

The new Hungarian asset management foundation

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Abstract

The most important global issues of wealth planning are privacy, asset protection, and tax compliance. The ultimate question is how these needs match with the current and future legal environment. Obviously, privacy is under attack and the implementation of the fifth Anti-Money Laundering Directive is sweeping away the remaining ruins of it. The separation of private and business assets is one of the bases of the legal work and, during the last 10 years, tax compliance was forced out by The Organisation for Economic Co-operation and Development (OECD) Member States, achieving the result that assets are declared and taxed. There is very little room for manoeuvre, if someone wants to achieve all three aims at once. The new Hungarian asset management foundation—a hybrid of a trust and a private foundation—provides an excellent solution to link privacy, asset protection, and tax compliance together.

decision between different legal solutions may be based on several considerations; nevertheless, at the end usually there are only two to three applicable solutions, and there are only nuances between two forms. There are two competing legal solutions¹ for estate planning in Hungary besides the last will and testament; these are the family foundation and the fiduciary asset-management (the so-called Hungarian trust) relationship. The Hungarian trust enjoys a very favourable tax neutral treatment; therefore, this is the main estate planning tool in Hungary; nevertheless, it would be easy to change the applicable tax code to provide the same treatment for the family foundation. The government decided to provide another solution for preserving wealth over generations and created a new type of foundation, for both public and private purposes, the asset management foundation (AMF).² This article provides some information about this new phenomenon.

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Introduction

One of the biggest challenges of estate planning is to find the best tools, which provide the result closest to the client's aim. A professional must take into account the personal needs and circumstances of the client, his or her tax residency, the applicable tax rules, the applicable personal law, the asset protection rules, the legal limitations, international treaties, as well as the foreseeable future regulations. The

The concept of the AMF in general

Hungarian law knows several forms of property management. A common feature of these various forms of

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1. A Menyhei, 'The Use of the Hungarian Foundation for Asset Protection and Private Purposes' (2017) 23(6) *Trusts & Trustees* 673.

2. This article is based on the Act No XIII 2019 on the AMFs and its justification.

asset management is that they are intended to perform tasks related to assets owned by another person. The purpose of asset management is the preservation and enhancement of wealth.

As far as professional asset management is concerned, the Civil Code³ has introduced a new legal institution, the fiduciary asset management. The fiduciary asset management is a trust-like contractual relationship,⁴ where the settlor transfers the ownership of the assets to the trustee, who shall manage the assets for the utmost benefit of the beneficiary.

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The Civil Code also renewed the regulations of foundations and introduced the so-called family foundations. The Civil Code's rules provide an option for the founder and its relatives to be beneficiaries of the foundation. The Civil Code, however, retains that the foundation cannot pursue any economic (business) activity and that the foundation is only entitled to carry out an economic activity directly related to the achievement of the objective of the foundation.

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As the fiduciary asset management's maximum duration is 50 years, there was a need to allow setting up a foundation that could also carry out professional asset management as a business activity. Indeed, foreign regulatory models show that the foundation can

be used as a legal entity for generational management of private assets. The trust (fiduciary asset management) is a more flexible contractual arrangement, which may be terminated by the settlor (revocable trust). This flexibility of duration also applies to the new private AMFs (the new type of foundation may be private or public) if the board of trustees does not exercise the rights of the founder.

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The Act on AMFs⁵ is intended to meet the above needs, which are recognized by the legislator. The main purpose of the AMF Act is to offer the AMF as a legal asset manager institution for investors, supplementing the existing legal regulations. Therefore, the AMF Act creates a special form of foundation that can perform asset management as its main activity.

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The main function of this foundation is to provide distributions for the beneficiary or beneficiaries indicated in the founding charter. In the context of the

3. Act V of 2013 on the Civil Code (hereinafter, Civil Code).

4. A Menyhei, 'Development of the Estate Planning Industry Through the Introduction of the Trust in Hungary' (2016) 22(6) *Trusts & Trustees* 659.

