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# Charitable Foundations and Associations in Switzerland

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# Charitable Foundations and Associations in Switzerland

Oliver Arter\*

## Introduction

On 1 January 2006, the Swiss Foundation Law was revised with the intention of increasing the desire to establish foundations.<sup>1</sup> The background to this<sup>2</sup> revision was the belief that foundations could significantly support and relieve the state in many of its responsibilities and that with the liberalisation of the Foundation Law the areas of culture, education, research, science and social welfare would benefit from additional funds.<sup>3</sup> Accordingly, the main objective of revising the Foundation Law was to facilitate granting of funds.<sup>4</sup> This was achieved through three legislative measures: first, by the possibility of changing the purpose of a foundation under certain conditions,<sup>5</sup> secondly, by improving the control of foundations and, thus, the creation of increased transparency through the introduction of a mandatory auditor, and, thirdly, by increasing the ability to make tax deductions for voluntary contributions to charitable institutions.<sup>6</sup>

Before the revision of the Foundation Law, charitable institutions were already widespread in Switzerland. According to estimates, there are over 8,000 classic foundations in Switzerland that are committed to the public welfare.<sup>7</sup> These are exempted from tax liability under certain conditions. The tax exemption for institutions that pursue charitable purposes is, however, not limited to foundations. Other legal entities, in particular associations, may also be exempted from taxes.

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1 AS 2005, 4545 ff.

2 The Foundation Law and the Association Law were revised together with the Limited Liability Company Law and with adjustments in Stock Corporation Law, Corporation Law, Commercial Register Law and Company Name Law as of 1 January 2008. The changes concern in particular organisational deficiencies as well as obligations of accounting and auditing. cf AS 2007, 4791 ff. cf also Hans Michael Riemer, 'Aktuelle Neuerungen im schweizerischen Vereins- und Stiftungsrecht' in Florian S Jörg and Oliver Arter (Hrsg.) *Entwicklungen im Gesellschaftsrecht I* (Bern, 2006) p 17 ff and Hans Michael Riemer 'Aktuelle Rechtsentwicklungen im schweizerischen Vereins- und Stiftungsrecht' in Oliver Arter and Florian S. Jörg (Hrsg.) *Entwicklungen im Gesellschaftsrecht II* (Bern, 2007) p 123 ff.

3 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, 23 October 2003, BBl 2003, 8153 ff.

4 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, 23 October 2003, BBl 2003, 8154.

5 Art 86a Abs 1, ZGB (Civil Code).

6 Art 33a, DBG and Art 59, para 1 sub-para c, DBG; Art 9, para 2, sub-para F, StHG and Art 25 para 1, sub-para c, StHG. cf also parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, 23 October 2003, BBl 2003, 8154.

7 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, 23 October 2003, BBl 2003, 8156.

This article starts with an overview of the Swiss tax system. Subsequently, it is shown under which conditions voluntary payments to charitable institutions are tax exempted. Then the conditions under which charitable institutions are tax exempted are looked at in more depth. Finally, two possible forms of non-profit legal entity will be looked at closely: namely the Foundation and the Association.

## **A brief overview of the Swiss tax system**

### ***Federal state and tax structure***

The Swiss tax system has grown historically and reflects the federal state structure of the country. Taxes are levied by the Confederation, the cantons and communes.

The *Confederation* covers most of its fiscal revenue through value-added tax,<sup>8</sup> stamp duties,<sup>9</sup> customs duties and from special user taxes.<sup>10</sup> In addition, the Confederation levies an income tax.<sup>11</sup>

Each of the 26 *cantons* has its own tax law and charges the income, assets, inheritance, capital and land gains and other tax items differently.<sup>12</sup> Finally, the approximately 2,700 *communes* are authorised to levy municipal taxes either at their sole discretion or to levy an additional charge on the cantonal tax that is owed.<sup>13</sup>

Within the scope of the Federal Constitution, the Swiss cantons are free to organise their own fiscal systems.<sup>14</sup> Therefore, for a long time the cantonal tax laws differed from each other considerably. Meanwhile, however, the tax regulations of the Confederation, cantons and communes have been coordinated and partially harmonised. Legal basis of the *tax harmonisation* is Art 129 of the Swiss Federal Constitution, the Federal Law on the harmonisation of direct taxes of cantons and communes<sup>15</sup> and the Federal Law on direct federal taxes.<sup>16</sup> According to Art 129 of the Swiss Federal Constitution, the Confederation has to determine the principles of tax legislation of the cantons and communes on tax liability, subject and time assessment of taxes as well as procedural law and law regarding fiscal offences, and to monitor compliance.<sup>17</sup> On the other hand, the Confederation is not responsible for defining tax scales, tax rates and tax-free amounts.<sup>18</sup>

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8 Federal Law on Value Added Tax (MWSTG) of 2 September 1999, SR 641.20.

9 Federal Law on Stamp Duties (StG), SR 641.10.

10 cf 'Schweizerische Steuerkonferenz (Information)' *Kommission für Information*, Bern 2009, 6.

11 Federal Law on Direct Federal Tax (DBG), SR 642.11.

12 Schweizerische Steuerkonferenz, *Information* (fn 10), 6.

13 Schweizerische Steuerkonferenz, *Information* (fn 10), 6.

14 Art 3, BV, 76, BV, 127 ff, BV, ESTV-Concordat, 1.

15 Federal Law on the Harmonization of Direct Taxes of Cantons and Communes (StHG), SR 642.14.

16 Federal Law on Direct Federal Tax (DBG), SR 642.11.

17 cf Art 1, StHG:

'1 This Law determines the direct taxes to be levied by cantons and defines the principles according to which the cantonal legislation shall be formed.

2 The Law also applies to the communes, provided that the cantonal law admits to the communes fiscal sovereignty for the prescribed cantonal taxes according to article 2, paragraph 1.

3 As far as this Law provides no rule, cantonal law applies to the form of the cantonal and communal taxes. In particular the provision of tax scales, tax rates and tax-free amounts remains a matter for the cantons.'

cf also Art 2, StHG:

'The cantons levy the following taxes:

- a. an income and property tax on natural persons;
- b. a profit and capital tax on legal persons;
- c. withholding tax on certain natural and legal persons;
- d. a real estate capital gains tax.'

18 Art 129, para 2, sentence 2, BV.

## **Main features of taxation of non-tax exempted foundations and associations**

### ***Profit tax***

The profit tax of non-tax-exempted foundations and associations at federal level is 4.25 per cent of net profits<sup>19</sup> whereby profits under CHF 5,000 are not taxed.<sup>20</sup> Membership fees to associations and contributions to the assets of foundations are not calculated as taxable income.<sup>21</sup> Furthermore, the necessary expenses to achieve income can be deducted in their entirety from the taxable income of the associations.<sup>22</sup>

At the level of the Swiss cantons different regulations apply. Some cantons' tax foundations and associations according to the applicable provisions and tariffs for natural persons, others according to the applicable rules for companies and yet others apply a separate tax scale.<sup>23</sup> The tax rate often ranges between 4 per cent and about 10 per cent of the profits.<sup>24</sup> In the canton of Zurich and Zug, for example, the profit tax for foundations and associations is 4 per cent of net profit, provided that it reaches at least CHF 10 000.<sup>25</sup>

### ***Capital tax***

The cantonal property and capital taxes in the individual cantons also differ considerably. In the canton of Zurich, for example, the capital tax for foundations and associations is 0,75 per thousand of taxable equity capital.<sup>26</sup>

## **Legal basis of tax exemption**

### ***General***

When considering the taxation of charitable institutions, a distinction has to be made between the tax exemption of the actual legal entities that pursue public, charitable or cult purposes, and the deductibility of donations that are made by natural or legal persons to such entities.

### ***Deductibility of donations to charity organisations***

#### ***On the federal level***

Article 33a DBG provides that *voluntary contributions of money and other assets to legal entities with seat in Switzerland*,<sup>27</sup> which in view of their *public or charitable purposes* are exempt from tax liability, can be deducted from the income of natural persons, provided that in one tax year

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19 Art 71, para 1, DBG.

20 Art 71, para 2, DBG.

21 Art 66, para 1, DBG.

22 Art 66, para 2, DBG.

23 Andreas Kolb: 'Besteuerung von Stiftungen in der Schweiz und in Liechtenstein', *Steuer & Wirtschaft International*, No. 6, June 2001, 270 ff.

24 Kolb (fn 23), 271.

25 Art 76, StG, ZH, Art 66, para 4, StG, ZG.

26 Art 82 STG, ZH, provided that it is at least CHF 100,000.

27 cf Federal Supreme Court, judgment of 7 May 2002, 2A.148/2002. cf Peter Mäusli-Allenspach 'Steuerliche Überlegungen bei der Widmung von Vermögenswerten an ausländische Stiftungen' STR 1996, 115 ff.

these contributions reach at least CHF 100 and in total don't exceed 20 per cent of net income.<sup>28</sup>

A similar provision is found in respect of the calculation of net profit of legal persons. *Voluntary contributions of money and other assets* (up to 20 per cent of net profit) to *legal persons with seat in Switzerland*, which in regard of their *public or charitable purposes* are exempt from tax liability, constitute justified business expenses of a legal person, which can be deducted from revenue.<sup>29</sup>

#### *On the cantonal level*

According to the requirements of the tax harmonisation law, *voluntary contributions of money and other assets to legal entities with seat in Switzerland*, which in regard of their *public or charitable purposes* are exempted<sup>30</sup> from tax liability,<sup>31</sup> can be deducted from the net income of natural persons up to a level determined by cantonal law.<sup>32</sup> Legal persons may claim contributions to such bodies on the cantonal level as business expenses and deduct them from income.<sup>33</sup>

In contrast to the legislation on direct federal tax, there is no provision in the tax harmonisation law that determines the amount of possible deductions. This is because the Confederation is not competent to determine the amount of taxes to be levied or the allowable deductions of the cantons.<sup>34</sup> The amount of possible deductions therefore varies between the different cantons.<sup>35</sup>

#### *Conditions of tax deductibility*

Donations are tax-deductible, provided certain preconditions are met. Only *voluntary*

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28 Art 33a, DBG. See re the amount of the deduction the comment of the Swiss Federal Council of 5 December 2003 to Parliamentary initiative on revision of the Foundation Law (Schiesser), report of the Commission for Economic Affairs and Taxation of the Council of States, 23 October 2003, BBl 2003, 8194 ff.

29 Art 59, para 1, lit c, DBG.

30 cf Art 23, para 1, sub-para f, StHG.

31 The same applies to contributions to the Confederation, cantons, communes and their institutions. Cf Art 23, para 1, sub-para a-c, StHG.

32 cf Art 9, para 2, sub-para i, StHG.

33 Art 25, para 1, lit c, StHG.

34 cf Art 129, BV.

35 The cantonal laws provide by analogy that voluntary money contributions to the Confederation and its institutions, to the canton and its institutions, to the cantonal communes and its institutions and other legal persons with seat in Switzerland, which in regard of public or exclusively charitable purposes are exempted from tax liability, can be deducted from income, provided that in the tax period the contributions reach a minimum amount, usually CHF 100, and in total don't exceed a certain percentage of taxable income (reduced by expenses). Following maximum percentages apply to natural persons in the cantons: Aargau: 20 per cent (§ 40, lit k, STG AG); Appenzell Ausserrhoden: 10 per cent (Art 36, lit b, StG AR); Appenzell Innerhoden: 10 per cent (Art 35, lit i, StG AI); Basel-Land: no minimum and maximum sum limit (Art 29, para 1, lit 1, StG BL); Basel-Stadt: 10 per cent (Art 33, lit b, StG BS); Bern: 10 per cent (Art 38, para 1, lit k, StG BE); Fribourg: 5-15 per cent (Art 34, para 1, lit i, StG FR); Geneva: 5 per cent (Art 8, StG GE), Glarus: 5 per cent (Art 31, para 1, No 9, STG GL); Graubünden: 10 per cent (Art 36, lit i, StG GR); Jura: generally 10 per cent, further deductions possible (Art 40, para 1, lit i, StG LU); Neuchâtel: 1 per cent (Art 36, para 1, lit i, StG NE); Nidwalden: 10 per cent (Art 37, para 1, No 2, NW StG); Obwalden: 10 per cent (Art 35, para 1, lit i, StG OW), Schaffhausen: 20 per cent (Art 35, para 1, lit k, StG SH); Schwyz: 10 per cent (§ 33, para 3, lit b, STG SZ); Solothurn: 20 per cent (§ 41, para 1, lit l, StG SO); St Gallen: 10 per cent (Art 46, lit c, StG SG); Tessin: 10 per cent (Art 32, para 1, lit h, StG TI); Thurgau: 10 per cent, but at least CHF 8,000 (Art 34, para 1, number 11 STG TG); Uri: 10 per cent (Art 41, StG UR); Waadt: 10 per cent (Art 37, lit i, STG VD), Wallis: 10 per cent (Art 29, lit i, VS STG); Zug: 10 per cent (Art 31, lit b, StG ZG); Zurich: 20 per cent (Art 32, lit b, StG ZH).

contributions<sup>36</sup> of money or other assets<sup>37</sup> to legal persons<sup>38</sup> with seat in Switzerland, which in regard of their public or charitable purposes are exempt from tax liability, are deductible.<sup>39</sup> On the cantonal level, voluntary contributions to institutions that pursue cult purposes, are also often tax-deductible.<sup>40</sup>

It is controversial whether allowing the tax deductibility of membership fees or other payments due according to statute and to which a legal person is entitled, is admissible. According to the practice of the Swiss Federal Tax Administration, such payments are not considered as deductible donations.<sup>41</sup> However, everyday life shows that people often join an association as a member only because they want to support the public good by paying their membership fees. Even though in such cases the payments are not truly voluntary, but rather the association is entitled to the membership fee, such donation should be allowed as a tax deduction.<sup>42</sup>

### ***Tax exemption of legal persons for profit and capital***

#### *On the federal level*

#### TAX EXEMPTION OF LEGAL PERSONS THAT PURSUE PUBLIC OR CHARITABLE PURPOSES

*Legal persons* that pursue public or charitable purposes are exempt from tax on their profits dedicated exclusively and irrevocably to these purposes.<sup>43</sup>

#### TAX EXEMPTION OF LEGAL PERSONS THAT PURSUE CULT PURPOSES

*Legal persons* that pursue cult purposes throughout Switzerland are also exempt from tax on their profits dedicated exclusively and irrevocably to these purposes.<sup>44</sup>

#### *On the cantonal level*

The tax harmonisation law contains identical provisions to those in the Federal Law on direct federal taxes (DBG) in respect of the tax exemption of legal persons that pursue public, charitable or cult purposes. It accordingly provides for tax exemption for profits and capital dedicated exclusively and irrevocably to these purposes.<sup>45</sup>

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36 ie contributions that are not made in performance of an obligation.

