



## Charitable foundations under Liechtenstein law and the option to structure these as a protected cell company

This Bulletin discusses the basic features of a charitable foundation under Liechtenstein law. It is expanded by a chapter on the option of structuring such a legal entity as a protected cell company. A so called PCC has the benefit that founders can save costs by affiliating with existing charitable foundations. They can set up a cell that is allocated to an existing foundation but can reach out for its own purpose.

For more in-depth information about this topic, interested readers are referred to ATU's 2019 specialist brochure about the charitable foundation and to Bulletin No.28 of March 2015 about protected cell companies.

ATU is very well versed in the topic of charitable foundations. It manages a large number of charitable legal entities and itself belongs to the charitable parent foundation "Stiftung Fürstlicher Kommerzienrat Guido Feger".

ATU is conscious of its social responsibility and is pleased to share its know-how and experience in the field of charitable activities.

This Bulletin should therefore serve to inspire and in particular motivate readers to set up a charitable foundation in Liechtenstein.

### **The charitable foundation**

A foundation is charitable if it entirely or mainly serves charitable purposes pursuant to Art. 107 para.4a of the Persons and Companies Act (PGR):

*"Where the Act refers to non-profit making (common benefit) or charitable purposes, this shall include such purposes the fulfilment of which is of benefit to the general public. In particular, there is deemed to be a benefit to the general public if the activity serves the common good in a charitable, religious, humanitarian, scientific, cultural, moral, social, sporting or ecological sense, even if only a specific category of persons benefits from the activity."*

### **Setting up a charitable foundation**

A foundation can be established inter vivos (by a living person) or upon the death of

the founder by testamentary disposition or an inheritance contract that complies with the applicable formal requirements. The foundation acquires legal personality upon constitutive entry in the Commercial Register through application of a member of the foundation board or the legal representative (Art. 552 § 14 para. 4 PGR).

The written application for entry must be accompanied by the foundation deed (original or certified copy) and has to provide the information listed in Art. 552 § 19 para. 3 PGR. This includes the name, registered office and purpose of the foundation as well as pertinent information about its organisational structure, in particular the fact that the charitable foundation is subject to supervision by the Foundation Supervisory Authority pursuant to Art. 552 § 29 para. 1 PGR.

#### **The purpose of a charitable foundation**

The key feature of a foundation is its purpose. It must be formulated such that the foundation board as executive body is guided in its actions by the purpose. The purpose must explain how the foundation assets may be used, which criteria determine the group of beneficiaries, and how the beneficiaries are appointed.

For charitable foundations, a specific subject takes centre stage. This is expressed in the formulation of the purpose, e.g. protection of fauna and flora, cultural institutions, or medical research to find a cure for specific diseases. Although the pertinent beneficiary groups can be described by typical features, the principle of legal certainty has to be observed.

The founder can formulate main and secondary purposes, thereby granting a higher priority to specific objectives. These can be combined with additional objectives that support the primary objective or pursue a completely different purpose.

The purpose is described in broad terms in the foundation deed (statutes). It can

be formulated more precisely and in more detail in the supplementary foundation deed (by-laws) and the regulations.

#### **Impermissible purposes**

To protect the integrity of Liechtenstein as a foundation location, the competent authorities take care to ensure that the foundation documents do not include any forbidden purposes. Under the law, foundations with an unlawful or immoral purpose cannot attain legal personality (Art. 107 para. 5 PGR).

The purpose is the defining feature of every foundation. This purpose must be outward looking. As a result, foundations that pursue exclusively ends in themselves (purely self-purpose foundations) are also not permitted in addition to unlawful and immoral purposes. By pursuing their purpose, charitable foundations interact with their external environment in a manner that is visible to third parties.

#### **The participants in the foundation**

Art. 552 § 3 PGR defines the foundation participants as the founder, the entitled beneficiaries, the prospective beneficiaries, the discretionary beneficiaries, the ultimate beneficiaries, the foundation board, the auditor, an optional controlling body and other optional governing bodies of the foundation. The other governing bodies include, for example, bodies with the function of determining individual beneficiaries, the timing, amount and conditions of distributions, monitoring the management of the assets, supervising the management of the foundation and compliance with its purpose, or safeguarding the best interests of the foundation participants. Such additional bodies are mainly recommended for larger foundations. They allow the founder to strengthen the powers of the foundation's management by appointing specialist committees to support the foundation board, thus broadening the foundation governance.

#### **The foundation board**

The foundation board is the highest governing and executive body of the foundation. According to Art. 552 § 24 para. 2 PGR, the foundation board must consist of at least two members. It manages the business of the charitable foundation and represents the foundation vis-à-vis third parties. It ensures that the foundation is managed in accordance with the law and in compliance with the foundation board's statutory rights and obligations. Because of the external focus of its purpose, the foundation board is obliged to actively pursue the wishes of the founder as perpetuated in the foundation documents. This means that the foundation board in its function as executive body has to ensure that the foundation's assets are managed and used in fulfilment and continuation of the founder's will.

With regard to the special obligations of the foundation board, foundation law states that the foundation board has to manage the foundation's assets in compliance with the purpose of the foundation and the principles of good business management. The founder can include specific and binding management criteria in the foundation deed, the supplementary foundation deed or the regulations (Art. 552 § 25 paras. 1 and 2 PGR).

#### **The auditor**

According to Art. 552 § 27 PGR, the appointment of an auditor is compulsory for a charitable foundation. The auditor is appointed by the court and assumes a position as a governing body of the foundation (Art. 552 § 3 para. 6 (3) PGR). The Foundation Supervisory Authority is a party to these proceedings. The founder can propose two auditors who meet the requirements of independence and professional qualification (cf. Art. 191a et seqq. PGR).

The auditor has the legal duty to examine whether the foundation assets are managed and used in accordance with the foundation's purpose once a year (Art. 552 § 27 para. 4 PGR). It has to submit a report

about the outcome of this audit to the foundation board and the Foundation Supervisory Authority. If there are no grounds for objection, it is sufficient for the auditor to issue a confirmation that the management and appropriation of the foundation's assets comply with the foundation's purpose and the provisions of the law and the foundation documents. However, if the auditor discovers that the foundation assets are managed improperly or in a manner that threatens the continued existence of the foundation, it must submit a comprehensive report about this mismanagement to the Foundation Supervisory Authority.

#### **The foundation's assets**

The statutory minimum foundation capital is CHF 30,000. This can also be endowed in euros or US dollars (Art. 552 § 13 para. 1 PGR). The foundation capital can be increased at any time by subsequent endowments by the founder and third parties in the form of donations (Art. 552 § 13 paras. 2 and 3 PGR).

If only the income is distributed and the capital is preserved, we talk about a revenue foundation. With such a foundation, the purpose can be pursued indefinitely. A charitable foundation can also exhaust the assets in full. Such a foundation is a limited term foundation. Liechtenstein does not apply a capital preservation obligation for charitable legal entities.

#### **Foundation governance**

Foundation governance in Liechtenstein is very innovative and attractive. The legislator successfully implemented a modern system of foundation supervision that is also applied in practice.

In contrast to traditional associations, a foundation as an independent special-purpose fund does not have an ownership structure to supervise its business activities. A special set of rules – foundation governance – was therefore developed to ensure that all foundation participants act responsibly.

#### **Liechtenstein's Foundation Supervisory Authority**

Together, the court and the Foundation Supervisory Authority (STIFA) provide the mechanisms for foundation supervision and control. The supervisory authority has to ensure ex officio that the foundation's assets are managed and used in compliance with its purpose. STIFA bases its activities on the annual auditor's report received from the auditor. It fulfils its obligations without direct interaction with the responsible parties and its supervisory activities are determined by the auditor's reports.

