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## **Factsheet on the procedure for the registration of foundations subject to supervision in the Commercial Register and for placing them under the supervision of the Foundation Supervisory Authority**

### **1. General**

Exclusively and predominantly common-benefit foundations are by law subject to the supervision of the Foundation Supervisory Authority (STIFA). In addition, private-benefit foundations can voluntarily subject themselves to STIFA supervision based on a provision in the foundation deed.

Also establishments organised similar to a foundation that serve exclusively common-benefit purposes are subject by law to STIFA supervision (Art. 551 para. 2 in conjunction with Art. 552 §§ 27 and 29 PGR). In addition, establishments organised similar to a foundation that pursue private-benefit purposes have the option of voluntarily placing themselves under STIFA supervision.

Regarding the procedure for being placed under STIFA supervision there are practical questions, which are addressed below.

### **2. Common-benefit foundations**

#### **2.1 Duty of notification on the basis of the transitional provisions (TP) of the new foundation legislation**

Pursuant to Art. 1 para. 4 second sentence TP (LGBl. 2008 No. 220), the members of the foundation council had to notify STIFA of common-benefit foundations existing at the time of the entry into force of the new foundation legislation on 1 April 2009 (foundations under the old legislation) by 1 April 2010<sup>1</sup>, submitting an extract from the Commercial Register.

#### **2.2 Abolition of the duty of notification for foundations subject to supervision after 1 April 2009**

There is no duty of notification for foundations under the old legislation that only become subject to supervision after 1 April 2009 (also see the constellations described under 5.) or common-benefit foundations that are established after 1 April 2009.

In the absence of a duty of notification, it is necessary for STIFA to become aware of the existence of a foundation subject to supervision by other means in order to be able to carry out its supervisory activities. This is ensured as follows:

Common-benefit foundations must be entered in the Commercial Register pursuant to Art. 552 § 14 para. 4 PGR and only acquire the right of personality once they have been registered.

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<sup>1</sup> The 6-month deadline set out in LGBl. 2008 No. 220 was extended to 12 months by means of LGBl. 2009 No. 247, meaning that the deadline ended on 1 April 2010.

Likewise, there is a duty to register if the purpose of the foundation changes in such a way that a duty to register arises (Art. 552 § 19 para. 5 PGR).<sup>2</sup>

As soon as the foundation has been entered in the Commercial Register, STIFA will be informed internally about the registration in the Office of Justice (AJU). If the purpose shown in the register extract indicates a predominantly common-benefit purpose, the foundation is subjected to the supervision of STIFA. If, on the other hand, it cannot be clearly determined from the declared purpose whether the foundation is predominantly common-benefit and thus subject to supervision, STIFA will contact the foundation in question and subject it to its supervision, taking into account the information provided by the representative of the foundation.

The foundation will subsequently receive written confirmation from STIFA that the foundation is subject to supervision of STIFA pursuant to Art. 552 § 29 PGR. At the same time, STIFA will arrange for “Foundation Supervisory Authority” to be entered in the “Supervisory Authority” field in the Commercial Register. The foundation is not required to apply for this.

With regard to the appointment of an auditor, reference is made to the “Factsheet on the procedure for appointing an auditor”.

### **2.3 Duty of notification of the foundation council in the case of foundations that have already been voluntarily entered in the Commercial Register**

If, in the case of a previously private-benefit foundation that is voluntarily registered, the purpose changes in such a way that the foundation now pursues (predominantly) common-benefit purposes, the foundation council must inform STIFA of the fact that it is a common-benefit foundation, since in such cases, as it had already been entered in the Commercial Register, STIFA would not become aware of the new common-benefit foundation.

Common-benefit foundations are, however, *ex lege* subject to STIFA supervision (Art. 552 § 29 para. 1 PGR). Pursuant to Art. 552 § 19 para. 3 fig. 9 PGR, this fact must be entered in the Commercial Register. Since the existing entries in the Commercial Register no longer correspond with the facts in such a case, the members of the foundation council, as persons obliged to perform the registration, therefore have a duty to notify STIFA (also see Art. 965 and Art. 968 PGR). The latter will then arrange the corresponding entry in the Commercial Register.

With regard to the appointment of an auditor, reference is made to the “Factsheet on the procedure for appointing an auditor”.

## **3. Private-benefit foundations that voluntarily place themselves under the supervision of STIFA**

If a private-benefit foundation is subject to STIFA supervision by virtue of a provision in the foundation deed, the foundation council must notify STIFA of this fact by submitting the foundation deed, irrespective of whether the foundation is registered in the Commercial Register or a notification of formation has been filed with the Commercial Register (deposited foundations).

STIFA then examines the provisions of the foundation deed with regard to voluntary placement under its supervision and subsequently confirms in writing that the foundation is under the supervision of STIFA. At the same time, STIFA will arrange for “Foundation Supervisory Authority” to be entered in the “Supervisory Authority” field in the Commercial Register, or in the Official Certificate (*Amtsbestätigung*) respectively. The foundation is not required to apply for this.

