise the foundation shall prevail. Moreover, the Supreme Court also let the beneficiaries loose in terms of 'time travelling'[88]. The Supreme Court held: 'a time restriction pertaining to such rights to supervision regarding (future) beneficiaries with regard to the past would result in serious oversight deficits'[89].

The supreme body of the foundation is the Foundation Board which is established to represent the foundation and manage its business. The Foundation Board fulfils the foundation's purpose acting in strict accordance with the Deed of Foundation and founder's will respectively.

The Foundation Board shall comprise at least two members, natural persons or legal entities. 'This provision applies only to foundations established after 1 April 2009'[90]. Foundations established prior to 2009 with only a single foundation board member do not have to appoint additional members.[91] Unless otherwise provided in the Deed of Foundation the Foundation Board is appointed for the period of three years with the right of reappointment.

The founder is free to appoint additional executive bodies.

The Foundation Board or another executive organ can amend the foundation's purpose but only in event if the purpose ceases to be attainable or permissible or upon occurrence of event that changed the essence of the original purpose. Other provisions of foundation documents can be amended by the Foundation Board or another executive organ insofar such option is stipulated in the Deed of Foundation.

[87] Johannes Gasser, *Information Rights in Liechtenstein foundations, reloaded: back to the future* (Trust and Trustees Vol. 33, 7 September, 2016,) 770
[88] ibid 773
[89] ibid 771
[90] Markus Wanger (n 67)
[91] ibid

The judge can exercise the powers to amend the content of Deed of foundation or Supplementary Deed of Foundation or the purpose of the foundation in urgent case if the foundation participant applies or on the basis of a communication from the foundation's supervisory authority or Office of the Public Prosecutor.

The foundation shall be dissolved: [92]

- In case of bankruptcy proceedings in respect of the foundation assets;
- Resolution on rejection of bankruptcy proceedings arising out of insufficiency of assets;
- If the court has ordered dissolution;
- If the Foundation Board has adopted resolution on dissolution.

The Foundation Board can adopt resolution on dissolution as soon as: [93]

- The founder has ordered revocation of the foundation;
- The purpose has been achieved or can be no longer achieved;
- The duration stipulated in the Deed of Foundation has expired;
- Other grounds provided in the Deed of Foundation.

Therefore, Liechtenstein Family Foundation provides a number of benefits in terms of asset management. The main motive for the establishment of the Lichtenstein family foundation is a high level of anonymity and discretion. The Liechtenstein law of foundations provides anonymity and discretion by giving the foundations possibility not to be registered in the public register, which can be attributed to about 97% of all Liechtenstein foundations. The Liechtenstein law on foundations takes this idea into account and contains only a single provision, according to which in the case of the fiduciary establishment of the foundation the founder must be disclosed to a third party. Such private family foundations are also not subject to authority supervision. It also does not require the deposit of the Deed of

[92] Law on the Amendments of the Persons and Companies Act (Liechtenstein Law Gazette 2008) §39
[93] ibid

Foundation rather than notification of formation to the Office of Land and Public Registration. Furthermore, there is no obligation to disclose the beneficiaries to the authorities.

Another motive for the establishment of the foundation is extensive tax advantages. Liechtenstein foundations are subject to an annual income tax which amounts to 12.5% of the taxable net income. Such rate is considered to be relatively low especially for Europe.

The new tax act provides for a new category of PIS - private investment structures (*ger. PVS – Privatvermögensstrukturen*). PIS include foundations, registered trust companies, institutions and other legal entities that hold only bankable assets.[94] Structures qualified as a PIS are subject only to the annual minimum 'all in' rate of CHF 1,200. The regulation on PIS was introduced to make the establishment of asset management structures in Liechtenstein more attractive. To qualify as a PIS the structure has to comply with the certain requirements: [95]

PIS conducts asset management in the interests of individual;

PIS is not engaged in commercial activities;

PIS is not listed on an exchange;

PIS acquires, holds, manages and sells the financial instruments stipulated in Art. 4, § 1(g) of the Asset Management Act (*ger. Vermögensverwaltungsgesetz).*

PIS may hold only equity interests in legal entities, liquid funds, and bank account balances;

If PIS holds equity interests, it beneficiaries and shareholders may not have direct or indirect influence on the management of the structure.

The capital tax was abolished by the Lichtenstein tax reform.

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[94] Markus Wagner, *Liechtenstein's New Tax Law- The End of Offshore Companies* (Tax Notes International, Vol. 64, N.9, 28 November, 2011) 635

[95] ibid 635-637

Neither the dedication of assets to the foundation nor the distributions to the beneficiaries are taxed in Liechtenstein.

There are also no tax consequences arising out of the liquidation of a Liechtenstein family foundation.

3.2 Austrian Private Foundation

Prior to the entry into force of the Private Foundation Act on 1 September 1993, foundations in Austria could be only established for charitable (Gemeinnützig) and public-benefit (Mildtätig) purposes according to the Federal Foundations and Funds Act (Bundesstiftungs- und Fondsgesetz BSFG) or according to additional provincial legislation.[96] At that time, at the end of the 1980s, countries such as Germany, Switzerland and Liechtenstein with a liberal foundation law have already had experience in this sphere. Especially, Liechtenstein foundations become foreign a lot due to the transferred Austrian assets. This could lead to a further outflow of Austrian wealth into foreign foundations which, of course, would have caused economic damage. With the introduction of the Private Foundation Act in 1993, in which Austrian legislator allowed to set up foundations to pursue private purpose and/or public-benefit purpose, the interest to the private foundation sector in Austria raised and the number of foundations significantly recovered. Along with the introduction of the new law the legislator also provided for tax advantages, even if a foundation is established for purely private purpose. Therefore, in 1994, the number of private foundations reached 110; in 1998, the number had increased to 969; by the end of 2002, there were already 2,336; and by the end of 2010, there have been registered 3,284 private foundations.[97] Sudden jump in numbers was observed in 2000 with 804 newly established private foundations. This can be explained with the introduction of the higher rate of the inheritance tax. In 2001 it amounted to 5% unlike 2,5% in 2000. But in 2009 the gain in numbers plummeted due to the abolishment of the inheritance tax and replacing it with the entry tax (2,5% (reduced rate) or 25%). With the abolition of inheritance and gift tax an important motive for establishing a private foundation in Austria,

[96] Johannes Zollner, *Foundations in Austria:The Law of Public and Private Foundations*, ed. Chiara Prele Developments in Foundation Law in Europe (Springer 2014) 4
[97] ibid

namely the avoidance of high inheritance and gift tax was omitted. Starting with 2012 the gain in numbers has become negative.[98]

The ideological motivation for implementation of law on the foundations with the pursuit of private purpose was built upon three ideas: promoting the reflow of domestic capital from abroad, preventing domestic capital from capital outflow and promoting the inflow of foreign capital through creating favorable environment (especially for the Austrian banking system and the political stability) thus strengthening the Austrian Capital Market. In fact, the Private Foundation Act created a vehicle for the preservation and management of wealth, which was endowed with numerous tax privileges. But in the meantime, such tax advantages have been eliminated.

Nowadays, private foundations are more popular and being registered more often than the foundations according to federal or provincial law. On April 4, 2017 according to the data of the Association of Austrian Private Foundations (Verband Österreichischer Privatstiftungen) in Austria there were registered 3,177 private foundations, 200 of which pursue pure public-benefit purpose. A number of private foundations are established for mixed purposes and pursue public-benefit purposes as well as pure private. Their number in percentage is around 15% of private foundations. 460 foundations were established in accordance with the Federal Foundations and Funds Act[99].

