

# CENTER FOR CIVIL SOCIETY STUDIES

at the Johns Hopkins Institute for Policy Studies

COMPARATIVE NONPROFIT SECTOR PROJECT

## Nonprofit Law in Switzerland

*by*

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### **The Johns Hopkins Comparative Nonprofit Sector Project**

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Working Paper Number 47  
March 2009

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### ***The CNP Project in Switzerland was funded by:***

GEBERT RÜF STIFTUNG, Basel  
Ecoscientia Stiftung, Vaduz

ISBN 1-886333-61-0

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*This publication is available for download at [www.ccss.jhu.edu](http://www.ccss.jhu.edu).*

### **Suggested form of citation**

Dominique Jakob, Roman Huber and Katharina Rauber. "Nonprofit Law in Switzerland." *Working Papers of the Johns Hopkins Comparative Nonprofit Sector Project*, No. 47. Baltimore: The Johns Hopkins Center for Civil Society Studies, 2009.

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## Preface

This is one in a series of working papers produced under the Johns Hopkins Comparative Nonprofit Sector Project (CNP), a collaborative effort by scholars around the world to understand the scope, structure, financing, and role of the nonprofit sector using a common framework and approach. Begun in 1991 in 13 countries, the project continues to expand, currently encompassing more than 40 countries.

The working papers provide a vehicle for the initial dissemination of the CNP work to an international audience of scholars, practitioners, and policy analysts interested in the social and economic role played by nonprofit organizations in different countries, and in the comparative analysis of these important, but often neglected, institutions.

Working papers are intermediary products, and they are released in the interest of timely distribution of project results to stimulate scholarly discussion and inform policy debates. A full list of these papers is provided inside the back cover.

The production of these Working Papers owes much to the devoted efforts of our project staff. The present paper benefited greatly from the contributions of Senior Research Associate Wojciech Sokolowski and the editorial work of CNP Project Coordinator Megan Haddock and Project Assistant Chelsea Newhouse. On behalf of the project's core staff, I also want to express our deep gratitude to our project colleagues around the world and to the many sponsors of the project listed at the end of this paper.

The views and opinions expressed in these papers are those of the authors and do not necessarily represent the views or opinions of the institutions with which they are affiliated, the Johns Hopkins University, its Institute for Policy Studies and Center for Civil Society Studies, or any of their officers or supporters, or the series' editors.

We are delighted to be able to make the early results of this project available in this form and welcome comments and inquiries either about this paper or the project as a whole.

Lester M. Salamon  
Project Director



## ABBREVIATIONS

AG	<i>Aktiengesellschaft</i> = stock company
AHVG	<i>BG über die Alters- und Hinterlassenenversicherung</i> = Old-Age and Survivors Insurance Law – Swiss Federal Law of 20 December 1946 pertaining to the old-age and survivors insurance, SR 831.10
Art.	article
AS	<i>Amtliche Sammlung des Bundesrechts</i> = Official Collection of the Swiss Federal Laws
ASA	<i>Archiv für Schweizerisches Abgaberecht</i> = Archive for the Swiss Law on Duties, Bern 1932 et seqq.
BG	<i>Bundesgesetz</i> = Swiss Federal Law / Act
BGE	<i>Bundesgerichtsentscheidung/en</i> = Ruling/s of the Swiss Federal Court
BGer	<i>Bundesgericht</i> = Swiss Federal Court (= Swiss Supreme Court)
BV	<i>Bundesverfassung der Schweizerischen Eidgenossenschaft (Bundesverfassung)</i> = Federal Constitution of
cf.	confer
CHF	Swiss Francs
DBG	<i>BG über die direkte Bundessteuer (Bundessteuergesetz)</i> = Swiss Federal Law of 14 December 1990 pertaining to the direct federal taxes, SR 642.11
ECJ	European Court of Justice
ed.	editor
eds.	editors
e.g.	<i>exempli gratia</i> = for example
EG	<i>Einführungsgesetz</i> = introductory law
EstV	<i>Eidgenössische Steuerverwaltung</i> = Swiss Federal Tax Administration
et al.	<i>et alii</i>
et seq.	<i>et sequens</i> = and the following one
et seqq.	<i>et sequentes</i> = and the following ones
EU	European Union
FusG	<i>BG über Fusion, Spaltung, Umwandlung und Vermögensübertragung (Fusionsgesetz)</i> = Swiss Merger Act – Swiss Federal Act of 3 October 2003 on merger, de-merger, conversion and transfer of assets, SR 221.301
GmbH	<i>Gesellschaft mit beschränkter Haftung</i> = limited liability company
HRegV	<i>Handelsregisterverordnung</i> = Commercial Register Ordinance of 17 October 2007, SR 221.411
i.a.	<i>inter alia</i> = among other things
i.e.	<i>id est</i> = that is
KAG	<i>BG über die kollektiven Kapitalanlagen (Kapitalanlagegesetz)</i> = Swiss Federal Act of 23 June 2006 on Collective Investment Schemes, SR 951.31 (Collective Investment Schemes Act, CISA)
lit.	<i>litera</i>
MWStG	<i>BG über die Mehrwertsteuer (Mehrwertsteuergesetz)</i> = Value Added Tax Law - Swiss Federal Law of 2



	September 1999 pertaining to the value added tax, SR 641.20
NPO	Nonprofit organization
OR	<i>Schweizerisches Obligationenrecht</i> = Swiss Code of Obligations - Swiss Federal Law of 30 March 1911 pertaining to the amendment of the Swiss Civil Code (Fifth Part: Code of Obligations), SR 220
p.	page
para.	paragraph
RAG	<i>BG über die Zulassung und Beaufsichtigung der Revisorinnen und Revisoren (Revisionsaufsichtsgesetz)</i> = Audit Admission and Oversight Law – Swiss Federal Law of 16 December 2005 pertaining to the admission and supervision of auditors, SR 221.302
SchKG	<i>BG über Schuldbetreibung und Konkurs (Schuldbetreibungs- und Konkursgesetz)</i> = Law on Debt Enforcement and Bankruptcy - Swiss Federal Law of 11 April 1889 pertaining to debt enforcement and bankruptcy
SchIT	<i>Schlusstitel</i> = final provisions
SR	<i>Systematische Sammlung des Bundesrechts</i> = Systematic Collection of the Swiss Federal Laws
StG	<i>BG über die Stempelabgaben (Stempelabgabegesetz)</i> = Stamp Duty Law – Swiss Federal Law of 27 June 1973 pertaining to stamp duties, SR 641.10
StGB	<i>Schweizerisches Strafgesetzbuch</i> = Swiss Penal Code of 21 December 1937, SR 311.0
StHG	<i>BG über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (Steuerharmonisierungsgesetz)</i> = Swiss Federal Law of 14 December 1990 pertaining to the harmonization of direct taxes of the cantons and municipalities, SR 642.14
vol.	volume
VStG	<i>BG (Verrechnungssteuergesetz)</i> = Withholding Tax Law – Swiss Federal Law of 13 October 1965 pertaining to the withholding tax, SR 642.21
ZGB	<i>Schweizerisches Zivilgesetzbuch</i> = Swiss Civil Code of 10 December 1907, SR 210

# *Nonprofit Law in Switzerland*

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## **I. MAIN FEATURES OF THE SWISS LEGAL SYSTEM AND LEGAL FORMS APPLICABLE FOR NONPROFIT ORGANIZATIONS IN SWITZERLAND**

### ***a) Structural organization of the State and legislative competences***

Switzerland is a federal state built upon three governmental levels: the Confederation, cantons, and municipalities. Every level may act as an independent legislator within its jurisdiction. Hence Switzerland is governed by federal, cantonal and municipal law.

Pursuant to art. 3 BV, the cantons are sovereign unless their sovereignty is limited by the Federal Constitution, and they exercise all rights that are not vested in the Confederation.

Different types of enactments exist on those three governmental levels (Confederation, cantons, municipalities). The Constitution is the highest norm for every community. The (formal) law is a legal norm which was passed by the formal legislator, i.e. by the competent legislative authority, following the due legislative procedure. The parliamentary ordinance, as well as the governmental and departmental ordinance are also part of the material law.

When choosing the appropriate legal form for a nonprofit organization, one has to bear in mind the distinction between federal and cantonal law. The Swiss Federal Private Law provides for a *numerus clausus* of ten possible legal forms (see below section I. d.). In addition and according to art. 59 para. 3 ZGB, there are some private law corporations based on cantonal law which can mainly be found in the agricultural sector (*Allmendgenossenschaften [common land associations]*), etc.; those are of relatively minor significance and therefore not further explained herein.

### ***b) Legal system***

The Swiss legal system has to be viewed in the context of the civil law tradition prevalent in continental Europe. The main characteristic is the pre-eminence of written laws as a legal source: the courts must adhere to the legal texts and the intention of the legislators. This is due to the fact that, essentially, the legislature is considered to

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be the only legal source. The courts apply and interpret the laws, and in case of legal gaps make decisions according to the rule that they would enforce as legislators (art. 1 Para. 2 ZGB).

