INDUSTRIE- UND FINANZKONTOR

News

No.1/April 2010

Content

The story behind populism

Indeed, to be up to one's neck in debt is painful. That is also the reason why one might intellectually understand the current efforts of certain larger democracies to collect as much money as possible.

However, from an ethical and constitutional point of view no one can understand the very «dubious» methods used to achieve this goal. It seems that the only thing that counts is how much and how fast money flows! The «*why*» is all too happily swept under the carpet. In fact, it is far more painful to confess to the real cause behind the mishap: one's own incapacity, a wasteful spending policy and a bloated public sector.

Getting off the topic is attempted by populist methods and a concerted media campaign. The bankers and the rich are particularly well-suited to be pilloried as scapegoats. Because most people too gladly believe that only the «greed» of these two groups is to blame for the crisis. But, if one looks closer it becomes obvious that they merely serve as a «means to an end».

In reality, neither the «bankers» nor the «rich» are the cause of the problem. Rather, the problem lies in various factors which reciprocally influence each other. Among other things, one problem is the policy of certain states which favours populist, strongly repressive and protectionist activities instead of switching to urgent but simply unpopular actions (such as the adjustment of the state apparatus). Such policies aim at perpetuating the idea of the «champion of the common people», instead of telling the public the plain truth.

In the context of its form of government, Liechtenstein relies on the principle «shared responsibility and active participation» of the citizens, which is also supported by the element of direct democracy. This understanding leads to a collective long-term way of thinking and a public demand for sustainability. Ultimately, this attitude has a very positive impact on the interests of our clients.

Liechtenstein is aware of the fact that the individual's well-being has a great impact on collective well-being – and «vice versa»!

Michael of Liechtenstein

The Financial Centre Liechtenstein

On 11th August 2009 Liechtenstein and the United Kingdom of Great Britain and Northern Ireland (UK) have concluded a Tax Information Exchange Agreement, a Memorandum of Understanding and a Joint Declaration which results in a new disclosure opportunity, called the «*Liechtenstein Disclosure Facility*» (LDF).

Through the LDF UK-related clients with a connection to Liechtenstein can become tax-compliant under favourable conditions until March 2015. The Memorandum of Understanding (MoU) specifies the conditions of the disclosure procedure and provides for the five-year *Taxpayer Assistance and Compliance Programme*. During this five-year-period no request for administrative assistance will be submitted.

Existing as well as new clients of the Liechtenstein financial centre can make use of the LDF. The assessment period for subsequent payment of taxes is limited to approximately the past 10 years, starting April 1999. Events preceding April 1999 are not taxable under the LDF.

The client can choose: Either to have a retroactive annual calculation of taxes, using the applicable tax rates, or to pay a single Composite Rate of tax of 40% per UK-fiscal year (this rate may vary until 2015). The Composite Rate option will then cover all UK-taxes. In addition, the client will have to pay a 10%-penalty (or no penalty in case of an innocent error) on the calculated tax liability as well as interest (on the basis of UK-ordinary rates of return).

The two model cases show the different tax liabilities. The difference is extensive, depending on whether the HMRC itself institutes legal proceedings or whether a client chooses to voluntarily participate in the LDF.

Criminal prosecution is excluded under the LDF if voluntary disclosure is fully and accurately made. Furthermore, the taxpayer under the LDF is excluded from the «*name and shame*»-procedure announced by the HMRC in April 2009.

Clients subject to taxation in the UK who have relevant property in Liechtenstein and undeclared tax liabilities in the UK can participate in the LDF.

Subject to taxation in this relation is either a client who is «*resident and domiciled*» in the UK. Or a client – for inheritance and gift tax purposes – who is «*resident, non-domiciled*» in the UK and who has been resident there for more than 16 years.

Each client's case is different and therefore needs to be reviewed with care! The first question shall be: Is disclosure under the perspective of the nature of the legal structure required or may the legal structure be adapted? The second question: What steps need to be taken next?

Model case 1:

In 1998 Mr. X set up a Liechtenstein discretionary foundation and endowed £ 10 m. (inherited from offshore) to the foundation. Mr. X was resident and domiciled in the UK during his lifetime. In 2004 Mr. X died. The foundation's total value as per 2008 amounted to £ 15 m. All beneficiaries (within the class of beneficiaries) are resident and domiciled in the UK. Five beneficiaries (of the class of beneficiaries) have received a one-time capital distribution of £ 100'000 each.

