27 The Restructuring and Further Developing of Foundations

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1 Needs and Background

Many foundations see themselves as social investors, investing in the well-being of society and thus complementing the state and the economy. As committed risk-takers, foundations initiate innovation and progress and generate an economic impact.[1] However, the fast pace of today's world, the volatile financial environment, crises (such as Covid-19, environmental disasters, or the wars in Ukraine and Gaza with all their consequences), and the acute need for transformation processes to preserve our natural resources are increasingly pushing the rigid concept of a foundation as a perpetuated institution to its limits.

The image of foundations is evolving further and further away from the purely charitable awarding of grants in their comfort zone toward active participation in the sector and in global transformation processes, which the state and the economy cannot shoulder alone, and which cannot be driven forward without the involvement of foundations. However, these transformation processes (especially in the areas of climate and environment, biodiversity, nutrition, energy transition, mobility, and transportation, strengthening the global South through poverty reduction, etc.) will not be achieved through traditional grantmaking activities but through sustainable economic incentive mechanisms that also lead to a new economy.[2]

> For example, a rural community in the Democratic Republic of Congo or in South America will not protect its rainforest area at the expense of arable farming and livestock breeding because individuals receive short-term benefits from donations. Sustainable transformation will only be achieved if a large-scale, internationally functioning system of economic incentives is created that places an *economic value* on the rainforest and its conservation, and provides an intrinsic motivation for the population to conserve the area.
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> The Elea Foundation's "Amazi" project is a vivid example of impact-orientated foundation activity.[3] Amazi runs a chain of nail and beauty salons in South Africa, training disadvantaged women, employing them

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> as beauticians, and giving them career opportunities. The foundation supports Amazi as an investor and strategic partner in the development of the company and the fight against inequality and unemployment. In doing so, it unleashes the social and economic potential of women otherwise excluded from the labor market and gives them a future. The basic idea behind such "impact investments" is to invest directly in the form of shareholdings and loans in the development of companies and organizations in developing countries, whose activities open up new sources of income for people and/or drive forward ecological processes. These companies and organizations involve the beneficiaries not as *recipients of donations and aid* but as customers, producers, or traders *in global value chains* and help them utilize these to their advantage sustainably. The aim is always to ensure that the partner companies and organizations are self-financing in the long run and not permanently dependent on transfer payments.

If we look at preserving our ecological systems, the window of opportunity for action is extremely short and is becoming increasingly shorter. Transformation measures must, therefore, be implemented in the coming years. The preservation of natural resources is just *one* (albeit important) example. The rapid development of (e.g., medical) research, digitalization, political disruptions (and the resulting consequences such as hunger, poverty, and displacement), as well as the dynamics of today's "poly-crisis," are permanently changing the environment of existing foundations. As a result, foundations will need to *evolve* if they are to contribute and have the desired impact in these scenarios.[4] For example, foundations will need to:

- Change their funding areas, their funding activities, and their investment behavior and adapt them to the new circumstances;
- Pursue new approaches to philanthropy ("next philanthropy") or become active in funding types and channels that are innovative, often international, and possibly entrepreneurial in nature and, therefore, sometimes unfamiliar to the authorities.[5]

If foundations should play the role that is expected of them given the development of our society and our environment, we need a rethinking in many respects. It shows that the practice of the Swiss supervisory entities can prove to be too rigid and restrictive when it comes to amendment requests and that there is a need for more flexibility in the further development of foundations.[6] After all, foundations must be progressive vehicles that should be able to act and react at the forefront of their respective areas of specialization. It would be a serious drawback if foundations could not realize their potential because some authorities have a different understanding of how foundations should function. Furthermore, it is detrimental to Switzerland

as a foundation center if existing foundations cannot develop with the times and new foundations are set up in other locations instead. Only a *dynamic understanding of foundations* can, therefore, ensure that foundations can play an effective role in future challenges (see also section 2.4). Thus, this chapter aims to demonstrate what is possible and necessary taking into account the *existing* legal framework for foundations in Switzerland.[7]

2 Legal Situation

The legal basis for foundations is set by federal law (see section 2.1) and – implementing – cantonal law (see section 2.2). Therefore, supervisory activities depend primarily on the *interpretation* of these provisions (e.g., in the case of undefined legal terms), the general principles of supervision, and the authorities' understanding of the foundation and supervisory system (see section 2.3). A brief look at the legal bases is necessary to illustrate the existing room for maneuver.

