

Factsheet on notification and reporting obligations of a foundation subject to supervision in the event of dissolution, termination and transfer of registered domicile

1. General legal situation

Liechtenstein Foundations Act (Liechtenstein Law Gazette LGBl. 2008 No. 220), which came into force on 1 April 2009, applies to foundations existing at the time of the entry into force of the new provisions only to the extent that this is expressly ordered by the transitional provisions (Art. 1 para. 1 in conjunction with para. 4 of the transitional provisions). The applicability of the new foundation law thus adheres to the principle “old law for old foundations, new law for new foundations”.

Accordingly, provisions relating to the dissolution and termination of the foundation pursuant to Art. 568 and Art. 569 of the old Liechtenstein Persons and Companies Act (“PGR old”) apply to foundations already in existence on 1 April 2009, and the provisions of Art. 552 §§ 39 and 40 PGR apply to foundations established after the entry into force of the new foundation law.

Art. 552 §§ 39 and 40 PGR largely correspond in content to the old provisions under Art. 568 and Art. 569 PGR. There is only a difference with regard to competence. While Art. 568 and Art. 569 PGR old named the government as the supervisory authority, competence now lies uniformly with the Foundation Supervisory Authority (Stiftungsaufsichtsbehörde – “STIFA”). This means that both old-law and new-law foundations subject to supervision must fulfil the following notification obligations exclusively vis-à-vis STIFA in the event of dissolution, termination and transfer of registered domicile.

The following statements apply mutatis mutandis to establishments organised under foundation law that serve exclusively common-benefit purposes and are subject to STIFA supervision (Art. 551 para. 2 in conjunction with Art. 552 §§ 27, 29 and 39 PGR). The same applies to establishments organised under foundation law that pursue private-benefit purposes and have voluntarily placed themselves under the supervision of STIFA.

2. Dissolution of a foundation (Art. 568 para. 3 PGR old/Art. 552 § 39 para. 3 PGR)

2.1. Duty to report dissolution resolutions

If the foundation council of a foundation under STIFA supervision has adopted a dissolution resolution, the foundation council must

- inform STIFA about the dissolution resolution.

This duty applies both to foundations that are subject to the obligation to appoint an auditor as well as to those foundations that are exempt from the obligation to appoint an auditor.¹

¹ Also see “Factsheet on exemption from the obligation to appoint an auditor for common-benefit foundations subject to supervision”.

Within the context of the notification of the dissolution of a foundation subject to supervision,

- the date of the foundation council resolution as well as
- the grounds for the dissolution (Art. 568 para. 2 (1) to (4) PGR old for foundations under the old law / Art. 552 § 39 para. 2 (1) to (4) PGR in the case of foundations under the new law)

must be reported to STIFA. It is not necessary to enclose the resolution. STIFA will acknowledge receipt of the notification to the foundation and will draw attention to the further procedure in the confirmation of receipt.

2.2. Presentation of audit report in the case of foundations that are subject to the obligation to appoint an auditor

Once the resolution to dissolve the foundation has been adopted, and following the completion of the liquidation, although before a request is submitted to the Commercial Register to delete the foundation,

- the report of the auditor pursuant to Art. 552 § 27 para. 4 PGR must be submitted to STIFA,

which has to contain information on whether the foundation assets have been managed and used during the current financial year, taking into account the foundation activities in the course of the liquidation proceedings (distribution to the ultimate beneficiary), in accordance with its purpose.²

If the report of the auditor to be drawn up pursuant to Art. 552 § 27 para. 4 PGR therefore covers the period during which the liquidation of the foundation was completed on the basis of a validly adopted dissolution resolution, the auditor must make express reference to this fact in its report for the attention of STIFA. During the course of this audit, the auditor shall in addition verify the legal validity of the dissolution resolution.

On the basis of the audit, the auditor must confirm the following to STIFA:

“The assets of the foundation have been distributed in accordance with the foundation purpose, meaning that the liquidation has been completed.”

After taking note of this last report of the auditor, STIFA shall inform the foundation whether there are any objections to the application for the deletion of the foundation from the Commercial Register.

If no objections are raised by STIFA, the application for deletion of the foundation may be submitted to the Commercial Register. A copy of the letter from STIFA stating that there are no objections to the deletion must be attached to this request. In this conjunction, it should be noted that this letter from STIFA loses its validity after a period of six months and for this reason the deletion process should proceed expeditiously.

2.3. Inspections conducted by STIFA in the case of foundations that are exempted from the obligation to appoint an auditor

Pursuant to Art. 552 § 29 para. 3 PGR in conjunction with Art. 4 para. 2 StRV, in the case of foundations that are exempted from the obligation to appoint an auditor³, STIFA as a rule exercises the inspection itself and by this means verifies that the management and use of the foundation assets are in accordance with the purpose, in place of the auditor.

² Costs incurred by the foundation as a result of the liquidation of the foundation, e.g. for the preparation of the final report of the auditor pursuant to Art. 552 § 27 para. 4 PGR, registry fees etc., must be taken into account accordingly by the responsible foundation council in conjunction with its distribution activities or the dissolution and termination of the foundation.

