Private Trust Foundations in Liechtenstein

Alex Baker TEP and Alicia Dimitrova, Senior Advisors at Griffin Trust AG

Background

Wealthy families sometimes set up a private entity, known as a Private Trust Company (PTC), to act as trustee of their family trusts.

One of the main advantages of PTCs is the ability to appoint family members to the board, thus adding a degree of comfort and means of staying directly involved in trustee decisions. Care needs to be taken not to overshoot the involvement of family members and thus compromising the trusts' integrity, or inadvertently moving the place of effective management somewhere else.

In order to ensure continuity by avoiding the shares in the PTC falling into the owner's estate, PTCs are commonly held by a non-charitable purpose trust, set up for the sole purpose of holding and thereby perpetuating the shareholding of the PTC. Accordingly, a professional trustee will need to be involved as trustee of the purpose trust and a trust law without rules on perpetuities will need to be chosen.

This article aims to introduce an alternative (and arguably more efficient) method of structuring the trusteeship of a family's trust(s) which avoids the double-layered approach inherent to PTCs, namely by using a Liechtenstein Foundation (hereinafter referred to as a Private Trust Foundation or PTF).

Liechtenstein foundations

Now celebrating its third centenary, Liechtenstein ranks as one of the most politically-stable countries worldwide. Its sophisticated law on foundations is embedded in a balanced political system which actively fosters the development of a local fiduciary branch's know-how and professionalism.

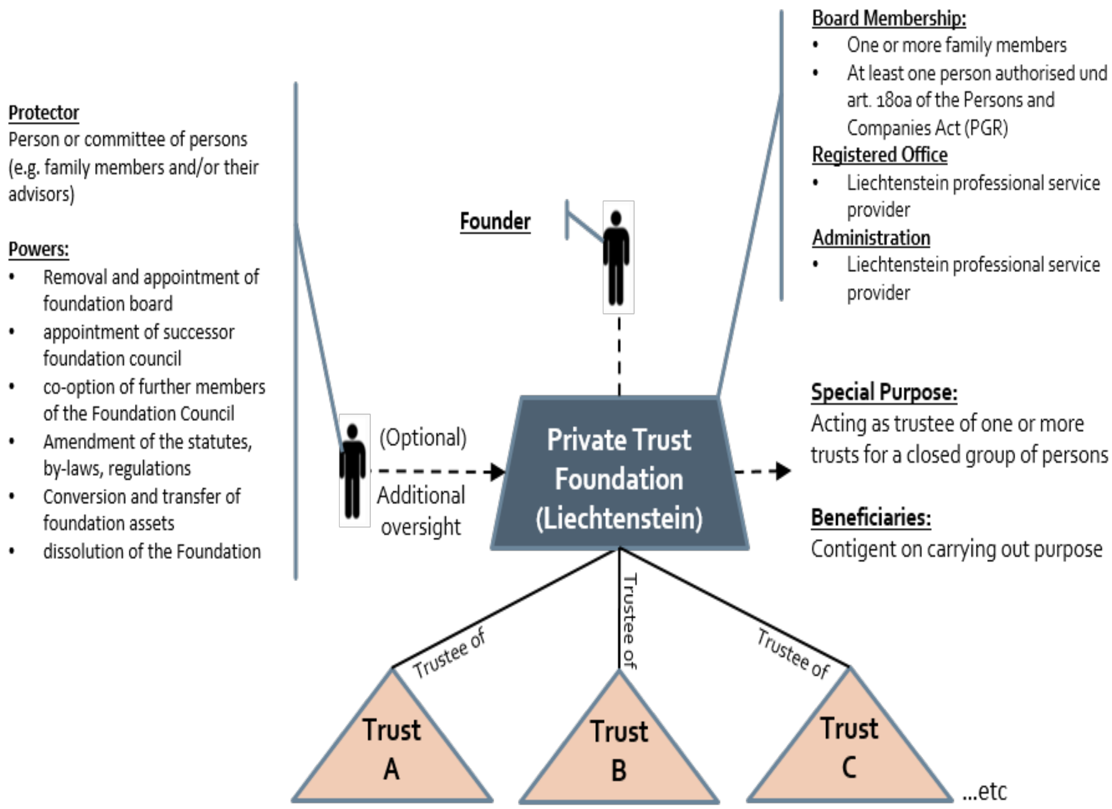
Liechtenstein's membership of the European Economic Area ensures that its foundations are fully recognised across the European Union as legal entities operating within a robust legal framework since 1926, when Liechtenstein's Persons and Companies Act (*Personen und Gesellschaftsrecht,* PGR) came into force. Periodic revisions, most recently substantially revised on 1 April 2009, ensure the continued relevance of the PGR's art.552 ss.1-41.

A foundation's structure is set out in its articles of association and by-laws. Unlike companies, a foundation does not have shareholders; it is effectively a fund endowed with a specific purpose and possessed of its own status as legal person. The foundation's council must comprise at least one person authorised under art.180a of the PGR.