2.1 Federal Law

The mandate of the foundation supervisory authority is based on art. 84 para. 2 of the Swiss Civil Code of December 10, 1907 (hereinafter CC), which only rudimentarily instructs the supervisory authority to ensure "that the foundation's assets are used for their declared purpose."[8] Provisions relating to the modification of the foundation can be found in art. 85 et seqq. CC. They are a consequence of the foundation's institutional nature and the principle of separation and solidification.[9] However, even a conscientious founder cannot predict the future. The actual circumstances may change, and the provisions regarding the purpose or organization may become obsolete.[10]

For this reason, art. 85 CC allows the subsequent amendment of the foundation's *organization* if this is urgently necessary to preserve the assets or to safeguard the purpose of the foundation.[11] If the original purpose of the foundation has taken on a completely different meaning or effect, to the extent that the foundation has obviously become estranged from the founder's intention, according to art. 86 CC, the *purpose* of the foundation can be adapted to the changed circumstances. Minor amendments to the foundation charter in accordance with art. 86b CC can be made provided they are objectively justified and do not impair the rights of any third party. Before January 1, 2024, such minor amendments had to appear *necessary for valid* objective reasons. Therefore, the legislator has lowered the threshold for minor amendments to the charter.[12] Furthermore, since January 1, 2006, amendments to the purpose and, since January 1, 2024, also of the organization can be made at the request of the founder, provided that such an amendment was reserved in the foundation charter and at least ten years have passed since the foundation was established or last amended (art. 86a CC).

2.2 Cantonal Law

The primary source of foundation law is federal law. However, the aforementioned provisions of the CC are relatively vague and rely on practical concretizations.[13] As the Confederation has comprehensive competence for civil law with subsequent derogatory effect (cf. art. 122 of the Federal Constitution of the Swiss Confederation of April 18, 1999) and foundation law is in principle conclusively regulated, the cantons are only authorized to issue so-called implementation ordinances for supervision.[14] In this regard, they are empowered to implement federal law, as well as supplement it, specify it, or clarify it in accordance with the law. Moreover, no cantonal law may be enacted that impedes federal law, contradicts it, or goes further than federal law in terms of substance. Consequently, cantonal law and the corresponding supervisory practice cannot amend or restrict the principles guaranteed by federal law (such as the freedom of the founder).[15]

In the Canton of Zurich, for example, the supervision of traditional foundations is assigned to the BVG and Foundation Supervisory Authority of the Canton of Zurich (BVS) as an independent public-law institution (§ 1, § 2 para. 2 and 3 BVSG). The cantonal implementing provisions are based on the Law on BVG and Foundation Supervisory Authority (BVGS). This law regulates the organization of the supervisory authority (§ 3 et seqq. BVSG), its activities (§ 11 et seqq. BVSG), as well as personnel, finances, and the administration of justice (§ 22 et seqq. BVSG). In particular, it assigns responsibility to the BVS Zurich within the meaning of art. 85, 86, and 86a CC (§ 12 lit. a BVSG). In addition, BVS Zurich provides various information sheets, for instance, on asset investment for traditional foundations[16] and on amending charters for foundations under the supervision of BVS Zurich.[17]

2.3 General Supervisory Principles

The measures taken by the supervisory authority are administrative in nature and, therefore, only permissible within the framework of proper administrative action.[18] Due to the sovereign nature of the actions, these are primarily governed by the basic principles of constitutional law and the (uncodified) principles of general administrative law. In this context, it is important to mention the principles of proportionality and subsidiarity, according to which the authority must always choose the mildest appropriate means and protect the foundation's autonomy by exercising restraint with regard to official interventions.[19] Finally, the principles of legality and good faith must be remembered.[20]

In addition, the basic principles of foundation law apply, which are directly relevant to supervisory activities. The principle of *legal supervision* is essential in this context, according to which a decision and, with it, the exercise of discretion by the foundation board may only be reviewed for its *legality* but not for its expediency[21].[22] The supervisory authority may, therefore, not examine whether, in its view, there is a more appropriate or better

decision and may not substitute its discretionary judgment for that of the foundation board. It is the foundation board that decides on the manner in which the purpose is to be fulfilled and the assets are to be managed within the framework of the statutory requirements in the proper exercise of its discretion. If no legal errors are apparent, the supervisory authority must accept the decision.[23]