37 For example, immovable and movable property, capital assets, claims or intellectual property rights. cf parliamentary initiative on revision of the Foundation Law (Schiesser), report of the Commission for Economic Affairs and Taxation of the Council of States, 23 October 2003, BBl 2003, 8173 ff.

38 Donations to a trust are probably excluded. cf Edgar H Paltzer and Patrick Schmutz, 'Switzerland: Are charitable trusts an alternative to charitable foundations?' [2008] *Trusts & Trustees* 14(5) 357 at 362 ff.

39 Martin Zweifel and Peter Athanas (Hrsg.) (Bask-Bearbeiter) *Basler Kommentar zum Schweizerischen Steuerrecht, Bundesgesetz über die direkte Bundessteuer (DBG), Art 1 - 82 DBG* (Basel 2008), BasK-Zigerlig/Jud, N 3 ff to Art 33a, DBG.

40 Art 23, para 1, sub-para g, StHG. cf for example, § 61, lit i, StG ZH.

41 Eidgenössische Steuerverwaltung (KS 12), Hauptabteilung Direkte Bundessteuern, Kreisschreiben No 12 of 8 July 1994, 7.

42 See also Bask-Zigerlig/Jud (fn 39), N 9 to Art 33a, DBG.

43 Art 56, para g, DBG.

44 Art 56, para h, DBG.

45 cf Art 23, paras f and g, StHG.

*Conditions for a tax exemption*

The conditions that have to be met for a tax exemption are covered in more detail further below.

***Tax exemption for estates and gifts***

Estate and gift taxes are levied by almost all cantons and communes, but not by the Confederation.<sup>46</sup> The canton of Schwyz has neither estate tax nor gift tax, and the canton of Lucerne only levies estate tax.<sup>47</sup> In many cantons, transfer of property to direct descendants or to the spouse based on inheritance or gift are not subject to any taxation.<sup>48</sup> All transfers of property by reason of death to the legal heirs or the legatees<sup>49</sup> are regarded as tax objects under estate tax. The objects of gift tax are voluntary, nonpaid contributions inter vivos.<sup>50</sup> The taxpayer is in principal the recipient of the property transfer,<sup>51</sup> which means for estate tax the heirs or legatees and for gift tax the gift recipient.<sup>52</sup> The (market) value of the estate,

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46 Daniela C Fischer, Beat Walker and Clarisse Pifko, *Das schweizerische Steuersystem. Eine praxisorientierte Einführung mit zahlreichen Beispielen* (Zürich, 2004), p 61; Peter Mäusli-Allenspach and Mathias Oertli, *Das schweizerische Steuerrecht. Ein Grundriss mit Beispielen* (Bern, 2004), p 441; see also Ernst Höhn and Robert Waldburger *Steuerrecht. Band I. Grundlagen-Grundbegriffe-Steuerarten. Interkantonales und Internationales Steuerrecht. Steuerverfahrens- und Steuerstrafrecht* (Bern/Stuttgart/Wien, 2001), § 27 N 6.

47 In the canton Graubünden, in addition, a special feature exists, according to which, besides the canton, the communes are also entitled to levy a tax on inheritances; Peter Mäusli-Allenspach and Mathias Oertli (above, fn 46), p 442.

48 cf for example, § 11, ESchG-ZH:

‘The spouse, the registered partner and the descendants of the deceased or the donor are exempt from tax liability.’

See also Peter Mäusli-Allenspach and Mathias Oertli (above, fn 46), p 441 f.

49 Legal transactions and transfers of property in the form of estates, legacy, or heir order are captured here; the civil law provisions of inheritance law are decisive. In the event that a testator has left a formal and materially valid last will and testament, it is also decisive for the levy of estate tax; otherwise, the rules of legal succession apply. In order to be recognised as a legacy under tax law, it must be provided for in the last will and testament (otherwise it will generally be considered a gift). See Ernst Höhn and Robert Waldburger (above, fn 46), § 27, N 21 ff.; Peter Mäusli-Allenspach and Mathias Oertli (above, fn 46), p 443; Daniela C Fischer, Beat Walker and Clarisse Pifko (above, fn 46), p 61.

50 The term ‘gift’ under tax law is generally broader than the term ‘gift’ under the civil law according to Art 239 ff, OR. Cantonal tax laws often contain their own definitions of the object of the gift tax, cf for instance § 4, ESchG-ZH:

‘1 Contributions inter vivos, by which the receiver is enriched from the assets of another without giving consideration, are subject to gift tax.

2 Particularly receipt of assets in credit to the future inheritance, gifts inter vivos to heirs or non-heirs and the establishment of a foundation during lifetime, constitute taxable gifts.

3 Contributions of insurance payments that become due during the lifetime of the donor are subject to gift tax, provided that they are not taxed as income.’

See also Ernst Höhn and Robert Waldburger (above, fn 46), § 27 ff N 30 ff, and regarding the concept of donation especially N 34 ff.

51 Ernst Höhn and Robert Waldburger (above, fn 46), § 27 N 16. cf For example § 8, ESchG-ZH:

‘1 The recipient of the transferred property (heir, legatee, gift recipient, beneficial owner, beneficiary) is liable to taxation.

2 On the transfer of usufruct and periodic contributions, the beneficiary or the recipient is liable to taxation.

3 In the concept of substitutional heir, both the pre-and post-heir are liable to taxation.’

52 Ernst Höhn and Robert Waldburger (above, fn 46), § 27, N 16; Peter Mäusli-Allenspach and Mathias Oertli (above, fn 46), p 443.

legacy or gift provides the calculation basis<sup>53</sup> for estate and gift taxes.<sup>54</sup> The tax rate is determined by the value of the transferred property and the grade of relationship.<sup>55</sup> The tax rate, in general, is progressive.<sup>56</sup>

There are various reasons for tax exemption and allowances in Swiss cantons and communes, which are sometimes very differently regulated. Legal persons that pursue public or charitable purposes or cult purposes in a canton or in Switzerland as a whole are often exempt from taxes on transfers of property.<sup>57</sup>

## **Criteria for the tax exemption of legal persons**

### ***General***

The conditions according to which charitable institutions enjoy tax exemption are presented below. The Swiss Federal Tax Administration has issued a so-called circular letter dated 8 July 1994 regarding the levy of direct federal tax.<sup>58</sup> This deals in detail with the views of the tax authority regarding the exemption from tax of legal persons that pursue public, charitable or cult purposes.<sup>59</sup> In addition, on 18 January 2008 the Swiss Tax Conference, an association of the Swiss tax authorities, published practice notes on the same subject for the attention of cantonal tax administrations.<sup>60</sup> These two documents are of great importance for tax exemption questions.<sup>61</sup>

### ***Legal person***

#### *In general*

According to the terminology of Art 56, paras (g) and (h), DBG as well as Art 23, paras (f) and (g), StHG, *legal persons* are exempt from tax liability under certain conditions. Natural

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53 cf also Schweizerische Steuerkonferenz: Steuerinformationen, Teil D Einzelne Steuern, Die Erbschafts- und Schenkungssteuern, February 2009. Most Swiss cantons levy a so-called 'estate receipt tax', which is levied separately based on the inheritance of each heir or legatee and therefore is calculated according to the amount of the individual estates. With the exception of the canton of Graubünden, which knows only an estate tax, and the canton of Schwyz, which levies neither an estate nor a gift tax, all cantons use the 'estate receipt tax' type. An estate tax on the entire estate, not divided property of the descendant, will be levied in the canton of Graubünden, whereas the communes of the canton may additionally levy an 'estate receipt tax'. In the canton of Solothurn an estate tax is levied in addition to the 'estate receipt tax'.

54 Ernst Höhn and Robert Waldburger (above, fn 46), § 27 N 47; Peter Mäusli-Allenspach and Mathias Oertli (above, fn 46), 444.

55 cf Ernst Höhn and Robert Waldburger (above, fn 46), § 27 N 56 ff.

56 cf for example § 22, ESchG-ZH.

57 cf for Zurich §10, para 1 sub-para f, and para. 2, ESchG-ZH in connection with § 61, paras g and I, StG ZH.

58 Regarding the legal nature of the circular letter cf BGE 131 II 1 ff, 11, according to which circular letters of the Swiss Federal Tax Administration, like guidelines, bulletins, directives, circulars and instructions, do not belong to Federal law and do not constitute rights or obligations of citizens. The circular letter has only the significance of expressing an opinion of the administration regarding the interpretation of the applicable Federal law.

59 Eidgenössische Steuerverwaltung, KS 12 (fn 41).

60 Schweizerische Steuerkonferenz (Steuerbefreiung): Kommission für Selbständigerwerbende und juristische Personen, Arbeitsgruppe Steuerbefreiung: Steuerbefreiung juristischer Personen, die öffentliche oder gemeinnützige Zwecke oder Kultuszwecke verfolgen, Abzugsfähigkeit von Zuwendungen, Praxishinweise zuhanden der Kantonalen Steuerverwaltungen, 18 January 2008. cf Walo Stählin, 'Steuerbefreiung juristischer Personen mit öffentlichen oder gemeinnützigen Zwecken, Schweizerische Steuerkonferenz publiziert Praxishinweise', ST 2008, 235 ff.

61 Concerning the extent binding for the Federal Supreme Court cf in particular BGE 123 II 16 ff., 30, BGE 121 II 473 ff., 478, BGE 117 Ib 225 ff, 231.



persons or partnerships may not be exempted from tax liability, not even if they perform exactly the same, as such tax-exempted, activity as legal entities.<sup>62</sup>

In practice, of the tax-exempt legal persons,<sup>63</sup> foundations<sup>64</sup> and associations<sup>65</sup> are in the foreground.<sup>66</sup> However, companies, eg joint stock companies,<sup>67</sup> may also be exempted from tax liability under the same conditions as foundations or associations, although a joint stock company is additionally required to abandon the right of distributing dividends<sup>68</sup> or management bonus<sup>69</sup> in its articles of associations.<sup>70</sup>

*Digression: Tax exemption for trusts?*

Trusts are not legal persons.<sup>71</sup> According to Swiss law, legal persons are characterised by the fact that they have a legal personality of their own.<sup>72</sup> Although trusts have some similar features to the Swiss foundation, the trust lacks its own legal personality according to the opinion of the Swiss tax authorities, because under civil law the trustee and not the trust itself is the owner of the trust property,<sup>73</sup> subject to the obligation to keep the trust property for the benefit of a third party, the beneficiary or for a particular purpose.<sup>74</sup>

The principle according to which legal persons differ from other personal and impersonal entities by fact of having their own legal personality is not unlimited under Swiss

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62 Thomas Koller, 'Gemeinnützigkeits- und Spendenrecht in der Schweiz', in W. Rainer Walz, Ludwig von Auer and Thomas von Hippel (Hrsg.) *Spenden- und Gemeinnützigkeitsrecht in Europa, Rechtsvergleichende, rechtsdogmatische, ökonomische soziologische Untersuchung* (2007), p 441 ff, 447; Reto Kuster, *Die Steuerbefreiung von Institutionen mit öffentlichen Zwecken*, (Zürich, 1998), p 244.

63 The association, the foundation, the joint stock company, the association limited by shares, the limited liability company and the cooperative are legal persons under Swiss law. cf Heinrich Honsell, Nedim Peter Vogt and Thomas Geiser (Hrsg.) (Bask-Bearbeiter) *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I, Art 1 - 456 ZGB* (Basel/Genf/München, 2006), BasK-Huguenin, N 6 zu Vorbemerkungen Art 52-59, ZGB.

64 Art 80 ff, ZGB.

65 Art 60 ff, ZGB.

66 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2

67 The advantage of a joint stock company is that the membership rights to it are transferable. cf Peter Böckli, *Schweizer Aktienrecht* (Zürich, 2004), § 1 N 20.

68 Art 620, para 3, OR regarding the possibility of establishment of a joint stock company also for non-profitable purposes; Art 706, para 2, no 4, OR regarding the exclusion of profitability of a joint stock company.

69 Art 627, para 1, no 2, OR regarding the inclusion of provisions on management bonuses in the articles of association; Art 677, OR regarding distribution of management bonuses in general.

70 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2.

71 See also Schweizerische Steuerkonferenz (Trusts): *Besteuerung von Trusts*, Kreisschreiben 30, 22 August 2007, 2 f.

72 BasK-Huguenin (fn 63), N 7 to pre Art 52-59, ZGB.

73 Trusts legally established in accordance with the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition are considered as trusts, regardless of whether they are proven in writing pursuant to Art 3 of the Convention.

