

AN OVERVIEW OF THE SWISS PHILANTHROPIC SECTOR

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SWISS NON-PROFIT SECTOR IN FIGURES

In contrast to other legal systems, Switzerland does not have any particular legislation that specifically defines the qualification of charitable organisations.

In practice, foundations and associations are the two legal forms that are commonly chosen to carry out charitable activities. Each of these legal forms is governed by about 20 provisions of the Swiss Civil Code and by tax provisions. Swiss foundations and associations enjoy great freedom in terms of structure and governance. For this reason, Switzerland is usually regarded as a place of choice for the establishment of charitable organisations, and this sector is increasingly popular including for non-Swiss founders such as international families, large charitable institutions or corporate foundations.

At the end of 2016, a total of 13,172 charitable foundations were registered in Switzerland. Of these, 349 were registered in 2016 alone. One-third of the Swiss foundations have an international scope, confirming the trend of an increasingly global philanthropy approach. The total number of associations cannot be precisely quantified since these entities are, in most cases, not compulsorily required to register with the commercial register.

OVERVIEW OF THE LEGAL FRAMEWORK

The Swiss legal framework for charitable activities is provided by a set of rules:

The main requirements are set forth in the Swiss Civil Code (see articles 60 to 89bis of the Swiss Civil Code (SCC) and in Swiss federal tax legislation (see article 56g of the Swiss Federal Direct Tax Act (FDTA), Circular No. 12 of the Federal Tax Administration of 8 July 1994, and guidelines of 18 January 2008 issued by the Swiss Tax Conference for cantonal tax authorities). Some of these requirements are also laid out in guidelines issued by

the Swiss Federal Department of Home Affairs and in the relevant cantonal tax legislation (Switzerland being a federal state with three levels of tax jurisdiction: federal state, cantons and municipalities).

Swiss law distinguishes the form of an organisation under civil law from its tax status. Thereby, it is the tax legislation that will ultimately be relevant in determining whether a legal entity that is acting in the public interest qualifies for tax privileges and can, as a result, be considered as a “charitable organisation”.

OVERVIEW OF THE STRUCTURE AND GOVERNANCE OF SWISS FOUNDATIONS AND ASSOCIATIONS

Foundations

Under Swiss law, foundations are defined as a pool of assets irrevocably dedicated to serve a specific purpose (see article 80 et seq SCC).

From a civil law perspective, the purpose can be of any kind, provided that it is lawful, not impossible nor immoral. The assets transferred to a foundation can also be of any kind (cash and securities, real estate, intellectual property rights, etc).

A foundation is established by one or several founders (who can be natural persons or legal entities) by public deed or testamentary provision. Swiss civil law does not provide for a minimum initial capital. However, in practice, an initial capital of at least 50,000 Swiss francs is required.

The registration with the commercial register of the canton of the seat of the foundation is compulsory, and the foundation acquires full legal personality only upon such registration.

The foundation is the owner of its own assets. Consequently, the control of the founder over the foundation and its assets ends at the time of the constitution (eg, selection of the initial board members). The founder can nonetheless retain the right in the by-laws to appoint new board

members or, under certain conditions, to amend the purpose of the foundation.

The main organ of a foundation is its board (made up of at least three natural or legal persons), which is vested with executive functions such as the management and the representation of the foundation. A foundation must have at least one board member with individual signature rights who is a Swiss or European citizen with Swiss residency.

In addition, foundations must appoint an independent external auditor, bearing in mind that the Swiss Civil Code provides for general accounting obligations for both foundations and associations. Other organs, such as an executive committee or an internal advisory board, are optional.

Finally, it is important to note that, unlike associations, foundations are subject to the supervision of a state authority. Foundations with an international scope are subject to the supervision of the Federal Supervisory Authority on Foundations, whereas foundations with a domestic scope are subject to the supervision of the relevant cantonal supervisory authority.

Associations

Associations are defined as corporations without a founding capital pursuing a certain purpose (see article 60 et seq SCC).

In order to acquire full legal personality, associations are only required to have written articles of association describing the purpose, the resources and the organisation of the entity. Associations acquire legal personality without further formality. In particular, there is no need for a public deed or for an initial endowment. In contrast with foundations, the registration in the commercial register is not mandatory (but voluntary registration is possible), except for large associations (see articles 61 and 69b SCC).

The supreme organ of an association is the general assembly of its members, which means that, unlike foundations, associations do have members. In practice, a minimum of two founding members are required to constitute an association.

The nationality and residence requirements mentioned above for board members of a foundation also apply to associations.

As also mentioned above, associations are not subject to state supervision. However, in order to maintain a tax-exempt status, associations need to meet the relevant requirements in an ongoing manner.

The appointment of an external auditor is only mandatory for large associations (more precisely, if certain thresholds in terms of asset value, turnover and staff are exceeded in two successive business years; see article 69b SCC).

