Austria/OECD

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An Argument for Treating Distributions by Austrian Private Foundations to Foreign Beneficiaries as Dividends under Tax Treaties Based on the OECD Model

This article presents an argument that distributions paid by Austrian private foundations to foreign beneficiaries should be treated as dividends rather than as other income under Austrian tax treaties that are based on the OECD Model.

1. Introduction: Characteristics of Austrian Private Foundations

Private foundations play a significant role for Austrian business. It is estimated that 80 of the 100 largest Austrian businesses are controlled, directly or indirectly, by private foundations, and that a total of around 400,000 Austrian jobs are linked to private foundations.[1] Furthermore, private foundations manage very large real estate portfolios and are known as Austria's largest private estate owners. In many cases, the beneficiaries entitled to the distributions of private foundations are tax resident outside Austria. Accordingly, the question arises as to how distributions by Austrian private foundations are to be qualified under tax treaties.

Private foundations under the Austrian "*Privatstiftungsgesetz*" (Private Foundations Act, PSG) are separate legal persons.[2] In contrast to most other legal persons, however, private foundations do not have owners, nor do they have shareholders or other members.[3] From a corporate law perspective, therefore, no one holds corporate rights, membership rights or anything similar in a private foundation. Consequently, setting up a private foundation results in a certain degree of legal autonomy and independence for the assets transferred by the founders.[4] The assets are owned by the private foundation with legal personality. The private foundation itself, however, does not belong to anyone.

Private foundations only have so-called beneficiaries ("*Begünstigte*")[5] and final beneficiaries ("*Letztbegünstigte*").[6] Beneficiaries are those persons who receive distributions or other benefits from the private foundation while the foundation is in existence. On the other hand, the final beneficiaries are those persons to whom any assets remaining after the dissolution of the private foundation are to be transferred. Such dissolution may occur, for example, due to the exercise of a revocation right by the founders or due to the expiration of the maximum term provided for in the foundation deed or by law.[7] Beneficiaries and final beneficiaries are determined by the individual regulations of the respective foundation deeds.

In contrast to shareholders and members of other legal persons, beneficiaries and final beneficiaries of private foundations do not in principle have any direct voting or participation rights.[8] In practice, however, many foundation deeds establish foundation boards ("*Beiräte*"), in which beneficiaries are also represented. Such foundation boards are usually granted reservations of consent for certain fundamental transactions of the private foundations. The extent to which such reservations of consent are permissible is limited.[9] The admissibility of reservations of consent often requires that beneficiaries are not represented by a majority in the foundation board.[10]

2. Taxation of Private Foundations and Beneficiaries under Austrian Domestic Law

2.1. In general

Under domestic law, Austrian private foundations qualify as legal persons, i.e. bodies corporate both in general terms and for tax purposes.[11] Accordingly, the income generated by private foundations is subject, in principle, to Austrian corporate income tax at the foundation level.[12] As the assets transferred by the founders constitute equity, from the perspective of both local generally accepted account-

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1. *See* R. Korinek, *Die Privatstiftung am Prüfstand*, 16 FONDSexklusiv 2/35 (2018).
2. AT: *Privatstiftungsgesetz* (Private Foundations Act, PSG), sec. 1(1).
3. *See* AT: *Oberster Gerichtshof* (Supreme Court, OGH), 25 Feb. 1999, 6 Ob 332/98m.
4. *See* AT: OGH, 15 July 1999, 6 Ob 74/99x.
5. Sec. 5 PSG.
6. Id., at sec. 6.
7. Id., at sec. 35.
8. *See* S. Kalss & J. Zollner, *Mitwirkungs- und Kontrollrechte der Begünstigten – Gestaltungsmöglichkeiten des Stifters*, 37 GesRZ, p. 351 et seq. (2008).
9. For more details, *see* S. Kalss, *Privatstiftung*, in *Österreichisches Gesellschaftsrecht*, 2nd edn., m.nos. 7/106 et seq. (S. Kalss, C. Nowotny & M. Schauer eds., Manz 2017).
10. Id., at m.no. 7/108.
11. Sec. 1(1) PSG and AT: *Körperschaftsteuergesetz* (Corporate Income Tax Act, KStG), sec. 1 (2)(1).
12. Sec. 1(2)(1) KStG.