74 Oliver Arter, 'Anwalt und Trust' in Winterthur Versicherungen (Hrsg.): *Haftpflicht des Rechtsanwaltes*, (Zürich/St. Gallen, 2006), 113 ff., 117 ff. cf also Art 2 of the Convention on the law applicable to trusts and on their recognition:

'For the purposes of this Convention, the term 'trust' refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics –

- a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.'

law.<sup>75</sup> For example, pursuant to Swiss law, partnerships<sup>76</sup> and limited partnerships<sup>77</sup> are treated as if they were a legal person with regard to their legal relationships to third parties.<sup>78</sup> On the other hand, the corporate entity is disregarded and the shareholders of a company are held responsible if there is economic identity between the company and its shareholders and invoking the corporate entity would be an abuse of rights.<sup>79</sup> Finally, for Swiss international private law, the notion of legal personality is not the point of reference for corporate issues.<sup>80</sup> In fact, organised bodies of persons and property entities are considered as companies.<sup>81</sup> Prior to the ratification of the Hague Trust Agreement, certain trusts were considered as companies according to Swiss international private law.<sup>82</sup> Since the ratification of The Hague Trust Agreement, however, the trust has been defined autonomously in respect of international private law.<sup>83</sup> Accordingly, the Swiss Tax Law may not consider the trust as a legal person with reference to international private law.<sup>84</sup>

Neither does a trust constitute a 'foreign legal person' according to Art 49, para 3, DBG<sup>85</sup> and Art 20, para 2, StHG, because this legal regulation only captures personal entities that have legal personality according to Swiss private law.<sup>86</sup> According to the predominant doctrine, a trust is not a foreign company or other foreign personal entity without legal personality pursuant to Art 11, DBG<sup>87</sup> and Art 20, para 2, StHG, either.<sup>88</sup>

In conclusion, it is clear that there is no legal basis in the current Swiss Tax Law that would allow a foreign trust to be treated like a legal person for tax purposes.<sup>89</sup> This also means that on the one hand tax payers subject to Swiss Tax Law cannot deduct voluntary contributions to charitable trusts from their tax obligations, and on the other hand, charitable trusts cannot be exempted from tax obligation.<sup>90</sup> On the contrary, voluntary contributions to trusts trigger estate and gift taxes, because the trustee is a third party, who for such receipt not only does not benefit from tax exemption, but also has to bear a very high

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75 BasK-Huguenin (fn 63), N 7 zu Vorbemerkungen Art 52-59, ZGB.

76 Art 552 ff, OR.

77 Art 594 ff, OR.

78 cf Art 562, OR for partnerships and Art 602, OR for limited partnerships. Whether partnerships and limited partnerships have a quasi-legal personality is controversial. cf BGE 116 II 654 f. and BasK-Huguenin (fn 63), N 7 zu Vorbemerkungen Art 52-59, ZGB.

79 BGE 121 III 319, BGE 113 II 36, BGER., Judgement of 3 April 2001, 5C.246/2000, BasK-Huguenin (fn 63), N 7 zu Vorbemerkungen Art 52-59, ZGB.

80 Art 150, para 1, IPRG.

81 Art 150, para 1, IPRG.

82 Arter (fn 74), 113 ff, 132 f.

83 For the definition of trusts see Art 149a, IPRG:

'Legally established trusts in accordance with the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition are considered as trusts, regardless of whether they are proven in writing pursuant to Art 3 of the Convention.'

84 Schweizerische Steuerkonferenz, Trusts (fn 71), 7.

85 cf for instance Art 49, para 2, DBG:

'Foreign legal persons and according to article 11 taxable, foreign commercial companies and other foreign persons without legal personality are equated to the domestic legal persons that they legally or in fact most resemble.'

86 Schweizerische Steuerkonferenz, Trusts (fn 71), 7.

87 cf Art 11, DBG:

'Foreign commercial companies and other foreign persons without legal personality that are taxable due to economic affiliation pay their taxes according to the provisions for legal persons.'

88 cf Schweizerische Steuerkonferenz, Trusts (fn 71), 7, according to which the autonomous tax qualification of these provisions only covers entities, whose members are in a 'community of persons' with each other, such as heirs in community or in the form of 'partnerships' under Anglo-Saxon law.

89 Schweizerische Steuerkonferenz, Trusts (fn 71), 7.

90 cf also Paltzer and Schmutz (fn 38), 357, 364 ff.

tax burden, because the trustee does not stand in any kind of close relationship to the donor or deceased.<sup>91</sup>

### **Purpose**

#### *Preliminary remarks*

The general concept of common public interest has to be clarified for the purposes of tax legislation. On the one hand, institutions that pursue *public* purposes may be exempted from taxes. Furthermore, institutions that pursue *purposes of the common good in a narrower sense* may be exempted from taxes. Finally, institutions that are devoted to cult purposes may be exempted from taxes.

#### *Purpose*

#### **PUBLIC TASKS**

Public purposes are closely related to public tasks.<sup>92</sup> All purposes of a community that fall within the scope of its common functions are public, no matter whether these tasks have been assigned expressly by law or are generally considered as tasks of the community.<sup>93</sup> Besides to communities, such tasks may from time to time also be assigned to private or mixed-economy legal persons.<sup>94</sup> It is essential for the tax exemption of such legal persons that they actually pursue a comprehensive activity towards what is in fact a public task, that they assign their financial means exclusively and irrevocably to their statutory and actual purpose and – in the case of liquidation – that these means pass to the state or to another tax-exempted institution with the same or a similar purpose.<sup>95</sup> The term ‘public purpose’ is very restrictedly interpreted and has to be proven by a statement of the interested public community that assigns the task to the legal person.<sup>96</sup>

Political parties do not pursue public purposes, but serve primarily the interests of their members, for which reason a tax exemption is not granted.<sup>97</sup> The same also applies to

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91 cf for example for the canton of Zurich § 23, Abs 1, ESchG-ZH:

‘From the taxes calculated according to § 22, para 1 owe:

- a. Parents the simple amount,
- b. Grandparents and step-children the double amount,
- c. Siblings the threefold amount,
- d. Step-parents the fourfold amount,
- e. Uncles, aunts, offspring of siblings the fivefold amount,
- f. Other beneficiaries and non-relatives the sixfold amount.’

92 cf Daniel Imthurn ‘Die Praxis der Steuerbefreiung bei privatrechtlich organisierten juristischen Personen mit öffentlichen Zwecken, Wie hilfreich sind die ‘Praxishinweise der Schweizerischen Steuerkonferenz vom 18. Januar 2008’ in der Rechtsanwendung?’, STR 2008, 760 ff. and Kuster (fn 62), 1 ff. cf also Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

93 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 5.

94 Kolb (fn 30), 272; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

95 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 5.

96 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 5.

97 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 5; Danielle Yersin ‘Le statut fiscal des partis politiques’, ASA Band. 58, 97 ff, 107. The deductibility of donations to political parties is unclear in Switzerland. In some cantons donations to political parties may be deducted, in others not. In a recent decision, the Swiss Federal Supreme Court has criticised the cantons that provide for such deductions, and has qualified such deductions as being contrary to federal law. On the basis of a parliamentary initiative a statutory provision is currently being discussed, which in the future should regulate the deductibility of donations to political parties. In the future, it should be explicitly provided that natural persons can deduct membership fees and donations to political parties when calculating their taxable income and that legal persons can claim donations to political parties as business

associations with all kinds of idealistic purposes and to sports clubs.<sup>98</sup> However, a symphony orchestra was granted a tax exemption.<sup>99</sup>

For a tax exemption it is not necessary that ‘own sacrifices’ are made.<sup>100</sup>

#### INCOME OR SELF-HELP PURPOSE

A tax exemption will generally not be granted if a legal person pursues primarily the purpose of income or self-help.<sup>101</sup>

However, a tax exemption is admissible in two exceptional cases. First, a tax exemption might be possible if a legal person is entrusted with a public task, whereby grants of subsidies or concessions are not to be considered as public acts forming the bases for tax exemption.<sup>102</sup> Secondly, a tax exemption is admissible if the community has at least shown an explicit interest in the legal person, supervision by the community is to a certain extent provided, the exclusive and irrevocable, continuous dedication of the equity for a public purpose according to the articles of associations is provided for and no dividends or at least no excessive dividends are distributed.<sup>103</sup>

#### *Charitable purpose*

#### PUBLIC INTERESTS

##### *In general*

Pursuit of a public interest is the basis for a tax exemption due to charitable purpose.<sup>104</sup> A promotion of the general welfare is possible through activities in charitable, humanitarian, health promotional, ecological, educational,<sup>105</sup> scientific and cultural fields, such as social

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expenses. cf Draft of the Federal Law on the tax deductibility of donations to political parties, BBl 2008, 7481 ff, and the comment of the Swiss Federal Council to the parliamentary initiative on tax deductibility of donations to political parties, BBl. 2008, BBl. 7485 ff.

98 Regarding the principle for sports clubs cf BGer, decision of 7 May 2002, 2A.148/2002; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 5. cf BasK-Greter (fn 39), N 32 to Art 56, DBG.

99 Decision of the Berner Steuerrekurskommission of 14 December 1999, JP 358/1997, DBSt 171/1997, BVR 2001, 106 ff.

100 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

101 BGer, decision of 2 July 1992, 2A.408/1990; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

102 cf Decision of the Berner Steuerrekurskommission of 14 December 1999, JP 358/1997, DBSt 171/1997, BVR 2001, 106 ff.; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 5.

103 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 5.

104 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2.

105 cf in particular, BGE 113 Ib 7 ff., 10f.: ‘Not every community-enriching activity of cultural or artistic form is exclusively not-for-profit, and even then not, if it is aimed at a wide audience. For example, events with only entertaining character cannot be considered as being in the common public interest (BGE 63 I 319/320 E. 2). In contrast, a common public interest may be present, for example, when public artistic events for the unselfish promotion of artists, who require such promotion, are performed by an association. (cf, in this sense BGE 69 I 27 ff.). Furthermore, the common public interest can be assumed, if artistic high-quality productions are offered to the general public, which do not just serve the entertainment of the public, but provide general education and promote people’s (spiritual) welfare or have a character of religious edification. For example, the music activities of the big concert societies in Basle, which made use of the concert halls of the casino company, has been considered non-profit (BGE 63 I 318/9 E. 1). In a recent decision on the cantonal tax law, the Federal Supreme Court went even further, as under the limited viewpoint of arbitrary cognition it regarded a zoological garden – in the widest sense also part of our culture – not just as being for the entertainment and amusement of the visitors, but attributed to such a business under expert scientific management an important social function, and therefore a common public interest, because it contributes to the promotion of understanding of animals, animal protection, etc. (not published E.9a of the opinion of 18 March 1983 in the matter *Zoologischer Garten Basel AG* (BGE 109 Ia 335 ff)). b) It is however clear that the borderline between merely entertaining purposes and

welfare, arts<sup>106</sup> and science, education, the promotion of human rights, protection of historic monuments, nature conservation, animal protection and development aid.<sup>107</sup> Whether an activity is in the general public's interest is assessed according to the people's view, whereby legal-ethical principles, as they are outlined in the Federal Constitution and the Swiss laws and precedents, are important sources of insight.<sup>108</sup>

*Activity outside of Switzerland*

The public interest is not restricted to activities in Switzerland, but may exist in global activities of a Swiss legal person, as far as the activity is in the public's interest and unselfishly conducted.<sup>109</sup> In international activities, the public interest has two foundations: On the one hand, development aid as a public task, and on the other hand, the support of private efforts.

Development aid represents a major component of Swiss foreign policy and includes cultural, social, ecological, economic and global economic problems.<sup>110</sup> Article 5 of the Federal Law on international development cooperation and humanitarian assistance<sup>111</sup> provides that development cooperation supports the developing countries to improve the living conditions of their populations. Development aid should encourage these countries in their own development efforts. It should furthermore promote the development of rural areas, improvement of the food situation, particularly through the agricultural production for self-sufficiency, handcraft and local small-scale industry, job creation as well as production and preservation of an ecological and demographic balance.<sup>112</sup> Besides the state development aid, the support of the activities of private organisations represents a second important part of international development cooperation.<sup>113</sup> *Solidarity* is the central notion, which encourages helpfulness and grants support to fellow human beings not only in emergencies, but also generally aims to correct social deficits.<sup>114</sup>

In summary, tax exemption can be seen to be admissible for Swiss institutions, which are involved abroad in the fields of development aid, humanitarian assistance, cultural promotion and environmental assistance.<sup>115</sup>

Tax exemption is also admissible for institutions that act in the interests of foreign organisations (by fundraising).<sup>116</sup> Tax exemption is excluded, however, if assistance shall be provided to foreign foundations based in so-called 'offshore regions'.<sup>117</sup> Whether this also excludes foundations in the Principality of Liechtenstein is unclear, because the 'offshore regions' are not defined.<sup>118</sup>

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culturally valuable purposes that serve the public welfare is tricky and it cannot be the task of tax administration to decide on the value or degradation of cultural events.'

106 cf fn 105 above.

107 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2.

108 cf BasK-Greter (fn 39), N 28 ff. to Art 56 DBG; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

109 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

110 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 16.

111 Federal Law on international development cooperation and humanitarian assistance of 19 March 1976, SR 974.0.

112 Art 5 of the Federal Law on international development cooperation and humanitarian assistance.

113 cf basically Markus Reich: Gemeinnützigkeit als Steuerbefreiungsgrund, ASA 58, 466 ff.; Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 16.

114 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 17.

