

## EFC COUNTRY PROFILE JANUARY 2011: SWITZERLAND

Drafted by Prof. Dr. Dominique Jakob, M.I.L., Zentrum für Stiftungsrecht and Beate Eckhardt, SwissFoundations

### I. Legal framework for foundations

- **Does the jurisdiction have a basic legal definition of a foundation (Description where applicable)? What different legal types of foundation exist (autonomous, non-autonomous without legal personality, civil law, public law, church law, corporate foundations, enterprise foundations)?**

The foundation is not legally defined in art. 80 et seqq. *Zivilgesetzbuch* (ZGB – Civil Code). Art. 80 provides that the formation of a foundation requires assets being dedicated to a special purpose.

Types with own legal personality: “Conventional/ordinary” foundation (Art. 80 et. Seqq. ZGB); ecclesiastical foundations (Art. 87 ZGB); foundations concerning staff welfare schemes (Art. 89 Art. 89bis ZGB, art. 331, 331 a-f, 361, 362, 673, 674 para. 3 OR), which are subject to certain special regulations; family foundations (Art. 355 ZGB); corporate foundations.

Dependent Foundations: A dependent foundation is not a legal person but comprises special funds transferred by the founder that are permanently linked to a specific purpose.

- **What purposes can foundations pursue?**

The founder is generally free to determine the purpose of the foundation (so-called freedom of foundation). Of course, general legal restrictions are to be observed when determining the purpose; in particular, the purpose may not be in violation of objectively mandatory laws or fundamental moral views. The foundation may have a public benefit or a private purpose but cannot be of a self-serving nature (no “foundation for the founder”, no “self-purpose foundation”). Political purposes are allowed within the general restrictions.

- **What are the requirements for the setting up of a foundation (procedure, registration, approval)? What application documents are required? Are there any other specific criteria for registration?**

Basically, foundations become legal persons upon their entry into the commercial register (Art. 52 para. 1 and art. 81 para. 2 ZGB, Art. 94 HRegV; the so-called register or normative system - *Handelsregisterverordnung*). Apart from its publication effect, the entry also has a constitutive effect (BGE 120 II 137, 141). Prior to the entry, the foundation may obtain the legal position of a *nasciturus* (Art. 31 para. 2 ZGB). Public law, family and ecclesiastical foundations do not require entry into the commercial register to obtain legal personality (Art. 52 para. 2 ZGB). A voluntary entry is for declaratory purposes only.

The actual foundation transaction, the act of dedicating, is a one-sided legal transaction that does not require an acknowledgement. The desired legal effect is achieved by the mere declaration of intent made by the founder.

The foundation deed requires the following information:

- The intention to form an independent foundation;
- The identification of the assets to be dedicated to the foundation;
- The description of the foundation's purpose.

For the rest, the founder may set up and organise the foundation virtually at his or her own discretion. It is possible to form a foundation in a legal transaction *inter vivos* (Art. 81 para. 1 ZGB) or by disposition (Art. 81 para. 1 in connection with Art. 493 para. 1 ZGB). Since the revision of the Law on Foundations of 8 October 2004, it is licit, contrary to the previous judgment of the Federal Supreme Court (BGE 96 II 273), to establish a foundation by way of a contract of inheritance and not only by way of a last will.

The required documents to register are specified in Art. 95 HRegV.

➤ **Is State approval required? (approval by a State Supervisory Authority with/without discretion? Registration with a state authority or court? Notarisation by a Notary public? )**

No (family foundations and ecclesiastical foundations).

Yes for other foundations, with discretion. Registration with a state authority.

➤ **Do foundations have to register? If yes, in what register?**

Family foundations and ecclesiastical foundations do not have to register.

For all other foundations the registration at the commercial register is mandatory.

If foundations are registered, what information is kept at the register?

The information kept in the register is spelled out in Art. 94 HRegV.

If foundations are registered, is the register publicly available?

The register is publicly available.

➤ **Is a minimum capital required?**

Not by law. However, according to the practice adopted by the Federal Foundation Supervisory Authority (*Eidgenössische Stiftungsaufsicht*), the initial capital must be at least CHF 50,000 (approx. €38,500)

➤ **What governance requirements are set out in the law?**

The foundation's governing bodies and the manner in which it is to be administered are set forth in the foundation deed (Art. 83 para. 1 ZGB). The founder may set up regulations in writing to provide for the organisation of the foundation in more detail; this procedure may help to implement any changes more easily (BGE 76 I 77). The foundation always requires a superior organ which ensures the foundation's legal capacity and which is entitled to management and representation.