	HMRC usual conditions	LDF-conditions
Taxable period	1998 – 2009	1999 – 2009
[1] Initial amount per 1998	£ 10 m.	£ 10 m.
[2] Foundation's total value per 2008	£ 15 m.	£ 15 m.
[3] Total capital distributions (before 06/04/2008)	£ 500'000	£ 500'000
20% Inheritance Tax on [1] (£ 223'000 tax free amount)	£ 1'955'400	£ 0 (founded before 1999)
Additional 4% Inheritance Tax on [1] minus tax free amount, due to settlor's death within 7 years.	£ 391'080	£ 391'080 (death after 1999)
6% on [2] (due every foundation's 10-years-anniversary)	£ 900'000	£ 900'000
40% Income Tax on [3]	£ 200'000	£ 200'000
Total taxes due	**£ 3'446'480**	**£ 1'491'080**
plus penalty (30%* versus 10%)	£ 1'033'944	£ 149'108
plus interests**	£ 832'043	£ 95'640
Total amount due	**£ 5'312'467**	**£ 1'735'828*** **

* Penalty can reach 100% of the total taxes due at the conclusion of a HM Revenue & Customs (HMRC) enquiry.
** Interests arise from the date that the tax was originally due at varying rates.
*** The total amount due under LDF-conditions is only one-third of the total amount due under usual conditions at the conclusion of a HMRC enquiry!

Model case 2:

In 1995 Mr. Z settled a Liechtenstein discretionary trust and endowed £ 10 m. (inherited from offshore) to the trust. This amount was then split up as follows: £ 3 m. in an investment portfolio and a £ 7 m. investment in five underlying offshore-companies doing trading business. Mr. Z is resident and domiciled in the UK. In 2005 the investment portfolio was valued at £ 8 m., the investment in the trading companies at £ 17 m. The income from the investment portfolio has been £ 500'000 p.a. The companies have made profits of £ 1 m. p.a. The profits have never been passed up to the trust as dividends. No distributions have been made to beneficiaries.

	HMRC usual conditions	LDF-conditions	LDF 40% Composite Rate
Taxable period	1995–2009	1999–2009	1999–2009
[1] Initial amount per 1995	£ 10 m.	£ 10 m.	£ 10 m.
[2] Value of investment portfolio per 2005	£ 8 m.	£ 8 m.	£ 8 m.
[3] Total income from investment portfolio until 2009	£ 7 m.	£ 5 m.	£ 5 m.
[4] Total profits from companies until 2009	£ 14 m.	£ 10 m.	£ 10 m.
20% Inheritance Tax on [1] (£ 154'000 tax free amount)	£ 1'969'200	£ 0 (settled before 1999)	£ 0 (settled before 1999)
6% on [2] (due every trust's 10-years-anniversary / this charge is only payable on the value of the investment portfolio, not on the value of the investment in companies)	£ 480'000	£ 480'000	£ 0 (not applicable because of Composite Rate)
40% Income Tax on [3 & 4] (the investment income and the profits are attributed to Mr. Z)	£ 8'400'000	£ 6'000'000	£ 6'000'000 (applying the Composite Rate)
Total taxes due	**£ 10'849'200**	**£ 6'480'000**	**£ 6'000'000**
plus penalty (30%* versus 10%)	£ 3'254'760	£ 648'000	£ 600'000
plus interests**	£ 4'721'133	£ 2'169'744	£ 2'094'960
Total amount due	**£ 18'825'093**	**£ 9'297'744**	**£ 8'694'960*** **

* Penalty can reach 100% of the total taxes due at the conclusion of a HM Revenue & Customs (HMRC) enquiry.
** Interests arise from the date that the tax was originally due at varying rates.
*** The total amount due under LDF-conditions is less than half of the total amount due under usual conditions at the conclusion of a HMRC enquiry!

We with Industrie- & Finanzkontor advise, assist and guide UK-related clients who want to disclose.

We have in-house know how as well as a selected network of local tax experts available. In addition, we provide our clients comprehensive and intelligent wealth planning solutions. Our focus is on the long-term protection of family wealth.

The Founder in the Liechtenstein Foundation Law

In the new Foundation Law the founder plays a relevant part. He has a significant role in the process of setting up the foundation and based on this process he can reserve certain rights.

In the following text we describe a few basic founder's rights in the new Liechtenstein Foundation Law. The founder's rights are restricted to the founder; he can neither cede nor bequeath them.

The founder's rights at the time of formation:
In the Persons and Companies Act (PGR) the legislator defines in art. 552, § 1, par. 1 of the new Foundation Law (nStiG) as follows:

«A foundation within the meaning of this Section is a legally and economically independent special-purpose fund which is formed as a legal entity (juristic person) through the unilateral declaration of will of the founder. The founder allocates the specifically designated foundation assets, stipulates the purpose of the foundation, entirely non-self-serving and specifically designated, and also stipulates the beneficiaries.»