5. Hereinafter referred to as 'the AMF Act'.

beneficiary, the AMF Act also provides the opportunity to establish an AMF for public interest purposes, where the circle of beneficiaries is open.

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Following the foreign examples, the AMF Act requires a mandatory minimum capital for the establishment of the AMF. The minimum capital requirement is HUF 600 million.⁶ This may be accomplished by the founder with any type of contribution provided by the Civil Code. Accordingly, in addition to bankable assets, the foundation's assets may also consist of non-bankable assets (contribution in kind). Regarding that in the case of an AMF, it is mandatory to appoint a permanent auditor, and the assessment of the contribution in kind is the duty and responsibility of the permanent auditor. Therefore, the AMF Act stipulates only one requirement that the transferred assets should be marked per property item, as detailed as necessarily required for their identification in the founding charter.

Another important feature of the AMF is that the founder may assign the founder's rights to the foundation and appoint the board of trustees to exercise them. This may affect the whole range of founders' rights, or may be limited to some of them. This is one of the reasons to require an obligatory supervisory board for an AMF. In addition, as a warranty provision, the AMF Act also provides that the board of trustees may amend the foundation charter only if the founder has expressly authorized it. In the absence of such an authorization, the foundation charter may be amended only if changing circumstances or legal

requirements made the amendment necessary to achieve the foundation's objectives.

The AMF Act also stipulates that if the founder assigned the rights of the founder to the foundation or appointed the board of trustees to exercise it, he or she shall also appoint a person outside of the foundation in addition to the supervisory board for the purpose of checking the activities of the board of trustees. This person is the foundation property protector, who is responsible for exercising the founder's rights and managing the assets of the foundation. The foundation property protector may also exercise the rights of the supervisory board, and may, among other things, initiate a law enforcement procedure.

The goals of the foundation assets management should be defined in the founding charter. In addition, an investment policy must also be drawn up, which may form part of the founding charter depending on the founder's decision, but in any case serves as the basis for asset management of the AMF.

According to the AMF Act, the AMFs are also covered by the Civil Code. The rules on foundations provided by the Civil Code are applicable to the AMF as well, if the AMF Act does not provide different provisions for them. Therefore, the applicable rules on foundations and legal persons as provided by the Civil Code or other acts should also be applicable to the AMF, if the AMF Act does not provide otherwise.

The detailed rules of the AMF Act

Unique hybrid legal solution, mixing the trust's and the foundation's concept

Section 1 of the AMF Act defines the substantive scope of the Act by stating that it applies to AMFs established and registered as such under this Act. Accordingly, the court of registration registers the AMFs in accordance with the registration procedure rules for foundations, provided by the court records

6. Currently, this sum is a little bit under EUR 2 million.

of civil organizations and the related procedural rules Act of 2011 CLXXXI. However, there is no obstacle to the creation of an AMF if the founder of a foundation amends the founding charter in accordance with the provisions of AMF Act.

The concept of the Foundation as defined in the Civil Code (section 3: 378 of the Civil Code) is also applicable to the AMFs, since such foundations are also created by the founder for the continuous realization of a permanent goal as defined in the founding charter, and of course the founding charter shall determine the organization of the foundation and the wealth to be given to it.

Since foundation goals can be very diverse, and as the AMFs can serve many purposes, the AMF Act on these foundations had to identify the common elements that are characteristic of all AMFs, and had to define the specifics through which these foundations can be separated from other foundations within the general foundation type regulated by the Civil Code. The AMF, which appears in the AMF Act, is a sub-type of foundations governed by the Civil Code, in which the foundation's activities, rather than the founding objectives, are the decisive elements for differentiation. From a conceptual point of view, therefore, it is of primary importance that the AMF is set up for the purpose of pursuing the objectives set out in the founding charter, and for the benefit of the beneficiary or beneficiaries specified therein, specifically to carry out asset management (investment and portfolio management) activity, and to distribute the yield of this activity in accordance with the objectives of the AMF.

