The Liechtenstein Foundation as a cross-border wealth planning instrument under the Liechtenstein Disclosure Facility and the Liechtenstein—UK Double Taxation Agreement

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Abstract
The Liechtenstein Disclosure Facility (LDF), in contrast to the Swiss–UK Agreement gives non-compliant UK taxpayers a unique chance to regularize their past tax obligations on their worldwide assets while being given immunity from prosecution for tax offenses. If the clients decide to keep their structures in Liechtenstein upon completion of the LDF, they profit from corporate tax incentives as, under specific conditions, Liechtenstein foundations (Stiftungen), establishments (Anstalten) as well as UCITS and AIFM funds will henceforth have access to the treaty benefits provided by the comprehensive Double Taxation Agreement which was signed by Liechtenstein and the UK on 11 June 2012.

Introduction
The present article provides the reader with an encompassing update on the Liechtenstein Disclosure Facility (LDF) thereby paying particular attention of the framework of the MOU1 and then leads over to elaborate on a short break-down of the principal rules applicable under the Liechtenstein–UK Double Taxation Agreement (DTA),2 with a principal point of focus on the applicable residency requirements for both individual and corporate taxpayers.

In recent months these two international agreements have been indicative of a steady increase in confidence in Liechtenstein on the side of the UK and represent a pragmatic and sustainable partnership that is not limited to the official level, but also extends to encompass the private sector. Liechtenstein’s financial intermediaries have recognized the sign of the time, and what seemed unimaginable in 2009 has in the meantime become implemented reality. The extension until 5 April 2016 of the LDF, the only full disclosure programme3 currently in operation, has clearly reinforced the attractiveness of Liechtenstein as a financial and business centre.

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3. <www.gov.uk/government/news/uk-isle-of-man-cooperation-to-combat-tax-evasion> The new Isle of Man disclosure facility that was launched on 19 February 2013 is similar to the LDF, but it however neither offers immunity from criminal prosecution nor a composite rate tax.
The Double Taxation Agreement between Liechtenstein and the UK (DTA) which entered into force as of 1 January 2013 in Liechtenstein\(^4\) is a milestone in establishing a comprehensive cooperation between these two countries.\(^5\) This modern contractual framework creates legal certainty for international clients in the area of cross-border activities and taxation not only on an individual level, but also in terms of recognition of Liechtenstein structures. Read together with the new Liechtenstein Tax Code (LTC)\(^6\) which entered into force on 1 January 2011 the DTA upgrades Liechtenstein in the eyes of the UK to the level of an equal onshore partner. From a client’s point of view this extensive contractual framework provides UK clients with tax incentives to keep and develop their existing Liechtenstein structures, including foundations and trusts, upon the completion of the LDF.

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The Liechtenstein Disclosure Facility

Liechtenstein Disclosure Facility—What is it?

On 11 August 2009 The Government of the Principality of Liechtenstein and Her Majesty’s Revenue and Customs (HMRC) signed a Memorandum of Understanding Relating to Cooperation in Tax Matters (MOU).\(^7\) The MOU introduces a five-year taxpayer assistance and compliance programme as well as a special disclosure facility for persons wishing to regularize their UK tax affairs. In brief the so-called Liechtenstein Disclosure Facility (LDF), compared to the Swiss–UK Agreement, gives non-compliant UK taxpayers the unique chance to regularize their past tax obligations on their worldwide assets while being given immunity from prosecution for tax offenses. The LDF is open for registration until 5 April 2016.

Specific matters are dealt with in more in detail in the three Declarations which the parties have signed since 2009. Liechtenstein has implemented the wording of these Agreements in its national legislation. On 1 September 2010, the Statute\(^8\) enacted by the Liechtenstein Parliament and the relevant Ordinance\(^9\) enacted by the Liechtenstein Government came into force. Since then, the Ordinance has been adapted three times and its changes are discussed below.