On incorporation, the founder may appoint beneficiaries and specify a purpose for which the foundation assets shall be held, managed and eventually distributed. Where a foundation is to act as a PTF, its purpose should be drafted to include serving as trustee of the family's trust(s), ensuring the PTF's compliance with art.552 ss.1 para 1 of the PGR (which requires foundations to have external, not entirely self-serving purpose). The confidential by-laws of the PTF are flexible in that they may be updated from time to time to allow the PTF to adapt to evolving circumstances.

Foundations must have a registered address in Liechtenstein (generally provided by professional service providers) and can be registered with the Liechtenstein tax authorities as Private Asset Structures (*Privatvermögensstrukturen*), which enables them to (i) obtain a

Liechtenstein tax number and (ii) be subject to a flat tax currently set at CHF1,800 *per annum*.



The benefits of Liechtenstein PTFs

The double-layer structure involving a non-charitable purpose trust holding the shares in a PTC may be avoided by replacing the PTC with a PTF.

Foundations, being legal entities without shareholders, may continue indefinitely and free from (i) the usual succession planning issues which might be encountered when structuring the PTC's shareholding and (ii) potential acceptance and recognition issues associated with constructs without legal personality (such as a non-charitable purpose trust).

Family members wishing to retain a measure of control may serve as members of the PTF's council or act as protector without compromising the structure's robustness in terms of asset protection, while any desired change of service provider may easily be effected by appointing the new service provider to the foundation's council as replacement of the outgoing council member, often in conjunction with the appointment of a new administrator.

The articles of a PTF will specify that the primary goal for which the foundation was established is to act as a trustee of a closed number of family trusts settled by or for the benefit of the founder or any of the founder's family members.

Confidential regulations or by-laws (*Beistatuten*) issued by the founder will set out in greater detail the provisions relating to, *inter alia*, beneficial interests, the foundation's management, potential controlling organs and the scope of the protector's office.

Taken together, the articles and by-laws can be drafted so as to create a sophisticated governance mechanism suitable for a PTF, which can be extended to include a wider family governance framework, thus enabling the continued involvement of generations to come.

Regulations and classifications

Local regulations

Legal entities seeking to assume fiduciary powers must be authorised by the Financial Market Authority (*Finanzmarktaufsicht*) only in such instances where the fiduciary activities in question are themselves subject to authorisation and carried out as a business (defined in Art. 3 (1) (a) of the Trustee Act (*Treuhändergesetz*) as the performance of services that are independent on a regular basis and for remuneration or when the profit-seeking intent can be deduced from the frequency of the activity or otherwise).

Despite the absence of specific regulations relating to PTFs, Liechtenstein's government expressly confirmed that:

- a PTF that does not carry on its activities as a business shall be considered to fall outside the scope of the Trustee Act and its stringent provisions as to the licensing and regulating of professional trust companies (cf. *Report and request of the government to the parliament of the Principality of Liechtenstein concerning the total revision of the Trustees Act and the amendment of other laws (42/2013) of 09.07.2013 (BuA (42/2013) of 09.07.2013)*);
- at least one of the members of the PTF's council must be (i) authorised under art.180a of the PGR as a licensed professional fiduciary or (ii) in an employment relationship with such a professional fiduciary), so as to ensure the application of the Liechtenstein Due Diligence Act (*Sorgfaltspflichtgesetz*) (cf. Art.3 (1) (k) thereof); and
- a PTF shall not automatically be deemed to be carrying out a commercial or business activity solely by virtue of the PTF's management organs charging fees for their services.

To ensure that the PTF does not become subject to the onerous provisions of the Trustee Act and cumbersome oversight by the Financial Market Authority, it is advisable for a PTF to therefore limit its statutory purpose to the provision of trustee services to a closed group of trusts and *pro bono* save in respect of fees necessary to remunerate its management organs. International classification.

The PTF with an authorised Liechtenstein fiduciary as council member, as well as any trust of which the PTC acts as trustee, fall within the definition of 'trustee documented trust' under both the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standards (CRS). The Liechtenstein fiduciary is thus able to make any necessary reporting on behalf of the PTF and the trust(s).

Conclusion

While the classic PTC structure may be appropriate in certain circumstances, Liechtenstein PTFs (with their own legal personality and tax number) provide a cost-effective and flexible structure that professionals in foreign jurisdictions often find easier to comprehend, thus reducing management costs, such as the opening of bank accounts in countries otherwise unfamiliar with the concept of trusts as entities having no legal personality of their own.

Finally, the existence of clear guidance on the treatment of foundations as PTFs, their classification under FATCA and CRS, as well as their demonstrable tax base in Liechtenstein as evidenced by the issuance of a tax number, combine to give wealth planners and the families they advise the certainty that the structure they are creating shall be as stable and long-lasting as Liechtenstein has been to date.