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II. Swiss Foundations

1. Introduction

- Legal basis: Art. 80–89bis CC, art. 52–59 CC, CO, Swiss Merger Act
- Past and pending reforms
 - 2006: Revision in force (CC and tax legislation)
 - Some collateral amendments over the years
 - Parliamentary Initiative (14.470) «Swiss Foundation Location. Strengthening (*Schweizer Stiftungsstandort. Stärkung*)» of 9 December 2014: Adopted; consultation procedure from 28 November 2019 until 13 March 2020, results pending
- Concept
 - Classical foundation concept
 - Assets endowed with legal personality and dedicated to a specific purpose («special purpose assets»)



II. Swiss Foundations

1. Introduction

- Concept
 - Institutional nature as an establishment (*Anstalt*) (*cf.* art. 52 para. 1 CC): No members, no owners, only beneficiaries who are to benefit from the assets
 - Separated from the founder at the time of establishment and in principle permanently perpetuated (separation and solidification principle)
 - Freedom of the founder to set up a foundation and to shape it according to his ideas
- Forms of appearance
 - Classical/ordinary foundation: Any public or private benefit purposes that are not contrary to law or morality
 - Special forms: (pure) family foundations (art. 87, 335 CC), ecclesiastical foundations and pension fund foundations with respective special provisions



II. Swiss Foundations

1. Introduction

- Forms of appearance
 - «Charitable» or «non-profit» is not a civil law but a tax law term
 - Differentiate from foundation substitute forms:
 - Dependent foundations
 - Associations
 - Non-profit companies
 - Cooperatives

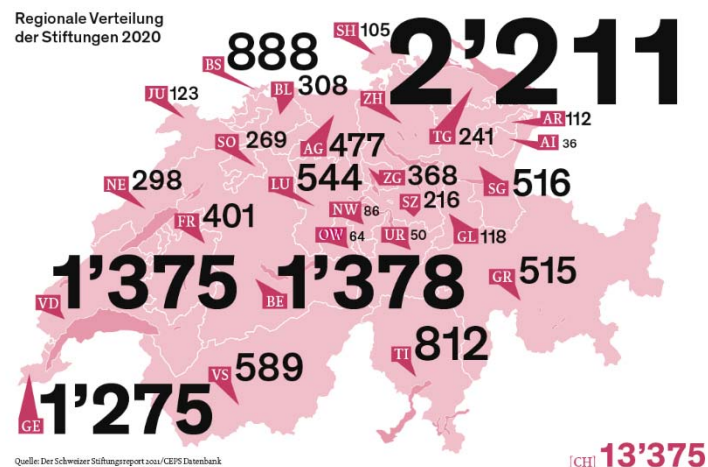


II. Swiss Foundations

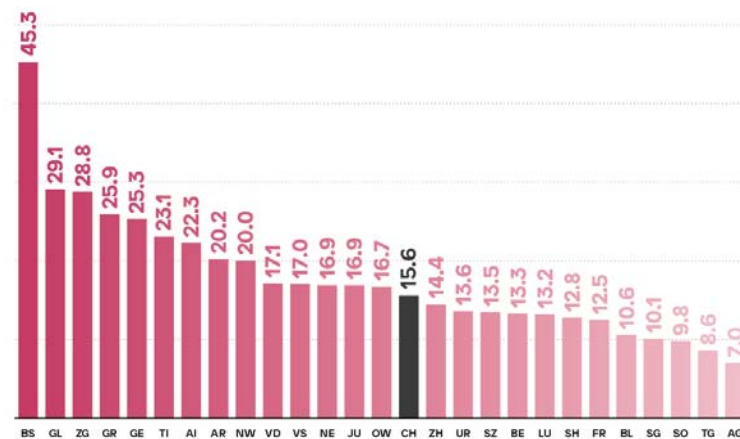
1. Introduction

– Numbers

- Currently 13'375 charitable foundations with a total of foundation assets of approximately CHF 100 billion
- Concentration of foundations: 15.6 per 10'000 inhabitants



Stiftungsdichte* nach Kanton 2020



*Anzahl Stiftungen auf 10'000 Einwohner

Quelle: Der Schweizer Stiftungsreport 2021/CEPS Datenbank



II. Swiss Foundations

2. Establishment of a Foundation

- Nature of the establishment act
 - Unilateral legal declaration of the founder
 - Interpretation according to the principle of will: The *original* will of the founder is crucial, subsequent expressions of will are in principle irrelevant
- Types and form of the act of dedication (*cf.* art. 81 CC)
 - Declaration *inter vivos* (public notarisation)
 - Disposition *mortis causa* (last will or inheritance contract)