115 Reich (fn 113), 466 ff, Stählin (fn 60), 237.

116 Stählin (fn 60), 237.

117 Stählin (fn 60), 237.

118 Stählin (fn 60), 237.

*Documentation*

The realisation of the purpose has to be documented and be proven with appropriate documents (activity reports, annual financial statements, etc), particularly in those cases in which the activity is carried out outside of Switzerland.<sup>119</sup>

*Open circle of beneficiaries*

A public interest is only approved if the circle of beneficiaries who shall profit from the promotion and support is open.<sup>120</sup> A circle of beneficiaries that is too close, for example, limitation to the circle of a family, the members of an association or particular profession, excludes tax exemption based on a common public interest.<sup>121</sup>

ALTRUISM

The concept of common public interest also includes a subjective element of altruism besides the objective element of the public interest: What is needed is an altruistic act.<sup>122</sup> Common public interest in the tax law sense is only given, if an activity not only aims to promote the public interest, but also the interest is based on public spirit.<sup>123</sup> The concept of common public interest accordingly assumes that, on the one hand, the activity of a legal person is in the public interest, and on the other hand, that sacrifices are made for the public-interest purpose of members or third parties – disregarding the legal person's own personal interests.<sup>124</sup> Therefore, for tax exemption, it is always required that no personal interests are pursued.<sup>125</sup> This also means that such altruistic purpose is missing from self-help organisations and associations for the promotion of recreational activities.<sup>126</sup>

Furthermore, a lack of income<sup>127</sup> or self-help purposes<sup>128</sup> is a condition for a full or partial tax exemption due to a common public interest. However, not every kind of gainful activity leads to a general exclusion of tax exemption. A gainful activity may be undertaken to the extent that it is not the real purpose, but only the means to an end, and furthermore does not represent the only economic basis of the legal person.<sup>129</sup> Under some circumstances, the economic activity of a charitable organisation is even indispensable to achieving its public interest purposes.<sup>130</sup> For example, a residential children's care home requires a farm and a training workshop.<sup>131</sup> Tax exemption is granted as long as the economic activity is subordinate to the altruistic activity.<sup>132</sup>

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119 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

120 BGer, decision of Federal Supreme Court of 11 June 2008, 2A.42/2007; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

121 BGer., decision of Federal Supreme Court of 11 June 2008, 2A.42/2007; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

122 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

123 cf Tribunal administratif du Canton de Fribourg, 16 Mai 2003, 4F 01 103; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

124 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

125 cf BGer., decision of the Federal Supreme Court of 2 July 1991, 2A.408/1990; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

126 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

127 cf BGE 114 Ib 277 ff. A profit purpose is given if a legal person uses capital and works in economic competition or in a position of economic monopoly with the purpose of making profit and thereby requests payment for their work product at the usual market rate.

128 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 3.

129 Marc R Richter, 'Die Steuerbefreiung gemeinnütziger Vereine mit wirtschaftlicher Tätigkeit im Bund und im Kanton Zürich', STR (1994), 297 ff., 305; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

130 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

131 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

132 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

### ***Business purposes and holding foundations***

Capital investments of a foundation, even if it holds more than 50 per cent of the participation rights in an enterprise, are not contrary to a tax exemption, provided that no influence on the business management is possible and, for example, the voting rights for such investments are not with the foundation itself.<sup>133</sup> An organisational and personal separation of the foundation board and the board of directors is required. However the presence of a liaison person is allowed.<sup>134</sup> It is also necessary for substantial participations that the sustainability of the company is subordinated to the charitable purpose. This requires that substantial funds are regularly distributed by the company that is held by the foundation, and that these funds are used for a charitable activity.<sup>135</sup>

### ***Swiss-wide cult purpose***

A legal person pursues tax privileged cult purposes if it fosters and promotes a common statement of beliefs in doctrines and worship throughout the whole of Switzerland, no matter what the denomination or religion.<sup>136</sup> The criterion of pursuing the purpose ‘throughout the whole of Switzerland’ means that only those legal persons may be tax-exempt, which have committed themselves to a statement of beliefs that is of importance all over Switzerland.<sup>137</sup> The publication of writings also has cult character, if they are aimed at renewing and promoting faith, and do not serve income purposes.<sup>138</sup>

Legal persons who do not perform cult purposes, but rather certain economic, ideological, philosophical or idealistic tasks on a religious basis, do not benefit from tax exemption.<sup>139</sup>

The mixed purpose (partly charitable and partly cult purposes) is not an obstacle to tax exemption; in relation to the deductibility of donations, however, where there is a mixed purpose a separate entity for each of these purposes has to be regularly created.<sup>140</sup>

### ***Exclusive dedication to the purpose***

#### ***Basic principle***

Tax-exempt activities have to be aimed exclusively at a public function or well-being of third parties; accordingly, the goals of the legal person must not be connected with income purposes or own interests of the legal person or its members.<sup>141</sup> A partial tax exemption may be possible in certain circumstances where a legal person pursues other purposes alongside exclusively charitable purposes.<sup>142</sup>

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133 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

134 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

135 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 4.

136 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 6.

137 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 6.

138 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 6; Schweizerische Steuerkonferenz, Steuerbefreiung (fn 68), 21 ff.

139 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 6.

140 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 6.

141 BGE 131 II 1 ff., 6 ff.; Madeleine Simonek, ‘Steuerbefreiung und Privatisierung’, Der Schweizer Treuhänder, 1-2/2001, 230 ff., 233; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2.

142 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2.

*Partial tax exemption with pursuit of other purposes as well*

A partial tax exemption is possible if the proportion of tax-exempt activities is substantial and from an accounting point of view separate from other assets and income.<sup>143</sup> A legal person who pursues income or self-help purposes besides public purposes is exempted only insofar as its resources are exclusively and irrevocably dedicated to public purposes.<sup>144</sup>

***Irrevocable dedication to purpose***

The funds dedicated to a tax-exempt purpose must be irrevocably determined for tax-exempt purposes; a return to the benefactor or founder is excluded.<sup>145</sup> After dissolution of the legal person, the asset has to be transferred to another tax-exempt legal person with a similar purpose.<sup>146</sup> If the purpose of a foundation changes, the amended purpose must be for the public or charity.<sup>147</sup>

***Actual achievement of purpose***

A pure stipulation of tax-exempt activity in the articles of association does not lead to tax exemption.<sup>148</sup> What is needed is rather that the proposed tax-exempt activity is actually carried out.<sup>149</sup> Accordingly, for example, foundations whose primary purpose is in fact the mere accumulation of capital by the formation of reserves from income with no reasonable relationship to any possible future tasks of the foundation (so called Thesaurus Foundations) have no right to be exempted from taxes.<sup>150</sup>

***Tax exemption only upon application***

If a charitable institution wants to be exempted from taxes, it has to submit a corresponding application and to prove that the legal conditions for tax exemption are met.<sup>151</sup> An automatic tax exemption does not occur.

***Tax exemption of private schools in particular***

In most cases, the bodies running private schools aim to achieve certain mind-sets, pursue religious aspects or are established for commercial reasons.<sup>152</sup> Therefore, there is a need for individual examination as to whether private schools may benefit from tax exemption. The promotion of further education is in principle for the public interest – and therefore has the character of a common public interest – as well as for the public benefit.<sup>153</sup>

As already shown, tax exemption based on *charitable activities* requires, besides public interest, also the element of altruism; where profit-oriented purposes are pursued, there is no

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143 BGE 131 II 1 ff., 6 ff.; Eidgenössische Steuerverwaltung, KS 12 (fn 41), 6.

144 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 6.

145 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2.

146 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2.

147 Art 86a, para 2, ZGB.

148 BGer., decision of the Federal Supreme Court of 2 April 2001, 2A.254/2000; Kuster (fn 62), 244.

149 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 2.

150 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 1.

151 Eidgenössische Steuerverwaltung, KS 12 (fn 41), 1.

152 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 6.

153 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 6.



altruism, hence, tax exemption is excluded.<sup>154</sup> If the school is managed such that school fees cover or exceed costs, the character of exclusive common public interest is missing. In this case, profit is not based on the notion of ‘making sacrifices’,<sup>155</sup> but on participation in business under market economic conditions.<sup>156</sup> If a private school wants to be exempted from taxes due to charitable activity, financial sacrifices of the institution or the provision of altruistic services by the members are required. This is shown, for example, if the amount of school fees is not usual in the market, if a gradation of fees is made according to the parents’ ability to pay or where necessary a complete exemption from school fees is granted.<sup>157</sup>

If there is a lack of altruism, tax exemption might still be possible based on the pursuit of a *public purpose*. It is not of itself sufficient that a private school is supported by public funds.<sup>158</sup> What is needed is rather that the school administration, professional leadership, organisation and school facilities ensure permanent teaching standards equivalent to those in state schools, for the subjects that are taught in public schools.<sup>159</sup> Tax exemption is given primarily to institutions that are devoted to education from primary schooling through to graduation from apprenticeship training, be it through regular school instruction or via special training.<sup>160</sup> Today, further education is essential for career success. It therefore makes little sense to limit tax exemption to the period between primary school and accomplishing apprenticeship.<sup>161</sup> Since adult education is also in the public interest, it would be justifiable to exempt such organisations from taxes too.<sup>162</sup>

Outside this scope of teaching from primary school to graduation from apprenticeship, the public interest has to be further evidenced in order to receive a tax exemption.<sup>163</sup> The basic requirement for any tax exemption is often a state-approved curriculum, which determines teaching areas according to content and number of lessons, educational goals and learning targets as well as the weekly teaching time.<sup>164</sup> In addition, the teaching material used, teaching facilities such as technical equipment and illustrative materials, the existence of a school library, the number and origin of the students, composition of the school administration, the possibility of extra tuition for students with educational problems caused by speaking a foreign language, illness, change of residence, special family conditions or similar reasons, as well as whether and how education is provided to students with learning, performance or conduct disorders and disabilities, are also relevant for a possible tax exemption.<sup>165</sup>

The generated funds may only be used to run schooling and teaching activities; income motives of members, shareholders or teaching staff are prohibited.<sup>166</sup> There is no obstacle to tax exemption because teachers are paid at normal market conditions.<sup>167</sup>

For tax exemption, a lack of self-help purposes is also required, which means that the activity shall not take place primarily or exclusively in the interests of the members.<sup>168</sup>

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154 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 6.

155 cf BGer, decision of the Federal Supreme Court of 2 July 1991, 2A.408/1990.

156 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 6.

157 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 6.

158 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 6.

159 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 6.

160 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 7.

161 Stählin (fn 68), 236.

162 Stählin (fn 68), 236.

163 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 7.

164 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 7.

165 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 7.

166 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 7.

167 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 7.

168 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 7.

Parents who want to send their children to a tax-exempt private school may not be obliged to join the private school, because otherwise there would not be an open circle of beneficiaries.<sup>169</sup> Access to the school must be open to all students who respect the pedagogical direction of the school.<sup>170</sup> If certain mind-set or religious purposes are pursued, tax exemption is allowed where the approved educational goals and teaching targets in the curriculum are in the foreground and their achievement is ensured.<sup>171</sup> Furthermore, the education may not primarily serve the encouragement of a certain mentality.<sup>172</sup>

### ***Tax exemption of youth organisations in particular***

Youth organisations may benefit from tax exemption based on a common public interest under certain conditions. In particular, the public interest has to be examined, that is to say whether activities offered in the interests of the young constitute the basis of the institution.<sup>173</sup> The activities concerned must be geared towards a supportive, creative and educational purpose.<sup>174</sup>

Institutions that engage in recreational/leisure activities in the areas of sport and culture (music companies, theatres, etc) do not usually qualify for tax exemption on the basis of common public interest, since the requirement of altruism is missing. Typically, the members of such institutions are the only or at least the primary beneficiaries.<sup>175</sup> Tax exemption is only possible if the performed activity is for the benefit of adolescents and is aimed at introducing them to a sport or an instrument and if the activity has an educational character that is more dominant than the leisure activity element.<sup>176</sup> For this, the introduction to a sport or to a musical instrument must present the real purpose of the institution and clearly prevail over the leisure purpose.<sup>177</sup>

In the area of sports, clubs often comprise several teams (for example, football clubs, which are divided into several teams such as juniors, first team, seniors).<sup>178</sup> In such cases, there has to be a clear organisational and accounting-related separation for the different parts, so that those parts of the organisation that pursue an educational purpose, can benefit from tax exemption.<sup>179</sup>

If a self-help purpose is pursued, tax exemption is generally not permitted, unless the income or self-help activity is incidental and contributes to achieving the charitable goal of a youth organisation.<sup>180</sup>

### ***Tax exemption of international sports associations in particular***

Although international sports associations are generally subject to direct federal taxes, the majority of Swiss cantons, in an extensive interpretation of the Federal Tax Law,<sup>181</sup> have

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169 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 7 f.

170 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 8.

171 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 8.

172 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 8.

173 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 36.

174 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 36.

175 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 37.

176 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 37.

177 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 37. cf also Art 11 BV.

178 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 37.

179 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 37.

180 Schweizerische Steuerkonferenz, Steuerbefreiung (fn 60), 38.

181 Art 56, para G, DBG.

exempted international sports associations from direct federal taxes for a long time.<sup>182</sup> Upon the request of some cantons, on 5 December 2008 the Federal Council approved this cantonal practice developed over many years.<sup>183</sup>

Accordingly, those international sports associations, which are domiciled in Switzerland and associated to the International Olympic Committee (IOC), are exempted from direct federal taxes, as are their international sub-associations domiciled in Switzerland.<sup>184</sup> The respective national and regional sub-associations, such as the Swiss sports associations, are not considered as sub-associations.<sup>185</sup> Tax exemption is limited to direct federal taxes; other federal taxes and duties, such as VAT, are not concerned.<sup>186</sup> However, natural persons in the environment of international sports associations, such as employees, members of committees or functionaries are not exempted from taxes.<sup>187</sup>

## **The Swiss foundation**

### *Overview of Swiss foundation law*

The foundation,<sup>188</sup> according to Swiss law, is a legally independent purpose fund or special fund.<sup>189</sup> Depending on the purpose of a foundation, it can be distinguished between the common foundation<sup>190</sup> and three legal special forms, namely the family foundation,<sup>191</sup> the ecclesiastic foundation and the personnel welfare foundation.<sup>192</sup> Certain specific provisions apply for the three legal special forms. Besides the mentioned legal special forms, there are other virtual special forms, namely the enterprise foundation, the mixed foundation and the public-law foundation.<sup>193</sup>

### *Special forms*

#### *Family foundations*

#### DEFINITION AND PURPOSE

Although some special legal provisions apply to family foundations, primarily it is the common provisions<sup>194</sup> of the Foundation Law that are relevant.<sup>195</sup> According to Swiss law,

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182 Eidgenössische Steuerverwaltung: Hauptabteilung Direkte Bundessteuern, Rundschreiben Steuerbefreiung von internationalen Sportverbänden vom 12. Dezember 2008.

183 Eidgenössische Steuerverwaltung: Hauptabteilung Direkte Bundessteuern, Rundschreiben Steuerbefreiung von internationalen Sportverbänden vom 12. Dezember 2008.

184 Eidgenössische Steuerverwaltung: Hauptabteilung Direkte Bundessteuern, Rundschreiben Steuerbefreiung von internationalen Sportverbänden vom 12. Dezember 2008.

185 Eidgenössische Steuerverwaltung: Hauptabteilung Direkte Bundessteuern, Rundschreiben Steuerbefreiung von internationalen Sportverbänden vom 12. Dezember 2008.

186 Eidgenössische Steuerverwaltung: Hauptabteilung Direkte Bundessteuern, Rundschreiben Steuerbefreiung von internationalen Sportverbänden vom 12. Dezember 2008.

187 Eidgenössische Steuerverwaltung: Hauptabteilung Direkte Bundessteuern, Rundschreiben Steuerbefreiung von internationalen Sportverbänden vom 12. Dezember 2008.

188 As of 31 December 2008 18,321 foundations were registered in the Swiss commercial registry, cf Eidgenössisches Amt für das Handelsregister EHRA: *Handelsregister-Statistik 2008*, (Bern, 2009). cf the number of foundations in Switzerland, Harold Grüninger, 'Aktuelles aus dem Stiftungs- und Gemeinnützigkeitsbereich – neue Stiftungen, Literatur, Entscheide', (successio 2008), 55.

189 BasK-Grüninger (fn 63), N 1 to Art 80, ZGB.

190 Art 80, ff. ZGB.

191 Art 87, ZGB; Art 335, ZGB.

192 Art 89<sup>bis</sup>, ZGB. BasK-Grüninger (fn 63), N 3 to Art 80, ZGB.

193 BasK-Grüninger (fn 63), N 3 to Art 80, ZGB.

194 Arts 80–89, ZGB.

195 BasK-Grüninger (fn 63), N 4 to Art 335, ZGB.

family foundations are characterised in such a way that property is available for a family to pay the costs of education, facilities or support of family members or for similar purposes.<sup>196</sup> The family foundation is different from the common foundation in that, according to the intention of the founder, the circle of beneficiaries is limited to members of a single, specific family, to which only people related by blood, marriage or adoption belong.<sup>197</sup> So the family foundation is a common foundation<sup>198</sup> that is characterised by being a foundation for beneficiaries from the founder's<sup>199</sup> family and that performs only certain statutory tasks.<sup>200</sup> The statutory tasks are limited to paying the costs of education, facilities, support, or to similar purposes.<sup>201</sup>

According to constant legal practice of the Federal Supreme Court, the list of purposes for which family foundations may be set up as contained in the law is an exclusive list.<sup>202</sup> These purposes have in common that family members who belong to the circle of beneficiaries should be supported in certain circumstances, namely at a young age, when settling down or establishing a livelihood as well as in cases of hardship and the satisfaction of the particular needs that they have as result.<sup>203</sup> The 'similar purposes', which are mentioned in the law are only those purposes that also consist of granting material aid to family members in certain circumstances, where it appears necessary or desirable under the particular circumstances.<sup>204</sup>

#### COST OF EDUCATION

The costs of a basic education and of further education at universities, professional schools and other educational institutions are considered admissible education costs.<sup>205</sup> Additionally, living costs associated with school attendance, at least for external accommodation, also fall under education costs.<sup>206</sup> Hence, general living costs of a beneficiary may also be financed during his education.<sup>207</sup>

#### ENDOWMENT

The term 'endowment' was originally understood exclusively as the dowry of marriageable or marrying daughters.<sup>208</sup> In modern times of equal rights, in contrast, anything that serves the establishment, improvement and protection of livelihood, particularly when getting married or starting a business falls under the term of endowment.<sup>209</sup>

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196 Art 335, para 1, ZGB.

197 BGer, decision of the Federal Supreme Court of 4 March 2002, 2A.457/2001; Hans Michael Riemer (BK-Riemer), *Berner Kommentar zum schweizerischen Privatrecht, Band I, Einleitung und Personenrecht, Die juristischen Personen, Die Vereine, Systematischer Teil und Art 60-79 ZGB*, (Bern, 1990), BK-Riemer, N 109 zu Systematischem Teil die Stiftungen; Michael Hamm and Stefanie Peters, 'Die schweizerische Familienstiftung – ein Auslaufmodell?', (successio 2008), 248.

198 According to Art 80 ff, ZGB.

199 This generally means dependents of the donor.

200 Alexandra Zeiter 'Neues zur Unterhaltsstiftung', SJZ 2001, 451, 452.

201 Art 335, para 1, ZGB.

202 BGE 108 II 394.

203 BGE 108 II 394.

204 BGE 108 II 394.

205 BasK-Grüninger (fn 63), N 10 zu Art 335, ZGB.

206 BasK-Grüninger (fn 63), N 10 zu Art 335, ZGB.

207 BasK-Grüninger (fn 63), N 10 zu Art 335, ZGB.

208 BK-Riemer (fn 197), N 147 zu Systematischem Teil die Stiftungen.

209 Following the provision of Art 626, ZGB regarding the beneficiaries' obligation to equalize. Christian Brückner, *Das Personenrecht des ZGB* (Zürich 2000), N 1460.

#### FINANCIAL SUPPORT

Financial support is intended to bridge financial difficulties and requires financial need on the part of a beneficiary.<sup>210</sup>

#### ADMISSIBLE SIMILAR PURPOSES

According to jurisprudence, the term ‘similar purposes’ covers maintenance of a family tomb or the reading of a requiem.<sup>211</sup> Controversial, but probably admissible, if at least not presenting the only purpose of a foundation, are maintenance of the founder’s memorial, writing of a family chronicle,<sup>212</sup> preservation of family documents or family libraries or financing of regular family reunions.<sup>213</sup> In contrast, the preservation of collections or family jewelry exclusively for the benefit of family members would probably be inadmissible.<sup>214</sup>

#### INADMISSIBLE MAINTENANCE FOUNDATIONS

According to Swiss law, it is no longer permitted that family members unconditionally benefit from a foundation’s assets or earnings to make a living or to improve their economic situation.<sup>215</sup> The statutory definition of the purpose of the family foundation aims at preventing the absolute economic security of family members for further generations by establishing a clear distinction between the permissible family foundation, which pursues certain purposes, and the inadmissible family entailment, which serves economic purposes.<sup>216</sup> Family entailments, which may no longer be established today, constitute a special class of property without legal personality of the owner or beneficial owner, who unconditionally benefits from the property, subject to the burden to preserve the property and to leave it to his legal successor within the on his death.<sup>217</sup> A foundation, which appoints family members as beneficiaries and does not pursue a task according to the statutory provision of Art 335, para 1, ZGB, is in conflict with the prohibition on the establishment of family entailments.<sup>218</sup> It is illegal and void<sup>219</sup> and does not obtain any legal personality.<sup>220</sup>

The Swiss Federal Supreme Court also qualified foundations that serve the acquisition or maintenance of real estate that is available to family members for representation<sup>221</sup> or recreation<sup>222</sup> as illegal maintenance foundations.<sup>223</sup>

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210 BasK-Grüninger (fn 63), N 11 zu Art 335, ZGB.

211 BGE 72 II 24; BasK-Grüninger (fn 63), N 12 zu Art 335, ZGB.

212 BGer, decision of the Federal Supreme Court of 4 March 2002, 2A.457/2001.

213 BasK-Grüninger (fn 63), N 12 zu Art 335 ZGB.

214 BasK-Grüninger (fn 63), N 12 zu Art 335 ZGB.

215 Art 335, para 2, ZGB; BGE 108 II 393, 394; BGE 108 II 398, 403; BGE 93 II 439, 448 ff. cf also Hamm and Peters (fn 197), 248 f.

216 BGE 71 I 265, BGE 120 Ib 474, 483. cf 335 para. 2 ZGB: ‘The establishment of family entailment is no longer permitted.’ The government policy behind this was the prevention of idleness. cf also the prohibition on repeated heritage substitution under Swiss inheritance law in according to Art 488, paras 1 and 2, ZGB:

‘1 In his last will, the testator is entitled to oblige a determined heir as pre-heir, to give the inheritance to another as substitutional heir.

2 Such obligation cannot be imposed on the substitutional heir.’

217 BGer, decision of the Federal Supreme Court of 4 March 2002, 2A.457/2001.

218 BGer, decision of the Federal Supreme Court of 4 March 2002, 2A.457/2001.

219 Zeiter (fn 200), 453. Exceptionally, a conversion into an admissible foundation is also possible, for example, into a common foundation. cf BGer, decision of the Federal Supreme Court of 8 May 2001, 5C.9/2001.

220 Art 52, para 3, ZGB. BGer, decision of the Federal Supreme Court of 8 May 2001, 5C.9/2001, BGE 93 II 439, 451.

221 So-called Burgstiftung, cf BGE 93 II 451.

222 So-called Ferienhausstiftung, cf BGE 108 II 393.

223 cf BasK-Grüninger (fn 63), N 9 to Art 335, ZGB, Hamm and Peters (fn 197), 239.

When establishing a family foundation, attention has to be paid to ensuring that no single person nor any single person of a generation exclusively benefits; this could be assessed as a sign of an illegal maintenance foundation.<sup>224</sup>

#### EXCEPTIONS TO THE COMMON PROVISIONS OF THE FOUNDATION LAW

Family foundations do not need to be registered in the commercial registry in order to obtain legal personality.<sup>225</sup> They are not subject to a regulatory authority, under reservation of public law.<sup>226</sup> Finally, family foundations are exempted from the obligation to mandate an auditor.<sup>227</sup>

##### *Ecclesiastic foundations*

Ecclesiastic foundations are mentioned several times in the Swiss Civil Code, in the context of relief from registration in the commercial registry,<sup>228</sup> the reservation of cantonal and public federal law,<sup>229</sup> not being subject to the supervision of an authority<sup>230</sup> and exemption from mandating an auditor.<sup>231</sup> However, the law does not provide a legal definition of the ecclesiastic foundation.

According to legal doctrine and jurisprudence, two conditions have to be met: on the one hand, a religious purpose is required; on the other hand, there must be a specific organisational connection to a religious community.<sup>232</sup> Only foundations that serve the faith in God, are 'ecclesiastic'.<sup>233</sup> Foundations that pursue social and charitable purposes and are administered by the church do not fall under this definition.<sup>234</sup> There is an organisational connection with a religious community when the internal, independent supervision of the mentioned religious community replaces government supervision.<sup>235</sup>

##### *Personnel welfare foundations*

A foundation is often chosen as the vehicle in Switzerland for pension funds that serve the continuation of living standards after retirement. Besides the common provisions in foundation law, many special norms are relevant.<sup>236</sup>

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224 BK-Riemer (fn 206), Systematischer Teil N 111; Bask-Grüniger (fn 63), N 9 to Art 335, ZGB.

225 Art 52, para 2, ZGB.

226 Art 87, para 1, ZGB. In case of doubt, the supervisory authority decides, cf BGE 40 I 261.

227 Art 87, para 1<sup>bis</sup>, ZGB.

228 Art 52, para 2, ZGB.

229 Art 59, para 1, ZGB.

230 Art 87, para 1, ZGB.

231 Art 87, para 1<sup>bis</sup>, ZGB.

232 BGE 106 II 106, 112; Alexandra Zeiter, *Die Erb Stiftung* (Fribourg, 2001), 167.

233 Zeiter (fn 232), 167.

234 Zeiter (fn 232), 167.

235 BGE 106 II 106, 112 f.; Zeiter (fn 232), 167 f.

236 cf Art 89<sup>bis</sup>, ZGB with corresponding references.

*Enterprise foundations*

DEFINITION AND PURPOSE

The concept of an enterprise foundation is unknown in Swiss legislation.<sup>237</sup> Enterprise foundations have emerged in practice. This is a foundation that is in some way connected with an enterprise.<sup>238</sup> An enterprise foundation could be a common foundation or a family, personnel welfare or ecclesiastic foundation.<sup>239</sup> An enterprise foundation does not necessarily serve an economic purpose, but can also be aimed at an idealistic purpose.<sup>240</sup> The enterprise foundation is characterised by an economic activity and pursues a specific property investment policy, in that it is connected with a enterprise.<sup>241</sup> It differs from traditional foundations in its organisational structure.<sup>242</sup>

For a long time it was controversial whether the establishment of enterprise foundations was actually admissible. Some years ago the Swiss Federal Supreme Court approved the concept of an enterprise foundation in a leading case.<sup>243</sup> However, many questions have still not been answered, for example whether the foundation may interfere in the operational activities of its affiliated enterprise, which it by majority or wholly owns, how existing and subsequently added subsidiaries of a holding should be dealt with, how instructions of the foundation board for exercising voting rights in the companies which are held by the foundation should be handled, or how the foundation board should be compensated.<sup>244</sup> Problems may arise if the same person holds a position as member of the foundation board and on the board of directors of a subsidiary, which is recommended from the point of view of information of the foundation board.<sup>245</sup>

There are many purposes behind establishing an enterprise foundation. The topic of estate planning in the broad sense is at the forefront. By establishing an enterprise foundation, the control of a company should in the first place be permanently secured.<sup>246</sup> Very often further purposes are also pursued, such as beneficial treatment of all or certain employees of the enterprise, the promotion of research, education or further training in the field of the business's activity or the general promotion of charitable purposes.<sup>247</sup>

MAIN FORMS

Enterprise foundations have two main forms. Either there is a foundation that conducts a commercial, manufacturing or other business in the pursuit of an economic or non-economic purpose, and which is therefore directly the responsible body of the enterprise itself (the so-

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237 Zeiter (fn 232), 169; Edgar H Paltzer and Patrick Schmutz, 'The Swiss Business Foundation – a suitable estate planning vehicle for entrepreneurs?' (2007) *Trusts & Trustees* 13(5) 190.

238 Zeiter (fn 232), 169.

239 Zeiter (fn 232), 69; Paltzer and Schmutz (fn 247), 190.

240 Zeiter (fn 232), 170.

241 Alexandra Zeiter, 'Errichtung einer Unternehmensstiftung, Attraktive Option in der Nachlassregelung', *ST* 2004, 241

242 Zeiter (fn 241), 241.

243 BGE 127 III 337 ff.

244 Hans Michael Riemer, 'Unternehmensstiftungen', in Hans Michael Riemer (Hrsg.), *Die Stiftung in der juristischen und wirtschaftlichen Praxis*, (Zürich, 2001), 177, 184; Thomas Sprecher, *Die Revision des schweizerischen Stiftungsrechts*, (Zürich/Basel/Genf, 2006), 83.