ing principles and tax law, distributions made by private foundations are not deductible at the foundation level.[13]

At the level of the beneficiaries, distributions of any kind made by private foundations result in taxable income from capital assets ("*Einkünfte aus Kapitalvermögen*").[14] The latter qualification as income from capital assets at the beneficiary level is independent of the type of income generated by the private foundation itself.[15] Like most subtypes of income from capital assets under Austrian domestic law, distributions by private foundations are put in a separate basket from other income and, in general, are subject to a special tax rate of 27.5%.[16] The tax of 27.5% is calculated on the basis of the gross amount of the distributions. Consequently, a deduction of expenses is not permitted.[17] The tax so calculated is withheld by the distributing private foundation and directly transferred to the competent tax office.[18]

The described regime matches the domestic principles of taxation that apply to the shareholders of companies. The principles do not only apply to domestic beneficiaries, who are subject to the so-called unlimited tax liability on their worldwide income, but also to foreign beneficiaries, who are subject to Austrian limited tax liability in respect of specific types of income from Austrian sources.[19]

2.2. Interim taxation

Special rules apply to foundation income that is subject to the so-called "*Zwischenbesteuerung*" (interim taxation). This regime covers:

- interest income;
- income from realized appreciations of capital assets, for example, capital gains from the disposal of shares;
- income from derivatives; and
- income from the disposal of real estate.[20]

With regard to such types of income, private foundations are not subject to regular corporate income tax at a rate of 25%, but must pay an interim corporate income tax of 25% instead. In contrast to the regular corporate income tax, the interim corporate income tax is conceptualized as an advance payment for the withholding tax on subsequent distributions to beneficiaries.[21] Accordingly, any interim corporate income tax paid is credited against the withholding tax to be levied in cases of subsequent distributions, and therefore reduces the withholding tax liability accordingly, generally from 27.5% to only 2.5%. However, such credit of interim corporate income tax is only possible if and insofar as Austria is entitled to tax distributions by private foundations in the first place.[22] Under tax treaties, this situation is not necessarily the case (*see* section 3.1.). Apart from possible timing effects, the taxation of beneficiaries matches with the domestic principles of taxation applying to shareholders of companies also regarding foundation income subject to the described interim taxation regime.

3. Qualification of Foundation Distributions under Tax Treaties

3.1. In general

With regard to distributions by Austrian private foundations to foreign beneficiaries, the question arises as to which distributive rule of the relevant tax treaty should apply. In this context, the application of articles 10 ("Dividends") or 21 ("Other income") of the OECD Model[23] is discussed.

According to article 10 of the OECD Model, dividends paid by a company that is a resident of one of the contracting states to a resident of the other contracting state may be taxed in that other state, where the recipient is resident. However, these dividends may also be taxed in the source state, but the tax there should not exceed 15% of the gross amount of the dividends. In the event of distributions paid by Austrian private foundations, an application of the distributive rule of article 10 would mean that Austria, being the source state, would, in principle, be entitled to tax distributions to foreign beneficiaries at a rate of 15%. Then, the tax of 15% withheld in Austria would have to be credited against the income tax in the foreign state of residence of the beneficiary.[24]

According to article 21 of the OECD Model on other income, income not dealt with in the other articles of a tax treaty should be taxable only in the state in which the recipient is resident. In the case of distributions by Austrian private foundations, the application of this distributive rule would mean that Austria would not be entitled to tax at all.

The question of the relevant distributive rule can have significant implications. These implications not only concern the two states involved, but can also affect the beneficiaries themselves:

- Tax treaties restrict the taxing rights of the contracting states, but they do not have the effect that the state entitled to taxation actually exercises its right to tax under its domestic tax law.[25] If the foreign state of residence of a beneficiary does not tax distributions

