

Swiss family foundations and the new registration requirement—paper tiger or paradigm shift?

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Abstract

Swiss family foundations remain subject to controversial debate. At the core of a decade-old discussion lies, essentially, the question whether they continue to remain a ‘wallflower’ or if they could, instead, blossom by revitalizing them as an eligible estate planning tool. On top of a restrictive judicial approach, a new registration requirement in Switzerland might be regarded as a further impediment for Swiss family foundations since their confidentiality privilege has now been removed. However, this move towards an enhanced governance regime could, in fact, allow for a new and holistic approach ultimately resulting in a liberalization of Swiss family foundations.

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Introduction

While Article 335 paragraph 1 of the Swiss Civil Code (CC) states that:

[a] body of assets may be tied to a family by means of a family foundation created under the law of persons or inheritance law in order to meet the costs of raising, endowing or supporting family members or for similar purposes

Article 335 paragraph 2 CC prohibits the establishment of a family fee tail (*Familienfideikommiss*).¹ The intention behind these (and other, such as Articles 488 and 749 paragraph 2) provisions of the Swiss Civil Code was, historically, to prevent the establishment or perpetuation of feudal structures, as well as to keep potential beneficiaries from laziness and idleness following from the knowledge of eventually receiving a ‘gift from heaven’ without the need to earn a living.²

The intention behind these provisions of the Swiss Civil Code was, historically, to prevent

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1. For an overview of the status quo as well as possible approaches *de lege lata* and *de lege ferenda* with regards to family foundations, see D Jakob, ‘Ein Stiftungsbegriff für die Schweiz, Gutachten zum Schweizerischen Juristentag 2013’ (2013) ZSR II, 185ff (323ff) and D Jakob, ‘Freiheit durch Governance – Die Zukunft des Schweizer Stiftungsrechts mit besonderem Blick auf die Familienstiftung’ in D Jakob (ed), *Stiftung und Familie* (Helbing Lichtenhahn Verlag 2015) 61ff.

2. G Studen, ‘Die Familienstiftung und der gesellschaftliche Wertekanon im Wandel der Zeiten’ in D Jakob (ed), *Stiftung und Familie* (Helbing Lichtenhahn Verlag 2015) 89ff with further references. Specifically, with a view to Art 335 para 2 CC in the context of trusts, see T Geiser, ‘Familienfideikommiss und Trusts – Fortschritt oder kollektives Vergessen?’ in H Honsell, B Huwiler and H Schulin (eds), *Liber amicorum Nedim Peter Vogt – Privatrecht als kulturelles Erbe* (Helbing Lichtenhahn Verlag 2012), 89ff.

the establishment or perpetuation of feudal structures

At first sight, Swiss law seems to provide ample room for manoeuvre for a family foundation as long as its purpose falls within the catalogue of—seemingly broad—activities described in Article 335 paragraph 1 CC. However, the admissible scope of Swiss family foundations was (and, one might add, unnecessarily) tightened by a very narrow interpretation adopted by the Swiss Federal Court in light of the notion of ‘similar purposes’.³ Essentially, the court’s narrow view prevents Swiss family foundations from granting *unconditional maintenance payments* to members of a family. Notwithstanding fierce criticism in literature,⁴ the Swiss legislator has so far refused to amend Article 335 CC by widening the scope of admissible purposes for family foundations.

However, the admissible scope of Swiss family foundations was tightened by a very narrow interpretation adopted by the Swiss Federal Court

Privileges enjoyed by Swiss family foundations

Swiss family foundations traditionally enjoyed certain privileges compared to ‘conventional’ foundations:⁵ first, they are exempted from general state supervision (Article 87 paragraph 1 CC). Secondly, they do not require appointing external auditors (Article 87 paragraph 1 *bis* CC). Thirdly, until very recently Swiss family foundations also enjoyed the privilege of not having to register with the commercial register for

their coming into existence. And fourthly, as a result of the lack of a duty to register in the commercial register, Swiss family foundations enjoyed a privileged accounting insofar as they needed to merely keep accounts on income and expenditure as well as on their asset positions.⁶

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General registration requirement from 1 January 2016

As a general rule, foundations established under Swiss law do not come into existence until they are registered into the commercial register; registration has, therefore, not only *declaratory* but also *constitutive* effect.

As from 1 January 2016, *all* Swiss foundations must be entered into the commercial register. Due to an amendment made to Article 52 paragraph 2 CC, the previously exempted family foundations now fall within the general registration requirement in Article 52 paragraph 1 CC.

