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# QUESTIONNAIRE

## PRIVATE FOUNDATIONS WORLD SURVEY

### ***1. Introduction: The jurisdiction***

Briefly describe the basic features, the legal system and the constitution of your jurisdiction.

### ***2. Brief overview of all the various types of foundations in your jurisdiction and their main purposes***

- a. What are the types of foundations (private and charitable foundations, family and mixed foundations, etc) in your jurisdiction, and what are their main uses?
- b. Is the function of a private foundation performed by another entity in your jurisdiction, eg a company limited by guarantee?
- c. Does your jurisdiction offer alternatives to private foundations, such as trusts or partnerships, etc?

### ***3. Foundation law***

- a. What is the legal basis that provides for private foundations?
- b. What new legislation/regulations concerning private foundations, or of interest to private foundations, have appeared recently, eg in the last 12 months?
- c. What new legislation/regulations (if any) are expected or are under discussion for the future?
- d. What key case decisions concerning private foundations have recently appeared or are pending in your jurisdiction?

### ***4. Private foundations: key information***

- a. How long does it take to form a private foundation?
- b. Does the private foundation have legal personality?
- c. What are the costs of and fees for forming a private foundation?
- d. What is the minimum capital required?

- e. What, approximately, are the basic annual costs of maintaining a private foundation?
- f. Are private foundations registered on formation?
- g. If so, what is the extent of the information in relation to private foundations (if any) which is available to the professional service provider and the registrar of foundations (or equivalent) and which is available on the public register?
- h. What are the foundation documents: statutes and by-laws? Briefly describe their contents and any registration or other formalities.
- i. Is a private foundation allowed to trade?
- j. Is there a statutory limit to the duration of a private foundation?

#### *5. Termination and migration of private foundations*

- a. In which ways can a private foundation be terminated (dissolution, revocation, transformation, etc)?
- b. Can a private foundation from your jurisdiction migrate to another jurisdiction? Briefly discuss the relevant rules.
- c. Can private foundations migrate into your jurisdiction?
- d. Can the founder choose a foreign law to govern the constitution of a private foundation?

#### *6. The dramatis personae*

- a. Founder
  - i. Who may act as the founder? Is a nominee founder permitted?
  - ii. May the founder reserve specific rights? Which rights does he enjoy by law?
  - iii. May he amend any provisions of the private foundation at a later time (eg the provisions of the by-laws)?
- b. Beneficiaries
  - i. What are the types of beneficiaries (fixed, discretionary, other)?
  - ii. Must the foundation's objects include a reference to individual beneficiaries (or families), and are non-charitable purposes also permitted in a private foundation?
  - iii. Do the beneficiaries have an enforceable claim to a distribution of the foundation's assets?
  - iv. Do the beneficiaries have a right to object to the decisions of the foundation council regarding their beneficial entitlement?

- v. Are the beneficiaries entitled to revoke/vary the foundation?
- vi. Do beneficiaries have rights against the foundation council or the foundation council members? If so, do their rights act in personam or in rem against the foundation property?
- vii. Do the beneficiaries have a right to dismiss foundation council members and, if yes, for what reasons, and who may appoint successors?
- viii. What are the obligations of foundation council members to provide beneficiaries and others (eg protectors) with copies of the accounts, foundation documents, other information, and documents relating to the foundation?
- ix. Can beneficiaries or others pursue a claim when the assets of a foundation are mixed with other assets by the foundation council?
- c. Foundation council
  - i. Who may be appointed to the foundation council? Can only individuals be appointed or are corporate members also permissible?
  - ii. What are the duties of the members of the foundation council?
  - iii. What standards of care are laid down in law to measure the performance of foundation council members? Do the council members owe their duties to the foundation itself or to the beneficiaries?
  - iv. Is there a residency requirement for foundation council members? If not, are there any other restrictions as to who may act as a foundation council member?
  - v. Are there any restrictions on having non-resident foundation council members?
  - vi. Is the use of nominees permitted?
  - vii. If the foundation council fails to take a relevant matter into account when administering the foundation, can an appeal be made to the court to put matters right? Who can make the appeal?
  - viii. Does the court (or other supervisory authority) have the power to release members of the foundation council from liability for breach of their duties?
  - ix. Are there any reporting requirements to the registrar, founder, or any other party?
  - x. Have there been any recent court cases against professional service providers which deal with their conduct?

### **7. Protectors (or similar)**

- a. What specific rules are there relating to protectors? If none, how does general law treat them?

- b. Are protectors frequently used in relation to foundations? Is their function different from that of trust protectors?
- c. Are protectors regarded as fiduciaries and thereby liable to beneficiaries if proper care is not exercised by them?