In Switzerland's hierarchy of norms, the Federal Constitution (BV) ranks higher than the laws. Nonprofit organizations are primarily governed by the Swiss Civil Code (ZGB: relevant for associations and foundations) and the Swiss Code of Obligations (OR: relevant for companies and cooperatives). In addition, mainly in connection with the Donation and Charity Law, tax laws are relevant, such as the Federal Law pertaining to the direct federal taxes (DBG) [*Direktes Bundessteuergesetz*], the Federal Law pertaining to the harmonization of direct taxes of the cantons and municipalities (StHG) [*Steuerharmonisierungsgesetz*], and other federal and cantonal tax laws.

### ***c) Relevant fundamental rights***

The fundamental rights play a significant role in the legal system. The individual can directly refer to them. Courts, as well as administrative authorities have to apply directly constitutional norms guaranteeing fundamental rights. Therefore, judicial enforceability does not require any implementation laws [*Ausführungsgesetzgebung*]. Within their jurisdiction, federal and cantonal legislators are also obligated to contribute to the protection of the fundamental rights and to concretize them (Häfelin/Haller 2005, p. 70).

The Federal Constitution guarantees judiciary independence. The way judicial or administrative procedures are applied is essential for the legitimacy of a state decision and its acceptance by the people. The guaranteed constitutional procedures specified in art. 29-32 BV are designed to meet the constitutional requirements and to guarantee a minimum standard.

The classic fundamental rights which are important for nonprofit organizations are freedom of expression and of information (1), freedom of assembly (2), freedom of association (3) and the guarantee of ownership (4).

#### **1. Freedom of expression and of information and freedom of media**

The freedom of expression and of information and the freedom of media (art. 16 and 17 BV) together with other fundamental rights (such as the freedom of assembly and the freedom of association) guarantee the freedom of social communication (Häfelin/Haller 2005, p. 447 et seq.).

The Federal Court assumes that opinions of ideal content are subject to the freedom of expression, whereas statements for commercial purposes are subject to the more limited economic freedom (art. 27 BV) (BGE 128 I 295, 308). As a result, informational activities of nonprofit organizations are protected. Demonstrations are protected by the freedom of expression and the freedom of assembly (BGE 127 I 164).

#### **2. Freedom of assembly**

The freedom of assembly (art. 22 BV) consists of the right to organize meetings and to participate, as well as to not participate in meetings, with protection against state intervention.

An assembly means a temporary gathering, i.e. of limited time, which is generally held at a given location (Häfelin/Haller 2005, p. 158). However, an assembly can also be a moving assembly (e.g. in form of demonstrations). Natural and legal persons are holders of the freedom of assembly. Legal persons cannot assemble but they can organize an assembly and therefore require this freedom too. This is relevant for the collective side of nonprofit organizations.

### **3. Freedom of association**

The freedom of association (art. 23 Para. 2 BV) consists of the right to form, to join or to belong to an association and to participate in the activities of an association, without any state interference.

Associations, in terms of art. 23 BV, are any long-term associations formed by persons aiming at the pursuit of a common ideal purpose. The ideal purpose may also include political goals (political parties) or the protection of mutual economic interests (Häfelin/Haller 2005, p. 162). Profit associations, on the other hand, are only protected by the economical freedom (art. 27 BV). Religious communities are protected by the freedom of religion and conscience (art. 15 BV) which – in relation to the freedom of association – is considered the more specific fundamental right.

With reference to associations, for example, the freedom of association includes the right to establish and to dissolve an association, the right to voluntarily join and to leave or not to be compelled to join an association. The right is addressed only towards the state; particularly, the freedom of association does not grant the right to be accepted as a member by an association. Participation in an association's activities is protected too, in particular participation in its internal activities (e.g. the holding of membership meetings). The attendance of events aimed at the public, however, and especially if they are open to the public, is protected by the freedom of expression and the freedom of assembly.

According to an older ruling of the Federal Court (BGE 100 Ia 277, 286 et seq.), which is controversial amongst academics, only natural persons can be holders of the freedom of association. By contrast, there is nearly unanimous agreement among legal scholars that not only are the members of an association guaranteed protection, but the association itself is also protected by the fundamental rights of freedom of association and can defend itself against any interference in its activities (Häfelin/Haller 2005, p. 163).

### **4. Guarantee of ownership**

In Switzerland, the guarantee of ownership (art. 26 BV) is bipartite, namely on one hand a guarantee of the existence of ownership in general terms and on the other hand a guarantee of ownership in concrete terms. The institutional guarantee protects the right to own private property as a core inviolable institution of the Swiss legal system (Häfelin/Haller 2005, p. 175).

The second part, i.e. the guarantee of the concrete extent of private property, protects specific, individual property rights against state intervention. Any state restrictions imposed on private property or on any other

property right protected by the guarantee of ownership are permitted only if they are based on a sufficient legal basis, are covered by a sufficient public interest, and do not violate the principle of commensurability (art. 36 para. 1-3 BV). All natural persons are entitled to the guarantee of ownership, irrespective of their nationality. Further, legal persons, including nonprofit organizations, may refer to the guarantee of ownership.

#### ***d) Numerus clausus of permitted legal forms of companies under Swiss law***

As opposed to the Law of Obligations where, in principle, the parties involved are authorized to agree on a broad range of contracts (so-called freedom of contract/private autonomy), the Corporate Law provides only for a limited number of licit forms (so-called compulsory form) whose contents are also restricted (so-called fixed form).

The parties may choose between ten legal forms specified by the federal statutory law: a simple partnership [*einfache Gesellschaft*] (art. 530 et seqq. OR), a general partnership [*Kollektivgesellschaft*] (art. 552 et seqq. OR), a limited partnership [*Kommanditgesellschaft*] (art. 594 et seqq. OR), a stock company [*Aktiengesellschaft*] (art. 620 et seqq. OR), a company limited by shares [*Kommandit-Aktiengesellschaft*] (art. 764 et seqq. OR), a limited liability company [*Gesellschaft mit beschränkter Haftung*] (art. 772 et seqq. OR), a cooperative [*Genossenschaft*] (art. 828 et seqq. OR), an association [*Verein*] (art. 60 et seqq. ZGB), and, in a recent development, the investment company with variable capital [*Investmentgesellschaft mit variablem Kapital*] (art. 36 KAG) and the limited partnership for collective capital investments [*Kommanditgesellschaft für kollektive Kapitalanlagen*] (art. 7 KAG).

The choice of the concrete legal form for a nonprofit organization is based on various reasons. In practice, associations, cooperatives and stock companies with nonprofit purposes are the most common forms. Foundations are also of great significance. Their nature is institutional, they do not have members and their key feature is assets dedicated to a specific purpose (Jakob 2006, p. 49 et seq.).

## **II. LEGAL REQUIREMENTS FOR THE RECOGNITION OF NONPROFIT ORGANIZATIONS IN SWITZERLAND**

### ***a) Embodiment pursuant to the civil law and tax status***

In contrast to other legal systems, a dogmatically strict separation is made between an organization's form under the civil law and its tax status. The legal form (e.g. association or foundation) is based merely on civil law criteria. Thus, a foundation does not qualify as a foundation based on nonprofit activities and its compliance with certain (tax) criteria but because of its compliance with the formation requirements applicable to the selected legal form. The tax law comes into play only on a second level, and it determines if the selected legal form is a nonprofit entity and thus eligible for tax privileges (i.e. it receives the nonprofit status for tax purposes).

Formal exemption from direct federal and state taxes is generally possible irrespective of the legal form (art. 56 lit. g DBG, cf. tax law III. b. 2.); however some legal forms are better qualified than others to fulfill tax exemption purposes.

## **b) Typical legal forms for nonprofit organizations in Switzerland**

The association [*Verein*] (1), the foundation [*Stiftung*] (2) and the cooperative [*Genossenschaft*] (3) are typically the legal forms selected for nonprofit organizations. The stock company with a nonprofit purpose [*Aktiengesellschaft mit gemeinnützigem Zweck*] (4) and the limited liability company [*Gesellschaft mit beschränkter Haftung*] (5) are also possible legal forms.

### **1. Association [*Verein*]**

#### *1.1 Term and definition of the association*

The association is a corporately organized group of persons that pursues a basically ideal (non-economic) purpose and has a legal personality (Hausheer/Aebi-Müller 2008, p. 326). Pursuant to the statutory concept, the association as a cooperative association personality is not subject to state approval (concession) or state supervision. This regulation is subject to the provisions pertaining to the commercial register if the association carries out economic activities within the legal scope.

The association is subject to the specific legal provisions set forth in art. 60 – 79 ZGB. The general provisions pertaining to legal persons (Art 52-59 ZGB) and the special provisions of the Merger Act (FusG) (see below II. b. i. *Dissolution and Merger*) are also to be observed.

#### *1.2 Purpose of the association*

Pursuant to art. 60 para. 1 ZGB, the purpose of an association may be political, religious, scientific, cultural, charitable, social or of other non-economic nature. Associations of persons pursuing a commercial purpose are subject to the company law defined in the Code of Obligations (art. 59 para. 2 ZGB). The decisive question is how a commercial purpose is defined (Portmann 2005, p. 11 et. seqq.).

