Article

Stewardship purpose planning with Dutch private foundations in an international context

Ineke A. Koele*

Abstract

There is a growing interest of wealthy families in stewardship ownership planning, which stems from developments in society and an increased awareness on the wise long-term use of wealth in a modern society, following long-standing examples in the North European culture.

In the common law part of the world, these developments are driven by international financial centres with a quick adaptive mind, now followed by discussions on the development of trust law more generally. In the classic European foundation legislations, pure stewardship planning is stretching the legal limits as well and most often, the most likely option is the use of the strictly regulated charitable foundation.

The author describes the distinct approaches from a comparative and Dutch stewardship perspective based on a corporate foundation model, that historically allows a self-serving or purely stewardship ownership structure.

These stewardship foundations are not structured with the intention to serve private interests of the family that divested their ownership and should not be regarded as an APV or similar target of anti-abuse legislation that applies to discretionary private trusts and foundations.

Introduction

In a time, where it is gradually becoming acknowledged that good old capitalism needs to be modernized as 'conscious capitalism' in order for societies to thrive, we face many new terms to embrace this sentiment: the Doughnut economy,[1] the Purpose economy,[2] a Thrivability society,[3] a Regenerative Economy or a Social and Solidarity economy (SSE).[4] It all boils down to the same: we have to combine and converge our pursuit for income and profit and our pursuit for wellbeing over generations. We feel an urge to abandon the ever increasing antagonism, division and popularization of our corporations and culture and instead to devote our life work and energy to sustainable undertakings that foster wisdom, compassion and responsibility.

This all contributes to our wish to create a meaningful legacy during our life, the final endeavour of any human being.

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1. K Raworth, The Doughnut Economy, https://www.kateraworth.com/doughnut/.
2. www.purpose-economy.org.
3. https://ageofthrivability.com/.
4. This is the vocabulary used by the United Nations on the topic. See the UN Inter-Agency Task Fore on Social and Solidarity Economy (www.unsse.org).

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In this paradigm shift, there is also an increasing interest for existing or new enterprises driven by purpose beyond profit and that do not allow the enterprise to be sold to a larger conglomerate of corporations. Again, here are many different terms that cover the same ambition: a Social Enterprise, a Purpose Enterprise and the increasingly popular term 'Stewardship Ownership' enterprise. Instead of valuing a business as a simple asset that can be sold at the command of ownership at any moment, these are deliberately passed on to successors that are aligned to the values of the business.[5]

This can take the lighter form of a 'golden share' model, where a third party has the power to block a potential sale, or a more robust form of an 'alternative ownership' structure where the original owners transfer their ownership at least partially into a more institutionalized form of ownership.

From a bottom up perspective, there is an increasing awareness for owners of mature family businesses that in order to let the business thrive over generations, it may be best to let the purpose of thriving the business come first as a strategy for succession instead of the automatic inheritance for the younger generations where the business is subject to divorces and other discord of the respective family members and the values are subject to erosion by the owners.[6] The same counts for family wealth owners where assets are concerned that by their nature cannot easily be split and divided (real property, art collections) if the intention of the family is to maintain these special assets for the longer term. Steward-ownership provides a third alternative to inheritance or sale and division and since awareness of this alternative increases, the popularity of the same is gaining momentum.

Both perspectives—the societal perspective and the private perspective—together converge to the use of legal structures that are suitable to support a 'self-serving' purpose as a primary driver whereas ownership and stakeholder interests are a secondary or even a subservient aspect. Ownership is in this perspective considered as a responsibility *vis-à-vis* the next generations, whilst the owners ('stewards') are deeply committed to the values and stakeholders of the corporation.

Purpose planning or, as it is earlier referred to: '*Alternative Ownership structuring*' is not new at all. There are many long existing foundation-held businesses in countries like Germany (Bosch, Zeiss), Denmark (Moller-Maersk, Novo-Nordisk, Carlsberg) and the Netherlands (Van Leer, IKEA, Albron) and Switzerland (Rolex, Victorinox) that may qualify by modern standards as 'steward-ownership' enterprises. Many of them take the form of charitable foundations, which is the compulsory form in some jurisdictions (Switzerland), but a growing number of steward-ownership structures take the form of private non-charitable foundations. In some cases purpose foundations are used in combination with non-voting equity or governance mechanisms that effectively split voting power from economic interest (like the Dutch Stichting Administratiekantoor), in order to retain maximum flexibility.