13. Id., at sec. 8(2).
14. AT: *Einkommensteuergesetz* (Income Tax Act, EStG), sec. 27(5)(7).
15. If, for example, a private foundation owns commercial property that generates rental income that is used to fund distributions to beneficiaries (either in the same year in which the rent is received or in subsequent years), the beneficiaries receive income from capital assets, and, therefore, the nature as rental income is lost at the beneficiary level.
16. Sec. 27a(1)(2) EStG.
17. Id., at sec. 20(2).
18. Id., at sec. 93 et seq.
19. Sec. 98(1)(5)(a) EStG and sec. 21(1)(1) KStG. The Austrian limited tax liability covers persons without domestic residence or habitual abode (sec. 1(3) of the EStG) or, in the case of legal entities, without domestic seat or place of management (sec. 1(3)(1) of the KStG).
20. Sec. 13(3) KStG.
21. *See* the decision of the Austrian *Verwaltungsgerichtshof* (Supreme Administrative Court, VwGH) in AT: VwGH, 23 Oct. 2013, 2010/13/0130. *See also* V. Englmair, in *KStG*, 2nd edn., sec. 13 m.no. 188 (M. Lang et al. eds., Linde 2016).
22. Secs. 13(3) and 24(5)(3) KStG.
23. Most recently, *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
24. Id., at art. 23A(2) and 23B(1).
25. *See* S. Bendlinger & G. Kofler, *Funktion von Doppelbesteuerungsabkommen*, in *Internationales Steuerrecht*, 2nd edn., m.no. IX/25 (S. Bendlinger et al. eds., LexisNexis 2018).

by foundations according to its domestic law, the application of article 21 of the OECD Model would result in double non-taxation. On the other hand, in the case of the application of article 10 of the OECD Model, Austria could at least impose a tax of 15%.

– Another significant implication arises in connection with the income of private foundations that is subject to the so-called interim taxation. This position is due to the fact that a credit of interim corporate income tax is only possible when Austria is entitled to tax distributions in the first place (*see* section 2.2.). If article 21 of the OECD Model were to apply, this would not be the case.[26]

3.2. Prevailing view

According to the currently more or less undisputed consensus,[27] as well as the administrative practice of the Austrian *Bundesministerium für Finanzen* (Ministry of Finance),[28] distributions by Austrian private foundations to foreign beneficiaries are to be qualified as other income, as defined by article 21 of the OECD Model. The reasons for this assessment seem to be quite plausible at first sight. They are based on the wording of article 10 of the OECD Model. Under article 10(1) of the OECD Model dividends must be paid by a "company", and from the definition of article 10(3) it follows that dividends in any case must derive from "corporate rights". With regard to distributions from private foundations, however, the general view is that such distributions do not constitute income from "corporate rights".[29] Accordingly, distributions by private foundations should not qualify as dividends within the meaning of article 10 of the OECD Model.[30] Against the background that, from a corporate law perspective, it is not possible to hold "corporate rights" in a private foundation, this view seems prima facie quite persuasive. Nevertheless, the author would critically question this prevailing opinion. Consequently, section 3.3. examines whether a qualification of distributions by foundations as dividends within the meaning of article 10 of the OECD Model might be indicated in certain cases.

3.3. Critical review

3.3.1. Companies

As it can be inferred from article 10(1) of the OECD Model that dividends can only be paid by a "company", the meaning of the term "company" must be explored first. In the present context, it is tempting to deny that private foundations should be qualified as "companies". This position would be based on the doctrinal understanding according to Austrian corporate law, under which private foundations are not considered to be companies.

Article 3(1)(b) of the OECD Model provides a legal definition of the term for treaty purposes, however. According to this definition, the term "company" means "any body corporate or any entity that is treated as a body corporate for tax purposes".[31] With regard to the second part of the definition, the Commentary on Article 3 of the OECD Model specifies that the entity should be treated as a body corporate "for the purposes of the tax law of the Contracting State of which it is a resident",[32] which in the present context would be Austrian tax law. As private foundations organized under the Austrian PSG are by definition legal persons and, therefore, bodies corporate in general terms[33] under Austrian law,[34] and as private foundations are treated as bodies corporate for Austrian tax purposes,[35] they are to be qualified as companies within the meaning of tax treaties.[36]