Concretely, this means that in the process of setting up a foundation only the founder himself can lay down the fundamentals (→ *essentialia negotii*) for the foundation's formation. These involve the following:

Declaration of establishment:
For setting up the foundation the founder's declaration of establishment is required. Therein the founder expresses in writing his intention of forming the XY Foundation.

Dedication of assets:
Furthermore, a minimum capital of CHF 30'000 (resp. USD or EUR 30'000) is required for setting up the foundation. Once the foundation has acquired its status as legal entity, the founder can subsequently endow further assets to the foundation. All assets dedicated or endowed to the foundation cease to be part of the founder's private assets.

Specification of purpose:
The founder needs to specify the purpose for which the XY Foundation is to be set up. In principle, the founder is free to elect any foundation purpose as long as such purpose is not illegal, immoral or seditious. In the scope of the foundation purpose, the founder can – but is not obliged to – further designate beneficiaries or the class of beneficiaries. In practice, however, the designation of beneficiaries is made separately, within a by-law.

The declaration of establishment forms an integral part of the foundation documents *(→ declaration of establishment, statutes and by-laws as well as possible regulations issued)*. In order for the foundation documents to achieve legal validity, the founder's signature needs to be certified on the documents.

In practice, the founder makes use of the possibility of an *indirect representative*. Thereby, the founder's privacy in relation to third parties is guaranteed. As a result, through this fiduciary formation the trustee (as the founder's authorised representative) appears as the founder of the foundation. However, the *founder in terms of the law* remains the real founder (as authorisor). The founder can revoke his declaration of establishment as long as the foundation has not yet achieved its legal status. After the foundation has achieved legal personality, the founder's will is set in stone *(→ principle of solidification)*. From then on no change to the specification of the purpose is allowed. However, the founder can reserve the right of modification of the foundation documents.

Founders may be one or more, domestic or foreign, natural persons or legal entities. The formation of a foundation *mortis causa* (by reason of death) – which occurs on the basis for instance of a last will or a testament – constitutes an exception since it only can have one founder.

The founder's rights after the formation:
As previously mentioned, the purpose of the foundation solidifies in accordance with the original founder's will after the foundation has achieved legal personality.

Nevertheless, the founder (in case that the founder is a natural person) can reserve for himself the right to revoke the foundation respectively the right to amend the declaration of establishment in the statutes. Consequently, he would then be empowered for instance to amend the foundation's purpose. Again, the founder can assign his indirect representative to exercise such rights of revocation or amendment. However, these rights would expire upon the founder's death. To consider: In the fiscal field, the reservation of a right of revocation or amendment can signify a penetration factor towards the founder, which would then lead to an imputation of the foundation's assets to the founder.

If the founder has reserved for himself the right to revoke the foundation and if he himself is the ultimate beneficiary, the beneficiaries shall not be entitled to information and disclosure rights. In this case, only the founder is entitled to a comprehensive information right.

The foundation council (which conducts the foundation's business affairs and represents the foundation outwards) is initially appointed by the founder, who also defines the organisation, business management and representation of the foundation council in the foundation statutes.

In addition, the founder can set up a controlling body in the declaration of establishment and include this information in the statutes. An audit authority, a qualified natural person of trust of the founder or the founder himself can be appointed as a controlling body. The requirement is that the controlling body is independent from the foundation. For instance, if the founder should appoint himself as the controlling body, this would exclude him as a beneficiary of the foundation. The existence of a controlling body would entail that beneficiary rights are reduced to a minimum.

Other founder's rights are for instance:

- The right to enact a by-law (supplementary foundation deed) or to enact regulations, provided that the founder has reserved for himself these rights in the statutes (foundation deed).
- The right to determine specific and binding management criteria for the foundation's assets.
- The right to provide other bodies, such as protectors, and to define their role.
- The right to voluntarily place a private-benefit foundation under the control of the Liechtenstein Foundation Supervisory Authority (STIFA).
- The right to transfer amendment rights to bodies (e.g. the foundation council).
- The right to retain provisions under the law of enforcement (in the event of creditors of beneficiaries).

Conclusion:
Also within the new Liechtenstein Foundation Law the founder has a wide array of possibilities with regard to the shaping and structuring of the foundation according to his needs and wishes.

If you wish to obtain further information on the new Foundation Law please use the following link: *www.iuf.li → Publications*.

Industrie- und Finanzkontor • P. O. Box 339 • Herrengasse 21 • FL-9490 Vaduz • Liechtenstein
Phone +423 237 58 58 • Fax +423 237 58 59 • www.iuf.li • info@iuf.li