Chapter 14
Foundation Law in Switzerland: Overview and Current Developments in Civil and Tax Law

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14.1 Permitted Legal Forms for Nonprofit Activities Under Swiss Law

14.1.1 Legal Forms for Nonprofit Organisations in Switzerland

As opposed to the law of obligations where the parties, in principle, are free to enter into a broad range of arrangements and contracts (so-called freedom of contract/private autonomy), the Swiss corporate law provides only for a limited number of licit forms (so-called compulsory form), the contents of which are restricted (so-called fixed form).

The parties may choose between ten legal entities specified by federal statutory law: a simple partnership [*einfache Gesellschaft*] (art. 530 et seqq.) *BG betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht)* (OR, Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), SR 220), a general partnership [*Kollektivgesellschaft*] (art. 552 et seqq. OR), a limited partnership [*Kommanditgesellschaft*] (art. 594 et seqq. OR), a company limited by shares [*Aktiengesellschaft*] (art. 620 et seqq. OR), a partnership limited by shares [*Kommandit-Aktiengesellschaft*] (art. 764 et seqq. OR), a limited liability company [*Gesellschaft mit*

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beschränkter Haftung] (art. 772 et seqq. OR), a cooperative [*Genossenschaft*] (art. 828 et seqq. OR), an association [*Verein*] (art. 60 et seqq. *Schweizersiches Zivilgesetzbuch)* (ZGB = Swiss Civil Code of 10 December 1907, SR 210) and, as a recent development, the investment company with variable capital [*Investmentgesellschaft mit variablem Kapital*] (art. 36 *BG über die kollektiven Kapitalanlagen)* (KAG = Swiss Federal Act of 23 June 2006 on Collective Investment Schemes, SR 951.31) as well as the limited partnership for collective capital investments [*Kommanditgesellschaft für kollektive Kapitalanlagen*] (art. 7 KAG).

Outside the scope of corporate law, foundations are of great significance in the Swiss nonprofit sector. Foundations under the Swiss law are institutional in nature without members or owners and characterised by assets dedicated to serve a specific purpose (Jakob 2006, 49).

14.1.2 Embodiment Pursuant to the Civil Law and Tax Status

In contrast to other legal systems, the Swiss law strictly separates an organisation's form under the civil law and its tax status. The legal form (e.g. association or foundation) is based purely on the criteria laid down in civil law. Hence, an entity does not qualify for example, a as foundation based merely on nonprofit activities it carries out or its compliance with certain (tax) criteria. Its legal status as a foundation depends rather on the compliance with the formation requirements applicable to foundations (art. 80 et seqq. ZGB). The tax law is relevant on a different level: it determines whether or not a selected legal form is a nonprofit entity which can be granted nonprofit status for tax purposes thereby being eligible for tax privileges.

The choice of the specific legal form for a nonprofit organisation is based on numerous reasons. The association [*Verein*], the foundation [*Stiftung*] and the cooperative [*Genossenschaft*] are typically legal forms selected to carry out nonprofit activities. The company limited by shares [*Aktiengesellschaft*] and the limited liability company [*Gesellschaft mit beschränkter Haftung*] with a nonprofit purpose are other possible legal forms.

A formal exemption from Direct Federal and State Taxes is generally possible irrespective of the legal form of the entity or corporate body in question (art. 56 lit. g) *BG über die direkte Bundessteuer* (DBG = Swiss Federal Act of 14 December 1990 on the Direct Federal Tax, SR 642.11).[1] However, certain legal forms are better suited than others for the pursuit of tax-exempt purposes.

[1] For tax aspects, see below.

14.2 Legal Framework for Foundations

Due to its favourable legal and fiscal conditions Switzerland is often referred to as a "paradise" for foundations and founders. The total number of foundations in Switzerland cannot be quantified exactly since family and ecclesiastical foundations are currently not required to be registered in the commercial register. In addition, the quantity of dependent foundations [*unselbständige Stiftungen*] is unknown due to the fact that these forms of foundations are neither obliged nor eligible to be registered in the commercial register. As regards the 17,431 foundations that had been registered as of 1 January 2014, it has to be differentiated between nonprofit foundations and for-profit entities. Excluding employee benefits schemes established in the form of foundations (see below), some 12,900 *conventional* or *ordinary* entities remain that are structured as genuine nonprofit foundations (Eckhardt et al. 2014, 4).

As regards the positioning of the Swiss foundation sector within the broader European perspective, the motion of State Council Werner Luginbühl from 20th March 2009 with its explicit aim of "raising the attractiveness of the Swiss Foundation Landscape" deserves particular attention. Against the background of recently implemented additional tax privileges in other countries (for instance, Germany), the motion argued in support of a modification of general fiscal conditions in Switzerland in line with its neighbouring countries (Jakob 2009, 47). However, the Swiss Federal Council discussed the motion in 2013.

14.2.1 Legal Basis and Types of Foundations

General

The provisions regarding foundations set forth in the ZGB (art. 80-89a ZGB) are based on the "conventional/ordinary" foundation which, by being entered into the commercial register, achieves the right of personality, is supervised by the state and not subject to any elaborate special laws. In addition to ordinary foundation there are special forms of foundations, including ecclesiastical foundations (art. 87 ZGB), employee benefits schemes established in the form of foundations (art. 89a ZGB, art. 331, 331a-f, 361, 362, 673, 674 para. 3 OR) and asset foundations (art. 53g-k BVG), all of which are subject to certain specific regulations. The employee benefits schemes foundations ("pension funds") offer social security to employees of private employers. They are of great practical significance for the financial security of employees and an addition to the basic state insurances for retirement (AHV) and disability (IV). The asset foundations also play an important role in the field of social security as they serve the collective investment and management of employer security company funds. Despite its important practical function and

relevance, the asset foundation was not codified until the recent structural amendment of the *BG über die berufliche Alters-, Hinterlassenen und Invalidenvorsorge* (BVG = Swiss Federal Act of 25 June 1982 on Occupational Old-age, Survivors' and Invalidity Insurance, SR 831.40).[2]

Family Foundations

The family foundation (art. 335 ZGB) deserves special attention: it is a foundation serving private purposes and neither required to be registered in the commercial register nor subjected to state supervision. Pursuant to art. 335 para. 1 ZGB, this type of foundation may only be established to defray the costs of upbringing, to endow or support family members or for similar purposes. Under Swiss law, a family foundation must not be established for purposes of mere financial alimony or – a fortiori – for luxury. This restriction is based on the statutory prohibition of the establishment of entailed family estates [*Familienfideikommisse*] pursuant to art. 335 para. 2 ZGB. The Swiss Federal Court has held, however, that art. 335 para. 2 ZGB is not to be considered a mandatory provision of Swiss law within the meaning of art. 18 IPRG (*loi d'application immediate*) as regards foreign family foundations, thus removing a long-lasting legal uncertainty. As a consequence, foreign legal entities are admissible in Switzerland even if they are in conflict with art. 335 para. 2 ZGB (Jakob et al. 2010, 860; Jakob 2008b, 539).

