



## The Limited Term Trust – An Exception to the Preservation of Assets

### Summary

According to *Jakob*: “The mandatory mummification of foundations is no longer up to date.” (*Jakob*, npoR 2020, 239, 246). Nevertheless, the perpetual foundation is statistically the most prominent form of foundation. However, the everlasting preservation of foundations increasingly conflicts with the requirement of Section 80 (2) sentence 1 of the German Civil Code (prospectively Section 82 sentence 1 of the future German Civil Code): the permanent and sustainable fulfilment of the foundation's purpose has to be secured. Although this requirement is intended to prevent financially undercapitalized foundations, there is a growing number of “non-performing foundations” (*Hüttemann/Rawert*, ZIP 45/2013, 2136 ff.). These foundations are not able to secure the permanent and sustainable fulfilment of their purpose. Both academia and practice increasingly examine those “foundations in need”. Also the reform of foundation law, that was finally passed in the 19<sup>th</sup> legislature, was motivated by supporting such “foundations in need”. The intention of this reform should have been to transfer the German foundation law into the 21<sup>st</sup> century (*Weitemeyer*, npoR 2019, 1,2). Consequently, time limited foundations such as the limited term trust are becoming increasingly important as part of a modern and reformed foundation law.

Since its legal recognition by the Voluntary Strengthening Act (‘Ehrenamtsstärkungsgesetz’), the limited term trust has rarely been examined academically. The current legal situation has only been taken into account superficially and the knowledge regarding the time limited trust *de lege lata* is therefore limited. At the same time, since the last major amendment by the Foundation Law Modernization Act in 2002 (‘Gesetz zur Modernisierung des Stiftungsrechts’), foundation law was only recently reformed by a process lasting several years. This reform was nevertheless criticized as “in many ways backwards, counterproductive and poorly crafted” (*Arnold/Burgard/Jakob/Roth/Weitemeyer*, npoR 2020, 294). The acceptance of different forms of time limited foundations will considerably be restricted by the future foundation law despite the existing need in foundation practice and in comparison to more liberal jurisdictions such as in the U.S.A. or Switzerland.

In order to address the existing research gap regarding the law of time limited trusts as well as the future foundation law, the study focuses on the following three research questions. On the one hand, the analysis aims to provide possible interpretations of the future foundation law. On the other hand, the study

outlines improvements *de lege ferenda* when the future foundation is being assessed two years after becoming effective (BT-Drs. 19/31118, p.8):

- (1) What is the purpose of the general principle of preservation of assets and can the time limited trust *de lege lata* as well as *de lege ferenda* be considered as a narrow exception to that principle? From the requirement of Section 80 (2) sentence 1 of the German Civil Code (prospectively Section 82 sentence 1 of the future German Civil Code), that the permanent and sustainable fulfilment of the foundation's purpose has to be secured, the idea of a permanent legal figure that is fundamentally perpetual is derived. However, the number of “non-performing foundations” is growing. With the legal recognition of the time limited trust it has also been legally clarified that a foundation does not need to exist until eternity. Therefore, it can also be questioned why the foundation's assets must be preserved and why only the income from the assets should be used to fulfil the purpose – especially, if one considers that the foundation's assets are primarily supposed to support its purpose. Hence, the general principle of preservation of assets *de lege lata* and *de lege ferenda* needs to be examined in order to assess whether the time limited trust has to be considered as an exception to that principle that has to be handled narrowly.
- (2) Which fields of question exist with regard to the establishment and termination of a time limited trust and which solutions can be developed regarding those fields of question? Relevant questions exist with regard to the timing, the requirement of a minimum capital, the provisions regarding the use of funds and the termination of the time limited trust. The study outlines potential solutions to those fields of question while taking into account the future foundation law. Those solutions shall fulfil several purposes: being independent to the current interest level, filling legal gaps, providing possible interpretations of the current as well as future foundation law, outlining improvements *de lege ferenda* when the future foundation is being assessed two years after becoming effective.
- (3) On which legal basis can a perpetual foundation be transformed into a time limited trust and what are the requirements for such a transformation? Until now, the academic literature focuses on the addition and merger of foundations. While these measures are being examined intensively, the transformation into a time limited trust has only been outlined superficially so far, despite its practical importance.

This study focuses on the legal form of the time limited trust, its relationship to the principle of preservation of assets and the civil law issues associated with its establishment and termination. The tax

law issues are not being examined. Also the future rules regarding time limited trusts have not been examined intensively on an academic level. Hence, the study aims to provide possible interpretations of the future foundation law as well as to outline improvements *de lege ferenda* when the future foundation is being assessed two years after becoming effective. Consequently, the study does not deliver answers to all questions that might arise in the relatively young field of research regarding time limited trusts. At the same time, the study points out the relevance of time limited trusts for a modern and flexible foundation law.