

News Flash

May, 2023



**Private foundations in Slovakia –
a solution in asset management**

Private foundations in Slovakia – a solution in asset management

Are you considering a disposal with your property in the event of death or injury, or are you only interested in its regulated use separately from the rest of your assets?

The very same purpose was presented within the proposal of a newly established institute of a private foundation (hereinafter referred to as "PF") enclosed within the drafted amendment to the Act No. 34/2002 Coll. on foundations and on the amendment of the Civil Code as amended and by which some laws are amended and supplemented.

The amendment arisen from the workshop of members of the National Council of the Slovak Republic, Anna Andrejiová and Miloš Svrček, and was submitted to the National Council only recently. **Its aim is to establish a new institute of a private foundation.** This is to fill the legal vacuum in the Slovak Republic in relation to the effective management of private property, with a focus on its control and appropriate distribution within the family or to other persons important to the current owners.

Advantages of the Private Foundation (not only in case of the death of the founder)

By depositing a property in the private foundation, it is possible to:

- **determine in advance the person** authorized to manage or any fulfilment resulting from its management,
- **prevent complex and often lengthy inheritance proceedings,**
- **prevent fragmentation of property**
- **minimize inheritance disputes,**
- **to prevent the outflow of private property** from Slovakia, due to the existence of similar institutes exclusively abroad.

By expanding the purpose of the foundation not only for public benefit purposes, the private foundation will enable founder's decisions on the management and use of the property or its part determined to be adopted solely in accordance with their individually determined purpose with a single limitation – the obligation to respect the requirement for compliance with good manners.

The difference from current foundations (i.e. foundations for a public benefit purpose)

An undoubted advantage over foundations known so far, is its **availability** to a wide range of people. The proposed amendment in the scope of application upon PF **departs** from the obligation to create **foundation capital** as the minimum required registered property of the PF, which is associated with dispositional restrictions regarding its use.

The PF continues to be defined as a **special-purpose association of property**, but the minimum amount of the founder's contribution can be set at **EUR 1**, while this contribution is not subject to any legal disposition restrictions regarding its use.

Who can establish the private foundation and what are the essential requirements of the foundation deed

The private foundation can be established by **any natural person who is not included in the list of tax debtors** or does not have registered social insurance premium arrears; this does not apply if the relevant tax administrator, which is the tax office or the customs office, grants them permission to establish a private foundation.

The PF is **established by a foundation deed**, which should be given a form of the notarial deed.

Among the essential requirements of the foundation deed, regarding special purpose of the PF, are in particular:

- determination of the private purpose they should serve
- designation of the founder
- the period for which the PF is established
- person/s authorized to receive payments from the PF and the method of their provision
- designation of the PF statutory bodies, method of their establishment and definition of their powers

At this point, we consider it important that within definition of the UBO (for the purposes of the PF) falls also any person entitled to payment from the PF property (the so-called beneficiary), regardless of the extent of their benefit.

Management of the private foundation

The management of the PF is entrusted to the administrator of the PF (which, along with the Supervisory Board, is one of the two mandatorily established bodies of the foundation). As a statutory body of the PF, the administrator decides on all matters of the PF, if they are not reserved for the competence of other bodies by law, foundation deed or Articles of association. His competence includes deciding on the use of the PF's property in accordance with its purpose, foundation deed and Articles of association.

Only a natural person with full legal capacity, being a citizen of the Slovak Republic or a member state of the European Union, having unimpeachable integrity and is registered in the register of natural persons **can be the administrator of the PF**. At the same time, the law excludes from administrator's function any beneficiary designated by the Foundation deed, provided that the sum of its (the PF) property exceeds the amount of EUR 10 million.

In context of the PF management, the administrator is limited by the foundation deed,

the decision of the Supervisory board and the law. From the point of view of the administrator's personal responsibility we can talk about an analogy in relation to the responsibility of the statutory body of a commercial company. In the case of exceeding the powers of the administrator, the PF can impose the same responsibility for damage against him as the limited liability company could claim against its managing director.

Property of the private foundation

The PF can dispose with its property, i.e. use and appreciate it, but also use it to cover its expenses (costs) for administration. **Appreciation of the property means, among other things, its investment.** In these actions, however, they cannot act contrary to the private purpose of the PF (whose main goal must not be business activity) or violate the conditions specified in the foundation deed nor Articles of association.

According to the proposed amendment, **the PF is liable for its obligations with all its assets** and, at the same time, up to the amount of the founder's contribution for his tax arrears, which arise after the contribution is made and relate to the tax periods that began before the contribution was made.

If the foundation deed or the Articles of association of the PF do not stipulate otherwise, the assets of the PF cannot be encumbered, used to secure obligations (either own or third party obligations) or guaranteed by its assets.

The Private foundation vs. Trust Fund

From the point of view of the defined objective determined in the explanatory report submitted to this proposed amendment, it might seem that the PF is very close to the institute of Trust Funds (hereinafter referred to as "TF"), which is often used abroad.

When comparing the legal regulation of the TF contained in the example of the Czech Civil Code, we can conclude that both institutes should, as a rule, serve the same or at least a similar purpose. Considering the nature of PF, as it is contained in

the submitted proposal, however, the proposed legal regulation appears to us to be insufficient. When compared with the legal regulation of the TF, this does not contain provisions expressly aimed at e.g. for the termination of the indicated purpose for which the PF was established, or the possibility of establishing a PF for a recipient who is not existed at the time of its establishment, it is not possible to determine it, or it will be determined in the future.

The proposed PF adjustment differs from the Czech TF adjustment further, for example:

- **by the moment of creation of the trust fund** (which, for example, if it is intended for the event of death, it is created at the moment of the death of the testator),
- in the possibility of the founder to **supervise the management of the fund's assets** and to invoke his right through court or the possibility of judicial supervision over the management of PF property in accordance with the foundation charter,
- **for the purpose of establishing a fund** which, in the case of a private TF, can generate profit/invest,
- **in the manner of administration** (whereas the administrator of the trust fund can also be the PO) and the overall statutory structure of the PF as a legal entity, necessarily supplemented by the bodies designated by law, which are not necessary in the case of trust funds,
- **by the administrator's legal option to designate a person authorized to perform**, if this right is not used by the founder of the trust fund, or
- **by limiting the time** specified for the creation/termination of the right to payment from the fund, etc.

However, the most significant difference, undoubtedly remains the fact that the ownership right to the property in the TF is exercised by the administrator in his own name on behalf of the fund; From the point of view of the authorized person, this property does not belong to "anyone", but is exclusively intended to be administered by the administrator in accordance with its specified purpose.

Compared to this legal regulation, the proposed amendment takes a different approach to the property of the PF, looking at it rather as it is the property of a legal entity. Simultaneously, it establishes restrictions on the possibility of its encumbrance (as an example, the ban on PF acting as a partner of a commercial company with unlimited liability or a silent partner of an entrepreneur) or use as a security measure, if such authorization is not included within the foundation deed.

Conclusion

The proposed amendment is currently only in first stage of its adoption process in the National Council. It will at least be interesting to see in what final version (if at all) and when it will be adopted.

However, from our point of view, the current absence of the possibility of managing one's own property and its protection for the future and in the event of death is a pressing issue that must be addressed to protect private property in Slovakia. Ideally, perhaps even at the cost of possible shortcomings, which if the law does not regulate, it remains to be believed that the application practice will resolve.

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