The asset management and investment activity are carried out by the AMFs in respect of their own assets and it is not allowed to provide investment services or advice to other (third) persons. However, the AMF may also manage those assets it takes into trust management (fiduciary asset management) as an economic activity. The Civil Code introduced a trust-like

solution in Hungary in 2014 in the form of a contractual fiduciary relationship. Based on this relationship, the settlor transfers its assets to the trustee, who shall manage the assets for the ultimate benefit of the beneficiary.⁷ According to the Act on the Trustees and their activities,⁸ a professional trustee must have a licence issued by the National Bank and non-licensed persons may act in only one trust relationship at a time.⁹ Nevertheless, the AMF Act provides that the AMF is not subject to the Trustees Act. Therefore, the AMF may provide trust services to several relationships simultaneously without being subject to licensing but this trustee activity is limited to the sole purpose of its asset management as defined in its founding charter of the AMF. As a result, the settlor of a trust relationship may assign the asset to the AMF just with the condition that the purpose of the trust relationship must be the same as the purpose of the AMF. This legal form is a hybrid solution, as it mixes the Anglo Saxon Trust and the German foundation, creating an AMF, which also may act as a trustee. The AMF Act provides certain deviations from the general rules of the trust relationship, if it is managed by an AMF. First, in respect of the assets taken into fiduciary asset management by the AMF, the AMF shall be regarded as the exclusive beneficiary of the fiduciary asset management (trust relationship) arrangement. Secondly, Article 2(3)(b) of the AMF Act exempts the fiduciary asset management (trust) performed by the AMF from the general rule of the Civil Code limiting the maximum duration of fiduciary asset management in 50 years. Therefore, the duration of a fiduciary asset management performed by an AMF may be without any time limit. Thirdly, although fiduciary asset managers (trustees) operating under the Trustees Act are subject to professional confidentiality required by the Civil Code, they are exempted from confidentiality by the Trustees Act in the case of public authorities' inquiries. On the other hand, if the fiduciary asset

7. Menyhei (n 4).

8. Act XV of 2014 on the Trustees and the rules of their activities, hereinafter referred to as The Trustees Act.

9. Menyhei (n 4).

management (trust) is performed by an AMF, it remains subject to the strict confidentiality requirement provided by Article 6: 319(1) of the Civil Code:

the fiduciary asset manager is obliged to keep confidential all facts information and data, which he gained knowledge about in the frame of or in relation to his assignment as fiduciary asset manager

and

this obligation is independent from the creation of the asset management relationship and applies even after the termination of the asset management assignment.

Fourthly, Article 6: 316 of the Civil Code excludes the settlor's and the beneficiaries' power to give instruction to the fiduciary asset manager and renders any different arrangement null and void. However, Article 2(4) of the AMF Act allows the parties to derogate from this prohibition, if the trust relationship is provided by an AMF. Therefore, a founder transferring assets to an AMF for fiduciary asset management (trust) may reserve the right to give instruction to the board of trustees, even in the scope of desired distributions to persons or entities to be defined by him later.

On the basis of the above, it seems that the AMF could only manage its own and the trust assets as economic activity. The AMF's own asset may be the assets assigned by the founder upon establishing the AMF and the assets under separated trust relationships are those deriving from the settlors of such relationships. However, it is allowed for the AMF to establish a company—within the framework of the founding charter—for the purpose of other economic activity, as well as to acquire a participation in any companies. Nevertheless, in the case of the AMF, Article 3: 379 section 3 of the Civil Code shall be applied, which states that a foundation shall not be a member with unlimited liability of another legal entity, and is not allowed to establish a foundation or join another foundation.

Minimum capital requirement

An important feature of foreign private foundations is that they are typically established with high own capital as without this, their purpose to achieve enough yield to be distributed (donated) for the aim or to the beneficiaries would hardly be realized. Therefore, for the establishment of an AMF, Article 3 of the AMF Act requires—irrespective of whether it is public or private interest—an own minimum (registered) capital. Accordingly, the amount of the AMF's assets shall be at least HUF 600 million (EUR 2 million), but a sector-specific legislation may set a higher minimum capital for particular foundations. The minimum capital means that the minimum amount of the assigned assets must be met. Obviously, the initial amount of the assigned assets of the AMF may even exceed the capital minimum.