The importance of the private foundations for the Austrian economy is significant. They dispose of around € 70 billion.[100] 64% of those assets are transferred to the private foundations in form of company shares, 24% - in immovable property and 12% - private assets[101].

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[98] Verband österreichischer Privatstiftungen http://www.stiftungsverband.at/media/pdf/Privatstiftungen_Grafik_Anzahl_2016_Stand_20170124.pdf accessed 13 March 2017

[99] Verband österreichischer Privatstiftungen <http://www.stiftungsverband.at/pages/facts-figures/die-oesterreichische-privatstiftung.php> accessed 4 April 2017

[100] ibid

[101] ibid

Out of 250 high-ranking Austrian industrial enterprises 47 are at least partly owned by private foundations. With a total of around 75 Austrian companies that are listed on the regulated market on the Vienna Stock Exchange, shares of 20 of them are currently directly held by private foundations. Among them are Erste Group Bank AG (25,3%), Flughafen Wien AG (10%), voestalpine AG (14%), DO&CO AG (40%) etc.[102]

Legal Background

The definition of the private foundation is set up in Art.1 of the Private Foundation Act:

> *'The Private Foundation is a* ***legal entity*** *which has been* ***endowed with assets*** *by the founder in order to serve through their use, administration and utilisation, a* ***legal purpose*** *designated by the founder; a Private Foundation is vested with legal personality and shall have* ***inland domicile*** *status'.*[103]

The essential features of a private foundation are separate legal personality, the endowment with assets, which are managed to pursue legitimate purpose, determined by the founder. As a body corporate the private foundation has unrestricted legal capacity. The private foundation has no owners, shareholders or members, it hold the ownership title for the transferred assets itself. 'The foundation's assets are separated from the assets of the founder and are fiscally and from a Civil Law point of view, not to be attributed to him'[104].

A private foundation can be established inter vivos by (a) natural or juridical person(s) by formation of Declaration of Establishment or causa mortis only by singular natural person only. The foundation causa mortis is established by notarized testamentary declaration, which has to fulfil the requirements of succession laws.

[102] ibid
[103] Christoph Kerres, Florian Proell, *Austrian private foundation act: a practitioner's guide* (Vienna: LexisNexis Verl. ARD Orac, 2013)
[104] ibid 10.

The private foundation inter vivos is established by a Declaration of Establishment *(ger. Stiftungserklärung)* in the form of a notarial deed and comprises the Deed of Foundation *(ger. Stifungsurkunde)* and Supplementary Deed of Foundation *(ger. Stiftungszusatzurkunde).*

The private foundations are obliged to be registered in the Commercial Register and deposit its Deed of Foundation there. The first Board of Directors shall sign the application before a public notary and file for the registration of the foundation.[105] Any changes to the Deed of Foundations have to be registered in the Commercial Register. With the establishment of the Deed of Foundation and before the registration in the Commercial Register, when the private foundation come into existence, the foundations functions as a 'private foundation prior to registration' without legal capacity. Before the registration of the foundation the founder is free to amend and to revoke the Deed of Foundation without any restrictions.

The private foundations activities are not subject to supervision and control by public authorities.

The obligatory information which shall be included into the Deed of Foundation[106] is the name, address, birth date of the founder or his commercial registry number, the name and the seat of the foundation (the foundation must be seated in Austria), the duration of the foundation the contribution to and the purpose of the foundation and the name(s) of beneficiary (beneficiaries) or a general characterisation of beneficiaries and the body within the private foundation who determines the beneficiaries.
Other important and private information such as the names of the beneficiaries may be laid down in Supplementary Deed of Foundation, which is not submitted to the Commercial Register.

However, to enjoy tax benefit of 2,5% of entrance tax, the Deed of Foundation and the Supplementary Deed of Foundation must be disclosed to the Austrian tax authorities. But even in this case, the Supplementary Deed of Foundation will not be publicly opened.

[105] ibid 10
[106] Private Foundation Act Art. IX

The basic requirement for establishing a private foundation is a donation of minimum amount of EUR 70.000,00[107] paid into the foundation's bank account[108]. 'Chattels or immovable properties as well as tangibles and intangibles, and group of assets or services' can also be donated to a private foundation. In this case an audit may be appointed by the Court to confirm the value of transferred estate. Upon the application of the documents to the Commercial Register the bank has to confirm that the capital of EUR 70.000,00 was registered on the foundation's account and they are of free disposal by the Board of Directors.

It is reasonable to advise initially to donate the amount of EUR 70.000,00 and to transfer the assets higher than the minimum amount by declaration in the Supplementary Deed of Foundation. The minimal capital is not intended for the protection of creditors, but thus the creditors can only be free to dispose of EUR 70.000,00.

The purpose of the private foundation is determined in the Deed of Foundation by the founder. It cannot be legally prohibited or contrary to the law or public morality. The purpose shall be designated concretely and accessibly in order to serve through their use and management to the will of the founder. The founder may reserve in the Deed of Foundation a right to amend and to revoke the Deed of the Foundation after its registration. Therefore, the purpose can be also changes in the founder provided for the reservation of this right. If there is more than one founder, such modifications can be only excepted when all the founders agree on the modification.

A person or entity donating assets to the foundation after its formation is not regarded as a founder, rather as a co-founder. Such person cannot enjoy the founder's rights.

Private foundation can be also established through a fiduciary service or an authorized trustee. In this case the name of the trustee will be entered into the Commercial Register. Nevertheless, the name of the founder has to be disclosed to the bank, which operates the accounts of the foundation and to tax authorities. Banks require detailed information of the

[107] Christoph Kerres, Florian Proell (n 90) 16.
[108] Private Foundation Act Art. IV

beneficial owner of the foundation due to the compliance with the KYC (Know-Your-Customer) requirements, recommendation on anti- money laundering and terrorist financing. Therefore, fiduciary service may be unreasonable and unjustified action to hide the real owner of the assets. On the contrary, it can be evaluated as a strong argument for the fact of evasion of taxes.

The Beneficiary[109] may be any natural person or legal entity as well as the founder himself designated in the Declaration of Establishment or been determined by the agency assigned by the founder or by the Board of Directors. Members of Board of Directors or Auditors cannot be listed as beneficiaries.

Private Foundation Act provides for the definition of a Final Beneficiary[110]. Final beneficiary, a natural person or legal entity, shall get the remaining assets after the dissolution of a private foundation. After the revocation of a foundation by a founder, he will automatically become the final beneficiary, otherwise stipulated in the Deed of Foundation. If no final beneficiary can be identified the general principles of Austrian inheritance law apply to the assets of the foundation and the remaining assets will be passed by escheat to the Republic of Austria.

Additionally to the requirement to disclose the Deed of Foundation and the Supplementary Deed of Foundation the Board of Directors is obliged under the Austrian Budget Supplementary Act to inform without delay the tax authorities of the nominated beneficiaries for the Corporate Tax assessment of the private foundation. Under the provisions of Austrian Banking Act, banks are required to identify the beneficial owner(s) of a private foundation. In this sense, a beneficial owner is the beneficiary of the distribution of assets out of the foundation and/or natural persons who control minimum 25% of the foundation's assets. If the beneficiaries of the private foundation have not yet been determined, "beneficial owner" shall apply to the group of persons in whose interest the foundation operates or was originally established.

[109] Private Foundation Act Art. V
[110] Private Foundation Act Art. VI

As far as the Private Foundation Law is concerned, it can be said that the beneficiaries are entitled to access to information and control rights of their position as economic beneficiaries of the private foundation with a special control interest. The only practically significant control instrument, which according to the law granted to the beneficiary, is the right of access according to Art. 30 Abs.1 of Private Foundation Act. Bodies of the Private Foundation may provide information on the fulfillment of the purpose of the foundation as well as the insight into the annual financial statements, the management report, and the examination report. The question is to what extent the beneficiaries' request for information applies is controversially discussed in the literature.