Corporate Foundations

Furthermore, company-affiliated or corporate foundations [*unternehmensverbundene Stiftungen, Unternehmensstiftungen*] which are neither regulated nor mentioned in the Swiss foundation law are a very common feature in practice. Corporate foundations exist in two forms: directly supporting foundations and holding foundations. *Directly supporting foundations* [*Direktträgerstiftungen*] have a long-lasting tradition in Switzerland as entities providing social services by means of operating hospitals, schools, care centres, foster homes, etc. In addition to this type of corporate foundations, holding foundations have emerged over the past few decades. The latter are foundations holding a significant share in a corporation which operates a commercial business. The legitimacy of corporate foundations has long been controversial insofar as they pursue an economic purpose (Riemer 2001, 517). This controversy has been settled by a landmark decision in 2001 when the Federal Court argued in support of the legitimacy of corporate foundations pursuing an economic purpose (Jakob 2006).[3]

[2] BBl 2010, 2017 et seqq.

[3] BGE 127 II 337 et seqq.

Dependent Foundations and Trusts

A general distinction has to be made between independent foundations with own legal personality and so-called dependent foundations [*unselbständige Stiftungen*]. A dependent foundation is not a legal person, but comprises special funds transferred by the founder and permanently linked to a specific purpose (Jakob 2012, 10–11, 2006, 81). The special funds are usually based on a free endowment (donation, legacy/heritage, bequest) and can be held in trust or administered subject to certain provisions laid down by the parties involved. Dependent foundations are currently gaining momentum in Switzerland in the context of so-called umbrella foundations [*Dachstiftungen*] (Studen 2011).

No matter how the dependent foundation is structured (i.e. either as a *trust model* or a *donation on condition*), its main characteristics are separate earmarked assets for a special purpose linked to a third person. In this regard, the Swiss private law does not provide any specific norms. Therefore, the relevant substantive law (law of donation, inheritance law) has to be consulted to answer any existing questions of law. Some authors call for an analogous application of the provisions on (independent) foundations as defined in the Civil Code (ZGB) in case of remaining gaps in the relevant law (Riemer 2001, 511), whereas others argue in favour of a more nuanced approach (Studen 2011, 109).

Trusts as the Anglo-Saxon variety of dependent foundations are often used as devices for estate and tax planning, asset protection as well as charitable purposes.[4] As is the case in most of the civil law countries in continental Europe, the Swiss legislator has not yet implemented the instrument of the trust into national law. However, the Hague Convention of the Law Applicable to Trusts and on their Recognition of 1 July 1985 became effective in Switzerland on 1 July 2007. As a consequence, trusts established in other jurisdictions are recognised under Swiss law as a foreign legal form sui generis (Jakob and Picht 2010, 856; Jakob and Gauthey Ladner 2008, 453–458).

Public Law Foundations

Finally, public law foundations have to be mentioned. This particular form of foundation is subject to federal and cantonal public law, pursuant to art. 59 para. 1 ZGB. In most cases the establishment of public law foundations is based on individual legislative acts (Hürlimann-kanp and Schmid 2010, 277).

[4] For a general comparison of charitable trusts and foundations in Switzerland, see Edgar H. Paltzer and Patrick Schmutz, "Switzerland: are charitable trusts an alternative to charitable foundations?", Trusts & Trustees (2008), 357–368.

14.2.2 Definition of the Foundation

General

The Swiss law does not provide for a definition of the notion of foundation in art. 80 et seqq. ZGB. According to art. 80 ZGB, a foundation is established by the endowment of assets for a particular purpose. Based on this a foundation can be described as an independent pool of assets provided with legal personality dedicated to a particular purpose (Hausheer and Aebi-Müller 2008, 346). The term foundation under Swiss law therefore includes the following characteristics (Jakob 2006, 38): the intention to establish a foundation, a purpose, assets and an organisation (which can also be appointed following the establishment).

Within the system of legal persons under the Swiss private law the foundation is considered an institution (art. 52 ZGB); hence, it is the only non-corporate legal person under the Swiss nonprofit law.

Purpose

The founder is generally free to determine the purpose of the foundation (so-called freedom to establish a foundation) (Jakob 2012). However, general limits laid down in law must be observed in the process of the formulation of the purpose. In particular, the selected purpose must neither violate the compulsory law nor fundamental moral values (Grüninger 2010). A foundation may have a public benefit, a solely private or even a mixed purpose [*gemischte Zwecksetzung*], but cannot be of a self-serving nature (no *foundation for the founder* or a *self-purpose foundation*). Foundations serving political purposes are allowed within the general restrictions.

Assets

The law does not stipulate requirements as regards the nature of the dedicated assets. As a consequence, the founder can provide the foundation with a plethora of assets-including real estate, cash, intellectual property, securities, claims against third parties or even claims against the founder personally.[5] A preceding factual transfer from the founder to the foundation is not required since the existence of a commitment under the law of obligations to transfer the assets is considered sufficient.

The founder is also free in determining the scope of the assets. However, the foundation has to be provided with sufficient assets to fulfil its intended purpose (so-called means-ends relation [*Zweck-Mittel-Relation*]). According to the practice adopted by the Federal Foundation Supervisory Authority, the initial capital must

[5] BGE 99 II 261 et seqq.

be at least CHF 50,000 which, strictly speaking, contradicts the freedom of the founder. If the foundation has been established initially with a smaller capital amount, the founder has to provide evidence indicating the receipt of additional sufficient funds after the formation. If the foundation's assets prove to be insufficient in relation to its purpose, art. 83d para. 2 ZGB applies analogously, thus enabling the supervisory authority to transfer those assets to another foundation pursuing the same or a similar purpose.

Organisation

The foundation's governing bodies as well as the type and method of administration are specified by the foundation deed or charter (art. 83 para. 1 ZGB). The founder may provide further details, instructions or rules regarding the organisation by means of written regulations; this procedure may facilitate certain alterations or modifications of the organisational structure if deemed necessary.[6] In any case, a foundation requires a supreme body which ensures the foundation's legal capacity and which is responsible for its management and representation.

According to art. 55 ZGB, the foundation acquires rights and obligations by the concluding transactions of its governing body which may consist of one or several natural or legal persons. The governing body is often referred to as a foundation council [*Stiftungsrat*], foundation board of directors [*Stiftungsvorstand*], foundation commission [*Stiftungskommission*] or board of trustees of the foundation [*Stiftungskuratorium*] (Hausheer and Aebi-Müller 2008, 353).

Art. 83a ZGB provides for a general accounting obligation. Pursuant to art. 83b ZGB, foundations are also obliged to appoint external auditors.

Other organs are optional and often exist as controlling bodies or internal advisory boards. Furthermore, the management of the foundation may be subdivided, for instance, by the installation of a committee accompanying the executive board.[7]

Subsequent organisational modifications are permitted by way of an exception pursuant to art. 85 ZGB where such a step is urgently required in order to preserve the foundation's assets or safeguard the pursuit of its purpose.

