

## The New Liechtenstein Foundation Law

### An Overview on the Important Changes

#### **I. Introduction**

##### **1. Why a Reform**

The Liechtenstein Foundation Law (Art. 552 – 570 Persons and Companies Act (PGR)) has been existing for over 80 years and has contributed substantially to the economic success of Liechtenstein. The last few years, however, have shown that some important topics are not regulated sufficiently clear. Many topics were left to the courts and often times contradictory decisions added up confusion. In the field of foundation law, however, continuity plays an important role and a high level of legal security is desired.

##### **2. Chronology**

The revision of the foundation law started in 2001. There has always been unanimity to continue to adhere to the liberal principles of the foundation law to not only keep the foundation attractive but to render it even more attractive. Nevertheless regarding various questions the opinions differed partly widely. The many reports on the 2004 proposal of the Government for a new foundation law made this evident.

After an analysis of these reports the Government decided to reform the foundation law completely and invited foundation law experts to support it. The Government also built heavily on the Liechtenstein market players to ensure that the new law serves the needs of the market. These players reported to the Government on its proposals after having discussed in turn the issues with business partners and clients. This finally lead to the passing of the new law in Parliament in June 2008. It enters into force on 1 April 2009.

#### **II. The Important Changes in a Nutshell**

##### **1. Clearer structure**

In terms of content the new law is very similar to the present law, but it has a completely new structure. Compared to the present law it is much clearer. The new law makes it especially clear which provisions are applicable on private foundations and which on charitable foundations.

The present Art. 553 – 570 PGR are abolished by the new law which is now contained in Art. 552 §§ 1 – 41 PGR (in the following only the respective § is cited).

An important change of the new foundation law is the abolishment of the reference to the law on the trust enterprise (Art. 932a §§ 1 et seq. PGR). The referral in Art. 552 para. 4 PGR stipulated the application of the law on the trust enterprise by analogy on foundations, if the foundation law did not provide for a respective rule and unless such analogy was not excluded in the foundation statutes.

The reference to the law on the trust enterprise was abolished intentionally to create a homogenous and closed foundation law system. However, the application of the provisions on the trust enterprise by analogy on foundations is thereby not excluded. This may be helpful regarding certain questions also in the future.

## **2. Terminology Adjusted to Practice**

In the present law (cf. e.g. Art. 552 para. 2 PGR) the supreme body is called *Stiftungsvorstand*, but in practice the term *Stiftungsrat* (foundation council or foundation board) is common. The new law (§ 24 et seq.) adopts this practice.

As under the present law the fiduciary formation of a foundation is admissible under the new law. Regarding the fiduciary formation of a foundation the Liechtenstein Supreme Court has opined that the fiduciary and not the principal has to be considered as the founder. This led to difficulties when the founder's will and intentions had to be investigated or in case founder's rights were reserved.

This conflict was abolished. The new law (§ 4) explicitly sets forth that the fiduciary formation of a foundation is admissible and that in any case the principal is the founder. Nevertheless, the principal (founder) needs not to be disclosed to the Registrar (cf. 3.) because also the new law knows the institute of the so called deposited foundation.

## **3. Deposition is Regulated by the Formation Notification**

Also the new law stipulates the principle that private foundations, i.e. especially all foundations commonly called family foundation, need not be entered in the Register to acquire legal personality. The entry in the Register is only required for those private foundations which carry on commercial activity which is admissible only in a very restricted manner, namely if and insofar the proper administration of the assets of the foundation require such commercial activity (cf. §§ 1 para. 2 and 14 para. 3).

The old provisions regarding the deposited foundation oblige the Registrar to examine whether a foundation has to be entered in the Register, is subject to foundation supervision or pursues an unlawful object. All foundation documents enabling the Registrar to examine these questions had to be deposited. Compared therewith the new law merely stipulates the deposition of a Formation Notification; no further foundation documents have to be deposited with the Registrar. It is the obligation of the foundation council to deposit the Formation Notification, but this obligation can also be discharged by the representative. The Formation Notification model relieves the Registrar from administrative work on the one hand and provides for the examination of the foundation documents by experts on the other hand.

