

## **2. AUSTRIA**

### **2.1. Civil Law Framework**

#### **General Information**

In Austria, there are in principle two different types of foundations: public benefit foundations and foundations for private purposes. Only the establishment of public benefit foundations is governed by the Federal Foundations and Funds Act (Bundesstiftungs- und Fondsgesetz)<sup>1</sup> and nine provincial foundations and funds acts. The Austrian Private Foundation Act (Privatstiftungsgesetz, PSG)<sup>2</sup> enabled the establishment of foundations for both private and public interest, charitable or religious purposes. Under this section, we will primarily cover the so-called private foundations.

#### **The Private Foundation**

A private foundation is a legal entity having a legal personality in its own right; it can exercise rights and assume duties. However, in contrast to other legal entities such as companies or associations, private foundations have neither a proprietor nor members. It is the private foundation itself that owns the assets donated. While public benefit foundations have to pursue exclusively public interests, this is not the case for private foundations, and the majority of Austrian private foundations do not pursue any purposes of common interest at all. In fact, the reason for setting up a private foundation is in general the provisioning for family members or other beneficiaries. There are of course also private foundations in Austria that pursue public utility purposes, but this is certainly not the case for the majority of private foundations.

#### **The Establishment of the Private Foundation**

Private foundations are set up by means of drawing up a declaration of establishment (“Stiftungserklärung”) and come into being upon entry in the Company Register. The private foundation must be endowed with assets of at least EUR 70,000. At the time of establishment, this amount has to be effectively available.

The will of the founder (Stifterwille) is laid down in the declaration of establishment, and it is the responsibility of the Board of Directors (Stiftungsvorstand) to ensure and control that the purpose of the foundation set forth in the declaration of establishment is observed. The declaration of establishment consists of a foundation deed which has to be drawn up under Aus-

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<sup>1</sup> BStFG, Federal Law Gazette 1975/11

<sup>2</sup> PSG, Federal Law Gazette 1993/694

trian law. The foundation deed must include some minimum information such as the endowment of the foundation with assets, the purpose of the foundation, the name of the founder, the beneficiaries, the name of the private foundation, its registered seat and the period for which it is established. The foundation deed has to be deposited with the Company Register and is accessible to the public. In many cases, the foundation deed is supplemented by a so-called appendix to the foundation deed (Stiftungszusatzurkunde) which is not accessible to the public and may contain more detailed information on the above-mentioned points, or additional rules. A foundation can be established for a definite or an indefinite period of time. Private foundations whose main purpose is the provisioning of natural persons can be set up for a maximum period of time of 100 years; however, the ultimate beneficiaries may decide to extend this period by another 100 years. The bodies which are entrusted with pursuing the purpose of the foundation are the Board of Directors (Stiftungsvorstand), the Auditor of the Foundation (Stiftungsprüfer) and, in specific cases, the Supervisory Board (Aufsichtsrat).<sup>3</sup> Moreover, the founder may determine additional bodies for the protection of the foundation purpose. The responsibility of the Board of Directors is the external representation of the private foundation and, at the internal level, its management. In the exercise of its duties, the Board of Directors has to ensure that the purpose of the foundation is observed. The Board of Directors also has to keep the books of the private foundation. In this context, the provisions of the Company Law (Unternehmensgesetzbuch, UGB) have to be observed. Moreover, the report on the situation of the foundation must include information on the progress made in the pursuit of the foundation purpose. The Foundation Auditor has to audit the annual accounts including the report on the situation of the private foundation. An auditor's report is required by law. The publication of the annual accounts, however, is not mandatory.

The foundation documents also have to set forth how the distributions to the beneficiaries are to be effected. The Board of Directors has to ensure the implementation of these documents.

## ***2.2. Tax Treatment of Private Foundations***

As a legal person, a private foundation is in principle subject to corporate income tax. The fiscal treatment of payments to the beneficiaries is governed by income tax law. While the fiscal treatment of private foundations is governed by both corporate tax law and income tax law, a great number of special provisions exist. This situation ultimately results in a special tax status for the private foundation which entails considerable advantages. Moreover, there are special rules for endowments to private foundations which need to be considered, too. In the following, we want to describe the fiscal impact of donations to private foundations and explain what the regular taxation looks like at the level of both the private foundation and the

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<sup>3</sup> A supervisory board has to be appointed if the private foundation employs more than 300 staff or if the number of employees with companies and cooperatives domiciled in Austria in which the private foundation has a substantial shareholding exceeds 300. Details are governed by Article 22 Private Foundation Act.