Growing international interest in steward-ownership structures

Where the development of the common law trust conceptually differs from the foundation law in civil law jurisdictions, the use of non-charitable purpose trusts traditionally has been a difficult one in common law jurisdictions. The concept that a trust would serve the purpose of maintaining a business and its stakeholders in perpetuity, would imply a deviation from the rule against perpetuities, the rule that a trust must have a well designated class of beneficiaries or at least an enforcer of the trust. In the case of a charitable trust, the jurisdiction's attorney-general is designed to act as a public enforcer. Apart from flexible jurisdictions like *eg* Bermuda, Cayman Islands, BVI, the Bahamas,

5. For more information on Steward-ownership in general, see https://purpose-economy.org/en/resources/.

6. I Koele and R Feldthusen, "Shareholder foundations of enterprises: the North European style of securing family businesses for the long term – rising up to the global challenge", 26(7) Trusts & Trustees (2020) 654–662.

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Guernsey, Jersey or Gibraltar, there was little development in this field for sometime.

However, a few US States, such as Oregon, South Dakota, New Hampshire and Delaware have allowed in recent years purpose trusts to continue in perpetuity and are expected to gradually re-write business succession planning in the USA.[7] US Scholars have started to write about amending the Uniform Trust Code in order to accommodate the need for a new type of purpose trust: the *Stewardship Trust*.[8] Also, commentators have argued that the so-called *cy-près doctrine*, that allows charitable trusts to redirect their funds to causes that are closest to the originally stated purpose, where that original purpose is no longer considered to be practicable or possible, should also be extended to private purpose trusts.[9] Another commentator expresses resistance to these developments and considers the recognition of a 'nonfiduciary trust' to stand as a 'stark repudiation of the prevailing concept of the trust, thereby posing a direct challenge to the cogency of the trust concept'.[10] Like always, innovations come with interesting debate between legal scholars.

As a continental lawyer used to Dutch purpose foundations, I welcome the acknowledgment of a US commentator that the typical objectives of this perpetual purpose trust ownership would reflect the following[11]:

1. Ensure retention and continuation of the business indefinitely;
2. Allow family members, descendants, and key employees to manage or participate in management of the business;
3. Provide benefits to family members in and out of the business, as well as other parties, such as employees and charities;
4. Consider and develop the favourable impact the company has on the community;
5. Protect against outside disruptions or exposure to loss of business ownership, such as divorce, lawsuits, estate disputes, etc.; and
6. Protect against sale of the business or hostile takeovers by outside investors.

The desire for this new private purpose trust in the USA is underpinned by the circumstance that in US law, non-publicly funded charities are not allowed to own substantial holdings in underlying businesses. In other words, in the US landscape family businesses cannot be transferred to newly created charities that are incorporated by the family who have divested themselves from the business. This would run foul to heavy sanctions to the excess business holding rules for '*private foundations*'—in the US terminological tangle: the only way to refer to non-publicly funded charities.

In the UK, a trust for non-charitable purposes is void in most cases[12] as having no human beneficiary capable of enforcing the trust. The 'human beneficiary' principle therefore is only relaxed if a purpose trust meets the requirements of a charity under UK law which is strictly regulated; in that case, the Attorney-General takes the role of 'enforcer' on behalf of the public (beneficiaries) at large. Apart from this 'human beneficiary' principle, a purpose trust may fail for want of certainty, being capricious and restricted to the perpetuity period in force. Nonetheless, there are commentators who plead for a statutory scheme for validation of Private Purpose Trusts in the UK.[13]

In 'classical'[14] Germanic foundation jurisdictions such as Liechtenstein, Austria and Germany, there are similar restrictions in the law for foundations.[15] For

7. See A Bove, Jr. and M Langa, "The perpetual business purpose trust: the business planning vehicle for the future, starting now", ACTEC Law Journal, Fall 2021.
8. S Gary, "The need for a new type of Purpose Trust, the Stewardship Trust", in ACTEC Law Journal, Fall 2019; S Gary, "The Oregon Stewardship Trust: A New type of purpose trust that enables steward-ownership of a business", 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426845.
9. T Simmons, "Purpose Trust Cy-Près", ACTEC Law Journal, Fall 2019.
10. J Schoenblum, "The Nonfiduciary 'Trust'", ACTEC Law Journal, Summer 2021.
11. A Bove and M Langa, note 7, 9.
12. Except for specific purposes like maintenance of specific animals, tombs and monuments.
13. M Pawlowski, "Private purpose trusts – a statutory scheme for validation", 25(4) Trusts & Trustees (2019) 391–396.
14. Reference by the term 'classical' is made to jurisdictions where a foundation is treated as the instilled wish of the founder, and therefore has a typical 'fiduciary' character.