3.3.2. Corporate rights

According to the prevailing view,[37] distributions by private foundations cannot be qualified as dividends due to the lack of "corporate rights", particularly as private foundations are not supposed to provide their beneficiaries with any share or participation. However, the plausibility of this assessment must be reviewed. In this context, the definition of dividends in article 10(3) of the OECD Model must be explored. This definition reads as follows:

> The term "dividends" as used in this Article means income from shares,... "jouissance" rights... or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treat-

26. *See* E. Marschner, *Steuerliche Gesetzesänderungen für (Privat) Stiftungen zum Jahresende*, 11 ZFS, p. 259 et seq. (2015).
27. *See* M. Lang, *Einkünfte aus Privatrechtsstiftungen nach den österreichischen Doppelbesteuerungsabkommen*, 3 SWI, p. 13 et seq. (1993); G. Kofler, *Die österreichische Privatstiftung im Internationalen Steuerrecht: Zuwendungen an ausländische Begünstigte*, 11 ZFS, p. 231 et seq. (2015); F. Wassermeyer & C. Kaeser, in *DBA*, 145th instalment, art. 10 m.nos. 84 and 139 (F. Wassermeyer ed., C.H. Beck 2019); E. Marschner, *Optimierung der Familienstiftung*, 4th edn., m.no. 1353 (Linde 2019); G. Aigner & B. Prechtl-Aigner, in *DBA*, 2nd edn., art. 10 m.no. 118 (D. Aigner, G. Kofler & M. Tumpel eds., Linde 2018); S. Kanduth-Kristen & G. Kofler, *Regelungsinhalt des internationalen Steuerrechts*, m.no. II/83, in Bendlinger et al. eds., *supra* n. 25; H. Kovar & A. Marihart, *Zuwendungen von Privatstiftungen an ausländische Begünstigte*, in *Stiftungsbesteuerung*, 2nd edn., p. 185 et seq. (G. Cerha et al. eds., Linde 2011); C. Ludwig, *Begünstigte einer Privatstiftung und Zuwendungen an diese*, in *Stiftungshandbuch*, 2nd edn., m.no. 13/65a (N. Arnold & C. Ludwig eds., Linde 2014); J. Prillinger, in Lang et al. eds., *supra* n. 21, at sec. 21 m.no. 83; and F. Rosenberger, *Zuwendungen österreichischer Privatstiftungen an ausländische Begünstigte*, 4 ZFS, p. 119 et seq. (2008).
28. *See* Express-Antwort-Service (EAS) 3197; EAS 3091; EAS 2482; EAS 2321; EAS 1762; EAS 1450; EAS 1409; EAS 947; EAS 873; and EAS 617, and *Stiftungsrichtlinien 2009*, m.no. 262.
29. *See* Lang, *supra* n. 27, at p. 15; Wassermeyer & Kaeser, *supra* n. 27, at m.nos. 84 and 139; Kofler, *supra* n. 27, at p. 233; Kanduth-Kristen & Kofler, *supra* n. 27, at m.no. II/83; Marschner, *supra* n. 27, at m.no. 1353; Ludwig, *supra* n. 27, at m.no. 13/65a; and Aigner & Prechtl-Aigner, *supra* n. 27, at m.no. 118.
30. *Supra* n. 29.
31. For a detailed analysis, *see* J.F. Avery Jones et al., *The Definitions of Dividends and Interest in the OECD Model: Something Lost in Translation?*, 1 World Tax J. 1, p. 7 et seq. (2009), Journal Articles & Papers IBFD.
32. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 3* para. 3 (21 Nov. 2017), Treaties & Models IBFD.
33. For the relevance of a general law understanding, *see* Avery Jones et al., *supra* n. 31 at p. 9.
34. Sec. 1(1) PSG.
35. Sec. 1(2)(1) KStG.
36. *See* EAS 2482 and EAS 1409; Lang, *supra* n. 27, at p. 15; Kofler, *supra* n. 27, at p. 232; Ludwig, *supra* n. 27, at m.no. 13/65a; and Kovar & Marihart, *supra* n. 27, at p. 185. With regard to foundations in general, *see also* para. 2 *OECD Model: Commentary on Article 3* (2017) and P.A. (Peter) Harris, *Article 10: Dividends - Global Tax Treaty Commentaries*, sec. 5.1.1., Global Topics IBFD.
37. *See supra* n. 27.

ment as income from shares by the laws of the State of which the company making the distribution is a resident.

