

# CHARITABLE FOUNDATIONS AND CORPORATE SUCCESSION

Charitable foundations are receiving increased media attention at the moment. The reason for this is less due to the continuous growth of the Swiss charity sector, (which currently consists of more than 13,000 charitable foundations), but more due to the charitable commitment of well-known and influential entrepreneurs and business people.

## Motivation to Establish a Charitable Foundation

Central to the establishment of any charitable foundation is the intention to do good and to provide a benefit to society. It is not uncommon for a charitable foundation to be established for a whole number of different reasons, arising both from the inner views and the personal background of the founder. Therefore, charitable foundations are more and more often built upon both philanthropic as well as economic considerations. A prime example of this is the establishment of a charitable foundation where a company dedicates its own assets as foundation assets. In the context of succession planning, for example because the founder has no descendants who are able or willing to carry on the business and he fears that the company will be sold or broken apart after his death, the founder can safeguard jobs and preserve his interests in the long-term through the creation of a charitable foundation. Simultaneously, the income of the company should – at least in part – serve charitable purposes.



## Establishment Requirements

Article 80 of the Swiss Civil Code sets out three essential material requirements for the establishment of a charitable foundation which must be expressly contained in the foundation deed. There must be the intent to establish a charitable foundation, the original assets must within the meaning of the dedication undergo a definitive separation from the founder in favor of the newly created legal entity, and there must also be a purpose for which the foundation is to be established.

For the establishment of a charitable foundation initial capital is required, which according to common practice of the Federal Supervisory Authority for Foundations must be at least CHF 50'000. A lower initial capital amount is permitted on an exceptional basis, provided that the founder demonstrates that further sufficient contributions are genuinely to be expected.

In addition, there are formal establishment requirements. Apart from the required form – official document or testamentary disposition –, an entry of the charitable foundation must be made in the commercial register. This will require additional information, such as the name and headquarters of the charitable foundation, along with the designation of potential auditors or appointment of trustees, when applicable.

## Tax Exemption

Although tax exemption is not a central priority for all founders, the pursuit of a foundation goal which is in the general interest of society is a fundamental requirement. Charitable foundations receive tax exemption for profits and capital if the common good is served through its activities in charitable,

humanitarian, health-promoting, environmental, educational, scientific or cultural fields. Possible activities that lead to tax exemption for charitable foundations include for example social work, art and science, education, the promotion of human rights, homeland security, environmental and animal protection, as well as development aid.

If the assets of a charitable foundation are in the form of a company, then the tax exemption is subject to further requirements. This is to ensure, among other things, that the non-profit foundation does not exercise a dominant influence over the company. This also requires that an organizational and personal separation is created between the trustees of the charitable foundation and the executive board of the company, although it is permissible for a liaison person to be active in both bodies. It is further necessary that the company's continued existence is subordinate and secondary to the charitable purpose. For this reason, it is required that the foundation receives substantial donations from the company on a regular basis, with which it exercises its altruistic activities for the common good.

## Potential influence of the founder

When a charitable foundation is established, it emerges with its own independence and autonomy and the will of the founder is thus withdrawn. Nevertheless, there are still possibilities for the founder to exercise further influence upon the charitable foundation. It is permitted for the founder himself to be a trustee of the charitable foundation and in that way take part in the management activities. In principle, it is even permissible for the founder to be the only body of the charitable foundation. However, the founder does not receive any special additional rights within his role as trustee, and he must abide by the foundation deed in the same way as every other trustee.

Furthermore, the founder has the possibility to grant himself in the foundation deed a so-called right of influence, which enables him to retain a certain power over the charitable foundation, even if he himself is not a trustee of the foundation board. The founder can for example reserve the right to appoint or dismiss individual or all trustees, make foundation decisions subject to his own explicit approval, or grant himself the possibility of a foundation regulation, where appropriate, to issue orders to the foundation's various bodies. Additionally, according to article 86a of the Swiss Civil Code the founder has the possibility to modify the purpose of the charitable foundation, provided that a corresponding reservation was included in the foundation deed. It is prohibited, however, for the founder to grant himself, his legal successors, or any third parties in the foundation deed a free right of termination. It is, however, conceivable that the founder already at the time of establishment of the foundation limited the duration of its existence or predetermined a future termination of it.

## Conclusion

In the next five to ten years, approximately 70,000 small and medium-sized companies which are majority owned by the family will pass on to their successors. In addition to business activities, family-owned businesses also often pursue charitable activities.

By setting up a charitable foundation in which the company itself is used as the asset, there is a perfect opportunity for family businesses to pursue philanthropic objectives, serve the common good and at the same time regulate corporate succession.

**If you liked this article you may also be interested in reading about [Charitable Foundations and Associations in Switzerland](#), in [Trust Law International](#), Vol. 24, No. 1, 2010 by Oliver Arter**

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