In addition, this prescribed capital minimum must be available for the newly established AMF before the application for AMF's registration is submitted in such a way that the assets shall only be available to the AMF, which is created with the act of registration. Consequently, the founder can undertake to assign the assets to the AMF at a later time or within a specified time frame only in excess of the capital minimum. The trust assets managed by the AMF based on a trust relationship are not part of the AMF's minimum capital; therefore, the founder shall transfer the minimum capital to the AMF independently of any other trust assets.

In case of failure to transfer the assigned assets beyond the capital minimum, the AMF Act provides different legal consequences than those under the general provisions on foundations in the Civil Code. Moreover, the consequences differ, if the founder's rights are exercised by the board of the AMF or if the founder exercises the rights of the founder itself. In the case of using the wide and unconditional possibility to transfer the founder's rights to the board of trustees, which results in the founder's rights being exercised by the board of trustees, the foundation could demand the fulfilment of the missing part of the assets from the founder. On the other hand, if the founder's rights are upheld and exercised by the

founder, in the case of such failure it makes no sense to suspend the exercise of the founder's rights as the general rule provides in the Civil Code.¹⁰ There is a much more rational, stimulating, and effective provision. In this case, the board of trustees is allowed to exercise the founders' rights as long as the founder does not transfer the missing part of the assets.

Assets assigned to the Trust Fund may consist of any property, including intangible assets. It is important, however, that for the purpose of asset management control, the founding document identifies these assets as accurately as possible and, if necessary, outlines them, although the fulfilment of this requirement may in fact be justified even in the case of other types of foundations. In addition to the definition of assets, their valuation is also an important task, which is the task of the statutory auditor to be appointed in the case of AMFs, since the court of registry may decide, among other things, whether the minimum capital required for the registration of the trust fund is at the disposal of the foundation.

The AMF's assets may consist of any type of assets, tangible or intangible, including IP rights or receivables. The proper control of the asset management activity requires describing the assigned assets with utmost due care in the founding charter. Therefore, the AMF Act requires a precise description of the assigned assets so they can be identified at any time. Moreover, the AMF Act provides that the permanent auditor of the AMF shall value the assigned assets before the application for the registration of the AMF. This helps the registration court to see whether the minimum capital of the AMF is fulfilled and to make a decision about it during the registration.

This minimum capital requirement must be maintained during the existence of the AMF. If the capital of the AMF falls under the minimum amount, the board may suspend or reduce the distribution for the beneficiaries. If the AMF does not meet the minimum capital condition over three consecutive years, the AMF must be liquidated.

Public and private interest purpose AMF

The AMF Act allows the establishing of an AMF for public interest purposes as well; therefore, a distinction must be made between public interest and private interest AMFs. The AMF Act provides different rules and requirements for an AMF for public interest.

A distinction must be made between public interest and private interest AMFs

The AMF Act defines precisely what purposes are to be considered in the public interest. The definition of the public interest purpose essentially corresponds to the conceptual legal framework of the Hungarian law and to what is commonly understood by such purposes, taking into account the requirements of general life experience and social habits. Consequently, any level of education, health care, charity, social-, family-, child-, and youth-protection, cultural or sports activities, or the maintenance and operation of institutions providing such activities meet the public interest purpose. However, the fact that an AMF is created for any of the above purposes is a necessary, but not a determining condition for qualifying as an AMF for public interest.

Thus, the mere fact that an AMF has been created for public interest purposes or serves a public interest purpose does not mean that it is classified as such under the provisions of the AMF Act. For an AMF to be for public interest and for the court to register it as such, there are two more conjunctive conditions in addition to the public interest objective. The first (already mentioned) condition is that the trust fund shall be founded for a public interest purpose, the second condition is that the circle of the AMF's beneficiaries shall be open, meaning that an AMF shall not provide its benefits to a pre-defined closed circle of people, and finally, the third condition is that the founder shall ask for classification as a public interest. Among these statutory conditions, the public interest

10. s 3: 382(4) of the Civil Code.

objectives were already mentioned above, and the third mentioned condition does not require any particular explanation; the founder has free choice to decide whether he or she wishes to register the AMF for a public interest purpose. The submission of such an application is not merely a procedural but a substantive condition for the classification of an AMF for public interest. The founder may to authorize the board of trustees to exercise this right; but such transfer of the founder's power requires explicit provisions in the founding charter.

