

Le fonds de pérennité : the French Privatstiftung?

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In the last decades, France faced an issue with the transmission of businesses as many companies were sold to foreign groups which led, among other reasons such as a general loss of competitiveness, to a reduction in industrial activity. Once a business is sold to a foreign shareholder, decisions are taken abroad with an increased risk that the activity would be transferred to a country with cheaper labour costs and jobs would be lost in France. This has also made it more difficult to develop and to keep in France a large number of SMEs comparable to the German *Mittelstand* which is the bedrock of its economy.

One major reason for this unfortunate development, even if the situation has considerably improved in the last years, has been the level of inheritance and wealth tax. The wealth tax forced many unlisted family companies to distribute large dividends in order to allow shareholders who were not at the same time directors or officers (as these were exempted) to pay their wealth tax and anticipate the payment of the estate tax. This curtailed the capacity of small and medium-sized enterprises (SMEs) to grow by reinvesting their profit rather than distributing a dividend, hurting their long term prospects. In 2003, the wealth tax was reduced by 50 % for shareholders concluding a shareholders' agreement (so-called *Pacte Dutreil*), meaning they have to hold the shares for a certain time, so this was an improvement. In 2017, the wealth tax was removed altogether for all investments in securities, but the damages already caused will be long to overturn. As to the estate tax, if shares are granted to the heirs, the maximum tax bracket of 45 % is reduced by 75 % in case of conclusion of another type of *Dutreil* Pact¹. In addition, if the ownership transmitted is a bare-ownership (*nue-propriété*) so that the donor keeps the voting rights, the tax will be reduced by another 50 % if the donor is less than 70 years old.² In practice, this means that the level of tax will be around 6 % of the price of the assets transferred which is quite low.

The question of the transmission of companies to the heirs has been solved from a tax perspective. However, the question of how to favor the long-term control of companies, especially family companies, so that they are not sold and their headquarters stay in France is not completely solved. One possible way is to look at foreign countries which have been able to develop a large SMEs sector and also have large family controlled listed companies. For instance, more than half of the Danish stock exchange is held by private foundations.³ This helps keep the control of those companies in the country and facilitates the adoption by those companies of a long-term view since the controlling shareholder is very stable. The drawback is that the

management of those companies tends to become conservative. Another advantage is that these foundations can sometimes, depending on their legal status in the country, support socially useful activities and public interest. They can support philanthropic activities which might be legally difficult if the holding structure is a company.

Unfortunately, in France, the idea to have private foundations has not been very popular due to a traditional hostility towards wealth and business. Private foundations have also a bad reputation as being associated with tax havens (Liechtenstein *Anstalt*) or are considered to be a way to evade taxes (Dutch *Stichting Administratiekantoor*). This opposition is short sighted as similar structures are found in Scandinavian and German speaking countries which are not at all especially known to be tax havens.⁴ Sometimes, their creation is recent which shows that they fulfill a useful purpose. For instance, they were introduced in Austria in 1993 (*Privatstiftung*) by a social democratic government. Another issue in France is that it is not so well accepted that philanthropic activities could be run by private institutions as it is considered that only the State should act in the public interest.

Nevertheless, in France, there are foundations and three types are dominant. The first one is the Public Interest Foundation (*Fondation reconnue d'utilité publique*). It is created by decree and, as its name implies, must pursue a public interest. The founders are in a minority position in the board of directors and the French State is a member of the board or has representatives who can attend the board meeting as an external participant (*Commissaire du Gouvernement*). In principle, directors and managers cannot be compensated and they cannot distribute any profit. Since 2005, those Foundations can hold more than 50 % of the shares of a company but still need to pursue a public interest goal.⁵ They can only be established as part of a sale or inheritance of a company. Only four such Foundations exist, among them the Pierre Fabre Foundation.⁶ The 2005 reform was designed specifically for the Pierre Fabre Foundation

There are also business foundations (*Fondations d'entreprises*) which have been granted a legal status in 1990. They are more flexible since they are established for a limited time period (with possible renewal) and financed annually rather than in one lump sum. They are a « subsidiary » of a company but their goal is limited to supporting non-profit activities.⁷ Therefore, they are different from private foundations which are found in other countries and are designed to control a company. Some of these foundations are significant and well known in France: Fondation Louis Vuitton created in 2006, Fondation L'Oréal in 2007... If their activity is socially useful, they can be granted a status of Public Interest Foundation.

The third type is the *Fonds de dotation*, established in 2008, which has met some success. The *Fonds de dotation* (Endowment Fund) is much more flexible than the Public

1 - Art. 787 B of the Tax Code (*Code général des impôts*).

2 - Art. 790 of the Tax Code (*Code général des impôts*).

3 - *Inspection Générale des Finances* (IGF), *Le rôle économique des fondations*, Report n°2017-M-008 authored by A. Jevakhoff and D. Cavaillolès, April 2017, p. 14.

4 - See for a European comparison, European Foundation Center (EFC), *Comparative Highlights of Foundation Law. The Operating Environment for Foundations in Europe*, 2015, 64 pp.

5 - Art. 18-3 of the 1987 Act on Business Foundations, as introduced by article 29 of the law n° 2005-882 du 2 août 2005 *en faveur des petites et moyennes entreprises*.

6 - Fondation Pierre Fabre, Fondation Christophe et Rodolphe Merieux, Fondation Avril, Fondation Varenne.

7 - *Loi n°87-571* du 23 juillet 1987 *sur le développement du mécénat*.