Scheiding van zeggenschap en belang in de familiesfeer

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Summary: Separation of control and interest of family assets (*Scheiding van zeggenschap en belang in de familiesfeer*)

I have researched three different legal arrangements and assessed whether these are effective when separating control of assets from the economic[1582] interest: the Dutch (testamentary) administration regime, exchanging assets for depositary receipts (*certificering*) and legal arrangements that qualify as a 'separated private estate' (*afgezonderd particulier vermogen* or *APV*). "Effective" in this context implies that the legal arrangement concerned should meet three criteria: (i) durability, (ii) keeping a balance between interests involved and (iii) lack of fiscal impediments.

First I have researched the civil law (or where applicable common law) characteristics of these legal arrangements and assessed whether they are effective in durably separating the control over and economic interest in an asset, i.e. for asset protection within a family context, both in general and in relation to the Dutch forced heirship rules (durability criterion). This civil law assessment also encompasses the assessment whether either the statutory provisions governing the legal arrangement concerned provide for a balance between the interests of the parties involved[1583] or it is possible to create such a balance when setting up the legal arrangement, e.g. by provisions in the articles of a legal entity involved or in the (trust) conditions of the arrangement (balance criterion).

Subsequently I have analysed the fiscal consequences of these arrangements and assessed to what extent such fiscal consequences can form an impediment for implementation of the arrangement concerned. To the extent I have observed impediments, I have considered their nature (e.g. whether these could be considered as caused by imperfections in the relevant statutory provisions). Also, I have analysed to what extent removal of such impediments would be appropriate and made suggestions for the manner in which this may be implemented. My conclusions are summarised hereafter, per legal arrangement researched.

(Testamentary) administration

I can be relatively short on the testamentary administration regime: as the (legal and economic) owner of the assets under administration has the possibility to apply to court and request termination of the administration as of five years after its commencement, it is uncertain whether the administration of assets can continue for a longer period of

1582 Given that 'beneficial ownership' has a specific meaning in relation to trusts, I will in this context refer to economic ownership or interest to emphasize that this is a somewhat different concept. Economic ownership entails that the economic owner is entitled to all benefits (and liabilities) of an asset, while economic interest also covers the situation when there is a less encompassing interest in an asset.

1583 I.e. the creator / settlor of the legal arrangement, the legal / economic or beneficial (in case of trusts and trust-like arrangements) owner and the administrator / trustee.

time. Apart from that the inheritance of assets placed under administration conflicts with forced heirship rules, which allow the heir to claim an unencumbered statutory share and therefore (in most situations) a possibility to circumvent the administration. The risk that the administration will not last entails that it is uncertain whether this arrangement can durably separate control and economic interest. This implies in my view that administration is from a civil law point of view not effective for asset protection. The statutory provisions governing the Dutch (testamentary administration regime do, however, provide for regulations governing the relationship between the administrator and the legal owner of the assets under administration. The testamentary administration therefore does not meet the criterion of durability, but it does meet the balance criterion.

From a fiscal perspective the testamentary administration does not cause impediments: the fiscal treatment of assets is similar in the situation with and without these assets being under administration. Placing assets under administration can therefore take place fiscally neutral. This makes the administration without reservation suitable for asset protection from a fiscal perspective. Given the civil law limitations this legal arrangement is nevertheless in my view not effective as an asset protection arrangement.

Exchanging assets for depositary receipts / certificering

Certificering[1584] entails that the creator of this legal arrangement exchanges the legal ownership of assets for depositary receipts, which, generally speaking,[1585] entitle the holder to the economic value of the assets transferred, as well as the income arising from those assets, thus making the holder of the depositary receipts the economic owner of the assets. Characteristically a foundation (*STAK*[1586]) will serve as legal owner and administrator of the assets, given its lack of shareholders, members, etc. There are no specific statutory provisions for *certificering*, so it is created on a contractual basis. The relationship between the *STAK* and the holder of the depositary receipts is, apart from the law in general (e.g. provisions governing foundations), governed by the articles of the *STAK* and by the administration or trust conditions.