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example, Liechtenstein foundations law requires that the purpose of a foundation be described with sufficient certainty and also shows a directly outward-related effect, and specifically identified purposes as well as beneficiaries; a foundation just holding a valuable art collection or focused on the maintenance of a large business, without at the same time providing for beneficiaries, would therefore be labelled as an invalid 'self-purpose foundation' ('*Selbstzweckstiftung*').[16] The same is true for Austrian foundations. Furthermore, 'classical' foundation legislations may prohibit or restrict a foundation from engaging in commercial activities generally or in a specific context such as participating in a partnership.

In most classical foundation laws, like Denmark,[17] Belgium[18] Germany and Austria,[19] private purpose foundations are subject to close scrutiny of administrative regulatory oversight which is effectively the consequence of the idea that the foundation is the continuation of the wishes of the founder of the foundation—which needs to be supervised. In the same spirit, it is difficult for classical foundations to change their original purpose and statutory law when circumstances change.

Dutch foundation as purpose planning vehicle for international families

Very different from the classical foundation laws in continental Europe, Dutch foundation law is based on the real concept of a corporation—be it without shareholders.

That is why, in the Dutch legal tradition, we have no issue with a completely liberal self-purpose, as long as the purpose cannot be said to be in contradiction to public policy and common decency. There is also no specific need to create sufficient *certainty*, as it is perfectly possible and in fact very usual to describe the purpose of foundation in very abstract and general ways thereby leaving much discretion to the board[20]. It is perfectly possible for a Dutch foundation to have as a purpose to *maintain* specific assets, be it a valuable art collection or a business, without any 'direct outward-related effect'. We have hundred years' old foundations that own the shares in a 'social' enterprise, where excess profits are used for innovations to be used by the enterprise itself, without external beneficiaries (*eg* stichting Albron). A more recent example is Stichting INGKA that owns a vital part of the IKEA concern. Where the circumstances change, by default the governing organs can decide to amend the purpose of the foundation. Only if the founder has determined in the original deed of incorporation that the purpose cannot be amended, this would require the prior consent of the Court. In all other situations, the foundation itself is able to govern in accordance with any changing circumstances. We therefore do not need any *cy-près* doctrine.

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In a comparative context, a crucial aspect of Dutch foundation law may be that a—light version of—public enforcement is available for all Dutch foundations where common law only knows an enforcer for charitable trusts. The distinction here is that the board of a foundation is accountable to the stated purpose of the

15. As explained in greater detail by J Niegel, "Purposeful trusts and foundations?", 18(6) Trusts & Trustees (2012) 451–462; P Panico, *Private Foundations, Law and Practice* (Oxford University Press 2014) 345 ff, even declares a 'surprising similarity between the 'beneficiary principle' under English law and the corresponding approach to private foundations in the 'classic' civil law jurisdictions such as Liechtenstein, Austria and Panama.

16. J Niegel, "Purposeful foundation revisited", 27(6) Trusts & Trustees (2021) 433–440.

17. I Koele and R. Feldthuse*n*, note 6, 659.

18. M Ex, A Verbeke, and B Verdickt, "The Belgian private foundation", 27(6) Trusts & Trustees (2021) 478–486, refers to the fact that all gifts in excess of 100,000 euro require an approval by the Minister of Justice at the risk of being null and void.

19. See for an overview, Comparative Highlights of Foundation Laws, 2021, by the European Foundation Centre, on www.efc.be.

20. M van Steensel and R van der Velden, "The Dutch foundation – statutory objectives and new disclosure requirements", 27(6) Trusts & Trustees (2021) 561–565. It should be emphasized that the Stichting Administratiekantoor (STAK), to which reference is made in here, is not a purpose foundation but has only a function to regulate voting power.

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foundation (either to the founder or beneficiaries). In case of mismanagement by the board of the foundation *vis-à-vis* the stated purpose of the foundation, any interested person is able to apply to the Court to dismiss board members. Since foundations are part of the private domain, there is no active regulatory oversight by administrative bodies. Although the law provides for the possibility of an infringed action initiated by any interested party by the Public Prosecutor before the Court if there are reasonable grounds that a foundation is not acting in good faith in accordance with the law and its articles of incorporation, or where individual board members are acting or lacking action in contradiction to the law or the articles of incorporation, there is no current legal mechanism that requires the Public Prosecutor to *require* follow-up; in practice, the Public Prosecutor is using its powers scarcely to effectively control foundations.

That is why, in practice, in order to create prudent and meaningful purpose foundations, foundations are incorporated with a sophisticated governance consisting of different (supervisory, advisory, family and other) organs and different powers. These organs have a continuing power like organs of regular corporations do. Unlike the classical foundation laws, the organs of a foundation are able to amend the articles and purpose of the foundation, by way of default. Using the model of a supervisory board, this is an effective way of maintaining (corporate type) control for a foreign based family over the main operations of a Dutch based foundation.