It is essential that an association does not primarily strive for monetary and financial benefits for its members. The ideal purpose always has to remain the main focus even if the association runs a commercial business. The difference between a commercial and a non-commercial purpose is not based on whether the association of persons operates a business or not (BGE 88 II 209 et seqq., 219). If an association operates a commercial business and achieves a gross revenue of at least CHF 100.000 per year (annual revenue), it is obligated to be entered into the commercial register (art. 61 para. 2 no. 1 ZGB, art. 36 para. 1 HRegV). If an association does not operate a commercial business, it is eligible for entry in the commercial register; in such case the entry is only a declaration but results in the association's publication and makes it subject to debt enforcement by bankruptcy or debt recovery from bill of exchanges. An association that is under a duty of audits must also be entered into the commercial register (art. 61 para. 2 no. 2 ZGB, see below IV. a. 3.2 *Association Audit*; Portmann 2005, p. 68 et seq.).

### *1.3 Formation of the association*

An association will become a legal person as soon as the desire to exist as a corporation is apparent in its articles of association (art. 60 para. 1 ZGB). The articles of association must be done in writing and indicate information about the purpose of the association, its resources and its organization (art. 60 para. 2 ZGB).

At least two natural and/or legal persons are required to form an association (Heini/Scherrer 2006, art. 60 ZGB N 30). Associations that have not yet obtained a legal personality are subject to the legal provisions applicable to the simple partnership (art. 530 et seqq. OR; art. 62 ZGB).

### *1.4 Organization*

Art. 63 ZGB contains provisions for the hierarchy of norms regarding the internal organization of an association and the relationship of members with the association. The mandatory legal norms have priority over the provisions contained in the articles of association. In addition, the resolutions adopted by the association are to be observed. If the association lacks relevant articles of association or resolutions, the non-mandatory, alterable legal norms apply.

The law requires association to have two organs: the general meeting as the supreme governing body (art. 64 para. 1 ZGB) and the association's committee (art. 69 ZGB). The articles of association may provide for additional or different organs, such as a secretary or a delegates' meeting in addition to or instead of the general meeting.

#### *i) General meeting of members*

The general meeting of members has supremacy over all other organs of the association. It adopts resolutions about the admission and exclusion of members, elects the committee and decides on all matters that are not assigned to other organs of the association (art. 65 ZGB). As the supreme governing body, the general meeting must decide on the formation and dissolution of the association and on any changes of the articles of association (Portmann 2005, p. 185 et seqq.).

The general meeting is to be convened according to the provisions set forth in the articles of association and, if a fifth of the members demand that the meeting be convened, as provided by law (art. 64 ZGB). The due convening of the general meeting (art. 64 para. 2 and 3 ZGB) and sufficient notice about the agenda items (art. 67 para. 3 ZGB) are required for a resolution to be effective. These requirements may be waived if all members are either present or represented (universal meeting). Further, the general meeting may be replaced by a delegates' meeting. In this case, the voting rights of the members is delegated to a smaller number of members.

#### *ii) Committee*

Unless the articles of association provide otherwise, the committee consists of one or several persons and is elected by the general meeting (art. 65 para. 1 ZGB). External third parties may also be elected as members of the committee (BGE 73 II 1) unless explicitly prohibited in the articles of association. It is controversial whether or not legal persons can be appointed as members of the committee (Heini/Scherrer, 2006, art. 69 ZGB N 7 et seqq.). The committee convenes and prepares the general meeting and is responsible for the management and representation of the association (art. 69 ZGB).

### 1.5 Membership

#### i) Beginning and termination of membership

One may become a member of an association either by participating in the formation and approving the articles of association or, at a later date, by being formally accepted via membership application (art. 70 para. 1 ZGB; BGE 108 II 9 et seq.).

The law provides that the membership may be resigned subject to a six-month notice expiring at the end of a calendar year or, in case of an administration period, at the end of such period (art. 70 para. 2 ZGB). According to the practice adopted by the Federal Court, membership may be terminated immediately for due cause (BGE 129 III 428, 434).

The articles of association may specify reasons of exclusion, but they can also allow exclusions without reasons being given (art. 72 para. 1 ZGB). If the articles of association do not contain a regulation pertaining to exclusions, the non-mandatory, alterable provision as set forth in art. 72 para. 3 ZGB applies, according to which a person may only be excluded based on a resolution by the members and compelling reasons.

#### ii) Rights and duties in connection with membership

The articles of association impose duties on the members. As a basic principle, a difference is made between personal and proprietary duties. As recognized by doctrine and in practice, the main personal duty of the members of an association is the general duty of allegiance, according to which members must desist from any actions having a harmful impact to the association's interests.

The main proprietary duty of members is the payment of contributions as specified in the articles of association (art. 71 ZGB). Art. 71 ZGB was revised effective 1 June 2005 and provides that contributions may only be demanded from the members of an association if the articles of association contain such a stipulation, and the newly added art. 75a ZGB provides that an association's liability to pay debts is limited to its assets unless provided otherwise in the articles of association (Riemer 2005, p. 52; cf. previous legal situation BGE 5P.292/2002 and BGE 133 III 105 regarding the transitional law [*Übergangsrecht*]).

### 1.6 Dissolution and merger

Pursuant to art. 76 ZGB, an association may be dissolved at any time by resolution of its members. The association is dissolved by operation of law if it is insolvent or if a committee can no longer be appointed in accordance with the articles of association (art. 77 ZGB). Where the purpose of the association is unlawful or immoral, the competent authority or an interested party can apply for a court order of dissolution (art. 78 ZGB; BGE 63 I 281).

On dissolution, the Law of Associations does not contain any specific provisions concerning the distribution of assets and liquidation. Thus, the general art. 57 and 58 ZGB apply which refer i.a. to the liquidation regulations set forth for cooperatives (art. 913 OR).



Based on the Swiss Merger Act (FusG), dated 3 October 2003 and effective 1 July 2004, associations are allowed to merge. Both forms, the absorption and the combination are permitted (art. 3 FusG). If the association has not been entered into the commercial register, it may only merge with other associations (art. 4 para. 4 FusG). Associations that have been entered into the commercial register may also merge with corporations [*Kapitalgesellschaften*] and cooperatives [*Genossenschaften*] as transferring companies, and with cooperatives without capital as absorbing companies (Frey 2003, p. 29; art. 54 para. 2 FusG). The supreme managing organs conclude the merger agreement in writing which is then subject to approval by a general meeting of the involved entities (art. 12 FusG), whereat at least three quarters of the ‘members’ of the involved associations who are present at the general meeting must approve the merger (art. 18 para 1 lit. e FusG).

## 2. Foundation [*Stiftung*]

Due to its favorable legal and fiscal conditions, Switzerland is often referred to as a “paradise” for foundations. Certainly, the total number of foundations in Switzerland cannot be determined because family and ecclesiastical foundations are not required to be entered into the commercial register. In addition, the number of dependent foundations is not known because they are neither obligated nor eligible to be entered into the commercial register. With reference to the 18,641 registered foundations that had been entered into the commercial register as of 1 January 2007 (Grüniger, 2008, succession, S. 56), a difference has to be made whether these foundations are nonprofit or for-profit organizations. To the exclusion of the foundations concerning staff welfare schemes (see below, II. b. 2.1 *Foundation: Legal Basis and Types*), about 12,000 “conventional/ordinary” foundations remain that are nonprofit foundations (Wagner 2007, p. 43 et seq.).

### 2.1 *Legal basis and types*

The provisions set forth in the ZGB are based on the “conventional/ordinary” foundation which, by being entered into the commercial register, achieves the right of personality, is monitored by the state, and is not subject to any comprehensive special laws (art. 80-89<sup>bis</sup> ZGB). In addition, there are special forms, including ecclesiastical foundations (art. 87 ZGB) and foundations concerning staff welfare schemes (art. 89<sup>bis</sup> ZGB, art. 331, 331 a-f, 361, 362, 673, 674 para. 3 OR), which are subject to certain special regulations. The foundations concerning staff welfare schemes (“pension funds”) offer security to employees of private employers. They are of great practical significance for the financial security of employees and are an addition to the basic state insurances for retirement provisions (AHV, *Alters- und Hinterlassenenversicherung = old-age and survivors insurance*) and disability (IV, *Invalidenversicherung = disability insurance*).

The family foundation (art. 335 ZGB) is a special case to accentuate: it is a foundation for private purposes that is not required to be entered into the commercial register and is not subject to state supervision. Pursuant to art. 335 para. 1 ZGB, this type of foundation may only be established to defray the costs of educating, endowing or supporting family members or for similar purposes, but it is not permitted to be established for purposes of mere financial alimony or a fortiori not for luxury. This is based on the prohibition of setting up entailed family estates [*Familienfideikomisse*] pursuant to art. 335 para. 2 ZGB.

Also common in Switzerland are company affiliated foundations (corporate foundations) [*unternehmensverbundene Stiftungen (Unternehmensstiftungen)*] that are not regulated or even mentioned in

the Swiss Law dealing with foundations. ‘Direct supporting foundations’ [*Direktragerstiftungen*] (foundations as direct supporters of “social service companies,” such as hospitals, schools or homes of any kind [e.g. nursing or foster homes]), have always existed, and over the past few decades, holding foundations (foundations which have a significant share in a corporation (stock company [*Aktiengesellschaft*]) that operates a commercial business) have also become common. The legitimacy of corporate foundations is controversial if they pursue an economic purpose (Riemer 2001, p. 517). But in its landmark decision in 2001, the Federal Supreme Court approved the legitimacy of company foundations pursuing an economic purpose (BGE 127 II 337 et seq.; Jakob 2006, p. 57 et seq.).