245 Sprecher (fn 244), 83.

246 BasK-Grüninger (fn 63), N 19 zu Vorbemerkungen Art 80-89<sup>bis</sup>, ZGB.

247 BasK-Grüninger (fn 63), N 19 zu Vorbemerkungen Art 80-89<sup>bis</sup>, ZGB.

called business foundation).<sup>248</sup> Or there is a foundation that is a substantial shareholder of an enterprise (the so-called holding foundation).<sup>249</sup>

### ***Establishment of a classic Swiss Foundation***

#### *Overview*

To establish a Swiss foundation, the dedication of property for a particular purpose is required.<sup>250</sup> The foundation is established by a deed or by a will.<sup>251</sup> Based on the deed, registration in the commercial register takes place.<sup>252</sup>

#### *Dedication of assets to a particular purpose*

To establish a valid foundation assets must be dedicated for a *particular purpose*.<sup>253</sup> Dedication in this respect means relinquishing the founder's assets in favour of the to-be-established foundation. There must be a reasonable relationship between the assets of a foundation and the purpose of the foundation, which means the assets have to be adequate in relation to the purpose.<sup>254</sup> If a foundation's assets are not sufficient, the establishment of a foundation is invalid.<sup>255</sup> According to the practice of the Federal Foundation Supervisory Board, the initial capital has to amount to at least CHF 50,000.<sup>256</sup> If the foundation is provided with too little foundation capital – in comparison to its target purpose – the founder may provide evidence according to which it is apparent that further sufficient donations may seriously be considered in the future.<sup>257</sup> The foundation assets can be composed of any type of assets, such as cash, securities, estate, movables, intellectual property rights or receivables.<sup>258</sup>

The purpose of a foundation defines, on the one hand, its tasks and purposes, and on the other hand, the circle of beneficiaries.<sup>259</sup> The purpose can be chosen freely within the general limits of the legal order.<sup>260</sup> Illegal are only those purposes that violate mandatory law or are immoral.<sup>261</sup> However, it is necessary that the purpose is defined.<sup>262</sup> General

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248 Zeiter (fn 232), 169.

249 Harold Grüninger, *Die Unternehmensstiftung in der Schweiz: Zulässigkeit – Eignung – Besteuerung*, (Basel/Frankfurt am Main, 1984), 12; Zeiter (fn 242), 169.

250 Art 80, para 1, ZGB.

251 Art 81, para 1, ZGB.

252 Art 81, para 2, ZGB.

253 Art 80, para 1, ZGB.

254 BGE 108 II 263, BGE 99 II 261, BGE 96 II 296 f.; Eidgenössisches Departement des Innern EDI, Generalsekretariat GS-EDI, Rechtsabteilung/Eidgenössische Stiftungsaufsicht: Leitfaden für Stiftungen (Eidgenössische Stiftungsaufsicht), (Bern, 2008), 3.

255 Eidgenössische Stiftungsaufsicht (fn 254), 3; Verfügung des Eidgenössischen Departements des Innern vom 26. August 1988, Verwaltungspraxis der Bundesbehörden, VPB 52 No. 57.

256 Eidgenössische Stiftungsaufsicht (fn 254), 3.

257 Eidgenössische Stiftungsaufsicht (fn 254), 3. cf, eg BGE 96 II 273, 296 f.: 'If two people (spouse, siblings), after the death of both of them want to give their assets to a foundation that was established by them, they can achieve this goal – as far as they are not satisfied by the separate last wills because of the possibility of revocation by already establishing the foundation during their lifetime and stocking it only with modest property and determining in a testamentary contract with mutual appointment as heir that the foundation should be substitutional heir of the predeceased and the main heir of the later deceased contract partner.' cf also BGE 95 II 519, 521 ff.

258 BasK-Grüninger (fn 71), N 6 to Art 80, ZGB.

259 BasK-Grüninger (fn 71), N 12 to Art 80, ZGB.

260 BasK-Grüninger (fn 71), N 14 to Art 80, ZGB.

261 BasK-Grüninger (fn 71), N 14 to Art 80, ZGB.

262 BasK-Grüninger (fn 71), N 15 to Art 80, ZGB.



descriptions such as ‘charitable purposes’ are problematic, because the foundation organs must at least be told what they should do with the foundation’s assets.<sup>263</sup>

For a long time, it was controversial, whether Swiss foundations may only pursue idealistic purposes, or whether economic purposes that unconditionally benefit the beneficiaries are also admissible. This controversy has since been resolved, as the Swiss Federal Court has decided that a foundation may have an economic purpose.<sup>264</sup>

#### *Compliance with the form requirements of establishment*

For the establishment of a foundation, the mandatory legal forms of establishment must be complied with. Foundation can be established either by a deed or by a will.<sup>265</sup>

#### *Entry in the commercial register*

For the establishment of a foundation, entry into the commercial register is required.<sup>266</sup> The Swiss Foundation Law provides – there are some exceptions, for example for family foundations – the principle of a compulsory registration requirement.<sup>267</sup> A foundation acquires its legal personality with the entry in the commercial register.

#### *No immoral or illegal purpose*

In order to acquire legal personality, a foundation must not pursue an immoral or illegal purpose.<sup>268</sup>

#### *Challenge*

A foundation may be challenged by the heirs<sup>269</sup> or the creditors of the founder.<sup>270</sup> Under

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263 BasK-Grüniger (fn 63), N 15 to Art 80, ZGB.

264 BGE 127 III 337 on the enterprise foundation.

265 ZGB, Art 81, para 1. Only since the revision of the Foundation Law on 1 January 2006 can a foundation be established not only through a will, but also within the scope of a testamentary contract. If a foundation is established by a last will, it cannot be excluded that the heirs do not comply with the last will of the deceased. To remedy this, the authority that opens the last will has to inform the competent commercial register about the establishment of the foundation. This has to inform the supervisory authority about the registration of the foundation and be given the confirmation by the supervisory authority that it accepts the supervision. cf Art 81, para 3, ZGB and Art 96, HRegV. cf also parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8164.

266 ZGB, Art 52, para 1. Ecclesiastic foundations and family foundations do not require any entry in the commercial register. cf Art 52, para 2, ZGB.

267 Eidgenössische Stiftungsaufsicht (fn 254), 4.

268 cf Art 52, para 3, ZGB: ‘Personal associations and institutions with immoral or illegal purposes may not obtain the right of personality.’

269 With regard to heirs, cf Art 527, paras 3 and 4, ZGB, which would not be applicable without the reference in Art 82, ZGB, since this is limited to gifts, the establishment of a foundation is not considered as a gift, but as a unilateral act of establishment:

‘Apart from the last will, the following acts are subject to the challenge:

3 gifts that the deceased could freely revoke or that he has given during the last five years before his death, with the exception of usual occasional gifts;

4 relinquishing of assets by the deceased, apparently for the purpose of circumventing the restriction on disposal.’

Regarding creditors cf the ‘challenge of a gift’ pursuant to Art 286, para 1, SchKG:

‘1 Challengeable are all gifts and nonpaid disposals, with the exception of the usual occasional gifts, that the debtor has made within the last year before the attachment or bankruptcy.’

certain conditions there is a right for restitution of the received assets from the foundation. Whether this leads to dissolution of the foundation is determined according to whether there are still sufficient assets to pursue the foundation's purposes after restitution.<sup>271</sup>

### ***Organisation of the foundation***

#### *Freedom of foundation*

There is great freedom in organising a foundation. It is only mandatory according to statute that the organs of the foundation and the type of administration are regulated in the foundation deed.<sup>272</sup> This means that a supreme organ, usually referred to as the foundation board, has to be appointed, which foundation board ensures the foundation's capacity to act<sup>273</sup> and assumes the management of the foundation.<sup>274</sup>

#### *Administration of the foundation by the foundation board*

The foundation board is responsible for the administration of the foundation. It holds all authorities that have not been transferred to another organ by the bylaws. It is mandatory that the foundation board assumes certain tasks, namely the rules of signature and representation authorisation of the foundation, the election of the foundation board, the election of the auditor and the approval of the annual financial statements.<sup>275</sup>

#### *Other foundation tasks*

If no deviating provisions are found in the foundation's bylaws, the foundation board has – in addition to the task of administration – to assume all further tasks of the foundation that relate to the management of the foundation.<sup>276</sup> These include investment and use of the foundation's assets, communication with authorities and beneficiaries, representation towards third parties, general management and promulgation of regulations.<sup>277</sup> A delegation of these tasks, for example to a general manager, is allowed.<sup>278</sup>

#### *Number of members of the foundation board*

The Federal Foundation Supervision Committee requires that the foundation board consists

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*cont.*

cf also the 'challenge of intention': Art 288, SchKG:

'Challengeable are all legal acts that the debtor has carried out within the last five years before the attachment or bankruptcy with the intention, discernable to the other party, of disadvantaging creditors or favouring some creditors to the detriment of others.'

270 Art 82, ZGB.

271 BasK-Grüninger (fn 63), N 4 to Art 82, ZGB.

272 Art 83, ZGB.

273 Art 54, ZGB: 'Legal persons have the capacity to act as soon as they have appointed the essential organs according to the law and articles of association'.

274 BasK-Grüninger (fn 63), N 3 to Art 83, ZGB.

275 Eidgenössische Stiftungsaufsicht (fn 254), 5.

276 BasK-Grüninger (fn 63), N 10a to Art 83, ZGB.

277 BasK-Grüninger (fn 63), N 10a to Art 83, ZGB.

278 BasK-Grüninger (fn 63), N 11 to Art 83, ZGB.

of at least three natural or legal<sup>279</sup> persons.<sup>280</sup> For foundations with international character, at least one authorised member must have EU citizenship and residence in Switzerland.<sup>281</sup>

*Remuneration of the foundation's organs*

The Federal Foundation Supervision Committee assumes that the foundation board members perform their job voluntarily. However, expenses can be compensated.<sup>282</sup> In exceptional cases, the payment of a reasonable remuneration to individual organs of a non-profit institution is permitted for especially time-consuming services provided by individual members of the foundation board to the foundation over and above mere board meeting work, for example for development of concepts, projects, management duties in particular cases, etc.<sup>283</sup>

It is true that fixed compensation to the foundation board members in the form of allowances, honorarium or attendance fees for organs are regularly not permitted by the tax authorities if the foundation is to be exempted from taxes.<sup>284</sup> Sometimes it is countered that when exempting charitable organisations from taxes it is only about the common public interest of the foundation itself, and the foundation's organs cannot be required to do their job without pay.<sup>285</sup> According to the practice of the tax authorities of the canton of Zurich, therefore, compensation to the foundation board does not exclude exemption from tax for the foundation, if this compensation serves the purpose of the foundation.<sup>286</sup> It is also recognised that general managers of a foundation may receive remuneration.<sup>287</sup>

*Investment of the foundation's assets in particular*

The investment of the foundation's assets has primarily to be oriented towards its original composition and the intention of the founder.<sup>288</sup> The principles of liquidity, returns, security, risk distribution and maintenance of assets must be observed when investing the foundation's assets.<sup>289</sup> According to the practice of the Federal Foundation Supervision Committee, the foundation's assets must be managed in accordance with recognised business principles and must distribute risk.<sup>290</sup> A gilt-edged investment is, however, not required.<sup>291</sup>

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279 The admissibility of legal persons as members of the foundation board is, however, disputed. cf BasK-Grüninger (fn 71), N 5 to Art 83, ZGB.

280 Eidgenössische Stiftungsaufsicht (fn 254), 5. However, a minimum number of foundation board members is not legally required. cf BasK-Grüninger (fn 63), N 5 to Art 83, ZGB.

281 Eidgenössische Stiftungsaufsicht (fn 255), 5. Nationality and residence requirements are not provided for in the law. cf BasK-Grüninger (fn 71), N 5b to Art 83, ZGB.

282 Eidgenössische Stiftungsaufsicht (fn 254), 5.

283 Eidgenössische Stiftungsaufsicht (fn 254), 5.

284 Eidgenössische Stiftungsaufsicht (fn 254), 5.

285 BasK-Grüninger (fn 63), N 27 to Art 83, ZGB.

286 BasK-Grüninger (fn 63), N 27 to Art 83, ZGB. cf also Bernhard Hahnloser, *Stiftungsland Schweiz, Schriftenreihe proFonds*, (Basel, 2004), 22 ff, 34 ff.

287 BasK-Grüninger (fn 63), N 27 to Art 83, ZGB.

288 BasK-Grüninger (fn 63), N 13 to Art 83, ZGB.

289 BGE 108 II 352 ff concerns in detail the investment in an apartment and the fact that on the one hand this did not produce a yield, although a return on investment would have been possible, and on the other hand, this investment had a certain security. Finally, it was found that there was overall no equitable risk distribution between the various investments of the foundation and only modest amounts were available for serving the purpose, which included hardly more than 5 per cent of the foundation's assets, so the apartment had to be sold in order to achieve a higher return on investment; BGE 124 III 97 ff.; BGE 99 Ib 255 ff., 259, according to which purely speculative or high risk investments endanger the foundation's property and therefore also the pursuit of the foundation's purpose; BGE 108 II 254 ff.; Eidgenössische Stiftungsaufsicht (fn 254), 6.