The second condition, regarding the openness of the circle of beneficiaries, requires a more detailed explanation. This requirement does not mean that the AMF can be considered open if the beneficiaries are not personally defined. If the founding charter sets certain conditions regarding the beneficiaries or describes certain specifics of those who may be beneficiaries, the AMF can be considered open. Openness in this regard means that anyone can meet the given conditions or descriptions, and may be in or out of the circle of beneficiaries. The time dimension is also an important factor in the evaluation of openness. It is possible that at a given time, the circle of persons designated as possible beneficiaries can be relatively closed, but if during the duration of the foundation this circle of potential beneficiaries may change continuously, and in a certain time frame it effectively changes, the AMF should be considered open for the total duration.

In some respects, the AMF has stricter legal requirements (for example, the capital minimum), but in other respects its requirements are less stringent and more flexible than those of the foundation regulated by the Civil Code. The Civil Code,¹¹ for example, prohibits, as a general rule, the creation of a foundation for the benefit of the founder, the member of the foundation's body, and their relatives.¹² Compared to this, the AMF Act provides a possibility for the private purpose AMF to be established for the benefit of the founder, the members of the AMF's bodies, or their

relatives. In the case of a public interest purpose AMF, the above general prohibition of the Civil Code is still applicable.

In the case of a private interest AMF, Article 3:404 paragraph 1 of the Civil Code is not applicable, according to which, in the event of the termination of the foundation without a legal successor, the assets remaining after the satisfaction of the creditors, of the founder, of other donors indicated in the founding charter, and their relatives shall be covered only to the extent that they do not exceed the original contribution of the founder or donor. Therefore, if someone establishes a private purpose AMF or joins such a foundation, he should pay attention to the provisions of the founding charter dealing with the event of the AMF's termination without a legal successor and should create rules for the ultimate beneficiaries of the remaining assets.

According to the AMF Act, in the case of a private purpose AMF, the founder, the beneficiaries, and their close relatives may be members of the board of trustees without any limitations. In the case of public interest AMF, the general prohibitions of the Civil Code are applicable in this respect.

Transfer of the founder's rights and powers to the board of trustees

The AMF Act significantly aims at making the AMFs 'self-driven', so that their long-term, up to decade-long, operation may be independent from the founders. In other words, an AMF should operate fully without its founder and the founder should not intervene in the operation with the exercise of its founder's rights. Obviously, this must be the decision of the founder, so the AMF Act provides an opportunity for the founder to select this option and be able to waive the full scope of his/her founder's rights and appoint a foundation body, including the board of trustees, to exercise these rights.

11. art 3: 379 s 4 of the Civil Code.

12. Menyhei (n 1).

In addition, the AMF Act provides the possibility for the founder (including the founder of an already existing AMF), who otherwise maintains the rights of the founder, to delegate the founder's rights to the foundation without amending the foundation charter. In the latter case, the board of trustees exercises the founder's rights of the AMF. The same rules shall be applied regarding to exercise of the founder's rights as when the founder appointed the board of trustees in the founding charter to exercise the full range of these rights. The appointment of the board of trustees to exercise the rights of the founder may be revoked. However, this requires the modification of the founding charter, which only the founder may be able to do, if the founder reserved this right in the founding charter. If the founder delegated the founder's rights to the AMF without amending the founding charter, the founder is not able to revoke this decision in this form anymore.