As the final part of article 10(3) of the OECD Model refers to "other corporate rights", it can be concluded that all items of rights listed in article 10(3) must qualify as "corporate rights".[38] The term "dividends", therefore, should only cover income from such rights.[39]

With regard to the term "corporate rights" itself, a treaty-based (autonomous) understanding should be given preference over a domestic law meaning.[40] This seems also to be supported by the Commentary on Article 10 of the OECD Model (For the reference to domestic law regarding the tax treatment *see*, however, section 3.3.3.).[41]

First, it is to be noted that the potential existence of "corporate rights" should not require any kind of corporate relationship or membership in terms of corporate law.[42] This position can be derived from the explicit mention of "jouissance rights"[43] in article 10(3) of the OECD Model as an example of "corporate rights" potentially leading to dividends, as such jouissance rights are creditor rights of purely contractual nature and, therefore, not based on any corporate relationship or membership.[44]

The fact that beneficiaries hardly have any voting or participation rights should also not affect the potential existence of "corporate rights".[45] Again, this follows from the explicit reference to jouissance rights, as the latter cannot grant their holders any voting or participation rights whatsoever.[46]

When determining whether "corporate rights" are given, the overall picture of the rights and obligations should be decisive,[47] and substance should come before form.[48] In the view of the prevailing opinion,[49] which is also supported by the Commentary on Article 10 of the OECD Model, the decisive aspect for the existence of "corporate rights" in the sense of article 10(3) of the OECD Model is a participation in the risk of the legal entity concerned, which is more or less equivalent to the risks borne by regular shareholders of a company.[50]

A mere participation in current profits should not by itself be sufficient to assume a qualified participation in the risks of the relevant legal entity.[51] This situation is evident from the definition of dividend in article 10(3) of the OECD Model. The latter provision addresses debt claims that grant the creditor a right to participate in the current profits of the debtor and clarifies that the remunerations paid on such debt claims are not to be qualified as dividends.[52] The mere entitlement to a current profit participation, therefore, cannot be sufficient for qualification as "corporate rights" in the sense of tax treaties. Rather, additional requirements have to be met.

According to the prevailing view,[53] in order to hold "corporate rights" within the meaning of article 10(3) of the OECD Model, a person has not only to participate in current profits, but additionally must participate in the liquidation proceeds,[54] i.e. in the hidden reserves realized