290 Eidgenössische Stiftungsaufsicht (fn 254), 6.

291 Eidgenössische Stiftungsaufsicht (fn 254), 6.

### **Accounting**

The highest organ of the foundation is responsible for keeping the accounts of the foundation in accordance with the provisions of the Swiss Code of Obligations on business accounting.<sup>292</sup> If the purpose of the foundation is the conduct of a business, the provisions of the Swiss Code of Obligations on financial accounting and publication of the annual financial statements for stock companies with limited liability are applicable.<sup>293</sup>

### **Auditor**

The highest organ of the foundation appoints<sup>294</sup> an independent external auditor.<sup>295</sup> The auditor must annually check the accounting of the foundation and submit a detailed audit report about the outcome to the foundation board with a request for approval.<sup>296</sup> In particular, the auditor shall examine the accounting and financial situation of the foundation<sup>297</sup> and the compliance of financial statements<sup>298</sup> with the statutory provisions as well as the provisions of the foundation deed.<sup>299</sup> In addition, the auditor must control compliance with the provisions of the bylaws (deed and regulations) and the foundation's purpose.<sup>300</sup> If there are any deficiencies, the auditor must inform the foundation board, which must rectify the deficiencies; otherwise, the auditor has to inform the supervisory authority.<sup>301</sup>

To the extent there are no special provisions for foundations, the provisions of the Swiss Code of Obligations on the audit of stock companies with limited liability are applicable.<sup>302</sup> The type of audit (regular or limited audit) is determined in accordance with stock corporation law. Even if a foundation is only obliged to carry out a limited audit, the supervisory authority can demand a regular audit if this is required for the reliable assessment of the situation of assets and income of the foundation.<sup>303</sup>

### **Insufficient organisation of the foundation**

If the proposed organisation is not sufficient for a foundation, it lacks one of the statutory organs or any of these organs is not lawfully constituted, the supervisory authority has to take necessary measures.<sup>304</sup> In particular, the supervisory authority may set the foundation a time

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292 Art 83a, para 1, ZGB. For the preparation of financial statements cf Arts 957 ff, OR, which are correspondingly applicable.

293 Art 83a, para 2, ZGB. cf the stock corporation law provisions of Arts 662 ff, OR, which are correspondingly applicable.

294 According to Art 83a, para 4, ZGB, the supervisory authority can exempt a foundation from the obligation to appoint an auditor. The pre-conditions of exemption are defined in Art 1, para 1 of the ordinance of 24 August 2005 regarding foundation auditors, SR 211.121.3. An exemption may be granted if the cumulative total assets of the foundation are less than CHF 200,000 in two consecutive fiscal years, and the foundation does not call publicly for donations or other contributions. cf Giacomo Roncoroni, 'Das neue Stiftungsrecht, Überblick und Ausblick', ST 2006, 733 ff., 736 f.

295 Art 83b, para 1, ZGB. Under certain circumstances, the supervisory authority can exempt the foundation from this, cf Art 83b, para 2, ZGB.

296 Eidgenössische Stiftungsaufsicht (fn 254), 6.

297 cf Art 728, OR regarding stock corporation law.

298 cf Art 84b, ZGB.

299 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8168.

300 Eidgenössische Stiftungsaufsicht (fn 254), 6.

301 Eidgenössische Stiftungsaufsicht (fn 254), 6.

302 Art 83b, para 3, ZGB in connection with Art 727 ff, OR.

303 Art 83b, para 4, ZGB.

304 Art 83d, para 1, ZGB.

limit within which the lawful status has to be reconstituted<sup>305</sup> or the missing organ or a trustee has to be appointed.<sup>306</sup> If appropriate organisation cannot be guaranteed, the supervisory authority must turn over the assets to another foundation with a purpose as similar as possible.<sup>307</sup> The foundation pays the costs of these measures.<sup>308</sup> If there is good reason, the foundation may require the supervisory authority to recall persons who have been appointed by it.<sup>309</sup>

### ***Supervision***

Foundations are under the supervision of the community (Confederation, canton and commune) to which they belong.<sup>310</sup> The supervisory authority has to ensure that the foundation's assets are used in accordance with its purposes.<sup>311</sup>

### ***Measures in cases of over-indebtedness***

If there is reasonable concern that the foundation is over-indebted or can no longer fulfill its long-term liabilities, the highest organ of the foundation must – based on residual value – prepare an interim balance sheet based on residual value and submit it to the auditor for examination.<sup>312</sup> If the auditor finds that the foundation is over-indebted or cannot fulfill its long-term liabilities, it must submit the interim balance sheet to the supervisory authority.<sup>313</sup> The supervisory authority requires the highest organ of the foundation to initiate the necessary measures.<sup>314</sup> If the foundation does not do so, the supervisory authority has to take the necessary measures.<sup>315</sup> If necessary, the supervisory authority may apply bankruptcy measures, in which case the provisions of the stock corporation law on declaring or suspension of bankruptcy are applicable by analogy.<sup>316</sup>

### ***Reorganisation of a foundation***

#### *Permissible for good reasons*

Foundations are fixed entities that are dominated by the will of the founder as recorded in the foundation deed.<sup>317</sup> The foundation board has only administrative powers and cannot change the character, purpose or form of the foundation.<sup>318</sup> However in exceptional cases for good reasons a change of organisation or purpose is possible.

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305 Art 83d, para 1, no 1, ZGB.

306 Art 83d, para 1, no 2, ZGB.

307 Art 83d, para 2, ZGB.

308 Art 83d, para 3, ZGB.

309 Art 83d, para 4, ZGB.

310 Art 84, para 1, ZGB.

311 Art 84, para 2, ZGB.

312 Art 84a, para 1, ZGB.

313 Art 84a, para 2, ZGB.

314 Art 84a, para 3, ZGB.

315 Art 84a, para 3, ZGB.

316 Art 84a, para 4, ZGB.

317 Eidgenössische Stiftungsaufsicht (fn 254), 6.

318 Eidgenössische Stiftungsaufsicht (fn 254), 6 f.

### *Organization*

The competent federal or cantonal authority may change the organisation of a foundation upon the request of the supervisory authority and after having heard the highest organ of the foundation, if it is urgently required for the conservation of the assets or the preservation of the foundation's purpose.<sup>319</sup> The change of organisation serves the rescue of an otherwise jeopardised purpose of the foundation.<sup>320</sup>

### *Amendment of purpose*

#### UPON REQUEST OF THE SUPERVISORY AUTHORITY OR HIGHEST ORGAN OF THE FOUNDATION

Upon the request of the supervisory authority or the highest organ of the foundation, the responsible federal or cantonal authority can amend the purpose of a foundation, if its original purpose has acquired an entirely different meaning or effect, so that the foundation has obviously become estranged from the will of the founder.<sup>321</sup> When amending the purpose, the hypothetical will of the founder has to be determined and it has to be asked whether – in view of the changed situation – the founder would still implement his will in this way, or whether he would now rather carry out a change of the purpose.<sup>322</sup> Subject to the same conditions, requirements or preconditions that affect the foundation's purpose may also be removed or altered.<sup>323</sup>

#### UPON THE REQUEST OF THE FOUNDER OR BASED ON HIS WILL

The competent federal or cantonal authority changes the purpose of a foundation upon the request of the founder or on the basis of his last will if a change of purpose has been reserved in the foundation deed and if, since the establishment of the foundation or since the last amendment requested by the founder, at least ten years have elapsed.<sup>324</sup> The founder is therefore allowed to apply to the competent authority for amendment of the foundation's purpose and to give the foundation a new direction.<sup>325</sup>

If the foundation pursues a public or charitable purpose, the modified purpose must also be public or charitable.<sup>326</sup> On the one hand, this additional restriction of the founder's right should prevent the reservation of the right to amend the purpose is abused for tax reasons and tantamount to a reverse transfer right of the founder.<sup>327</sup> On the other hand, people who have given donations to a foundation considering the foundation's purpose should be guaranteed that their money will be used in any case for a public or charitable purpose.<sup>328</sup>

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319 Art 85, ZGB.

320 Eidgenössische Stiftungsaufsicht (fn 254), 7.

321 Art 86, para 1, ZGB.

322 Eidgenössische Stiftungsaufsicht (fn 254), 7.

323 Art 86, para 2, ZGB.

324 Art 86a, para 1, ZGB. cf Roncoroni (fn 294), 733, 734, and Gotthard Steinmann, 'Das neue Stiftungsrecht – ein Überblick über die zivilrechtlichen sowie steuerlichen Neuerungen', STR 2005, 466, 469.

325 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8169.

326 Art 86a, para 2, ZGB.

327 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8169.

328 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8169.

The right to amend the foundation's purpose cannot be inherited or transferred.<sup>329</sup> If the founder is a legal person, this right shall be lost no later than 20 years after the establishment of the foundation.<sup>330</sup> If several people have set up the foundation, they may only together require the amendment of the foundation's purpose.<sup>331</sup>

The reservation of the right to amend the purpose of the foundation in Art 86a of the Civil Law is not applicable to family foundations and ecclesiastic foundations.<sup>332</sup> Amendments to purpose are not allowed in such foundations.

#### *Insignificant amendment of the foundation deed*

The supervisory authority may, after hearing the organ of the foundation, make insignificant modifications to the foundation deed, such as a change of name or the seat of the foundation, if this appears for strong factual reasons to be necessary and no rights of third parties are affected.<sup>333</sup>

#### ***Dissolution of the foundation***

The competent federal or cantonal authority may dissolve the foundation upon application or on its own initiative, if the purpose has become unattainable and the foundation cannot be maintained by an amendment to the foundation deed,<sup>334</sup> or if the purpose has become illegal or immoral.<sup>335</sup> Any person who has an interest is entitled to apply for the dissolution of the foundation.<sup>336</sup>

#### ***No reassignment right***

The Swiss Foundation Law does not recognise any possibility of reassignment, which would allow the founders after a certain period to claim back the amount contributed into the foundation or parts thereof.<sup>337</sup> The introduction of a possibility of reassignment was discussed in connection with the revision of the Swiss Foundation Law.<sup>338</sup> Due to concerns of additional administrative expenses for the involved persons (taxpayers, tax authorities, foundations, foundation supervision), and in order to prevent any misuse (tax evasion, money laundering), the creation of a possibility of reassignment was rejected.<sup>339</sup>

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329 Art 86a, para 3, ZGB.

330 Art 86a, para 3, ZGB.

331 Art 86a, para 4, ZGB.

332 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8169.

333 Art 86b, ZGB; BGE 103 Ib 164 f.

334 Art 88, para 1, Ziff 1, ZGB.

335 Art 88, para 1, Ziff 2, ZGB.

336 Art 89, para 1, ZGB.

337 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8160.

338 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8160.

339 Parliamentary initiative on revision of the Foundation Law, report of the Commission for Economic Affairs and Taxation of the Council of States, BBl 2003, 8160.

## **The association**

### ***Definition***

The association according to Swiss law is a coming together of persons in one legal person in order to pursue a common non-economic purpose.<sup>340</sup> Associations are corporations without founding capital, that bear a name freely chosen<sup>341</sup> within the scope of the legal order.<sup>342</sup> An association pursues an idealistic purpose as long as no concrete economic advantage<sup>343</sup> is given to the members of the association.<sup>344</sup>

### ***Establishment***

#### *Acquiring legal personality in general*

Associations that dedicate themselves to a charitable, religious, scientific, artistic, social, political or other non-economic task acquire legal personality as soon as the will to be a corporation is apparent from the articles of association.<sup>345</sup> The articles of association<sup>346</sup> have to be established in written form and have to provide information about the purpose of the association, its capital and its organisation.<sup>347</sup> Once the statutory conditions for the establishment of an association are met, the association exists without further ado.

#### *Will to exist as a corporation*

The will to exist as a corporation must clearly emanate from the articles of association; a mutual internal will of the members is not enough.<sup>348</sup>

#### *Individualisation*

Also needed is a sufficient individualisation of the association. For this reason, the purpose of the association, ie its task and activity area, must be incorporated into the articles of association.<sup>349</sup> A sufficient individualisation requires that the association has a name,<sup>350</sup> which in principle can be freely chosen.<sup>351</sup> In contrast to legal persons under the Swiss Code of Obligations, for which primarily the special provisions of company name law and only secondarily the provisions of the name law<sup>352</sup> apply, associations are in principle only subject to the name law.<sup>353</sup>

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340 Ullin Steiff, Bruno Pellegrini and Adrian von Kaenel, *Vertragsvorlagen* (Zürich/Basel/Genf, 2008), 348.

341 Regarding name protection cf Art 29, ZGB.

342 Steiff, Pellegrini and von Kaenel (fn 340), 348.

343 For discussion about the legitimacy of associations with economic purposes cf BGE 90 II 333 ff, and Piera Beretta, *Wirtschaftliche Vereine in der Schweiz*, (Basel, 2001), 1 ff.

344 BasK-Heini/Scherrer (fn 63), N 4 to Art 60, ZGB.

345 Art 60, para 1, ZGB.

346 Partially also referred to as standing orders, by-laws or constitution. cf BasK-Heini/Scherrer (fn 63), N 42 to Art 61, ZGB. In addition BGE 100 Ia 100.

347 Art 60, para 2, ZGB.

348 BGE 88 II 229 f.

349 BasK-Heini/Scherrer (fn 63), N 20 to Art 60 ZGB.

350 ZK-Egger, N 16 to Art 60 ZGB.

351 BGE 117 II 517; BasK-Heini/Scherrer (fn 63), N 5 to Art 61, ZGB.

352 Art 29, ZGB:

‘1 If someone is challenged in the usage of his name, he can file a lawsuit for declaration of his right.

2 If someone is affected by another assuming his name, he can file a lawsuit and claim for cessation of the assumption and in case of fault for damages and, where the type of damage justifies it, for payment of a monetary sum as compensation’.

353 BGE 102 II 165.



Officially, there are no regulations on how the name of an association has to be constituted.<sup>354</sup> In order not to affect someone's protected right to the name (Art 29 of the Civil Code), the name of an association must clearly differ from other names.<sup>355</sup>

#### *Seat*

It is not mandatory to identify a seat of the association. If the articles of association do not define a seat, the seat is at the place where the administration is carried out.<sup>356</sup> A chosen seat of association does not have to be consistent with the geographic centre of the actual activities; it is necessary, however, that the association has a postal address at its seat.<sup>357</sup> Tax law determines the seat of an association from a fiscal point of view.<sup>358</sup> But the seat of the association is important for the determination of the court of jurisdiction.<sup>359</sup>

#### *Organisation*

The law provides that the articles of association should present information about the organisation of the association.<sup>360</sup> However, this statutory provision is not mandatory, because dispositive statutory provisions will apply if any information about the organisation of an association is missing.<sup>361</sup>

#### *Founding members*

By definition, associations have members. At the time of establishment, the founding members have to declare that they want to form an association as a legal person.<sup>362</sup> A minimum number of members is not legally required. Prevailing legal doctrine assumes that two members are sufficient.<sup>363</sup>

#### *Funds*

The articles of association must provide information about its funds.<sup>364</sup> Associations may hold all kind of assets.<sup>365</sup>

#### *Entry in the commercial register*

As soon as the board of association is constituted and the articles of association have been

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354 BGE 117 II 517.

