

THE AUSTRIAN PRIVATE FOUNDATION

A BRIEF GUIDE FOR INVESTORS

TABLE OF CONTENTS

I.	Introduction	3
II.	Legal Background	3
III.	Organisation	5
3.1.	The Board of Directors (Stiftungsvorstand)	5
3.2.	The Auditor (Stiftungsprüfer)	5
3.1.	The Advisory Board (Stiftungsbeirat).....	5
IV.	Motives	6
V.	Tax Background.....	6
VI.	Executive Summary	8
VII.	Disclaimer	8

I. Introduction

The Austrian Private Foundation Act ("**Privatstiftungsgesetz**") came into force in 1993 and established a completely new private foundation law and a new form of foundations in Austria, comparable to the legal form of a trust in countries like the United Kingdom or the United States of America.

Prior to that time, it was only possible to establish a foundation for charitable or public interest purposes, governed by the Federal Foundations and Funds Act ("**Bundes-Stiftungs- und Fondsgesetz**") or federal state law.

At that time Austria was surrounded by countries with a modern and functioning private foundation law, like Switzerland, Germany and Liechtenstein, therefore the Austrian legislator had to react and enacted a modern private foundation law, in order to prevent huge assets and valuable companies to leave Austria. With the Austrian Private Foundation Act, a milestone act in Austrian law, the Austrian legislator established a new legal person and at the same time created a very attractive tax environment, which made and partially still makes the Austrian private foundation a very successful legal entity, which is widely recognised outside of Austria.

Today there are more than 3200 private foundations established in Austria, with estimated total assets worth about 90 billion Euros and a value creation of approximately 2.000 million Euros.

Tax changes in Austria, especially the annulment of inheritance and gift tax, may have decreased the tax attractiveness of Austrian private foundations, however the Austrian private foundation is still an excellent legal opportunity for wealthy private investors, large family estates and for other individuals from Austria and abroad. It is frequently used in the course of company successions, for protection against outside influences, the support of family members as well as to protect large private estates against fragmentation (see IV.).

II. Legal Background

The Austrian private foundation is a legal person without owners, members or shareholders. The private foundation can be characterised as an estate, donated by the founder, which belongs to itself. Thus the private foundation is an estate that is self-organized and subject of rights and duties. The private foundation also has the capacity to sue and get sued as an individual legal person.

A private foundation can be established *inter vivos* by (a) natural or legal person(s) or *causa mortis* by one natural person only. The foundation *causa mortis* is established by testamentary declaration and is qualified as a legal transaction under the law of succession.

The establishment of a private foundation can be carried out by an authorised trustee. This however, makes the trustee the official and irrevocable founder and is only recommended in certain cases. Especially as it is impossible to later transfer the legal position from the trustee to the real founder, meaning that the founder is always dependent on the trustee.

The private foundation *inter vivos* is established by a declaration of establishment that must be in the form of a notarial deed and consist of the foundation deed ("**Stiftungsurkunde**"). It is common to add an additional appendix which is called "**Stiftungszusatzurkunde**" to the foundation deed.

In the process of establishment, it is obligatory to register the private foundation in the local commercial register and to deposit the foundation deed there (which makes the foundation deed as well as the identity of the founder publicly accessible!).

The founder has the possibility of including only the obligatory minimum content in the foundation deed and other very important content or detailed information in the appendix, which can stay secret. This reflects the demand of potential founders for the highest possible discretion.

However, to qualify for tax advantages, the foundation deed and the appendix must be disclosed to the Austrian tax authorities. But even then, the appendix remains secret to the open public though.

The private foundation must be domiciled in Austria. For establishing a private foundation a minimum amount of EUR 70.000,00 has to be donated and transferred to the foundations bank account. If this amount is not donated in cash and in Euros, a cost-intensive audit has to take place, to confirm that the transferred estate is worth at least EUR 70.000,00.

However the minimum amount for a reasonable establishment of a foundation lies higher than EUR 70.000,00 anyway, therefore it is recommended to initially donate a cash amount of EUR 70.000,00 to the foundation and transfer other assets by declaration in the appendix or later.

Besides the declaration, that the foundation has received the minimum amount, the foundation deed also has other obligatory content as follows:

- (a) the purpose of the foundation;
- (b) the person(s) who benefit(s) from this purpose (beneficiaries) or an authority inside the foundation that determines these persons;
- (c) the foundations name and domicile;
- (d) the founders name, address, birth date or commercial registry number;
- (e) declaration if the foundation is established for a definite or an indefinite time.

The purpose of the Foundation should be in accordance with the intentions of the founder and typically includes the support of the founder and his present family as well as future generations.

The purpose may not be contrary to the law or public morality. It also needs to have an effect to the outside, which means that the retaining of profits alone is not an allowed purpose.

Once established this purpose can only be changed, if the founder has included the right of amendment in the foundation deed. Same applies for the right of revocation of the foundation. All Amendments require a notarial deed.