As part of its competence, the supervisory authority must also respect the *freedom of the founder*. This freedom guarantees the ability to establish a foundation, to determine its purpose freely, and to enjoy wide-ranging freedom in its organization.[24] Further, it is particularly important to consider the founder's intent and pay close attention to its *interpretation*. As a unilateral transaction, the foundation transaction is interpreted according to the principle of intent: the decisive factor is what the founder really intended, not what potential recipients of the declaration might understand.[25] Generally, the founder's *original* intention, as manifested when the foundation was established, is determined (whereby subsequent elements of intention or elements of intention outside the charter may be considered by way of the "indication" theory[26]).[27] If the founder was unable to form an opinion about a circumstance at the time of establishment (e.g., due to a change in circumstances or completely new developments), a supplementary interpretation must be made, and the hypothetical intention of the founder must be taken into account. This involves determining what the founder would have declared in good faith if he had been aware of the changed circumstances (rather than what the authority considers appropriate by exercising its own discretion).[28] The founder's intent, thus, serves as a guiding compass not only for the foundation board but also for the supervisory authority. At the same time, the original founder's intent must not be used against the foundation board's requests for amendments without determining its hypothetical component in light of the facts of the amendment (see below section 3.1).

2.4 Dynamic Understanding of Foundations and Foundation Autonomy

The freedom of the *founder* should not be confused with the freedom of the *foundation*, i.e., the foundation board's *autonomy* of action. The primary task of the foundation board is to fulfill the founder's original intent, which is anchored in the foundation's purpose. While the founder sets the framework for the fundamental, identity-defining characteristics of the foundation, the foundation board needs to give concrete form to the foundation's purpose in its day-to-day realization through its actions. Consequently, the foundation board is comparable to a helmsman who must always interpret the course set by the founder in the current weather conditions in a contemporary manner.

However, the envisaged conditions often change, and sometimes the route leads through turbulence, making navigation a challenging task. If the foundation is heading toward a (metaphorical) iceberg, for example, the

foundation board will have to deviate from the prescribed course temporarily – or even want to set a completely new course to avoid the danger zone as much as possible. This results in a difficult balance of interests: the protection of the founder's trust must be reconciled with the foundation board's dutiful interest in ensuring that the foundation's actions are as meaningful and effective as possible.

This is where the autonomy of the executive bodies comes into play. It allows the foundation board to adjust the management of the foundation to changing circumstances based on their best judgment. This means they can develop the foundation further, if necessary, by making decisions that deviate from the founder's wishes and by taking even unpopular measures. Also, the Swiss Foundation Code[29] has added a new fourth principle, stating that the foundation must *develop* its organization and activities in line with the current requirements, considering cultural, ecological, political, and technical developments. The dynamic development of the foundation is, therefore, inherent in the proper functioning of the foundation board. However, if the foundation board faces identity-defining, fundamental decisions regarding purpose, assets, and organization, after which the foundation no longer has the identity that the founder gave it, its autonomy ends. The statutorily entrenched "core" of the founder's will or the provisions of the statutes can only be modified via the legal amendment provisions.[30]

It goes without saying that with such dynamic foundation management, the proper exercise of discretion (in addition to the correct interpretation of the founder's intent[31]) is crucial in reviewing the possibilities and requirements. For although the founder relinquishes control over the specific *outcomes* of the decisions, he must and may rely on a proper process of preparation, consideration, and decision-making. If a decision of the foundation board is based on a flawed or inadequate decision-making process – e.g., if a nonexistent margin of discretion was assumed, irrelevant considerations were included in the weighing procedure, or necessary arguments were incorrectly weighted – this constitutes an error of discretion. In the case of decisions made by the foundation board that contain errors of discretion, the authorities are called upon to intervene. As already said, the supervisory authority only examines the *legality* of the decision made by the foundation board, not its expediency (so-called legal supervision, see above section 2.3). However, the competent authority remains authorized and obliged to examine the proper *exercise* of discretion for errors of discretion.[32]

It should be noted that the proper exercise of discretion may not only *authorize* but even require the foundation bodies to change a strategic direction, the foundation structure, or the foundation documents. If, for example, in the case of a foundation for the promotion of certain students, the funds can no longer be reasonably distributed due to antiquated statutory allocation criteria or a purpose that is too narrow, the foundation board *must* apply for an amendment to the statutes. In such cases, the supervisory

authority is called upon to *comply with this dynamic understanding* of the foundation. Overall, managing a foundation *lege artis* is not about mummifying a historical wording down to the smallest detail, but about always giving the founder's core ideas the greatest possible effectiveness in a contemporary environment.[33]

3 Development Scenarios

3.1 Amendments of Purpose

Significant amendments to the foundation's *purpose* are subject to strict legal requirements (art. 86 CC). In particular, the purpose may only be changed if there has been an objective change in the meaning and effect of the purpose and a subjective estrangement from the original founder's intention.[34] These requirements are substantial but should not be applied more restrictively than necessary by the supervisory authorities.