355 BGE 117 II 517.

356 Art 56, ZGB.

357 BasK-Huguenin (fn 63), N 7 to Art 56, ZGB.

358 ZK-Egger, N 7 to Art 56, ZGB; BK-Riemer (fn 197), N 26 f. to Art 56, ZGB. cf for example Art 50, DBG. In addition Art 20, StHG: 'Corporations, cooperatives, associations, foundations and other legal persons are subject to tax if their seat or their effective management is located in the Canton.'

359 BGE 102 Ia 409 f., BGE 94 I 567, BGE 53 I 127, BasK-Huguenin (fn 63), N 18 to Art 56, ZGB. cf also Art 30, para 2, BV.

360 Art 60, para 2, ZGB.

361 Art 63, para 1, ZGB.

362 BK-Riemer (fn 197), N 7 to Art 60, ZGB.

363 BK-Riemer (fn 197), N 16 to Art 60, ZGB; BasK-Heini/Scherrer (fn 63), N 30 to Art 60, ZGB.

364 Art 60, para 2, ZGB.

365 BK-Riemer (fn 197), N 42 to Art 60, ZGB. cf also Art 53, para f, ZGB.

adopted, the association is authorised<sup>366</sup> to apply for entry in the commercial register.<sup>367</sup> This protects the public good faith.<sup>368</sup>

### ***Organisation of the association***

#### *Principle: Freedom of organisation*

There is great freedom in the organisation of an association and the relationship between the association and its members.<sup>369</sup> The rules presented below only apply if the articles of association do not contain provisions to the contrary. Only a few statutory provisions are mandatory.

#### *Mandatory provisions*

Mandatory legal provisions in the Association Law are in particular the obligation to convene an association meeting if 20 per cent of the members so require,<sup>370</sup> the right of the association meeting to dismiss the organs at any time if there is an important reason,<sup>371</sup> the right for members to leave the association with six months' notice,<sup>372</sup> the irrevocable competences of the association meeting<sup>373</sup> and the right of a member to speak<sup>374</sup> at the association meeting.<sup>375</sup> If a financial contribution is required from the members, it is mandatory that this is provided for in the articles of association.<sup>376</sup> Since the revision of the Association Law, it is also mandatory that the provisions of the Code of Obligations on business accounts apply to associations that are obliged to be entered in the commercial register.<sup>377</sup> Under certain conditions the accounting books must be examined by an auditor.<sup>378</sup>

### ***The association meeting***

#### *Highest organ*

The association meeting constitutes the highest organ of the association.<sup>379</sup> It is convened by the board.<sup>380</sup> It is mandatory that an association meeting is convened if one fifth of the members require it.<sup>381</sup>

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366 If associations conduct a commercial business, entry in the commercial registry is mandatory.

367 Art 61, para 1, ZGB.

368 BGE 104 Ib 322 f, BGE 111 II 483 ff.

369 BasK-Heini/Scherrer (fn 63), N 1 zu Art 63, ZGB.

370 Art 64, para 3, ZGB.

371 Art 65, para 3, ZGB.

372 Art 70, para 2, ZGB.

373 Art 64, para 1, ZGB. BasK-Heini/Scherrer (fn 63), N 5 to Art 64, ZGB, BasK-Heini/Scherrer (fn 63), N 5 ff. to Art 65, ZGB.

374 BasK-Heini/Scherrer (fn 63), N 16 to Art 66, ZGB.

375 cf BasK-Heini/Scherrer (fn 63), N 5 to Art 63 ZGB, Steiff/Pellegrini/von Kaenel (fn 350), 348.

376 Art 71, ZGB.

377 Art 69a, ZGB.

378 Art 69b, ZGB.

379 Art 64, para 1, ZGB.

380 Art 64, para 2, ZGB.

381 Art 64, para 3, ZGB.

*Further organs of the association*

The association meeting and the association board are the only two organs that an association must have in all cases.<sup>382</sup> Given certain personal and economic conditions, the accounting has also to be checked by an auditor.<sup>383</sup> In addition, the articles of association can stipulate further optional organs, such as committees, branches, a secretariat, arbitration tribunal or, if not already mandatory, an auditor.<sup>384</sup>

*Regularity and timing of association meetings*

The articles of association regularly provide for the regularity and timing of association meetings.<sup>385</sup> In the majority of cases, the articles of association provide that the competence<sup>386</sup> to convene an association meeting lies with the board;<sup>387</sup> it is disputed whether this competence can be transferred to another organ by the articles of association.<sup>388</sup> In any event, if an association meeting is convened by a person without competence, the resolutions taken are null and void.<sup>389</sup>

*Convening and the agenda*

The articles of association must contain provisions on the notice for convening association meetings as well as on the location and time of association meetings.<sup>390</sup> The agenda is set by the association board or the organ that convenes the association meeting. Each member is entitled to ask the board to put a topic on the agenda, provided that such request is made on time and falls into the competence of the association meeting.<sup>391</sup>

Decisions that are taken in violation of provisions on the convening of association meeting are challengeable or even void.<sup>392</sup> The violation of formal regulations in the invitation to an association meeting, however, leads only to a resolution being void if there is a causal connection between the violation and the passing of the resolution.<sup>393</sup> An agenda topic is properly announced if after the consultation of the agenda and the articles of

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382 Art 64, ZGB for the association meeting, Art 69, ZGB for the association board.

383 Art 69b, ZGB:

‘1 The association shall have its accounts properly audited by an auditor, when two of the following amounts are exceeded in two consecutive business years:

1. Total balance sheet of 10 million francs;  
2. Turnover of 20 million francs;  
3. 50 full-time jobs on an annual average.

2 The association shall have its accounts restrictedly audited by an auditor if a member of the association who is subject to personal liability or reserve liability requests it.

3 The provisions of the Code of Obligations on the auditor for joint stock companies are correspondingly applicable.

4 In other cases, the articles of association and the association meeting are free to regulate the auditing.’

384 BasK-Heini/Scherrer (fn 63), N 6 to Art 64, ZGB and Art 69b, para 4, ZGB.

385 BasK-Heini/Scherrer (fn 63), N 19 to Art 64, ZGB.

386 This is regardless of the obligation to convene an association meeting where required by statute or by law.

387 Art 64, para 2, ZGB.

388 Bejahend BK-Riemer (fn 197), N 27 to Art 64, ZGB, and BasK-Heini/Scherrer (fn 63), N 20 to Art 64, ZGB. In contrast ZK-Egger, N 7 to Art 64, ZGB.

389 BGE 71 I 388.

390 BasK-Heini/Scherrer (fn 63), N 25 to Art 64, ZGB, BK-Riemer (fn 206), N 40 f to Art 64, ZGB.

391 BasK-Heini/Scherrer (fn 63), N 26 to Art 64, ZGB.

392 BK-Riemer (fn 206), N 44 to Art 64, ZGB, BasK-Heini/Scherrer (fn 63), N 27 to Art 64, ZGB.

393 BGE 114 II 197.

association the association members can easily identify which subjects shall be discussed and resolved on.<sup>394</sup>

#### *Delegation meeting*

The possibility to replace the association meeting with a delegation meeting is not provided for in statute but approved in case law.<sup>395</sup> Associations with a large number of members have especially made use of this. The rights of individual members may be limited only insofar as this is necessary.<sup>396</sup> The right to elect<sup>397</sup> the delegates remains available to the individual members, as does the right to challenge<sup>398</sup> the resolutions of the delegation meeting that are in violation of the law or the articles of association.

#### *Competence of the association meeting*

The association meeting has various irrevocable competences, such as the establishment and amendment of the articles of association,<sup>399</sup> the control, discharge and dismissal of other organs<sup>400</sup> as well as the possible dissolution of the association.<sup>401</sup>

If there are no provisions to the contrary in the articles of association, the association meeting also decides on the admission and exclusion of members, elects the board and decides on all matters that are not transferred to other association organs.<sup>402</sup>

#### *Conduct of the association meeting*

By law, the board is responsible for convening the association meeting; however, the articles of association may also determine another organ for this.<sup>403</sup> In addition, an association meeting has to be held if it is required by one-fifth of the members.<sup>404</sup> The notice convening an association meeting must contain information about the notice period for the meeting, the location and date of the meeting, a reference to the convening organ and the agenda.<sup>405</sup> Association resolutions made in violation of the provisions for convening the meeting are challengeable or void.

Association resolutions are taken by the association meeting.<sup>406</sup> The articles of association or the rules and regulations shall determine the rules of procedure for the conduct of the association meeting.<sup>407</sup>

According to non-mandatory provisions,<sup>408</sup> all association members have the same

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394 BGE 114 II 197, Art 67, para 3, ZGB.

395 BGE 48 II 156. BasK-Heini/Scherrer (fn 63), N 29 f to Art 64, ZGB.

396 BasK-Heini/Scherrer (fn 63), N 30 to Art 64, ZGB.

397 BK-Riemer (fn 197), N 33 ff to Art 66, ZGB.

398 Art 75, ZGB: 'Decisions that violate the law or the articles of association can be challenged by law at court by any member who has not voted in favour of them, within one month after the member became aware of them.'

399 So-called statutory supremacy.

400 Art 65, paras 2 and 3, ZGB.

401 BasK-Heini/Scherrer (fn 63), N 17 to Art 64, ZGB.

402 Art 65, para 1, ZGB.

403 Art 64, para 2, ZGB.

404 Art 64, para 3, ZGB.

405 Unless the articles of association provide a release from this. cf BasK-Heini/Scherrer (fn 63), N 25 to Art 64, ZGB; Art 67, para 3, ZGB. BK-Riemer (fn 206), N 36 to Art 64, ZGB.

406 Art 66, para 1, ZGB.

407 BasK-Heini/Scherrer (fn 63), N 9 to Art 66, ZGB

408 Provided there are objective reasons for it. A differentiation is admissible, for example, for so-called passive members.

voting rights at the association meeting.<sup>409</sup> Association resolutions are passed by majority vote of members present, including those who abstained from voting.<sup>410</sup> The articles of association may contain provisions to the contrary and may depart from the requirement of an absolute majority.<sup>411</sup>

### ***The association board***

Within the scope of the articles of association, the board of an association performs the daily internal management and the representation of the association towards third parties.<sup>412</sup> Accounting for income and costs as well as for the assets of the association is a task of the association board and is regulated by law. For associations that are obliged to be entered in the commercial register, the keeping of commercial accounts in accordance with the regulations of the Code of Obligations is an additional responsibility of the board.<sup>413</sup> Further, the association board has to exercise all those tasks that are assigned to it in accordance with the articles of association, regulations or association resolutions.<sup>414</sup> These include in particular the form of the internal organisation of the association, the distribution of tasks, the investment of the association's assets, making available the association's premises and facilities, management of member data, collecting membership fees, contact with the association members, attracting new members, the preparation, convening and conduct of the association meeting, taking minutes of the association meeting as well as the organisation of other association events and the arrangement of the association's activities.<sup>415</sup> The articles of association or regulations may assign certain tasks to individual members of the board alone – otherwise, all board members have to act together.<sup>416</sup>

### ***Becoming a member of the association***

Membership of an association is acquired either by participation in the founding meeting or by subsequent joining.<sup>417</sup> Whereas founding members become members by consenting to the articles of association, joining after the founding of an association takes place in accordance with the articles of association.<sup>418</sup> Usually, a resolution of acceptance by the competent organ of the association is required.<sup>419</sup> For non-profit organisations, however, joining often occurs automatically without any requirements of form, when a donation is made.<sup>420</sup>

Basically, the association membership may not be sold or inherited.<sup>421</sup> However, the articles of association can provide for rules deviating from this.<sup>422</sup>

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409 Art 67, para 1, ZGB; BasK-Heini/Scherrer (fn 63), N 5 to Art 67, ZGB.

410 Art 67, para 2, ZGB.

411 BasK-Heini/Scherrer (fn 63), N 17 to Art 67, ZGB.

412 Art 69, ZGB.

413 Art 69a, ZGB.

414 BK-Riemer (fn 197), N 61 f to Art 69, ZGB.

415 Florian S. Jörg, 'Recht des Vereins', Vortragsmanuskript anlässlich einer Veranstaltung der Educaris AG: Gesellschaftsrecht 2009 – Rechtsentwicklungen und Herausforderungen, 6. May 2009, 23 f.

416 BK-Riemer (fn 197), N 66 to Art 69, ZGB.

417 Vreni Schawalder, *Unser Verein: Handbuch für Vorstand und Mitglieder* (Zürich, 2003), 45.

418 Jörg (fn 415), 31.

419 Anton Heini, Wolfgang Portmann, *Schweizerisches Privatrecht II/5, Das Schweizerische Vereinsrecht*, (Basel/Genf/München, 2005), § 11 N 227.

420 Schawalder (fn 417), 42.

421 Art 70, para 3, ZGB.

422 Arthur Meier-Hayoz and Peter Forstmoser, *Schweizerisches Gesellschaftsrecht, mit neuem Recht der GmbH, der Revision und der kollektiven Kapitalanlagen* (Bern, 2007), § 20 N 56.

## **Conclusion**

The location of Switzerland provides founders of a foundation and charitable institutions with many possibilities for realising their plans. The statutory provisions – both from a civil law and a tax law aspect – provide a solid and reliable framework for the establishment of charitable institutions. At the same time, there are sufficient possibilities for handling complex projects on an individual basis respecting the interests of those involved.

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