There is a difference between those independent foundations having their own legal personality and the so-called dependent foundations. A dependent foundation is not a legal person but comprises special funds transferred by the founder that are permanently linked to a specific purpose (Jakob 2006, p. 81). The special funds are usually a gratuitous grant (donation, legacy/heritage, bequest) and can be held in a trust or may be administered subject to certain provisions. However the dependent foundation is to be construed (“trust model” or “donation subject to certain conditions”), its main characteristics are its separate funds with a special purpose that are linked to a third person. In this regard, the Swiss Private Law does not provide for any specific norms. One has to refer to the relevant right in rem (law pertaining to gifts, inheritance law) to answer any legal questions; if there are gaps in the relevant law, the Law on Foundations as defined in the ZGB might be applied analogously (Riemer 2001, p. 511). The national Swiss law has not yet implemented the trust. 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.

Finally, public law foundations have to be mentioned. They are subject to the Public Law, pursuant to art. 59 para. 1 ZGB. In most cases, a public law foundation has been established based on an individual law (Schmid 2001, p. 277).

## 2.2 Definition of the foundation

### i) General

The foundation is not legally defined in art. 80 et seqq. ZGB. Art. 80 ZGB provides that the formation of a foundation requires assets being dedicated to a special purpose. Thus, the foundation is an independent pool of assets that has a legal personality and is dedicated to a special purpose (Hausheer/Aebi-Muller 2008, p. 346). The term foundation therefore includes the following parts (Jakob 2006, p. 38 et seq.):

- intention of formation
- purpose
- assets
- organization (which can be caught up at a later date).

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

### ii) Purpose

The founder is generally free to determine the purpose of the foundation (so-called freedom of foundation). Of course, general legal restrictions are to be observed when determining the purpose; in particular, the purpose may not be in violation of objectively mandatory laws or fundamental moral views (Grüniger, 2006, BSK, art. 80 ZGB N 14). The foundation may have a public benefit or a private purpose but cannot be of a self-serving nature (no “foundation for the founder”, no “self-purpose foundation”). Political purposes are allowed within the general restrictions.

### iii) Assets

The law does not regulate the nature of dedicated assets. Properties, cash, intellectual properties (*Immaterialgüter*), securities or receivables, including receivables from the founder, are possible (BGE 99 II 261 et seq.). A preceding transfer is not required, the existence of an obligation pertaining to the Law of Obligations is a sufficient reason to affirm the transfer of the relevant assets.

The value of the assets which are to be endowed can be pretty freely determined. However, the foundation has to have sufficient assets to fulfill its intended purpose. According to the practice adopted by the Federal Foundation Supervisory Authority [*Eidgenössische Stiftungsaufsicht*], the initial capital must be at least CHF 50,000 which, strictly speaking, contradicts the freedom of foundation. If the foundation has been established with a smaller capital amount, the founder has to prove that, additionally, sufficient funds are expected to be received after the formation. If the foundation’s assets are in fact insufficient in relation to its purpose, art. 83d para. 2 ZGB applies (analogously), according to which the insufficient assets are to be transferred to another foundation pursuing a similar purpose.

## 2.3 Formation

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

The actual foundation transaction, the act of dedicating, is a one-sided legal transaction that does not require an acknowledgement. The desired legal effect is achieved by the mere declaration of intent made by the founder. The foundation deed requires the following information (Hausheer/Aebi-Müller 2008, p. 349):

1. the intention to form an independent foundation;
2. the identification of the assets to be dedicated to the foundation;
3. the description of the foundation’s purpose.

For the rest, the founder may set up and organize the foundation virtually at his or her own discretion. It is possible to form a foundation in a legal transaction *inter vivos* (art. 81 para. 1 ZGB) or by disposition *mortis*

causa (art. 81 para. 1 in connection with art. 493 para. 1 ZGB). Since the revision of the Law on Foundations of 8 October 2004 (AS 2005, p. 4545), it is licit, contrary to the previous judgment of the Federal Supreme Court (BGE 96 II 273), to establish a foundation by way of a contract of inheritance and not only by way of a last will.

#### 2.4 Organization

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

The governing body responsible for management confers rights to the foundation and binds the foundation by concluding transactions according to art. 55 ZGB. It may consist of one or several natural or legal persons and is often referred to as a foundation council [board of trustees / *Stiftungsrat*], foundation board of directors [*Stiftungsvorstand*], foundation commission [*Stiftungskommission*] or curatorship [*Kuratorium*] (Hausheer/Aebi-Müller 2008, p. 353).

Art. 83a ZGB provides that all foundations are generally obligated to keep records. Pursuant to art. 83b ZGB, foundations are further obligated to appoint external auditors (cf. below IV. a. 4.2 *Foundation Audit*). Additional organs are optional, such as controlling organs or internal supervisory organs. Further, the management may be split/bipartite, for instance, a committee may be established apart from the executive board (BGE 120 II 137 et seq., 141).

Future organizational changes are permitted exceptionally pursuant to art. 85 ZGB if the reorganization is indispensable in order to preserve the assets or to protect the foundation's purpose (cf. II. b. 2.6 *Foundation Change of Purpose or Reorganization*) for the regulations pertaining to changes.

#### 2.5 Supervision

Foundations, as the only legal persons under the Federal Private Law, are subject to supervision by a state authority (art. 84 para. 1 ZGB). The supervisory authority has to monitor the foundation to ensure that its purpose is fulfilled, the founder's will is complied with and that the foundation organs do not make any decisions that are in contradiction to the foundation deed or the stipulated regulations and/or that are illegal or immoral. The supervisory authority is entitled to give instructions that are binding for the foundation organs and has the right to sanction the foundations if they fail to follow the instructions (BGE 108 II 497, 499). The legal relationship between the foundation and the supervisory authority is subject to the Public Law because the state acts in its sovereign capacity (Schmid 2001, p. 283). With reference to the jurisdiction, foundations are subject to the supervision of the community "that they belong to according to their purpose," pursuant to art. 84 para. 1 ZGB. Therefore, the foundation's purpose and the areal extent of its activities are essential: concretely, the state community that would have to assume the foundation's responsibilities if the foundation did not exist, has jurisdiction (BGE 120 II 374).

If the foundation is important to all of Switzerland, the Confederation will be the supervisory authority. On this federal level, nonprofit foundations are supervised by the General Secretary of the Federal Department of the Interior (art. 3 para. 2 lit. a OV-EDI [*Organisationsverordnung für das Eidgenössische Departement des Innern = Organization Ordinance for the Federal Department of the Interior*]).

Pursuant to art. 84 para. 1<sup>bis</sup> ZGB, the cantons may subject foundations at the municipal level to supervision at the cantonal level. The internal cantonal jurisdiction of the supervisory authorities is regulated by the cantonal introductory laws to the ZGB. As an example, pursuant to § 34 para. 1 cipher 2 EG ZGB of the canton Zurich, the municipal council, is responsible for the supervision of foundations that according to their purpose are part of the municipality. Analog regulations apply to district and government councils' (§ 37 and § 44 para. 2 cipher 12 EG ZGB of the canton Zurich) supervision that falls into their area of jurisdiction.

Doctrine and legal practice make a difference between preventive (precautionary) and repressive (restoring) supervisory means. Preventive supervisory means are, for example, regulations pertaining to the investment of assets, the foundation organs' obligation to provide an annual report, and the submission of regulations and changes thereto. The repressive means aim to eliminate the consequences of mistakes made by the foundation organs; for example, reminders, warnings, reprimands, the revocation of a decision made by the foundation's organs, replacement of measures, fines, criminal complaint, and in serious cases even the removal of the foundation's organ (Schmid 2001, p. 284). However, the supervisory authority may not exercise discretionary control. In addition, the supervisory authority must always adhere to the principle of commensurability when implementing these supervisory means (Riemer 2002, p. 272).

In the event that the organization of the foundation is insufficient, art. 83d ZGB provides a special regulation: the supervisory authority has to take the necessary measures; in particular, it can set a time limit in which the foundation has to restore the legally required situation and it can appoint the body which is lacking or an administrator at the foundation's cost (art. 83d ZGB). In accordance with legal practice the board of trustees shall only be removed – which is considered the most drastic intervention – if the foundation council's actions with regard to the legal and foundation provisions are no longer acceptable, the purpose of the utilization of the foundation's assets is affected or even at risk and other, less drastic measures are not successful. Removal of the foundation council does not require that the council has acted with willful negligence (BGE 105 II 321, 326). Finally, the supervisory authority may reorganize the foundation (art. 85 ZGB) or change its purpose with the goal to promote the founder's actual intention (art. 86 ZGB, see II. b. 2.6).