Scope of the LDF

The aim of the Parties to the MOU is that ‘relevant persons’ with a ‘beneficial interest in relevant property in Liechtenstein’ can participate in the LDF by making a full, accurate and unprompted disclosure. The definitions of both a ‘relevant person’ and ‘beneficial interest in relevant property’ are laid down in the MOU itself. The legal term ‘relevant property’ means a bank or financial (portfolio) account in Liechtenstein or (among other entities) a foundation formed, founded, settled, incorporated, administered, or managed in Liechtenstein.\(^10\) Since its launch on 1 September 2009 the LDF has been available to existing and new UK clients of Liechtenstein financial intermediaries. UK taxpayers are allowed to take advantage of the LDF by including in their disclosure all kinds of undisclosed assets that they

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4. In the UK with the beginning of the new tax year as of 1 April 2013 and 6 April 2013, respectively.
7. See n 1 above.
10. cf n 1, Sch 1, cif 1 p. The legal term ‘relevant property’ thus also applies to existing Liechtenstein foundations.
UK taxpayers are allowed to take advantage of the LDF by including in their disclosure all kinds of undisclosed assets that they hold offshore on a worldwide basis.

Hold offshore on a worldwide basis under the reservation that they have a ‘substantial business relationship’ in Liechtenstein (so-called footprint or also meaningful relationship). Yet, it is not necessary to transfer all the relevant property to Liechtenstein to qualify for the LDF as can be seen from the following paragraphs.

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### Requirements

A substantial business relationship according to the terms of the MOU and the implementing national legislation is qualified as meaningful when the following requirements are met: first, there must be a connection between the ‘relevant property’ and Liechtenstein via the person of the Liechtenstein financial intermediary. Relevant property means a bank or financial (portfolio) account and/or an entity (e.g. a foundation) formed or managed in Liechtenstein. The relationship is assumed to be meaningful if, for example, the client relationship has been a long-term one, there is personal contact between the client and the intermediary, the services provided are not merely of minor importance, or also that a substantial part of the assets covered by the LDF are invested or managed in Liechtenstein. This wording has always left the decision as to whether or not a meaningful client relationship exists and also whether or not a confirmation of relevance can be issued at the discretion of the Liechtenstein financial intermediaries. A client relationship with a Liechtenstein financial intermediary already in existence prior to 1 December 2011 per se qualifies as meaningful.

With effect of 1 September 2012 another requirement has been added in the respective Ordinance which applies only to new clients. When the relevant property invested in Liechtenstein and later submitted to disclosure exceeds a certain minimum percentage or amount, a meaningful client relationship has been established beyond any doubt. Insofar, this new entry requirement does not replace the old rule but instead has to be seen as an additional clause to the existing rule. The new rule stipulates that a new client relationship is meaningful when an amount of 20% of the individual’s bankable assets that are submitted to the LDF disclosure is deposited in a Liechtenstein bank account, respectively 10% in the case of a Liechtenstein entity (e.g. a foundation) or 15% in the case of a foreign entity managed in Liechtenstein. The 15 and 20% limits however do not apply in the case that the deposit is higher or equivalent of CHF 1 Mio. Consequently, it is therefore not necessary to transfer all relevant property to Liechtenstein to qualify for the LDF.

If these requirements are fulfilled, the client relationship is meaningful and the issuance of the confirmation of relevance by the Liechtenstein financial intermediary as a prerequisite for the filing with HMRC is guaranteed.

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11. Art 3 (2) (a) and (b) of the Ordinance to the UK Tax Assistance Act dated 31 August 2010, published in the Liechtenstein Law Gazette under No 254 (2010).
13. As the wording ‘new clients’ is not explicitly mentioned in the Ordinance under Art 3 (3), this paragraph can also be understood as a further option to fulfil the requirements that in the sense of an argument derived from the contrary means that a Liechtenstein bank account is not mandatory. However, with the Amendment to the Ordinance to the UK Tax Assistance Act dated 31 August 2010, published in the Liechtenstein Law Gazette under No 176 (2013), Art 3 (3) has most probably to be understood not as further but as only option for new clients to establish a meaningful relationship.
**Form of tax compliance**

A unique cost- and time-efficient way to prove tax compliance was explicitly agreed with HMRC and has been available since 22 December 2011. UK taxpayers can provide their Liechtenstein financial intermediaries with proof to the effect that they are compliant with UK tax law in respect of their above-mentioned relevant property or that they have in the past fully complied with UK tax law in respect of such property (self-certification of tax compliance). Such self-certification simplifies the procedure of establishing tax compliance and does not automatically entail the necessity of using the services of a qualified UK agent. Before signing off on such a self-certification, UK taxpayers however should be absolutely certain as to their tax situation and be aware of the consequences under fiscal and criminal law in the event that this information should prove to be incorrect at a later stage.