Family foundations

It is worth mentioning that, under Swiss law, family foundations constitute a separate category that is subject to specific requirements. A Swiss family foundation is a type of foundation serving private purposes that may only be established to defray the costs of upbringing, to endow or support family members or for similar purposes (see article 335 et seq SCC). Swiss family foundations cannot be established for purposes of mere financial alimony. Foreign legal entities that would be in conflict with these principles are nevertheless admissible in Switzerland, to the extent that they comply with the rules applicable under the relevant foreign law.

TAX CONSIDERATIONS

The status of tax-exempt organisations

Only Swiss foundations and associations that pursue a purpose of public interest and whose activities have an altruistic character can apply for a complete tax-exemption on the profits that are exclusively and irrevocably dedicated to such purpose. The requirements described below are laid down in the tax legislation and in guidelines (see article 56g FDTA, circular no. 12 of the Federal Tax Administration of 8 July 1994 and guidelines of 18 January 2008).

Purpose of public interest

In order to benefit from a tax-exempt status, foundations and associations have to pursue a purpose which is of public interest. This requirement goes beyond the mere non-profit qualification. Purposes related to social care, art and science, education, the promotion of human rights, the protection of the environment, homeland and animals, as well as

development aid, are considered to be of public interest.

Compliance with this requirement requires that the circle of the beneficiaries must be open and not limited to a certain category of persons. As a result, distributions must not be restricted to, for instance, members of a certain family, members of an association or members of a profession. Charitable organisations that are active abroad but maintain their seat in Switzerland can benefit from Swiss tax-exemption. In some cantons, however, full tax-exemption is subject to the availability of benefits to local beneficiaries.

Exclusion of profit and effective activity

The assets and income of the legal entity must be wholly allocated to the fulfilment of the purpose, it being specified that operative costs are admissible. The purpose of public interest must, consequently, be pursued effectively. Entities whose main purpose is to accumulate the proceeds of their activity or investment without having a specific project of public interest to be carried out are not entitled to tax-exemption.

Entities that combine commercial purposes with purposes of public interest can benefit from a partial tax-exemption.

Absence of self-interest

This requirement, in particular, implies that board members must carry out their activities on a voluntary basis and, in principle, cannot be remunerated (expenses can, however, be reimbursed). Remuneration is only admissible when performing special tasks that go beyond what can reasonably be expected of a board member and in the field of expertise of the relevant board member.

Irrevocable use of the assets

Finally, the by-laws of the entity must provide that in case of dissolution the funds cannot return to the founder, their family or the members and must be allocated to another organisation that has similar objectives.

Benefits for donors

The tax-exempt status also provides benefits to Swiss-based donors. Gifts made to Swiss legal entities benefitting from a tax-exemption can be deducted from the income of individual taxpayers, if these contributions reach at least 100 Swiss francs and in total do not exceed 20 per cent of the net income (in a tax year). Companies can also deduct contributions made to Swiss tax-exempted entities up to 20 per cent of their net profit.

Gifts made by Swiss-based donors to a foreign charitable organisation do not

fall under automatic tax-exemption and will depend on the applicable cantonal tax legislation (for example, see article 28 paragraph 2 of the Geneva Gift and Inheritance Tax Act) or an international tax treaty.

RECENT AND FORTHCOMING LEGAL DEVELOPMENTS

A current major trend in the Swiss non-profit sector (in particular for foundations) is the promotion of more transparent governance. In this context, the obligation for foundations to register in the commercial register has recently (2016) been extended to religious and family foundations, entities which were in the past not subject to such registration requirement. In the same vein, legislative amendments aiming at the modernisation of the commercial register have also been undertaken (introduction of a central database and improvement of the identification system of natural persons registered, such as board members, reinforcement of the role of the commercial register in the case of lack of organ, free online consultation of by-laws, etc). Foundations and associations are, in addition, subject to the new financial duties in force since 2015 – implementing the revised recommendations of the Financial Action Tasks Force (FATF) – in terms of commercial accounting and financial reporting.

Even if Swiss foundations and associations are already rather flexible structures, a parliamentary initiative to further strengthen the attractiveness of Swiss foundations was submitted to the parliament in September 2014. The proposed bill included propositions aiming at optimising the tax legislation in the non-profit sector, easing organisational changes in the structure of foundations, authorising the remuneration of board members of the foundation and limiting the liability of those working on a voluntary basis. Even though this initiative overcame the first parliamentary commission last year, it was rejected on 3 November 2016 by the Committee for Legal Affairs of the National Council (ie, one of the two chambers of the Swiss Parliament), which considered that the proposed amendments were not appropriate measures to effectively reach the goals that were initially set. Consequently, the legislative process is still ongoing in Parliament.

Finally, the sector is currently dealing with a draft bill on the reorganisation of the Federal Foundation Supervisory Authority.