

Private Foundations in Russia: Are They an Alternative to Trusts and Foreign Personal Foundations?

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In Russia, an attempt has been made to establish the mechanism of structuring and managing family assets, inheritance planning, ensuring business continuity and assets protection similar to the concept of foreign trusts, private foundations (including Stiftung) and other related structures.

Starting from 1 March, 2022, it will be allowed to create lifetime **Private Foundations**¹ within the Russian jurisdiction.

In 2017, the structure of **the Testamentary Foundations created only after the death of the settlor** on the basis of a settlor's will was introduced into the Russian law. It was significantly inferior to its foreign analogues, since when structuring the transfer of assets to beneficiaries, it is important to start this process during the lifetime of settlor in order to completely establish the rules and structure of the family foundation management. The concept of Private Foundations allows the creation of a Private Foundation specifically during the lifetime of a settlor, to establish the rules of its management, to determine the personal composition of the management bodies, etc.²

Status and Property of a Private Foundation

A Private Foundation is a nonprofit unitary organization and may be set up:

- on the basis of the settlor's resolution **for a definite or indefinite time period**; or
- by a notary after the death of a person in accordance with his/her will (Testamentary Foundation).

¹ Federal Law No. 287-FZ, dated 1 July, 2021, On Amendments to Part One and Part Three of the Civil Code of the Russian Federation (**Law on Private Foundations**). Full text of the Law on Private Foundations is available [here](#).

² As soon as the Law on Private Foundations is enacted, the Testamentary Foundation shall cease to exist as a separate structure but will become a special type of a Private Foundation.

The settlor may transfer any of his/her property to the Foundation, provided that, the **market value of such property is not less than 100 million rubles.**

However, in certain cases, the property may be returned from the Private Foundation, which makes the nature of such Foundation revocable³.

In some foreign structures, in case of creation, for example, of irrevocable discretionary trusts, the property shall irrevocably be transferred to the asset manager (trustee), which provides additional protection for the assets transferred to the trust/foundation and makes the structure of the trust/foundation entirely separated for the settlor from his/her creditors.

Private Foundation shall be entitled to carry out business activities, establish legal entities or have a share in them.

Private Foundation Documents

The main **constituent document of a Private Foundation shall be the Articles of Association** (in foreign jurisdictions known as a trust document), which are subject to notarization.

The settlor of the Foundation may additionally approve **the Private Foundation Management Conditions**, which are subject to notarization, as well as other internal documents.

An important aspect is that during the lifetime of a settlor, **making amendments** to the documents on which basis the Private Foundation is managed shall be allowed without limitation **but after his/her death—only in exceptional cases on the basis of a court decision.**

The Articles of Association of a Private Foundation shall not be an entirely confidential document as it shall be submitted to the registration authorities and a notary. The Private Foundation Management Conditions and other internal documents shall not be subject to any disclosure and shall be deemed confidential (except for disclosing the Private Foundation Management Conditions to the notary).

³ For example, the Articles of Association of a Private Foundation may as well establish that a settlor is a beneficiary to whom the property of the Private Foundation is to be transferred; the Articles of Association of the Foundation created for a definite time period may provide that in case of liquidation of the Foundation, its property shall pass into possession of the settlor due to occurrence of a particular event or the expiry of the term for which the Foundation was created, etc.

At the same time, the beneficiaries of the Foundation shall be entitled to obtain (i) information regarding the Private Foundation Management Conditions specifying the procedure of determination and appointment of the Private Foundation bodies, provisions on transferring property to such a beneficiary as well as (ii) a description of the circumstances upon which the transfer shall occur.

The Articles of Association and other internal documents shall not contradict each other, therefore, certain provisions of the Private Foundation Management Conditions and other internal documents shall also be set forth in the Articles of Association. Currently, there is no clear distinction between the information of public nature to be included into the Articles of Association of the Private Foundation and the information of confidential nature to be included into the Private Foundation Management Conditions⁴.