II. Swiss Foundations

2. Establishment of a Foundation

- Content of the act of dedication
 - Will to establish an independent foundation
 - Purpose of the Foundation
 - Assets
 - (Organization)

→ These are the features of the «foundation concept», there are disputes about the details



II. Swiss Foundations

2. Establishment of a Foundation

- Amount of assets
 - Purpose-to-means ratio, in practice CHF 50'000
- Commercial register entry
 - As a rule: Constitutive entry (*cf.* art. 52 para. 1, art. 81 para. 2 CC)
 - Original exception: Public law, ecclesiastical and family foundations did not require registration (old art. 52 para. 2 CC)
 - Since the entry into force of the «Federal Act on the Implementation of the 2012 Revised Recommendations of the Groupe d'action financière» on 1 January 2016, also constitutive entry for ecclesiastical and family foundations (*cf.* new art. 52 para. 2 CC; transitional period of 5 years, *cf.* art. 6b para. 2^{bis} SchIT)



II. Swiss Foundations

3. Organisation of the Foundation

- Basics of the organisation
 - Foundation deed: Will of the founder (art. 83 CC)
 - Written regulations (easier to change)
 - Organisation must guarantee the functionality of the foundation (*cf.* art. 83d CC)
- Administration
 - Foundation board or the supreme organ: Management and representation (art. 83a CC)
 - Cannot form a will of its own, but must execute the will of the founder (differentiated from the corporate management)



II. Swiss Foundations

3. Organisation of the Foundation

- Auditors (new provisions since 1 January 2008)
 - In principle duty to audit (art. 83b CC)
 - Stock corporation law regulations apply analogously (art. 83b para. 3 CC, art. 727 ff. CO)
 - Above thresholds ordinary audit (new thresholds per 1 January 2012)
 - Below thresholds limited audit as a minimum requirement
 - Appointment of auditions according to criteria of «independence» (art. 728 CO)
 - Excluded are family and ecclesiastical foundations (art. 87 para. 1^{bis} CC)
 - Individual exemptions possible for very small foundations (art. 83b para. 2 CC)
- Other bodies possible: *E.g.*, internal supervisory bodies or checks and balances according to the standards of a «good foundation governance»
- Deficiencies in the organisation can be remedied by the supervisory authority (*cf.* art. 83d CC)



II. Swiss Foundations

4. Supervision of the Foundation

- Legitimacy, purpose and content
 - Ownerless special-purpose assets as an entity in need of protection
 - Securing the purpose of the foundation/monitoring the organs
 - Through a public authority (art. 84 para. 1 CC)
 - Exemption of family and ecclesiastical foundations (art. 87 para. 1 CC)



II. Swiss Foundations

4. Supervision of the Foundation

- Responsibility
 - Community (canton/supra-regional) to which the foundation is destined to belong, *i.e.* which would be most likely to assume the corresponding task if the foundation did not exist (art. 84 para. 1 CC)
 - Foundations with nationwide significance: Federal Department of Home Affairs («Federal Supervisory Authority»)
- Means of supervision
 - Preventive and repressive means of supervision
 - Reminder, reprimand, inspection of files, removal of board members as last resort
 - But: Respect of an organ's margin of discretion (purely legal supervision)
 - Proportionality and subsidiarity principle



II. Swiss Foundations

5. Restructuring of the Foundation

- Starting point
 - Exception, as no corporate structure
 - Intentional immobility of the foundation assets
 - Minor amendments to the articles of association are permissible:
«...the supervisory authority may make minor amendments to the foundation charter provided these appear necessary for valid objective reasons and do not impair the rights of any third party.»
(art. 86b CC, in force since 1 January 2006)
- Change in organisation
 - By public authority: «...where such amendment is urgently required in order to preserve the foundations's assets or to safeguard the pursuit of ist objects.» (art. 85 CC)
 - Consultation of the supreme organ of the foundation



II. Swiss Foundations

5. Restructuring of the Foundation

- Change of purpose
 - By the supervisory authority (art. 86 CC)
 - At the request of the supervisory authority or the supreme organ of the foundation
 - Permissible «if its original purpose has acquired a completely different meaning or effect, so that the foundation has obviously become alienated from the will of the founder»