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Reason behind the new registration requirement

The Financial Action Task Force (FATF), an intergovernmental body affiliated with the Organisation for

3. This narrow interpretation dates back to a (tax) decision of the Swiss Federal Court rendered in the year 1945, cf BGE 71 I 265. Prior to this decision, the practical approach seems to have been more liberal with regards to ‘similar purposes’. Therefore, it can, to some degree, be said that older Swiss family foundations have been caught by surprise by this decision.

4. See, for instance, M Hamm and S Peters, ‘Die schweizerische Familienstiftung – ein Auslaufmodell?’ (2008) 3 *successio* 248ff.

5. For a general description of Swiss foundations and their main features, see D Jakob, ‘Will Substitutes in Switzerland and Liechtenstein’ in A Braun and A Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart Publishing 2016, forthcoming).

6. Conventional foundations require a comprehensive accounting in accordance with art 957ff CO. However, conventional foundations may keep simple accounting records on income, expenditure, and their asset positions as long as they are exempted from the duty to appoint an auditor (Art 957 paras 2 and 3 CO in conjunction with Art 83b para 2 CC). As a result of the new registration requirement, from 1 January 2016 Swiss family foundations also fall under the general duty to provide comprehensive accounting. However, it remains to be seen whether the transitional period of five years with regards to the registration requirement shall also apply to the accounting duty for Swiss family foundations, which already existed on 1 January 2016.

Economic Cooperation and Development (OECD), defines international standards and promotes the implementation of specific measures aiming at combating money laundering and preventing terrorism financing. The FATF regularly publishes recommendations widely considered as the international standard in these matters. The most recent revision of these FATF recommendations in 2012 was under the influence of the financial crisis and its subsequent consequences, among others an increasing tax competition between jurisdictions and the corresponding pressure on (Swiss) banking secrecy. Therefore, it is not surprising that the latest FATF Recommendations called for the implementation of new standards aiming at establishing better transparency rules for legal entities.

These new standards with a view to increased transparency requirements have been implemented into national Swiss law with the Swiss Federal Act on the Implementation of the Revised FATF Recommendations dated 12 December 2014 (hereinafter 'Implementation Act').

Obligation to register into the commercial register and consequence of non-compliance

An entry into the commercial register is now constitutive for all foundations established under Swiss law. Under the new Article 6b (2bis) of the final title of the CC, family foundations already existing on 1 January 2016 shall remain recognized as legal entities for a transitional period of five years (ie until the end of 2020). Initially, it was not quite clear what would happen with family foundations that fail to register within the transitional period. This issue was, however, provisionally clarified by a statement of the Swiss Federal Commercial Register Office pointing out that non-registered family and ecclesiastical foundations would continue to exist even after the expiration of the five-year transitional period, thus also in case of non-registration. However, it remains to be

seen which approach Swiss courts will take with a view to continued legal existence in case of non-compliance by a non-registered family foundation.

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Measures aimed at ensuring compliance and sanctions in case of non-compliance

Irrespective of the issue of continued legal existence, non-registration might have other legal implications for family foundations and responsible persons. In particular, non-compliant foundations face sanctions in accordance with the Federal Commercial Register Ordinance (CRO). Since the Commercial Register Office does not have authority to enforce the filing of required supporting documents (eg the statutes of a foundation), a registration *ex officio* in line with Article 152 paragraph 1 CRO does not apply.⁷ However, under Article 152 paragraph 2 CRO the Commercial Register Office may request the responsible person to register the legal entity within 30 days. Such request is, obviously, only possible in cases where the Commercial Register Office is (made) aware of the existence of an unregistered foundation.

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But also in cases where the Commercial Register Office is not aware of non-compliance and, hence, cannot issue a formal request, it is strongly recommended that unregistered foundations take action since - in addition to a possible violation of the board members' fiduciary duties - substantial sanctions can be imposed once the failure to register comes to light: first, the Commercial Register Office

7. A Tagmann, in R Siffert and N Turin (eds), *Handkommentar Handelsregisterverordnung (HRegV)* (Stämpfli 2013) art 152 marginal note 3.

may impose a fine in accordance with Article 943 paragraph 1 of the Swiss Code of Obligations (CO). In addition, if the responsible person(s) act intentionally, their acts or omissions may result in criminal charges pursuant to the Swiss Criminal Code. Finally, the responsible person who intentionally or negligently fails to fulfil the registration requirement may also be (personally) held liable for any resulting damages in accordance with Article 942 CO.