With regard to the Law on Foundations one can observe a process of implementing corporate governance rules that would be applicable to foundation governance. A lot of work has already been done with regard to self-regulatory mechanisms/guidelines: The Swiss Foundation Code 2009 of Swiss Foundations, the Association of Grant-Making Foundations in Switzerland, which was published in a second edition in 2009, is designed for grant-making

foundations and includes 3 principles, 26 recommendations and an extensive commentary. The Swiss NPO Code of the Conference of Presidents of Large Relief Organisations of Switzerland (KPGH [*Konferenz der Präsidentinnen und Präsidenten grosser Hilfswerke der Schweiz*]), established 31 March 2006, is generally applicable to all non-profit organisations and pursues the principle “comply or explain.”

Is it mandatory to have a supervisory board?

No

What are the requirements concerning board members? Is a minimum/maximum number of board members specified? What are the rules concerning appointment of board members? And their resignation/removal?

No requirements from official quarters.

What are the duties and what are the rights of board members, as specified by national legislation?

Duties according to the foundation deed. The governing body responsible for management confers rights to the foundation and binds the foundation by concluding transactions according to Art. 55 ZGB.

What are the rights of founders? Can fundamental decisions, such as change of purpose, be made at the discretion of the founder? What are the legal requirements in such circumstances?

No specific rights. However, the founder himself may request a change of the foundation's purpose provided that the founder reserved this right in the foundation deed, that at least ten years have passed since the foundation was formed or the last change was implemented, and that the foundation preserves a non-profit purpose (Art. 86a ZGB; in force since 1 January 2006).

What are the rights of beneficiaries (e.g. right of information)?

The law does not provide special rights for beneficiaries. A right of information is accepted by parts of the doctrine. Possibility of complaint against state supervisory body in the case of a legitimate interest.

What rules are in place to ensure against conflict of interest? What is the legal definition of a conflict of interest under your legislation? How is self-dealing prohibited?

Rules according to the foundation deed.

There is no rule of the foundation law that prohibits Self-dealing. According to the Swiss Federal Court contracts which result out of self-dealing are tolerable if the nature of the contract excludes the danger of a disadvantage for the substituted party. Possibly art. 718b OR can be applied by way of analogy. This article stipulates that such contracts have to be composed in writing.

Can staff (director and/or officers) participate in decision making? How and to what extent?

Yes, if provided for in the foundation deed.

➤ **Who can represent a foundation towards third parties? Is this specified in law or is it up to the statutes of the organisation?**

The governing body represents the foundation towards third parties. All modifications are up to the statutes.

Do the director and officers have powers of representation?

The governing body responsible for management confers rights to the foundation and binds the foundation by concluding transactions according to Art. 55 ZGB. It may consist of one or several natural or legal persons and is often referred to as a foundation council (board of trustees / *Stiftungsrat*), foundation board of directors (*Stiftungsvorstand*), foundation commission (*Stiftungskommission*) or curatorship (*Kuratorium*).

What is the general standard of diligence for board members? Does your country differentiate between voluntary (unpaid) and paid board members?

There is no general standard. The diligence goes by the contract between the foundation and the board member. A differentiation between voluntary and paid board members is judged controversial in the literature. The supporters of a differentiation base their opinion on Art. 99 para. 2 OR which provides a less strict liability for the party who is acting without personal benefits.

Is there a “*business judgment rule*”, giving a board member a “safe harbour”, if she/he (1) acts on an informed basis; (2) acts in good faith, (3) acts in the best interests of the corporation, (4) does not act out of self-interest (duty of loyalty concept plays a role here), and (5) is not wasteful?

No there isn't (although a discussion is emerging on the issue). But there is no liability when the member acts independently of negligence (Art. 97 and 41 OR).

What is the liability the directors and officers?

The Law on Foundations does not provide for a specific basis for the liability of the organs. The appointed organ is thus liable according to the general provisions, i.e. internally (towards the foundation) according to the contract and for unlawful acts (Art. 41 et seqq. OR), and externally (towards recipients and third parties) only for unlawful acts (Art. 55 para. 3 ZGB in connection with Art. 41 et seqq. OR). Internally (towards the foundation), the factual organ is liable according to the general basic principles for management activities carried out without the existence of a contract (Art. 419 et seqq. OR) and for unlawful acts (Art. 41 et seqq. OR). Externally (towards recipients and third parties), the organ is liable only for unlawful acts (Art. 55 para. 3 ZGB in connection with Art. 41 et seqq. OR).