**Latest developments**

By 28 February 2013, around 4200 voluntary disclosures had been filed under the LDF, more than ever expected by HMRC. This shows both the attractiveness and general functionality of the LDF as well as the constructive dialogue between the involved parties. In the past three and a half years, the parties have gained substantial experience both in terms of content through the direct involvement of the private sector not only in Liechtenstein but also at the organizational level in the UK through the creation of a central unit (offshore co-ordination unit) within HMRC in Birmingham. These developments also guarantee the necessary timely implementation as well as the sustainable improvement of various matters, eg the appointment of the panel which has been in office since 19 December 2012, and have ultimately made the LDF an ongoing success story. With a time gap of four years compared to the LDF the Taxation Cooperation Agreement between Switzerland and the UK (Swiss Agreement) came into force on 1 January 2013 after having been reviewed by the competent EC authority with respect to its compatibility with the provisions of European law. Restricted clearance was finally given.

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**Comparison of the Liechtenstein LDF with Swiss—UK Agreement: ‘Mind the gap, please!’**

Apart from the lack of experience on how the agreement between Switzerland and the UK will be applied in practice, the Swiss Agreement is far more restrictive in terms of time limits, substantive content and geographical application: Whereas only assets located in Switzerland (geographic restriction) as at 31 December 2010 fall within the scope of the Agreement and new client relationships will therefore not qualify (time limit), only such natural persons are eligible who are not—even without their knowledge—under civil or criminal investigation by HMRC and who can further provide proof of compliance, in which case such persons must avail themselves of the services of qualified UK agents.

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In contrast to the LDF, anonymity stands in the way of clearing tax liabilities under the Swiss

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Agreement, in particular in respect of inheritance tax. The Swiss Agreement creates a situation in which tax clearance is limited exclusively to UK tax liabilities in connection with assets in existence as of this date. Finally, past tax liabilities are basically assessed from the year 2003 onwards at normal tax rates (substantive restrictions).

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These two different agreements the UK has entered into with Liechtenstein and Switzerland respectively give UK taxpayers with undisclosed assets the opportunity to choose either one of the two options or even combine them to their benefit. This decision mainly depends on whether the client prefers to have full protection of his financial affairs in the sense of guaranteed confidentiality in relation to third parties but not the HMRC (LDF option) or banking secrecy in the sense of a guarantee of anonymity and protection against disclosure to authorities like HMRC (Swiss option). The latter however relates to the banking secrecy understood either as banking secrecy or as banking (client) secrecy as defined by law. But as only the LDF guarantees a final settlement of past tax liabilities in the UK and the immunity from prosecution for tax offences, the LDF in the view of the authors is the only option to exclude any future financial, civil, and criminal risks for the client and UK taxpayer and therefore fully serves the client’s interests in the meaning of providing the client with banking client secrecy.

To summarize, the concessions made in LDF are—in comparison to the other facilities offered by HMRC and in particular to the Swiss Agreement—very privileged. The LDF offers unique and advantageous conditions for existing as well as new clients, inter alia assessment from 1999 onwards, coverage of all types of taxes, low average tax rates (between 12% and 15%) and low penalties (10% up to 2009/2010, and a maximum of 20% from 2010 to 2011 onwards) and attractive composite rate taxes. As a regularized relevant property, an existing Liechtenstein foundation can offer added value for UK clients from a UK (tax) perspective and thus constitutes an ideal starting point for further planning strategies. This seen in conjunction with the Liechtenstein–UK DTA that shall be discussed in the following paragraphs provides UK clients with encompassing tools for future tax and estate planning via Liechtenstein foundations, trusts and other entities.