The *objective* component is met if there has been a de facto change in the meaning and effect of the purpose. The *subjective* component requires that the purpose has become estranged from the founder's original intention, meaning that the founder's intention can *no longer be reasonably realized* in the manner outlined in the statutes due to the changes that have occurred.[35] For example, the purpose may have become completely obsolete (if the disease to combat has been eradicated or if the school education supported has been abolished or taken over by the state), it may have become uneconomical (if the funds are too plentiful for a purpose that is too narrow or if the funds are too small for a purpose that is too ambitious but cannot reasonably be divided), or legitimate expectations may simply not have been fulfilled.[36] However, it is *not* necessary (although the supervisory authorities often assume this) that a foundation's purpose has become *completely impossible*, a test that would already fail if the previous purpose could theoretically (even if unreasonably) still be fulfilled. Such a "logical" impossibility of achieving the purpose is *not* a prerequisite of art. 86 CC. Instead, an estrangement according to the criteria mentioned is sufficient to initiate an amendment of purpose under the applicable law.

Given the considerations set out in section 2.3, the (hypothetical) intent of the founder and its interpretation are also relevant for verifying these criteria. If a specific amendment of the foundation's purpose is in question, it must be determined by applying the principle of intent (and possibly by way of the "indication" theory) whether the founder would have formulated the purpose differently if aware of the circumstances.[37] It speaks for itself that the *original* hypothetical intention is decisive and not the intention that the founder may express today. Nevertheless, it is not prohibited to take the currently expressed intent of the original founder as a reference to his hypothetical intent.

A further distinction must be made between the "whether" of the amendment of purpose and the "how," as it is a frequently stated principle (albeit

one that is not prescribed by law) that the amended purpose should be as similar as possible to the previous one.[38] The task at hand is to determine how the founder would have described or would *reasonably* describe the purpose at the time of the amendment, taking into account the changed situation.[39] In addition to determining the hypothetical intent (possibly with the intent of the living founder as a reference, see above), this also requires a certain margin of judgment ("reasonably"). At this point, we see a gateway to the dynamic understanding of the foundation: the new purpose must be formulated so that it makes sense today and lays the groundwork for the future, ensuring a sustainable effect. According to the principles of foundation autonomy and legal supervision, this margin of judgment should be filled by the interpretation of the *foundation board,* which is closer to both the founder's intent and the foundation's activities (with all their strengths and weaknesses) than the authorities. Unless legal errors are evident, there should be no room for the supervisory authority to intervene or make its own (supposedly more appropriate) judgment (see section 2.3 for the supervisory principles).

3.2 Purpose Reductions and Expansions

The above applies, in particular, to reductions and expansions of purpose. These phenomena are to be distinguished from "genuine" changes of purpose (which establish an entirely *new* purpose) because they do not change the "heart" and "spirit" of the foundation (but often also do not constitute "minor amendments" for which art. 86b CC would be relevant). This involves adapting to changed circumstances, learning lessons from previous activities, or drawing consequences from the ratio between purpose and means. The goal is to improve the foundation's impact in light of current circumstances through targeted adjustments.[40] However, restrictive supervisory practice often equates reductions and expansions of purpose with a *complete* amendment of purpose and demands the same standard for less intrusive *amendments* of purpose as for a complete *reversal* of purpose: If a foundation purpose has not become impossible and can theoretically (even if unreasonably) still be fulfilled, the threshold for an amendment of purpose has not been reached. It is often not asked whether the founder, had he been aware of the circumstances, would also have amended the purpose accordingly.

The lower amount of change that occurs in the event of an expansion or reduction of purpose must, therefore, be taken into account when handling such applications by the authorities. In view of a dynamic understanding of foundations, when assessing the facts of "estrangement," the question should be asked whether the purpose can be *better* realized by reducing or expanding it and whether the adjustment corresponds to the actual or presumed intent of the founder. The complete "impossibility" of further fulfilling the purpose will probably never exist in these cases. Therefore, a "reasonable" handling

of development concerns is required that the foundation board has verified in a proper exercise of discretion for the foundation's benefit. Anything else results in an artificial "rigidification" of the foundation, which is the opposite of "dynamization." This would discourage foundations from further development and a targeted increase in impact, ultimately harming Switzerland as a foundation center.

3.3 Reorganizations

According to art. 85 CC, the foundation's organization can be modified upon application if such a step is urgently required to preserve the foundation's assets or to safeguard the pursuit of its purpose. However, given the wording "urgently," the question arises as to whether meaningful organizational changes, which do not affect the purpose of the foundation (otherwise, art. 86 CC would apply), really have to reach a level of escalation that fulfills the criterion of an existing "urgency." Or whether it is also possible to take *proactive* or *preventive action*, precisely to prevent the foundation from being confronted with the *urgent* risk of lasting damage and facing a profound crisis. The requirements for an organizational adjustment should not be set too high, and the latter should be possible in a broad interpretation of the legal wording if it is necessary for better fulfillment of the foundation purpose or better management of the assets and therefore appears reasonable in the individual case.[41] The "urgency" should, therefore, be given a proactive meaning, and it should be applied so that urgency does not have to already *prevail* for the organizational change but rather that it can be *prevented* by the amendment.