Internal relationship: In general, an organ is established by the “organ agreement”, an agreement *sui generis* which is mainly based on the provisions of the Employment and Contract Law. The organ is liable only if actual damages occur in connection with a contract breach, wilful negligence and an adequate causality between the contract breach and the damage is established. The due diligence standard to be met by the organ is based on Art. 321e para. 2 OR, even if it is assumed that the provisions under the Contract Law generally apply, as Art. 391 para. 1 OR of the Contract Law also refers to the provisions under the Employment Law. Art. 419 and 420 OR constitute the basis for the internal liability of the factual organ; the factual organ has to exercise the same due diligence in terms of quality as the appointed organ because the contractual liability basis applies to both accordingly.

External relationship: Externally, the foundation is liable with its assets. But in addition, the acting organs may be personally liable if they acted with wilful negligence (Art. 55 para. 3 ZGB)

Can the founder modify the standard of diligence for board members in the foundation's statutes?

Such a modification (liability excluded for slight fault) is discussed very controversially.

Can board members be held **civilly** and/or **criminally** liable in the following cases?

	Yes	Probably yes	Unclear/ depends	Probably no	No
The foundation distributes money for a purpose which is a public benefit purpose but not accepted in the foundation's statutes.	X				
The foundation loses its status of a tax benefit foundation (because one requirement in tax law was not fulfilled).				X	
The foundation loses money because a board member has acquired some stocks in a company which unexpectedly went bankrupt.			X	X	
The foundation sells immovable property to the spouse of a board member. The board member was unaware that the price was too low.			X		
The foundation sells immovable property to a third person. The board member was unaware that the price was too low.		X			

➤ **Are economic activities allowed (related/unrelated)?**

Yes

➤ **Are there any rules/limitations regarding foundations' asset management?**

Not within the law applying for conventional foundations. There are, however, some rules developed by jurisprudence and some guidelines established by associations. Additionally, there exist specific rules for foundations concerning staff welfare schemes within the law of pension schemes (BVG) which may also serve as an "orientation" for conventional foundations

➤ **Are foundations legally allowed to allocate grant funds towards furthering their public benefit purpose/programmes which (can) also generate income? (recoverable grants; low interest loans; equities)**

Yes

➤ **What are the requirements for an amendment of statutes/amendment of foundations purpose?**

Changes of a foundation's organisation are permitted as an exception pursuant to Art. 85 ZGB provided that the reorganisation is indispensable for the preservation of the assets or for the protection of the purpose of the foundation. If the original purpose of the foundation has significantly or effectively changed and the foundation apparently does not represent the founder's will any longer, the purpose of the foundation may be adjusted according to the

change of circumstances, pursuant to Art. 86 ZGB. In both cases, a special federal or cantonal authority is competent to implement the change, as set forth in Art. 85 and Art. 86 para. 1 ZGB.

While – with respect to changes to the organisation – only the supervisory authority is allowed to request such changes of the organisation and only the highest organ's statements have to be heard, the Federal Law dated 8 October 2004 (in force since 1 January .2006) now provides that the highest organ of the foundation may also request changes of the purpose of the foundation.

Since this revised law was adopted, minor or insignificant changes of the foundation's purpose, as well as minor organisational changes may also be realised in a simplified procedure pursuant to Art. 86b ZGB. Art. 86a ZGB is completely new: The founder himself may request a change of the foundation's purpose provided that the founder reserved this right in the foundation deed that at least ten years have passed since the foundation was formed or the last change was implemented, and that the foundation preserves a non-profit purpose (and therefore keeps its tax exemption). This provision was politically and dogmatically argued because it affects the principle of separation that the Swiss Foundation Law is traditionally based on.

➤ **What are requirements with regard to reporting, accountability, auditing?**

Reporting requirements: Do annual reports and/or accounts of foundations need to be made publicly available?

No

What type(s) of report must be submitted (annual report including details of finances and activities, public benefit report, tax report/tax return, other reports e.g. on 1% schemes)?

If the foundation has an impact on all of Switzerland, the Confederation will be the supervisory authority. On this federal level, non-profit foundations are supervised by the General Secretary of the Federal Department of the Interior. It demands an activity report, annual financial statements, audit report (where the foundation is obliged to be audited), list of the board members, and the board's approval of the annual reports. Pursuant to Art. 84 para. 1bis ZGB, the cantons may subject foundations with an impact only on one canton to supervision at the cantonal level. The internal cantonal jurisdiction of the supervisory authorities is regulated by the cantonal introductory laws to the ZGB.

Tax reports have to be submitted to the tax authorities. The supervisory authority does not decide about tax exemptions.

Who checks (supervisory/tax authorities)?

Supervisory authorities. Foundations are subject to supervision through the community (confederation, cantons, municipalities) that they belong to according to their purpose (Art. 84 para 1 ZGB).

But it is the tax authorities' discretion to check if an organisation meets the necessary material requirements for a tax exemption.