To appoint a foundation body, including the board of trustees, by exercising the founder's rights is also possible under the rules of the Civil Code¹³ but it is applicable only in a narrow set of circumstances, if the founder died, ceased without legal successor or is not able to exercise the rights of the founder for any other reason. However, in the case of the AMF, the appointment is possible without such conditions. Nevertheless, this does not affect the application of the general rules of the Civil Code¹⁴ in the case of an AMF. Even if the founder has not appointed any other person or other foundation body (including the board of trustees) to exercise the founder's rights in an AMF, or if the founder died, ceased without legal successor or if the founder for other reasons is not able to exercise the rights of the founder, the board of trustees exercises the founder's rights with the limitation provided by the Civil Code.

According to the Civil Code,¹⁵ the foundation body may not exercise certain founder's rights. Providing

more flexibility for the AMF, the AMF Act allows the exercise of the aforementioned founders' rights to remain within the competence of the board of trustees or the Supervisory Board or both. This provides complete independence of the AMF from its founder. This power contains that the AMF's bodies may also elect the members and the chairs of their corporate bodies themselves.

As a safeguard, the decision to fill a vacant seat in the board of trustees or even the chair shall be made by the board of trustees and the supervisory board jointly. The replacement of the members of the supervisory board and its chair, in the event of vacancy, shall also be carried out in this way. Nevertheless, in both cases, it must be ensured that the majority decision does not result in a person becoming a member of any of these bodies against the majority vote of its members. Accordingly, the AMF Act stipulates that if the founder's rights are exercised by the board of trustee and any vacancy occurs, unless otherwise provided by the founding charter, the board of trustees, together with the supervisory board, shall jointly elect the new member with majority vote of both bodies and the majority vote of that body where the vacancy occurs. In addition, the founding charter may require an additional qualified majority to decide on this issue.

Finally, the AMF Act also provides rules for the dismissal of members and chairpersons of the board of trustees and supervisory board. The decision of dismissal should be made in the same way as the appointment, but exercising this right may be subject to conditions or even be restricted in the founding charter.

The bodies of the AMF

With regard to the organization of AMFs, the AMF Act contains only a few obligatory (cogent) provisions

13. s 3: 394(1) of the Civil Code.

14. s 3: 394 Article 1(1) of the Civil Code.

15. s 3: 394(3) of the Civil Code:

if an organ of the foundation is entitled to exercise the rights of the founder, the authorized foundation body shall not exercise its founder's rights with its members and manager and with the persons responsible for the control of the body.

and mostly the dispositive rules of the Civil Code apply.

The AMF Act requires to have at least five individual members of the board of trustees, which excludes the possibility of establishing a board of trustees with legal persons, and does not allow a single person to act as a management body (curator). In addition, due to the considerable capital and activity of AMFs, the Act also imposes the obligation to establish a supervisory board and to appoint a permanent auditor.

An important provision concerning the organization of an AMF is that the founding charter of such foundations may require qualifications and other professional requirements for the chairs and members of the board of trustees and the supervisory board.

The protector of the AMF

If the founder's rights are exercised by the board of trustees, going beyond the supervisory board, there is no other body or person outside the foundation who could act against activities that jeopardize the interests or rational management of the AMF and restore lawful operation. Therefore, there is need for a body or person who, in order to avoid the loss of the assets of the AMF, is able to restore the lawful operation of the asset management, to ensure that the asset management is in compliance with internal regulations, to protect the interest of the beneficiaries and the purpose of the founder. Therefore, there is a need for a person outside the organization of the foundation who can act against management decisions and thereby ensures the foundation's lawful operation. Providing a solution and an extra layer of operational guarantee, the AMF Act introduces the protector to the Hungarian legal system. If the founder appointed the board of trustees to exercise the founder's rights, the founder shall also appoint a protector in the founding charter to control, beyond the supervisory board, the practice of the founder's rights. Although the protector has been commonly used by professionals in Hungary in the case of the trust relationship, the regulation of the protector's rights and power is new in the legal system.