14.2.3 Formation

Foundations acquire legal personality upon their entry in the commercial register (art. 52 para. 1 and art. 81 para. 2 ZGB, art. 94 HRegV; so-called registry or normative system). Apart from its effect of publicity, the entry in the commercial

[6] BGE 76 I 77.

[7] BGE 120 II 137 et seqq., 141.

register also has a constitutive effect.[8] Prior to the entry, the foundation may obtain the legal position of an unborn child [*Nasciturus*] (art. 31 para. 2 ZGB). Public law, family and ecclesiastical foundations are currently not required to be entered in the commercial register to obtain legal personality (art. 52 para. 2 ZGB). In these cases, a voluntary entry has solely declaratory effect.

The actual endowment transaction [*Stiftungsgeschäft*] – the act of dedicating assets – is a unilateral legal transaction not requiring acknowledgement. The desired legal effect is achieved by the mere declaration of intent expressed by the founder. The foundation deed requires the following information (Hausheer and Aebi-Müller 2008, 349): the intention to establish an independent foundation, the identification of the assets to be dedicated as well as the description and formulation of the foundation's purpose.

As for the rest, the founder is free to set up, structure and organise the foundation virtually at his or her own discretion. It is admissible to establish a foundation in a legal transaction inter vivos (art. 81 para. 1 ZGB) or by testamentary disposition (art. 81 para. 1 in conjunction with art. 493 para. 1 ZGB). Ever since the revision of the law on foundations of 8 October 2004,[9] the founder is also permitted – contrary to a previous view expressed by the Swiss Federal Court[10] – to establish a foundation by way of a contract of inheritance.

14.2.4 Supervision

Foundations, as the only legal entity under Swiss private law, are generally subject to supervision by a state authority (art. 84 para. 1 ZGB). The existence of a state supervision is the reverse side of the fact that foundations, as opposed to other legal entities, do not have owners or members and therefore as such lack the *natural* internal control mechanism.

The main objective of the supervision is to monitor the foundation in order to ensure that it carries out its activities in accordance with its purpose and the will of the founder. Therefore, the supervisory authority has to make sure that the foundation's organs do not act illegally or immorally or take any decisions and conclude transactions in breach of the foundation deed or the written regulations. In this context, the supervisory authority is entitled to give appropriate binding instructions to the foundation's bodies and to sanction any committed misconduct.[11] The legal relationship between the foundation and the supervisory authority is subject to public law as the latter is exercising public authority (Hürlimann-kanp and Schmid 2010, 283). Article 84 para. 1 ZGB deals with issues of competence and stipulates

[8] BGE 120 II 137, 141.

[9] AS 2005, 4545.

[10] BGE 96 II 273.

[11] BGE 108 II 497, 499.

that foundations are supervised by the state authority to which they are assigned (Confederation, Canton or Commune). In this regard, the foundation's purpose and the local sphere of its activities are essential: the competence lies with the state community that would be responsible for the activity in question in the hypothetical case of non-existence of the foundation.[12]

If the foundation's purpose and activities are of significance throughout Switzerland, the Confederation is the competent supervisory authority. On this federal level, nonprofit foundations are supervised by the General Secretariat of the Federal Department of Home Affairs (art. 3 para. 2 lit. a *Organisationsverordnung für das Eidgenössische Departement des Innern (OV-EDI = Organisational Ordinance for the Federal Department of Home Affairs)*).

Pursuant to art. 84 para. 1^{bis} ZGB, the Cantons may subject foundations at communal level to supervision at cantonal level. The internal cantonal competence of the supervisory authorities is regulated by the cantonal introductory laws to the ZGB. For instance, pursuant to Section 34 para. 1 number 2 EG ZGB of the canton Zurich, the municipal council is responsible for the supervision of foundations which by virtue of their nature or purpose belong to the municipality of Zurich. Corresponding provisions apply to the supervision exercised by the district and cantonal councils within their respective area of regional competence (Section 37 and Section 44 para. 2 number 12 EG ZGB of the canton Zurich). The cantonal supervisory authorities have been reorganised as a consequence of the structural amendment of the BVG (Jakob et al. 2011, 47).

Judicature and doctrine draw a distinction between preventive (pre-emptive) and repressive (restoring) supervisory measures. Preventive supervisory measures are, inter alia, guidelines and requirements in respect of the investment of assets as well as obligations on the governing body to report annually and to submit foundation regulations, including any modifications thereto. The repressive means are intended to remedy the consequences of mistakes made by the foundation organs. Potential repressive measures include, inter alia, reminders, warnings, reprimands, revocations of decisions made by the foundation's organs, substitute measures, fines, criminal complaints and in serious cases even the removal of the foundation's board members. The competence to dismiss board members is mandatory and cannot be excluded by way of a contrary will of the founder.[13] However, as regards discretionary decisions of the foundation organs, the supervisory authority is limited to review only their legality; as a result, questions of usefulness or expedience of board decisions are excluded from scrutiny. Furthermore, the supervisory authority must always apply the principle of proportionality when implementing supervisory measures.[14]

Art. 83d ZGB provides for a special provision if the foundation's system of organisation proves inadequate, if the foundation lacks one of the prescribed

[12] BGE 120 II 374.

[13] Judgement of the Swiss Federal Court of 19 January 2009, case 5A_274/2008.

[14] Hans Michael Riemer, *Personenrecht des ZGB* (Bern: Stämpfli Verlag, 2002), 272.

governing bodies or if one such body is not lawfully constituted. In these cases, the supervisory authority must take the necessary measures which may include in particular: setting a time limit within which the foundation must restore the legally required situation, appointing the body which is lacking or appointing an administrator at the foundation's cost. According to case law, the board of trustees may only be dismissed as a last resort and merely if the behaviour in question constitutes a breach of law or if it does not comply with the foundation's regulatory framework or its purpose. In addition, the use of the foundation's assets for its intended purposes must be affected or at risk and other less severe measures must prove to be less promising. It is not necessary, however, to establish culpable conduct of the board.[15]

Finally, the supervisory authority may change the organisational structure of the foundation (art. 85 ZGB) or modify its purpose in order to promote the founder's actual will and his intentions (art. 86 ZGB).

14.2.5 Change of Purpose and Organisational Modifications

A foundation does not have a will of its own in the legal sense. Instead, it is the first and foremost task of the foundation's governing body to administer the will of the founder as stipulated in the foundation deed. It goes without saying, however, that even the most diligent founder is not able to anticipate all future events: facts and circumstances which were considered to be essential at the time of the establishment of the foundation may have changed or the organisational structure may become outdated and obsolete over time.

Therefore, pursuant to art. 85 ZGB modifications of a foundation's organisation are permitted as an exception provided that the reorganisation is urgently required in order to preserve the foundation's assets or to safeguard the pursuit of its purpose. In addition, the supervisory authority may amend the objects (purposes) of the foundation according to art. 86 ZGB if they have altered in significance or effect to such an extent that the foundation has plainly become estranged from the founder's intentions. In both cases, the competence for the implementation of the relevant modifications lies with a special federal or cantonal authority (as set forth in art. 85 and art. 86 para. 1 ZGB). Whereas changes of the foundation's organisation are possible only at the request of the supervisory authority with the board merely being heard, modifications of the foundation's purpose can be requested both by the supervisory authority and since January 2006 also by the governing board of the foundation.[16]

[15] BGE 105 II 321, 326.

