

BRIEFING MARCH 2023

FOUNDATION LAW

Switzerland is internationally renowned as a leading foundation hub. Notably because of its liberal legal system, Switzerland is home to a large number of foundations, active both nationally and internationally. Recently, the Swiss legislator has enacted punctual reforms in the area of foundation law to further strengthen the Swiss foundation sector. Other planned legislative changes will also have an impact on Swiss foundations.

OVERVIEW

Switzerland is one of the world's leading foundation jurisdictions. As of 1 January 2023, 17,830 foundations were registered in Switzerland. The liberal Swiss foundation law (art. 80 - 89 Swiss CC) allows for a foundation to be established for every purpose provided that purpose is legally permissible. The Swiss foundation sector therefore consists of multiple types of foundations: While the large majority of all foundations in Switzerland have a charitable purpose (13,790 charitable foundations existed at the end of 2022), there are also a substantial number of enterprise foundations, art foundations as well as the recently emerging „crypto-foundations“, to name just a few. Recent estimates suggest that Swiss charitable foundations have assets totaling approximately CHF 139.5 billion in assets. Despite the broad variety of the pursued purposes, these foundations are so called „classical foundations“ as they are governed by the general rules of Swiss foundation law. Other types of foundations have a specific set of rules, namely family foundations (art. 87 and art. 335 CC), ecclesiastical foundations (art. 87 CC) as well as pension fund foundations (art. 89a CC and the provisions of the Swiss Social Security Act).

The recent reforms in foundation law made important changes for classical foundations. While some of the amended provisions were enacted on 1 January 2023, others will not come into effect until 1 January 2024.

REMUNERATION REPORT

Since 1 January 2023, Swiss foundations are obliged to disclose to the competent supervisory authority the total amount of compensation paid annually whether directly or

indirectly to the board and any management members (art. 84b CC, in force since 1 January 2023). Although supervisory authorities have occasionally requested such information in recent years, the new provision now obliges all foundations to produce a remuneration report (irrespective of whether they are supervised by the federal, cantonal or municipal supervisory authority).

The obligation to produce a remuneration report sheds new light on the controversial question of the appropriate remuneration of board members of charitable foundations. From a legal point of view, appropriate remunerations are permissible. There is no threshold for remunerations per se according to widely accepted practice, but factors such as the foundation's capital, the complexity of the administration, the expertise of the board member etc. need to be taken into consideration to evaluate whether a remuneration is appropriate.

However, the remuneration of board members can be viewed differently when it comes to the recognition of a foundation as charitable for tax purposes: While the tax exemption of charitable organisations is subject to only a few provisions at a federal level, the practices of cantonal tax authorities vary widely. For instance, some rather restrictive cantonal authorities perceive the payment of compensations to board members as detrimental to the altruistic characteristics of charitable foundations, whereas others do not. Since the supervisory authority and the cantonal tax authorities are distinct authorities, the remuneration report does not itself have any tax implications and is not passed on to the tax authorities. However, charitable foundations should review whether the remuneration of their board members is (still) in line with the principles laid out in the tax ruling granting the foundation the status of being a charity for tax purposes.

Some details regarding the remuneration report are as yet unclear, e.g., whether the report needs to contain the total amount of the remuneration paid to all members of the board and the management (as indicated by the wording of art. 84b CC) or whether the remuneration of each member must be reported separately (as would indicate art. 734a para. 3 Swiss Code of Obligations applicable to stock companies by analogous application). The Federal Supervisory Authority recently issued a guideline in which it requests the disclosure of the individual remuneration of each board member.

DUTIES IN CASE OF INSOLVENCY AND OVER-INDEBTEDNESS

Under the modified art. 84a para. 1 CC which was part of the revision of corporate law and came into force on 1 January 2023, the supreme body of the foundation (i.e., the foundation council) is obliged immediately to notify the supervisory authority in case of imminent insolvency or over-indebtedness. Moreover, if auditors find that the foundation is insolvent or over-indebted, they must also notify the supervisory authority (art. 84a para. 2 CC). This revision modifies the duties of the foundation's bodies and provides for a more direct mechanism whenever the finances of a foundation get out of balance. Under the old provisions, the board itself had the duty to draw up an interim balance sheet and then submit it to the auditor or directly to the supervisory authority, namely when the foundation was exempt from audit obligations.