### *2.6 Change of purpose and reorganization*

Foundations do not have a will in the legal sense, but it is rather the organs that have to represent the will of the founder according to the foundation deed. In practice, the problem often occurs that even a diligent founder cannot indefinitely anticipate the future. The actual conditions based on which the foundation has been established may change, and the provisions pertaining to the foundation's organization may become outdated (Riemer 2002, p. 274).

Therefore, changes of a foundation's organization are permitted as an exception pursuant to art. 85 ZGB provided that the reorganization is indispensable for the preservation of the assets or for the protection of the

purpose of the foundation. If the original purpose of the foundation has significantly or effectively changed and the foundation apparently does not represent the founder's will any longer, the purpose of the foundation may be adjusted according to the change of circumstances, pursuant to art. 86 ZGB. In both cases, a special federal or cantonal authority is competent to implement the change, as set forth in art. 85 and art. 86 para. 1 ZGB. While – with respect to changes to the organization – only the supervisory authority is allowed to request such changes of the organization and the highest organ's statements only have to be heard, the Federal Law dated 8 October 2004 now provides that the highest organ of the foundation may also request changes of the purpose of the foundation (Jakob 2005, p. 675).

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

### *2.7 Dissolution (revocation) and merger*

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

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

Recently, foundations received the right to merge and to transfer assets pursuant to art. 78-87 FusG, but they are not entitled to divisions and changes in their form of organization. A merger is permitted "if it is objectively justified and is particularly aimed at the protection and implementation of the purpose of the foundation" (art. 78 para. 2 FusG). The merger agreement is concluded by the highest organs 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 may also not alienate the purpose of the foundation or result in an avoidance of compliance with the requirements for a purpose change pursuant to art. 86 ZGB (art. 78 para. 2 FusG).

In addition to the merger, the transfer of assets from the foundation to another holder of rights (companies, foundations etc.) is possible (art. 86 and 87 FusG), whereat the above-mentioned provision of art. 78 para. 2 FusG applies accordingly.

### 3. Cooperative [*Genossenschaft*]

#### 3.1 Definition of the cooperative

The cooperative is a person-related corporation with an open-ended number of members. It primarily pursues the members' common economic purposes and may operate a commercial business (art. 828 para. 1 OR). Unless the articles of incorporation provide otherwise, the cooperative's liability is limited to its assets (art. 868 para. 1 OR; Meier-Hayoz/Forstmoser 2007, p. 609). Legislators assumed that, contrary to the stock company, the cooperative is to be based on a model that provides for a person-related concept. Art. 828 OR provides that the purpose of the cooperative should be pursued with the common efforts of its members, comparable to an association.

According to its legal definition, the cooperative has to pursue economic purposes. This is a difference to the association which is subject to art. 60 ZGB providing that an association has to be dedicated to a "non-economic task." Since the cooperative's pursuit of economic goals is only required to be the "main" function, it may expand its goals to non-economic and nonprofit tasks based on the direct economic interests of its members (Meier-Hayoz/Forstmoser 2007, p. 604 et seq.). A look into the Commercial Register Ordinance (art. 86 lit. b No. 2 HRegV) shows that cooperatives with exclusive nonprofit purposes are also to be permitted. According to the prevailing doctrine, this regulation is – contrary to the wording of art. 828 OR – legitimate. The law itself provides optionally for a nonprofit utilization of the cooperative's assets with regard to liquidation proceeds (art. 913 no. 4 OR).

In summary, the pursuit of nonprofit purposes in the form of a cooperative is possible and does not entail any disadvantages for members (who desire to pursue such purposes) nor for third parties (which are sufficiently protected by the provisions applicable to cooperatives, cf. art. 869 OR). However, over the past two decades, the "cooperative idea" has tended to stagnate. As a result, cooperatives have become less significant for the nonprofit sector as well (Wagner 2007, p. 43; Meier-Hayaz/Forstmoser 2007, p. 627).

#### 3.2 Formation

The formation requires the following three steps:

1. written articles of incorporation (art. 832, 833 OR);
2. a formation meeting (art. 834 OR);
3. the constitutive entry of the cooperative into the commercial register (art. 830, 835, 838 para. 1 OR).

#### 3.3 Organization

The law provides for three organs: the general meeting as the legislative organ, the management as the executive organ and the audit division as the controlling organ. With reference to the audit division, it is a new development that "the provisions under the Stock Company Law are accordingly applicable" (art. 906 para. 2 OR) to the cooperative; this is due to the standardization of audit regulations applicable to the different legal forms of organization. Subject to the approval of all members of a cooperative, it should be permitted to renounce the establishment of an audit division if the cooperative includes only a few employees (art. 727a

para. 2 OR analogously; Meier-Hayoz/Forstmoser 2007, p. 621, cf. below the section referring to the audit IV. a. 5.).

#### i) General meeting

The law considers the general meeting to be the highest organ (art. 879 para. 1 OR). Unless specified otherwise in the articles of association, the general meeting is responsible for legislative and voting functions, as it is the case for the stock company. Pursuant to art. 879 OR, the general meeting of a cooperative decides on fundamental questions and appoints the other two organs.

If a cooperative comprises more than 300 members or if the majority of its members are cooperatives themselves, the authorities of the general meeting may be entirely or partially transferred to a delegates' meeting (art. 892 OR). Subject to the same conditions, a cooperative may exercise the competences of the general meeting entirely or partially by a vote in writing (so-called ballot vote) (art. 880 OR). A combination of a delegates' meeting and a ballot vote is also permitted and can be frequently seen in large cooperatives.

#### ii) Management

Contrary to the provisions of the Stock Company Law, it is mandatory for a cooperative to have a management consisting of at least three members (art. 894 para. 1 OR). This is to confirm the personalistic-democratic structure in the executive.

Formation of administrative board committees and appointment of executive managers and directors are permitted (art. 897 et seq. OR). Contrary to the Stock Company Law, a list of nontransferable competences is lacking. However, the general obligation to provide for management leads to the conclusion that the area of responsibilities that may not be delegated is similar to that of a stock company (art. 716a OR). It is controversial whether delegates may assume management functions or if this would be in contradiction of the cooperative system (Meier-Hayoz/Forstmoser 2007, p. 619). Finally, it has to be noted that the majority of the executive board must be members of the cooperative (art. 894 para. 1 OR).

### 3.4 Dissolution and merger

Dissolution procedures are subject to similar regulations applicable to the termination of a stock company; in some instances the Stock Company Law even applies directly (cf. art. 913 para. 1 OR).

The articles of incorporation (art. 911 no. 1 OR) and a resolution adopted by the general meeting (art. 911 no. 2 OR) may cause a cooperative to be dissolved (so-called "regular reasons" for the dissolution). Two thirds of votes cast must approve of dissolution (art. 888 para. 2 OR). In addition to other cases provided by law (art. 911 no. 4 OR) and bankruptcy (art. 911 no. 3 OR), a dissolution for due cause, considered an extraordinary reason for the dissolution, is possible.

Reorganizations and mergers are subject to the Swiss Merger Act: Art. 53 FusG regulates the reorganization of companies which includes cooperatives as well, according to art. 2 lit. b FusG. Pursuant to art. 54 para. 4 FusG, a cooperative may be converted into a corporation; it may also be converted into an association provided that no shares have been issued and the association will be entered into the commercial register. A change into a



general or limited partnership [*Kollektiv-/Kommanditgesellschaft*] is not permitted (Rimle 2003, art. 54 margin no. 35). Due to the different legal position of a member of a cooperative compared to a shareholder of a corporation, the law provides that a takeover of a corporation by a cooperative is subject to the approval of all partners and/or stockholders (art. 18 para. 1 lit. b FusG) and that the merging cooperative requires the approval of two thirds of the cast votes (if the liability is extended, the approval of even three quarters of all members of the cooperative is required) (art. 18 para. 1 lit. d FusG). Art. 915 OR applies to the takeover by a public law corporation.

#### **4. Stock company [*Aktiengesellschaft (AG)*]**

A stock company is a company with its own company name whose capital (capital stock) is predetermined and divided into partial amounts (stocks) and whose liability is limited to the company's assets (art. 620 OR, Meier-Hayoz/Forstmoser 2007, p. 393). The stock company is the most important company form in Switzerland.

A stock company usually pursues commercial purposes. However, it may also be established for non-commercial, so-called ideal purposes (art. 620 para. 3 OR). In practice, however, stock companies that do not pursue any economic purposes can hardly be found. Due to the high number of regulations, the extensive management and strict accounting requirements under the Stock Company Law, as well as tax laws, an association or foundation is the preferred option to pursue noneconomic purposes (Baudenbacher 2002, BSK, Art. 620 OR N 1 et seqq.; Forstmoser et al. 1996, p. 22; Meier-Hayoz/Forstmoser 2007, p. 101).

Nonprofit organizations are generally incompatible with the free transferability of stocks. But this could be limited by restrictions imposed on the transferability turning the usually capital related stock company into a more person related organization.

#### **5. Limited liability company [*Gesellschaft mit beschränkter Haftung, GmbH*]**

Until 31 December 2007, the law provided that a limited liability company could only be established for economic purposes (art. 772 para. 3 old OR). This has since been changed due to the reform of the Law on Limited Liability Companies. The limited liability company is a person-related corporation with one or several persons or partnerships holding an interest. The company capital is stipulated in the articles. Its liability is limited to the company's assets (art. 772 para. 1 OR). It remains to be seen which role limited liability companies will fill in the nonprofit sector in the future.