[16] Dominique Jakob "Das neue Stiftungsrecht der Schweiz", *Recht der Internationalen Wirtschaft* (2005): 675.

Since this revision of the foundation law, a simplified procedure exists for minor or insignificant changes of the foundation's purpose as well as minor organisational modifications (art. 86b ZGB). Finally, art. 86a ZGB was introduced: the founder himself may request a change of the foundation's purpose provided (i) that the foundation deed reserves the right to change the purpose and (ii) that at least 10 years have elapsed since the foundation was established or since the last alteration requested by the founder. If the foundation pursues a public or charitable purpose (and therefore benefits from tax exemption), the altered purpose must likewise be public or charitable. The right to change the foundation's purpose is neither transferable nor heritable and, in case of a legal entity as founder, expires at the latest 20 years after the establishment of the foundation. The implementation of art. 86a ZGB was both politically and dogmatically controversial because, strictly speaking, it contravenes the underlying separation principle as regards the founder and the foundation [*Trennungsprinzip*] – traditionally one of the pillars of the Swiss foundation law.[17]

14.2.6 Dissolution and Merger of Foundations

A foundation is bound by the will of the founder, and therefore, as opposed to corporations, it cannot dissolve itself. The dissolution of a foundation under Swiss law requires specific circumstances.

The competent federal or cantonal authority may dissolve a foundation on application or of its own accord if the foundation's purpose has become unattainable and cannot be maintained by modifying the foundation deed or if its purpose has become unlawful or immoral (art. 88 para. 1 ZGB). Any interested party may file an application or bring an action for the dissolution of the foundation (art. 89 ZGB).

The law on foundations does not provide a special provision for the distribution of assets and the liquidation procedure, thus the general provisions laid down in art. 57 and 58 ZGB apply, the latter of which refers to the provisions governing cooperatives and companies limited by shares (art. 913 OR; art. 736 et seqq. OR):

In 2003, foundations have been provided with the possibility to merge and to transfer assets pursuant to art. 78–87 *BG über Fusion, Spaltung, Umwandlung und Vermögensübertragung* (FusG = Swiss Federal Act of 3 October 2003 on Merger, De-merger, Conversion and Transfer of Assets, SR 221.301). However, foundations are still neither allowed to demerge nor to change their legal form by way of transformation. A merger is permitted only if it is objectively justified and, in particular, if it is aimed at preserving and achieving the foundation's objectives

[17] For details, see Dominique Jakob, in Dominique Jakob and Andrea Büchler (ed.), Commentary Civil Code, art. 86a ZGB. Dominique Jakob, "Das Stiftungsrecht der Schweiz im Europa des dritten Jahrtausends", *Schweizerische Juristen-Zeitung* (2008a: 536).

(art. 78 para. 2 FusG). The merger agreement is concluded between the supreme governing bodies of the foundations involved and is subject to the approval of the competent supervisory authority (art. 79 para. 1 and art. 83 FusG). The merger must not alienate the purpose of the foundation and, where applicable, has to comply with the requirements regarding a change of purpose set forth in art. 86 ZGB (art. 78 para. 2 FusG).

In addition to a merger, foundations may transfer all or part of their assets and liabilities to other legal entities (art. 86 and 87 FusG), with the aforementioned provision of art. 78 para. 2 FusG applying accordingly.

14.3 Duty to Audit

14.3.1 General

The regulations on auditing and auditors are essentially covered by the legal provisions governing companies limited by shares and the new Federal Act of 16 December 2005 on the Admission and Oversight of Auditors (Audit Oversight Act, AOA). The AOA implements an admission procedure for all natural persons and agencies providing auditing services. The auditing supervisory authority examines whether the applicant complies with the statutory requirements (art. 2 lit. a and art. 3 et seqq. AOA).

The substantive auditing provisions are set forth in the section of the Code of Obligations regarding companies limited by shares. These regulations apply equally to other legal entities that are subject to auditing.

14.3.2 Foundation

Accounting

The audit is closely connected to the obligation to keep accounts. The governing body of the foundation has to keep business records in accordance with the regulations pertaining to commercial accounting as set forth in the Code of Obligations (art. 83a para. 1 ZGB). If the foundation conducts a commercial operation in pursuit of its purpose, the provisions of the Code of Obligations on accounting and the presentation of annual financial statements apply mutatis mutandis (art. 83a para. 2 ZGB). This provision can be justified by the increased interest of the foundation's beneficiaries, creditors and donors in respect of the use of funds in case of a commercial business activity.[18]

[18] Dominique Jakob, *Verein – Stiftung – Trust: Entwicklungen 2007* (Bern: Stämpfli Verlag, 2008b, 62).

As far as the accounting is concerned, the regulations as set forth in art. 958 et seqq. OR apply. Art. 83a ZGB in conjunction with art. 957 para. 2 OR provides that foundations which are not required to appoint an auditor only have to keep records about their income, expenses and assets – an alleviation especially for smaller foundations.[19]

Audit

Art. 83b ZGB stipulates the general obligation to appoint auditors. The obligation to conduct audits is subject to exceptions: family and ecclesiastical foundations are generally excluded (art. 87 para. 1^{bis} ZGB). Secondly, the supervisory authority may exempt a foundation from the duty to appoint external auditors pursuant to art. 83b para. 2 ZGB in conjunction with the according bylaw (so-called opting-out) if the foundation has minor assets (total assets of less than CHF 200,000 in two consecutive business years) and if it does not publicly call for donations. However, the waiver of the obligation to conduct audits does not exempt the foundation from its general obligation to give account to the supervisory authority. Exempt foundations may – voluntarily – conduct an audit in three different ways: in a limited version, as an ordinary (full) audit as well as an audit which does not strictly follow statutory regulations (so-called opting-in, art. 83b para. 4 ZGB).

As regards the substantive law, art. 83b para. 3 ZGB refers to the provisions of the Code of Obligations on external auditors for public limited companies. As a consequence, a foundation is subject to an ordinary audit if it exceeds two of the following parameters in two consecutive business years: total assets of CHF 20 million, revenue of CHF 40 million and an annual average of 250 full-time employees (art. 727 para. 1 No. 2 and 727b para. 2 OR in conjunction 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). Therefore, foundations are at least subject to a limited audit.

A specific feature of the Swiss foundation law is the ability of the supervisory authority to demand an ordinary audit from foundations which in fact are subject to a limited audit if this is considered necessary to reliably assess both the financial and profit situation of the foundation in question (art. 83b para. 4 ZGB). Finally, according to art. 83c ZGB, the auditors must provide the supervisory authority with a copy of the audit report and all important communications with the foundation.

[19] Message Regarding the Amendment of the Code of Obligations; BBl 2008, 1589, 1738 et seqq.

