The Austrian Privatstiftung.

Introduction.

There are many reasons for creating a Privatstiftung, a private foundation under Austrian law. First and foremost, it is usually the wish of the grantor to protect and maintain assets, followed by the desire to support family members and other persons close to the grantor. A further reason may be the risk of fragmentation and splitting up of family wealth due to succession, or the wish to have one’s name linked to a specific charity or scientific or social institution and achievement. A major advantage of the Austrian Private Foundation Act (Privatstiftungsgesetz) is the flexibility offered by this particular legal form in terms of civil law. The Privatstiftung can largely be tailored to the grantor’s specific requirements.

The following description of the Privatstiftung is based on the Austrian legal framework. It does not replace any legal or tax advice that may be required in individual cases. Any civil law and tax implications in the country of domicile resulting from the creation of an Austrian Privatstiftung by non-residents (e.g. considerations regarding inheritance and family law, inheritance tax and gift tax, income tax etc.) should be clarified by the grantor’s legal advisers and tax consultants before a foundation is created.

Definition of Privatstiftung.

The Austrian Privatstiftung (subsequently referred to as “Privatstiftung”) is a legal entity whose internal organisation and purpose are largely determined by the grantor. The purpose of the Privatstiftung is to carry out the intentions of the grantor in accordance with the foundation deed (and, if applicable, the respective appendix to such foundation deed) of the Privatstiftung (see below).

A Privatstiftung is a legal person. Its structure largely resembles that of a limited company, but it has beneficiaries instead of proprietors. It must be domiciled in Austria and entered in the Commercial Register.

The grantor and the grantor’s rights.

The grantor of a Privatstiftung may be one or more natural or legal persons. Such person or persons are vested with the status of grantor only when they create a Privatstiftung, and not by any subsequent legal acts. A (co-)grantor who is not yet of age may establish a Privatstiftung with the approval of a guardian appointed by a court and, if a parent is a co-grantor, a request must be submitted for a court to appoint a collision guardian.

A grantor may create a Privatstiftung during his lifetime (inter vivos) or by testament (mortis causa). If created by a will, a Privatstiftung may have only one grantor.

A grantor creates a Privatstiftung when he/she submits a declaration of establishment, in which he/she can make arrangements that give him/her the possibility to exert influence over the Privatstiftung. In practice, an arrangement of considerable importance is the right to amend the declaration of establishment after the Privatstiftung has been entered in the Commercial Register, and the right to revoke the Privatstiftung. If the latter is exercised, this leads to the dissolution of the Privatstiftung. A grantor’s right to structure the Privatstiftung may not be transferred and it does not pass to his legal successors (e.g. the heirs). Only natural persons may revoke a Privatstiftung.

Declaration of establishment and purpose of a Privatstiftung.

A Privatstiftung is founded by a declaration of establishment that is subject to certain rules and procedures. The Privatstiftung comes into legal existence when it is entered in the Commercial Register.

In the declaration of establishment the grantor declares that he/she wants to withdraw specific assets from his/her own assets, transfer those assets to a Privatstiftung as a legally independent entity, and earmark them for a special purpose. The declaration of establishment can define the purpose of the foundation in either general or precise terms. With a precise definition of the purpose of the foundation the grantor can determine the fortunes of the Privatstiftung long after his death. Apart from the limitations arising from the purpose of the Privatstiftung, the Austrian Private Foundation Act (Privatstiftungsgesetz) expressly and exhaustively restricts the activities of a Privatstiftung.

The grantor must endow the Privatstiftung with assets of at least EUR 70,000 when he/she creates the foundation. In addition to cash, contributions to a Privatstiftung may take the form of securities, equity interests, real estate, art collections, etc. Additional assets may be contributed to the Privatstiftung after it has been created.

Practice has shown that a Privatstiftung is created with assets of about three million euros or more.

Beneficiaries.

Beneficiaries may be specifically named in the foundation deed (and may be further specified in the appendix), or they may be defined in general terms. If a group of beneficiaries is defined so generally as to require persons to be named in specific cases, the grantor must appoint a body for this particular purpose (e.g. the grantor himself/herself or an advisory board). If no such body is named, this responsibility is exercised by the board of trustees, although if appropriate arrangements have been made in the declaration of establishment, the board of trustees may be bound by proposals made by other bodies (e.g. a family advisory board).

Since the Austrian Budget Supplementary Act 2011 (Budgetbegleitgesetz 2011) a Privatstiftung is required to promptly inform the competent tax office of the beneficiaries specified by the board of trustees. This is in addition to the already existing requirement to disclose the foundation deed and the appendix.

Under the Austrian Banking Act, banks are required to determine the identity of the beneficial owner(s) of a Privatstiftung. In this context, a beneficial owner within the meaning of the Austrian Banking Act is the beneficiary or beneficiaries of the distribution of assets out of the Privatstiftung and/or natural persons who control 25 per cent or more of the Privatstiftung’s assets. If the individual persons who are beneficiaries of the Privatstiftung have not
yet been named, “beneficial owner” shall be deemed to apply to the group of persons in whose interest the Privatstiftung is active or was originally created.

Board of Trustees.

The board of trustees must comprise at least three members, of which two must have their habitual domicile in an EEA country (EU member states including Iceland, Liechtenstein and Norway). The board of trustees manages and represents the Privatstiftung, while ensuring that it fulfils the purpose for which it was created. The activities of the board of trustees are guided by the intentions of the grantor as specified in the declaration of establishment.

The first board of trustees is named by the grantor or, under certain circumstances, by the curator (in the case of a testamentary foundation). New members of the board of trustees are subsequently appointed by the competent court unless other arrangements have been made in the declaration of establishment. The declaration of establishment may also contain provisions governing the appointment of persons to the board of trustees (e.g. members are appointed by the grantor, by an advisory board or by a co-opting procedure).

Beneficiaries, their spouses or partners, next of kin of beneficiaries and relatives as distant as third cousins, as well as legal persons are excluded from serving on the board of trustees.

Tax aspects of the Privatstiftung.

As a legal person under private law, a Privatstiftung is subject to corporate income tax. The manner in which a Privatstiftung is taxed depends on the type of private foundation. The following information refers only to a Privatstiftung that acts in its own interest and has complied with the disclosure requirements of the Austrian Corporation Tax Act (Körperschaftsteuergesetz). A Privatstiftung which does not meet the disclosure requirements is taxed as a corporate entity.

Tax aspects of the establishment of a Privatstiftung.

Gratuitous contributions of assets to a Privatstiftung as inter-vivos transactions are subject to a foundation entrance tax payable at a rate of 2.5%. However, the rate of 2.5% is only applied if all documents relating to the Privatstiftung’s internal organisation (the foundation deed and appendix in particular) as amended from time to time are disclosed to the competent Austrian tax office together with any fiduciary relationship by indicating the name of the actual grantor, by the date foundation entrance tax is due. Otherwise the foundation entrance tax rate increases to 25%.

A gratuitous contribution of Austrian land to a Privatstiftung is not subject to the foundation entrance tax. To compensate for the exemption from foundation entrance tax, the rate of land transfer tax increases by 2.5 percentage points from 3.5% to 6%. If foreign land is contributed to a Privatstiftung, neither a foundation entrance tax nor a land transfer tax is payable.

Current taxation of a Privatstiftung.

The Austrian Corporation Tax Act contains a number of special provisions applicable to Privatstiftungen which act in their own interest if a Privatstiftung meets the disclosure requirement pursuant to the Corporation Tax Act.

The income is calculated in accordance with the relevant provisions applicable to the type of income. In the case of specific forms of income in the non-business sphere of a Privatstiftung that acts in its own interest, the special provisions of the Corporation Tax Act provide for interim taxation at a rate of 25%, and for exemption from tax on specific income (see below). All other income not covered by these special provisions is subject to corporations tax at the standard rate of 25%.

Special provisions.

Dividends paid by an Austrian company or industrial cooperative society and received by a Privatstiftung that acts in its own interest are exempt from corporation tax in the hands of the Privatstiftung, irrespective of the proportion of the equity interest held.

If a Privatstiftung receives dividends from foreign companies domiciled in the European Union or in a country with which Austria has an agreement on comprehensive administrative aid assistance, such dividends are exempt from tax if the disclosure obligations are met. The exemption does not apply in cases where the dividend-paying company domiciled outside Austria is not subject to a tax comparable to Austrian corporation tax or if the rate of foreign corporation tax applied to the dividend-paying company is lower than 15%. In such cases the foreign dividends are subject to corporation tax (25%) at the level of the Privatstiftung; the foreign tax, which is deemed to be a prior charge on the dividend payment, may be credited against Austrian corporation tax at the level of the Privatstiftung.

If a Privatstiftung receives foreign dividends from a substantial international shareholding – essentially, an equity interest of at least 10% in a foreign company which is held for at least one year –, such dividend income is exempt from Austrian corporation tax, regardless of whether the dividend-paying company is domiciled in or outside the EU, and regardless of whether an agreement on comprehensive administrative aid assistance has been concluded with the country in which the dividend-paying company is domiciled. Tax exemption will be lost and the credit method will be applied only if the tax rate applied to the dividend-paying company in the country where it is domiciled is lower (rate of corporation tax lower than 15%) and if the foreign company’s income is predominantly “passive” (e.g. interest income, royalty income, income from the sale of shares in a company).

Interim taxation.

Specific income listed in the Austrian Corporation Tax Act is excluded from the general procedure to determine income and is now subject to interim taxation at a rate of 25%. The revision of taxation on income from capital significantly broadened the scope of income from capital that is now subject to interim taxation (capital gains tax).
The purpose of interim taxation is to apply advance taxation to specific income ahead of the taxation of later distributions to beneficiaries, thereby reducing the tax deferral effect.

Interim taxation need not be applied to the extent that distributions to the beneficiaries of the Privatstiftung are directly made in the year in which income that is subject to interim tax is received.

**Taxation of distributions to beneficiaries.**

In most cases – if distributions are made to the personal assets of natural persons – such distributions represent capital investment income, with Austrian capital yield tax being withheld and no further tax being levied on such distributions. The Austrian Gift Reporting Act 2008 (Schenkungsmeldegesetz) has made it possible for a Privatstiftung, subject to the fulfilment of certain conditions, to make a tax-neutral repayment of assets which were contributed to the Privatstiftung.

Distributions to persons who are not domiciled in Austria and do not have their habitual place of abode in Austria are subject to limited tax liability.

Double taxation agreements may lead to restrictions on tax liability which exists under Austrian national law for distributions to non-resident taxpayers. According to the prevailing view, and in line with practice of the Austrian tax authorities, distributions by an Austrian Privatstiftung are to be classified as “other income” within the meaning of the OECD Model Tax Convention, with the beneficiary’s country of residence having sole taxing power. Most of the Austrian double taxation agreements follow the OECD Model Tax Convention. For this reason, Austria has no taxation right for distributions by a Privatstiftung to persons resident in most countries with which Austria has double taxation agreements. In such cases, relief from Austrian capital yield tax may be obtained at source if evidence is provided that the requirements for tax relief pursuant to the double taxation agreement are met (certificate of residence issued by the tax authorities of the country with which Austria has a double taxation agreement). It should be pointed out in this connection that not all double taxation agreements concluded by Austria follow the OECD Model Tax Convention and thus the taxation in Austria of distributions to countries with which Austria has double taxation agreements is not automatically excluded. Whenever distributions are made to beneficiaries resident in a country with which Austria has a double taxation agreement, the tax treatment of the distribution pursuant to the double taxation agreement should be checked on a case-by-case basis.

**Disclaimer.**

The representations cannot replace legal or tax advice tailored to individual needs. If you have any questions about your personal situation, we highly recommend that you consult a lawyer and/or tax consultant prior to the establishment of a Privatstiftung. While the above information is based on careful research and reliable sources, we do not assume any responsibility for the completeness or accuracy of the information provided. UniCredit Bank Austria AG shall not be liable for the content of these representations.

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