### **III. TAX ASPECTS**

#### ***a) General information about the tax system***

In Switzerland, the Confederation, as well as the cantons and municipalities impose taxes on the income of natural persons and on the profit of legal persons. In addition, the cantons and municipalities impose property taxes on the property of natural persons and capital taxes on the capital of legal persons.

The tax regulations pertaining to the Nonprofit Law, which are set forth in the Federal Law pertaining to the direct federal taxes (*DBG*) and in the Federal Law pertaining to the harmonization of direct taxes of the cantons and municipalities (*StHG*), do not provide any details and require interpretation. Therefore, the Swiss Federal Tax Administration (*ESTV*) released a circular No. 12 on 8 July 1994 regarding the tax exemption of legal persons that pursue public, charitable or religious purposes and regarding the tax deductibility of donations. This circular essentially covers the practice that has been adopted by the Federal Court for many years with regard to tax exemption of nonprofit legal persons under the law of direct federal taxes, but it is non-binding for the tax authorities (Koller 2007, p. 443).

In addition, most cantons impose an inheritance and gift tax even though the Federal Law does not require them to impose such taxes. Several cantons that originally imposed these taxes have abolished them over the past few years in order to improve advantages of the location.

The Confederation has the exclusive competence to impose a value added tax (*MWStG*), as well as a withholding tax (*VStG*) and duties on emissions and revenues of certain securities (*StG = Stamp Duty Law*). Overall, the practice of the Nonprofit Tax Law is very important because the tax privileges of nonprofit organizations and the Donation and Contribution Law are only rudimentarily regulated (Koller 2007, p. 444).

## ***b) Status of an organization enjoying tax privileges***

### **1. General**

With reference to direct taxes, the same principles apply to both the direct profit of organizations by means of tax exemption and for the indirect profit of a donor making tax deductible contributions. If donations are made to a tax-exempt nonprofit organization, those may – up to a certain extent – be deducted from the donor's income or profit tax provided that the nonprofit organization has its registered office in Switzerland. On the other hand, nonprofit organizations with their registered offices abroad are entitled to direct privileges in the form of an exemption from profit taxes and capital taxes payable in the cantons. With regard to the latter, the legal situation corresponds to the legal practice adopted by the ECJ in the *STAUFFER* case (ECJ ruling of 14 September 2006, legal case C-386/04) where it was ruled that the exclusion of foreign corporations from tax privileges for nonprofit organizations, as provided under the German Corporate Tax Law, is in violation of the free movement of capital as set forth in art. 56 EC Treaty. This problem does not arise for indirect taxes (e.g. value added tax, inheritance and gift tax) (Koller 2007, p. 447).

### **2. Requirements for the tax exemption of legal persons**

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

## 2.1 Nonprofit purpose

### i) Direct taxes

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

In its circular No. 12 of the year 1994, the Federal Tax Administration defines the term “nonprofit” in more detail and provides that two cumulative requirements must be met: on one hand, promotion of the general public interest and on the other hand, disinterestedness.

The relevant public opinion determines if an activity is in the general public interest. Public benefit may be promoted by activities in charitable, humanitarian, health promoting, ecological, educational, scientific and cultural areas (circular No. 12 No. II. 3. a)). Circular No. 12 names the examples social care, art and science, education, the promotion of human rights, the protection of the environment, homeland and animals, as well as development assistance. Public benefit is determined by the overall opinion of society (BGE 114 Ib 277, 279). Further, circular No. 12 demands an open circle of recipients and states that the restriction to one family, the members of an association or certain professionals is too limited (circular No. 12 No. II. 3. a)).

An activity is considered disinterested if it is not linked to the legal person’s own economic or personal interests or those of its members or close persons (BGE 114 Ib 277). Based on the rulings adopted by the Federal Court, a nonprofit organization and its employees have to make sacrifices in the public’s best interest (BGE 113 Ib 7, 9 et seq.). In general, there is a lack of disinterestedness when a business purpose is pursued unless such activity is subordinate to the nonprofit purpose. The operation of a business may only have a supporting function; further, it may not represent the sole economic basis of the legal person (BGE in ASA vol. 19, p. 328 et seqq.). In the event that essential capital contributions are made to companies, the nonprofit purpose must prevail over the maintenance of a company; this presumes that the organization is supported by substantial funding from its company and that these funds are actually used for nonprofit activities (Koller 2007, p. 453 et seq.; circular No. 12 No. II. 3. c)).

The general public interest is not limited to domestic activities. A legal person that is not active in Switzerland but in another country or worldwide may also be exempted from taxes, provided that its activities are in the general public interest and that they are disinterested. The actual implementation of such purposes must be proven with proper records, e.g. annual report, annual financial statements (circular No. 12 No. II. 3. a)). Legal persons with their registered office located abroad are exempted from taxes if they would be subject to taxes in Switzerland based on an economic connection, e.g. as a real estate owner (Koller 2007, p. 455).

### ii) Value added tax

Basically, the rules applicable to the direct federal taxes also apply to the Value Added Tax Law: only legal persons who waive distributions of the net profit to members, partners and organs may be recognized as

nonprofit organizations (art. 33a para. 4 lit. a-d MWStG; Boschung/Reding 2006, S. 784, Jakob 2005, S 677). Nonprofit organizations that achieve an annual revenue of up to CHF 150,000 are exempted from the subjective obligation to pay taxes (art. 25 para. 1 lit. d MWStG). In addition, certain revenues of nonprofit organizations are also exempted from the objective obligation to pay taxes (art. 18 no. 8, no. 10, no. 12 and no. 17 MWStG).

### iii) Inheritance and gift taxes

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

### iv) Property gains tax

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

## 2.2 Public purpose

Apart from a tax exemption for nonprofit purposes, the DBG and the StHG also provide for a tax exemption for legal persons who pursue public purposes. According to circular No. 12, these public purposes may include only a limited category of tasks which – contrary to the nonprofit purposes – have to be very similar to state responsibilities and do not require any sacrificing (circular No. 12 No. II. 4.; cf. also Koller, p. 454 et seq.).

The term “public purpose” is interpreted restrictively. Although the existence of political parties is in the interest of a functioning democracy, a party itself does not pursue a public purpose, but the party’s interests represent the interests of its members. Thus, a political party is not considered an organization eligible to receive the tax-exempt status (circular No. 12 No. II. 4.; Scherrer/Greter 2007, p. 33).

## 2.3 Legal person

In most instances, legal persons are subject to taxation (art. 49 lit. a and b DBG). Based on personal affiliation, this applies if their registered office or their actual management 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 a resolution based on them. At the principal fiscal domicile, the legal person has unlimited tax liability for any income and property which is not subject to taxation in another fiscal domicile due to a special statutory or state contractual assignment norm (Scherrer/Greter 2007, p. 40).

The exemption from such tax liability is set forth in art. 56 DBG. Art. 56 lit. g DBG provides that the person who pursues nonprofit activities has to be a legal person. Natural persons may not demand tax exemption for assets reserved for nonprofit purposes even if they guarantee that these assets will not be used for any other purposes at a later date (Koller 2007, p. 447). Legal persons who dedicate only a portion of their funds exclusively and irrevocably to 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 funds that are to be made eligible for tax exemption from other assets and income (circular No. 12 No. II. 5.; so-called “Spartenrechnung”).

Some specifics apply to the different legal forms of organizations.

i) Association, stock company, company with limited liability and cooperative

Theoretically, any legal person may qualify for nonprofit status, but some legal forms face problems due to their provisions under the Civil Law. For example, strictly speaking, the association (in contrast to the foundation) is not able to fulfill the requirement that funds are to be irrevocably linked to nonprofit purposes because the Swiss Law on Associations does not provide for relevant options. First, a regulation contained in the articles of association resp. of incorporation which is referred to as irrevocable may be cancelled or changed by an unanimous resolution at any time. Secondly, the association lacks a supervisory authority which could monitor irrevocability. Finally, regulations pertaining to irrevocability are subject to the freedom to form articles of association and the association's autonomy (Koller 2008, p. 353 et seqq.; Jakob 2008, p. 48 et seq.). The stock company, the limited liability company and the cooperative face similar problems.

The Federal Tax Administration maintains that not only associations but also stock companies that pursue a nonprofit purpose may enjoy a tax exemption. According to circular No. 12 No. II. 2. a), the stock company's articles of incorporation must provide that the stock company waives the distribution of dividends and royalties. In addition, it has to be ensured that if the stock company is dissolved, its assets will be transferred to another tax-exempt corporation pursuing similar purposes (circular No. 12 No. II. 2. c)).

ii) Foundation

Foundations, too, must "pursue public or nonprofit purposes" (art. 56 lit. g sentence 1 DBG) in order to enjoy tax privileges. This is why family foundations are not exempt from tax liabilities, contrary to ecclesiastical foundations (art. 56 lit. h DBG, art. 23 para. 1 lit. g StHG) and foundations concerning staff welfare schemes (art. 56 lit. e DBG, art. 23 para. 1 lit. d StHG). Corporate foundations are considered nonprofit provided that the interest in maintaining the company serves a nonprofit purpose and no management activities are carried out (art. 56 lit. g sentence 2 and 3 DBG, art. 23 para. 1 lit. f sentence 2 and 3 StHG).