According to the AMF Act, the protector shall ensure and restore the integrity of the foundation in the case of any deviation from the asset management policy, the founding charter, or the purpose of the AMF. The protector has strong rights and powers provided by the AMF Act and the founder may provide further rights and power to the protector in the founding charter. Among others, the protector may control the activity and decisions of the AMF's bodies, check documents, join the meetings, provide his opinion before a resolution is taken and, in the case of a conflict of a resolution with the founding charter or other governing deed, the protector has the power to initiate a court procedure as a final tool to block the fulfilment of an unlawful resolution.

It is therefore necessary to designate the person or organization who may act as a protector if the founder or any other independent person does not exercise the founder's rights. Therefore, in this case, the AMF Act provides as a mandatory content of the founding charter to appoint a protector, and entrusts the appointment to the founder, who must also specify the amount of remuneration of the protector in the founding charter.

However, the founder may authorize the foundation itself to appoint a protector. This must be incorporated into the founding charter as well. If the AMF exercises this founder's right, according to the AMF Act, the board of trustees and the Supervisory Board shall jointly appoint the protector, and this resolution shall be approved by the court of registration to ensure the independence and impartiality of the protector. In order for the court to be able to ascertain this, the declaration of acceptance of the protector, including a declaration that there are no reasons for excluding him from the position and no conflicts of interest as defined in the law or in the founding charter or both, must be attached to the registration application.

This provision shall also apply if the founder's rights are exercised by the board of trustees and the protector resigns, dies, or is terminated without legal successor, or no longer possesses the requirements necessary for the performance of the duties, and

therefore the appointment of a new protector becomes necessary.

A chartered auditor, an audit company, an attorney at law who is also a bar member, a law firm, or a natural person who has a clean criminal record and fulfils the professional requirements defined in the founding charter can be appointed as a protector. The AMF Act stipulates the most common reasons for conflicts of interest concerning the protector, which may be supplemented by the founding document. The court of registration shall review the protector's compliance with these requirements during the registration procedure of the AMF or during the approval of the corporate decision of the foundation bodies.

Among the rights that can be exercised by the protector, the strongest is that the protector ultimately may initiate a law enforcement proceedings forcing the AMF's bodies to restore the lawful operation of the foundation. This is the most powerful tool that a protector can use if he detects a malfunctioning in the operations of the AFM. This provision is also applicable if the asset management of the AMF does not comply with the asset protection obligation.

The protector may play a role if the relevant corporate bodies fail to make a resolution within 90 days about a vacancy in the board of trustees or supervisory board membership. In this case, the protector shall suggest a person to be appointed to the vacant position, and the court of registration shall make a final decision about the appointment of the new member to the board of trustees or supervisory board.

The AMF Act allows the protector to exercise additional rights or perform further obligations specified in the founding charter. Pursuant to the AMF Act, the protector is entitled to control the operation of the organs of the AMF. If the notice given by the protector is not successful, he may initiate a law enforcement proceedings to ensure and restore the lawful operation of the AMF. In the cases specified in the founding charter, the protector is entitled to challenge both the resolutions of the board of trustees and the supervisory board and request its annulment if the resolution concerned is unlawful or does not

comply with the founding charter or the investment policy.

In order to be able to exercise these rights properly, the AMF Act provides that the protector shall have access to all information concerning the operation of the AMF, which would otherwise also be available to the Supervisory Board.

Finally, the AMF Act also makes it clear that the protector is remunerated and this is charged to the assets of the foundation.

The founding charter

As the AMFs' minimum capital requirement is high, it is important that their organization and asset management requirements are created and recorded with the necessary expertise and responsibility. Therefore, the AMF Act provides that the founding documents shall be incorporated in a public deed or in a private document countersigned by an attorney at law.

It is also an important legal requirement that the fundamental aims and principles of the management and utilization the AMF's assets must be incorporated in the founding charter. The AMF Act provides the possibility for the founder to create and annex the investment policy to the founding charter, so it becomes part of the founding charter.

As a content requirement for the investment policy, the AMF Act requires the description of the portfolio, the risk management, and the decision-making method applicable to investments.