Thus, due to the absence of additional clarifications, it may not be exactly determined whether, for example, the information on the procedure for formation of the Private Foundation bodies, their membership and functions is to be public or confidential, which may significantly affect the beneficiary's choice of such Foundation as the Private Foundation may not be able to ensure absolute confidentiality of their information, which is a substantial criterion in structuring the personal assets management.

Private Foundation Management

The Articles of Association of the Foundation determine the structure of the management bodies consisting of:

- **Individual or Collective Executive Body** (*obligatory body*)—any individuals and legal entities may be the members thereof (**except for the settlor of the Foundation**), including professional asset managers, as well as any authorized persons of the settlor;
- **Supreme Collective Body and the Board of Trustees** (*in the case provided for in the Articles of Association*)—any individuals may be the members thereof including the settlor and beneficiaries;

⁴ As a general rule, the information **on the procedure for managing the legal entity's activity** refers to the information required to be included in its Articles of Association pursuant to Article 52 of the Civil Code of the Russian Federation and therefore is of public nature. The Law on Private Foundations establishes that the Private Foundation Management Conditions, along with the provisions on transferring the Foundation property to the beneficiaries or certain categories of persons and other provisions, may also include the provisions **on the procedure for determination and appointment of the Private Foundation bodies** and on **the procedure for paying remuneration to the members of these bodies**.

- **Supervisory Body** (*in the case provided for in the Articles of Association*)—any individuals may be the members thereof including the settlor and beneficiaries.

Supervisory Body may perform functions similar to the powers of a protector in foreign structures (for example, approval of certain transactions; control of payments to beneficiaries; appointment of beneficiaries).

During the lifetime of the settlor, it shall be possible **to change in any way the composition of the management bodies**, their functions and membership in accordance with the Articles of Association and the Private Foundation Management Conditions. After the death of the settlor, **the bodies of the perpetual Private Foundation shall survive and function in accordance with the Articles of Association and the Private Foundation Management Conditions.**

Powers of the Settlor of a Private Foundation

The settlor shall have broad rights in respect of its Foundation, including: the right to transfer the property at no cost to the Private Foundation; determine the composition, functions and membership of the Foundation management bodies; appoint beneficiaries; reorganize the Private Foundation, etc.

An important distinctive feature of Russian Private Foundations as compared to foreign structures is that only one individual person may be the settlor, and no substitution is possible, even in case of his/her death.

Co-founding shall be allowed solely for spouses and only in respect of their common property. Other persons, including close relatives, may not act as co-settlors. The Law on Private Foundations also limits the rights of third parties to gratuitous transfer of property to the Private Foundation.

In certain foreign foundations, co-founding is possible, their composition may change within the activities of the foundation, and also third parties may transfer property to the private foundation (for example, the property of beneficiaries may often be managed/owned by third parties). Such conditions regarding prohibition of co-founding may make the structure of the Private Foundation within the Russian jurisdiction less attractive.

For example, separation of assets owned by several family members may require creation of several foundations. As the Law on Private Foundations does not allow for further reorganization in the form of merger of foundations, whose settlors are

different persons, such approach may be disadvantageous in terms of costs for maintenance of Private Foundations' functioning. Alternatively, the restructuring of owning of an asset may occur through its transfer to one person who will then become the settlor of a Private Foundation. However, in such case, there are risks related to the loss of the ownership right to the asset or the right to receive income from the transferred asset.

Rights of Beneficiaries and Certain Categories of Persons

Private Foundation Management Conditions may provide that the Private Foundation property shall be transferred to **(i) certain persons, that is, beneficiaries**, or **(ii) certain categories of persons from an unlimited number of persons**.

Any individuals or nonprofit legal entities may act as **beneficiaries** of the Private Foundation. Besides, beneficiaries may be **expressly listed** in the documents of the Foundation (for example, it may be the children and other relatives of the settlor) or **determined through a class or other attribute** allowing to appropriately identify such persons (for example, the settlor's descendants).