14.4 Liability

The main difference between communities under law (such as the partnership) and corporations is that in the latter case only the legal entity is liable for its debts. Likewise, a foundation with its institutional nature is liable for its obligations essentially with all of its assets.

14.4.1 Liability Under the Law on Foundations

Liability of Foundations

As has already been pointed out, the Swiss foundation is a legal entity acting through its governing body. The governing body binds the legal entity vis-à-vis third parties by concluding transactions as well as by their other actions (art. 55 para. 1 and 2 ZGB). The foundation is liable to third parties with its assets for any obligations resulting from the actions of its governing body.

Liability of the Board Members

Swiss foundation law does not provide a specific basis for the liability of the foundation's organs. The appointed board members are thus liable according to the general provisions. The organs may be liable internally (as regards the liability to the foundation) both in contract and tort (art. 41 et seqq. OR) while externally (as regards the liability to beneficiaries and third parties) only in tort (art. 55 para. 3 ZGB in conjunction with art. 41 et seqq. OR).

In case of a person who regularly acts on behalf of the foundation without being officially appointed as the foundation's organ (so-called factual organ [*faktisches Organ*]), the individual may be internally (in view of the foundation) liable both as an agent without authority (art. 419 et seqq. OR) and under the law of tort (art. 41 et seqq. OR). Externally (as regards the liability to beneficiaries and third parties) the factual organ is only liable in tort (art. 55 para. 3 ZGB in connection with art. 41 et seqq. OR).

Internal Relationship

In general, a board member is appointed by contract (the so-called organ agreement [*Organträgervertrag*]). This agreement sui generis is mainly based on the provisions on employment law and agency contracts. The board member is liable if actual losses or damages occurred as a result of his breach of contract; furthermore, liability requires fault on the tortfeasor's part and a sufficient causal link between the infringement and the damage. The relevant standard of care is defined in art. 321e para. 2 OR. This is the case even if it is assumed that agency contract law applies in general because art. 391 para. 1 OR refers to the provisions on employment law (Lanter 2001).

Art. 419 and 420 OR constitute the basis for the internal liability of the factual organ. The general principles of liability in contract apply equally to factual organs, and, as a result, the same standard of care is applicable to both the factual organ and an appointed board member.

External Relationship

Externally, the foundation is liable with all its assets to third parties. Additionally, the acting board members may personally be liable for their wrongful acts (art. 55 para. 3 ZGB) (Huguenin 2010).

As regards the external relationship, the question arises whether or not the beneficiaries may raise a claim directly against the board members, for example in case of a culpably caused decrease in the foundation's assets diminishing or eliminating the beneficiaries' entitlements to benefits. In Switzerland, the beneficiaries do not have the right of action to the benefit of the foundation in the meaning of an *actio pro fundatione*. In addition, beneficiaries do not have claims under the foundation law against board members because the contract between the individual board member and the foundation has no third-party effect. The foundation law in Switzerland lacks a provision extending the contractual relationship between the organs and the foundation to third parties; furthermore, the special provisions on companies limited by shares and cooperatives are not applied analogously. A contract for the benefit of a third party is, in theory, possible but has no significance in practice (Jakob 2006, 259). As a consequence, there is no contractual liability of the board members towards beneficiaries. As far as a non-contractual liability is concerned, it has to be differentiated between direct and indirect damages. The beneficiary may assert a claim pursuant to art. 55 para. 3 ZGB in conjunction with art. 41 OR only in case of direct damages or losses (Jakob 2006, 260).

14.4.2 Excursus: Failure to Comply with the Obligation to Pay Social Contributions

Additional legal provisions may provide the basis for the organs' liability in special circumstances. For example, the personal and joint liability as regards outstanding social insurance contributions is based on the general legal liability of employers pursuant to art. 52 *BG über die Alters- und Hinterlassenenversicherung* (AHVG = Swiss Federal Act of 20 December 1946 on Old-age and Surviving Dependants Insurance, SR 831.10).

14.5 Tax Aspects

14.5.1 General Information on the Swiss Tax System

In Switzerland, the Confederation on the one hand and the Cantons and Municipalities on the other hand levy taxes on the income of natural persons and the profit of legal entities. Furthermore, on a cantonal and municipal level, natural persons are subject to property taxation, whereas legal persons have to pay capital taxes.

The tax law governing nonprofit organisations is laid down in the *BG über die direkte Bundessteuer* (DBG = Swiss Federal Act of 14 December 1990 on the Direct Federal Tax, SR 642.11) as well as the Federal Act on the Harmonization of Direct Taxes of Cantons and Communities *BG über die Harmonisierung der direkten Steuern der Kantone und Gemeinden* (StHG = Swiss Federal Act of 14 December 1990 on the Harmonization of Direct Taxes of Cantons and Communities, SR 642.14). However, those regulations are sparse and require further interpretation. Therefore, the Swiss Federal Tax Administration released the circular letter no. 12 of 8 July 1994 on the tax exemption of legal persons that pursue public, charitable or educational and cultural purposes and regarding the tax deductibility of donations. This circular letter essentially lays down the long-standing practice adopted by the Swiss Federal Court with regard to the tax exemption of nonprofit legal persons under the law of direct federal taxes. However, the circular letter is non-binding for the tax authorities (Koller 2007, 443).

In addition, most Cantons levy an inheritance and gift tax, although federal law does not impose an obligation for the introduction of such taxes. Several Cantons that originally imposed these taxes have abolished them over the past few years in order to strengthen their competitive position.

Furthermore, the Confederation has the exclusive competence to impose a value-added tax *BG über die Mehrwertsteuer* (MWSTG = Federal Act of 12 June 2009 on Value Added Tax, SR 641.20), a withholding tax (VStG) as well as stamp duties on transactions and certain securities (StG).

By and large, the practice is of substantial importance in the field of nonprofit tax law. This is a result of the fact that the tax privileges for nonprofit organisations as well as the law governing donations and contributions provide only for a rudimentary regulatory framework (Koller 2007, 444).

14.5.2 Status of a Tax-Privileged Organisation

General

With regard to direct taxes, the same principles apply to both direct tax advantages of organisations and indirect tax advantages of donors by means of tax deductibility. Donations to a tax-exempt nonprofit organisation may – up to a certain extent – be deducted from the donor's income or profit tax provided that the nonprofit organisation has its registered office in Switzerland. On the other hand, nonprofit organisations with registered offices outside Switzerland benefit from direct tax advantages in the form of exemptions from the tax on profit and the cantonal taxes on capital. Thus, the legal situation of foreign foundations carrying out activities in Switzerland corresponds to the legal practice adopted in the STAUFFER case.[20] The ECJ ruled that the exclusion of foreign legal entities from tax privileges for nonprofit organisations under German tax law and, as a consequence, the differential treatment of resident and non-resident charitable foundations constitutes a breach of the free movement of capital as set forth in art. 63 of the Treaty on the Functioning of the European Union. This problem does not arise, however, in the context of indirect taxes (e.g. value-added tax, inheritance and gift tax) (Koller 2007, 447).