In practice, it also remains to be seen whether a cooperation between the Commercial Register Office and tax authorities will emerge: since Swiss family foundations had also in the past not been granted tax-exempt status, they always remained subject to Federal and Cantonal taxation and, therefore, have been on record—so far only for tax purposes. Additionally, certain interested parties, such as (potential) beneficiaries or creditors of Swiss family foundations may choose to inform the Commercial Register Office about the existence of a particular foundation thereby (indirectly) enforcing compliance.

General impact of enhanced transparency with a view to Swiss family foundations

All this illustrates the main purpose associated with the registration requirement: establishing transparency in the entire foundation sector. Due to the publicity of the Commercial Register in Switzerland,⁸ a foundation's existence as well as essential information (ie address; purpose; names of the members of the foundation board; auditors, if appointed) are recorded and published. Authorities and individuals may freely access this information; in addition, certain registration documents are accessible against payment of a (small) fee.⁹

From a 'foundation governance' point of view, the registration requirement introduces further elements of checks and balances: should a family foundation lack a proper organization, the Commercial Register

Office may now issue a formal request to remedy this defect, and—should the foundation's governing body or responsible person refuse to comply—transfer the matter to a civil court (Article 154 CRO). Furthermore, any interested party (such as beneficiaries) may inform the Commercial Register Office about the lack of proper organization in order to allow for a correction of the existing organizational deficit.

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Consequences of enhanced transparency for Swiss family foundations

The amendment of Article 52 paragraph 2 CC removed a central privilege and pivotal feature of Swiss family foundations, ie their confidentiality. This legislative measure can be viewed as departing from the conventional Swiss approach, which emphasized the discretionary nature of family foundations. The discretionary status and confidential nature was further (and still is) accompanied by a lack of general state supervision: Swiss family foundations remain, so to speak, under the internal control of the family. If necessary, governance can be enforced through Article 87 paragraph 2 CC stating that (civil) courts decide on private law disputes. As family foundations historically only had very little interaction with third parties, additional control was (and, indeed, still is) not deemed necessary.

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At the same time a considerable disadvantage for Swiss family foundations went hand in hand with the

8. Art 930 CO: 'The commercial register, including all applications for entry and supporting documents, is public.'

9. In particular, through the official website of the Central Business Names Index, www.zefix.ch, last accessed 24 February 2016.

privilege of confidentiality: the limited scope of purposes under Article 335 paragraph 1 CC and the prohibition of maintenance payments to family members. As a matter of fact, these restrictions were partially justified with the opacity of Swiss family foundations as well as their inherent exposure to abuse.

Since one of the very pillars of Swiss family foundations has now been removed by adding a substantial layer of control through publicly accessible information, the question arises whether the narrow approach to the permissible ('similar') purposes for Swiss family foundations should be reconsidered. In fact, this narrow approach has never been expressly stated in the law, but is a mere interpretation of the courts. Therefore, the registration requirement could emerge as the decisive governance element encouraging the Swiss Federal Court to review its narrow reading of Article 335 paragraph 1 CC. If the court refuses to loosen its interpretation, the legislator could also use the registration requirement in order to justify an explicit broadening of the scope of admissible purposes for family foundations by amending the existing Article 335 paragraph 1 CC.

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All in all, the latest revision could provide a unique opportunity for the Swiss estate and asset planning sector in general and for Swiss family foundations in particular: the enhanced governance and, thus, the elimination of confidentiality, could be compensated by introducing a more liberal environment for potential founders of family foundations.¹⁰

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Summary

As a result of the Implementation Act, Swiss family foundations must now be entered into the commercial register in order to obtain legal personality. All existing foundations that have not been registered as of 1 January 2016 continue to be recognized as legal entities, but must take appropriate measures to get registered until the end of 2020. After that date, non-compliance with regards to the registration requirement may result in a wide array of sanctions. The registration requirement brings with it public availability of essential information about family foundations and a general obligation for a comprehensive accounting.

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At the same time, these changes could also constitute a viable and valuable opportunity for a change of approach to Swiss family foundations as the rationale behind the strict interpretation of Article 335 paragraph 1 CC loses some of its persuasiveness following the implementation of new governance elements. This could, and from the authors point of view should, lead to a more liberal regime of permissible purposes for Swiss family foundations in the 21st century.

This could lead to a more liberal regime of permissible purposes for Swiss family foundations

10. For further details, see Jakob, 'Ein Stiftungsbegriff für die Schweiz' (n 1) 333ff and Jakob, 'Freiheit durch Governance' (n 1) 78.

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