As a legal arrangement *certificering* is very flexible, which can be set up in various ways. Because of this, it is an effective legal arrangement when it comes to durably separating control and economic interest. Keeping the balance between the various interest involved, i.e. the purpose of the arrangement on one hand and the interests of the holders of the depositary receipts on the other hand, does, however, in my view imply that the trust

1584 There is no ideal term for this in English. *Certificering* might be translated as administration agreement, as it entails that assets are held on trust and administered by the *STAK* on behalf of the economic owner, but given the overlap in terminology with the testamentary administration, I will for the avoidance of doubt continue to use the Dutch term.

1585 Depending on the trust conditions, the economic interest can be more or less restricted.

1586 Generally called *Stichting Administratiekantoor* [...] or *STAK*.

conditions need to contain certain provisions, such as the possibility for the holders of the depositary receipts to assess the administration by the board of directors of the STAK or have this assessed by an external party, such as the court. Given the flexibility of the legal arrangement it is possible to include such provisions.

In order to determine the durability of *certificering*, I have made a comparison with various legal arrangements that, unlike *certificering*, are expressly provided for by Dutch law. I have assessed whether the administration agreement, that forms the basis of *certificering,* could qualify as one or more of these regulated arrangements, and as such would be subject to termination based on the law, in other situations than provided for in the trust conditions. In this context I have e.g. assessed whether *certificering* can qualify as a partnership or as a contract for services or mandate. I have, however, concluded that *certificering* is a legal arrangement *sui generis* and that the legally provided for grounds for termination applicable to other legal arrangements do in principle not apply to *certificering*. A point of attention is, however, the possibility of (certain provisions of) the trust conditions qualifying as general terms and conditions: if the trust conditions qualify as such, the provision that the *certificering* cannot be terminated by the holders of the depositary receipts, which is necessary for a durable separation of control and economic interest, is in my view voidable by those holders. In that case the *certificering* can be terminated before the termination date envisaged by the settlor of the arrangement.

In principle it is, however, possible to use *certificering* to create a durable separation between the control over and economic interest of assets. The Dutch forced heirship rules do not change this, assuming that the forced heir acquires the depositary receipts as heir and not as legatee. This is caused by the circumstance that the acquisition of a claim (in this case the economic interest of the administrated assets and the income thereof) is in principle considered to be in violation of the statutory share if acquired by way of legacy, but not if acquired as an heir. In case of a legacy the forced heir could therefore renounce and instead claim his statutory share, and in this manner circumvent the *certificering*. The value of the statutory share would, however, be significantly lower than the value of the administrated assets reflected by the depositary receipts.

In relation to the forced heirship rules it should also be noted that the Dutch Supreme Court has ruled that a provision in the trust conditions, entailing that the holder of de depositary receipts cannot terminate the *certificering* without cooperation of the *STAK* (i.e. the depositary receipts are not convertible by their holder), can in general not be considered socially unacceptable. The forced heir can therefore in principle not challenge the administration of assets on this basis. In does, however, in my view remain to be seen whether the Supreme Court would still rule in the same manner, if the trust conditions were to be (much) more restrictive than just the provision that

the depositary receipts are non-convertible. The most restrictive form of *certificering* would entail that (i) the depositary receipts are not convertible, (ii) the depositary receipts are not transferable, (iii) the *STAK* does not have any obligation to pay income arising from the administrated assets to the holder of the depositary receipts and (iv) the holders of the depositary receipts have no possibility of involvement in the management of the *STAK* and the administered assets at all. I.e. In this case the holder of the depositary receipts does not have any possibilities of independently capitalise the depositary receipts and it is uncertain whether he will receive any value at all. Under such circumstances I doubt whether the *certificering* can still be considered socially acceptable.

In conclusion *certificering* meets both civil law criteria: this legal arrangement is potentially durable and can be set up in such a manner that the balance between the interests involved can be maintained.

From a fiscal perspective there are, however, several points of attention, also depending on the provisions contained by the trust conditions and the nature of the assets under administration:

- If the holder of the depositary receipts is not the economic owner of the administered assets (i.e. he does not have the full economic interest), while the *STAK* has no obligation to immediately pay income and capital gains from these assets to this holder, the question rises at what point in time the holder of the depositary receipts is deemed to receive such income or capital gains from a fiscal perspective, at the moment of receipt by the *STAK*, or at the moment the *STAK* distributes them to the holder of the depositary receipts (obviously this does not apply to box 3 assets).

- If the holder of the depositary receipts should be considered to receive the income /capital gains after receipt by the *STAK*, the question rises whether and, if so, how the income or capital gains should be taxed until the moment of distribution by the *STAK*.