The Articles of Association of the Foundation may also provide for the determination of the beneficiaries/certain categories of persons by the management bodies of the Foundation. The Law on Private Foundations does not determine the list of such categories of persons.

In addition to the rights to receive payments, property and property rights (for example, the rights to use certain property, including upon a certain age, under certain conditions), the Law on Private Foundations grants special rights specifically to the beneficiaries, such as:

- the right to receive certain information regarding the activities of the Private Foundation;
- the right to request auditing the Private Foundation by the auditor chosen by such a beneficiary;
- the right to be a member of the Supreme Collective Body or the Board of Trustees if their creation is provided for by the Articles of Association of the Foundation; and
- the right to claim damages in case of violation of the Private Foundation Management Conditions by its bodies.

The rights of the Private Foundation beneficiary may not be transferred by way of inheritance after the death of a person or reorganization of a legal entity (except for reorganization by transformation of the legal entity).

Guarantees of the Creditors' Rights

Regardless of the fact that transferring property to the Private Foundation entails termination of the settlor's ownership right to such property, the Law on Private Foundations establishes a "transitional period", during which the settlor and the Private Foundation shall bear subsidiary liability under the obligations of each other.

According to the draftsmen of the Law on Private Foundations, this provision is aimed to prevent using Private Foundations as an instrument allowing it to exclude the property from bankruptcy estate or release the settlor from liabilities to the creditors⁵.

The settlor's creditors will be able to levy execution on the Private Foundation property within three years from its creation if the settlor's property is deficient, and vice versa, on the settlor's property, if the Private Foundation property is deficient.

In exceptional cases, if the creditors fail to file any claim within three years for good reasons, **the court may extend this term up to five years**⁶.

In a number of foreign jurisdictions there are also provisions protecting the creditors' rights from reducing the settlor's assets. However, levying execution on the assets of foreign trusts and foundations in relation to the settlor's debts shall be possible, provided that the applicants comply with considerably strict standards of proof (for example, it is necessary to prove that the trust or foundation is controlled by the settlor or sham, etc.), or in certain jurisdictions, the reference is made to the settlor's bankruptcy and the certain time period before the bankruptcy proceedings, within which it is possible to levy execution on the property transferred to the trust or foundation.

⁵ Thus, in the Explanatory Note to the Law on Private Foundations, it is specified that there is a possibility to challenge the resolution of an individual on establishment of a Private Foundation (as a transaction) under the insolvency (bankruptcy) legislation.

⁶ Also, it is not quite clear what the "good reasons" mean, due to which the creditors may miss the three-year term for filing claims in relation to the settlor's debts. Such cases are likely to be established in the court practice.

At the same time, beneficiaries shall not be liable for the obligations of a Private Foundation, and a Private Foundation shall not be liable for the obligations of beneficiaries.

As set forth above, under the Law on Private Foundations, it is allowed to provide, in the Articles of Association, for the right of the settlor Private Foundation to also be its beneficiary. It appears that, in such case, the Foundation beneficiary's status shall not be the ground for releasing him/her from the subsidiary's liability.

Creditors may also learn of creation of the Private Foundation from public registers since the Foundation is subject to the state registration as a nonprofit organization.

All these provisions may also adversely affect the choice of the Foundation structure by beneficiaries as they provide for serious exceptions to the principle of separation of the Foundation property, as well as the possibility to return the property to which the settlor has already lost the property right, within five years from the day of the Foundation creation.

Redomiciliation of Foreign Foundations and Trusts

Federal Law No. 290-FZ, dated 3 August, 2018, On International Companies ("Law on ICs"), adopted under the Program of De-Offshorization of the Russian Economy, allows foreign unitary nonprofit organizations with the asset balance not less than 500 million rubles to adopt the resolution on a change of the personal law by establishment of an international foundation in the special administrative regions in the territories of Russky Island (Primorsky Krai) and Oktyabrsky Island (Kaliningrad Region) ("SARs (Special Administrative Regions)").