³ Also see “Factsheet on exemption from the obligation to appoint an auditor for common-benefit foundations subject to supervision”.

Once the resolution to dissolve the foundation that is exempted from the obligation to appoint an auditor has been adopted, and following the completion of the liquidation, although before a request is submitted to the Commercial Register to delete the foundation,

- the foundation documents must be submitted to STIFA for inspection pursuant to Art. 552 § 29 para. 3 sentence 3 PGR in conjunction with Art. 4 para. 2 StRV.

STIFA shall inspect whether the foundation assets have, during the financial years under audit⁴, and taking into account the foundation activities in the course of the liquidation proceedings (distribution to the ultimate beneficiary), been managed and used in accordance with its purpose.⁵ During the course of this inspection, STIFA shall in particular verify the legal validity of the dissolution resolution.

On the basis of this inspection, STIFA shall inform the foundation whether there are any objections to the application for the deletion of the foundation from the Commercial Register.

If no objections are raised by STIFA, the application for deletion of the foundation may be submitted to the Commercial Register. A copy of the letter from STIFA stating that there are no objections to the deletion must be attached to this request. In this conjunction, it should be noted that this letter from STIFA loses its validity after a period of six months and for this reason the deletion process should proceed expeditiously.

2.4. Notification that termination has been completed (deletion of the foundation)

Once the termination (deletion) has been completed, the liquidator must inform STIFA (enclosing a Commercial Register extract)⁶

- that the foundation has been terminated.

In this case, the legal representative also has the power of notification. This requirement applies equally to foundations that are subject to the obligation to appoint an auditor as well as to those that are exempt from the obligation to appoint an auditor.

2.5. Special case: Opening of bankruptcy proceedings or rejection of a bankruptcy petition on the grounds of an insufficiency of assets as grounds for dissolution (Art. 552 § 39 para. 1 (1) and (2) PGR)

The foundation council must adopt a resolution to dissolve the foundation as soon as it becomes apparent that the purpose of the foundation can no longer be achieved due to an insufficiency of assets. Careful management and administration on the part of the foundation council should therefore ensure that, particularly in the case of common-benefit foundations, there is no need to file for bankruptcy proceedings.

If the foundation council nevertheless files a petition to declare bankruptcy on the assets of a foundation supervised by STIFA, the auditing and reporting obligations of the auditor pursuant to Art. 552 § 27 para. 4 PGR and of STIFA pursuant to Art. 552 § 29 para. 3 PGR remain in force.

Within this context, STIFA also states that the auditor is often faced with the problem that the foundation can no longer pay the costs of the audit on account of an insufficiency of assets. If the

⁴ Pursuant to foundation law, the first inspection by STIFA shall cover the financial year that started after 31 December 2008 as well as all subsequent financial years to date (*analogous application of Art. 1 para. 5 transitional provisions (ÜB) to the new foundation law, LGBl. 2008 No. 220 in the version LGBl. 2009 No. 247). The following inspections by STIFA are, as a rule, conducted at 3-year intervals. Also see "Factsheet on exemption from the obligation to appoint an auditor for common-benefit foundations subject to supervision".

⁵ Costs incurred by the foundation as a result of the liquidation of the foundation, such as STIFA fees for inspecting the accounts, registry fees etc., must be taken into account accordingly by the responsible foundation council in conjunction with its distribution activities or the dissolution and termination of the foundation.

⁶ In the case of a private-benefit foundation that is voluntarily subject to STIFA supervision, notification without an official certificate is sufficient.

auditor, as creditor of the foundation, suffers a loss due to the fact that distributions were made contrary to Art. 552 § 37 para. 2 PGR, a claim for compensation may be brought against the members of the foundation council.⁷

3. Transfer of the registered domicile of a foundation abroad - analogous obligations vis-à-vis STIFA

3.1. Duty to inform about the resolution concerning transfer of registered domicile

In analogous application of the relevant provisions concerning the dissolution of a foundation subject to supervision, before a request is submitted to the Commercial Register to transfer the registered domicile,⁸

– STIFA must first be informed about the adopted resolution to transfer the registered domicile.

This duty applies both to foundations that are subject to the obligation to appoint an auditor as well as to those foundations that are exempt from the obligation to appoint an auditor.

When notifying STIFA of the transfer of the registered domicile, reference must be made to the date of the resolution to transfer the registered domicile. It is not necessary to enclose the resolution. STIFA will acknowledge receipt of the notification to the foundation and will draw attention to the further procedure in the confirmation of receipt.