Requirements for a Tax Exemption of Legal Persons

Pursuant to art. 56 lit. g DBG, legal persons which pursue public or charitable purposes are exempt from taxes on profits that are exclusively and irrevocably dedicated to such purposes. The same applies accordingly to cantonal taxes on profits and capital (art. 23 para. 1 lit. f StHG).

Nonprofit Purpose

Direct Taxes

Both the Federal Act on the Direct Federal Tax (DBG) and the Federal Act on the Harmonization of Direct Taxes of Cantons and Communities (StHG) use the undefined legal concept of *public benefit* [*Gemeinnützigkeit*] in their respective formulation of the requirements for tax exemptions. The relevant provisions (art. 56 lit. g DBG and art. 23 para. 1 lit. f StHG) correspond to a large extent. The difference is merely that the provisions of the StHG cover both the exemption from taxes on profits as well as capital since the Cantons, contrary to the Confederation, impose capital taxes on legal persons.

The Federal Tax Administration defines the term *public benefit* in its circular no. 12 of the year 1994 in greater detail. The circular letter stipulates two cumulative requirements that must be met in order to qualify for tax advantages. On the one hand, the activities of the organisation in question must be in the general public interest; additionally, the activities must be of an *altruistic* or *selfless* [*uneigennützig*] character.

[20] Judgement of the ECJ of 14 September 2006, case C-386/04.

The relevant public opinion is decisive in answering the question whether or not an activity is in the general public interest. The common good may be promoted by activities in charitable, humanitarian, health-promoting, ecological, educational, scientific and cultural areas.[21] The circular letter no. 12 expressly mentions as examples social care, art and science, education, the promotion of human rights, the protection of the environment, homeland and animals, as well as development aid. The public benefit is determined by the overall opinion and view of the society.[22] Furthermore, the circular letter no. 12 requires the class of beneficiaries to be open; as a consequence, distributions must not be restricted, for instance, to members of a certain family, association or profession.[23]

An activity is considered to be of a selfless nature if it is neither linked to the economic and personal interest of the legal person nor its members and/or affiliated persons.[24] According to the case law of the Swiss Federal Court, a nonprofit organisation and its employees have to make sacrifices for the sake of the greater public good.[25] This must be reflected in the remuneration of the governing body of the nonprofit organisation. The members of the governing body are generally supposed to carry out their activities on a voluntary basis and can be reimbursed only for their expenses. Board members can be remunerated, however, for extraordinarily performed tasks outside the conventional scope of the governing body.[26] As a general rule, an activity is not seen as being selfless or altruistic if the organisation is carrying out commercial activities-unless such activity is subordinate to a nonprofit purpose. The business activity may only have an auxiliary function and as such must not be the sole economic basis of the legal person.[27] In the case of equity investments, the nonprofit purpose of the organisation must have priority over the preservation of the company; this requires the organisation to be financially supported by substantial funding from its company as well as the actual use of those funds for nonprofit activities (Koller 2007, 453–454).

The general public interest is by no means limited to purely domestic activities. Therefore, a legal person that is not active in Switzerland, but in another country or throughout the world, may also be exempted from Swiss taxes provided that its activities correspond – from a Swiss perspective – with the general public interest. The actual realisation of such purposes must be evidenced with appropriate documentation, such as annual reports or annual financial statements. The requirements on the verification are stricter if the purposes and objectives of the organisation are

[21] Circular letter number 12, no. II. 3. (a).

[22] BGE 114 Ib 277, 279.

[23] Circular letter number 12, no. II. 3. (a); cf. judgement of the Swiss Federal Court of 2 February 2009, case 2C_592/2008.

[24] BGE 114 Ib 277.

[25] BGE 113 Ib 7, 9 et seqq.

[26] Cf. practice instructions of 18 January 2008 of the association of Swiss Tax Authorities (SSK), 39 et seqq.

[27] BGE in ASA vol. 19, 328 et seqq.

pursued abroad compared to a purely domestic activity.[28] Legal entities with registered offices abroad are equally exempted from Swiss taxes if they, in principle, are subject to taxes in Switzerland because of a sufficient connecting factor, for instance, as a property owner in Switzerland (Koller 2007, 455).[29]

Value-Added Tax

The revised value-added tax law (MWSTG) entered into force on 1 January 2010. As was the case under the previous statutory provisions, nonprofit organisations with annual revenues up to a figure of CHF 150,000 are generally exempted from tax liability (art. 10 para. 2 lit. c MWSTG). In addition, certain revenues of nonprofit organisations are exempted from the value-added tax (art. 21 no. 12, no. 13, no. 17 and no. 27 MWSTG). As for the definition of nonprofit organisations, art. 3 lit. j MWSTG refers to art. 56 lit. g. DBG and therefore requires the exclusive and irrevocable pursuit of public and nonprofit purposes. According to art. 18 para. 2 lit. a and lit. d MWSTG, donations and subventions are not regarded as a compensation and are thereby excluded from the scope of the value-added tax. Under the new value-added tax law, the receipt of donations – in contrast to the receipt of subventions – does not give rise to a pro rata pre-tax deduction (art. 33 MWSTG). Finally, pursuant to art. 37 para. 5 MWSTG associations and foundations are able to make use of the flat-rate tax method (Jakob 2009, 506; Jakob et al. 2009, 9 seqq.).

Inheritance and Gift Taxes

The Cantons have the exclusive competence to regulate and levy inheritance and gift taxes. Donations made to nonprofit organisations are often exempted from those taxes. Due to their cantonal character, the different tax laws lack a uniform definition of the requirements for a tax exemption based on public benefit.

Immovable Property Gains Tax

The exclusive competence to introduce and regulate immovable property gains taxes lies equally with the Cantons. However, the federal provision of art. 23 para. 4 StHG stipulates the obligation to impose immovable property gains taxes on legal entities which are otherwise exempt from taxes. As a result, a foundation which exclusively pursues nonprofit purposes and therefore has the status of a tax-exempt organisation is nevertheless obliged to pay immovable property gains taxes in case of a sale of its real estate at a profit.

[28] Circular letter number 12, no. II. 3. (a). For details on the administrative requirements in practice, see Harold Grüninger, "Stiftungsstandort Schweiz – für Europa attraktiv?", *Stiftung & Sponsoring* (2008a), 28.

[29] Practice instructions of 18 January 2008 of the association of Swiss Tax Authorities (SSK), 17 et seqq.

