

EFC Tax seminar on Economic Activity and Major Shareholding – What is at Stake for Foundations?

Are foundations allowed to engage in economic activity either directly or through another legal entity? How is this economic activity taxed? Is major shareholding allowed? Is there a risk for foundations to be in conflict with EU competition rules? These key questions were discussed at the EFC Tax Seminar 2005 attended by over 65 participants, both foundation practitioners, and legal and fiscal experts.

Simon Hebditch of the Charities Aid Foundation and Chair of the EFC European Union Committee Tax Task Force chaired the tax seminar together with Marco Parlangei of the Fondazione Monte dei Paschi di Siena and Vice Chair of the EFC European Union Committee Tax Task Force. The seminar addressed the current state of affairs concerning direct and indirect economic activity and its tax treatment in the old and new EU Member States as well as the US with the aim of benchmarking good existing legal and fiscal practice. Participants of the seminar also gained an insight into the environment of Italian foundations of banking origin, which has over the past years gained a European dimension: A merger of European banks just took place between Unicredit and Hypovereinsbank and participants examined in more detail the merger and the effect it may have on foundations, which are shareholders in the bank. Another European issue for Italian foundations of banking origin as shareholders in banks is a potential conflict with EU competition rules. The European Court of Justice has been asked to examine if substantial shareholding in companies by tax-exempt foundations would be regarded as “state aid” according to the EC Treaty. Experts at the seminar claimed that only direct economic activities or a majority shareholding combined with real influence on the management of a company could be considered as economic activity in the meaning of EU state aid rules.

A recent Italian law proposal aims to restrict voting rights for foundations in case they are major shareholders beyond 30%. The debate at the seminar made clear that major shareholding of foundations is a reality in many countries. In Denmark, Finland, Germany, Sweden, Norway, the Netherlands, and Switzerland many large companies are foundation-owned.

Participants reviewed a number of areas in which reform of existing national laws would be desirable in order to ensure a strong, growing and sustainable foundation sector. The EFC has developed some proposals to push for a more favourable environment with regard to foundations and their economic activity. The EFC Legal and Fiscal Principles and EFC Model Law suggest that public benefit foundations should be allowed to engage in economic activities. Income from economic activities should be tax-exempt provided that revenues are applied to the public benefit purpose of the foundation and the trade is carried on in the course of the actual pursuing out of a public benefit purpose of the foundation. Where foundations, however, compete with other actors in the market, competition rules will have to be taken into account. Even in cases in which competition exists, it has to be examined whether potential conflicts with EU Competition rules could be justified.

The EFC will continue to monitor the issue and will keep its members informed about developments with regard to foundations and economic activities. Foundation representatives as well as third parties were invited to state their interest to the EFC in being involved in the debate.