38. *See* M. Helminen, *The International Tax Law Concept of Dividend*, 2nd edn., p. 68 (Kluwer 2017); K. Vogel, *Klaus Vogel on Double Taxation Conventions*, 3rd edn., art. 10 m.nos. 185 and 188 (Kluwer 1997); W. Haslehner, in *Klaus Vogel on Double Taxation Conventions*, 4th edn., art. 10 m.no. 90 (E. Reimer & A. Rust eds., Wolters Kluwer 2014); Wassermeyer & Kaeser, *supra* n. 27, at m.nos. 110 and 139; Aigner & Prechtl-Aigner, *supra* n. 27, at m.no. 104; Avery Jones et al., *supra* n. 31 at p. 26; M. Lang, *Introduction to the Law of Double Taxation Conventions* 2nd edn., m.no 279 (IBFD & Linde 2013), Books IBFD; S.-E. Bärsch, *The Definitions of Dividends and Interest Contained in the OECD Model, Actual Tax Treaties, and the German Model*, 42 Intertax 6/7, p. 435 (2014); and F.M. Giuliani, *Article 10(3) of the OECD Model and Borderline Cases of Corporate Distributions*, 56 Bull. Intl. Fiscal Docn. 1, sec. 4. (2002), Journal Articles & Papers IBFD.
39. *See* Vogel, *supra* n. 38, at m.nos. 185 and 188; Lang, *supra* n. 38, at m.no. 279; Helminen, *supra* n. 38, at p. 178; Bärsch, *supra* n. 38, at p. 435; Aigner & Prechtl-Aigner, *supra* n. 27, at m.no. 104; and D. Altehoefer & M. Landendinger, *Die Ausgestaltung von Genußrechten ausländischer Kapitalgeber und die Beschränkung der inländischen Quellenabzugsbesteuerung durch DBA und EG-Recht*, 6 IStR, p. 324 (1997).
40. *See* Vogel, *supra* n. 38, at m.no. 188; Helminen, *supra* n. 38, at p. 179; Lang, *supra* n. 27, at p. 14 et seq.; and Bärsch, *supra* n. 38, at p. 435.
41. For more details, *see* Avery Jones et al., *supra* n. 31, at p. 37 et seq.
42. *See also* Vogel, *supra* n. 38, at m.no. 189; G. Widmayer, *Genussrechte als Instrument für grenzüberschreitende Finanzierungen*, 10 IStR, p. 341 (2001); and Bärsch, *supra* n. 38, at p. 435. *See*, however, Avery Jones et al., *supra* n. 31, at p. 24 et seq. and Wassermeyer & Kaeser, *supra* n. 27, at m.no. 139.
43. "*Genussrechte*" (jouissance rights) are financing and/or participation instruments that are characterized as creditor rights of a purely contractual nature. Jouissance rights were developed by business practice for purposes that could not be satisfactorily realized by using conventional instruments. In most jurisdictions, jouissance rights are not legally regulated and, therefore, the legal structuring of jouissance rights is usually flexible. Jouissance rights can grant their holders various property rights, such as a participation in current profits, a participation in the liquidation proceeds and/or an entitlement to interest payments, and can impose obligations, such as an obligation to make a capital contribution and/or to participate in the issuer's losses, but cannot under any circumstances grant their holders any voting or participation rights. In practice, jouissance rights play a relevant role, particularly (but not only) in the DACH countries, i.e. Austria, Germany and Switzerland. For more details, *see* S. Bergmann, *Genussrechte*, p. 1 et seq. (Manz 2016).
44. *See* Bergmann, *supra* n. 43, at p. 3 et seq.; Vogel, *supra* n. 38, at m.no. 189; and Bärsch, *supra* n. 38, at p. 435.
45. *See* W. Tischbirek & G. Specker, in *DBA*, 6th edn., art. 10 m.no. 189 (K. Vogel & M. Lehner eds., C.H. Beck 2015); Vogel, *supra* n. 38, at m.no. 189; Wassermeyer & Kaeser, *supra* n. 27 at m.no. 122; M. Lang, *Hybride Finanzierungen im Internationalen Steuerrecht* p. 123 et seq. (Orac 1991); and M. Six, *Hybride Finanzierung im Internationalen Steuerrecht* p. 108 (Linde 2007).
46. *See* Bergmann, *supra* n. 43, at pp. 163 et seq. and p. 545.
47. *See* Lang, *supra* n. 45, at pp. 126 and 142 et seq. and Bergmann, *supra* n. 43, at p. 546.
48. *See*, for example, para. 25 *OECD Model: Commentary on Article 10* (2017); para. 19 *OECD Model: Commentary on Article 11*; and Harris, *supra* n. 36, at sec. 5.1.3.2.4.
49. *See supra* n. 27.
50. *See* paragraph 25 of *OECD Model: Commentary on Article 10* (2017); Vogel, *supra* n. 38, at m.no. 189; Tischbirek & Specker, *supra* n. 45, at m.no. 189; Helminen, *supra* n. 38, p. at 181; Widmayer, *supra* n. 42, at p. 341 et seq.; Altehoefer & Landendinger, *supra* n. 39, at p. 324 et seq.; and K. Kopp, (*Eigenkapital, Fremdkapital und hybride Finanzierungen im internationalen Steuerrecht*), in *Eigenkapital und Fremdkapital* p. 869 (W. Schön ed., Springer 2013).
51. Bergmann, *supra* n. 43, at p. 545.
52. Id.
53. *See supra* n. 27.
54. *See* Helminen, *supra* n. 38, at p. 180; Haslehner, *supra* n. 38, at m.no. 92; Wassermeyer & Kaeser, *supra* n. 27, at m.no. 122; Tischbirek & Specker, *supra* n. 45, at m.nos. 189 and 194 et seq.; Vogel, *supra* n. 38, at m.no. 189; Six, *supra* n. 45, at p. 108 et seq.; Lang, *supra* n. 38, at m.nos. 280 and 296; Giuliani, *supra* n. 38; M. Tenore, *Taxation of Dividends: A Comparison of Selected Issues under Article 10 OECD MC and the Parent Subsidiary Directive*, 38 Intertax 4, p. 226 (2010); and H. Schaumburg, *Internationales Steuerrecht*, 4th edn., at m.nos. 16.332, 16.337 and 16.363 (Otto Schmidt 2017).