Under the Private Foundation Act there two obligatory organs of foundation: the Board of Directors and the Auditor, who has to be a certified accountant.

The Board of Directors[111] is the executing body of the foundation, which officially represents the foundation, manages its business activities to ensure the fulfilment of its purpose and keeps the accounts. It shall consist of at least three members, two of whom must have their permanent residence in the EU or EEA.

The persons who belong to the beneficiaries, their spouse or partner and persons who are directly related to the beneficiary or who are collateral relatives up to the third degree, as well as legal entities[112] are not allowed to be designated as the members of the private foundation. The founder may not be the member of the Board of Directors as long as he is a beneficiary of the foundation or a close relative or married to a beneficiary.

The ***certified accountant*** shall audit the balance, accounting and annual financial report. The auditor is appointed by the founder or by the Board of Directors for the period of 3 years. The auditor has to be then confirmed by the Court.

Optional is the appointment of a ***supervisory board***. But in some cases when really large companies are founders, a ***supervisory board*** is an obligatory organ.

[111] Christoph Kerres, Florian Proell (n 90) 35
[112] ibid 38

In practice, a lot of private foundations have ***Advisory Board*** which corresponds to the intention of a founder to control the pursuit of his intentions and to retain influence on the Board of Directors. The founder and the beneficiaries usually form the Advisory Board of the foundation.

The founder is the only person who can ***revoke the foundation.*** He can do so only if he reserved for him the right to revoke the foundation in the Deed of Foundation. It is not possible to include such provision into the Deed of Foundation after the registration of the foundation. The founder who is a legal entity cannot reserve such right.

The private foundation can be dissolved only upon occurrence of following events[113]:

- The duration of the foundation is over;
- Bankruptcy proceedings have been opened over the assets of the foundation;
- Resolution of insufficiency of assets available to finance the bankruptcy proceedings;
- The Board of Directors comes to a unanimous dissolution order;
- The Court decides upon dissolution.

The Board of Directors shall come to dissolution, as soon as[114]:

- It has been reached by an admissible revocation of the founder;
- The purpose of the private foundation has been accomplished or has become unattainable;
- A term of 100 years has expired and final beneficiaries have not decided upon the continuation of the foundation for a further term;
- Other reasons, determined in the Declaration of Establishment.

Upon the liquidation of the foundation the Board of Directors shall call on the creditors to file their claims at the latest within one month of publication of the call. The remaining assets will be passed to the final beneficiary. If the final beneficiary was not identified the

[113] Christoph Kerres, Florian Proell (n 90) 84
[114] ibid

remaining assets will be passed to the Republic of Austria. But if the foundation is dissolved by the founder's revocation the founder himself will be the final beneficiary. The private foundation is dissolved with the deregistration from the Commercial Register.

The taxation of private foundations has three levels[115]:

Endowments to a private foundation are fundamentally subject to the **entrance tax** which amounts to 2,5%[116] of the donated assets for transparent foundations. The tax increases to 25%[117] for intransparent foundations, who have not disclosed the foundation deed as well as the appendix to the Austrian tax authorities. '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'.[118]

From June 1, 2014 onwards, the real value of the real estate as a basis for determining the basic income tax was to be used for property transfers to and through private foundations. Thus if the foundations is endowed with the Austrian land the entrance tax is 6% (3.5% of the basic purchase tax and 2.5% of the value of the foundation tax) of the market value.[119]

As a result of the tax reform 2015/2016, there are two changes[120] for land endowments to private foundations:

The basis for assessment is no longer the market value, but a separate "land value". The land value can be calculated either from the sum of the triple land value and the building value or from an appropriate real estate price comparison list.

Changes also resulted in the tax rate: the current tax rate[121] of 3.5% is applied only for the land value of € 400.001. Up to a land value of € 250,000, a tax rate of 0.5% applies. To the

[115] Worldwide Estate and Inheritance Tax Guide 2016 (Ernst&Young, 2016 <https://www.google.at/search?q=ernst+young&oq=ernst+young&aqs=chrome..69i57j0l5.4579j0j7&sourceid=chrome&ie=UTF-8> accessed 26 January, 2017

[116] ibid 10

[117] ibid 10

[118] Otto Farny, Ani Degirmencioglu, Michael Franz, Gertraud Lunzer, Martin Saringer, *Taxation of Foundations in Europe* (Chamber of Labour Vienna January 2009) 5

[119] *Worldwide Estate and Inheritance Tax Guide 2016* (n 101)

[120] ibid 11

land with the value between € 250,000 and € 400,000 the tax rate of 2% is to be taken into account.

Regardless of the tax reform, an additional 1.1% of the land register fee (measured from the common value) still applies to real estate transfers.

Donations from the private foundation to beneficiaries are subject to **capital gains tax** amounting to 27.5% (until 25.12.2015 25%)[122].

Intermediate tax is a kind of "advance payment" of a future **capital gains tax**. From 2016 to the rate increased up to 27, 5%. The intermediate tax applies in particular to domestic and foreign interest rates, profits from the sale of equity interests and other realized capital gains and disposals of private assets.[123]

Therefore, "tax advantages" alone can hardly ever be the main reason to establish a private foundation in Austria. Most tax benefits have been eliminated in the meantime, thus making the foundation less attractive in terms of taxation. Currently private foundations have at their disposal only minimal tax advantages.

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[121] ibid 11

[122] Steuerreform 2015/2016: Auswirkungen auf Privatstiftungen (Deloitte Österreich Tax News 22 June 2015) <http://www.deloittetax.at/2015/06/22/steuerreform-201516-auswirkungen-auf privatstiftungen/#.WYHvH4iGPIU> accessed 1 March 2017

[123] Steuererhöhungen für Privatstiftungen ab 2016 (TPA Group 2015) http://www.tpa-group.at/de/publikationen-news/newsletter/steuererhoehungen-fuer-privatstiftungen-ab-2016 accessed 6 April 2017

3.3. Swiss Private Purpose Foundations

The foundations under Swiss Law are regulated in the Swiss Civil Code *(ger. ZGB, Zivilgesetzbuch)* by Art. 80-89. The Swiss legislator permits to establish *foundations of public utility* (*ger. gemeinnützige Stiftungen*), *personnel provision foundations* (*ger. Personalvorsorgrstiftungen)* and *family foundations* (*ger. Familienstiftungen*).

The most comparable to private Austrian and Liechtenstein foundations is the Swiss corporate foundation (ger. *Unternehmensstiftung*), its subform - the holding foundation (*ger. Holding-Stiftung)* and the family foundation.

There is no legal definition or provisions for the corporate foundation under the Swiss Law. And for a long period of time it was controversial, if the corporate foundations, which pursue economic purpose, were permissible. But on 18 May, 2001 the Federal Court of Switzerland (Decision BGE 127 III 337[124]) held that the economic purpose for the establishment of the foundation is allowed and, therefore, the corporate foundations are permissible. The foundation which pursues the mere participation in companies is referred to as a holding foundation. The assets donated to a holding foundation is made in form of shares. Such foundations are traditionally established for mixed purposes: family, charitable or any other. A number of large companies are owned by the mixed-purpose holding foundations in order to promote charity, research and to preserve family wealth. Holding foundations are obliged to register and they are subject to state supervision. The provisions of the foundation deed that apply strictly to the private family purpose are subject to the special provisions set up for the family foundations by the legislator.

In recent years Swiss family foundations are seen in slightly different light. With the ratification of the Hague Trust Convention the foreign trusts must be recognized in

[124] Decision BGE 127 III 337 http://relevancy.bger.ch/php/clir/http/index.php?lang=de&zoom=YES&type=show_document&highlight_docid=atf%3A%2F%2F127-III-337%3Ade& accesses 2 May 2017

Switzerland. The ratification led to a serious question whether to implement a legal institution of a trust into the Swiss legal system or whether to revise the law on family foundations and therefore to strengthen the acceptance of family foundations. It is also not permissible under Swiss law to establish a family foundation as a maintenance foundation that 'makes distributions and grants other economic benefits to certain members of a specifically designated family in order to support them outside the narrow scope permitted by Swiss law'[125].

Under the Swiss Law a Foundation is established according to the rules of Art.80 of Civil Code. The family foundation is established under Art. 335 of Civil Code and has to be distinguished from the general foundation in such way that the family foundation has to serve for a specific family purpose and represent only the members of a single designated family to which they belong through blood relationship, marriage or adoption.[126] The founder can opt to limit the circle of the family members, who have the right to benefit from the family foundation. The restriction can be made to male or female beneficiaries, to bearers of the family name, to a specific place of origin, to Swiss nationality, to a specific confession, place of residence or blood relationship[127]. "According to modern understanding of the concept of the family, those persons that live in registered partnerships, such as cohabiting partners, are also to be counted, inasmuch as they are in stable concubinage, through which a marriage or registered partnership serves an equivalent purpose".[128] Households dependents and foster children cannot be designated as beneficiaries of the family foundation Ander Swiss law. Legal persons also cannot be counted as beneficiaries of the family foundation, even in case if it is controlled by the members of the designated family.

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[125] Patrick Schmutz; Edgar H. Paltzer, *Switzerland: estate planning with foreign family foundations – an assessment of the conflict of law and tax issues arising* (Trust&Trustees, Vol. 15, No. 5, July 2009) 412
[126] ibid
[127] Oliver Arter, The Swiss Family Foundation (Trust Law International, Vol. 26, No.3 2012) 164
[128] ibid 163

Apart from few exceptions, the same provisions of civil law apply to family foundations as to normal foundations.

Terms or special rights in favour of non-family members as well as merely occasional, ancillary and relatively insignificant disbursements from foundation capital for other purposes do not alter the character of a family foundation.[129]

The family foundation under the Swiss Law is a legally independent fund, established by the Deed of Foundation to serve the private purpose, but to a very limited extent. The purpose of the family foundation shall not be illegal or immoral. The Swiss Civil Code gives the following definition to the legal instrument of family foundation:

> *"Assets can be associated to defray the costs of education, to equip or support family members or to serve similar purposes a family foundation can be established under the rules of the law concerning persons or the law of succession for assets."*[130]

Therefore, Family Foundations are only allowed for covering of the costs of education, endowment, support of family members or similar purposes.

"It is thus not possible under Swiss law to establish a family foundation as a maintenance foundation that makes distributions and grants other economic benefits to certain members of a specifically designated family in order to support them outside the narrow scope permitted by Swiss law."[131]

The costs of education comprise both the cost of the primary and secondary education as well as higher education. The costs for professional training and reorientation, research projects or artistic education can also be covered by the assets of family foundation. Moreover, the costs arising out of the education such as accommodation (especially at non-

[129] Bask-Grüninger (fn 10), N3 on Art 87 CC; DGer, Judgment on 30 November 2006, 5C.68/2006, E.5

[130] Swiss Civil Code Art. 335 (1)

[131] Patrick Schmutz; Edgar H. Paltzer (n 111)

residence placement), transportation or other living expenses can also be included during the educational period.

The concept of endowment remains unclear. It was used to be understood as the ‘dowry for daughters suitable for marriage or actually marrying’[132]. But nowadays it describes ‘everything concerned with establishing, ensuring and improving one’s livelihood, […] for male and female family members alike’[133].

It is not permissible under Swiss law to grant family members unconditional beneficial access to the foundation’s assets or to proceed disbursements from the foundation’s capital to cover general living expenses or to improve their financial situation. Swiss legislator only permits ‘the provision of the unfettered economic security of family members over the coming generations’[134].

The family members can get financial support from the family foundation. The concept of support is restrictive. It can be applied to a concrete situation of need, for example, to the family members suffering of diseases, disabled, who are unemployed, living alone and faced financial difficulties.

The role of fee tail (Familienfideikommissen) in the Switzerland history of law can give the better understanding of the origins of the limitation of purpose. The fee tail was not granted a separate legal personality. The main idea of such instrument was the protection of assets and its passing over to the next successor upon the death of holder of the estate. The assets constituting the fee tail were to pass over to the member of the family as a rule to the first born. Therefore, the fee tail pursued a purely economic purpose, namely, ‘to provide respective holders or authorized users with unconditional enjoyment of the assets concerned’[135]. The instrument of inheritance of the fee tail existed till the enactment of the

[132] Oliver Arter (n 113) 166
[133] ibid 167
[134] ibid 158
[135] BK-Riemer (fn 33), N 133 on the systematic component

Swiss Civil Code in 1907. In Art. 335 Swiss legislator specified that setting up 'fee tail'[136] (*ger. Familienfideikommissen*) is no longer allowed[137], prohibiting the family members enjoy the family assets for the strengthening of the financial situation.

The beneficiaries of the family foundation are limited to the members of the founder's family. Because of the 'intimate character'[138] of the family foundation it can enjoy some particular benefits. First of all, the family foundation is exempted from the obligation to register in the commercial register or submit any documents to the state or cantonal authorities. Nevertheless, the founder can include into the charter of foundation a requirement to register the foundation, which will grant more transparency in legal matters and serve as a proof of existence of a foundation. Therefore, the registration of the family foundation in the commercial register is optional. There is only one exception from this rule: if the private foundation conducts trading, manufacturing or other commercial activity, it obliged to register under the commercial register.[139] Secondly, family foundations are not subject to governmental supervision[140], as well as they are exempted from an obligation to appoint an auditor[141], however family foundation can opt to designate an auditor. But according to the provision of Art. 957(2) Swiss Code of Obligations the obligation to keep accounts applies to legal entities. Foundations that are exempt from the requirement to appoint an auditor under Art. 83b paragraph 2 Swiss Civil Code are only required to keep accounts in income and expenditure and on their asset position.[142] The obligation to keep accounts concerns the supreme body of the foundation, as the body responsible for compliance with the provisions of Code of Obligations. In case the foundation conducts trading, manufacturing or any other commercial activities, the requirement to keep records and file the annual financial reports also applies.

[136] Fee tail (Familienfideikommissen) as defined by Webster's Collegiate Dictionary refers to the restriction of property by limiting the inheritance to the owner's lineal descendants or to a particular class thereof.
[137] Swiss Civil Code Art. 335 (2)
[138] Oliver Arter (n 113)161
[139] Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil-Obligationenrecht) Art. 934
[140] Swiss Civil Code Art 87
[141] ibid
[142] Swiss Code of Obligations Art. 957(2)

‘The principle of freedom to form foundations applies in Swiss private law’.[143] But nevertheless, the legislation lays some restrictions und requirements, that have to be complied with, upon the establishment of the family foundation:

Liquidation[144]

The founder has no possibility to reserve for him, his legal successors or for the foundation bodies the right of liquidation of the foundation in the foundation charter. The only possibility kept for the founder is to predetermine the foundation’s future dissolution by specifying its duration by setting up the fixed duration of the foundation or specify an event upon which the family foundation shall be dissolved. For example, he can restrict the circle of the beneficiaries to one generation or can introduce the way the assets of the foundation shall be distributed between the beneficiaries within expected period of time ending with the dissolution of the foundation. It is permissible to state in the foundation charter the dissolution of the foundation upon a resolutory condition – occurrence of an uncertain future event[145], which has to be detailed in the charter of the foundation, otherwise the bodies of the foundation or the beneficiaries will be able to misuse the clause in their own interests to dissolve the foundation. There also exists debatable right of abolition of the foundation. The founder at the time of the establishment of the foundation can introduce such right for the foundation’s bodies or beneficiaries upon occurrence of abolition condition. This point is arguable as the right of disposal of the foundation is inadmissible. Nevertheless, the foundation can be dissolved by court order if the objects of foundation have become unattainable and the foundation cannot be maintained by modifying its charter or its objects have become unlawful or immoral.

Modifications[146]

[143] Oliver Arter (n 113) 172
[144] ibid
[145] ibid 174
[146] ibid 176

After the establishment of the foundation it is generally no longer permissible to amend or modify the foundation charter. The amendments to the foundation law in 2006 made it possible for the founder to stipulate the right to change the purpose upon occurrence of particular events. But they are not applicable for family foundations, therefore, the purpose of the family foundation cannot be amended. Nevertheless, 'at the request of the supervisory authority or the board of trustees, the competent federal or cantonal authority may amend the objects of the foundation where the original objects have altered in significance or effect to such an extent that the foundation has plainly become estranged from the founder's intentions.'[147]

The founder can also grant the right to make modification or amendments to the foundation regulations to the foundation bodies or other persons, named in the foundation charter. However, 'the provisions of the foundation charter not to be violated nor the fulfilment of the foundation purpose defeated by modifications or amendments to the foundation's regulations'.[148] The purpose and the organization of the foundation cannot be changed after the establishment of the foundation. It is only allowed when there a good reason exists. If any of the beneficiaries do not agree to the modification the court is to be called in order resolve the dispute. No amendments are admissible if they aim at reduction or complete revocation of the foundation's assets, as the assets are required to fulfil the purpose of the foundation. The amendments to the organization can be only made for the preservation of assets and safeguarding of the foundation purpose. It means that it has to be 'in the interest of the fulfilment of the foundation purpose and on irrefutable grounds as appear necessary'[149]. "Amendments of the purpose or organization cannot be justified by a simple desire for greater convenience or optimization."[150] But nevertheless such amendments must not be extensive. The foundation's bodies or third parties are also prohibited from granting

[147] Swiss Civil Code Art. 86 (1)
[148] Oliver Arter (n 113) 176
[149] BK-Riemer (fn 33), N50 on Art 85/85 CC
[150] Oliver Arter (n 113) 184

rights ‘by means of which these latter may override the foundation charter without formal modification of its provisions’[151].

The founder has the right to set up the participation rights for himself and/or third parties, which allow them as a part of the foundation board to take part in the administration of the family foundation. The founder is free to designate himself as the only foundation body and thus to control the activities of the family foundation. If the founder decides not to be a part of foundation board he is still allowed to grant himself different writes to influence the foundation. These rights include, for example, the right to elect or withdraw the board trustees, to approve and instruct the board of trustees or even the right from exemption from regulation[152].

Beneficiary Rights

The beneficiary rights to information, inspection and disclosure are executed by the foundation board at their discretion and in case of arbitrary and unjustifiable refusal to get access to such rights the beneficiaries can apply to the court to enforce their rights. [153]

As it was already mentioned above the family foundations in Switzerland are not subject to governmental supervision. Administration of the foundation, the fulfilment of the purpose of the foundation and overall compliance with the founder’s will as well as the asset management and accounting fall under the supervision of the family foundation itself. In event of non-compliance with the intentions of the founder or irrelevant use of foundation assets the beneficiaries or third parties concerned may seek interference from the court. In case of existing disputes between the interested parties (beneficiaries, foundation board or third party creditors) the court can be approached to interfere and take the necessary measures.[154] The right to address the court for the dispute resolution is mandatory and no provision of the foundation charter or other documents can revoke such right.

[151] ibid 176
[152] Oliver Arter (n 113) 177
[153] ibid
[154] Swiss Civil Code Art. 87 (2)

The founder and the third parties which have made the contribution to the foundation enjoy the special rights over property and to the foundation's assets or obligatory rights in respect to the foundation. The founder or such third parties can exercise personally or in favour of individual specific people the right to use or to receive the distributions from the foundation assets. Granting the special rights lead 'to partial or total suspension of the foundation purpose, as the assets and/or the proceeds subject to the special rights are not for the time being available for the fulfilment of the foundation purpose'[155]. Therefore, the beneficiaries of the foundation with the special rights get the right of use or consumption of the foundation assets only out of the part subject to the special rights.

Switzerland does not impose any state supervision or reporting requirements upon Family Foundations. The formation of the Family Foundation is associated under circumstances with negative tax implications, since the relatives of the founder are subject to maximal tax rate of cantonal inheritance and gift tax.[156]

It may thus be concluded that Swiss family foundations are ill-suited for asset planning and estate planning mainly due to the purpose limitations. Family Foundations in Switzerland have at their disposal enormous assets which are blocked, because no events of need, that fall under the legal purpose of the Family Foundation no longer occur. The assets and income continue to be taxed but they cannot be used for the satisfaction of family needs. However, substantial disbursements to a beneficiary from Swiss family foundation are allowed.[157]

In Switzerland it is still possible to set up a 'basis' fiduciary foundation. The concept of the fiduciary foundation differs from family or corporate foundation. The data on their total number does not exist, as far as 'neither obliged nor eligible to be registered in the

[155] BK-Riemer (fn 33) N 369 on systematic component
[156] Oliver Arter (n 113) 168
[157] ibid 169

commercial register'[158]. Moreover, the Swiss legislator has not provided for the provisions for the fiduciary foundations. Nevertheless, it is estimated that a significant amount of foundations in Switzerland are still fiduciary and they are of significant relevance to the Swiss economy. In legal literature they are described as 'dependent' foundations opposed to the ordinary ones.[159]

In contrast to ordinary foundations, fiduciary foundations do not constitute the separate legal entity and the provisions for the ordinary foundations do not apply. The fiduciary foundation constitutes the free endowment of the founder's assets to the principal, either a natural person or a legal entity, for the specific goal, non-profit as well as private purpose. The fiduciary foundation can be established as an ordinary foundation by a disposition of mortis causa or inter vivos. Due to the contractual nature of the fiduciary foundation, it lacks legal regulation of the organs of foundations. The founder is free to include provisions for the appointment of himself or third person as an advisor or administrator.

The fiduciary foundation is distinct from the common law trust in the way that such foundation cannot be established without the consent of the principal. Thus, the foundation mortis causa comes into existence at the moment when the principal agrees to take his position. Therefore, if the suggested principal gave up the role after the death of the founder and the founder has not stipulated the alternative successor for this role in the deed of foundation, 'potential beneficiaries cannot apply to a Swiss court for the appointment of another principal'[160]. The possible solution in such case would be to provide in the testament for the subsidiary establishment of the fiduciary foundation. Thus one of the heirs of the founder will be obliged to establish the foundation with the intended goal. Moreover, the opposed to the duality of ownership of trust property, the Swiss fiduciary foundation cannot be the legal owner of the transferred assets. The principal becomes the legal owner of donated assets.

[158] Goran, Studen *Fiduciary foundations in Switzerland: a new look at an old idea* (Trust and Trustees Vol. 19, 6 July, 2013) 675
[159] ibid 675
[160] ibid 676

The foundation inter vivos comes into existence upon the consent of the founder and principal. The foundation deed will be 'qualified either as a gift subject to a condition or as a fiduciary mandate agreement'.[161]

The structure of the fiduciary foundation exists only in case of distinct connection of the assets and the purpose for which they were donated. The transaction can be established for the long period of time, enabling the principal to fulfil the purpose on the continuing basis or for a short period of time for the time of a specific project or for a single transaction.
Fiduciary foundation makes the founder more flexible in questions of amendment and revocation of the foundation. The deed can be amended or revoked at any time bilaterally by the founder. Moreover, the founder 'has a claim against the principal to use the transferred assets in accordance with the foundation's purpose and to make distributions in favour of the defined or definable beneficiaries'.[162]

The founder and the principal of the fiduciary foundation are not granted any tax benefits, if the foundation was established for private purpose only.

Therefore, fiduciary foundation can be a flexible instrument of wealth management suitable for private (family) purposes and charitable. In addition, fiduciary foundations have a specific feature: the principal managing a number of fiduciary foundations can pool the assets in order to minimise the investment costs and to boost the earnings.

[161] ibid
[162] ibid 678

4. CFC Rules: Case Russia

In the second chapter it was indicated that the legal structure is evaluated across three dimensions: control, asset protection and taxation. In the following chapters the benefits of private foundations in terms of control and the asset protection as well as the basic features of their taxation have been identified. But over the years asset allocation has become more international and therefore not only the law of the place of incorporation but also national laws of founder and/or beneficiaries have to be taken into account. Most countries tend to control the flows of assets of their nationals held in foreign entities and thus to ensure certain degree of tax compliance. In order to ensure that taxes are paid by foreign companies controlled by the residents to the national budget a lot of countries have introduced the Controlled Foreign Companies Rules (CFC rules). CFCs in form of private companies or other legal structures set up offshore, in low-tax jurisdictions or in the jurisdictions where the company or its shareholders are not taxed can be a useful tool to locate assets. One of the advantages of allocation of assets in a CFC is that 'tax on earnings of the company may be deferred until either the earnings are actually distributed to shareholders or the company is sold or shares otherwise disposed'.[163]

CFC legislation has already been implemented in Hungary, Great Britain, Germany, Denmark, Spain, Italy, Finland, Sweden, France, USA, Russia which require that their nationals to report to the respective tax authorities of being the shareholders in foreign entities.

By implementing CFC Rules the governments of these countries focus their attention on the companies and other legal structures which can be used to avoid tax. The core principle upon which whose rules are constructed is the place of management or the location where the board of directors makes decisions. Some countries apply taxation not simply on the basis of place of management but also in respect to ownership and voting rights. Thus, a private foundation incorporated in Austria, Liechtenstein or Switzerland can also be taxable in another country if the board of directors perform management activity there or other

[163] William Jennings, Stephen Horan, William Reichenstein (n 22) 23

persons exercise control over such foundation. In this case private foundations which do not have owners can be effective in avoiding CFC rules.

In this context we tried to investigate how CFC Rules can be avoided by using private foundation exemplified by the CFC Rules of the Russian Federation. As part of the Russian government's "deoffshorisation" plan to fight the unreasonable use of offshore structures to invest and hold assets, the Russian government has introduced on January 1, 2015 a law which introduces CFC rules into Russian tax law. Although, the adopted rules due to their complexity and irregularities have gone through a number of changes, there still remain gaps which need to be filled by opinion of legal experts and authorities as well as legal practice.

This law introduced unprecedented changes in the Tax Code of the Russian Federation impeding the proceeding of international payments, doing international business through foreign structures and participating in foreign companies. Despite the fact that CFC rules do not prohibit Russian citizens and legal entities from establishing, owning, controlling foreign companies (including offshore companies) and receiving profits from them, it has resulted in a number of duties for taxpayers - residents of the Russian Federation regarding establishing, owning, controlling and profiting, as well as responsibility for the failure to perform. The intended purpose of combating artificial strictures in low-tax jurisdictions, the new rules actually created economic obstructions for assets protection industry.

The CFC Rules under have for the first time:

- Introduced the mechanism of taxation in Russia of the profits of controlled foreign companies (primarily offshore) by including undistributed profits of these companies in the taxable base of their controlling residents, residents of the Russian Federation, as well as the responsibility of taxpayers for failure to fulfill their respective obligations (Chapter 3.4 of the Tax Code of the Russian Federation)[164];

[164] Tax Code of the Russian Federation, Chapter 3.4

- Introduced rules for the recognition of organizations by tax residents of the Russian Federation, with the help of the criterion of "place of management" (Article 246.2 of the Tax Code of the Russian Federation)[165];
- Clarifies the conditions for the application of international agreements on the avoidance of double taxation with the help of the ‘true recipient’ rule (Article 7, 312 of the Tax Code of the Russian Federation)[166].

In order to tax foreign companies in Russia, the beneficiaries can tax the profits from such business as their own income or profits of a company managed in Russia can be taxed in Russia if the company is Russian tax resident. The company can also be recognized ‘transit station’, but not a ‘true recipient’ if it shifts the passive income from Russia to an offshore jurisdiction (also through the European jurisdiction); as a result such ‘income will be taxed be at the general rate with no application of respective relief provided by a tax treaty’[167].

However, it should be noted that setting up an Austrian, Liechtenstein or Swiss private foundation under certain circumstances can fall under the exemptions, therefore, creating a loophole for enjoying the benefits of private foundations in terms of asset protection without unpleasant need to comply with CFC legislation.

Under Russian CFC Rules a controlled foreign corporation is an entity which meets the following criteria:[168]

- it is not considered to be a Russian resident for tax purposes, but
- it is controlled by a Russian tax resident.

The recognition of a foreign entity as a tax resident of Russia is executed upon complying with the criterion of effective management.

[165] Tax Code of the Russian Federation, Article 246.2
[166] Tax Code of the Russian Federation, Articles 7, 312
[167] Dimitar Hristov, Anna Zeitlinger, *Russia’s CFC rules: the latest developments and issues with foundations of a legal character* (Trust and Trustees Vol. 22, July 2016) 616
[168] Civil Code of the Russian Federation, Art. 25.13

A controlled foreign corporation here refers to body corporate with a legal personality. A foreign structure without formation of a legal entity controlled by the organization and (or) an individual recognized as a tax resident of the Russian Federation can also be recognized as a controlled foreign company.

> *Foreign structure without formation of a legal entity is an organizational form set up in accordance with the legislation of a foreign state (territory) without formation of a legal entity (in particular, a foundation, partnership, association, trust, other form of collective investment vehicle and (or) trust management); which in accordance with its personal law has the right to carry out activities aimed at extracting income (profit) in the interests of its participants (shareholders, trustees or other persons) or other (Item 2 of Article 11 of the Tax Code of the Russian Federation).*

This definition relates to all other types of entities and contractual relationships without legal character. 'Contractual relationships can especially be fiduciary contracts of any kind (eg regarding management or holding assets for another person)'.[169] The treatment of foundations as CFCs can be difficult. For example, 'if a foundation (or a trust or partnership) has a legal character, it constitutes a 'foreign organization' for the purpose of the Russian CFC Rules, otherwise it is to be classified as "foreign structure without legal personality'.[170]

The law defines control as "the exertion of or the ability to exert influence" on decision-making process and profit distribution of CFC.[171]

A controlling person of a foreign corporation is deemed to be:[172]

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[169] Dimitar Hristov, Anna Zeitlinger (n 150) 617

[170] ibid 617

[171] Ernst&Young, *Global Tax Alert: Russia publishes Controlled Foreign Companies Bill* (28 March 2017) http://www.ey.com/gl/en/services/tax/international-tax/alert--russia-publishes-controlled-foreign-companies-bill accessed 27 July 2017

[172] PWC, *Corporate – Group Taxation: Russian Federation* (31 May, 2017) http://taxsummaries.pwc.com/ID/Russian-Federation-Corporate-Group-taxation accessed 27 July 2017

- a person whose direct and/or indirect participating interest in a foreign company (for individuals, jointly with their spouse and minor children) is more than 25%, or
- a person who directly or indirectly owns more than 10% of a foreign company if Russian tax residents (for individuals, jointly with their spouses and minor children) hold a direct or indirect interest(s) in the foreign company in excess of 50%.