§ 20 para. 2 explicitly lists the information which has to be contained in the Formation Notification, comprising among others name, domicile, object, date of formation of the foundation; personal data regarding the

members of the foundation council; representative; confirmation that the beneficiaries or the class of beneficiaries was determined. In case of change of such information a so called Modification Notification (§ 20 para. 3) has to be deposited with the Registrar.

The correctness of this information contained in the Formation respectively Modification Notification has to be confirmed by a Liechtenstein lawyer, trustee or holder of a licence pursuant to Art. 180a PGR.

Based on this information the Registrar issues a Public Confirmation. This well proven practice is continued under the new law.

§ 21 authorises the Registrar to examine the correctness of Formation and Modification Notifications. The Registrar has the right to ask a foundation for information and also has the right of inspection through the control body (cf. 4.4.) or, if there is no such control body, through a third person, in most cases probably an auditor. No copies may be taken unless there is an indication that incorrect information is contained in the Formation or Modification Notification of the examined foundation.

#### **4. Information Rights of Beneficiaries**

The old law regulates the information rights of beneficiaries in a very rudimentary way only. This is detrimental to the legal security and has led to a considerable number of court disputes in the last few years. However, courts could not provide for enhanced legal security because of often times contradictory decisions. For this reason the much clearer provisions of the new law are positive.

The provisions on the information rights of the beneficiaries required finding a balance between the needs of the founder for confidentiality and the needs of beneficiaries for information. The legitimate interests of the founder that not all matters of the foundation be disclosed to all beneficiaries, especially subsequent beneficiaries, must not be as farreaching as to putting the beneficiaries in a position where they have to rely on the mere good will of the foundation bodies in safeguarding their legitimate interests.

The new law (§§ 9 – 12) defines an appropriate balance between these interests of the founder on the one hand and the beneficiaries on the other hand, as opposed to the case law of the recent years. The rules regarding the information rights of beneficiaries are based on the definition of the term beneficiary in §§ 5 – 8.

##### **4.1. Who is a Beneficiary**

Every natural or legal person drawing or possibly drawing an economic advantage from the foundation is a beneficiary, regardless of whether obtaining such beneficial interest is linked to a condition or any other restriction.

There are three types of beneficiaries: the beneficiary with a legal claim, the beneficiary without a legal claim (discretionary beneficiary, cf. discretionary foundation) and the ultimate beneficiary. If there is no ultimate beneficiary determined, the assets remaining after the liquidation of the foundation pass to the State of Liechtenstein (§ 8 para. 2) which is why it is recommendable to determine in every case an ultimate beneficiary.

#### **4.2. The Right of Information in General**

The right of information in general (§ 9 para. 1 and 2) is twofold: a beneficiary is entitled to inspection of the statutes, the by-statutes (by-laws) and regulations, if any; and the beneficiary is entitled to information and reporting on the asset situation which comprises the right to make copies and to examine all matters of the foundation, including the asset situation personally or through a representative.

The right of information is subject to three restrictions. Firstly, the right to information of a beneficiary exists only insofar as his rights are concerned. This restriction is relevant especially regarding members of the class of beneficiaries of discretionary foundations. As beneficiaries without a legal claim their right of information is generally less far-reaching than that of beneficiaries with a legal claim. Secondly, the right of information must not be used in an unsincere, improper way or in a way not in the interests of the foundation or other beneficiaries. And thirdly, in exceptional cases the right of information may be refused for important reasons to protect the beneficiary.

#### **4.3. Restriction in Case of Right to Revoke by the Founder**

As under the old law it is admissible pursuant to § 30 that the founder reserves the right to revoke the foundation. If in case of revocation the founder is the ultimate beneficiary, i.e. the assets of the foundation fall back to him in case of revocation (which is assumed by the law, cf. § 8 para. 3), the beneficiary does not have any right of information (§ 10). The rationale of this rule is that the foundation governance (cf. III. 3.) remains with the founder in case of reserved revocation rendering it appropriate to leave the supervision of the activities of the foundation with the founder.