- To the extent that the *STAK* is not obliged to distribute income and / or capital gains and does in fact not do so, as well as in case of taxes due on fictitious income, there will be a disadvantage for the holder of the depositary receipts, potentially leading to financial problems, as taxes will have to be paid while there is no revenue. This also applies to gift or inheritance tax due in connection with the acquisition of the depositary receipts, as in that situation there will not be any revenue for paying that tax either.

- In case of box 3 assets the exemptions are a point of attention. In my view in case

of a holder of the depositary receipts, who is the economic owner and therefore owner from a fiscal perspective, the box 3 taxation should be based on the nature of the administered assets and whether these meet the conditions for the exemptions, and not be based on the nature of the depositary receipt (i.e. a claim). This implies that if the administered assets meet the conditions, a box 3 exemption can apply. It is, however, clear that the State Secretary of Finance has a different view, so it stand to reason that, if one transfers assets to a *STAK* for administration, but claims a box 3 exemption, at least a discussion with the tax authorities will ensue.

In most cases these points of attention concern impediments caused by legal imperfections in the fiscal legislation.

The first three issues could in principle be addressed by the inclusion of the right provisions in the trust conditions. If these are drawn up in such a manner that the holder of the depositary receipts can be considered the economic owner of the administered assets, the moment of receipt of income or realisation of a capital gain by the *STAK* will also be the moment of receipt / realisation by the holder of the depositary receipts, even if the *STAK* does not immediately distributes the income / capital gain. Moreover, the trust conditions could include a provision that obliges the *STAK* to distribute at least such amounts as the holder of the depositary receipts needs for the payments of the taxes due by him.

The point with respect to the box 3 exemptions can, however, not be addressed by the composition of the trust conditions. Although these must be drawn up in such a way that the holder of the depositary receipts can be considered the economic owner of the administered assets, in order to make application of the box 3 exemptions possible, this does not solve the different position taken by the State Secretary. In my view a broader interpretation of the exemptions would be appropriate. However, as long as this is not the case discussion with the tax authorities is likely and transferring assets, which are eligible for an exemption, for the purpose administration brings the risk of losing that exemption.

In conclusion, *certificering* is in principle an effective legal arrangement for asset protection purposes, both from a civil law and a common law perspective, but points of attention are the possibility of the trust conditions qualifying as general terms and conditions and the administration of assets eligible for box 3 exemptions.

Separated private estate / APV

Various legal arrangements can qualify as an *APV*. In the civil law part of my research I have therefore focused on only specific legal arrangements, i.e. the Anglo-American trust

(under English law) and the Dutch foundation as *APV*. The assessment of the relationship between legal arrangements qualifying as *APV* and the Dutch forced heirship rules is, however, broader and can also be applicable to other legal arrangements.

Trusts, but also other legal arrangements qualifying as *APV*, are very flexible. Because of this they are in principle effective if used for family asset protection purposes. In case of trust the recognition under the The Hague Trust Convention is, however, a point of attention. A jurisdiction that, like the Netherlands, is not familiar with the trust as a legal concept, is not obliged to recognise a trust if the significant elements, other than the choice of applicable law, the place of administration and the habitual residence of the trustee, are more closely connected to states that do not have the institution of the trust or the category of trust involved. This means that the recognition of a trust with a Dutch settlor and only Dutch trust assets could be challenged.

Apart from this, the concurrence between an *APV* and the forced heirship rules leads to questions. If assets have been transferred to an *APV* by way of a gift, and this gift has either taken place within five years before the demise of the contributor, or the gift has apparently been made and accepted with prospect of disadvantaging the forced heirs, the contributed assets will be taken into account when determining the amount of the statutory share. An *APV* can only effectively serve an asset protection purpose if the contributor transfers (close to) all of his assets to the *APV*, which implies the transfer has been made with the prospect of disadvantaging the contributors heirs. Abatement of the contribution to the *APV* may then be possible, which would mean that the forced heirs would be able to partially undo the contribution of assets.