Currently, international foundations are not used for redomiciliation of foreign trusts and other similar institutions due to limitations in respect of the purposes of creation and activities of the international foundation.

Thus, it is not allowed to establish and use an international foundation for distribution of profit and other payments to the settlors, beneficiaries and third parties, as well as for carrying out management activities in relation to individual's property obtained by way of inheritance. In addition, pursuant to the Law on ICs, individuals may not be the settlors of an international foundation.

The Ministry of Economic Development of Russia developed a draft law on amendments to the Law on ICs and the Federal Law On Special Administrative Regions

in the Territories of Kaliningrad Region and Primorsky Krai (“Draft Law on ICs and SARs”)⁷, aimed at distinguishing the legal status of an international socially useful foundation and the international Private Foundation registered in the territory of the SAR.

The Draft Law on ICs and SARs establishes that, starting from 1 March, 2022, **foreign citizens will be able to create living and testamentary international Private Foundations through redomiciliation or incorporation in the territory of SARs**⁸. When registering an international Private Foundation, a settlor shall provide the representation to the managing company that there is no bankruptcy proceeding in respect of the settlor of the international Private Foundation or foreign foundation as well as confirm that the value of the property being transferred to the foundation amounts to not less than five billion rubles.

Formation of Special-Purpose Capital (Endowment) in the Structure of the Private Foundation

Family business often implies common expenses being incurred by the family members including those related to charity, cultural and other socially important projects. In this case, publicity and transparency of such expenses are of particular importance as well as the possibility to control the intended use of the transferred property.

Federal Law No. 275-FZ, dated 30 December, 2006, On Procedure for Formation and Use of Endowment of Non-Profit Organizations (“Law on Endowment”) allows to form special-purpose capital on the basis of foundations and other nonprofit organizations in order to carry out charity, cultural and other activities, funded on the basis of donation agreements or wills.

However, the Law on Endowment does not allow for transferring one's property to fund the special-purpose capital by its owners, except for the passive income from the property transferred for formation of the special-purpose capital by the third parties.

Though it is not expressly indicated in the Law on Private Foundations, it appears that Private Foundations will be able to form the endowment. At the same time, as mentioned above, gratuitous transfer of property to the Private Foundation by the persons who are not its settlors is prohibited. Thus, currently the endowment formed by

⁷ The text of the Draft Law on ICs and SARs is available [here](#).

⁸ The Draft Law on International Companies and Special Administrative Regions so far **does not provide for the possibility for the Russian citizens to redomicile or incorporate the international Private Foundation**.

a Private Foundation may be funded exceptionally at the expense of donations of the settlor and transfer of property under the will of the settlor.

Prospects for the Private Foundations' Development

Adoption of the Law on Private Foundations is an important step towards creation in the territory Russia of an alternative to the foreign trusts and foundations, which are popular among Russian citizens. Nevertheless, some provisions of the Law on Private Foundations, such as the possibility to return property from the Private Foundation in certain cases (revocability of the Foundation), subsidiary liability of the settlor and the Foundation under the debts of each other during the period of five years and limitations of confidentiality make the structure of a Private Foundation less attractive as compared to the foreign analogues.

When structuring the family property ownership, irrespectively of the jurisdiction of the Foundation, it is important to form a clear structure of the management bodies consisting of professional asset managers and the authorized persons of the settlor to specify thoroughly in the documents of the Foundation the principles of the foundation management and adoption of resolutions by the management bodies, defining of beneficiaries, management and distribution of property, etc. In Russia the market of professional asset managers is starting to develop, therefore, the adoption of the Law on Private Foundations will encourage formation of such family asset managers including on the basis of other professional asset managers.

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We will be happy to answer any questions you may have on this subject.

MOSCOW



Alyona N. Kucher
ankucher@debevoise.com



Vadim Kolomnikov
vgkolomnikov@debevoise.com