### ***8. Foundation governance***

- a. Internal and external foundation governance: which organs supervise private foundations and hence implement foundation governance?

### ***9. Foundation assets***

- a. Is it possible for a founder to add assets to the minimum capital of a private foundation during its existence, and can capital be withdrawn?
- b. What type of assets can be transferred to a private foundation?
- c. How is this transfer effected? When is it completed? Are there any specific requirements?

### ***10. Foundation investments***

- a. Do foundation council members have complete freedom to invest the foundation assets at their discretion in the absence of specific provisions in the foundation documents?
- b. To what extent are foundation investments regulated?
- c. What is the standard of care when making foundation investments for a foundation, and have there been any recent cases?

### ***11. Taxation***

- a. Does your jurisdiction levy capital gains or gift tax on the founder when assets are passed to the private foundation?
- b. Is a stamp duty or similar tax imposed when property is passed to the foundation?
- c. Annual taxation of the private foundation—is there a lump-sum taxation or other tax benefits?
- d. Are distributions to beneficiaries taxable?
- e. Does a private foundation qualify for treaty benefits under any double taxation treaty (DTT) concluded by your jurisdiction?

### **12. Asset protection**

- a. Does your local law contain any specific asset protection legislation?
- b. What measures have been enacted to preserve the integrity of a private foundation against hostile attacks?
- c. When, if at all, can creditors attack the foundation assets directly instead of taking personal action against the founder?
- d. What rules relating to fraudulent conveyance and action paulienne exist?
- e. Have there been any recent cases in this area of law?

### **13. Foundations as will substitutes**

- a. If an inter vivos private foundation is used as an alternative to a will, what precautions must be observed to prevent the foundation document being regarded as an invalid will and defeating the foundation?

### **14. Forced heirship**

- a. Are there provisions which protect foundation assets from forced heirship claims originating from a different jurisdiction, or to what extent are such claims recognized?
- b. Have there been any recent cases on forced heirship claims against private foundations?
- c. After which time, if at all, are forced heirship claims precluded?

### **15. Divorce**

- a. Are there provisions which protect foundation assets from claims in foreign divorce proceedings? Are there any time limits involved?
- b. Have there been any recent cases on this?

### **16. Sham foundations**

- a. Is there a similar concept applied to foundations in your jurisdiction?
- b. What protection is granted to defeat claims from outside the jurisdiction that a foundation is a sham?
- c. What are the consequences of a foundation being found to be a sham? Is there a piercing of the corporate veil or some similar doctrine?

### **17. Combating the abuse of foundations**

- a. **Is your jurisdiction rated as meeting the OECD standards for information exchange in tax matters?**
- b. **Has your jurisdiction recently introduced legislation or regulations concerning the exchange of information with other jurisdictions? Under which circumstances is information exchanged, for example on the founder or the beneficiaries?**
- c. **How (if at all) are professional service providers regulated? Is there any legislation or guidance on the regulation of professional service providers? (Please provide details of any useful websites)**
- d. **'Know your customer' (KYC) requirements: what reporting or other requirements (if any) are imposed on professional service providers under anti-money laundering regulation when forming a new private foundation or while administering an existing private foundation?**
- e. **What are your most recent anti-money laundering measures and have there been any anti-money laundering prosecutions in connection with a foundation?**

### **18. Useful sources/websites for further information**

### **19. Private foundation factsheet**

#### **JURISDICTION**

Location  
Time zone  
Travel to (airports)  
Language  
Legal system (civil/common law)  
Special features/specialization/markets served  
Position with OECD  
List of TIEAs  
List of DTTs  
Useful sources/websites

#### **PRIVATE FOUNDATIONS**

Types and principal uses  
Legal basis  
How long does the formation take?  
Costs of formation and annual costs  
Who may form a foundation?  
Is the use of nominee founders possible?

KYC requirements?

Are foundations registered upon formation?

Information available to registrar and in public register?

What are the foundation documents?

Minimum capital?

Who may be appointed to the foundation council? Number of foundation council members? Residency requirements?

Use of nominees?

Permission to trade?

Who is the typical founder? May he reserve specific rights?

Beneficiaries (types, right to information)

Protectors (specific rules)

Tax (capital gains tax, annual taxation, stamp duties, application of DTTs, lump sum taxation, tax on distributions)

Treatment of forced heirship claims

Treatment of claims resulting from foreign divorce proceedings

Specific asset protection legislation

Measures to combat abuse of foundations (civil and criminal concealment)

<http://www.pbookshop.com>