If the founder does not wish to draw up an investment policy and annex it to the founding charter, the preparation of the investment policy is still obligatory for the AMF. This must be prepared by the foundation (its board of trustees) within 6 months after its registration and approval, based on the suggestion of the supervisory board, by the person who exercises the founder's rights. In the event that the founder's rights are exercised by the board of trustees and thus the approval would also be the obligation of the board of trustees, the AMF Act requires that the board of trustees and the supervisory board jointly decide on

the approval of the Investment Policy, after obtaining the opinion of the protector.

The Civil Code provides the general rules of modifying the founding charter. Deviating from these general rules is permissible only if the founder's rights are exercised by the board of trustees or if the modification concerns the objectives of the AMF. It is logical to keep the founder's aims and the founder's decision in mind. They could only be changed by the board of trustees exercising the rights of the founder if the founder authorized it to do so. Therefore, if the board of trustees has not been authorized to amend the founding charter, the amendment can only be made in a narrow set of circumstances. The AMF Act refers to changed circumstances that have occurred since the registration of the AMF and also include a change in the legal environment. The modification shall be justified by the changed circumstances and by the fact that without the planned modification the objectives of the AMF and the asset management would be jeopardized. Issues may be determined for which the founding charter may not be amended by the board of trustees. In such a case, the founding charter may not be amended by the board of trustees, and the board of trustees may make changes only if this becomes necessary due to legislative changes.

If the amendment of the founding charter concerns the objectives of the AMF, the possibility of such modification is restricted to the founder and only if the AMF is not for public interest or if the board of trustees does not exercise the founder's rights.

The amendment of the founding charter may also affect the beneficiaries. In this case, the AMF Act stipulates that the obligations already established and due for the benefit of the beneficiaries have to be fulfilled. Therefore, the AMF may not be exempted from these already assumed obligations by the amendment of its founding charter.

In the case of a non-public AMF, derogation from the rules of Article 3: 387 of the Civil Code is allowed regarding the rule limiting the claim of beneficiaries.

Restrictions of the asset management

The founder may specify the minimum amount of the AMF's assets that shall be maintained during its existence. This must be specified in the founding charter. If a minimum amount of capital is determined by the founder, this minimum capital is required by the law, the AMF Act as well, therefore there is a legal obligation based on law to maintain it.

The asset retention obligation means that if the assets of the AMF fall below the amount specified in the founding charter or in the AMF Act, the distribution for the benefit of the beneficiaries shall be reduced proportionally to the amount of the loss of assets, or the distribution shall be retained until the value of the assets reaches the amount specified in the founding charter.

Termination of the AMF

The AMF Act provides a possibility for the founder (exercising the rights of the founder) to request the court to terminate the non-public interest AMF. This is an important deviation from the general rules of the Civil Code, which do not provide for the possibility of such a termination. If the court makes a judgment on the termination of the AMF, this judgment shall not affect the fulfilment of the foundation's obligations already established and due for the benefit of the beneficiaries. The AMF can be deleted from the register after the fulfilment of the above-mentioned obligations towards the beneficiaries. The AMF Act makes it clear that in the case of a public interest AMF, the founder may make no such application for termination.

In addition to the termination reasons specified in the Civil Code,¹⁶ the AMF shall be terminated as provided in the AMF Act if its assets do not reach the minimum amount of capital requirement for three full business years. The reason for this special termination occasion is that there is no point in maintaining an AMF whose assets have not even reached the minimum capital for years. In fact, an

16. art 3: 403(1) of the Civil Code.

AMF in such a situation is unable to realize its purpose and to distribute benefits to the beneficiaries. Thus, the AMF Act, as a legal fiction, states that this reason for termination should be regarded as if the achievement of the objective of the foundation had become impossible.

Summary

The government created a new hybrid legal entity for long-term family and public wealth preservation and private asset protection. Moreover, the new legal form provides a unique opportunity for families to keep their privacy and at the same time maintain control over their assets. This legal entity simultaneously may act as a foundation managing its own assets and as a

trustee of a trust relationship. This combination of legal relationships is absolutely unique and offers countless opportunities for professionals.

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