in the course of the dissolution.[55] Provided that a person is entitled to both a current profit participation as well as a participation in the liquidation proceeds, this person should regularly bear a risk that is more or less equivalent to that of a regular shareholder in a company.

In the author's opinion, however, these very conditions can potentially also be met with regard to beneficiaries of private foundations. A qualified participation in current profits should always be given if the distributions to be made to the beneficiaries are based on the private foundation's actual current profit. That situation would be the case if the distributions were linked to the private foundation's annual net profit or a similar profit figure. In practice, this is usually the case anyway. On the other hand, a qualified participation in the liquidation proceeds should usually be given with regard to those persons who are appointed as a private foundation's final beneficiaries.

If, under the provisions in the foundation deeds, the beneficiaries of private foundations are appointed at the same time as the private foundation's final beneficiaries, as is very often the case in practice, there should be very good reasons to assume that these persons are in a similar risk position to the regular shareholders in a company. This conclusion also seems to be in line with the Commentary on Article 10 of the OECD Model, according to which the notion of dividends basically concerns distributions by companies within the meaning of article 3(1)(b) of the OECD Model.[56]

The fact that beneficiaries who are not at the same time the private foundation's founders usually do not contribute any assets to the private foundation should not be of any relevance.[57] Their economic situation does not differ from that of the shareholders of companies who received their shares as a gift or inheritance.

Austrian private foundations are not subject to strict capital maintenance rules, however.[58] In particular, they are not confronted with a prohibition of disguised returns of capital. Accordingly, private foundations can also make distributions, in principle, which do not necessarily have to be covered by profits generated by the private foundation. Whether such distributions are permissible depends on the individual provisions of the foundation deeds. If this situation were to be the case, such a position could possibly thwart the assumption of "corporate rights". Ultimately, the overall picture should be decisive. In cases in which potential profit-independent distributions are only of minor significance compared to the profit-related distributions of the private foundation, it should be legitimate to assume that "corporate rights" are given. In the literature, the same argument is formulated with regard to hybrid financial instruments.[59]

3.3.3. Same taxation treatment as income from shares

Even if the existence of "corporate rights" can be assumed, a subsequent qualification of foundation distributions as dividends requires the fulfilment of an additional condition. According to article 10(3) of the OECD Model, dividends can only be paid with regard to:

> income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

As illustrated in section 2., in Austria, this should, however, be the case.[60]

Consequently, the author is of the opinion that distributions by Austrian private foundations should qualify as dividends within the meaning of article 10 of the OECD Model, provided that the beneficiaries and/or final beneficiaries hold "corporate rights" in the described sense.

4. Follow-Up Questions

In the case that a beneficiary of an Austrian private foundation is not a natural person but a foreign company, the follow-up question evolves whether Austria's right to source taxation could be subject to further limitations based on article 10(2)(a) of the OECD Model regarding direct (significant) shareholdings. According to the latter provision, the source state's right to tax is reduced to a tax rate of 5% instead of the regular rate of 15% under article 10(2)(b) of the OECD Model, provided that the recipient of the dividend is a company that holds at least 25% of the capital of the distributing company for a period of at least one year. In this context, the question arises whether beneficiaries who are entitled to a beneficiary quota of at least 25% also hold a quota of the private foundation's "capital" in the same percentage. Some authors argue that a participation in a legal entity's "capital" in the sense of article 10 of the OECD Model should be automatically deemed to exist if and insofar as "corporate rights" entitling dividends are given.[61] Under this precondition, an application of article 10(2)(a) of the OECD Model could also be possible with regard to beneficiaries in private foundations.[62]