SUPERVISORY COMPLAINT

Swiss foundations are supervised by either a municipal, cantonal or federal supervisory authority. The supervisory authority must ensure that the foundation's assets are used for the declared purpose. Although the possibility of filing a complaint by virtue of art. 84 para. 2 CC is already recognised as an implicit remedy *sui generis*, controversial decisions issued by the Swiss Federal Supreme Court have provoked debates over the procedural prerequisites and the question as to who should be able to file a complaint. On 1 January 2024, a new art. 84 para. 3 CC will come into force and explicitly regulate this aspect of foundation law, stating that *"beneficiaries or creditors of the foundation, the founder, the subsequent and former and current members of the board of the foundation who have an interest in ensuring that the administration of the foundation complies with the law and the foundation deed may file a complaint with the supervisory authority against acts and omissions of the foundation bodies"*.

This new provision represents a significant clarification for the practice, albeit not eliminating all uncertainties. For example, it is still unclear what the requested „interest“ actually is and if other interested persons, such as the heirs of the founder can file a complaint. It is important to note

that besides the complaint as a formal remedy, everybody can bring any alleged misbehaviour of a foundation body to the attention of the authority by way of informal notice. However, only the person who has the standing to file a formal complaint is considered a party in the upcoming procedure, with the right to be informed about the action taken by the supervisory authority and to file an appeal against decisions of the supervisory authority.

PRACTICE ADVICE: PRACTICE OF THE FEDERAL SUPERVISORY AUTHORITY

The Federal Supervisory Authority ESA launched a digital supervision system („eESA“). The aim of this project is to digitize the supervision and the communication with foundations. Since 1 January 2022, foundations that are supervised by ESA must either register via the online portal EasyGov and hand in their yearly reporting digitally or use special forms provided on the website of the Federal Supervisory Authority for their yearly submissions. The same applies for auditors who must submit their audit report separately either via EasyGov or by mail with a special form.

Starting with the annual report for 2023, foundations under the supervision of ESA can also hand in an English version of their activity report. This is particularly important for the numerous international foundations from an administrative as well as from a financial point of view as translation into a national language (German, French or Italian) is no longer necessary. Nevertheless, all communication with the supervisory authority will continue to be in a Swiss national language and the authority will still be able to request translation if necessary.

POWER TO RESERVE AMENDMENTS OF THE FOUNDATION'S ORGANISATION

From 1 January 2024 onwards, founders will be able to reserve the power to amend the foundation's organisation unilaterally under the new art. 86 para. 1 CC. Until then, it is only possible to reserve the power to amend the foundation's purpose while organisational amendments are subject to the approval of the Supervisory Authority (art. 85 CC). The power to amend the foundation's organisation needs to be reserved in the foundation deed and can only be exercised after ten years have passed since the establishment of the foundation,

or ten years after the last amendment of the foundation's purpose or organisation. It is important to note that two independent time periods apply for amendments to the purpose and organisation. In cases where several persons have set up a foundation together, they can only exercise the right of amendment jointly. Finally, while founders will be able to exercise the right to change the foundation's purpose and organisation through a testamentary disposition, this right is non-inheritable and non-transferable. If the founder is a legal entity, this right shall expire no later than 20 years after the establishment of the foundation.

PRACTICE ADVICE

The Federal Supervisory Authority already accepts new foundation deeds (i.e., before 1 January 2024) referring to the new reservation rights, provided that the foundation deed explicitly refers to the new article and/or the new wording of the law and that the deed was signed after 30 June 2022.

FACILITATION OF MINOR CHANGES OF THE STATUTES

The standard required for the supervisory authority to enact minor amendments to the foundation deed will also change starting from 1 January 2024. While the supervisory authority was able to enact minor amendments whenever it seemed *“necessary for good reasons”* and no third-party rights were affected, amendments under the new art. 86b CC will only have to *“appear justifiable on reasonable grounds”*. Amendments of the foundation deed will no longer require any further public notarization (new art. 86c CC).

OUTLOOK: FAMILY FOUNDATIONS

The current foundation law reform does not specifically address family foundations. Art. 335 para. 1 CC restricts the permissible purposes of family foundations to meet the costs of raising, endowing or supporting family members or for similar purposes. Pure maintenance foundations that allow distributions to family members for reasons other than education, endowment, support or similar reasons are not permitted under Swiss law. As the Swiss legislator is currently

contemplating the introduction of a proper Swiss trust law, this may be a chance to liberalise the provisions on Swiss family foundations at the same time. In December 2022, a motion to reform Art. 335 CC was introduced in the Swiss Council of States, with the outcome being yet unclear.