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The Liechtenstein–UK Double Taxation Agreement

General remarks

The DTA between Liechtenstein and the UK has been designed according to the OECD Model Double Taxation Convention. It is the legal framework which will give the Liechtenstein Foundation in particular the access to the treaty benefits in future. In the UK, the provisions of the DTA will take effect as
of 1 April 2013 for corporate taxes, as of or after 6 April 2013 for income and capital gains tax respectively and as of the date that falls six months after the date on which notice of termination was given for withholding taxes at source and for amounts paid or credited.\(^\text{16}\)

In Liechtenstein, the provisions of the DTA will take effect as of 1 January 2013 respectively for withholding taxes at source and for amounts paid or credited, as from the date that is six months after the date on which notice of termination was given.\(^\text{17}\)

The DTA provides for zero withholding rates on dividends, interest and royalties and incorporates the latest OECD provisions on exchange of information and on assistance in the collection of taxes.

The condition for access to the DTA is the qualification of the taxpayer as a ‘resident person’ in accordance with the definition of the treaty. A resident person is a ‘corporate’ or an ‘individual’ resident who must fulfil certain requirements in order to benefit from the treaty. These requirements are outlined and explained in the following sections. Particular attention is given to the various forms of taxpayers.

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\textbf{Residency requirements}

\textbf{Corporate taxpayers}

For treaty purposes, a ‘company’ is meant to be any incorporated body or an entity that is treated as an incorporated body for tax purposes.\(^\text{18}\) A company is entitled to apply the DTA when it is resident in one of the Contracting States. For the purpose of the DTA, a company is deemed to be resident when it is unlimitedly liable to tax according to the relevant tax laws of Liechtenstein or the UK respectively by reason of either the place of incorporation or the place of management.\(^\text{19}\)

Corporate taxpayers will become subject to Liechtenstein income tax if they have their legal domicile in Liechtenstein (as determined by the law, the incorporation contract, the articles or the like). Where no such provision exists, the ‘effective place of management’ shall be considered the domicile.

Foundations and other legal entities (eg company limited by shares (Aktiengesellschaft), limited liability company (GmbH), Trust reg.) are treated as corporate taxpayers in Liechtenstein. They file an annual tax return on the basis of an accounting that follows local statutory accounting rules. The resulting taxable profit is taxed at a flat rate of 12.5\%. The minimum corporate income tax is CHF 1200 per year and is applicable to companies performing activities that generate tax exempt income, such as pure holding activities or asset management activities of real estate located abroad.\(^\text{20}\)

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\textbf{Foundations (Stiftungen)}

As a basic rule, a foundation is a tax resident for DTA purposes. However, in contrast to an Anstalt

\(^{16}\) Art 29(a) DTA.  
\(^{17}\) Art 30(b) DTA.  
\(^{18}\) Art 3(1d) DTA.  
\(^{19}\) Art 4(1) DTA.  
\(^{20}\) See full list of tax exemption in Art 48 LTC.
(establishment), its treatment under the DTA does depend on the classification of the foundation itself.

If the foundation is of irrevocable and discretionary nature it consequently is the beneficial owner of its income and also entitled to the treaty benefits. An irrevocable foundation with named beneficiaries and fixed interests is treated as opaque but transparent for DTA purposes. If the beneficiaries are resident in Liechtenstein, they will be able to claim treaty benefits. If not, the UK will take a look-through approach and may grant them access to the benefits as contained in the DTA between the UK and any Third Country. Finally, the availability of the treaty benefits to a revocable foundation will depend on the terms of the foundation’s articles and bylaws as well as the residency of the founder and/or the beneficiaries. As a basic rule, the latter type of a foundation is treated as look-through and ‘transparent’.21

An irrevocable and discretionary foundation that is unlimitedly taxable under ordinary rules is to be considered as a resident for treaty purposes.

An establishment can be structured like a corporation (for commercial purposes) or have features similar to those of a foundation (private and/or charitable elements for non-commercial purposes).

Under the new tax rules, establishments are treated as companies ordinarily taxed at a rate of 12.5%.22 As a consequence, a newly established Anstalt is treated as resident for tax purposes in Liechtenstein. An Anstalt that has been created under the old rules and as such was not subject to corporate income tax at all, can now be subjected to tax under the new regime simply by filing a corresponding request.