The definitions of “control” and “controlling person” are rather complicated and shall be identified on a case-by-case basis. As follows from Article 25.13 of the Tax Code of the Russian federation, control over an organization does not only imply direct or indirect participation in it, but also other circumstances of influencing the decision-making. Such circumstances include: [173]

- participation in the contract, the subject of which is the management of this organization (for example, an agreement on the provision of services of a nominal director);
- being the party to the trust agreement, according to which a nominal shareholder owns the company's shares in favour of and in the interests of a certain beneficiary;
- relations within the framework of the general power of attorney issued by the company to a certain person.

As a result, not only the title holders of the company's shares but also the beneficiary owners can be recognised as persons, exercising control over the structure.

In the original version of the CFC Rules, there was uncertainty in regard such entities as private foundations constitute legal entities. The literal interpretation of the norms of the law made it possible to state that the "exercising of control" over the private foundation by the beneficiaries and founders was absent, if, according to the foundation's establishment documents, they are excluded from participation in decision-making process decisions on profit distributions.

[173] Tax Code of the Russian Federation, Art. 25.13

To determine if the person is controlling the foundation which has legal personality the criteria provided for structures without the formation of a legal entity (paragraphs 9-12 of Article 25.13 of the Tax Code of the Russian Federation) will be applied.

These rules would apply as follows:

As a general rule, the founder of such a private foundation is recognized as the controlling person unless the all of the following conditions are simultaneously complied with:

The founder of the structure is not recognized as its controlling person, if all the following conditions are simultaneously observed:[174]

- such person does not have the right to receive (directly or indirectly) the profit (income) from this structure in whole or in part;
- such person does not have the right to dispose of the profit (income) of this structure or its part;
- such person has not retained the rights to the assets endowed to this structure (the property was transferred to this structure on the terms of irrevocability)[175].

- such person does not exercise control over this structure in accordance with Par. 8, Art. 25.13 of the Tax Code.

Another person who is not the founder can also be recognized as the controlling person of a private foundation if such person exercises control over such a structure and at least one of the following criteria is fulfilled[176]:

- such person has the actual right to the income received by the structure;
- such person has the right to dispose of the property of the structure;

[174] Tax Code of the Russian Federation, Par. 10, Art. 25.13

[175] This condition is recognized as fulfilled if this person does not have the right to receive the assets of such a structure, fully or partially, in his ownership in accordance with the personal law and / or constituent documents of this structure throughout the duration of this structure, and also in the event of its termination or liquidation

[176] Tax Code of the Russian Federation, Par. 12, Art. 25.13

- such person is entitled to receive the property of such structure in the event of its termination (liquidation, termination of the contract).

In order to determine whether the relevant foreign structure falls under this exemption, it is necessary to identify which rules apply to such a structure by local legislation and which wordings contain the constitutional documents of such a structure in respect to ownership of assets, distribution of profits and beneficiaries. If the foreign structure was set up with full compliance of Par. 10 of Art.25.13 of the Tax Code of the Russian Federation, the person involved will not be recognized as controlling.

The foundation laws of Austria, Switzerland and especially Liechtenstein are rather flexible and allow setting up of the private foundation in such a way that neither the Russian resident founder nor the Russian resident beneficiaries would have the position of controlling persons.[177]

The following steps could probably help to achieve the above mentioned goal:
The Deed of Foundation has to be constructed in such a way to exclude the right of the founder to the profits received by the structure and the right to dispose of them. The foundation can also be set up as a discretionary private foundation which means that all the powers to manage assets and the distribution of profit, taking into account the rights of the protector, are vested in the hands of advisory board, which can include the founder himself or beneficiaries, taking into account the purposes indicated by the founder when creating the foundation.
The main motive for the establishment of the Lichtenstein family foundation is a high level of anonymity and discretion. The Liechtenstein law of foundations provides anonymity and discretion giving the foundations possibility not to be registered in the public register, which can be attributed to about 97% of all Liechtenstein foundations.

[177] Dimitar Hristov, Anna Zeitlinger (n 150) 619

Recognition of a beneficiary as controlling person of the private foundation can be avoid by appointment of the non-Russian resident beneficiary, as in this case it would not be covered by the CFC legislation.

The Deed of Foundation has to contain the provisions on the asset distribution after the termination of a foundation specifically that the assets are endowed to the foundation irrevocably. In terms of asset protection it makes sense to attribute the assets to another structure related to the founder after the termination.[178]

[178] ibid 619

Conclusion

As Warren Buffett famously said, 'It's only when the tide goes out that you learn who's been swimming naked'.[179] It is never too late to protect your assets, business and the well-being of your family.

Wealth management together with the collateral services of financial management, tax and legal advisory, accounting and others form a safe harbor for the wealthiest of the world where they can have the answer to any of their question and have their problems solved regardless of the complexity level. In the circumstances of the constantly changing regulatory landscape the industry of wealth management has to adapt quickly to the modern world trends and confounding wishes private clients.

One of tools that wealth managers have at their disposal is the structure of private foundation. For the purposed of this master thesis three jurisdictions in the financial heart of Europe that offer the political, economic stability – Austria, Liechtenstein and Switzerland have been selected. The aim of this master thesis was to investigate the role of private foundations of Austria, Liechtenstein and Switzerland for the wealth management purposes through revealing their benefits and controversial issues as well as the common applicable tax rules.

The Liechtenstein family foundations, which serve as classical model of private foundation on the European and international level has become another page in the book of economic success of Liechtenstein. The findings have shown that one of the main advantages of a Liechtenstein family foundation is a high level of confidentiality. Unlike Austrian private foundations, family foundations under Liechtenstein law acquire legal personality without registering in the public register; they only have to send a notification of the formation to

[179] Maude (n 15) (Source: Berkshire Hathaway Inc., Chairman's Letter to Shareholders, 1992)

the Public Register which guarantees a high degree of confidentiality. Furthermore, there is no obligation to disclose the founder or the beneficiaries to the authorities.

The new law on foundations of 2008 introduced a number of changes such as the changes into information rights of beneficiaries. Before 2008 the beneficiaries were also granted the right to information but the new law has specified the extent to which the beneficiaries could interfere into the foundation matters and the grounds for such interference could be restricted or denied.

Another benefit of the private foundation set up in Liechtenstein is extensive tax advantages. Liechtenstein foundations are subject to an annual income tax which amounts to 12.5% of the taxable net income. This is one of the lowest corporate tax rates in the world, which makes Liechtenstein family foundation together with other benefits the most secure, flexible and favourable tool of asset protection as compared to similar structures in Austria and Switzerland.

After Liechtenstein foundations have become a great success and contributed to the economic flourishing of Liechtenstein (a lot due to the transferred Austrian assets), Austria introduced the Private Foundation Act in 1993. The ideological motivation for implementation of law on the private foundations was to promote the reflow of domestic capital, prevent the outflow of domestic capital and to promote the inflow of foreign capital through creating favorable situation. Moreover, Austria could also guarantee strong banking system and the political stability.

Thus, the Austrian legislator allowed setting up foundations for pure private purpose and/or public-benefit purpose and the interest to the private foundation sector in Austria raised and the number of foundations significantly increased.

The private foundations in Austria are obliged to be registered in the Commercial Register and deposit its Deed of Foundation there, while the Liechtenstein rules prescribe that foundation is not obliged to be registered but shall only notify the Commercial register of formation. Important private information such as the names of the beneficiaries may be laid down in Supplementary Deed of Foundation, which is not submitted to the Commercial Register.

However, to enjoy tax benefit of 2,5% of entrance tax, the Deed of Foundation and the Supplementary Deed of Foundation must be disclosed to the Austrian tax authorities. But even in this case, the Supplementary Deed of Foundation will not be publicly opened.

Likewise Liechtenstein private foundations, Austrian private foundation grants flexibility to the founder to amend and revoke the foundation. Such rights of the founder have to be fixed in the constituent documents.

Austrian tax legislation applies high entrance tax rate of 25% to the endowments to a private foundation. But this is only true for the intransparent foundations, who have not disclosed the foundation deed as well as the appendix to the Austrian tax authorities. Transparent private foundations enjoy a lower entrance tax rate which amounts to 2,5% of the donated assets.

The most comparable to private Austrian and Liechtenstein foundations are the Swiss corporate foundation and the family foundation.

The results of the investigation have shown that Swiss family foundations are inappropriate for the wealth management purposes largely due to the purpose limitations. The support which family members can get from the foundation is quite restrictive. Support relates a concrete situation of need, for example, to the family members suffering of diseases, disabled, which are unemployed, living alone and faced financial difficulties.

Family foundation does not allow to grant family members unconditional economic assets or to make distributions from the foundation assets to cover general living expenses or to improve their financial situation. Swiss legislator only permits “the provision of the unfettered economic security of family members over the coming generations”[180].

[180] Oliver Arter (n 113) 158.

Enormous assets are currently being blocked in Swiss family foundations and cannot be used for the satisfaction of family needs, because no events of need, that fall under the legal purpose of the Family Foundation no longer occur.

The family foundation is exempted from the obligation to register in the commercial register or deposit any documents to the authorities, but in order to grant more transparence to the foundation and have a proof of existence the founder can include the registration requirement.

Under the Swiss law it is still possible to establish fiduciary foundation. The concept of the fiduciary foundation differs dramatically from family or corporate foundation. In contrast to ordinary foundations, fiduciary foundations do not constitute the separate legal entity. The fiduciary foundation is identified as the free endowment of the founder's assets to the principal, either a natural person or a legal entity, for the specific goal, non-profit as well as private purpose.

Therefore, this master thesis demonstrates that fiduciary foundation can be a flexible instrument of estate planning suitable for both private purposes. In addition, fiduciary foundations have a specific feature: the investment costs can be diminished by polling the assets controlled by one principal together.

The final chapter was dedicated to the practical assessment of the private foundations in terms of Russian CFC Rules. The main finding of this chapter is that the use of a private foundation can be one of the tools of wealth planning, which gives high level of flexibility and new opportunities for Russian wealthy clients. Setting up a private foundation for the purposes of asset protection can help to avoid Russian CFC rules. Nevertheless, drafting of constitutional documents and structuring 'requires tailor-made documents and a sophisticated case-by-case analysis, to achieve the required result'.[181]

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[181] Dimitar Hristov, Anna Zeitlinger (n 150) 619

The CFC legislation provides for the possibility of recognizing a person as controlling on the basis of information received from abroad. Despite the existing barriers (including those related to the sanctions policy in respect to Russia), it is expected that the possibilities for international exchange of tax information will be expanding and procedures improving. There is already functioning mechanism for the exchange of information within the framework of agreements on avoidance of double taxation. On July 1, 2015, the OECD Convention on Mutual Administrative Assistance in Tax Matters came into force for Russia. Starting from September 2018, Russia plans to join the automatic exchange of information on financial accounts (however, this obligation has not yet been legally fixed).

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Abstract

Wealth planning is the service of managing assets of wealthy clients while structuring it, preserving, transferring to the successors, optimizing and protecting from fragmentation. High-quality wealth management services are becoming increasingly broad and complex and highly demanded due to the evolving needs of clients in respect to tax efficiency and anonymity. Nowadays, the allocation of wealth has become more international and, therefore, raises the profile of legal and tax advice in terms of wealth planning. The industry of wealth management today is under strong pressure, especially from tax authorities, which adopt measures aimed at wealthy individuals attempting to hide their assets.

Wealth planning in used for the variety of reasons such as to solve family disputes regarding family assets, to preserve privacy of the family members and so to ensure family's reputation and safety. A number of countries implement laws and new rules which result in certain fiscal challenges and create economic obstructions for assets protection industry. The case with Russian HNWI will be described in course of current legislation changes (implementation of CFC rules).

The concept of private foundation as a tool of legal protection of assets gives certain advantages to the (U) HNWI in order to control their assets.

The proposed master thesis examines the legal structure of private foundations in Austria, Liechtenstein and Switzerland as these jurisdictions offer unique environment for such actions providing requisite services such as legal advice and banking services within politically and economically stable society. The master thesis also aims for revealing the peculiarities of the private foundations as a legal instrument for wealth planning purposes, their advantages over other means of wealth protection.

Abstract

Vermögensverwaltung ist die Leistung des Vermögensmanagements der vermögenden Kunden bei der Strukturierung, der Erhaltung, der Übertragung an die Nachfolger, der Optimierung und Schutz vor Fragmentierung. Hochqualifizierte Vermögensverwaltungsdienste werden zunehmend breiter und komplexer und aufgrund der sich wandelnden Bedürfnisse der Kunden in Bezug auf Steuereffizienz und Anonymität gefordert. Heutzutage ist die Zuordnung von Vermögen internationaler geworden und damit erhöht sich die Wichtigkeit der Rechts- und Steuerberatung in Bezug auf die Vermögensplanung. Die Branche des Vermögensmanagements ist heute unter starkem Druck, vor allem von den Steuerbehörden, die Maßnahmen verabschieden, die auf vermögende Personen gerichtet sind, die versuchen, ihre Vermögenswerte zu verbergen.

Vermögensplanung wird aus vielfältigen Gründen verwendet, z.B. um Familienstreitigkeiten über Familienvermögen zu lösen, die Privatsphäre der Familienmitglieder zu bewahren und so die Reputation und Sicherheit der Familie zu gewährleisten. Eine Reihe von Ländern setzen Gesetze und neue Regeln ein, die zu bestimmten fiskalischen Herausforderungen führen und ökonomische Hindernisse für die Vermögensverwaltungsindustrie schaffen. Der Fall mit dem russischen HNWI wird im Rahmen der geltenden Gesetzesänderungen (Umsetzung der CFC-Regeln) beschrieben.

Das Konzept der Privatstiftung als ein Instrument der Vermögenssicherung gibt den (U) HNWI gewisse Vorteile, um die Vermögenswerte zu kontrollieren.

Die vorgeschlagene Masterarbeit untersucht die rechtliche Struktur der Privatstiftungen in Österreich, Liechtenstein und der Schweiz, da diese Länder ein einzigartiges Umfeld für solche Maßnahmen bieten und die in einer politisch und wirtschaftlich stabilen Gesellschaft notwendige Dienstleistungen, wie Rechtsberatung und Bankdienstleistungen, erbringen. Die Masterarbeit zielt auch darauf ab, die Besonderheiten der Privatstiftungen als Rechtsinstrument für die Zwecke der Vermögensplanung und die Vorteile gegenüber anderen Mitteln der Vermögenssicherung aufzudecken.