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Austrian Private Foundation gains increasing popularity with international wealth planners



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The Austrian Private Foundation recently received increased attention and popularity as an onshore alternative to the usual foundation and trust solutions in jurisdictions such as Liechtenstein or the Channel Islands. The reason for the increased popularity is the search for onshore solutions, which benefit from tax treaty protection while accepting a certain but not too excessive level of taxation.

Typically common motives for the establishment of a private foundation are the preservation of property, the protection from outside influences, support of family members over the next generations as well as the safeguarding of corporate descent.

The following briefly outlines the basic essentials of Austrian private foundations from a legal and tax perspective.

I. Establishment of the foundation

A private foundation is established by natural or legal persons through a notarised declaration of establishment. It is possible to establish a private foundation via an authorised proxy who will then appear as official founder. This is important for founders who do not want to appear in person in the publicly accessible foundation registry.

Neither the foundation's establishment nor its activities are subject to supervision by public authorities. The only competent authority for a private foundation is the Austrian court, which cannot be influenced by external parties.

The private foundation may not carry on a trade and is not allowed to exercise management functions in a company or to be a partner with unlimited liability in a registered partnership.

In the declaration, the purpose of the foundation as well as the assets contributed, the name, the seat and the term have to be included. A private foundation may be established for a specified or for an unlimited period of time.

The beneficiaries may be determined in the addendum to the deed. This addendum is not filed with the court. Therefore, the names and identities of the beneficiaries are not accessible to the public and a third party inspecting the Austrian Register of Companies will usually only learn that a person has formed a private foundation and has paid up the minimum amount.

The founder is basically free to choose the purpose of the private foundation which serves the purpose of managing, increasing and securing the assets of the private foundation. Therefore typically, the purpose is the support of the founder and his family in the present and future generations.

After registration, amendments of the declaration or the addendum are only possible if the founder has reserved his right to do so in the declaration; amendments require a notarial deed. The founder is also free to reserve the right to revoke the foundation.

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II. Organisation

Basically, the main bodies of the foundation are the board of directors, the auditor of the private foundation (both legally required bodies) and, as the case may be, the supervisory board (upon exceeding legally prescribed thresholds). Moreover, additional bodies may be established (such as an advisory board). Practically, the most important bodies are:

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The Board of Directors

The governing body of the private foundation is the board of directors which represents the private foundation and administers its assets. It has to comply with the founder's intentions as stated in the declaration of establishment and is responsible for the implementation of the purpose of the foundation. The **beneficiaries** of the foundation **may not be members of the foundation's board of directors**.

The first board of directors is appointed by the founder. During his lifetime, the founder can retain the right to remove and appoint directors (but in this case the founder cannot be a beneficiary).

The board of directors consists of at least three members, two of whom must have their permanent residence in the EU or EEA.

The Advisory Board

An advisory board is optional. In case an advisory board is established, typically the founder and the beneficiaries are members of the advisory board. The advisory board supervises the board of directors and has to be consulted on important matters. Moreover, the declaration may provide a catalogue of transactions which require the approval of the advisory board, reducing the potential that fraudulent or negligent members of the board of directors could harm the foundation. Typically, the advisory board appoints new members to the board of directors, in particular if the founder has deceased.

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III. Tax law aspects

Taxation of donations to the Private Foundation

In general, donations of the founder to the foundation are taxed at a tax rate of 2.5%.

Corporate income tax

A private foundation is in principle subject to 12.5% corporate income tax. However, full tax exemptions apply for various groups of income, such as dividend income or capital gains from Austrian or non Austrian companies.

Taxation of distributions

A Private foundation has to withhold 12.5% withholding tax upon distributions to beneficiaries. However, if the beneficiary is resident outside of Austria, in most cases (depending on the beneficiary's country of residence) the withholding tax is reduced to 0% by the applicable tax treaty.

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From the above summary it can be concluded that the Austrian private foundation could be a suitable onshore

vehicle for wealth preservation. In many cases (in particular if the foundation acts as a holding foundation holding international equity participations) the Austrian foundation can be extremely tax efficient (effective income tax rate of 0% for dividend income and no withholding tax for cross border distributions) whilst being located in a highly regarded and secure jurisdiction which benefits from an extensive treaty network.