Liechtenstein and the UK have signed a Protocol that shall form an integral part of the DTA. The Protocol clarifies that both the ‘Stiftung’ and the ‘Anstalt’ that are unlimitedly taxable under the ordinary rules are to be considered as resident persons for treaty purposes.23

Establishments (Anstalten)

A good number of corporate taxpayers are legally structured as an establishment (Anstalt). The establishment (and also the trust enterprise) is a highly versatile form of legal entities specific only to Liechtenstein. An establishment can be structured like a corporation (for commercial purposes) or have features similar to those of a foundation (private and/or charitable elements for non-commercial purposes).

Collective Investment Vehicles

It is further stipulated that a Liechtenstein fund for collective investment in transferable securities

22. Art 44(1) LTC.
23. Art III(b) of the Protocol to the DTA. The qualification is line with HRMC’s guidance on entity classification in its International Manual INTM180000, which classifies certain foreign entities as either fiscally ‘transparent’ or ‘opaque’. INTM180030 classifies Liechtenstein Anstalten as opaque. Please refer to <www.hmrc.gov.uk/manuals/intmanual/intm180000.htm> accessed 26 April 2013 (Foreign Entity Classification For UK Tax Purposes) for additional information.
(UCITS), to which the 2011 Liechtenstein Act on Certain Undertakings for Collective Investment in Transferable Securities (UCITSG)\(^{24}\) applies, shall be resident for treaty purposes. The Contracting Parties have a mutual understanding that also a Liechtenstein fund containing other assets and real estate to which the provisions of the 2005 Investment Undertakings Act (IUA)\(^{25}\) apply is to be considered a resident of Liechtenstein.

The Contracting Parties have also anticipated the passing of the EU Directive on Alternative Investment Fund Managers (AIFMD)\(^{26}\) and the respective Liechtenstein Law on Alternative Investment Fund Managers (AIFMG)\(^{27}\) who shall be treated as resident under the DTA as well. From a UK perspective, the application is however conditional on the treatment of the Liechtenstein fund as an opaque structure which is ordinarily taxed and regulated under the USCITS or IUG (or in the future AIFM) legislation,\(^{28}\) broadly held and investing into diversified portfolio of securities. An opaque and ordinarily taxed UCITS or AIFM fund is the beneficial owner of its income and is therefore treated as a resident for treaty purposes provided that the fund managers have discretionary powers to manage the investments generating the income.

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**Individual Taxpayer**

For the purpose of the DTA, the term ‘resident’ includes any ‘person’ who is without limitation liable to tax in one of the Contracting States by reason of his domicile or residency which is generally defined as the primary and permanent home of a taxpayer.\(^{29}\) According to Article 2(1) b of the Liechtenstein Tax Code (LTC), an individual taxpayer will become tax-resident in Liechtenstein if this taxpayer has the intention to stay permanently in Liechtenstein. Alternatively, unlimited tax liability is also triggered if the ‘habitual abode’ points to Liechtenstein which generally requires a period of physical presence of at least six months per calendar year.\(^{30}\) The DTA is however not applicable to non-resident individuals who are liable to tax at source from income or capital gains in Liechtenstein or the UK. Excluded from the DTA are further so-called lump sum taxpayers.\(^{31}\)

**Dual residence conflicts**

In compliance with the OECD Model Convention Liechtenstein and the UK have implemented so-called ‘tie-breaker rule’ tests in the DTA by which it is determined in which contracting state a taxpayer shall be resident in the case of ‘dual residence’

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27. In December 2012, the Liechtenstein Government approved the final draft of the AIFMG. It will be enacted on 22 July 2013.
29. Art 4(1) DTA.
30. See Art 2(c) LTC: ‘habitual abode’ means the place or the area in which a person dwells not only temporarily. A temporarily contiguous abode of more than six months shall always and from the beginning be considered a habitual abode; short-term interruptions shall not be taken into account. An abode for the purpose of attending an educational institution and placement in a reform school, public assistance institution, or sanatorium as well as therapeutic and holiday stays for up to 12 months do not constitute a habitual abode or residence in Liechtenstein.
31. Art 30 LTC: non-Liechtenstein citizens who take up residence in Liechtenstein either for the first time or after a minimum 10-year period of absence may be taxed upon request on their expenditure (private living costs) instead of paying ordinary income and net wealth taxes. Conditional for this ‘lump sum tax’ regime is that the applicant does not work in Liechtenstein and lives from own (domestic or foreign) private sources. Even if lump sum taxpayers may qualify as residents for DTA purposes, lump sum taxes are not included in the scope of taxes under the treaty, see Art 2(3) DTA.
situations.\textsuperscript{32} In conformity with the OECD standard, the tie-breaker rules will not apply to the foundation and other corporate and other non-individual persons where dual resident conflicts will be solved by mutual agreement.

In conformity with the OECD standard, the tie-breaker rules will not apply to the foundation and other corporate and other non-individual persons where dual resident conflicts will be solved by mutual agreement.

In the absence of a mutual agreement, a Foundation or another specific entity in question shall be excluded from the treaty benefits.\textsuperscript{33} A typical dual-residence conflict may arise when a UK resident person is holding a subsidiary company incorporated in Liechtenstein. The UK investor will transfer bankable assets to the Liechtenstein entity which will perform day-to-day asset management. According to the Liechtenstein tax rules, the income derived from the asset management is subject to corporate income tax at a rate of 12.5%. At the level of the UK investor, the outbound transfer of the bankable assets may be regarded as abusive and consequently trigger UK CFC tax in the case that insufficient local substance is proven. The Liechtenstein entity in question will become a (dual) resident also under UK tax rules, and the income will end up being double-taxed. Whether Liechtenstein or the UK will have to recede from the right to tax must be formally negotiated upon mutual agreement.

\textbf{Excluded non-resident persons including trusts}

Legal persons in Liechtenstein that are subject only to the minimum corporate income tax such as private asset structures (PAS),\textsuperscript{34} charitable foundations or other corporate taxpayers that pursue charitable or ideal purposes shall be excluded from the DTA benefits. Private asset structures only pay the minimum annual tax of CHF 1200. They however cannot engage in business activity, a term which is widely construed. In practice these are legal persons, including foundations, who administer their own assets (eg a portfolio of securities at a bank).

Trusts in contrast are legally defined as ‘special dedications of assets without legal personality’ and thus are subject only to the minimum corporate income tax of CHF 1200 per year according to Article 65(1) LTC. Even if the trust may not access the treaty benefits under the same rules that are applicable to the Stiftung, an \textit{irrevocable trust with named fixed beneficiaries} or a \textit{revocable} trust may be treated as transparent for DTA purposes so that a resident settlor or beneficiary may himself apply for the treaty benefits (instead of the trust itself).

\textit{Even if the trust may not access the treaty benefits under the same rules that are applicable to the Stiftung, an irrevocable trust with named fixed beneficiaries or a revocable trust may be treated as transparent for DTA purposes so that a resident settlor or beneficiary may himself apply for the treaty benefits (instead of the trust itself)}

\textbf{Conclusion}

The realignment of cross-border asset planning and wealth management gives financial intermediaries in the UK, Liechtenstein, and also Switzerland a unique opportunity to intensify cooperation in the best interest of existing and new clients. For example, UK taxpayers can inter alia maintain their relationships with a trusted financial intermediary in Switzerland that date back many years and at the

\textsuperscript{32} Art 4(3) DTA.
\textsuperscript{33} Arts 22—24 DTA.
\textsuperscript{34} Art 64 LTC.
same time benefit from the advantages of the LDF in particular for the past and from Liechtenstein as an onshore jurisdiction for the future in general. The involvement of a Liechtenstein financial intermediary therefore represents a comprehensive and sustainable solution that protects the privacy of the client provided that the services of the financial intermediaries involved are aligned and coordinated accordingly. Thus the LDF coupled with the new Liechtenstein Tax Act and the Liechtenstein–UK DTA offers unrivalled conditions for UK clients to use Liechtenstein structures like foundations which are fully accepted from a UK perspective as perfect instruments for both their past, present, and future tax affairs.

Thus the LDF coupled with the new Liechtenstein Tax Act and the Liechtenstein–UK DTA offers unrivalled conditions for UK clients.

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