OTHER IMPORTANT LEGAL REFORMS FOR FOUNDATIONS

DATA PROTECTION

In 2020, Parliament approved the revision of the Swiss Federal Act on Data Protection (FADP). This new statute – and its corresponding Data Protection Ordinance – will enter into force on 1 September 2023. The revised FADP will provide additional obligations similar to the EU Data Protection Regulation, e.g., an active information duty, a duty to identify and notify data breaches, and a duty to keep a data processing register etc. For certain violations, the revised FADP foresees fines of up to CHF 250,000 against the individual responsible for the violation. Foundations processing data will be subject to new duties that apply in connection with the collection of personal data. For instance, according to the new information duty a foundation must proactively communicate and disclose information about their data processing activities, scope, purpose and duration. Foundations will also have an obligation to take appropriate measures to identify and react to data breaches in a timely manner.

PRACTICE ADVICE: REQUIRED ACTION ITEMS FOR FOUNDATIONS

- > Privacy notice (Datenschutzerklärung);
- > Data processing register (for larger foundations and those having sensitive data);
- > Implementation of a process to identify and notify the competent authorities and individuals affected by a data breach;
- > Implementation and documentation of data security measures.

COMMON REPORTING STANDARDS (CRS) AND AUTOMATIC EXCHANGE OF INFORMATION (AEOI)

Swiss charitable foundations are not subject to the Automatic Exchange of Information (AEOI). On 10 October 2022, the OECD's Fiscal Affairs Committee finally approved embedding

this important exemption at an international level in the Common Reporting Standard (CRS). The exact timetable for implementation is still pending.

SWISS LAW ON MERGERS

The new art. 84 of the Swiss Law on Mergers which came into force on 1 January 2023 grants a right to challenge a merger decision of a family foundation or an ecclesiastical foundation within three months on the grounds that the requirements have not been met. This right is granted to any beneficiary who has a direct claim and any member of the supreme foundation body (i.e., foundation council) who has not approved the merger resolution.

THE CURRENT REFORM IN VIEW OF THE BROADER TRENDS IN FOUNDATION LAW

Switzerland's foundation law is in a state of flux and the recent reforms have brought in significant streamlining when it comes to the modification of a foundation's organisation. These changes are an important step towards a legal environment that considers the needs of a different generation of founders and board members.

Young founders often envision more dynamic foundations, which can adapt to changing circumstances, eliminate outdated foundation governance and/or reorganise foundations. This is in line with broader trends such as foundations that do not limit themselves to using only the income arising, but also consume the foundation's capital, so maximising the foundation's impact in the short term rather than lasting forever with little (but regular) contributions. Such „consumption foundations“ are emblematic of a foundation sector that takes into broader consideration factors such as ESG, mission-based investments and impact.

In combination with other Swiss law reforms such as the reduction of forced heirship shares for descendants (see BK Briefing February 2023), the recent reforms in foundation law will improve the legal environment and strengthen the Swiss foundation sector.

AUTHORS



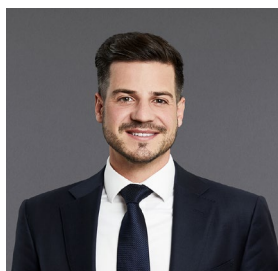
Dr. Daniel Leu
Partner
T: +41 58 261 55 42
daniel.leu@baerkarrer.ch



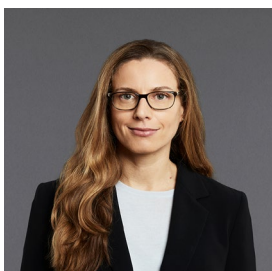
Tina Wüstemann
Partner
T: +41 58 261 55 60
tina.wuestemann@baerkarrer.ch



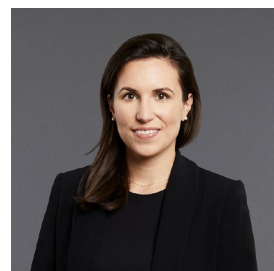
Dr. Lukas Brugger
Associate
T: +41 58 261 53 27
lukas.brugger@baerkarrer.ch



Lukas Schifferle
Associate
T: +41 58 261 56 81
lukas.schifferle@baerkarrer.ch



Dr. Debora Gabriel-Tanner
Associate
T: +41 58 261 56 76
debora.gabriel@baerkarrer.ch



Julia Eigenmann
Associate
T: +41 58 261 53 01
julia.eigenmann@baerkarrer.ch



Anna Camozzi
Junior Associate
T: +41 58 261 54 39
anna.camozzi@baerkarrer.ch



Jelena Saladin
Junior Associate
T: +41 58 261 52 73
jelena.saladin@baerkarrer.ch