Another follow-up question concerns deciding which distributive rule is relevant with regard to final distributions, for example, in the event of a revocation of a private foundation. The fact that, under Austrian domestic law, final distributions by private foundations are also qualified as distributions rather than as liquidation or disposal transactions[63] would suggest that such distributions should also be covered by the dividend article, provided that the previ-

55. *See* Vogel, *supra* n. 38, at m.no. 189; Giuliani, *supra* n. 38; and H. Loukota & H. Jirousek, *Internationales Steuerrecht* 28th instalment, I/1 Z 10 m.no. 84 (Manz 2015).
56. *See* paragraph 24 of the *OECD Model: Commentary on Article 10* (2017). *See also* Helminen, *supra* n. 38, at p. 83: "so long as an entity qualifies as a company it is also an entity that may issue corporate rights".
57. *See*, however, M. Lang, (*Die Stiftung im Internationalen Ertragsteuerrecht*), in *Die Stiftung als Unternehmer* p. 209 (P. Csoklich & P. Müller eds., LexisNexis 1990) and Kofler, *supra* n. 27, at p. 232 et seq.
58. *See* N. Arnold, *PSG*, 3rd edn., sec. 4 m.nos. 14 and 44 (LexisNexis 2013).
59. *See* Lang, *supra* n. 45, at p. 143 and Bergmann, *supra* n. 43, at p. 546.
60. *See* EAS 2321 and Kofler, *supra* n. 27, at p. 233.
61. *See* M. Lühn, *Bilanzierung und Besteuerung von Genussrechten* p. 263 (Deutscher Universitäts-Verlag 2006); Loukota & Jirousek, *supra* n. 55, at I/1 Z 10 Rz 13 and 44; Bergmann, *supra* n. 43, at p. 550; and EAS 2577.
62. *See*, dissenting in this respect, Marschner, *supra* n. 27, at m.no. 1354 and Rosenberger, *supra* n. 27, at p. 119 et seq.
63. *See* EAS 3086 and Prillinger, *supra* n. 27, at m.no. 83.

ously explained conditions for the existence of corporate rights are met. In this case, there would be income from corporate rights, which is, in accordance with article 10(3) of the OECD Model, treated the same way as income from shares under domestic law.

5. Conclusions

As outlined in this article, the rights of beneficiaries and/or final beneficiaries of Austrian private foundations should constitute "corporate rights" within the meaning of article 10(3) of the OECD Model, subject to the conditions that:

- the beneficiaries are appointed at the same time as the final beneficiaries; and
- the beneficiary status and the final beneficiary status essentially correspond to a current profit participation and a participation in the liquidation proceeds of the private foundation.

If these requirements are met, distributions by Austrian private foundations to foreign beneficiaries should be qualified as dividends within the meaning of article 10 of the OECD Model.

Against this background, it would be reasonable for the Austrian Ministry of Finance to reconsider its current standpoint on the qualification of distributions by private foundations as other income within the meaning of article 21 of the OECD Model with regard to those Austrian tax treaties that are based on the OECD Model.[64] The current interpretation by the Austrian Ministry of Finance, as well as the mainstream opinion in the literature,[65] seems to be influenced by a domestic law understanding of the term "corporate rights". However, a treaty-based understanding of the term should be given preference.

That the Austrian tax authorities naturally prefer the application of the distributive rule of article 10 of the OECD Model anyway is apparent from the fact that the Austrian Ministry of Finance regularly tries to amend the wording of article 10(3) when new tax treaties are concluded, or existing ones are renegotiated.[66] This situation is realized frequently by simply eliminating the requirement that dividends in the sense of article 10 of the OECD Model can only be derived from "corporate rights".[67]

64. For an overview of the Austrian double taxation conventions, *see* Kofler, *supra* n. 27, at p. 238 et seq.
65. *See supra* n. 27.
66. *See also* H. Jirousek, (*Die österreichische DBA-Politik*), in *Europäisches Steuerrecht – Festschrift Rödler* p. 418 (M. Lang & C. Weinzierl eds., Linde 2010).
67. *See* Kofler, *supra* n. 27, at p. 234.