

Public benefit

Swiss charitable foundations can play a valuable role in both philanthropic activities and estate planning, says *Cosima von Rechteren*

Switzerland, with its political stability and secure legal framework, offers an ideal legal environment for philanthropic structures. The Swiss foundation sector has undergone substantial growth during the last few years. The reputation of Switzerland as a location for foundations is based on clear, liberal and ethical framework conditions.

Switzerland's attractiveness as a place for charities is demonstrated by the fact that, at the end of 2011, there were about 12,700 charitable foundations active in Switzerland, with either Swiss or international management, with a total endowment of approximately CHF70bn and annual payouts estimated to be around CHF1–1.5bn (Swiss Foundations Report, 2012). Around half of the federally registered foundations give internationally (Interim Update of the Promoting Philanthropy in Switzerland Initiative).

Even with these impressive figures the philanthropic sector does not rest on its laurels. There have been numerous efforts towards a professionalisation of the sector during the last few years (a prominent example is the creation of the Swiss Foundation Code by SwissFoundations; the first of its kind in Europe) and recent foundation law reforms have brought an even greater flexibility for foundations in Switzerland.

Governing principles

Swiss foundation law is part of Swiss civil law and thus unified in Switzerland. A Swiss foundation is a separate legal entity, which has no members or shareholders, but the assets of a foundation are self owned and are administered in accordance with the



principles laid down in the governing documents of the foundation.

One reason for the popularity of Swiss foundations is that they are easy to set up and require only little starting capital. In particular, the establishment of a Swiss foundation requires the dedication of certain assets for a specific purpose. The initial capital of federally registered foundations has to amount to at least CHF50,000, although at cantonal level this may be less.

Unlike some other jurisdictions, there is no restriction as to the nature of the assets that may be endowed to a foundation. A Swiss foundation may also hold intangible or immovable assets.

The foundation is established by a public deed before a notary public or by a will. The foundation deed, the so-called charter, has to contain the name, the purpose, the initial capital and the main organisation of the foundation.

As a prerequisite for its incorporation, the foundation needs to be registered with the cantonal commercial register at the seat of the foundation. Thus, the name and purpose of the foundation, its seat, and the names, nationalities and residence of the members of the

council and the auditing company of the foundation constitute publicly available information. This does not apply to the regulations of the foundation and its annual reports, however.

While Swiss foundation law is very restrictive with regard to family maintenance foundations, the so-called 'classic' foundation (as opposed to a maintenance foundation), in principle, may have any purpose, as long as it is not illegal or immoral. Apart from purposes in a charitable or public interest, a Swiss foundation may as well pursue economic purposes. Swiss foundation law provides for a very broad understanding of a charitable or public purpose.

Furthermore, a Swiss foundation may have multiple purposes which need not to be associated to each other. A Swiss foundation can therefore be ideal where the founder wishes to pursue a purpose which may not be purely charitable and may be a suitable vehicle for venture philanthropy, a topic which also has gained considerable momentum in Switzerland during the last few years.

Switzerland is one of the few countries in Europe that allows for the founder to amend the purpose of

a foundation every ten years after its establishment, subject to an explicit reservation in the charter. This right to amend the purpose is neither transferable nor may it be inherited. Where the founder is a legal entity, this right expires after twenty years.

Apart from these amendments by the founder, the purpose may be changed by the competent supervising authority only in exceptional circumstances, i.e. when the purpose of the foundation has become unattainable.

Flexible friend

Swiss foundation law is extremely flexible and, with the considerable freedom of organisation that it provides, ensures that wishes with respect to the structuring of a foundation may be realised in the best way. For the most part, the foundation is free to determine its own organisation.

The constitutional documents can provide for more or less detailed provisions on the foundation's organisation, depending on its needs.

The organisation of a foundation is usually laid down in its regulations. Unlike the charter, regulations may be changed by the foundation council if need be. Decisions of the council to issue new, or adapt current, regulations need to be approved by the competent supervisory authority. It is recommended to liaise with the competent supervisory authority in advance for a pre-check of the foundation documents.

The superior body within a foundation is its council, which is ultimately responsible for the pursuit of its objects and the administration of its assets. According to Swiss foundation law, the founder may also serve as a member of the council. In the case of larger foundations, it is common to have a general management and one or several committees (investment, advisory, donations or other) in addition to the council.

The founder may provide for investment rules in either the charter or the regulations. Especially where the purpose of a foundation shall comprise elements of venture philanthropy, it is

advisable to provide for respective rules in the charter.

Provided neither the charter nor the regulations contain investment rules, the principles of liquidity, return on investment, security, allocation of risk and maintenance of assets are to be observed when investing the foundation's funds.

A Swiss foundation is required to keep adequate accounting records. Furthermore, Swiss foundation law provides for a mandatory audit requirement. However, only large foundations need to conduct a full audit. While the majority of the foundations are subject to a limited audit, small foundations may be totally exempted from this duty.

“ A Swiss foundation may have multiple purposes, which need not to be associated to each other ”

Foundations are subject to supervision by the community (federal, cantonal or municipal) to which they belong, according to their purpose. Foundations with an international scope are usually supervised by the federal supervisory authority. An important task of the supervisory authorities is to ensure that the foundation's assets are used in accordance with its purposes.

For this reason, a foundation has to submit to the supervisory authority an annual activity report.

Planning tool

Swiss charities are subject to profit tax on their income, including any donations made from Swiss or foreign resident individuals or entities, unless they are exempt from profit tax.

Entities that actively pursue a public or charitable interest are exempt from profit tax if their profit is exclusively and irrevocably devoted to a public or charitable interest.

If a Swiss foundation pursues multiple purposes, some of which are not purely

charitable or in a public interest, a tax exemption will nevertheless be granted, but only for the qualifying part of the public or charitable interest. It is strongly advisable to liaise with the competent tax authority prior to the establishment of a charitable foundation in order to ensure that a tax exemption will be granted.

The endowment of assets to a foundation qualifies as a donation (either during lifetime or upon death) and would generally trigger gift or inheritance taxes, which are levied generally in Switzerland at cantonal level. However, most of the cantonal gift and inheritance tax laws provide for an exemption for charities under certain conditions.

As a general rule, donations from abroad are, in most cases, not taxable in Switzerland, but may be subject to the tax laws or applicable tax treaties in the country of the donor's residence.

Apart from being ideal for the pursuit of philanthropic purposes, the Swiss charitable foundation may also constitute a possible estate planning tool. A foundation may be established during lifetime with only little starting capital that may be increased towards the end of the lifetime or upon death.

Swiss foundation law also allows for the founder to retain a life interest in the foundation's assets under certain conditions. Clients without children or close relatives, or clients who wish to avoid the partition of certain parts of their estate, for example, of an art collection, increasingly consider setting up a charitable foundation while retaining a life interest in certain parts of the foundation's assets for themselves.

The reasons to set up a Swiss foundation can be manifold and there are countless possibilities to structure a foundation. For whatever reason, the set up of a Swiss foundation always requires careful and anticipatory planning so as to make the foundation work according to the wishes of the founder and a long-term success. ■

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