The forced heirs will only have this possibility if (i) there is a gift that (ii) has in short been made with the purpose of disadvantaging the forced heirs. The possibility that a gift has been made in the five years prior to the demise of the contributor exists, but I am assuming that this can generally be avoided. I note that the contribution of (most of) the assets of the contributor to the trust implies that the forced heirs will be disadvantaged, so that it will depend on whether the contribution is seen as a gift, whether this contribution violates the statutory share. In my view, however, the contribution does in principle not meet the criteria of a gift, these being (i) impoverishment of the donor, (ii) enrichment of the donee and (iii) liberality. The contributor certainly impoverishes as a result of the contribution. The contribution will also take place out of liberality (in general), but given the discretionary nature of the *APV* it is less easy to identify a donee who has been enriched. The contributed assets are acquired by the *APV* that becomes the legal owner, but has no economic interest in these assets itself. Ultimately the beneficiaries receiving the assets but will be enriched, but given the discretionary nature of the *APV* they have no enforceable rights. A specific beneficiary may never receive a distribution. In my view this means that the beneficiaries are

not enriched at the time of the contribution. A question may be whether the *APV* can nevertheless be considered to be enriched, as it acquires the assets for the fulfilment of its purpose. In my view this is not the case, but opinions on this are divided. I therefore conclude that it is for the time being not certain whether the contribution of assets to an *APV* falls within the scope of the forced heirship rules.

Applying the civil law criteria, durability and balance between the interests involved, I conclude that an *APV* can meet both criteria. Dependent on the legal form, the applicable law already provides for a mechanism that aims to keep this balance and otherwise it is in principle possible to include such provisions in the regulations governing the *APV*. Moreover, it is possible to durably create an *APV*, although it should be noted that it is as of yet not clear whether a forced heir may partly undo the contribution of assets to the *APV* based on the forced heirship rules.

From a fiscal perspective there is, however, a lack of clarity on the interpretation of the law in various respects, as well as a number of significant impediments, which hinder the use of an *APV* for family assets protection purposes. Where it comes to uncertainty in the interpretation, the main points can be summarised as follows:

- Who is deemed to be the contributor in case the person formally making the contribution is married in marital community of property, just the formal contributor, or also his spouse?

- Should the attribution of assets to the heirs of the contributor solely be based on their pro rate share in the inheritance, or should legacies and third party benefits received by them also be taken into account?

- Does article 2.14a, section 4 Personal Income Tax Act 2001[1587] entail that every deviation for the intestate share is automatically corrected, because partial disinheritance also falls within the scope of this provision?

- What should be the basis for the attribution of assets after a correction of the attribution based on article 2.14a, sections 4, 5 or 6 PITA 2001?

- Is it possible to still provide the counterproof as meant in article 2.14a, section 6 PITA 2001 if an heir has been a beneficiary of the *APV*, but has at a later point in time been irrevocably excluded as such?

- How should an *APV* that is partially discretionary and partially non-discretionary be treated?

1587 Hereafter PITA 2001.

- Does the *APV* regime also apply if either the creation of the entity or the contribution of assets to the entity is revocable?

- Does the qualification of an entity as an *APV* lead to that entity being fiscally transparent, or merely to the attribution of the assets of this entity?

- Does the *APV* regime leave room for the application of the concept, developed in case law before the introduction of the *APV* regime, of deeming an entity fiscally transparent based on control over this entity by another person?

- How should the later exclusion of heirs as beneficiaries of the *APV* be treated for gift and inheritance purposes, assuming that such heirs are allowed the counterproof of article 2.14a, section 6 PITA 2001 upon being excluded? A provision comparable to article 53 Gift and Inheritance Tax Act is lacking, so a correction of the previously levied inheritance tax does not seem possible.

In addition to the lack of clarity in interpretation, there are various impediments. The main impediments can be summarised as follows:

- The attribution of *APV* assets has a number of fiscal consequences:

    - o the contribution can lead to the levy of personal income tax, because this is considered a taxable alienation of assets by one contributor to another contributor;

    - o if a second contributor contributes assets to an existing *APV* for fair market value, it is unclear which percentage of the *APV* assets and liabilities must be attributed to each contributor;

    - o a distribution may be considered an alienation by one person, to whom assets are attributed, to another, leading to the levy of personal income tax;

    - o if the *APV* realises income in order to make distributions, this income may be attributed to another person than the recipient of the distribution;

    - o the counterproof regime disregards the possibility that an heir may, as beneficiary of the *APV*, only have a fixed interest and can otherwise not receive any distributions; and

    - o if the beneficiaries receive distributions that are equal, i.e. in proportion to the percentage of *APV* assets attributed to them, they are considered to

make reciprocal gifts, which lead to gift tax being due with respect to a part of each distribution.