#### **4.4. Restriction in Case of a Control Body**

Until a few years ago the courts allowed the appointment of an auditor by the foundation council in case of disputes regarding the right of information of beneficiaries. The new law takes up the idea of using an auditor, however, it is not allowed to appoint an auditor only in case of disputes, but by providing for a special body, i.e. the control body, in the foundation documents (§ 11).

Upon formation of the foundation a control body can be provided for in the foundation documents. If there is a control body, a beneficiary can only ask for information regarding the object and the organisation of the foundation as well as his own rights vis-à-vis the foundation. He or she has the right to inspect the foundation documents in this regard. It is, however, not permitted to the beneficiary to examine the activities of the foundation, especially the reporting on the asset situation.

The control body has to comply with certain criteria as to independence. It has to examine the administration and application of the foundation funds at least once a year and to report to the foundation council. If there is no reason for complaints, a confirmation is sufficient that the foundation funds were properly administered and applied. In case of irregularities the control body has to report to the beneficiaries and to the court who decides on supervisory measures which can include the dismissal of a member of the foundation council (cf. § 35).

Control body can be an auditor, it can be the founder him- or herself or it can consist of one or more natural persons with sufficient knowledge in the field of law and economics to discharge their obligation (§ 11 para. 2).

This provisions opens the possibility that persons standing in a close relationship with the founder are entrusted with the control of the foundation. The standard as to the relevant education was not set too high, intentionally so in order to enable compliance with the wishes of the founder. Persons with a close relationship to the founder will be anxious that the foundation will realize the founder's intentions. They will therefore act carefully. Nevertheless, the beneficiaries are authorised to request the reports of the control body from the foundation as well as from the control body itself (§ 11 para. 5).

#### **4.5. Restriction regarding Supervised Foundations**

The beneficiaries do not have any right of information in case of foundations supervised by the Register as the competent authority. This is the case with charitable foundations as well as private foundations put under supervision voluntarily (§ 12).

#### **5. Composition and Term of Office of the Foundation Council**

The old law does not contain any rule as to the composition of the foundation council whereas the new law stipulates that the foundation council has to be composed of at least two members.

Moreover, § 24 para. 3 sets forth that the term of office is three years whereby re-election is admissible. However, another term of office can be provided in the foundation documents, especially the unlimited term of office.

#### **6. Report on the Asset Situation**

Pursuant to § 26 of the new law all the foundations with no commercial activity (in case of commercial activity the foundation is required to observe the proper accounting procedures, cf. Art. 1045 et seq. PGR) have to keep proper records which are appropriate regarding their structure and to keep the documents to enable the examination of the activities of the foundation and the development of its assets.

The title of this provision is not a legal term to clarify that foundations without commercial activity are subject to a standard regarding the reporting on the asset situation which is lower than that stipulated in Art. 1045 et seq. PGR regarding the observation of proper accounting procedures. It has to be noted especially that § 26 does not stipulate a general obligation to keep accounts and draw up an annual balance sheet in case of foundations with no commercial activity.

#### **7. The Charitable Foundations**

##### **7.1. The Criterion of Preponderance**

§ 2 para. 2 of the new law makes it clear that a foundation is not only charitable if its activities serve purely charitable purposes, but also if the activities serve predominantly charitable purposes. The preponderance is measured by quantitative criteria. This means that it depends on whether the foundation council has to apply more assets for private or for charitable purposes.

Correspondingly, § 2 para. 3 sets forth that a foundation is a private foundation if its activities have to serve purely or predominantly private purposes. This provision is an expression of the liberal spirit also of the new foundation law. It emanates from that rule that regarding the charitable component of a predominantly private foundation the provisions regarding the charitable foundation are not applicable. This is justified because in these cases the charitable activities by the foundation council are also subject to the control by the beneficiaries through their right of information.

Of course the situation is different if the private and the charitable purposes do not stand in parallel relationship to each other, but rather in a consecutive one, e.g. if the private purpose is replaced by the charitable because of a certain event. From then on it is a charitable foundation and the respective provisions are applicable.

## **7.2. Definition of Charitable**

The new law contains a definition of charitable (Art. 107 para. 4a PGR). Pursuant to that definition purposes which help fostering the public benefit are charitable or public benefit purposes. This is especially the case if the activities of the foundation foster the public benefit in the charitable, religious, humanitarian, scientific, cultural, moral, social, sporting or ecological field, even if the activities are only in favour of a determined circle of persons.

The ecclesiastical foundation is no longer mentioned separately, it is included in the definition of charitable foundation.

## **7.3. Obligation to be Entered in the Register**

As opposed to the old law charitable foundations have to be entered in the Register without exception. They acquire legal personality only upon the entry.

## **7.4. Obligation to Appoint an Auditor**

Again as opposed to the old law the new law stipulates the obligation to appoint an auditor (§ 27 para. 1). The auditor is appointed by the court; the founder has the right to submit a proposal; in case he does not make use of his right it may be exercised by the foundation council.

In exceptional cases charitable foundations do not need an auditor (§ 27 para. 5), namely if the foundation funds are small or an exception seems appropriate for other reasons. The Government has the competence to issue an Executive Order regarding the requirements to be exempted from the obligation to have an auditor. The competence to decide on exceptions lies with the Registrar as supervisory authority.

In the course of enacting the new foundation law it was not concretized what small foundation funds means, but the Government indicated that the relation between the audit costs and the foundation funds should serve as criterion. Audit costs should not constitute a disproportionate burden for the foundation.

It remains to be awaited in which other cases an exception will be deemed appropriate. The Government only mentioned that the control by an auditor could be replaced by an other control instrument granting comparable correctness. However, it could e.g. also be thought of exempting foundations with specifically designated charitable institutions as beneficiaries because they could see to the proper administration of the foundation based on their information rights pursuant to §§ 9 et seq.

What remains unchanged is that the new law adheres to the principle of misuse supervision i.e. that supervisory measures are taken only in case irregularities should have occurred, as opposed to the principle of prudential supervision which means basically that all activities of the foundation are continuously supervised.

### **III. Scope of Application of the New Law**

#### **1. General Rule**

The new law applies on new foundations.

The scope of application of the new law is regulated in Art. 1 transitory provisions (TP). As a general rule it is set forth that the new foundation law applies only on new foundations, i.e. foundations formed from 1 April 2009 on. This means that the new law does not force the old foundations to adjust to the new law within a certain period of time.

There are, however, two exceptions to this rule. The first one pertains to the relation of the foundation to the Registrar, the second one pertains to "Foundation Governance" as the Government calls it.

#### **2. Modification Notification**

Art. 1 para. 2 and 3 TP provide for a smooth transition regarding the relation of the foundation to the Registrar. When there is a change of a fact about which the Registrar has to be notified pursuant to § 20 para. 3 (modification change), a notification with the contents of the Formation Notification (§ 20 para. 2) has to be deposited. Among others, this notification has to contain: name, domicile, object, date of formation of the foundation; personal data regarding the members of the foundation council; representative; confirmation that the beneficiaries or the class of beneficiaries have been defined.

It is advantageous for existing foundations that they can demand the return of deposited foundation documents from the Registrar when they have to submit such a Modification Notification.

#### **3. Foundation Governance**

Art. 1 para. 4 TP lists those provisions of the new law which are applicable also on existing foundations. The Government summarizes these provisions under the term "Foundation Governance".

**3.1. Private Foundations: Right of Information**

The provisions on the right of information (§§ 5–12) are applicable on all existing foundations which considerably enhances legal security regarding the important relation between the foundation and its beneficiaries.

This is also of advantage because Art. 1 para. 4 TP allows for a (later) establishment of a control body, thereby providing for a control of the activities of the foundation, but at the same time limiting the right of information of the beneficiaries. The right to establish a control body is vested with the founder; this right can also be exercised by the fiduciary in case of fiduciary formation of the foundation. In case of predecease or incapacity of the founder, the control body may be established by the foundation council. The control body has to be established until 13 September 2009.

**3.2. Charitable Foundations: Entry in the Register and Auditor Mandatory**

Foundation governance regarding charitable foundations means that they have to be entered in the Register until 13 September 2009 and have to be notified to the Registrar as supervisory authority. The court then appoints an auditor if no exception applies (cf. § 27 para. 5 and II. 7.4.).

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