3.2. Criteria for the granting of authorisation to transfer the registered domicile by the Office of Justice (Amt für Justiz - "AJU") or STIFA

Art. 234 PGR establishes that making a domestic legal entity subject to foreign law and thus transferring the registered domicile abroad without dissolution is permissible only with the approval of the AJU. In this conjunction, the AJU or STIFA respectively must, in addition to the requirements for transferring the registered domicile pursuant to Art. 234 para. 2 PGR, safeguard the public interest in the protection of the law, function and continued existence of common-benefit foundations in particular.⁹ For this reason, the following additional criteria must be met when transferring the registered domicile abroad:

3.2.1 No registered domicile transfer during ongoing supervisory proceedings

According to established jurisprudence, there is no unrestricted right to transfer the registered domicile of a foundation subject to supervision during ongoing supervisory proceedings.¹⁰ An unrestricted right to transfer the registered domicile of a foundation involved in foundation supervisory proceedings would mean that the foundation or its foundation council affected by the supervisory proceedings could influence the ongoing supervisory proceedings by adopting a resolution on the transfer of the registered domicile abroad and could directly determine the end of the domestic supervisory proceedings by transferring the registered domicile. This would amount to unacceptable "governance shopping".

3.2.2 Equivalent foundation supervision under foreign law and no unrestricted possibility to change the purpose

Liechtenstein foundation law attaches particular importance to the protection of the law, function and continued existence of foundations.¹¹ Authorisation to transfer the registered domicile is therefore only granted if the foundation continues to exist under the foreign law. In the case of

⁷ Schauer in Schauer (Ed.), Kurzkommentar zum liechtensteinischen Stiftungsrecht, Art. 552 § 37 Recital 5.

⁸ Also see the "Factsheet on the transfer of registered domicile from and to the Principality of Liechtenstein" on the online desk of the Office of Justice.

⁹ Decision of the OGH on 10 HG.2008.32 of 13 April 2012 (LES 2012, 97).

¹⁰ Judgement of the StGH 2012/70 of 30 October 2012 (LES 2012, 97).

¹¹ Cf. LES 2006, 179 f; LES 2007, 67; LES 2010, 22.

foundations supervised by STIFA, this continued existence is ensured only if adequate foundation supervision exists abroad¹² and if it is ensured that a change of purpose under foreign law can be realised only subject to the analogous application of the provisions of Art. 552 §§ 31 or 33 PGR respectively.¹³

In accordance with established practice, the foundation council must provide the auditor with relevant evidence (e.g. confirmation from the foreign supervisory authority) during the course of the audit in the case of foundations subject to the obligation to appoint an auditor, or must provide this to STIFA in the case of foundations exempt from the obligation to appoint an auditor.

3.2.3 Presentation of the audit report in the case of foundations subject to the obligation to appoint an auditor or inspection by STIFA in the case of foundations that are exempted from the obligation to appoint an auditor

The reporting obligation by the auditor of foundations that are subject to the obligation to appoint an auditor¹⁴ and the inspection obligation by STIFA in the course of foundations that are exempted from the obligation to appoint an auditor¹⁵ before an application is made to the Commercial Register to transfer the registered domicile exists likewise for foundations that have adopted a resolution to transfer their registered domicile.

The auditor or STIFA respectively must examine whether the assets of the foundation have been managed and used in accordance with its purposes during the current financial year or during the current audit period and whether the transfer of the registered domicile adopted by the foundation council is permissible in accordance with the foundation documents. In addition, the auditor or, in the case of foundations exempt from the obligation to appoint an auditor, STIFA shall check whether the conditions set out in 3.2.1 and 3.2.2 have been met.

On the basis of its audit, the auditor must confirm the following to STIFA:

“We confirm that the foundation council has adequately demonstrated the requirements for the transfer of the registered domicile and that these requirements have been met in accordance with PGR and STIFA criteria.”

After taking note of the last report of the auditor or after STIFA has checked the foundation that is exempted from the obligation to appoint an auditor, STIFA shall inform the foundation whether there are any objections to the application to transfer the registered domicile to the Commercial Register.

If no objections are raised by STIFA, the application for transfer of the registered domicile may be submitted to the Commercial Register. A copy of the letter from STIFA stating that there are no objections to the transfer of the registered domicile must be attached to this request. In this conjunction, it should be noted that this letter from STIFA loses its validity after a period of six months and for this reason the transfer of the registered domicile should proceed expeditiously.

¹² In the case of a deposited private-benefit foundation that is voluntarily subject to STIFA supervision, the equivalent foundation supervision is not a requirement for a registered domicile transfer.

¹³ The requirements of equivalent foundation supervision and the limited possibility of changing the purpose apply analogously in the event that the foundation assets are distributed (transferred) to another legal entity with the same purpose abroad, having the effect of actively liquidating and terminating the Liechtenstein common-benefit foundation. Irrespective of this, the appropriate use of funds and their conformity with the provisions of the foundation documents must be ensured here as elsewhere.

¹⁴ Also see further information under 2.2. of this Factsheet.

¹⁵ Also see further information under 2.3. of this Factsheet.

3.3. Notification that the registered domicile has been transferred

Once the registered domicile has been transferred, the foundation council must then, enclosing a Commercial Register extract detailing the termination of the foundation,¹⁶

- report this to STIFA.

In this case, the legal representative also has the power of notification. This requirement applies equally to foundations that are subject to the obligation to appoint an auditor as well as to those that are exempt from the obligation to appoint an auditor.

¹⁶ In the case of a deposited private-benefit foundation that is voluntarily subject to supervision, notification without an official confirmation is sufficient.