III. Organisation

3.1. The Board of Directors (Stiftungsvorstand)

The foundation is governed by the obligatory board of directors which consists of at least three members, two of whom must have their permanent residence in the EU or EEA. The board of directors has to officially represent and manage the foundation and to ensure the fulfilment of its purpose. The directors have to comply with the regulations of the foundation deed and the appendix.

Without appropriate regulation in the foundation deed, the founder has no decisional authority towards the board of directors or its members. However, as long as the founder is not (the sole) beneficiary of the foundation it is possible to retain the right of removal and appointment of directors.

Persons who belong to the beneficiaries of the foundations purpose are incompatible with the function of a director of the foundation. Thus as long, as the founder is not a beneficiary of the foundation, he may be one of the directors of the foundation.

3.2. The Auditor (Stiftungsprüfer)

The only other obligatory institution for every foundation is the auditor of the foundation who has to audit the balance, accounting and annual report of the directors board. In certain cases, mostly when really large companies are founders, a supervisory board is obligatory for a Foundation, but these cases are very rare.

It is important to mention, that the foundations activities are not subject to observation and control by public authorities.

3.1. The Advisory Board (Stiftungsbeirat)

Many Austrian foundations have established an optional advisory board which most of the time reflects the founders intention to retain as much influence on the foundation as possible, by using advisors who represent the founders intentions. Typically the founder himself as well as the beneficiaries are members of the advisory board.

IV. Motives

"Tax advantages" is probably the motive that comes to peoples minds, when they are thinking about motives for private foundations, but in fact tax advantages alone have hardly ever been the main reason for someone to establish a private foundation in Austria. Until 2011 the tax deferral effect in connection with a successful investment made a huge tax benefit, especially for large assets, possible.

Most tax benefits have been abolished by the Austrian legislator in the meantime, making the foundation less attractive in terms of taxation. Compared to the taxation of capital companies and private persons only minimal tax advantages have remained for the foundation.

However there are other reasons for Austrian private foundations.

4.1. Private Persons

The most important reason for private persons is protection and endurance. Especially to protect large private estates against fragmentation through inheritance and to prevent disputes over inheritance in general. Sometimes also to have the free choice of the beneficiary, especially when there are no descendants.

4.2. Companies

The main motive for company owners is to ensure the continuance of the company after death in accordance with their wishes, when there are no descendants, only underage heirs or too many descendants.

4.3. Other Motives

Only a small amount of Austrian private foundations have mainly charitable, public or cultural purposes. Such purposes can better be pursued by foundations based on the Federal Foundations and Funds Act or the respective federal state laws.

V. Tax Background

5.1. Taxation of donations to the foundation

Gratuitous donations to Austrian private foundations are subject to the **Foundation Receipts Tax**. This tax amounts to **2,5%** of the donated amount for transparent Foundations. The tax **increases to 25%** for intransparent Foundations. Intransparent Foundations are those, who have not disclosed the foundation deed as well as the appendix to the Austrian tax authorities.

In case of the **donation of real estates** the tax increases by 3,5% to the amount of 6% of the market value.

5.2. Continuous taxation

Continuous taxation of the Private Foundation is divided into three areas which are subject to the following tax rates:

5.2.1. Tax Free

- Dividend payments received from Austrian national corporations.
- Profit distributions from limited liability companies from EU or EEA countries, or other countries, when a participation of at least 10% is held for more than a year ("**international intercorporate stockholdings**").

5.2.2. Interim Tax – 25%

- Domestic and foreign interest revenues from cash deposits and other claims against banks as well as bonds and investment funds.
- Income from realised capital gains from capital investments.

The interim tax does not lead to an additional tax burden but represents an advance tax on taxable donations to the beneficiary (see 5.3.)

5.2.3. Corporate Income Tax – 25%

- Every income that is not subject to the taxation pursuant to (5.2.1) or (5.2.2.)

5.3. Taxation of donations by the Private Foundation

All donations made by the Private Foundation to beneficiaries are deemed income from capital assets and are subject to a capital earnings tax in the amount of 25%, which is retained and transferred to the tax authorities by the Foundation. For paid interim taxes the Foundation receives a credit at most in the amount of the transferred capital earnings tax.

However, when no other assets are in the Foundation and the Foundation donates substantial assets which were donated to the Foundation after July 31st 2008, these donations are tax-neutral, pursuant to Article 27, Section 1, No 8 of the Austrian Income Tax Act.

VI. Executive Summary

The Austrian Private foundation is a highly important legal entity in Austria, which is proven by the fact that estimated total assets worth about 100 billion Euros are managed by Private Foundations in Austria.

The primary reasons for establishing a Private Foundation are no longer exclusively tax reasons as the Austrian legislator has recently eliminated most of the remaining tax advantages of Private Foundations which are now basically on par with natural persons or capital companies in terms of taxation.

However the Private Foundation remains a very important legal opportunity for both private persons and companies in Austria, especially to ensure the continuance of companies and/or to protect large private estates against fragmentation.

VII. Disclaimer

This document takes into account the current legislation until October 2014. Despite very careful research and editing, no responsibility is taken for the accuracy of the information in this guide and any liability of the author is expressly excluded.

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