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<sup>2</sup> In this event, the members of the foundation council are obliged to apply for registration of the foundation in the Commercial Register within 30 days.

With regard to the appointment of an auditor, reference is made to the “Factsheet on the procedure for appointing an auditor”.

#### 4. Establishments

Establishments organised similar to a foundation that serve exclusively common-benefit purposes and private-benefit establishments organised similar to a foundation that voluntarily place themselves under STIFA supervision must be notified to STIFA by the board of directors. In the case of voluntary supervision, the statutes must be enclosed.

In the case of establishments that voluntarily place themselves under STIFA supervision, STIFA examines the provisions of the statutes with regard to the voluntary placement under supervision. In the case of both exclusively common-benefit establishments and establishments voluntarily subject to supervision, STIFA confirms to the establishment in writing that the establishment is under the supervision of STIFA. At the same time, STIFA will arrange for “Foundation Supervisory Authority” to be entered in the “Notes” field in the Commercial Register. The establishment is not required to apply for this.

With regard to the appointment of an auditor, reference is made to the “Factsheet on the procedure for appointing an auditor”.

#### 5. Start of the duty of supervision

In the case of foundations that pursue a common-benefit purpose from the time of their incorporation, the duty of supervision begins with the registration of the common-benefit foundation in the Commercial Register, since common-benefit foundations only acquire the right of personality once they have been registered (Art. 552 § 14 para. 4 PGR).

In the case of foundations that change their purpose from private-benefit to common-benefit after they have been incorporated or that are voluntarily placed under supervision, it is necessary to determine the date on which supervision by STIFA starts. The following remarks show different constellations and also apply mutatis mutandis to establishments that are subject to supervision.

##### 5.1 Death of private-benefit beneficiaries

If the foundation documents provide that initially private-benefit beneficiaries and, if there are no longer any private-benefit beneficiaries, common-benefit beneficiaries are to benefit from the foundation, the foundation shall become common-benefit through the death of the last private-benefit beneficiary and thus through the cessation of the private-benefit purpose.

The foundation shall become subject to supervision on the date of death of the last private-benefit beneficiary, irrespective of when the foundation council becomes aware of this and irrespective of the date of entry in the Commercial Register of the previously deposited foundation.

<b>Start of the duty of supervision</b>	<b>Date of death of the last private-benefit beneficiary</b>
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##### 5.2 Waiver of the benefit

The pecuniary rights arising out of a benefit are rights that may be waived.<sup>3</sup> If the foundation documents provide that initially private-benefit beneficiaries and, after they cease to be private-benefit beneficiaries, common-benefit beneficiaries are to benefit from the foundation, the

<sup>3</sup> Lorenz, Pflichten des Stiftungsrates bei Wegfall von Begünstigten, in Schurr (Ed.), Zivil- und gesellschaftsrechtliche Fragen zur Führung und Abwicklung von Stiftungen (2015) 102.

foundation shall become common-benefit through the legally-valid waiver of the last private-benefit beneficiary and thus through the cessation of the private-benefit purpose.

In the event of the issue of a waiver, the foundation council must assess whether this waiver was validly declared. In particular, it must be clarified whether the beneficiary was legally competent when he or she issued the waiver, whether he or she was in error or whether improper influence was exerted upon him or her. The duty of supervision shall commence from the date on which the waiver was validly declared.

<b>Start of the duty of supervision</b>	<b>Date of the legally valid waiver of the last private-benefit beneficiary</b>
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### 5.3 Change due to the occurrence of a time limit or a condition

Foundations may specify in the foundation documents a certain point in time (time limit) from which the foundation is to pursue a common-benefit purpose. Also, conditions may be laid down on the basis of which the purpose pursued is to be private-benefit or common-benefit.<sup>4</sup> In these cases, the duty of supervision shall begin with the occurrence of the specific time or condition.

<b>Start of the duty of supervision</b>	<b>Date of the time specified in the foundation documents or of the occurrence of the condition</b>
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### 5.4 Mixed foundation purposes

Foundations may pursue a mixed foundation purpose (Art. 552 § 2 PGR). If the foundation council has the discretion to decide the extent to which private-benefit and common-benefit purposes are to be pursued, it is also up to the foundation council to assess whether the foundation is predominantly common-benefit and thus subject to supervision or predominantly private-benefit.<sup>5</sup> In case of doubt, such foundations must be considered common-benefit foundations (Art. 552 § 2 para. 3 final sentence PGR). This weighting may also change during the existence of a foundation.

<b>Start of the duty of supervision</b>	<b>Date of the change of the weighting from predominantly private-benefit to predominantly common-benefit</b>
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### 5.5 Forfeiture

Beneficiaries may be deprived of their rights on the grounds of forfeiture, either because the statutes or the law provides for forfeiture. A consequence of forfeiture can only occur pursuant to the statutes if the contesting party was aware of the forfeiture clause. The burden of proof lies on the party asserting this clause. The duty of supervision shall commence on the date on which the forfeiture conditions are met and thus (predominantly) common-benefit purposes are pursued.