The main objective that also determines the scope of STIFA's supervision is to verify that the actions of the foundation's governing bodies comply with the legal and statutory provisions (verification of legality). Although the Foundation Supervisory Authority can review the discretionary scope given to the executive bodies, it does not act on behalf of the foundation and does not exercise its own discretion. It also does not review the foundation board's decisions to ensure that the most sensible option within the legitimate scope of its discretionary powers was chosen (verification of opportunity).

Apart from its powers concerning a change of purpose, STIFA can require the amendment of other clauses if this will safeguard the foundation's purpose, in particular ensure the continued existence of the foundation and protection of the foundation's assets (Art. 552 §§ 33 and 34 PGR).

#### **The supervisory court**

In the exercise of its functional jurisdiction as supervisory court, the District Court joins the auditor and the Foundation Supervisory Authority as the third party involved in foundation governance. The District Court contributes the required elements of neutrality and independence to foundation supervision. The inclusion of the country's courts prevents efforts by third parties to influence the foundation. This creates confidence in the supervisory process and

promotes international acceptance of the jurisdiction of Liechtenstein as a foundation location.

STIFA can only implement orders for the investigation and dismissal of foundation bodies, the execution of special audits or the cancellation of resolutions by foundation bodies as a repressive measure via the district judges.

#### **Tax exemption**

Art. 4 para. 2 Tax Act (SteG) states that the tax administration grants tax exemption upon application to legal entities and special-purpose funds without a legal personality that exclusively and irrevocably pursue charitable purposes as defined by Art. 107 para. 4a PGR.

In addition to the elements included in Art. 107 para. 4a PGR, the conditions for tax exemption on the basis of a charitable purpose therefore include the exclusive and irrevocable pursuit of charitable activities. The term irrevocable expresses the fact that the applied funds are always and without exception bound to be used for charitable purposes by the foundation deed, up to the ultimate beneficiaries.

#### **Advantages of Liechtenstein as a foundation location**

Thanks to the political and economic stability of Liechtenstein, a foundation project can be implemented that will flourish over generations. History has shown that these two macro-economic factors are of essential importance when plans are made that go beyond the lifespan of a single person.

The foundation, its structure and its activities are not limited in terms of geography. The activities of the foundation, the composition of the foundation board and its recognition as a charitable foundation are not bound by any geographical borders. A foundation that has been legally set up in Liechtenstein can operate worldwide without any restrictions.

**Excursus: the protected cell company**

Art. 243 et seqq. PGR about the protected cell company (PCC) makes it possible to establish an umbrella organisation for charitable purposes. Apart from the core cell, the PCC consists of one or two segments that do not have their own legal personality. A specific area of activity and purpose are described for each of these cells in the foundation documents. Specific assets are exclusively and explicitly allocated to each cell for the pursuit of their purpose. The assets that have not been explicitly dedicated to a cell form the core assets and have to meet the minimum capital requirements. The individual cells must also have a legal reserve equalling the minimum capital for a protected cell company, i.e. at least CHF/EUR/USD 30,000.–.

The option of setting up a cell within an existing foundation structure is mostly preferred for reasons of costs. The costs for establishment and ongoing management are much less than for an independent foundation.

In an international comparison, an organisation structured as a PCC under Liechtenstein law has advantages when it comes to liability. Contractual third-party claims against such an organisation are restricted to the assets of the individual cell whose activities gave rise to the claim. Hence, liability is separated between the individual cells.

This Bulletin ends with emphasis on the charitable foundation, established by Allgemeines Treuunternehmen in the interests of its clients, to celebrate its 90<sup>th</sup> anniversary

**ATU Charity Foundation PCC**

This foundation was structured as a protected cell company in accordance with the information provided in this Bulletin. ATU wants to use this legal entity to support patrons who do not wish to set up their own foundation to pursue their charitable activities, but rather want to join an existing umbrella foundation as a separate cell.

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