II. Swiss Foundations

5. Restructuring of the Foundation

- Change of purpose
 - Upon application by the founder (art. 86a CC, in force since 1 January 2006)
 - Provision was very controversial, as the principle of separation has been weakened (change of foundation model?)
 - Reservation of the right to make amendments to the foundation deed
 - At least 10 years since last modification
 - Non-profit purpose must remain non-profit
 - Rights are non-transferable (by way of contract or inheritance)
 - Competence and procedure (art. 85 *et seq.* CC)
 - «Conversion authority» at the relevant local authority



II. Swiss Foundations

6. Dissolution of the Foundation

- No self-dissolution
- Grounds for dissolution (*cf.* art. 88 CC)
 - Impossibility or fulfillment of the purpose
 - Unlawfulness/immorality
 - Over-indebtedness/insolvency
- Specifications of the founder's will (disputed)
- Dissolution procedure
 - Right of application and right of action (art. 89 CC)
 - Dissolution by authority (art. 88 para. 1 CC)
 - Dissolution of family and ecclesiastical foundations only by the court (art. 88 para. 2 CC)



II. Swiss Foundations

6. Dissolution of the Foundation

- Merger
 - Admissible «if it is objectively justified and serves in particular to safeguard and implement the purpose of the foundation» (art. 78 para. 2 Swiss Merger Act)
 - Transfer of assets from the foundation to other legal entities also conceivable (art. 86 and 87 Swiss Merger Act)
- Liquidation and use of the assets of the foundation
 - Procedure: Art. 58 CC in conjunction with art. 913 para. 1 and art. 739 *et seq.* CO
 - Use of assets: Art. 57 CC
 - According to the dispositions of the founder or the board
 - Otherwise: Assets fall to community
 - To strive for further use according to the previous purpose



II. Swiss Foundations

7. The Main Types of Foundations

- Classic charitable foundation
 - Legally independent assets dedicated to a charitable purpose
 - For the definition of «public benefit» in the fiscal sense, see *Kreisschreiben* no. 12 of 8 July 1994 on the «tax exemption of legal persons»; key words: promotion of the general interest and selflessness
 - Pursuit of purpose is controlled by supervisory authority (art. 84 para. 2 CC)
 - Constitutive entry in the commercial register (art. 52 para. 2 CC; about the reformed law see above)
 - Auditors (art. 83a para. 1 CC); possibility of exemption for very small foundations (art. 83a para. 2 CC)



II. Swiss Foundations

7. The Main Types of Foundations

- Enterprise or business foundation
 - A foundation in which the dedicated assets consist wholly or mainly of a company or a significant participation in a company
 - Forms
 - Direct corporate foundation: Foundation runs an economic enterprise itself for its purpose
 - Holding foundation: Foundation holds significant shares in companies; can appear as
 - Pure-business foundation
 - Charitable foundation with shares as assets
 - Mixed foundation
 - BGE 127 III 337: Company foundation with an economic purpose permitted



II. Swiss Foundations

7. The Main Types of Foundations

- Enterprise or business foundation
 - Motives for establishing a foundation
 - Durability of the foundation
 - Independence of assets of the foundation
 - Long-term fixing of a corporate philosophy
 - Possibility of employee benefits, etc.
 - Wealth and succession planning
 - Problems
 - Self-purpose or self-maintaining foundation
 - State is involved with supervisory authorities
 - Low flexibility regarding business transactions and restructuring of assets



II. Swiss Foundations

7. The Main Types of Foundations

- Family foundation
 - Legally independent assets which are linked to a particular family by the fact that they are dedicated to cover the costs of education, endowment or support of family members or similar purposes (art. 335 para. 1 CC)
 - Prohibition of maintenance foundations
 - Prohibition of family *fidei commissi*: Long-term preservation of assets within the family (art. 335 para. 2 CC)
 - Legal personality originally also without entry in the commercial register, since 1 January 2016 mandatory registration (art. 52 para. 2 CC)
 - No supervisory authority, no auditors (art. 87 para. 1, 1^{bis} CC)
 - Problem: Recognition of foreign maintenance foundations in Switzerland in terms of civil and tax law



