The Private Wealth and Private Client Review

Ninth Edition

Editor
John Riches

The Law Reviews

© 2020 Law Business Research Ltd

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
John Riches

THE LAWREVIEWS

© 2020 Law Business Research Ltd

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Louise Robb

SUBEDITOR
Carole McMurray

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2020 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at August 2020, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-488-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BGP LITIGATION

CONE MARSHALL LIMITED

CONYERS DILL & PEARMAN

DORDA RECHTSANWÄLTE GMBH

ELIAS NEOCLEOUS & CO LLC

ESTUDIO BECCAR VARELA

HANNAFORD TURNER LLP

HANNES SNELLMAN ATTORNEYS LTD

HASSANS INTERNATIONAL LAW FIRM LIMITED

HAYNES AND BOONE, SC

HIGGS & JOHNSON

IQ EQ (ISLE OF MAN) LIMITED

LEE HISHAMMUDDIN ALLEN & GLEDHILL

LENZ & STAEHELIN

MAISTO E ASSOCIATI

MARXER & PARTNER RECHTSANWÄLTE

NIJSDRAYE | ATTORNEYS AT LAW

O'SULLIVAN ESTATE LAWYERS LLP

P+P PÖLLATH + PARTNERS

PERCHSTONE AND GRAEYS LP

PERSPECTA TRUST LLC

POTAMITISVEKRIS

© 2020 Law Business Research Ltd

PRAXISIFM GROUP LIMITED

RECABARREN & ASOCIADOS

RETTER S.À.R.L.

RMW LAW LLP

RUSSELL-COOKE LLP

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

SRS ADVOGADOS

STEP

STEPHENSON HARWOOD

SULLIVAN & CROMWELL LLP

UGGC AVOCATS

WITHERS LLP

WOLF THEISS

© 2020 Law Business Research Ltd

CONTENTS

PREFACE...vii
John Riches

Chapter 1 EU DEVELOPMENTS...1
Richard Frimston and Christopher Salomons

Chapter 2 MODERN TRUST DESIGN...12
Patrick Collins

Chapter 3 OECD DEVELOPMENTS...29
Emily Deane

Chapter 4 SUPERYACHT OWNERSHIP: LEGAL ISSUES 2020–2021...37
Mark Needham and Justin Turner

Chapter 5 ARGENTINA...45
Miguel María Silveyra, Valeria Kemerer and Enrique López Rivarola

Chapter 6 AUSTRIA...54
Paul Doralt and Katharina Binder

Chapter 7 BAHAMAS...64
Earl A Cash and Nia G Rolle

Chapter 8 BELGIUM...74
Alain Nijs and Joris Draye

Chapter 9 BERMUDA...89
Stephanie C Bernard and Adam Johnson

Chapter 10 CANADA...101
Margaret R O'Sullivan and Marly J Peikes

© 2020 Law Business Research Ltd

Chapter 11 CHILE 127
Pablo Chechilnitzky R

Chapter 12 CYPRUS 136
Elias Neocleous and Elina Kollatou

Chapter 13 FINLAND 149
Johan Hägerström and Stefan Stellato

Chapter 14 FRANCE 160
Line-Alexa Glotin

Chapter 15 GERMANY 168
Andreas Richter and Katharina Hemmen

Chapter 16 GIBRALTAR 176
Peter Montegriffo QC and Louise Lugaro

Chapter 17 GREECE 187
Aspasia Malliou, Maria Kilatou and Nefeli Sianidou

Chapter 18 GUERNSEY 204
Keith Corbin, Mark Biddlecombe and Rachael Sanders

Chapter 19 HONG KONG 214
Ian Devereux and Silvia On

Chapter 20 HUNGARY 224
Janos Pasztor

Chapter 21 ISLE OF MAN 239
Craig Brown

Chapter 22 ITALY 250
Nicola Saccardo

Chapter 23 LIECHTENSTEIN 261
Markus Summer and Hasan Inetas

Chapter 24 LUXEMBOURG 276
Simone Retter

© 2020 Law Business Research Ltd

Chapter 25 MALAYSIA 289
SM Shanmugam, Jason Tan Jia Xin, Ivy Ling Yieng Ping, Chris Toh Pei Roo and Shona Anne Thomas

Chapter 26 MEXICO 299
Edgar Klee Müdespacher and Joel González Lopez

Chapter 27 NEW ZEALAND..312
Geoffrey Cone and Claudia Shan

Chapter 28 NIGERIA..323
Akhigbe Oserogho, Osasere Osazuwa, Hokaha Bassey, Temidayo Adewoye and Damilola Oyelade

Chapter 29 POLAND..333
Sławomir Łuczak and Karolina Gotfryd

Chapter 30 PORTUGAL..348
Mafalda Alves

Chapter 31 RUSSIA 355
Alexander Golikov and Anastasiya Varseeva

Chapter 32 SWITZERLAND 363
Frédéric Neukomm, Heini Rüdisühli and Alexandra Hirt

Chapter 33 UNITED KINGDOM 375
Christopher Groves

Chapter 34 UNITED STATES 388
Basil Zirinis, Elizabeth Kubanik and Susan Song

Appendix 1 ABOUT THE AUTHORS..407
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 427

© 2020 Law Business Research Ltd

PREFACE

I would like to focus my remarks on some of the key trends that might be expected to affect the world of high net worth individuals in the immediate aftermath of the covid-19 pandemic.

I ISSUES DURING THE PANDEMIC

During the pandemic, we have seen a relatively consistent pattern among OECD countries of measures that are mainly focused on delaying obligations to file tax returns and make tax payments to reflect the turmoil in some business and personal finances that these exceptional circumstances have wrought. Interestingly, at the beginning of April the OECD issued an analysis examining double tax treaties and the impact of the crisis on individuals' presence, which may have been constrained as a result of the pandemic. The following were notable conclusions.

i Permanent establishments

For individuals constrained to work in a different location and, in particular, for those working from home, provided the state of affairs is regarded as temporary and exceptional it would not generate the required degree of permanency to create a fixed place of business.

ii Corporate tax residence

The view from OECD is that the temporary relocation of board members to different locations will not generally impact a company's tax residence.

iii Personal tax residence generally

In considering where an individual's centre of vital interest may be, any exceptional circumstances generated by the covid-19 pandemic should not, by themselves, cause an individual's residence to change.

One specific area where countries have taken steps to introduce exceptional guidance is in the context of a day count test. Specifically, Australia, Ireland and the UK have given guidance in the context of disregarding days of presence where this is used as a factor in determining residence. Clearly in all these cases, significant care needs to be taken to ensure that a temporary, exceptional circumstance does not become a permanent state of affairs. Where any tax analysis is dependent upon an individual being constrained in their ability to travel, it is likely to be prudent to keep contemporaneous records of attempts to travel to show that an individual has not changed his or her behaviour or residence in consequence of

© 2020 Law Business Research Ltd

the crisis on a more permanent basis and taken the opportunity to leave the relevant country as soon as possible. Difficulties may arise if an individual in Country A is unable to travel to Country B but could have gone to other locations. Will it be possible to argue that all steps were taken to leave if the individual waited until it was possible to travel to Country B?

II POSSIBLE RESHAPING OF TAX POLICY POST COVID-19

There have been many pronouncements and speculations appearing in the media about how national governments will look to finance the deficits they have incurred during the crisis. A significant degree of speculation has focused on the extent to which high net worth individuals will be targeted with an increased tax burden as one of the mechanisms for financing government deficits. Speculation varies between the possible introduction of some form of annual wealth tax to increased estate taxes.

One interesting example is a proposal in Argentina for a one-off tax levy on ultra-high net worth individuals (UHNWI). The bill being promoted in Argentina proposes a one-time tax on wealth calculated on personal assets of Argentine residents as at 31 March 2020. For individuals with a personal asset base of US$3 million, the proposed rate of tax would fall in the range of 2 per cent to 5.5 per cent. This would be in addition to the current annual wealth tax burden of 2.25 per cent for individuals on wealth that is held outside of Argentina. An article published by an Argentine think tank in April 2020[1] sets out an interesting array of proposals that have been advanced, principally by opposition parties, in South America and Europe. One additional strand that has emerged in Europe is the exclusion from state aid programmes for companies that are headquartered in 'tax havens'. This has been promoted in countries including the United Kingdom, Denmark and France.

A pan-European tax for UHNWIs in the EU has been suggested by economists, Gabriel Zucman and Emmanuel Saez (University of California at Berkeley) and Camille Landais (London School of Economics).[2] The suggested parameters they advance would be to tax those holding assets of more than €2 million (the top 1 per cent) at 1 per cent, those holding assets of more than €8 million (the top 0.1 per cent) at 2 per cent above that threshold and those holding more than €1 billion at 3 per cent above that threshold. They also argue that by making the tax EU-wide, there will be no incentive for individuals to relocate within the EU to avoid the tax.

Historically, one of the objections that has been raised, certainly in Europe, to wealth taxes is the relative inefficiency in the collectability of wealth tax because of the significant degree of compliance work required in checking an individual's filings and valuing their net worth to calculate the levy.

Clearly there is a paradox for tax authorities in considering any form of one-off, or permanent, tax measures that are targeted on high net worth individuals, namely the concern that such measures do not detract from the efforts of business entrepreneurs to create employment and prosperity for others. Furthermore, there will clearly be concern about measures that could be seen as targeting wealthy individuals from other jurisdictions who are looking to locate in the relevant country where increased tax measures could both discourage

1 https://centrocepa.com.ar/files/informes/20200502-wealth-tax.pdf.

2 https://voxeu.org/article/progressive-european-wealth-tax-fund-european-covid-response.

© 2020 Law Business Research Ltd

high net worth migrants from relocating to the jurisdiction or, in some cases, might create an incentive for such individuals to give up their residence.

If new measures of this character are proposed, it will be very interesting to see, in countries such as the UK or Italy that have special regimes for non-domiciliaries, how those regimes will be impacted, if at all, by tax-raising measures targeted at wealthy individuals.

Turning to estate taxes, one recent proposal that is worthy of note in the UK is a report published in January 2020 by a cross-parliamentary group of politicians that considered the UK's inheritance tax policy in the context of intergenerational fairness.[3] Notable conclusions from the report were to highlight the extent to which the UK's rule exempting gifts between individuals that occurred more than seven years before the death of the donor as allowing the very wealthy to mitigate their estate tax burden in a way that is not open to those of more modest means who do not have significant surplus to donate to future generations. The central proposal from the report was to scrap a 40 per cent inheritance tax burden levied on gifts occurring on death or within seven years with a flat rate 10 per cent tax that would apply to all gifts giving each individual a lifetime allowance for gifts that were exempt. Part of the thinking behind switching to a donee-based tax system is to encourage senior generations to make wealth transfers to younger generations (potentially from grandparents to grandchildren) in a manner that rebalances the distribution of wealth towards the young. While such measures are unlikely to be central in financing any deficits arising from the covid-19 pandemic in the short term, it will be interesting to see whether a flat rate tax, at a lower level, will find favour with policy makers in the UK. The thinking of the group issuing the report was that the overall unpopularity of the current regime, where taxes are levied on death could be overcome by one that is levied at a much lower rate and is applied uniformly to gifts during the lifetime as well as on death.

Another notable initiative from the EU that is likely to, potentially, impact private clients are the proposals incorporated within the sixth version of the EU Directive on administrative cooperation (DAC6). DAC6 aims to provide the tax authorities of EU Member States with additional information to enable them to close potential loopholes in tax legislation and harmful tax practices. Intermediaries advising on cross-border arrangements involving EU jurisdictions are obliged to report details of the arrangements and the relevant tax payers involved to their Member States who will share the information with other Member States' tax authorities. If there is no intermediary with an obligation to report, the relevant taxpayer will be obliged to do so. For the purposes of DAC6, an arrangement is interpreted very broadly and a cross-border arrangement is reportable if it concerns at least one EU member state and satisfies at least one of the hallmarks described in the Directive.

The hallmarks are very broadly worded and describe certain characteristics which, if satisfied, make the arrangement reportable. The majority of the hallmarks cover arrangements with some form of tax 'benefit' but there are specific hallmarks relating to arrangements that undermine the application of automatic exchange of information agreements such as the Common Reporting Standard and attempts to conceal beneficial ownership. A key concern with this particular hallmark is that the test appears to be wholly objective and the intentions of the parties are arguably not relevant. Intermediaries acting for high net worth individuals

3 www.step.org/sites/default/files/media/files/2020-05/STEPReform_of_inheritance_tax_report_012020.pdf.

© 2020 Law Business Research Ltd

and their structures will need to consider the impact of these rules on any arrangements entered into that may concern one or more EU Member States.

Turning away from the tax arena, many jurisdictions have introduced measures during lockdown to facilitate the digital execution of documents, including wills. It will be interesting to see to what extent policymakers will be happy to allow such measures to prevail on a long-term basis. Historically, the very strict measures that prevail on the execution of wills are clearly designed as a protective measure to mitigate the impact of undue influence. It seems likely that such measures will become a permanent part of the overall landscape for the execution of wills going forward. In circumstances where wills are drawn up by professional advisers who have direct contact with a testator or testatrix without the intervention of family members, such measures could well be a welcome relaxation that will make it easier for individuals to make wills in the years ahead in circumstances where it is likely to be less easy to travel to meet, in person, with one's professional advisers for a significant period of time. Given that, in many circumstances, there is a significant degree of 'inertia' that stops individuals from engaging with estate planning, this can only be a welcome development.

In conclusion, we can expect a significantly changed paradigm to prevail to the planning arena for wealthy families in the months and years ahead once the primary crisis generated by the pandemic concludes. A key area of uncertainty at present is the extent to which enhanced tax measures will be targeted at the wealthy. The wider changes in business practice and greater use of video meetings could, however, provide something of a 'silver lining' in terms of making it easier for individuals to access reliable estate planning and succession advice and measures on digital execution could facilitate the easier execution of documents once that process is concluded. What is certain is that a combination of these various measures is likely to significantly impact the planning environment for wealthy families in the years ahead. It seems likely in this context in particular that the EU will become more assertive in its approach to wealthy individuals and their tax affairs as DAC6 is implemented.

John Riches
RMW Law LLP
London
July 2020

© 2020 Law Business Research Ltd

Chapter 23

LIECHTENSTEIN

Markus Summer and Hasan Inetas[1]

I INTRODUCTION

In recent years, Liechtenstein has continued to improve the legal framework for wealth structuring and succession planning and to adjust to international developments.

On 1 January 2011, the completely revised Liechtenstein Tax Act entered into force. With the new Act, Liechtenstein introduced an attractive tax system, which complies with European law.

With a corporate tax rate of 12.5 per cent and the reduction of the effective tax rate even further through the notional interest deduction, Liechtenstein has joined the league of most tax-efficient jurisdictions by European standards. Furthermore, the taxation of legal entities as private asset structures (PAS) offers an attractive way for individuals to structure their wealth.

Liechtenstein is also an interesting jurisdiction for individuals to take residence. The top income tax rate for a resident of the capital, Vaduz, is 20 per cent. Income from assets that are subject to wealth tax is not taxed directly. Instead, tax is currently levied on a notional income of 4 per cent of the tax value of these assets. Moreover, a favourable lump-sum taxation regime is available for foreigners, and there is no inheritance or gift tax.

Liechtenstein has a long-standing tradition of private family foundations that continue to be attractive vehicles for wealth preservation and succession planning. With the latest reform of the Liechtenstein Foundation Law in 2009, a new foundation governance structure was implemented, providing for more checks and balances regarding the interests of the founder, the beneficiaries and the foundation itself, while the favourable opportunities for wealth planning have fully been preserved. The rules regarding the enforcement of forced heirship rights were amended, resulting in considerably more room for estate planning.

Liechtenstein has a long history of its own trust law. In 1926, Liechtenstein incorporated the institution of the trust, based on the English Trust Act of 1925, into national law. Since then, the Liechtenstein trust has developed into a popular vehicle for wealth structuring and succession planning.

Furthermore, with the implementation of the Alternative Investment Fund Managers Directive (2011/61/EU) (AIFMD) of the European Union into national law, Liechtenstein has incorporated a new investment fund referred to as a 'Smart Fund', which provides another internationally recognised, tax-neutral vehicle for structuring private wealth.

1 Markus Summer and Hasan Inetas are partners at Marxer & Partner Rechtsanwälte.

© 2020 Law Business Research Ltd

II TAX

i Taxation of trusts

Trusts managed from Liechtenstein are subject to an annual tax of 1,800 Swiss francs. No tax filings are necessary.

ii Regular taxation of legal entities

Corporate tax rate and tax base

Legal entities that are taxable in Liechtenstein are subject to corporate tax on their net income at a rate of 12.5 per cent under regular taxation rules.[2]

The net income is reduced by income from foreign permanent establishments, rental and lease income from foreign real estate, gains from selling real estate, distributions from foundations or trusts, dividends and capital gains on the sale of shares and unrealised capital gains on shareholding in companies both in Liechtenstein and abroad.[3] In general, dividend income and capital gains from the sale of shares are tax-exempt. As a result, not only income and capital gains from interests in partly or wholly owned subsidiaries, but also income and capital gains from shares held as part of a securities portfolio, are in principle tax-free.

However, in 2016, a number of the Organisation for Economic Co-operation and Development (OECD)'s Base Erosion and Profit Shifting (BEPS) measures were implemented in the Liechtenstein Tax Act, including the introduction of a hybrid mismatch rule. As a result, dividend income is no longer tax exempt if: (1) the shareholding in the respective subsidiary amounts to at least 25 per cent of the capital or voting rights; and (2) the share of profits are treated as expenses deductible for tax purposes by the subsidiary.[4] This means that if a Liechtenstein entity receives dividend income that for some reason is classified as tax deductible interest payment in the country where the dividend was declared, Liechtenstein will be forced to tax the dividend if the 25 per cent holding threshold is met.

In addition, the Liechtenstein Tax Act was further amended in 2018, based on a further analysis of BEPS standards. Losses resulting from a sale or impairment of participations will no longer be tax-deductible as of 2019 to terminate the asymmetric treatment of (tax-free) profits and tax-deductible losses.[5]

Further, a 'switchover' rule was introduced to ensure that taxable income resulting from a shareholding in a foreign entity, which has predominantly passive income and is subject to low (or no) taxation in its home state, will be additionally taxed in Liechtenstein. This 'switchover' from a tax-free dividend to taxable income applies if a Liechtenstein entity receives a dividend from a foreign tax-resident entity that has more than 50 per cent passive income over a multi-year period, if the foreign taxation, directly or indirectly, amounts to less than 50 per cent of the Liechtenstein tax. With regard to taxation at less than 50 per cent of the Liechtenstein tax, a distinction is made depending on the percentage of the shareholding in the foreign entity. Lower taxation is assumed if the shareholding is: (1) lower than 25 per cent and the local tax rate is less than 6.25 per cent; or (2) more than 25 per cent and the effective taxation is less than 50 per cent in a comparable domestic case.[6]

2 Article 61 of the Tax Act.
3 Article 48 of the Tax Act.
4 Article 48, Paragraph 3, Item (a) of the Tax Act.
5 Article 47, Paragraph 3, Item (c)-bis of the Tax Act.
6 Article 48, Paragraph 3, Item (b) of the Tax Act

© 2020 Law Business Research Ltd

For the purpose of determining whether a foreign tax-resident entity that has more than 50 per cent passive income, 'passive income' means:[7]

a interest or other income from financial assets; royalties or other income from intellectual property; and income from finance leases;
b profit shares or distributions from foreign legal entities whose total income consists of more than 50 per cent of low-taxed passive income pursuant to (a) above, provided that this income was not generated in the course of an actual economic activity; and
c realised and unrealised capital gains in the value of participations in foreign legal entities, provided these fulfil the conditions set out in (b).

If dividends from participations are not tax-exempt owing to fulfilment of the above criteria, capital gains (realised and unrealised) and liquidation proceeds from such shareholdings are not tax-exempt either.[8]

Dividends and capital gains from participations will continue to be tax exempt as long as the criteria set out above are not met. However, Liechtenstein entities have to prove that these criteria are not met to claim tax exemption.[9]

This 'switchover' rule has been applicable as of 1 January 2019, but shareholdings in foreign legal entities that were acquired prior to 1 January 2019 will only become subject to the new regime in 2022.

Notional interest deduction

The new tax law introduced a notional interest deduction, which is currently 4 per cent of the modified equity as a deemed expense to ensure equal treatment of debt and equity.

The modified equity is calculated by deducting the following items from the net equity:

a own equity;
b shares in legal entities;
c assets not required for the company's purposes; and
d a deduction of 6 per cent of all assets, under exclusion of the above-mentioned three items.[10]

The reason for the first three deductions is that they produce tax-exempt income and capital gains and, therefore, cannot be used to create a notional interest deduction. The term 'all assets' refers to the balance sheet total.[11] In case of 100 per cent equity funding, the effective notional interest deduction is reduced from 4 per cent to 3.76 per cent because of the deduction of 6 per cent from the total of all assets (100 per cent – 6 per cent = 94 per cent; 94 per cent × 4 per cent = 3.76 per cent).

When calculating the modified equity, increases and decreases of the equity during the financial year are taken into account pro rata. However, increases and decreases within the

7 Article 48, Paragraph 4 of the Tax Act.
8 Article 48, Paragraph 6 of the Tax Act.
9 Article 48, Paragraph 7 of the Tax Act.
10 Article 54 of the Tax Act; Article 32 of the Tax Ordinance.
11 BuA No. 48/2014, 33.

© 2020 Law Business Research Ltd

same tax quarter are netted off and are considered to have taken place mid-quarter.[12] The modified equity is calculated separately for each tax quarter; the average modified equity during the quarter is also calculated.[13]

The table below shows the effects of the notional interest deduction, assuming 100 per cent equity financing for various return-on-equity (ROE) scenarios and the resulting earnings before interest and taxation (EBIT). It is evident that the notional interest deduction can result in a substantial reduction of the effective tax rate. Obviously, the effect is higher the closer the ROE is to the 3.76 per cent effective notional interest deduction. However, even in the case of a highly profitable company yielding a 20 per cent ROE, the notional interest deduction results in a decrease of the effective tax rate from 12.5 per cent to 10.15 per cent.

ROE	3.76%	5%	10%	15%	20%
Equity (before deduction of 6% of all assets)	1 million	1 million	1 million	1 million	1 million
Equity (after deduction of 6% of all assets)	940,000	940,000	940,000	940,000	940,000
EBIT	37,600	50,000	100,000	150,000	200,000
Notional interest deduction (3.76%)	37.600	37.600	37.600	37.600	37.600
Profit before taxes	0	12,400	62,400	112,400	162,400
12.5% corporate tax	0	1,550	7,800	14,050	20,300
Effective tax rate	0	3.10%	7.80%	9.37%	10.15%

Since the revision of the Tax Act in December 2014, in cases of receivables from shareholders, founders, beneficiaries or related persons carrying an interest rate of less than 4 per cent, the interest rate differential between the interest paid to the legal entity by the related person and the notional interest deduction will generally be excluded in the calculation of the notional interest (except if such receivables from related person result from the main activity of the entity).[14]

iii Taxation as a private asset structure

As an alternative to regular company taxation and inspired by Luxembourg's private asset management company, the Liechtenstein legislature devised a new tax privilege for legal entities that are only engaged in the management of their own assets and do not perform any commercial activity. A PAS is only subject to the minimum corporate income tax of 1,800 Swiss francs annually without having to file any tax returns. Taxation as a PAS was approved by the ESA as being compliant with the European competition law on 15 February 2011.

The main feature with regard to the tax privilege is the lack of commercial activity. Article 64, Paragraph 1(a) of the Tax Act exemplifies, by reference to the Asset Management Act, what is not considered a commercial activity. This includes the acquisition, possession, management and sale of transferable securities such as bonds, stocks, money market instruments, shares in investment undertakings and derivatives.

Likewise, buying, holding and selling of precious metals, artwork and similar assets is generally possible. In its decision approving the provisions on the PAS, however, the ESA indicates that transactions in securities when effected 'as part of a commercial share dealing

12 Article 32, Paragraph 4 of the Tax Ordinance.
13 Article 32, Paragraph 5 of the Tax Ordinance.
14 Article 54, Paragraph 3 of the Tax Act.

© 2020 Law Business Research Ltd

activity' constitute economic activity. Regular and active trading of securities (and other assets) is therefore not considered permissible for a PAS unless decisions are delegated to an independent asset manager. The purchase and sale of securities as part of a long-term investment strategy is, however, allowed in any event.

As the mere exercise of ownership and the granting of benefits by the entity to its shareholders or beneficiaries are not considered commercial activities, the holding of a property does not constitute a commercial activity as long as the property is used by the PAS or its shareholders and beneficiaries and no rent is charged.

When a PAS holds shares in a subsidiary that exercises a commercial activity, neither the PAS nor its shareholders or beneficiaries are allowed to exercise any control over the management of the subsidiary through direct or indirect influence, otherwise the PAS itself will be regarded as commercially active and lose its status as a PAS.

When comparing regular taxation with PAS taxation, it turns out that in some cases there may be only a small difference in the tax burden because, even in cases of regular taxation, the income from the management of the legal entity's own assets tends to be tax-exempt anyway.

The following table shows where PAS taxation has advantages over regular taxation:

Investment	**Revenues**	**Regular taxation (12.5% corporate tax)**	**Possible advantage of PAS**
Shares (assuming no application of the hybrid mismatch and switchover rules)	Dividends	Tax-free	–
	Realised capital gains	Tax-free	–
Bonds	Interest	Taxable if net profit exceeds the 4% notional interest deduction	Yes
	Realised capital gains	Taxable if net profit exceeds the 4% notional interest deduction	Yes
Commodities (physical, e.g., gold in a safe)	Realised capital gains	Taxable if net profit exceeds the 4% notional interest deduction	Yes
Real estate (non-Liechtenstein)	Rent	Tax-free	–
	Realised capital gains	Tax-free	–
Derivatives	All income	Taxable if net profit exceeds the 4% notional interest deduction	Yes
Investment funds	Treated as transparent; investments of the fund are treated as being held directly by the legal entity		Yes (except pure stock or property funds)

The table illustrates that a Liechtenstein legal entity that is taxed as a PAS generally does not have any tax advantage over a regularly taxed company if it only holds shares, or real estate outside Liechtenstein. The reason is that even under regular taxation any income or capital gains produced by these asset classes will generally be tax-free anyway, provided that the hybrid mismatch rule and switchover rule set out above in Section II.ii do not apply. In the case of the other asset classes, whether taxation as a private asset structure is preferable over regular taxation depends on whether the asset classes yield more than the 4 per cent notional interest deduction applying in case of regular taxation.

© 2020 Law Business Research Ltd

iv Taxation of individuals

Income and wealth tax

Personal tax liability

The Liechtenstein tax regime for the taxation of individuals combines income and wealth tax. The wealth tax is based on the notional income of currently 4 per cent of the taxpayer's assets, which is then subject to income tax in lieu of the real income from such assets (which is tax-free). There is an eight-stage scale for determining the income tax.

Individuals having their residence or habitual abode in Liechtenstein are taxable on their entire wealth and income. While residence means the place where a person lives with the intent of staying permanently, habitual abode refers to the place or area in which a person dwells not only temporarily. The Liechtenstein Tax Act considers a temporary continuous abode of more than six months as habitual abode, whereby short-term interruptions are not taken into account.

Limited tax liability applies to individuals whose residence or habitual abode is not in Liechtenstein. Such individuals are taxable in respect of their Liechtenstein wealth and income.

Subject of income tax

All income in money and money's worth is subject to income tax such as:

a any income from self-employment;
b any income from employment relationship under private or public law;
c any income of board members, foundation council members and members of similar bodies of legal entities and trusts that they receive for their respective functions; and
d contributions received by the taxpayer as beneficiary, unless this is subject to wealth tax.[15]

Tax-exempt income includes income from wealth for which the taxpayer pays wealth tax, recurring benefits to the taxpayer, which are considered as taxable wealth, and income from permanent establishments abroad.

Subject of wealth tax

The entire movable and immovable wealth of the taxpayer is subject to wealth tax. Individuals with limited tax liability are only taxable in respect of their domestic wealth that is real estate and permanent establishments in Liechtenstein.[16]

The Tax Act provides for certain exemptions from wealth tax. In particular, real estate and permanent establishments abroad are exempted from wealth tax. Taxpayers are also entitled to make certain deductions, such as reducing assets by debts and other liabilities, provided that the taxpayer is liable as principal debtor.

Trusts or foundations with Liechtenstein-resident settlors or beneficiaries

With regard to trusts, foundations and similar vehicles with Liechtenstein residents as settlors or beneficiaries, the following rules apply.

15 Article 14(2) of the Tax Act.
16 Article 6(4) of the Tax Act.

© 2020 Law Business Research Ltd

The wealth of revocable foundations, trusts and establishments with a foundation-like structure is attributed to the founder and wealth tax is paid by the founder. However, it is possible to opt for taxation at the level of the trust, foundation or similar structure instead.

In the case of irrevocable trusts, foundations and establishments with a foundation-like structure, a distinction is made between entities with determinable beneficiaries that benefit from a certain quota and entities where this is not the case.

Concerning trusts, foundations or establishments with a foundation-like structure with determinable beneficiaries entitled to a certain quota, wealth tax is levied at the level of the Liechtenstein resident beneficiaries. However, the beneficiaries may apply for taxation at the level of these structures but require the consent of the body responsible for distributions. Such a structure will not become the taxpayer itself but rather must meet the wealth or personal tax liability in lieu of the beneficiaries.[17]

If such structures have no determinable beneficiaries entitled to a certain quota, no wealth tax is payable because the wealth cannot be attributed to any natural persons; however, if such structures are established by Liechtenstein tax residents, the set-up itself triggers a particular tax, which is illustrated as follows.

Such transfers to a discretionary structure are subject to taxation to the extent that: this wealth is no longer subject to wealth tax; and benefits or shares do not become liable to wealth tax.[18] For example, the first prerequisite is not met if real estate abroad is transferred as this is exempted from wealth tax.

The taxation of transfers to a fiduciary structure also applies in the event of changing circumstances after the establishment of a fiduciary structure that led to a shortfall of the wealth tax liability. As a result, the conversion of a determinable benefit into a discretionary benefit leads to taxation as well.[19]

The transferor shall pay a tax in the amount of 3.5 per cent of the wealth tax value of the contribution plus the applicable municipal surcharge. If a tax resident of Vaduz (where the municipal surcharge is 150 per cent) establishes a foundation or trust where no quota can be attributed to the beneficiaries and, therefore, the assets are no longer subject to wealth tax, the set-up is therefore taxed at a rate of 8.75 per cent. The assets will then no longer be subject to wealth tax. However, any distributions from such a foundation or trust to a beneficiary who is a Liechtenstein tax resident will be subject to income tax.

Tax calculation

The taxation of Liechtenstein tax resident individuals is based on a combination of wealth and income tax: the wealth tax is integrated into the income tax by transforming a part of the wealth into an additional category of income. This transformation is based on a notional income.[20] To determine the taxable base, wealth and income are calculated separately and then a notional income from the wealth is assumed. The interest rate for determining the notional income from wealth is determined annually in the Finance Act, being 4 per cent for 2020. This notional income from taxable wealth is then considered income (instead of the real income) and added to the total taxable income.

17 Draft Bill (BuA) No. 48/2010, 75.

18 See Article 13(1) of the Tax Act.

19 BuA No. 48/2010, 83.

20 BuA No. 48/2010, 25.

© 2020 Law Business Research Ltd

After basic exemptions up to 15,000 Swiss francs (and up to 22,500 Swiss francs in the case of single parents within the meaning of the Family Allowance Act and up to 30,000 Swiss francs for jointly assessed married couples), taxable income (including the notional income resulting from wealth tax) is then taxed at different rates for eight income brackets, with the highest rate for the national income tax being 8 per cent. Additionally, the Liechtenstein communities may levy a municipal surcharge of between 150 per cent and 250 per cent on the national tax. Currently, all Liechtenstein communities levy a surcharge of between 150 per cent and 200 per cent on the national income tax, with the rate in Vaduz being 150 per cent. The top tax rate for a resident of Vaduz therefore amounts to 20 per cent and applies in the case of a non-married taxpayer without children if his or her annual income exceeds 200,000 Swiss francs.

No inheritance or gift tax

Inheritance tax and gift tax have been abolished in the course of the revision of the Liechtenstein Tax Act. Under the new Liechtenstein tax regime, just a disclosure of donations to the fiscal authority is required. Liechtenstein-resident donors and recipients of gifts must therefore include gifts in their tax returns. The purpose of this notification is to enable comprehensibility of declarations of wealth set out in the tax returns of these individuals (i.e., the information is only declaratory).[21] The disclosure requirement applies only to gifts, inheritances and bequests exceeding 10,000 Swiss francs.

Lump-sum taxation

Individuals can apply to the fiscal authority for lump-sum taxation (i.e., apply for taxation on expenditure instead of income and wealth tax). The latter does not apply to real estate in Liechtenstein, which remains subject to wealth tax.

Liechtenstein citizens are not entitled to apply for such lump-sum taxation. Another prerequisite for the application is that the individual takes residence or habitual abode in Liechtenstein for the first time or after an absence of 10 years or more from Liechtenstein. The individual must not be entitled to work in Liechtenstein but shall live on income from his or her wealth or other receipts from abroad.

The discretionary decision regarding the lump-sum taxation depends on the Liechtenstein fiscal authority. The lump-sum taxation considers the total expenditure of the taxpayer, and the tax based on the expenditure amounts to 25 per cent of the expenditure.[22] The tax may be determined for several years depending on the regularity of the expenditure amount.

Individuals intending to apply for lump-sum taxation must also take into account the applicable provisions in conjunction with the permission to reside in Liechtenstein. Currently, residence permits are quite restricted, although there is a lottery open to citizens of the European Economic Area. Furthermore, several times in the political process there have been discussions to issue more resident permits to wealthy or highly qualified foreigners but no final conclusion has been reached thus far.

21 BuA No. 48/2010, 187.

22 See Article 33 of the Tax Act.

© 2020 Law Business Research Ltd

III SUCCESSION

Under the Liechtenstein Private International Law Act, all aspects of legal succession are governed by the law of citizenship of the deceased, which is applied by the Liechtenstein courts. Foreign testators and Liechtenstein nationals living abroad may, however, choose the law of the country of their last residence instead, which provides for flexibility on their side.

The enforcement of forced heirship rules against Liechtenstein trusts, foundations and other fiduciary structures has been the subject of several trials and has consequently led to actions by the Liechtenstein legislator.

Forced heirship rules allocate a part of the assets to the disposition of the testator and another part to certain family members. Contributing assets to a foundation may be disputed by the heirs in the same way in which they have the right to challenge donations.[23] If Liechtenstein inheritance law applies, upon request of a child, the spouse or the registered partner entitled to a compulsory portion, donations by the testator must be taken into consideration in the computation of the estate. The subject of the donation must be added to the estate.[24] If the estate is insufficient to cover the claims of forced heirship due to the fact that the assets were transferred to a foundation by the deceased, the subject of potential challenge is the assets. The trust cannot be disputed.[25]

Donations to persons not entitled to a compulsory portion that have been made more than two years prior to the donator's death are disregarded.[26] This fairly short period[27] also applies to contributions made to a foundation, with the caveat that its commencement depends on the structure of the foundation. In particular, the deadline does not start before the founder's death if the assets have not really been economically (i.e., the founder has not given up control of the assets) transferred to the foundation prior to his or her death.

Assets are not deemed entirely separated from the founder if he or she has reserved rights to revoke the foundation and to amend the foundation documents;[28] however, it has been argued that even where the foundation documents provide a revocation right, the statute of limitations starts with the setting up of the foundation if the foundation documents refer to a third party as ultimate beneficiary in the case of a revocation.

The founder is also entitled to waive such rights: upon waiver of such rights set out in the foundation documents, the two-year period shall also start.[29] The Liechtenstein Supreme Court recently stated that a revocation right is not the only indication that the assets have not been separated from the founder, and therefore the two-year period has not yet begun. Rather, any circumstances indicating the control of the foundation by the founder must be taken into account.[30]

23 Article 552, Section 38(1) of the Persons and Companies Act (PGR). This provision shall refer to Sections 785 and 951 of the Civil Code (ABGB) entitling the heirs to challenge. See BuA No. 13/2008, 122.

24 See Section 785(1) of the ABGB.

25 See BuA No. 13/2008, 122.

26 Pursuant to Section 785(3) of the ABGB, donations that the testator made out of current income for charitable purposes in accordance with moral duty or consideration of decorum without diminishing the substance of property will also be disregarded.

27 See Jakob, *Die Liechtensteinische Stiftung*, 2009, margin No. 685 with references to Germany and Switzerland.

28 See Jakob, *Die Liechtensteinische Stiftung*, 2009, margin No. 686.

29 See Jakob, *Die Liechtensteinische Stiftung*, 2009, margin No. 687.

30 Supreme Court, 7 December 2012, 03 CG.2011.93.

© 2020 Law Business Research Ltd

If the founder is not a citizen of Liechtenstein and not resident in Liechtenstein, his or her entire estate is governed by law of the country whose citizen he or she was at the time of his or her death (unless the founder chose the law of the country of his or her last residence instead in a will). That law will also apply to the questions of whether there is a forced share for certain family members and whether such compulsory heirs can challenge transfers to a trust or foundation under certain circumstances. As a result, if a foreign resident has established a Liechtenstein trust or foundation, any challenge of the transfer of assets will generally be based on the law governing his or her estate, not on Liechtenstein compulsory heirship law. Accordingly, the Liechtenstein Supreme Court has allowed claims of foreign heirs in several cases based on the applicable foreign heirship law, irrespective of the fact that the Liechtenstein two-year statute of limitations had expired.

However, the newly introduced Article 29, Paragraph 5 of the Liechtenstein Private International Law Act installed a further barrier to challenges,[31] prescribing that the heirs are entitled to claims for a compulsory portion only if they have equivalent claims under the laws governing the acquisition of the assets by the foundation or trust. Therefore, disputes by persons entitled to a compulsory portion of contributions to a Liechtenstein foundation made by its foreign founder must be possible both under the applicable inheritance law and under Liechtenstein law if Liechtenstein law had been chosen as the law governing the transfer or if Liechtenstein law is applicable because the funds were transferred to the foundation as part of its stated capital. As a result, if Liechtenstein law applies to the contributions to the foundation, the Liechtenstein rules regarding the statute of limitation is applicable.[32]

In practice, this means that if a foreigner establishes an irrevocable discretionary trust or a foundation in Liechtenstein (without reserving any revocation rights or equivalent powers) and chooses Liechtenstein law as the law governing the transfer of his or her assets to the foundation or trust, any claims of any compulsory heirs under the applicable inheritance law will become time-barred after the expiry of two years from the transfer of the assets to the trust or foundation.

Alternatively, a potential claim of compulsory portion will generally also be denied, if a founder makes an *inter vivos* donation to a Liechtenstein foundation and agrees that such contributions will be governed by a jurisdiction not having forced heirship rules at all.[33] However, this concept has not yet been contested in court, and it seems possible that under certain circumstances a court could rule that a foundation cannot rely in good faith on such a choice of law for the transfer of assets to the foundation, if it was designed only to frustrate the rights of compulsory heirs under the applicable inheritance law.

IV WEALTH STRUCTURING AND REGULATION

The main Liechtenstein vehicles used for wealth structuring and estate planning are trusts and foundations. The following have recently been the subject of discussions or legislative efforts:

a the checks and balances that can be incorporated in the structure of a Liechtenstein foundation to prevent any abuse (often referred to as foundation governance);

31 See BuA No. 13/2008, 140.
32 See BuA No. 13/2008, 140 et seq.
33 See Jakob, *Die Liechtensteinische Stiftung*, 2009, margin No. 692.

© 2020 Law Business Research Ltd

b asset protection and the protection of creditors in connection with Liechtenstein trusts and foundations; and

c the use of a Liechtenstein foundation as a private trust company instead of a trustee company owned by a financial service provider.

Smart Fund

In the course of implementing the AIFMD in Liechtenstein, a special investment vehicle was created for families. If the investor circle only consists of members of a single family, then a 'Smart Fund' can be set up. A Liechtenstein Smart Fund is an alternative investment fund in the meaning of the Liechtenstein AIFM Act and the AIFM Ordinance.[34] It provides an opportunity for families to create a tax-neutral, internationally recognised investment vehicle for family members only (i.e., all family members who are or have been related by marriage or registered partnership, by direct or collateral line or by inheritance).

i Foundation governance

Foundation types

The Liechtenstein foundation is a legally and economically independent special-purpose fund, which is formed as a legal entity through a unilateral declaration of will by the founder.[35] Assets transferred to a foundation become independent from the personal assets of its founder. The latest reform of the Liechtenstein Foundation Law has led to remarkable amendments. This chapter focuses on foundation governance as an area quite notably affected by the aforementioned reform.[36]

For foundation governance purposes, it is necessary to distinguish between common-benefit and private-benefit foundations. For instance, a common-benefit foundation requires a registration in the Commercial Register to acquire legal capacity. By contrast, private-benefit foundations acquire legal capacity by the declaration of establishment. While a common-benefit foundation serves entirely or predominantly common-benefit purposes, a private-benefit foundation serves entirely or predominantly private or personal purposes. If this is unclear, the foundation is treated as a common-benefit foundation.

External foundation governance

Common-benefit foundations are subject to supervision by the foundation supervisory authority (i.e., the Office of Justice).[37] This authority must *ex officio* ensure that the foundation assets are managed in accordance with the purpose of the foundation. The law grants certain information rights to the authority; for example, inspection of the foundation's books and right to information in relation to the foundation. Furthermore, the authority may apply to court in order to control or remove foundation bodies, to carry out special

34 See Article 155 of the AIFM Ordinance.

35 See Article 552, Section 1 of the PGR.

36 For further details see Marxer & Partner, *Liechtensteinisches Wirtschaftsrecht*, 2009, 104 et seq.; Jakob, *Die Liechtensteinische Stiftung*, 2009, 195 et seq.

37 See Article 552, Section 29 of the PGR.

© 2020 Law Business Research Ltd

audits or to cancel resolutions of the foundation council. Such measures are available for all foundation participants,[38] including the founder, the beneficiaries, the foundation bodies and the members of these bodies.

As a rule, private-benefit foundations are not subject to supervision by the foundation supervisory authority. This can be changed if the articles of the foundation (voluntarily) provide for supervision.

Internal foundation governance

All foundations that are subject to supervision by the foundation supervisory authority require an auditor. The auditor appointed by the court must be independent from the foundation. The auditor is obliged to annually review the management and the use of the foundation's assets to ascertain conformity with the purpose of the foundation, and must report to the foundation council, as well as to the foundation supervisory authority.[39]

External foundation governance of private-benefit foundations is constrained because they are not subject to supervision by the foundation supervisory authority. For this reason, mechanisms of internal foundation governance, particularly the rights granted to the beneficiaries, are of paramount importance. Beneficiaries of the foundation are entitled to inspect the foundation documents as far as their rights are concerned. Beneficiaries are also entitled to information, to reporting and accounts. Again, such rights are only available if the beneficiary's rights are affected. The law restricts the rights of the beneficiaries; for instance, in the event of abuse of such rights.[40] Moreover, the rights may not be exercised in a manner conflicting with the interests of the foundation or other beneficiaries. In this respect, carefully balancing different interests is necessary. The above-mentioned rights are also restricted insofar as they can be denied for important reasons to protect the beneficiary.[41]

To some extent, the interests of the founder can also be considered within the internal foundation governance: if the right of revocation has been reserved by the founder and if the founder is the ultimate beneficiary, the beneficiaries are not entitled to the information rights above.[42]

Adjustments of the internal foundation governance can also result from the founder's right to provide for other supervisory bodies. This will have the consequence that beneficiaries may only demand disclosure of information about the purpose and organisation of the foundation and with regard to their own rights in relation to the foundation, and may verify the accuracy of this information by inspecting the foundation deed, the supplementary foundation deed and the regulations.[43] This leads to restrictions for the beneficiary to gain information about the foundation. In practice, for example, the beneficiary will not be able to get the names of other beneficiaries, for example. The beneficiary will therefore also not know what distributions other beneficiaries received.[44]

38 See Article 552, Section 3 of the PGR.

39 Upon application, the foundation supervisory authority exempts a common-benefit foundation from the obligation to have an auditor in the case of low asset value.

40 See Article 552, Section 9(2) of the PGR.

41 See BuA No. 13/2008, 65; Jakob, *Die Liechtensteinische Stiftung*, 2009, margin No. 490; Article 552, Section 9(2) of the PGR.

42 Article 552, Section 10(1) of the PGR.

43 The founder can also be a controlling body pursuant to Article 552, Section 11(2), No. 3 of the PGR.

44 See BuA No. 13/2008, 68.

© 2020 Law Business Research Ltd

In summary, it can be stated that the Liechtenstein legislator has implemented various checks and balances. Because of a lack of mandatory supervision of private-benefit foundations by the foundation supervisory authority, information rights particularly granted to the beneficiaries are necessary to guarantee a control mechanism. On the other hand, the interests of the founder are also safeguarded by allowing several ways to exclude or limit the information rights of beneficiaries in certain cases.

ii Asset protection and protection of creditors

Asset protection and protection of creditors obviously reflect opposing interests. Needless to say, the settlor of a Liechtenstein trust or foundation seeks to protect the trust or foundation assets against third parties, but the interests of the founder or settlor are generally in conflict with the demands of third parties.

Creditors of the founder or settlor

Creditors may consider different options in order to enforce their claims on the founder of a foundation or trust. Firstly, creditors have the right to dispute contributions of assets to the foundation in the same way as they could challenge a gift.[45] As a rule, every creditor having an enforceable claim is entitled to do so if full compensation could not be achieved by enforcement of the claim against the founder or settlor, or this could be assumed at the time of approval of the enforcement.

Under Article 75 of the Legal Remedy Code, the challenge of a transfer of assets to a foundation or trust by a creditor must be possible under both the laws of the country of residence of the debtor and the law governing the transfer. As a result, if the transfer of assets to a Liechtenstein foundation or trust is made subject to Liechtenstein law, the challenge must be permissible not only under the laws of the country of residence of a foreign settlor or founder, but also under Liechtenstein law.

Under Liechtenstein law, the dispute of the transfer of assets must refer to actions made within a period of one year before approval regarding the enforcement.[46] The one-year period is not required if the creditor is able to prove that the debtor's (in the case of foundations, the founder's) actions are based on intent to defraud creditors, in which case a five-year limitation period from the point of transfer of assets is applicable.[47]

Under exceptional circumstances creditors may refer to the general principle of the ban on abuse of legal right enshrined in Liechtenstein company law.[48]

Furthermore, in the case of rights of revocation and amendment of the purpose reserved by the founder or settlor, creditors may attempt to attach such rights.[49]

45 Article 552, Section 38(1) of the PGR. Reference is particularly made to Article 65 of the Liechtenstein Legal Remedy Code (RSO); see BuA No. 13/2008, 121.

46 The burden of proof will be carried by the creditor (see Article 65(2) of the RSO).

47 See Article 74(1) of the RSO.

48 See Article 2 of the PGR; in a case of misuse of a foundation by the founder. Also see Constitutional Court, 16 September 2002, LES 2005, 128 et seq.; Marxer & Partner, *Liechtensteinisches Wirtschaftsrecht*, 2009, 107; Jakob, *Die Liechtensteinische Stiftung*, 2009, margin No. 708.

49 See Jakob, *Die Liechtensteinische Stiftung*, 2009, margin No. 710, providing conclusive arguments against such potential enforceability.

© 2020 Law Business Research Ltd

Creditors of the beneficiaries

Another instrument for asset protection is stipulated in Article 552, Section 36, Paragraph 1 of the PGR, which contains an enforcement privilege for family foundations providing that creditors of beneficiaries are not permitted to deprive the beneficiaries of their entitlement to a beneficial interest acquired without valuable consideration by way of enforcement or bankruptcy proceedings. Such an enforcement privilege must be included in the foundation articles.[50] In the case of mixed family foundations, such a privilege can only be implemented to the extent to which it serves the purpose of the foundation. It is, however, questionable whether a beneficiary who is simultaneously also the founder is entitled to such a privilege, as in the case of the founder, the beneficial interest was arguably not acquired 'without valuable consideration' since the founder contributed the assets.[51]

In practice, however, the meaning of the aforementioned enforcement restriction is limited. The reason is that it applies only if the beneficiaries have a sufficiently specified claim that could potentially be attached by the beneficiaries' creditors. In the event that discretionary beneficiaries of a foundation or trust are merely members of a class of several beneficiaries without any rights to certain shares in the trust or foundation fund, no enforceable claims exist. Therefore, the beneficiaries' creditors cannot attach their rights, which is a fact that has been confirmed by the Liechtenstein Supreme Court.[52]

V A LIECHTENSTEIN FOUNDATION AS A PRIVATE TRUST COMPANY

Many families use trusts as vehicles for estate planning and wealth preservation. Increasingly, instead of using trustee companies owned by financial service providers, private trust companies (PTCs) are appointed as trustees. The use of a Liechtenstein foundation as such a PTC offers several key advantages.

i A common set-up of a PTC structure

While using a PTC has several benefits, it begs the question of who should act as the shareholder of the privately held trustee company. In most cases, the shareholder cannot be the settlor of the trust because then the shares of the PTC would be part of his or her estate, which would frustrate the estate planning purpose of the trusts. A common set-up to solve this problem has been to establish a separate purpose trust whose only purpose is to hold the shares of the PTC.

The main drawback of this approach is that again a trustee is needed for the purpose trust holding the shares of the PTC. In most cases, a trustee company owned by a financial service company is used for this purpose. This means that the reasons for not using such a company as a trustee of family trusts are still present. However, they are moved to a remoter level (i.e., the purpose trust) and are mitigated because the only assets held by the trustee company of the purpose trust are the shares in the PTC.

50 See Article 552, Section 16(2), No. 6 of the PGR.

51 See Jakob, *Die Liechtensteinische Stiftung*, 2009, margin No. 713.

52 Supreme Court, 5 February 2009, 2R EX.2008.5850-17.

© 2020 Law Business Research Ltd

ii Using a Liechtenstein foundation as a PTC

Using a Liechtenstein foundation removes entirely the need for a trustee company owned by a financial service provider and at the same time reduces complexity. The structure then simply consists of a Liechtenstein foundation acting as trustee of one or more family trust.

A Liechtenstein foundation essentially is a fund endowed for a specific purpose that becomes autonomous and acquires the status of a legal person. It has no shareholders and therefore the question of who holds the foundation does not arise. Such a foundation can be established with the sole purpose to act as the trustee of one or more trusts for the benefit of a certain family.

When a Liechtenstein foundation acts as a PTC, generally no special business licence is necessary in Liechtenstein. This was clarified recently by a submission of the Liechtenstein government to the parliament dealing with an amendment of the Trustee Act. The Liechtenstein Trustee Act deals with the regulatory framework for professional trustees and trust companies. In this submission,[53] the Liechtenstein government clarified that a PTC does not qualify as a professional trust company and does not require a licence under the Trustee Act.

The government noted that a Liechtenstein PTC, like all other Liechtenstein companies without a special business licence, requires a member of the board who is licensed as a professional trustee or in an employment relationship with such a professional trustee. According to the Liechtenstein government, no separate regulation of the entity acting as a PTC is necessary. The government pointed out that the licensing requirement only applies to 'professional' trustees and that a privately held trustee company typically does not meet this criterion because it is not used with the goal of creating profits. The government also mentioned that the fact of directors charging a fee to the PTC is not harmful either. Furthermore, the government stated that even if the Liechtenstein entity charges a trustee fee to the trusts, it does not need to be regulated as the PTC offers its services to a closed circle of persons only. The government also specifically confirmed that a Liechtenstein foundation can act as a PTC.

VI OUTLOOK AND CONCLUSIONS

With the adoption of a tax law that is in compliance with European rules, and the revised foundation law, Liechtenstein has strengthened its position as an attractive jurisdiction for wealth structuring and estate planning.

In spite of a demanding environment, Liechtenstein has maintained its high degree of stability, especially with regard to the financial system, which proved very reliable in the last financial crisis. In this context, it is noteworthy that Liechtenstein remains one of the few European countries with a long-term credit rating of AAA by Standard & Poor's Rating Services (Outlook: stable).

53 See BuA 42/2013, 40 et seq.

© 2020 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

MARKUS SUMMER

Marxer & Partner Rechtsanwälte

Markus Summer is a partner at Marxer & Partner Rechtsanwälte, Liechtenstein's oldest and largest law firm. He has obtained legal degrees from the University of Innsbruck, King's College London and the University of Texas at Austin, and an MBA from Edinburgh Business School. His areas of special interest include tax law, trust and foundations, corporate law, finance law and investments. He is a member of the STEP and of the International Fiscal Association.

HASAN INETAS

Marxer & Partner Rechtsanwälte

Hasan Inetas is a partner at Marxer & Partner Rechtsanwälte. He attended the University of Innsbruck, the University of Cologne and Harvard Business School. His main areas of practice include family businesses, corporate law, trust and foundation law.

MARXER & PARTNER RECHTSANWÄLTE

Heiligkreuz 6
PO Box 484
9490 Vaduz
Liechtenstein
Tel: +423 235 81 81
Fax: +423 235 82 82
markus.summer@marxerpartner.com
hasan.inetas@marxerpartner.com
www.marxerpartner.com

© 2020 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-488-0

© 2020 Law Business Research Ltd