3.4 Minor Amendments

As a rule, amendments are considered minor (or "non-substantial") within the meaning of art. 86b CC if the nature of the foundation is not fundamentally changed and no provision of the foundation charter is affected, which, according to the presumed will of the founder, is to be regarded as unalterable.[42] Previous foundation law allowed such amendments to the foundation charter if they were deemed *"necessary for valid objective reasons."* However, with the revision of the foundation law that came into force on January 1, 2024, the requirements of art. 86b CC were lowered. From now on, the law only requires that the amendments *"are objectively justified."*

Now that the reasons do not have to be "valid," but only "objective," and that they only have to be "justified" and not "necessary," even the legislator has reacted to the legal practice by significantly lowering the threshold for making minor amendments in the interest of flexibility.[43] This should (and this is just a reminder) be noted by the supervisory authorities and appropriately taken into account when applying the new law. If a minor amendment appears objectively justified, i.e., *justifiable,* it should be granted.

3.5 Handling of Amendment Requests by the Authorities

Concerning the wording, the provisions in art. 85 et seq. CC could be interpreted as implying a certain degree of administrative discretion (the authority "may"). However, this understanding must be considered in the context of the general supervisory principles (see above section 2.3). As with other foundation decisions, it can be assumed that the foundation bodies are better informed about the specific area of activity, the circumstances, and development opportunities of the foundation than the supervisory authority.[44] If the foundation board applies for an amendment, it is *their* responsibility to verify the requirements based on the statutory and legal provisions at their proper discretion (taking into account the founder's intent, etc.). The supervisory authority then reviews this decision within the framework of the principles of its supervisory activities:[45] the principle of legal supervision, subsidiarity, and proportionality. If no *legal* errors are evident in the foundation board's decision, the applicant should be *entitled* to the amendment order.[46]

If the foundation board comes to the proper discretionary conclusion that the requirements for the amendment are met, the supervisory authority may not apply its own margin of judgment instead of that of the governing bodies but must accept the decision subject to legal supervision.[47]

3.6 Amendments of Regulations

Organizational provisions of the foundation are often shifted from the foundation statutes to regulations, which is permissible for all elements of the founder's intent that are not part of the "essentialia negotii" of the foundation deed.[48] The clear legal position is that any amendment to the charter and the statutes must be approved by the supervisory authority (cf. art. 85 et seqq. CC). This leads to the equally clear reverse conclusion that the amendment of *regulations* does *not* require a ruling or authorization by the supervisory authority.[49] Nonetheless – which is not unproblematic in terms of competence[50] – cantonal supervisory ordinances often stipulate that the amendment of regulations must also be submitted immediately to the supervisory authority for review.[51]

However, if the authorities require the submission of regulations, this can only be a declaratory acknowledgment of the content and not a *constitutive* approval or authorization requirement, given the legal situation under federal law. The request to submit regulations does not allow the supervisory authority to intervene beyond the regular competencies[52] of the authorities. Consequently, the submission can only be used for the general exercise of legal supervision and does not influence the *validity* of these regulations. However, if the review of the regulations reveals violations of the law or the foundation's statutes, regular measures of legal supervision will apply.[53] The authority may verify whether the amendment has been implemented in accordance with the procedure laid down in the statutes and the regulations. Furthermore, it may assess whether it complies with the foundation charter,

the founder's intention, and the mandatory objective law and, if necessary, intervene.[54]

So-called guidelines, on the other hand, which are below the level of regulations, are merely permanent resolutions of the foundation board and are therefore not even subject to the submission requirement of the cantonal ordinances.[55]

3.7 Foundation Board Actions below the Amendments of the Statutes

Now that the previous sections have shed light on the understanding of intervention regarding *statutes* and *regulations*, the final step is to define the supervisory authority's powers to intervene at a purely *operational* level. This is because the issue at hand does not end with document amendments. The dynamic understanding of foundations also – in particular – creates scope for foundation activity *within* the existing documents and thus *below* the threshold of the authorities (keywords: foundation autonomy and legal supervision).

It is not without reason that foundations should be granted this freedom in terms of economic, sectoral, and social policy: Foundations are often the spearhead of development processes, have access to innovative ideas, and have the financial capacity to try out the unproven. They operate in areas where the state cannot, and the economy does not dare to act. As a result, they are generally one step ahead of the state, the economy, and the supervisory authority in their field of expertise, which is precisely the potential of foundations. Such innovative activity, even in the unknown, must not be preventively suppressed but must – always subject to the prevention of abuse – be considered desirable and supported if foundations should contribute to achieving our sociopolitical and ecological goals. In addition, the supervisory authorities must internalize the "impact approach" and thus help to ensure that foundations can work and provide support where the impact for their purpose is the greatest (which also distinguishes the supervisory authorities, at least in part, from the tax authorities, who have to "guard" a stricter concept of *charitable* activities).[56] The desideratum to be realized by the supervisory authorities is a dynamic, entrepreneurial, innovative, and international understanding of foundations (see also section 2.4).

The supervisory authority must also adhere to the principles of supervisory administrative law in the area *below* the document amendments. These principles include legal supervision, proportionality, and subsidiarity (cf. section 2.3). The foundation board decides on how the purpose is to be fulfilled, and the assets are to be managed within the framework of the statutory requirements in accordance with *their* discretion. If there is no legal error, there is no basis for the supervisory authority to intervene at this level either.[57]

Authorities should be encouraged to implement the needs of the involved parties in a constructive and joint manner, provided that the founder's intent and the legal framework are preserved. Artificially shortening the

legal framework by means of an administrative "practice" is not in keeping with the principles of a liberal and dynamic foundation system and would result in a homemade disadvantage for Switzerland as a foundation center.

3.8 The Influence of Art. 86a CC

Since January 1, 2006, the founder has the right to request an amendment of the foundation's purpose if at least ten years have passed since the foundation was established or since the last amendment requested by the founder, provided that this right has been reserved in the statutes. Furthermore, since January 1, 2024, also amendments to the organization of the foundation are possible every ten years at the founder's request (art. 86a CC). This legislative intervention was designed to increase the flexibility of the foundation system, thereby enabling the founder to exert more influence over the foundation board during the foundation's operational phase.[58]

It should be noted that, according to the legal system, the supervisory authority *must* comply with the application if the legal requirements are met ("the competent federal or cantonal authority shall amend…"). Consequently, there is no discretion on the part of the authority,[59] and – apart from the special case of abuse of rights (art. 2 para. 2 CC) or clearly unlawful results – there is a legal entitlement to the administrative order.

It should also be pointed out that the new art. 86a CC will significantly alter the foundation landscape in the medium term. The role of foundation boards will become increasingly challenging in view of the enhanced founder's rights. After ten years, the founders are given the opportunity to reorganize the foundation and, for example, to reduce or even remove the members of the foundation board or another organ. For this reason, it seems particularly important to make the legal options for the further development of foundations accessible to the foundation boards as well, thus creating more flexibility in the management of the foundation. In this way, the foundation board should be able to *independently ensure* the continued well-being of the foundation and thus avoid the risk of being subjected to the influence of a dissatisfied founder after ten years.

At the same time, care must be taken to ensure that existing foundations, for which no statutory founder's rights have been reserved, are not disadvantaged compared to other foundations in terms of their opportunities for further development. Such foundations must also be guaranteed sufficient leeway to adopt a dynamic understanding of foundations in favor of the most effective pursuit of their purpose.

4 Summarized Desiderata and Conclusion

The chapter's objective was to identify potential improvements to the supervisory practice in Switzerland. Accordingly, it aims to provide guidance to

the supervisory authorities on achieving a modern interplay between supervision and foundation autonomy.

Foundation authorities should keep in mind the importance of the supervisory principles. First and foremost is always the primacy of the founder's intent, which is implemented through the discretionary decisions of the foundation board. These decisions must be principally respected, especially as foundations are typically innovative, highly specialized, and operate in pioneering roles that hardly allow the supervisory authority to assess the content of decisions better than the foundation board. Supervisory control only takes place as a final step in the form of *legal* supervision, guided by the principles of proportionality and subsidiarity.

Art. 85 et seqq. CC consist of undefined legal terms and leave some room for interpretation. It is important to note that art. 86 CC does not imply that the previous pursuit of the purpose must have become *impossible*; rather, objective and subjective estrangement from the founder's intention is sufficient. In the case of expansions or reductions of the purpose, lower requirements must be imposed on the estrangement. Furthermore, the newly formulated purposes must be *suitable* in terms of content to ensure a sustainable and effective future fulfillment of the purpose. When applying art. 85 CC, it should not be a prerequisite that the endangerment of the foundation is already urgent. Instead, it should be decisive that the "urgency" and, thus, the foundation's crises are *proactively prevented*. And in the case of art. 86b CC, reference should be made to the wording, stating that a minor amendment is possible if it appears "objectively justified."

The supervisory authority should also consider the general principles of administrative action when assessing amendments: legal supervision, subsidiarity, and proportionality. It is, therefore, primarily the foundation board that verifies the relevant requirements of the law and the founder's intentions. If no legal errors are apparent, there should be an entitlement to the issuing of the amendment order.[60] The amendment order must, therefore, not be at the authority's discretion.[61]

In conclusion, it can be stated that the *leeway permitted by law* must be used in *favor* of foundations and not *against* them. The authorities should extend a hand to the foundations and their development concerns. No "practices" that lack legal basis should be developed or maintained, and the law should not be interpreted more strictly than prescribed. Otherwise, there is a risk of disregarding the framework of legal supervision, jeopardizing the founder's freedom and the foundation's autonomy. Instead, the supervisory authorities should demonstrate a dynamic understanding of foundations and regard the further development of foundations as a *necessity* for an active, modern, and innovative foundation sector in Switzerland.

The understanding of the foundation system set out in this chapter is undoubtedly already present to a certain extent with some of the Swiss supervisory entities. However, establishing a "*unité de doctrine*" is highly

recommendable to lead to a supervisory practice that is approachable for foundations and geared toward partnership-based cooperation, which takes into account the dynamization of the foundation sector and provides a sustainable boost for Switzerland as a foundation center.

Notes

1 Extract from the protocol of the Government Council of the Canton of Zurich, 25 January 2023, no. 96, p. 2, available at: https://www.zh.ch/bin/zhweb/publish/regierungsratsbeschluss-unterlagen./2023/96/RRB-2023-0096.pdf (Accessed: 12/07/2024).
2 Jakob (2023). *Stiftungsreport 2023*, p. 24.
3 For the following, see elea's website, available at: https://www.elea.org/en/impact-stories/can-cosmetic-services-drive-economic-inclusion (Accessed: 12/07/2024).
4 Jakob (2023). *Stiftungsreport 2023*, p. 24.
5 For the tax law implications of these issues, see Jakob et al. (2023, p. 132 et seqq.).
6 For an evaluation of the practice of the Canton of Zurich, cf. the study "Stiftungsstandort Kanton Zürich", available at: https://www.zh.ch/bin/zhweb/publish/regierungsratsbeschluss-unterlagen./2021/1482/RRB-2021-1482_Stiftungen_im_Kanton_Zuerich.pdf (Accessed: 12/07/2024) and the extract from the protocol of the Government Council of the Canton of Zurich, 25 January 2023, no. 96, p. 3, 5, available at: https://www.zh.ch/bin/zhweb/publish/regierungsratsbeschluss-unterlagen./2023/96/RRB-2023-0096.pdf (Accessed: 12/07/2024).
7 For a new approach de lege ferenda, see Jakob (2020). *Jusletter of 20 April 2020.*
8 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 84 para. 1.
9 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 80 para. 23.
10 For the principles of supervisory law, see Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 84 para. 1 et seq.; Jakob et al. (2023, p. 78 et seq.), and section 2.3 et seqq.
11 For explanations of the terminology of the law, see section 3.4.
12 For the changes, cf. Jakob (2020). *Jusletter of 20 April 2020*, *passim*; Sprecher (2023). *Jusletter of 13 March 2023*, *passim*.
13 See also Degen (2023, p. 140).
14 On the whole, see Trajkova (2023, p. 127); also Grüninger (2022). *Basler Kommentar*, art. 84 para. 3; Riemer (2020). *Berner Kommentar*, art. 84 para. 42.
15 Trajkova (2023, p. 130 et seqq.).
16 Available at: https://www.bvs-zh.ch/assets/dokumente/stiftungen_formulare_und_merkblaetter/merkblatt_vermoegensanlage_kl_3.pdf (Accessed: 12/07/2024).
17 Available at: https://www.bvs-zh.ch/assets/dokumente/stiftungen_formulare_und_merkblaetter/2018_merkblatt_zur_urkundenaenderung_falls_bvs_aufsichtsbehoerde_1.pdf (Accessed: 12/07/2024).
18 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 84 para. 5.
19 Jakob (2019). *Stiftungsaufsicht*, p. 11; Trajkova (2023, p. 102 et seq.); Swiss Federal Supreme Court, BGE 111 II 97 consid. 3; 108 II 497 consid. 5.
20 These principles are derived from art. 5, 5a, 8, and 9 of the Federal Constitution and from general administrative law, see Riemer (2020). *Berner Kommentar*, art. 84 para. 36; see also Degen (2023, p. 140, 142).

21 Art. 84 para. 2 CC ("for their declared purpose") must not be confused with "expediency" of action; Jakob (2020). *Jusletter of 20 April 2020*, para. 20.
22 Grüninger (2022). *Basler Kommentar*, art. 84 para. 2; Degen (2023, p. 140); Jakob/von Schnurbein (2021, p. 20); Riemer (2020). *Berner Kommentar*, Syst. Teil para. 527; Swiss Federal Supreme Court, BGE 105 II 70 consid. 3b; 111 II 97 consid. 3.
23 Jakob (2020). *Jusletter of 20 April 2020*, para. 20.
24 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, Vor art. 80–89a para. 3.
25 Swiss Federal Supreme Court, BGE 108 II 393 consid. 6c; see also Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 80 para. 20.
26 The "indication" theory states that the intention of the drafter of a charter requiring a form, which (the intention) arises from circumstances outside the charter, may only (but at least) be taken into account if it is indicated in the charter; see Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 80 para. 22.
27 For all details on the interpretation of the founder's intent, see Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 80 para. 20 et seqq.
28 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 80 para. 23a.
29 Sprecher et al. (2021). Retrieved from https://www.swissfoundations.ch/wp-content/uploads/2021/06/9783727206849.pdf (Accessed: 12/07/2024).
30 See Jakob (2017). *Autonomie im Recht*, p. 239 et seq.; Jakob (2006). *Schutz der Stiftung*, p. 204 et seq.; in overview also Jakob and von Schnurbein (2021, p. 35 et seq.).
31 Already mentioned above section 2.3.
32 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 84 para. 5 and art. 83 para. 12 et seqq. with further references.
33 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 86 para. 3; Jakob (2014). *Stifterwille*, p. 66 et seqq.; Jakob and von Schnurbein (2021, p. 35).
34 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 86 para. 2.
35 Grüninger (2022). *Basler Kommentar*, art. 85/86 para. 7; Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 86 para. 2.
36 Grüninger (2022). *Basler Kommentar*, art. 85/86 para. 7.
37 Jakob (2020). *Jusletter of 20 April 2020*, para. 36.
38 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 86 para. 3.
39 Grüninger (2022). *Basler Kommentar*, art. 85/86 para. 8; Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 86 para. 3; Jakob (2020). *Jusletter of 20 April 2020*, para. 36.
40 Jakob (2020). *Jusletter of 20 April 2020*, para. 36.
41 Grüninger (2022). *Basler Kommentar*, art. 85/86 para. 4 with further references.
42 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 86b para. 3; Sprecher (2023). *Jusletter of 13 March 2023*, para. 18; these may also be purely editorial adjustments, e.g., the establishment of an auditor that has become necessary due to a change in the law (art. 83b CC), or the adaptation of the liquidation provisions to tax law requirements.
43 Sprecher (2023). *Jusletter of 13 March 2023*, para. 19 et seq.
44 See below section 3.7.
45 Already mentioned above section 2.3 et seqq.
46 Jakob (2020). *Jusletter of 20 April 2020*, para. 43; see also Trajkova (2023, p. 268). Incidentally, this also corresponds to German law, which is subject to the

concession system, but in which, as part of the reform that came into force on 1 July 2023, it is now clarified that there is a "right to recognition" not only for the establishment of foundations but also for amendments to the statutes. See Kirchhain (2022, p. 213), with further references.

47 Kirchhain (2022, p. 214).
48 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 85 para. 5.
49 Jakob (2019). *Stiftungsaufsicht*, p. 13 et seq.
50 See above section 2.2 and Trajkova (2023, p. 127).
51 This is the case in the Canton of Zurich, for example, where § 13 para. 2 BVSG ZH explicitly stipulates this rule.
52 On this, see section 2.3, 3.7 et seqq.
53 Jakob (2019). *Stiftungsaufsicht*, p. 14.
54 Jakob (2018). *Kurzkommentar zum Schweizerischen Zivilgesetzbuch*, art. 85 para. 5.
55 See Sprecher (2023). *Stiftungsrecht in a nutshell*, p. 59; see also below section 3.7 et seqq.
56 See Jakob et al. (2023, p. 131 et seqq.).
57 For the classic examples of asset management and the question of information and approval obligations for important matters, see Jakob (2019). *Stiftungsaufsicht*, p. 12 et seqq.
58 Jakob (2020). *Jusletter of 20 April 2020*, para. 39.
59 Sprecher (2023). *Jusletter of 13 March 2023*, para. 77.
60 Cf. in detail Footnote 46.
61 Jakob (2020). *Jusletter of 20 April 2020*, para. 43.

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