- A concurrence between Dutch corporate income tax (levied from the *APV*) and Dutch personal income tax (levied from the contributor) may occur, while there is no provision for setting one levy off against te other.

- It is not clear if and in what manner a concurrence between Dutch dividend withholding tax (levied from the *APV*) and Dutch personal income tax (levied from the contributor) can be eliminated.

- The persons to whom the *APV* assets are contributed may be faced with financial difficulties, as they do have to pay taxes, but may not receive the funds needed from the *APV*.

- Determining the percentage of the *APV* assets to be attributed to the various eligible persons could be problematic in case the *APV* has existed for a longer period and several successions have occurred. This situation could also cause a high administrative burden.

In my view these impediments are (nearly) all caused by legal imperfections in the fiscal legislation.

In these abovementioned cases, where the interpretation of the *APV* regime is unclear, clarification is in my view necesssary, by the legislator making a choice for a certain interpretation and implementing this. My personal view on the correct or preferred interpretation is discussed in the paragraphs that discuss these points of unclarity. As long as the interpretation remains unclear, there are impediments for the use of an *APV* for family assets protection purposes, because of the uncertain fiscal consequences.

The same applies to the abovementioned (other) impediments, which in my view should be removed. Contrary to (most of) the impediments that arise in case of *certificering*, these obstacles cannot be removed by a setting up the *APV* in a certain way. The fiscal consequences of attribution to multiple persons and the financial difficulties that may be caused by attribution, and therefore taxation, without receiving distributions are in this respect the most inhibitive impediments.

I have made proposals for the removal of the various impediments I have observed, such as (i) a system for the administrative "division" of the *APV* assets into shares, to remove the difficulties caused by the attribution to multiple persons, (ii) a right of recourse on the *APV* for the benefit of the person(s) to whom the *APV* assets are attributed, (iii)

set off of all profit tax levied from the *APV* with personal income tax levied from the contributor and (iv) extending the *APV* regime to the Dividend Withholding Tax Act in case of *APVs* that are not subject to Dutch personal income tax, in order to make crediting the dividend withholding tax with the personal income tax levied from the contributor possible. However, until the legislator removes the (main) impediments for using an *APV*, the fiscal obstacles arising from these impediments are sufficiently severe to make the *APV* unsuitable for family assets protection purposes from a fiscal perspective.

In conclusion the APV is therefore in principle effective for asset protection within family context from a civil law perspective, although it should be noted that it is as of yet uncertain whether the contribution of assets cannot be (partially) undone by forced heirs. In case of trusts the recognition under the The Hague Trust Convention is also a point of attention, assuming that the *APV* has the legal form of a trust within the meaning of this Convention. The impediments and uncertainties from a fiscal perspective are, however, so severe that an *APV* is all in all not suitable for the protection of family assets.

Conclusion

In summary, the legal arrangements assessed vary in effectiveness when used for the protection of family assets:

- The testamentary administration comes with legal provisions for keeping the balance between the various interests involved. It can also be implemented in a fiscally neutral manner. This legal arrangement does not, however, score high on durability, as the legal owner of the assets placed under testamentary administration can in principle after five years request removal of the administration by the court.

- *Certificering* can be implemented durably, both in general terms and in relation to the forced heirship rules. As this legal arrangement is not provided for by law, there is no legal system for balancing the interests involved, but as the legal arrangement is very flexible, this can be arranged the articles of the *STAK* or in the trust conditions. A point of attention is the possible qualification of the trust conditions as general terms and conditions, as this may create a possibility for early termination. From a fiscal perspective it is in most cases possible to set up the *certificering* in such a manner that there are no serious fiscal impediments. The only exception regards assets that are subject to personal income tax in box 3 and eligible for an exemption.

- An *APV* can in general be implemented in a durable manner. Points of attention are, however, uncertainty in relation to the effect of the forced heirship rules

and recognition under the The Hague Trust Convention, the latter depending on the legal form of the *APV*. The fiscal obstacles created by uncertainties in the interpretation of the *APV* regime on one hand and by outright impediments because of the fiscal consequences on the other hand, do, however, render the *APV* unsuitable for the protection of family assets from a fiscal perspective.