Public Purpose

In addition to the tax exemption based on nonprofit purposes, both the DBG and the StHG provide for a tax exemption for legal entities that pursue public purposes. According to circular letter no. 12, the notion of public purposes covers only a limited scope of activities which – in contrast to nonprofit purposes – have to be closely related to public tasks and which do not require any sacrifices from the organisation or its employees (Koller 2007, 454–455).[30]

The term "public purpose" is interpreted restrictively. For instance, even though the existence of political parties is vital for the functioning of a democratic society, a party itself does not pursue a public purpose; it rather canalizes, focuses and represents the interests of its members. Thus, a political party is not considered as an organisation eligible to receive the tax-exempt status under Swiss law (Scherrer and Greter 2007, 33).[31]

Legal Entity

General

In principle, legal entities are subject to taxation (art. 49 lit. a and b DBG). This applies on the basis of personal affiliation if the legal entity's registered office or its actual administration is located in Switzerland resp. in a Canton (art. 20 para. 1 StHG, art. 50 DBG). The registered office (so-called principal fiscal domicile) is the place determined as such in the articles of incorporation or an equivalent decision by the competent body. The legal person is fully taxable at its principal fiscal domicile with a view to any income and property which is not subject to taxation in another fiscal domicile due to a special statutory regulation or a bilateral tax treaty (Scherrer and Greter 2007).

The exemption from such tax liability is set forth in art. 56 DBG. Art. 56 lit. g DBG requires the nonprofit activities to be carried out by a legal person. Natural persons may not demand tax exemption for assets reserved for nonprofit purposes even in case of guarantees providing that the assets in question will not be used for any other purposes at a later date (Koller 2007, 445). Legal persons who dedicate only a portion of their funds exclusively and irrevocably for nonprofit or public purposes may be eligible for a partial tax exemption provided that their tax-exempt activity is an essential activity and that their accounting provides for a clear separation of the tax-exempt funds from other assets and income.[32]

[30] Circular number 12, no. II. 4.

[31] Circular number 12, no. II. 4.

[32] Circular letter number 12, no. II. 5.; so-called segment accounting [*Spartenrechnung*].

Some specific regulations exist for the different legal entities. In theory, any legal person may qualify for a nonprofit status, but some legal entities raise issues due to the relevant provisions under the civil law.

Foundation

Foundations as well must "*pursue public or nonprofit purposes*" (art. 56 lit. g sentence 1 DGB) in order to benefit from tax privileges. For this reason family foundations – contrary to ecclesiastical foundations (art. 56 lit. h DBG, art. 23 para. 1 lit. g StHG) and employee benefits schemes foundations (art. 56 lit. e DBG, art. 23 para. 1 lit. d StHG) – are not exempt from taxes (although a partial tax exemption is possible in the case of a mixed/combined purpose). A corporate foundation is considered nonprofit provided that the interest in maintaining the company serves a nonprofit purpose and if the foundation does not carry out management activities (art. 56 lit. g sentence 2 and 3 DBG, art. 23 para. 1 lit. f sentence 2 and 3 StHG).

The Swiss foundation law does not explicitly stipulate a non-distribution constraint. However, this restriction for tax-exempt foundations is a result of the notion of public benefit. Additionally, the practice regarding the compensation of leading organs can be seen as a Swiss manifestation of the non-distribution constraint.

Excursus: Pursuit of Educational and Cultural Purposes

Apart from public and nonprofit purposes, the pursuit of educational and cultural purposes qualifies for exemption from taxes (art. 23 para. 1 lit. g StHG; art. 56 lit. h DBG). The pursuit of educational and cultural purposes does not require the activities in question to be selfless and altruistic (Scherrer and Greter 2007, 38 et seqq.).

The notion of "educational and cultural purposes" lacks a legal definition, but it is derived from the constitutional freedom of religion and conscience set forth in art. 15 para. 1 *Bundesverfassung der Schweizerischen Eidgenossenschaft* (BV = Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101). The judicature of the Swiss Federal Court regarding the definition of this concept is rather casuistic.[33] According to the circular letter,[34] a legal entity is considered to pursue educational and cultural purposes that are eligible for tax privileges if it maintains and promotes a common belief – irrespective of the confession or religion in question – by means of lessons and through church services throughout Switzerland.

[33] BGE 107 Ia 126, 130.

[34] Circular letter number 12, no. III. 2.

14.5.3 Taxation of Organisations Eligible for Tax Privileges

General

Nonprofit organisations are basically exempt from profit taxes on the federal level and from profit and capital taxes on the cantonal level provided that the relevant requirements are met. As a result, income dedicated to nonprofit purposes (e.g. donations) is not subject to taxes. This may lead to problems of demarcation.

Questions of Demarcation

As regards foundations, it is particularly questionable how to treat the income which originates from asset management (a) as well as special purpose and commercial business activities (b).

Asset Management

Nonprofit organisations do not have to pay profit taxes on 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 and preserving the company serves a nonprofit purpose.[35]

Special Purpose Business and Commercial Business

A special purpose business is an entity that carries out economic activities which are indispensable for the realisation of the organisation's purpose (e.g. an approved school operates 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 nonprofit purpose are permitted (e.g. kiosk at a museum). In principal, the same applies to other commercial businesses: profit-making activities do not change the nonprofit character of an organisation as long as they are subordinate to the overall organisational activities (Koller 2007, 464 seqq.).

14.5.4 Excursus: Stamp Duty Law

In practice, the Stamp Duty Law is primarily important for cooperatives. A so-called emission duty is imposed on the preservation or increase of the nominal

[35] Circular letter number 12, no. II. 3. (c).

value (against payment or cost-free) of ownership rights in the form of shares in a cooperative, stocks, contributions in limited liability companies, etc. (art. 5 para. 1 lit. a StG).

14.5.5 Taxation of the Founder and the Donor

Deductions for Voluntary Contributions

Voluntary Contributions (Donations)

Donations within the meaning of tax law are voluntary contributions of money or other assets to legal entities with their registered office in Switzerland which are exempt from taxes based on their public or nonprofit purposes (art. 56 lit. g DBG) (art. 33a DBG, art. 9 para. 2 lit. i StHG). Endowments and additional funding are also included.

Natural Persons

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). Article 33a DBG, which is in force since 1 January 2006, also includes the above-mentioned voluntary contributions. Monetary contributions as well as contributions in kind from CHF 100.00 or more per fiscal year made by natural persons are deductible from their income, whereas the maximum deductible amount is 20 % of the taxable income decreased by certain expenditures (art. 26–33 DBG resp. art. 33a DBG).

However, membership fees paid to associations are not included in the list and are therefore considered nondeductible living expenses in terms of art. 34 lit. a DBG. Since an association is entitled to receive membership fees 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 (Scherrer and Greter 2007, 89).[36]

The Cantons specify independently the maximum deduction allowed under the cantonal and municipal tax laws (art. 9 para. 2 lit. i and art. 25 para. 1 lit. c StHG).

[36] Circular letter number 12, no. IV. 1. (a).