Hence, the competent supervisory authority does not decide on the question of whether a foundation may be exempted from taxes based on its non-profit status and does not monitor a foundation's fulfillment of the requirements.

### Where is the required information publicised?

### What are the legal requirements concerning external audit? Is external audit required by law for all foundations?

The new Art. 83b ZGB provides for the general obligation to appoint an audit division. This obligation to conduct audits is subject to exceptions: Family and ecclesiastical foundations are exempted (Art. 87 para. 1bis ZGB) as are individual foundations that are exempted by the supervisory authority according to Art. 83b para. 2 ZGB and an ordinance based upon this provision (opting-out) because they have minor assets (total assets are below CHF 200,000 (approx. €154,000) in two consecutive business years) and do not publicly ask for donations.

However, the exemption from the obligation to conduct audits does not release the foundation from its obligation to report to the supervisory authority. Of course, exempt foundations may voluntarily conduct a limited or official audit or an audit that is not based on statutory regulations (opting-in, Art. 83b para. 4 ZGB). In this regard, Art. 83b para. 3 ZGB refers to the regulations set forth in the Stock Company Law. A foundation is subject to an official audit to be conducted by an audit division if it exceeds two of the following parameters in two consecutive business years: Total assets of CHF 10 million (approx. €7.7 million); revenue of CHF 20 million (approx. €15.4 million); an annual average of 50 full-time employees (Art. 727 para. 1 No. 2 and 727b para. 2 OR in connection with Art. 83b para. 3 ZGB). If these limits are not exceeded, the foundation is subject to a limited audit of its annual financial statements (Art. 727a and 727c OR in connection with Art. 83b para. 3 ZGB). Thus, foundations are at least subject to a limited audit.

A special characteristic of the Foundation Law is that the supervisory board may demand from foundations that are only subject to a limited audit that an official audit be conducted if this is necessary to reliably assess the asset and profit situation of the foundation (Art. 83b para. 4 ZGB). The audit division will submit a copy of the audit report and any important messages for the foundation to the supervisory authority (Art. 83c ZGB).

### By whom should audits be undertaken? Do requirements/guidelines exist regarding international and national auditing agencies and standards?

The RAG (Audit Admission and Oversight Law) implements an admission procedure that is to be followed by all natural persons and auditing agencies that wish to provide auditing services. The supervisory authority checks if the applicant meets the statutory requirements (Art. 2 lit. a and Art. 3 et seqq. RAG).

### ➤ **Supervision (which authority – what measures / sanctions?)**

#### Does the supervisory authority comprise of a public administrative body, a public independent body, a combination of a governmental body and a court, or a public body and an independent body?

Public administrative body.

The legal relationship between the foundation and the supervisory authority is subject to the Public Law because the state acts in its sovereign capacity.

#### What is the extent of the supervision? Does the body review reports and make inquiries? Are public benefit organisations subject to inspection?



The supervisory authority has to monitor the foundation to ensure that its purpose is fulfilled, the founder's will is complied with and that the foundation organs do not make any decisions that are in contradiction to the foundation deed or the stipulated regulations and/or that are illegal or immoral.

Is approval from the authority required for certain decisions of the Board of Directors?

No

Is it mandatory to have a state supervisory official on the board?

No

What enforcement measures are in place (including compliance measures and sanctions for non-compliance) concerning registrations, governance, reporting, and public benefit status?

The supervisory authority is entitled to give instructions that are binding for the foundation organs and has the right to sanction the foundations if they fail to follow the instructions.

Doctrine and legal practice make a difference between preventive (precautionary) and repressive (restoring) supervisory means. Preventive supervisory means are, for example, regulations pertaining to the investment of assets, the foundation organs' obligation to provide an annual report, and the submission of regulations and changes thereto. The repressive means aim to eliminate the consequences of mistakes made by the foundation organs; for example, reminders, warnings, reprimands, the revocation of a decision made by the foundation's organs, replacement of measures, fines, criminal complaint, and in serious cases even the removal of the foundation's organ. However, the supervisory authority may only control the foundation organs' discretion on misuse, not replace the organs' decisions by its own discretion. In addition, the supervisory authority must always adhere to the principle of commensurability when implementing these supervisory means.

➤ **When and how does a foundation dissolve?**

Since a foundation is bound by the will of the founder, it cannot dissolve itself - in contrast to corporations. Certain circumstances are required for the dissolution of a foundation. The competent federal or cantonal authority will dissolve the foundation upon request or *ex officio* if the purpose of the foundation can no longer be achieved and the foundation cannot be maintained by a change of the foundation deed or if the purpose of the foundation has become illegal or immoral (Art. 88 para. 1 ZGB). Any person with an interest is entitled to file an application or to bring an action for the dissolution of a foundation (Art. 89 ZGB).