Albeit a completely self-serving purpose is not hindered by Dutch legislation, in practice we recommend always to include in a purpose foundation a secondary purpose, which is mostly to serve a social or societal purpose and eventually a charitable purpose. Often, quite general purposes are included such as '*endeavouring that young talented people reach their potential*'. This leaves the board with sufficient discretion to expand its activities in the future and affirms the social validity of the enterprise and enhances the attractiveness of the business for all its stakeholders. When prudently exercised, this adds to the legacy of the family who has divested themselves of their interest in the business.

It is interesting to note that Dutch law has other restrictions in its 'non-classic' foundation law compared to the classic foundation laws discussed above. Whereas the Dutch foundation is considered to be a company and distinct from a limited liability company divided by shares, the essential criterion of a Dutch foundation is that it cannot be used as a pure 'duplication' of the founder or transferor of the assets. It is crucial to understand that where a trust normally is held for a certain beneficiary or group of beneficiaries, the legal concept of a foundation comes from another angle. Whilst it has long been recognized that foundations may serve family related private purposes,[21] these private purposes should have a minimum scope in order to create a valid foundation. In order to deviate the foundation from a typical company, it needs to have a purpose that is larger than the purpose of the founder/transferor alone and therefore cannot serve *e.g.* a simple pension or savings arrangement for the founder. In those cases, the founder should use a limited liability company. This is also the basis for the so-called distribution prohibition, which however often is misunderstood as a prohibition to inure to any particular beneficiaries[22] whilst it basically demarcates the use of a foundation from a corporation with shares as the suitable legal vehicle in these 'duplication-type' circumstances.[23] If families would like to retain an income interest in the underlying business, they should not divest their entire interest in the business but could instead retain a part of the assets or alternatively, a

21. In the Netherlands, many family foundations are created by wealthy or noble families that last for more than 100 years, and have as a purpose to maintain family members of an extended family or to maintain a large family manor.

22. Like P Panico, note 15, 351. See for the use of Dutch foundations as an alternative to discretionary trusts with beneficiaries, I Koele, "The Dutch private foundation: a robust but flexible tool in dynastic structuring", 20(6) Trusts 6 Trustees (2014) 615–619.

23. Accordingly, the so-called distribution prohibition restricts the use of commercial foundations with private distributions since this would imply the use of a company limited by shares.

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usufruct which only provides for the right to dividends relative to the underlying business.

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Like corporations can live in perpetuity, the same is true for foundations. The art of creating a well thought purpose foundation refers in fact to a well-balanced governance of the foundation into the future. In practice, it is found that businesses that are owned by a foundation and therefore 'steward-owned', produce better performance results in the long term than the traditional closely owned companies and that excellent managers and executives are attracted to this type of businesses.[24] Rather than contributing to the profits of the few shareholders, people like to work for companies that serve the interests of the company, the employees, the customers and the public at large.

The tax aspects of steward-ownership structures are still in development and currently are dealt with on a case by case basis. In the Netherlands, there are examples where families remain in full control over the business, and based on the presumption that the foundation will not make any distributions to the family members the business will not be part of their equity for inheritance or income tax purposes any more. To the extent families continue to receive distributions from the foundation, the assets will remain within the tax scope of the family.[25] For foreign based families, this would however generally not lead to any effective Dutch tax.[26]

Families transfer the business in whole or in part to the foundation, by way of a ('*bootstrap*') sale, where the earnings of the company redeem the purchase price over time, or by way of gift. Alternatively, the foundation can seek to obtain temporary funding for preferred, dividend paying shares, to redeem the purchase price to the family.

Recognition and treatment of foreign foundations

Dutch international private law adheres to the incorporation principle and therefore recognizes any foreign foundation that is legally valid according to its law of incorporation. However, that does not mean that any foreign foundation will have the intended effect in the Dutch legal landscape.

In an international context, the typical Dutch approach to foundations is reflected in its case law.

In a recent case, the Dutch Supreme Court has decided that a foreign 'classic' foundation that acts *de facto* as a duplication of the founder, is not recognized as a meaningful structure for Dutch tax purposes. The case[27] referred to an Austrian foundation ('*eigennützige Privatstiftung*'), the founder of which was also the sole beneficiary and who could decide to add other beneficiaries. The foundation had an advisory board, where the founder served together with his brother and daughter, but according to the (amended) articles the founder had three votes in this board, thereby providing him with effective control. This advisory board had the power to appoint and dismiss the regular board of the foundation (*Stiftungsvorstand*), and to provide prior consent with respect to all relevant decisions. In addition, the *internal order* of the foundation's operations allowed the founder *de facto* to decide how the board should operate.

