

Comparison between the forthcoming private wealth foundation and the philanthropic foundation in Luxembourg



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Many years after the introduction of the Philanthropic Foundation¹, the draft bill n°6595 dated July 22nd, 2013 presents the private wealth foundation (the "Private Foundation"). Although the two vehicles share the same name of foundation, they actually serve very different purposes, which result in two specific set of distinct rules on their organization and legal framework.

This article aims therefore at differentiating the respective characteristics of each kind of foundation and highlighting their compatibility.

Different purpose and different beneficiaries

According to the Draft Bill, the Private Foundation is a family estate planning vehicle: it principally aims at completing the range of wealth management instruments already in force.

This clearly differs from the Philanthropic Foundation, which serves a public interest, such as social, educational or charitable aim.

As a consequence, a Philanthropic Foundation is not allowed to transfer assets to specific persons or to allocate them back to the founders. It is solely allowed to allocate its assets to the implementation of the philanthropic purpose for which it was founded, or, in case of liquidation, to distribute them to another Philanthropic Foundation. In the contrary, managing and transferring assets to specific persons is exactly what a Private Foundation does.

There might sometimes be a tiny line between the two, but the distinction between private benefit and general purposes should avoid any confusion. As an example concerning the Private Foundation, we may mention a founder who wants to financially support a family member with a rare illness including after the founders' death. In that case, the founder thus supports a specific beneficiary. In the same context, where the founder wants to help and financially support people suffering from that rare illness **in general**, then the Philanthropic Foundation is the appropriate vehicle.

Conditions at incorporation

As with most other legal entities, the incorporation of the foundations is subject to an authentic act², i.e. enacted in front of a notary.

Furthermore, whereas a Private Foundation may be established for a limited or unlimited duration, the Philanthropic Foundation is always set up for an unlimited period (with the exception of foundations set up under the aegis of an umbrella foundation, which can also be established for a limited duration).

Moreover a difference exists in terms of contribution. A Private Foundation needs a minimal capital of 50.000 EUR. Such a requirement is currently not necessary for a Philanthropic Foundation, although its initial capital shall be in line with its goals. Besides, while a Private Foundation may detain cash or assets in kind, both foundations may detain movable or immovable assets, but the philanthropic vehicle is limited to holding immovable assets only for the purpose of its activity.

Allocation of economic rights

A Private Foundation is able to issue certificates to third parties, which give them a right to obtain economic benefits from the foundation. The particular aim is to separate the economic ownership of the assets (entrusted to the holders of the certificates) from the legal ownership of the assets (retained by the Private Foundation).

¹ Law of 21 April 1928 on non-profit associations and foundations (the "1928 Law")

² Testament as well for philanthropic foundations (article 27 of the 1928 Law)

Since the Philanthropic Foundation has however a non-profit making purpose, certificates may not be issued and all income generated by its assets shall remain within the Philanthropic Foundation to serve its public goal.

Privacy

The fact that the Private Foundation is a family estate planning instrument, while the Philanthropic Foundation has a public interest purpose has an influence on the respective privacy or transparency of the two vehicles.

Fiscal point of view

The tax regime of a philanthropic vehicle is very advantageous since it is exempted from paying taxes and gifts made to it entitle donors to a tax rebate. This is not the case for the Private Foundation, which should not be considered as a tax free entity or as a tax planning tool. It is subject to corporate income tax on its profit though it benefits from certain tax advantages available to other forms of companies.

Are both foundations compatible?

In order to examine the compatibility between the two types of foundations, the example on supporting a disabled person above could help. It could be that the founder of a Private Foundation securing the financial assistance to a disabled person would like that the foundation provides ancillary contributions to a Philanthropic Foundation that serves general interests in the context of the same disability or rare illness, or that after the death of the disabled person so supported, the remaining assets of the Private Foundation are allocated to such a Philanthropic Foundation.

In fact, the Private Foundation can allocate a portion of its assets or profits to a Philanthropic Foundation or be the founder of a Philanthropic Founda-

tion. The combination is possible, and it is foreseen under the Draft Bill.

Nevertheless, the tax issue is problematical. In the current proposal the Private Foundation would likely have to pay, depending on the case at hand, a donation right or a proportional registration duty amounting up to 40% of the value of the assets allocated to a Philanthropic Foundation. In addition, it would not benefit from the favourable tax treatment that would otherwise be

available to the founder in case of a direct donation made by him to such a Philanthropic Foundation.

To summarize, both structures serve a purpose in the Luxembourg financial market, depending on the aim. A Private Foundation is most suitable for the management and administration of a family estate, whereas a Philanthropic Foundation would be the preferred structure in order to pursue in the long-term a charitable aim.

Private Foundation	Philanthropic Foundation
Purpose of managing and administering family assets for the benefit of one or more beneficiaries or for the benefit of one or more goals	Philanthropic / social / religious aim General interest
Not submitted to the control of the Ministry of Justice – not regulated	Supervised by the Ministry of Justice
In the interest of one or several beneficiaries or for one or more purposes other than those reserved to the Philanthropic Foundation	Non-profit purpose only
Subject to corporate income tax, tax advantages	No taxation
Contributions from a limited group of persons	Contributions from any individual or legal entity
Allocations of certain economic rights to third parties (certificates) – possibility to retransfer assets to the founder	No allocation of assets to specific persons or back to the founder(s)
Limited / unlimited duration	Unlimited duration
Minimum contribution EUR 50,000 – cash or kind / movable or immovable assets	Currently no requirement of a minimal contribution, but shall be in line with its corporate object. Contributions in cash or kind / hold immovable property only for the purpose of its activities
Legal personality as from the authentic act	Legal personality when statutes are approved by grand-ducal decree
No requirements to file annual accounts nor to publish them	Obligation to file annual accounts with the Luxembourg Trade and Companies Register