### 3. Excursus: pursuit of religious purposes

Apart from public and nonprofit purposes, the pursuit of religious purposes qualifies for exemption from taxes (art. 23 para. 1 lit. g StHG; art. 56 lit. h DBG). The pursuit of religious purposes does not require that the activities are selfless and disinterested (Scherrer/Greter 2007, p. 38 et seq.). The term "religious purpose" is not legally defined but can be derived from the statutory freedom of religion and conscience set forth in art. 15 para. 1 BV. The Federal Court's rulings with regard to the definition of the term can only be referred to on a casuistic basis (BGE 107 Ia 126, 130). According to the circular (circular No. 12 No. III. 2.), a legal person is considered to pursue religious purposes that are eligible for tax privileges if it maintains and promotes a common belief, irrespective of confession or religion, in education and church services in Switzerland.

### **c) Taxation of organizations eligible for tax privileges**

#### **1. General**

As seen, nonprofit organizations 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, the so-called ideal revenues dedicated to nonprofit purposes (e.g. donations) are not subject to taxes. This may lead to accrual and deferral problems.

#### **2. Questions regarding accruals and deferrals**

In particular, the question arises how the income from membership fees (2.1), asset management (2.2) and special purpose businesses and commercial businesses (2.3) are to be taxed.

##### *2.1 Membership contributions*

Associations, like all legal persons, are exempted from paying taxes for profits that are exclusively and irrevocably dedicated to public or nonprofit purposes (art. 56 lit. g DBG). However, membership contributions payable to the associations are not considered a taxable profit according to art. 66 para. 1 DBG. The same may apply to revenue-dependent fees that are demanded from the members of the association and that do not provide for any services in return, do not promote the personal interests of the individual members, and are payable by all obligors (Jakob 2008, p. 33; BGer of 13 June 2007, 2A.692/2005). Likewise, contributions made to the assets of foundations are not considered a taxable profit either (art. 66 para. 1 DBG).

##### *2.2 Asset management*

Nonprofit organizations do not have to pay profit taxes for capital interest, dividend income etc. On the other hand, income from capital shares in companies is only exempted from taxes if the organization's interest in maintaining the company serves a nonprofit purpose (circular No. 12 No. II. 3. c)).

##### *2.3 Special purpose business and commercial business*

A special purpose business is an entity that carries out economic activities that are indispensable for the realization of the organization's purpose (e.g. an educational home maintains a training workshop). In this case, the profits made from special purpose businesses are exempted from taxes. Supporting businesses that are clearly subordinate to the nonprofit purpose are permitted (e.g. kiosk at a museum). The same basically applies to other commercial businesses: profit-making activities do not harm the nonprofit principle as long as they are subordinate to the overall organizational activities (Koller 2007, p. 464 et seq.).

#### **3. Excursus: Stamp Duty Law**

In practice, the Stamp Duty Law is mainly important for cooperatives. A so-called emission duty is imposed on the preservation or increase of the nominal value (against payment or cost-free) of ownership rights in form of shares in a cooperative, stocks, contributions in limited liability companies etc. (art. 5 para. 1 lit. a StG).

## **d) Taxation of the founder and the donor**

### **1. Deductions for voluntary contributions**

#### *1.1 Voluntary contributions (donations)*

“Donations” within the meaning of the tax law are voluntary contributions of money and other asset values to legal persons having their registered office in Switzerland and who 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 in this term.

#### *1.2 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). Art. 33a DBG, which has been in force as of 1 January 2006, also includes the above-mentioned voluntary contributions. Monetary contributions, as well as contributions in kind of CHF 100.00 or more per fiscal year made by natural persons are deductible from the income, whereas the maximum deductible is 20% of the taxable income decreased by certain expenditures (art. 26 – 33 DBG resp. art. 33a DBG). However, membership contributions paid to associations are not included in the list and are therefore considered non-deductible living expenses in terms of art. 34 lit. a DBG. Since an association is entitled to receive membership contributions as defined in the articles of association, their payment is not considered a voluntary contribution under Civil Law which would be deductible according to art. 9 para. 2 lit. i StHG and/or art. 33a DBG – even if it is an association that is exempted from taxes due to its benefit to the public or its pursuit of a public purpose (circular No. 12, No. IV. 1. a); Scherrer/Greter 2007, p. 89).

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

#### *1.3 Legal persons*

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

### **2. Special topics**

#### *2.1 Differentiation between donation and sponsorship*

Contrary to donations, sponsorships serve advertising purposes. They are meant to maintain a company’s public reputation and create a contrary picture to the commercially oriented business (BGE 115 Ib 111, 118). Therefore, sponsorships are not tax deductible according to art. 33a DBG. In some cases, it can be difficult to make the differentiation. It is worth looking at the Value Added Tax Law which differentiates between donation and sponsorship as follows:

The value added tax applies to tax payers' revenues that are acquired through items supplied and services rendered within the country unless such revenues are explicitly exempted from the value added tax (art. 5 in connection with art. 18 MWSTG). The so-called exchange relationship of services and obligations is the core of the taxable object. A characteristic is the internal economic connection. The service is rendered in exchange for a certain consideration (Boschung/Reding 2006, p. 783). As a result, it is considered a sponsorship within the meaning of the Value Added Tax Law if the recipient receives services in return for a consideration (BGE 126 II 443, 459), while a donation is the provision of money or non-cash benefits without receiving any consideration in return. Donations are so-called non-revenues which are not subject to the value added tax (Boschung/Reding 2006, p. 873).

When differentiating between charitable donations and taxable sponsorships, art. 33a MWSTG has to be considered which is effective from 1 January 2006. This article provides that it does not represent a consideration when nonprofit organizations state the name of a contributor in a neutral manner or merely use the logo or original name once or several times in a publication of their choice (art. 33a MWSTG). On the other hand, advertising services, such as advertisements, bill board and perimeter advertising, advertising on sports uniforms, the mentioning of the sponsor in a newsletter or association magazine, loudspeaker announcements including the name and the professional, industrial or commercial activities of the sponsor, represent considerations (Koller 2007, p. 468; Jakob 2005, p. 676).

### *2.2 Deductibility of donations to political parties*

Pursuant to art. 33a para. 1 DBG, voluntary contributions made to legal persons are also exempted from the federal tax if the receiving organizations pursue public purposes. This could be important for donations made to political parties. However, according to the prevailing doctrine, the pursuit of political party interests does not constitute a public purpose (circular No. 12 No. II. 4.; cf. above III. b. 2.2). At present, according to the federal regulations, donations made to political parties may therefore not be deducted and a deduction would infringe the StHG – although cantonal practice is partially divergent (BGE from the 7 June 2007, 2.A.647/2005). This could be amended soon.

### *2.3 Deductibility of donations made abroad*

The law clearly provides that the receiving organization 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 organizations that have their registered office abroad are not deductible from direct taxes.

Unlike the tax allowances applicable to nonprofit organizations that – as seen above (cf. III. b. 1.) – do not require an organization's registered office to be located in Switzerland, this regulation's compliance with the European law is questionable in view of the ECJ ruling in the STAUFFER case (ECJ ruling of 14 September 2006, legal case C-386/04) and the PERSCHE case (request for preliminary ruling of 11 July 2007, legal case C-318/07, ruling still pending). Yet, there is no direct impact for Switzerland as it is not a member of the EU.



### ***e) Procedure***

Apart from a taxation procedure, a nonprofit organization may demand that a general tax exemption ordinance be issued (Koller 2007, p. 473). The tax authority may review this ordinance at any time.

It is therefore in the tax authorities' discretion to check if an organization meets the necessary material requirements for a tax exemption. Foundations are also subject to supervision through the community (Confederation, cantons, municipalities) that they belong to according to their purpose (art. 84 para 1 ZGB). However, the competent supervisory authority does not decide on the question of whether a foundation may be exempted from taxes based on its nonprofit status and does not monitor a foundation's fulfillment of the requirements.

## **IV. OBLIGATION TO CONDUCT AUDITS AND LIABILITY**

### ***a) Audit***

#### **1. General**

The regulations pertaining to the audit division are essentially covered by the Stock Company Law and the new Audit Admission and Oversight Law (RAG, BG of 16 December 2005). The RAG implements an admission procedure that is to be followed by all natural persons and auditing agencies that wish to provide auditing services. The supervisory authority checks if the applicant meets the statutory requirements (art. 2 lit. a and art. 3 et seqq. RAG).

The material auditing norms are set forth in the section of the Code of Obligations pertaining to regulations referring to stock companies. These regulations also apply to all other company forms that require an audit division. Therefore, the following will first demonstrate the auditing regulations set forth in the Stock Company Law. The new regulations of the Auditing Law, together with the reform of the Limited Liability Company Law, became effective on 1 January 2008. The audit is connected to the obligation to keep proper records which will briefly be explained in the following.

#### **2. Stock company**

##### ***2.1 Accounting***

A company's accounting is to ensure accountability for completed transactions (annual financial statements) and to provide a basis for future economic decisions.