Legal Persons

With reference to legal persons, the federal tax law provides that voluntary contributions of money and other assets to nonprofit legal entities with their registered office in Switzerland are deductible from the taxable net profit as business expenses in the amount of up to 20 % of the net profit (art. 59 para. 1 lit. c DGB). The contributions may not be deducted when determining the net profit.[37]

Special Topics

Differentiation Between Donation and Sponsorship

Contrary to donations, sponsorship contributions serve advertising purposes. They are intended to maintain a company's public reputation in contradistinction to the commercially oriented business activities.[38] Therefore, sponsorship contributions are not tax deductible according to art. 33a DBG. In some cases, the demarcation between deductible donations and nondeductible sponsorship contributions proves to be difficult. It is worth looking at the value-added tax law which differentiates between donations and sponsorship contributions as follows:

The value-added tax is payable on the tax payers' revenues resulting from the supply of goods and services within Switzerland unless such revenues are explicitly exempted from the value-added tax (art. 18 in connection with art. 21 MWSTG). Therefore, the so-called exchange of services relationship is at the core of the taxable object. A characteristic is the internal economic connection. The service is provided quid pro quo (Boschung and Reding 2006, 783). As a result, it is considered a sponsorship contribution within the meaning of the value-added tax law if the recipient receives services in return,[39] while a donation is the provision of money or noncash benefits without receiving any reward in return. Donations are so-called non-revenues which are not subject to the value-added tax.[40]

In the past, the differentiation between nonprofit donations and taxable sponsorship contributions was made pursuant to art. 33 aMWSTG (in force from 1 January 2006 to 31 December 2009). According to this provision, nonprofit organisations did not perform a service in return if they mentioned the name of the contributor once or repeatedly in a neutral form or if they used the logo or the firm's trade name in publications (art. 33 aMWSTG). On the other hand, advertising performances such as adverts in magazines, posters and clothes as well as loudspeaker announcements mentioning the firm or individual referring to its or his business or

[37] Circular letter number 12, no. IV. 1. (b).

[38] BGE 115 Ib 111, 118.

[39] BGE 126 II 443, 459.

[40] German Boschung and Roland Reding, "MWST und neues Stiftungsrecht", *Der Schweizer Treuhänder* (2006): 783.

professional activity were qualified as a service in return (Koller 2007, 468; Jakob 2005, 676). Under the new law, art. 18 para. 2 lit. d MWSTG stipulates explicitly that donations are not considered as a remuneration due to the lack of service in return and therefore are excluded from the scope of the MWSTG. Art. 3 lit. i MWSTG defines the term donation as a voluntary contribution without the expectation of a service in return. This also applies to contributions which are mentioned in a publication (once or repeatedly) in a neutral form, even if the firm's trade name or logo is used. The above-mentioned differentiation between nonprofit donations and taxable sponsorship contributions still exists under the new law.[41]

Deductibility of Donations Made Abroad

The law 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 with their registered office abroad are not deductible from direct taxes. The same applies in practice – despite the contrary view of the legal doctrine (Luuk et al. 2009, 499) – to donations made to Swiss business premises of foreign nonprofit organisations.[42]

This regulation's compliance with European law is – unlike the tax benefits applicable to nonprofit organisations which do not require an organisation's registered office to be located in Switzerland – questionable in the light of the judgements of the ECJ in the cases of STAUFFER[43] and PERSCHE.[44] However, there is no direct impact for Switzerland as it is not a member of the EU.[45]

14.5.6 Procedure

A nonprofit organisation may request a general tax exemption order from the competent tax authority outside the regular taxation procedure (Koller 2007, 473). The tax authority may review the issued order at any time.

It is, therefore, the duty and responsibility of the tax authorities to check whether or not an organisation (still) meets the material conditions necessary for a tax exemption. Foundations are subject to additional supervision by the administrative

[41] For details, see the informational letter MWST-Info 05 "Subventionen und Spenden" of the EStV from January 2010.

[42] See the practice instructions of 18 January 2008 of the association of Swiss Tax Authorities (SSK), 18.

[43] Judgement of the ECJ of 14 September 2006, case C-386/04.

[44] Judgement of the ECJ of 27 January 2009, case C-318/07.

[45] As regards the development of European nonprofit law and the currently debated draft of a supranational "European Foundation", see Dominique Jakob and Goran Studen, "Die European Foundation – Phantom oder Zukunft des europäischen Stiftungsrechts?" (2010): 61–107.

unit (Confederation, Cantons, Municipality) which they have the closest ties with according to their nature and purpose (art. 84 para 1 ZGB). However, the competent supervisory authority is not responsible for tax matters and thus cannot make any decision about a possible tax exemption of a foundation based on its nonprofit status; as a consequence, the supervisory authorities do not check whether the foundation in question and its activities fulfil all the necessary tax requirements for granting an exemption.

14.6 Corporate Governance and Nonprofit Organisations

14.6.1 General

In practice, associations and foundations are the main legal entities for the pursuit of non-commercial (ideal) purposes in Switzerland. In contrast to the regulations regarding for-profit entities under the Code of Obligations (in particular, the company limited by shares), the statutory provisions on associations and foundations in the Civil Code (art. 60–89 ZGB) are – intentionally – broad due to their concept of providing legal instruments for the pursuit of ideal and thus non-commercial purposes. With the exception of accounting and audit, the parties involved (association members, founders) are given wide room for manoeuvre (Riemer 2006, 513) which corresponds with the autonomy of associations and the freedom of the founder.

However, since a couple of years the sector increasingly faces the trend to apply corporate governance principles to nonprofit organisations (foundation or nonprofit governance). This has led to joint projects of relevant (umbrella) organisations in order to create codes providing certain conduct guidelines.

14.6.2 Developments

The above-mentioned development is reflected in the Swiss foundation practice which considers implementing corporate governance rules in the sense of foundation governance (Jakob 2006, 528 et seqq.; Sprecher 2010). Considerable results have already been achieved as regards the codification of conduct guidelines: The Swiss Foundation Code of the Association of Swiss Foundations, published on 25 October 2005, is specifically designed for foundations and includes recommendations and guidance. Furthermore, the Swiss NPO Code of the Conference of Presidents of Large Humanitarian and Relief Organisations dated 31 March 2006 is generally applicable to all nonprofit organisations and introduces the principle comply or explain.

Despite early scepticism in literature (Riemer 2006, 513), these regulations – which are based largely on voluntary implementation and participation – are gaining significance in practice and certainly promote both transparency and good governance in the nonprofit sector (Jakob 2008b, 119).

Additional points that can be subsumed under the term corporate governance include:

Measures in the event of over-indebtedness and insolvency: The reform act of 8 October 2004 already enshrined the principle of creditor protection in the Swiss foundation law (art. 84a ZGB). Where there are grounds for concern that the foundation is over-indebted or will no longer be able to meet its obligations in the longer term, its governing body must draw up an interim balance sheet at liquidation values and submit it to the external auditors. If the foundation has no external auditors, the governing body must submit the interim balance sheet to the supervisory authority which will take the appropriate and necessary measures.

Costs of management and administration: Foundations have to – either directly or indirectly – use all of its funds to fulfil their purposes. A foundation may lose its nonprofit status if it utilises less than 50 % of its funds for the tax-privileged purpose. Although it is quite difficult to compare different foundations in regard to their respective ratios of total expenses and management costs, it may be – as a rule of thumb – assumed that management costs below 10 % of the total expenses are considered low and as such do not cause problems; costs of 10–20 % are generally considered appropriate (Lang and Schnieper 2007, 143 et seqq.).

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