➤ **Under what conditions does the civil law in your country recognise a foreign foundation?**

The recognition is assessed according to Art. 154 IPRG. A foundation will be recognised if it was incorporated correctly in its country of origin. There are only few exceptions e.g. if the recognition would be contrary to the Swiss "*ordre public*".

➤ **Does the civil law in your country allow a foundation to conduct (some or all) activities (grant-making, operating, asset administration, fundraising) abroad? Is there any limitation?**

Yes, without limitations. There might, however, be an effect on the tax evaluation of the foundation.



## **II. Tax treatment of the foundation**

- **What are the requirements to receive tax exemptions (pursuing public benefit purposes, non-distribution constraint, being resident in the country?)**

Pursuant to Art. 56 lit. g DBG, legal persons that pursue public or charitable purposes are exempt from taxes for profits that are exclusively and irrevocably dedicated to such purposes. This regulation applies accordingly to cantonal taxes imposed on profit and capital (Art. 23 para. 1 lit. f StHG).

- **What are reporting/proof requirements to claim tax exemptions?**

Application for exemption to tax authorities.

- **Is specific reporting required for the use of state funds?**

No

- **Is there an obligation to report on donors and beneficiaries?**

No

- **Are there specific accounting rules for foundations?**

Accounting rules according to general rules for legal persons (art. 84b ZGB).

- **Is there a statutory definition in the civil law (foundation law, trust law) of your country what a public benefit purpose (charitable purpose) is? If yes, please give us the definition.**

No

- **Is there a statutory definition in the tax law of your country of what a public benefit purpose is? If yes, please give us the definition.**

Both the Federal Law pertaining to the direct federal taxes (DBG) and the Federal Law pertaining to the harmonisation of direct taxes of the cantons and municipalities (StHG) use the general legal term “non-profit” in their description of the requirements for a tax exemption. The relevant regulations (Art. 56 lit. g DBG and Art. 23 para. 1 lit. f StHG) are essentially the same. The only difference is that the StHG not only allows for an exemption from profit taxes but also from capital taxes because the cantons, contrary to the Confederation, impose capital taxes on legal persons.

In its circular no. 12 of the year 1994, the Federal Tax Administration defines the term “non-profit” in more detail and provides that two cumulative requirements must be met: On the one hand, promotion of the general public interest and on the other hand, disinterestedness. The relevant public opinion determines if an activity is in the general public interest. Public benefit may be promoted by activities in charitable, humanitarian, health promoting, ecological, educational, scientific and cultural areas (circular no. 12 no. II. 3. a)). Circular no. 12 names the examples social care, art and science, education, the promotion of human rights, the protection of the environment, homeland and animals, as well as development assistance. Public benefit is determined by the overall opinion of society (BGE 114 Ib 277, 279). Further, circular no. 12 demands an open circle of recipients and states that the restriction to one family, the members of an association or certain professionals is too limited (circular no. 12 no. II. 3. a). An activity is considered disinterested if it is not linked to the legal person’s own economic or personal interests or those of its members or close persons (BGE 114 Ib 277). Based on the rulings adopted by the Federal Court, a non-profit organisation and its

employees have to make sacrifices in the public's best interest (BGE 113 Ib 7, 9 et seq.). In general, there is a lack of disinterestedness when a business purpose is pursued unless such activity is subordinate to the non-profit purpose. The operation of a business may only have a supporting function; further, it may not represent the sole economic basis of the legal person (BGE in ASA vol. 19, p. 328 et seq.). In the event that essential capital contributions are made to companies, the non-profit purpose must prevail over the maintenance of a company; this presumes that the organisation is supported by substantial funding from its company and that these funds are actually used for non-profit activities (Koller 2007, p. 453 et seq.; circular no. 12 no. II. 3. c).

The general public interest is not limited to domestic activities. A legal person that is not active in Switzerland but in another country or worldwide may also be exempted from taxes, provided that its activities are in the general public interest and that they are disinterested. The actual implementation of such purposes must be proven with proper records, e.g. annual report, annual financial statements (circular no. 12 no. II. 3. a). Also, legal persons with their registered office located abroad can be exempted from taxes if they would be subject to taxes in Switzerland based on an economic connection, e.g. as a real estate owner.

➤ **Support of “the public at large”**

Do the activities of a tax-exempt foundation generally have to benefit “the public at large”?

Yes

If yes, can a tax-exempt foundation support a small number of disadvantaged/ underprivileged individuals?