Pursuant to art. 957 OR, the obligation to keep records applies to those who "are obligated to enter their company into the commercial register." Persons who own a commercial enterprise are always obligated to enter their company into the commercial register and are thus required to keep records (cf. art. 934 OR).

This obligation means that records are to be kept that continuously record any business transactions (art. 957 OR). In addition, art. 958 para. 1 OR provides for the obligation to prepare financial statements, the obligation to prepare profit and loss accounts, and the obligation to prepare inventories. These documents constitute documents under the Criminal Code. A person who creates a misleading picture by making false entries or omitting facts that must be reported is guilty of providing false certification (art. 251 no. 1 StGB = *Swiss Penal Code*; BGE 129 IV 130).

The development of accounting procedures today is based primarily on international regulations which are elaborated by international professional committees. In Switzerland, two standards are important: the “International Financial Reporting Standards” (IFRS) and the “Generally Accepted Accounting Principles” (US GAAP).

## 2.2 Audit

The revised law introduced two new audit forms, the official and the limited audit, which are adjusted to different auditing requirements. Annual financial statements of publicly owned companies and economically significant companies are subject to the official audit (art. 727 para. 1 OR). Small and medium sized companies are only subject to the limited audit (art. 727a para. 1 OR), while very small companies are not required to be audited provided that all partners approve (art. 727a para. 2 OR, Lengauer/Holderegger/Amstutz, p. 6).

### i) Official audit

The official audit (art. 727 OR) is mandatory for:

- publicly owned companies (companies that have stocks listed on a stock exchange, that gave out bonds or that contribute at least 20% to assets or revenue shown in the loss and profit account of a company admitted to official quotation).
- medium sized and large companies (companies that exceed two of the following parameters in two consecutive business years: total assets of CHF 10 million; revenue of CHF 20 million or an annual average of 50 full-time employees).

An official audit must also be conducted if it is demanded by stockholders who together represent at least 10% of the capital stock (art. 727 para. 2 OR). If the law does not provide for an official audit of the annual financial statements, an official audit may be provided for in the articles of incorporation or by resolutions adopted by the general meeting. (art. 727 para. 3 OR).

In the official audit, the audit division checks (art. 728a OR) if:

- the annual financial statements and the loss and profit account, if applicable, are in compliance with the statutory regulations, the articles of incorporation and the adopted regulations;
- the request submitted to the general meeting by the administrative board with regard to the utilization of the profit shown in the balance is in compliance with the statutory regulations and the articles of incorporation;
- an internal control system exists.

After the audit is completed, the audit division provides a comprehensive report to the administrative board, including details pertaining to the accounting, the internal control system and its implementation, and the audit results (art. 728b para. 1 OR). The audit division also provides a written summary about the audit results to the general meeting (art. 728b para. 2 OR).

If the audit division finds violations against the law, the articles of incorporation or the organization's regulations, it will submit a written report pertaining to such violations to the administrative board (art. 728c para. 1 OR). In case of significant violations or if the administrative board does not take appropriate measures, the audit division will also inform the general meeting (art. 728c para. 2 OR). If the company is obviously over-indebted and the administrative board fails to file a report, the audit division will inform the court (art. 728c para. 3 OR).

Art. 728 para. 2 OR includes a partial list of facts that are incompatible with the activities of the audit division. According to these regulations pertaining to incompatibility, the auditor may not actually be or appear to be affected; in particular, no interdependence between the auditors or the head of the audit division and the stock company or the organs is permitted.

#### ii) Limited audit

If the conditions for an official audit do not apply, the company's annual financial statements are subject to a limited audit (art. 727a OR).

In a limited audit, the audit division checks if circumstances exist that indicate that the annual financial statements are not in compliance with the statutory regulations and the articles of incorporation or that the request submitted to the general meeting by the administrative board with regard to the utilization of the profit shown in the balance is not in compliance with the statutory regulations and the articles of incorporation (art. 729a para. 1 OR). The audit is limited to questions, analyses and adequate reviews of details (art. 729a para. 2 OR). After the audit is completed, the audit division provides a written summary about the audit results to the general meeting (art. 729b para. 1 OR). If the company is obviously over-indebted and the administrative board fails to file a report, the audit division will inform the court (art. 729c OR).

Provided that all stockholders approve, no audit is required if the company does not exceed an annual average of ten full-time employees (art. 727a para. 2 OR).

#### iii) Liability of the audit division

The audit division that reviews the annual financial statements and the loss and profit account is liable towards the company, the individual stockholders and the company's creditors for damages that were caused through its willful or negligent breach of duty (art. 755 OR). Due to the new auditing duties, it is to be reviewed if the breach of duty occurred in connection with an official or a limited audit. It remains to be seen how far the legislators will be able to consider the difference in the scope and depth of each audit form when judging breach of duty.

### 3. Association

#### 3.1 Accounting

All associations are obligated to keep records about income, expenses and assets (art. 69a ZGB). Associations that are required to be registered (art. 61 para. 2 ZGB) are subject to business accounting regulations (art. 957 et seqq. OR). The accounting is the basis for a voluntary or statutory (art. 69b ZGB) audit of annual financial statements.

##### i) Audit

Associations are subject to an official audit of their accounting to be conducted by an audit division if they exceed at least two of the following parameters in two consecutive business years: total assets of CHF 10 million; revenue of CHF 20 million; annual average of 50 full-time employees (art. 69b para. 1 ZGB).

Pursuant to art. 69b para. 2 ZGB, an association is subject to a limited audit of its accounting to be conducted by an audit division if a member of the association that is personally liable or obligated to make additional contributions to the capital demands that such an audit be conducted. This right of *opting-in* of the association members who are liable or obligated to make additional contributions to the capital is justified by the risk that they bear when they assume liability or accept the obligation to make additional contributions to the capital. On the other hand, this regulation provides that regardless of any existing liability or obligations to make additional contributions to the capital, no audit division is required if the liable persons themselves are members of the committee or the executive board (Jakob 2008, p. 10).

All other associations – in fact probably the majority of them – are not subject to audits.

### 4. Foundation

#### 4.1 Accounting

The highest organ of the foundation has to keep business records in accordance with the regulations pertaining to business accounting as set forth in the Code of Obligations (art. 83a para. 1 ZGB). If a foundation operates a commercial business to fulfill its purpose, the regulations set forth in the Code of Obligations with regard to the accounting and disclosure of the annual financial statements of stock companies will apply accordingly (art. 83a para. 2 ZGB). Regulation is justified by the fact that if a commercial business is operated, the beneficiaries, creditors and donors have an increased interest to see how the income is utilized (Jakob 2008, p. 62).

The accounting regulations as set forth in art. 958 et seqq. OR apply. However, they are the object of a new auditing procedure that could result in a material change of the Foundation Law: Art. 83a E-ZGB [*ZGB in its amended version*] in connection with art. 957 para. 2 E-OR [*Code of Obligations in its amended version*] provides that foundations that are not required to be entered into the commercial register are only required to keep records about their income, expenses and assets – a relaxed provision that is not included in the currently applicable art. 83a ZGB (Message Regarding the Amendment of the Code of Obligations; BBl [*Bundesblatt = Federal Journal*] 2008 1589, 1738 et seqq.).

#### 4.2 Audit

The new art. 83b ZGB provides for the general obligation to appoint an audit division. This obligation to conduct audits is subject to exceptions: exempted are family and ecclesiastical foundations (art. 87 para. 1<sup>bis</sup> ZGB) and individual foundations that are exempted by the supervisory authority according to art. 83b para. 2 ZGB and an ordinance based upon this provision (*opting-out*) because they have minor assets (total assets are below CHF 200,000 in two consecutive business years) and do not publicly ask for donations. However, the exemption from the obligation to conduct audits does not release the foundation from its obligation to report to the supervisory authority. Of course, exempt foundations may voluntarily conduct a limited or official audit or an audit that is not based on statutory regulations (*opting-in*, art. 83b para. 4 ZGB).

In this regard, art. 83b para. 3 ZGB refers to the regulations set forth in the Stock Company Law. A foundation is subject to an official audit to be conducted by an audit division if it exceeds two of the following parameters in two consecutive business years: total assets of CHF 10 million; revenue of CHF 20 million; an annual average of 50 full-time employees (art. 727 para. 1 No. 2 and 727b para. 2 OR in connection with art. 83b para. 3 ZGB). If these limits are not exceeded, the foundation is subject to a limited audit of its annual financial statements (art. 727a and 727c OR in connection with art. 83b para. 3 ZGB). Thus, foundations are at least subject to a limited audit.

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

### 5. Cooperative

The regulations as set forth in the Stock Company Law are applicable to cooperatives as well (art. 906 para. 1 OR). The following persons may demand that an official audit of the annual financial statements be conducted by an audit division (art. 906 para. 2 OR): 10% of the cooperatives' members; cooperatives' members that together represent at least 10% of the capital; cooperatives' members that are personally liable or obligated to make additional contributions to the capital.

Cooperatives that are not required to conduct an official audit of their annual financial statements are subject to a limited audit conducted by a certified auditor (art. 727a para. 1 in connection with art. 906 para. 1 OR). