INDUSTRIE- UND FINANZKONTOR

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Content

The pursuit of control

Current occurrences make it clear that western nation-states have a strong desire for an automatic exchange of information, aiming to better control their citizens. This pursuit of control roots in a profound distrust between those governing and those governed.

Such striving for control is democratically and constitutionally more than dubious. The desire for an automatic exchange of information does not arise from an ordinary fiscal policy, because this could be perfectly satisfied with a compensation tax. In fact, the call from *«offshore»* to *«onshore»* expresses the desire for a repatriation of assets, clearly contradicting the desire for the diversification of assets. Moreover, through repatriation of assets the respective state gains direct access to all assets of a citizen! There is also anxiety that current occurrences serve as preparation for covering the escalating national debts with the citizens' assets.

Pressure is currently being exerted on Switzerland and Liechtenstein as representatives for all other low-tax countries. Not only is the repatriation of assets or an exchange of information in fiscal matters intended, but also the preparation for a high-level tax cartel.

Switzerland and Liechtenstein had to agree to an exchange of information in accordance with the OECD standard at the beginning of this year. Upon existence of a justified request both provide administrative assistance in fiscal matters – i.e. *«fishing expeditions»* are explicitly excluded from such administrative assistance.

We remain committed to our clients! Our goal is to adapt our structures to continue providing asset protection. We are convinced that even if certain states may record short term results with this pursuit of control, in the long run – as up until now – confidentiality, continuity and stability will prove its value.

Michael of Liechtenstein

The financial centre Liechtenstein

Liechtenstein's government has concluded the twelve OECD-compliant Tax Information Exchange Agreements (TIEAS) demanded by the G20. The intention was to be removed from the OECD «grey list».

On 12th March of this year the Liechtenstein government agreed to implement the OECD standards in fiscal matters. In the meantime, it has negotiated several Tax Information Exchange Agreements (→ TIEA) and Double Taxation Treaties (→ DTT) with different partner states.

Excepting one agreement, all agreements concern pure Tax Information Exchange Agreements or Double Taxation Treaties according to the OECD standard. The agreement concluded with the United Kingdom (→ UK) goes beyond that:

The so-called *Liechtenstein New Disclosure Opportunity* consists of a TIEA, a Memorandum of Understanding (→ MoU) and a Joint Declaration (→ JD). The TIEA follows the OECD standard, whereas an exchange of information – on justified request – can as a rule occur only as of 1st April 2015 (retroactive for circumstances as of the fiscal year 2010). The MoU governs the specific conditions of the disclosure procedure. For instance: the scope of application, the method of notification or the available opportunities of disclosure. In the Joint Declaration (JD) it is further stipulated how the implementation of this agreement has to occur, as of when contractual negotiations for a future Double Taxation Treaty will be started and how the UK will characterise Liechtenstein legal forms.

Signed agreements:

USA	TIEA	on 08.12.2008
UK	TIEA/MoU/JD	on 11.08.2009
Luxembourg	DTT	on 26.08.2009
Germany	TIEA	on 02.09.2009
Andorra	TIEA	on 18.09.2009
Monaco	TIEA	on 21.09.2009
France	TIEA	on 22.09.2009
San Marino	DTT	on 23.09.2009
St.Vincent & the Grenad.	TIEA	on 02.10.2009
Ireland	TIEA	on 13.10.2009
Belgium	TIEA	on 10.11.2009
Netherlands	TIEA	on 10.11.2009
Antigua & Barbuda	TIEA	initialed

Existing customers can make use of the *Liechtenstein New Disclosure Opportunity* as from September 2009 to April 2015. It further gives the appearance that new customers of the financial centre Liechtenstein also have the opportunity to make use of this disclosure opportunity as from December 2009 to April 2015. The assessment period for subsequent payment of taxes accounts for the past 10 years. The taxes to be paid annually will be calculated retroactively from April 1999. However, instead of a retroactive annual calculation, a customer can also choose a flat-rate average tax rate of 40% per UK-fiscal year. All UK-taxes would be covered by this flat-rate average tax rate. In addition, 10% on the calculated tax liability and interest will equally be due. Criminal prosecution shall be excluded within the *Liechtenstein New Disclosure Opportunity*.

Through the agreement with the UK, Liechtenstein is obliged to accept only British clients after April 2015 who can prove that they have paid all taxes due in the UK.

Beneficiaries in the Liechtenstein Foundation Law

Through the new Liechtenstein Foundation Law beneficiaries obtain certain rights of supervision. The intention is to provide a framework for basic beneficiary rights for foundations.

Persons and Companies Act (PGR), Art. 552: In § 5, point 3, par. 1 of the new Foundation Law (nStiG) «beneficiaries» are defined as follows:

"The beneficiary 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 (beneficial interest)."

In § 5, point 3, par. 2 nStiG the lawmaker also precisely defines the various types of beneficiaries, as well as their substantiation in §§ 6 – 8 nStiG:

Beneficiary with a legal claim:

1. Entitled beneficiary
   (→ with a current, enforceable, unconditional and unlimited legal claim / e.g. a first beneficiary)

2. Prospective beneficiary
   (→ with a prospective, indefeasible entitlement that is tied to a condition or a time limit / e.g. a second beneficiary)

Beneficiary without legal claim:

3. Discretionary beneficiary
   (→ who currently belongs to the category of beneficiaries; a possible benefit lies in the discretion of e.g. the foundation council)

Ultimate beneficiary:

4. In case of liquidation and if designated as such.

Not a beneficiary is:

5. A future discretionary beneficiary
   (→ an aspirant for a possible inclusion in the category of beneficiaries in the future)

Information and disclosure rights of beneficiaries:
The old Foundation Law did not provide for supervision rights or rights of information for beneficiaries. In the new Foundation Law beneficiaries of private-benefit foundations obtain a new role in the form of adjudicated rights of supervision. According to the argumentation of the lawmaker, beneficiaries shall ascertain that the purpose of the foundation originally intended by the founder remains preserved. Thus, § 9 nStiG states that «insofar as his rights are concerned» a beneficiary has the right to gain access to the foundation's articles of association, bylaws and possible regulations, and furthermore, «insofar as his rights are concerned», has the right to information, reporting and accounting. For this purpose a beneficiary may review all accounts and papers, and examine them (or have them examined). A beneficiary therefore receives supervision rights to a certain extent.

But, as the term «insofar as his rights are concerned» implies, a restriction of such rights exists in the following sense: a beneficiary must have a legitimate, constructible interest in the foundation. For instance, if a beneficiary pursues an abusive intention vis-à-vis the foundation or if granting disclosure is justifiably inadvisable (e.g. «*spoiling effect*»), the foundation council is not obliged to grant this beneficiary any information. The principle of *Protection of Interests* applies! The interests of the foundation and those of other beneficiaries are to be considered in relation to the interests of the respective beneficiary.

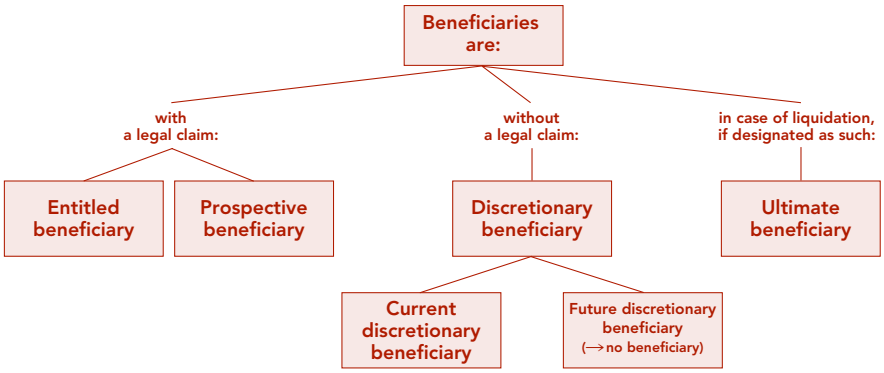
Exclusion of rights:
§§ 10 – 12 nStiG stipulate how the supervision rights can be transferred to other foundation participants so that beneficiaries enjoy the rights stated in § 9 nStiG only on a de facto restricted basis or even not at all. To this end, the law provides the following possibilities:

A total restriction of beneficiary rights occurs for example, if in the declaration of establishment the founder has reserved for himself the right to revoke the foundation (§ 30 nStiG) and he is himself the ultimate beneficiary. A total exclusion also comes about if a private-benefit foundation is willingly put under the control of external supervision through the Liechtenstein Foundation Supervisory Authority (STIFA). In addition, a total exclusion of beneficiary rights arises if, for instance, a person does not belong to the current category of beneficiaries, but merely has an expectancy of possible inclusion in the category of beneficiaries in the future. Or, if a beneficiary position is revocable at any time.

Limitation of rights:
If in the declaration of establishment a founder has set up a controlling body for the foundation, the beneficiary rights thereby reduce to a minimum. Then beneficiaries only have a right to information for the purpose and organisation of the foundation as well as for their own beneficiary position. Either the founder, a qualified person of trust of the founder or an auditing agency in accordance with § 27 nStiG can be appointed as a controlling body.

Conclusion:
As mentioned above, the lawmaker intended to grant the beneficiaries in private-benefit foundations legally anchored disclosure and information rights. The lawmaker thus wanted to ensure that the purpose of the foundation originally intended by the founder is pursued by the foundation council, and that the foundation council duly administers the foundation assets. This has succeeded to the greatest possible extent. It seems particularly important to us that despite the legally stipulated rights of supervision, the founder's freedom of organisation continues to remain preserved.

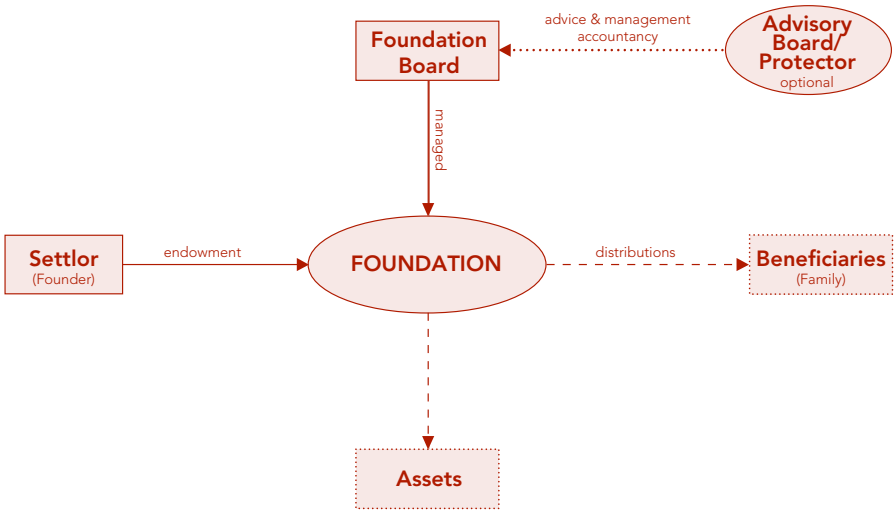
In the next I&F-News we will inform you about the founder's role in the new Liechtenstein Foundation Law.



Graphic: The designation of beneficiaries in the new Foundation Law.

Foundation and trust in comparison

The Liechtenstein foundation is the continental European counterpart to the Anglo-Saxon trust, which corresponds to the *Liechtenstein trust*. In the following, we will compare the Liechtenstein family foundation and the Liechtenstein trust:



Graphic: The Liechtenstein family foundation.
(Graphic to «The Liechtenstein trust»: cf. News No. 2/April 2009).

The Liechtenstein family foundation originates from the Continental European legal environment. With the use of such a foundation the founder aims to achieve the following:

- To preserve a family's assets.
- To protect assets against unauthorised access.
- To provide family members with means of education, support, maintenance and old-age/illness provisions.

The founder can choose between a pure and a mixed family foundation. With the mixed family foundation, the familial purpose outweighs the charitable or other private-benefit purposes. The founder subsequently endows the foundation (→ own legal personality) with certain assets (minimum capital upon formation: CHF/EUR/USD 30,000).

In order for the foundation to be capable of acting, it requires appropriate bodies which carry into effect the purpose of the foundation and thus the will of the founder. The foundation council consists of at least two members, whereas one member needs to be qualified according to art. 180a PGR. The foundation council represents the foundation outwardly and administers the assets in accordance with the purpose of the foundation. In addition to the foundation council, the founder can appoint an advisor/protector who may give advice to the foundation council. The founder also designates the beneficiaries; he defines their benefit in a bylaw.

In contrast to the foundation, the trust does not have legal personality, rather a transfer of assets «in trust» to the trustee occurs. Therefore no minimum capital is necessary.

The Liechtenstein foundation must be deposited (→ private-benefit foundations) with the Office of Land and Public Registration (GBOERA) or registered there (→ charitable foundations and such which will be put under the control of the Supervisory Authority) for its formation. With a trust this is not necessary at the beginning, but only within a period of more than 12 months. The employment of the trust aims to achieve a purpose similar to that of the foundation: preserve the family's assets, protect it against unauthorised access or give support to family members in the course of education, maintenance and old-age/illness provisions. The arrangement of purpose ensues from the type of trust.

In Liechtenstein there are four possibilities of arrangement:

- Fixed Trust *(benefits are known in detail).*
- Discretionary Trust *(with discretionary beneficiaries).*
- Charitable Trust *(for realisation of charitable purposes).*
- Special Purpose Trust *(for special purposes such as the preservation of a building owned by the family, or the preservation of an art collection, etc.).*

As with a foundation, the settlor can provide an advisor/protector to the trustee in an advisory capacity. The foundation and the trust will be taxed in the same manner: the tax administration imposes a tax of 1‰ on the capital; in practice, CHF 1.000 will be charged annually.

The Liechtenstein foundation and the Liechtenstein trust are in practice very similar. Either the foundation or the trust is frequently advisable, depending on the settlor's country of origin.

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