It depends: Above mentioned circular no. 12 demands an open circle of recipients and states that the restriction to one family, the members of an association or certain professionals is too limited (circular no. 12 no. II. 3. a)

Examples: Do the following purposes promote the public at large?

	Yes	Probably yes	Unclear	Probably no	No
For benefit of the inhabitants of a city with 1,000,000 inhabitants	X				
For benefit of the inhabitants of a village with 10,000 inhabitants	X				
For benefit of the employees of a company					X
For benefit of the members of a family					X
For benefit of the students of a university		X			
Award for the best student of a university		X			

➤ **Non-Distribution Constraint**

Does a tax-exempt foundation generally have to follow a “non-distribution constraint” which forbids any financial support of the foundation board, staff, etc?

No. However, too large a compensation for board members can be detrimental to tax exemption.

What happens with the foundation's assets in case of dissolution?

The Law on Foundations does not provide for the distribution of assets and liquidation. Thus, Art. 57 and 58 ZGB apply which refer *inter alia* to the liquidation regulations provided for in the Law on Cooperatives and Stock Companies (Art. 913 OR).

➤ **“Altruistic” Element**

Is remuneration of board members allowed in **civil law** and in **tax law**? If remuneration is allowed, are there any limits in **civil law** and/or in **tax law**?

No limits in civil law.

The tax authorities expect the board members to be working on an honorary basis, if the foundation should be exempted from taxes, though expenses should be repaid. Only if board members render services that step out of their obligations as board members, can remuneration in line with market conditions be paid. The Swiss tax authorities recommend that this remuneration principle is stated in the statutes.

Does **tax law** allow a donor/funder to receive some type of benefit in return for a donation? (e.g. postcards, free tickets for a concert)

Yes

Is there a maximum amount that can be spent on office/administration costs in **civil law** and in **tax law**? If yes, how are “administration costs” defined?

Basically, the foundation has to indirectly or directly use all of its funds to fulfil its purpose. A foundation may lose its non-profit status if it utilizes less than 50% of its funds for the purpose that the tax privileges are based upon. It is difficult to compare foundations in regard to the ratio between total expenses and management costs, but it may be assumed that management costs below 10% are considered low and should not cause any problems; costs in the region of 10-20% are considered appropriate

➤ **Hybrid Structures (elements of private benefit in public benefit foundations)**

Does the **civil law** of your country accept the following provisions/activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X
The founder retains a beneficial reversionary interest in the capital of a property or other asset for his own continuing use.		X			
The gift is of only the freehold reversion (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favour of the founder (or another member of her/his family) as tenant.		X			
A foundation distributes a (small) part of its income to the founder or his family.				X	

Does the **tax law** of your country accept the following provisions/activities of a tax-exempt foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X
The founder retains a beneficial <i>reversionary</i> interest in the capital of a property or other asset to retain for its own continuing use.					X
The gift is of only the freehold reversion (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favour of the founder (or another member of her/his family) as tenant.			X		
A foundation distributes a (small) part of its income to the founder or his family.					X

Are there any other examples from your country (in **civil law** and/or **tax law**) regarding such “hybrid structures” (e.g. law provisions, court decisions, etc.)?

Such hybrid structures may be accepted by the tax law, if the accounting of the foundation strictly separates the tax-exempted purposes from the others.

Maintenance foundations are generally forbidden (Art. 335 ZGB).

➤ **Distributions and Timely Disbursement**

Are foundations allowed to spend down their capital?

Yes

Are they allowed to be set up for a limited period of time only?

Yes

Does the **civil law** and/or the **tax law** of your country require a foundation to spend its income (or a certain amount of the income) within a certain period of time, e.g. within the next financial year?

No

Does the **civil law** and/or the **tax law** of your country require a foundation to spend a percentage of its overall assets in the form of a “payout rule”?

No

Example: Does the **civil law** of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 <sup>th</sup> year are there distributions for the public benefit purpose of the foundation.		X			

Example: Does the **tax law** of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 <sup>th</sup> year are there distributions for the public benefit purpose of the foundation.		X			

Are there any examples or cases from your country (in **civil law** and/or **tax law**) regarding the question of “timely disbursement” (e.g. law provisions, court decisions, etc.)?

➤ **Does activity abroad put the tax-exempt status at risk?**

The general public interest is not limited to domestic activities. A legal person that is not active in Switzerland but in another country or worldwide may also be exempted from taxes, provided that its activities are in the general public interest and that they are disinterested. The actual implementation of such purposes must be proven with proper records, e.g. annual report, annual financial statements (circular no. 12 no. II. 3. a). Also legal persons with their registered office located abroad can be exempted from taxes if they would be subject to taxes in Switzerland based on an economic connection, e.g. as a real estate owner.