II. Swiss Foundations

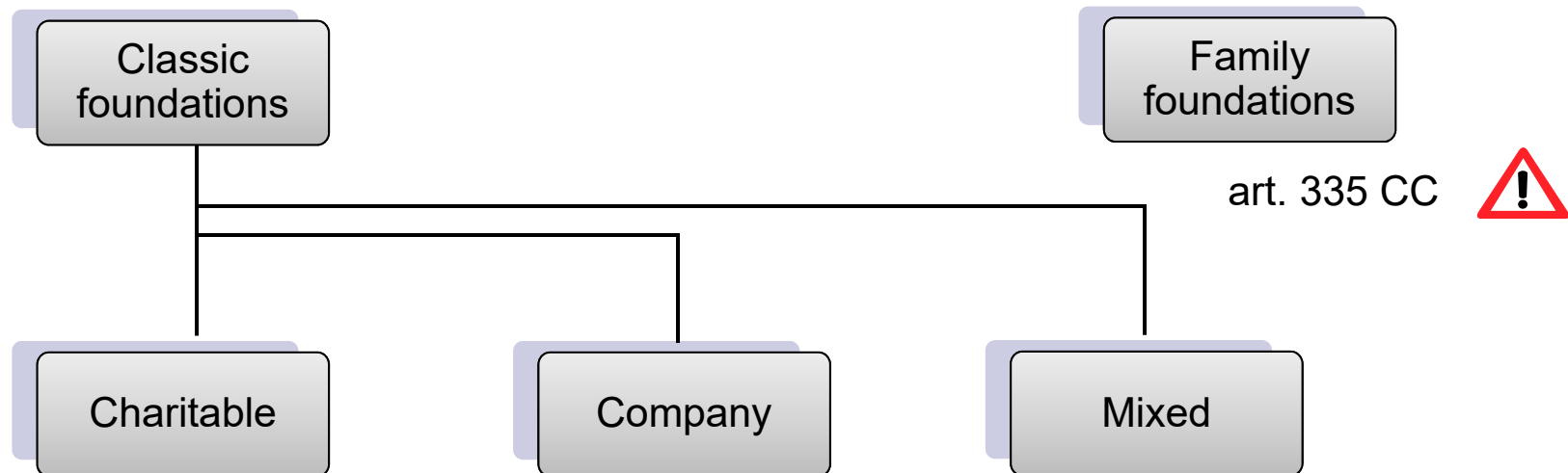
7. The Main Types of Foundations

- Mixed foundations
 - *E.g.*, dedication of assets/transfer of a company with the purpose of permanently maintaining the company and using the earnings to support certain charitable projects and the family in need
 - But: The restrictions of art. 335 CC cannot be circumvented by «mixing»
 - And: As soon as there is no pure family purpose, the entire structure becomes a classic foundation (with the duty of supervision)
 - Problems



II. Swiss Foundations

7. The Main Types of Foundations



Note further: Ecclesiastical, pension fund and investment foundations



II. Swiss Foundations

8. The Inheritance Foundation in Particular

- Art. 493 para. 1 CC: «The testator is entitled to bequeath all or part of the disposable portion of his or her property to a foundation for any purpose of his or her choosing.»
- Art. 493 para. 2 CC: Referring to the legal requirements, especially to foundation law (art. 80 *et seq.* CC)
- Foundation *mortis causa*, testamentary or inheritance foundation
- Main idea: Establishment of foundation only upon the founder's death



II. Swiss Foundations

8. The Inheritance Foundation in Particular

- As a rule, the foundation *inter vivos* is preferable:
 - Legal uncertainty concerning establishment and state of uncertainty until executed (but *cf.* art. 81 para. 3 CC)
 - Questions of doubt with supervision and tax authorities can be resolved by the founder himself
 - Founder is able to be part of the foundation management for some time and «live» his will; founder can possibly make use of art. 86a CC
 - Early organisation is crucial to make use of periods according to art. 527 para. 3 and 208 para. 1 CC
 - Assets retained to live with can be donated to the foundation later by disposition *mortis causa*



II. Swiss Foundations

8. The Inheritance Foundation in Particular

- Cases in which an inheritance foundation can be desired:
 - Founder feels too young to establish a foundation, but wishes to protect assets/business/kids for his case of death
 - Confidentiality and family peace: Founder wishes to avoid disputes
 - Assets are still in use or part of litigation
 - Simply no desire to take action in the lifetime
 - No time left or no logistic possibilities to establish a foundation by notary deed (e.g., Covid-19 pandemic)



II. Swiss Foundations

8. The Inheritance Foundation in Particular

- Discussion points
 - Time of establishment
 - Formal requirements and mandatory content
 - Interpretation questions (e.g., conditions)

→ Demanding structure with high need for professional advice