This leads to the conclusion that the founder of the Austrian foundation was considered able to dispose of the assets of the foundation as if these were his own. The founder is considered as the legal 'ruler' of the foundation and has not separated these

24. See note 2, 657–658 referring to the extensive research of the Danish 'industrial foundations' by S Thomsen.

25. In that case, we are not referring to a Purpose Foundation, but to a private foundation which is similar to a discretionary trust. See I Koele, "The Dutch private foundation in comparison with trusts: for the same purpose but rather different", 22(1) Trusts & Trustees (2016) 140–145.

26. Depending on the precise circumstances that should be verified in detail.

27. Supreme Court 12 February 2021, BNB 2021/99, ECLI:NL:HR:2021:212.

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assets effectively from his own private assets. Within a pure Dutch context, this would be an invalid foundation. For tax purposes, it is not recognized that the foundation has title to the assets and dividends since the founder is treated as the full owner. As a result, the foundation was not entitled to a reduction of Dutch dividend withholding tax.

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It should be mentioned here that this decision did not entail any concept like 'ultimate beneficiary' or fiction of transparency, since this decision is made purely on an interpretation of the relevant facts. The tax authorities viewed the Austrian foundation as similar to a Dutch regular corporate entity with the founder as shareholder and in that comparison, there was no entitlement to a reduction of dividend withholding tax either.

In two other decisions, the Dutch Courts[28] recently showed that they treat a 'classic' foundation with some discretionary elements according to Liechtenstein law as similar to a discretionary trust under common law. The Dutch anti-abuse legislation referred to as the 'Segregated Private Estate regime' or as it is officially called the Afgescheiden Privaat Vermogen (APV) regime[29] intends to close a tax loophole created by constructions involving 'floating assets'. These are cases where a person who contributes assets to an APV—defined as a segregated estate with which *more than incidentally private purposes are intended*—deliberately creates a situation whereby these assets can no longer be taxed on himself because he no longer has free disposal of them, while these assets are also not taken into account for the beneficiary because he has no or insufficient rights in respect of these assets ('discretionary assets'). The APV regime stipulates that the segregated assets remain attributed to the person who transferred these in the APV and, after his death, to his heirs, unless there are beneficiaries who have a specific legally enforceable right with regard to those assets (non-discretionary assets).

The combination of a Liechtenstein foundation that is intended to serve private purposes whilst the beneficiaries do not have a civil law 'enforceable' claim to the foundation, falls exactly into this category. The lack of a self-serving purpose, and the lack of enforceability at the side of the beneficiaries, places these foundations directly in the scope of the anti-abuse APV legislation even if they pass the test of having a broader scope than merely being a duplication of the founder.

The result is that the assets of the foundation are deemed to be allocated to the heirs of the founder, irrespective of whether they also receive distributions from the foundation. Even if the letter of wishes of the founder clearly indicates differently, and the foundation board follows up on these wishes promptly, there is no remedy and the heirs will be taxed based on this presumption.

In the Dutch way of thinking a letter of wishes bears no legal meaning, since it does not lead to an 'enforceable' claim by a third party or any similar relevant remedy. This is therefore not something to take into account when determining the tax consequences of the foreign foundation.

Disputes with tax authorities arise where the constitutional documents of Liechtenstein foundations seem to integrate features of the common law trust concepts and of civil law 'entitlements'. For instance, it says that 'a member of the class of beneficiaries is only entitled to his beneficial interest upon having reached the age of 27 years'. Finally, the Court decided in two similar cases that there was no enforceable interest by any of the beneficiaries, and accordingly the heirs were allocated the (receipt) of the assets and hence, also subject to inheritance tax with respect to the assets of the

28. Dutch Supreme Court 26 maart 2021, ECLI:NL:HR:2021:367 and Court of Appeal Arnhem-Leeuwarden 28 September, ECLI:NL:GHARL:2021:9202.
29. Afgescheiden Privaat Vermogen, see I Koele,note 22.

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foundation upon the death of their Dutch resident father/founder.

When foreign trusts or foundations however do not take the traditional 'family purpose' model, but instead the modern 'self-serving purpose' or stewardship model, it can be said that there is no APV as the separation of the assets has not the intention to serve private interests in the way as described above. As there is no 'expected beneficiary' within a designated specific class of beneficiaries to receive the assets, it fails the definition of an APV. That would effectively bring these assets outside the scope of the family that divested themselves from ownership, also for tax purposes.

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