➤ **Income tax treatment**

Grants and donations

No taxation.

Investment income (asset administration)

No taxation.

Economic activities related/unrelated)

A special purpose business is an entity that carries out economic activities that are indispensable for the realisation of the organisation’s purpose (e.g. an educational home maintains a training workshop). In this case, the profits made from special purpose businesses are exempted from taxes. Supporting businesses that are clearly subordinate to

the non-profit purpose are permitted (e.g. kiosk at a museum). The same basically applies to other commercial businesses: Profit-making activities do not harm the non-profit principle as long as they are subordinate to the overall organisational activities.

Major shareholding - considered as an economic activity and taxed accordingly?

See above. Holding foundations are permitted.

Income deriving from grant expenditure towards public benefit purpose/programme activities (such as loans, guarantees, equities)?

See above.

➤ **Capital gains tax, where separate from income tax**

➤ **Withholding tax on foreign investment income?**

No specific rules for foundations.

➤ **Gift- and inheritance tax**

The cantons have the exclusive competence to regulate the imposing of inheritance and gift taxes. Donations to non-profit organisations are often exempt from those taxes. However, a uniform definition of the tax exemption based on the public benefit does not exist.

➤ **Value added tax (VAT)**

Basically, the rules applicable to the direct federal taxes also apply to the Value Added Tax Law: Only legal persons who waive distributions of the net profit to members, partners and organs may be recognised as non-profit organisations.

Non-profit organisations that achieve annual revenues of up to CHF 150,000 (approx. €116,000) are exempted from the subjective obligation to pay taxes (Art. 10 para. 2 lit. c MWStG). In addition, certain revenues of non-profit organisations are also exempted from the objective obligation to pay taxes (Art. 21 no. 12, no. 13, no. 17 and no. 27 MWStG). For the definition of a tax exempted organisation Art. 3 lit. j MWSTG refers to Art. 56 lit. g DBG. Donations are so-called non-revenues which are not subject to the value added tax (Art. 18 para 2 lit. a and d MWSTG).

➤ **Capital taxes on value of assets, where applicable?**

Non-profit organisations do not have to pay profit taxes for capital interest, dividend income etc. On the other hand, income from capital shares in companies is only exempted from taxes if the organisation's interest in maintaining the company serves a non-profit purpose

➤ **Taxes on the transfer of assets?**

➤ **Other taxes, where applicable (Real property tax)**

The cantons are competent to regulate the property gains tax. Art. 23 para. 4 StHG provides that the cantons also have to impose the property gains tax on such legal persons who are otherwise exempt from taxes. This means that if a foundation that exclusively pursues non-profit purposes and is therefore exempt from taxes makes a profit from the sale of its real property, such profit will be subject to taxes.

➤ **Can a foreign foundation get the same tax benefits as a national foundation according to the wording of the tax law in your country? If yes, under what conditions?**

Yes, non-profit organisations with their registered offices abroad are entitled to direct privileges in the form of an exemption from profit taxes and capital taxes payable in the cantons under the same conditions as national foundations.

➤ **What is the tax treatment (inheritance and gift tax) of legacies to non-resident public benefit foundations?**

The cantons have the exclusive competence to regulate the imposing of inheritance and gift taxes. In general donations to domestic non-profit organisations are exempt from those taxes. Donations to non-resident non-profit organisations are often tax exempted. However, a uniform definition of the tax exemption based on the public benefit does not exist.

➤ **Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations are protected by the fundamental freedoms of the EC Treaty? Especially: Are the consequences of the Stauffer decision of the European Court of Justice and/or the current infringement procedures of the European Commission discussed by legal scholars or by practitioners? (e.g. publications in law journals) / Have there been any resulting changes to your country's legislation, or are changes being discussed?**

There is no direct impact for Switzerland as it is not a member of the EU. There is, however, a discussion among scholars and on the political level.

### **III. Tax treatment of donors**

➤ **System of tax credit or tax deduction?**

Deduction

➤ **Tax treatment of individual donors**

The Income Tax Law allows natural persons certain socio-politically motivated deductions (e.g. donations, alimony and support payments under the Family Law) a complete list of which is provided by the law (Art. 9 para. 2 StHG, Art. 33 DBG). Art. 33a DBG, which has been in force as of 1 January 2006, also includes the abovementioned voluntary contributions. Monetary contributions, as well as contributions in kind of CHF 100.00 (approx.



€77) or more per fiscal year made by natural persons are deductible from the income, whereas the maximum deductible is 20% of the taxable income decreased by certain expenditures (Art. 26 – 33 DBG resp. Art. 33a DBG).

However, membership contributions paid to associations are not included in the list and are therefore considered non-deductible living expenses in terms of Art. 34 lit. a DBG. Since an association is entitled to receive membership contributions as defined in the articles of association, their payment is not considered a voluntary contribution under Civil Law which would be deductible according to Art. 9 para. 2 lit. i StHG and/or Art. 33a DBG – even if it is an association that is exempted from taxes due to its benefit to the public or its pursuit of a public purpose (circular No. 12, No. IV. 1. a).

The cantons determine independently the maximum deduction allowed under the cantonal and municipal tax law (Art. 9 para. 2 lit. i and Art. 25 para. 1 lit. c StHG).

➤ **Tax treatment of corporate donors**

With reference to legal persons, the Federal Tax Law provides that voluntary contributions of money and other assets to non-profit legal persons having their registered office in Switzerland are deductible from the taxable net profit in the amount of up to 20% of the net profit as business expenses (Art. 59 para. 1 lit. c DGB). The contributions may not be deducted when determining the net profit (circular no. 12 no. IV. 1. b)).

➤ **Tax treatment of donations to non-resident public-benefit foundations**

The law, however, clearly provides that the receiving organisation must have its registered office in Switzerland (Art. 33a and Art. 59 para. 1 lit. c DBG; Art. 9 para. 2 lit. i and Art. 25 para. 1 lit. c StHG). Donations made to organisations that have their registered office abroad are not deductible from direct taxes. This regulation's compliance with the European law is questionable in view of the European Court of Justice ruling in the Stauffer case.

➤ **Other frameworks such as percentage law systems**

➤ **What are reporting/proof requirements to claim tax benefits?**

**IV. Tax treatment of the beneficiary (receiving a grant or other benefit from a foundation)**

**Individuals**

Depends on factual conditions of the individual case. For instance, exemption from income tax would be granted if the grant or other benefit cumulated with other incomes of the beneficiary does not exceed the necessities of life.

**Legal entities**

Depends on factual conditions of the individual case.

## V. Trends and developments

### ➤ **Recent trends or developments affecting the legal and fiscal environment for public benefit foundations**

The legislative body accepted a parliamentary “Motion” and agreed to make Switzerland a more attractive location for non-profit organisations. To achieve this goal it is planned amongst others to frame the taxation environment in a way that is more attractive to non-profit organisations. How the measures will be designed is not decided yet.

### ➤ **Impact of anti-terrorist debate**

Is there a specific national/regional anti-terrorism act (legislation) in your country, (which one and date of entry into force or adoption)?

No

If so, has this law introduced new legal and regulatory requirements for foundations (please describe)?

The Swiss Financial Market Supervisory Authority introduced new regulations against money laundering. The financial intermediary is therefore obliged, before starting a new relationship to a foundation, to ask for information about the founder, the authorised representative, the categories of persons which may be beneficiaries and the board members of the foundation.

Has the foundation supervisory authority introduced new regulatory/oversight requirements to comply with counter terrorism measures/law?

No

Has the foundation supervisory / regulatory authority(ies) introduced guidance tools to assist foundations to comply with counterterrorism measures/law?

No

If so, did the foundation supervisory authority engage in a consultation with the foundation sector on counter terrorism measures/ does it plan such a consultation?

No

### ➤ **Public fundraising**

Are there any specific laws that regulate fundraising and do they affect foundations?

New regulations are to be introduced 1 January 2013, concerning the measures that have to be taken when there is not an appropriate administration and usage of funds raised through public collection for public benefit purposes,. Such funds (so-called “*Sammelvermögen*”) are qualified as dependent foundations. The reform does not affect foundations which have their own legal personality.

### **Useful contacts**

Prof. Dr. Dominique Jakob, M.I.L. (Lund)  
Zentrum für Stiftungsrecht  
Universität Zürich  
Rechtswissenschaftliches Institut  
Treichlerstrasse 10  
CH-8032 Zürich

Tel +41 44 634 15 76  
Fax +41 44 634 49 32

[lst.jakob@rwi.uzh.ch](mailto:lst.jakob@rwi.uzh.ch)  
<http://www.rwi.uzh.ch/jakob>  
<http://www.zentrum-stiftungsrecht.uzh.ch>

Beate Eckhardt  
General Manager  
SwissFoundations  
House of Foundations  
Kirchgasse 42  
CH-8001 Zürich

Tel. +41 44 440 00 10  
Fax +41 44 440 00 11

[beate.eckhardt@swissfoundations.ch](mailto:beate.eckhardt@swissfoundations.ch)  
[www.swissfoundations.ch](http://www.swissfoundations.ch)