<b>Start of the duty of supervision</b>	<b>Date on which the forfeiture condition is met</b>
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### 5.6 Change of purpose

<sup>4</sup> Art. 552 § 5 Para. 1 PGR: "... unconditionally or subject to certain conditions or requirements, limited or unlimited ... at any time during the legal existence of the foundation...".

<sup>5</sup> Rohrer-Drexel, Privatnützige oder gemeinnützige Zweckausrichtung einer liechtensteinischen Stiftung und deren Auswirkung auf die Foundation Governance, 43.

The change of the statutory purpose, which was determined by the founder and “solidifies” after the establishment of the foundation, is possible only within narrow limits.<sup>6</sup> On the date of the resolution that the foundation henceforth pursues common-benefit purposes, the foundation shall become *ex lege* subject to supervision.

<b>Start of the duty of supervision</b>	<b>Date of the resolution of the foundation council or of the order of the Princely Court of Justice on the change of purpose</b>
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### 5.7 Voluntary placement under supervision

If the foundation council of a private-benefit foundation passes the legally valid resolution that the foundation shall henceforth be placed voluntarily under STIFA supervision and if this is included in the statutes (foundation deed), the foundation shall be subject to STIFA supervision from the date of the statutes containing the provision on voluntary supervision (Art. 552 § 29 para. 1 second sentence PGR).

<b>Start of the duty of supervision</b>	<b>Date of the statutes with which voluntary supervision is implemented</b>
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## 6. Special case: Common-benefit use of the entire residual assets

In those cases in which the foundation documents stipulate that immediately after the fulfilment of the private-benefit purpose of the foundation, the remaining assets are to be distributed entirely for common-benefit purposes and the foundation is subsequently to be dissolved pursuant to Art. 552 § 39 para. 2 fig. 2 PGR, the question arises as to the extent to which the foundation is subject to the provisions applicable to common-benefit foundations.

The efforts associated with the entry in the Commercial Register, the appointment of the auditor and the supervision are essentially regarded as disproportionately high in relation to the remaining short life of the foundation. On the other hand, it is important to note that the absence of controlling beneficiaries could cause a control vacuum that should under all circumstances be avoided within the context of *foundation governance* and the credibility of the foundation supervision.<sup>7</sup>

In this context, STIFA pursues a pragmatic approach. Foundations that distribute the remaining assets entirely for common-benefit purposes once there is no longer a private-benefit beneficiary, i.e. that are not designed for a further longer lifespan, must be notified to STIFA, enclosing the relevant foundation documents (statutes, by-laws, etc.). STIFA then imposes a reasonable deadline<sup>8</sup> on the foundation in question, within which the residual distribution is to be performed and demonstrated to STIFA. The appointment of an auditor and entry in the Commercial Register may be waived, insofar as the foundation has not anyway already been registered.

Following receipt of the documents proving that the residual distribution has been made and the notification of the resolution to dissolve<sup>9</sup>, STIFA shall inform the foundation whether there are any objections to the filing of the notice of termination or the deletion of the foundation with the Commercial Register. If no objections are raised by STIFA, the application for deletion of the

<sup>6</sup> Change of purpose by the founder, if he has reserved this right (Art. 552 § 30 PGR); change of purpose by foundation governing bodies or the Princely Court of Justice (Art. 552 §§ 31 and 33 PGR).

<sup>7</sup> *Rohrer-Drexel*, *Privatnützige oder gemeinnützige Zweckausrichtung einer liechtensteinischen Stiftung und deren Auswirkung auf die Foundation Governance*, 46 f.

<sup>8</sup> The guiding principle is that the distribution of the entire residual assets must be completed within a period of **6 months**. In special cases, a longer deadline may exceptionally be set following consultation with STIFA.

<sup>9</sup> In respect of the duty of notification concerning the dissolution resolution, attention is drawn to the information set out in the “Factsheet on notification and reporting obligations of a foundation subject to supervision in the event of dissolution, termination and transfer of registered domicile”.

foundation may be submitted to the Commercial Register. A copy of the letter from STIFA stating that there are no objections to the application for deposition of the notice of termination or for 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.

However, the pragmatic approach described above can only be considered if the asset situation of the foundation, irrespective of the asset size, allows a comprehensible inspection by STIFA.<sup>10</sup>

In those cases where it is not possible to arrange for the distribution of the remaining assets within the time limit set by STIFA and subsequently to terminate the foundation, there is an obligation to register also foundations that distribute the remaining assets for common-benefit purposes in the Commercial Register and to appoint an auditor or to submit a corresponding application for exemption to STIFA. With regard to the appointment of an auditor, reference is made to the "Factsheet on the procedure for appointing an auditor".

The above statements also apply mutatis mutandis to establishments that are subject to supervision.

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<sup>10</sup> The foundation assets consist exclusively of "bankable assets", i.e. no corporate holdings, real estate etc. are held. Also see "Factsheet on exemption from the obligation to appoint an auditor for common-benefit foundations subject to supervision", 2.2.3.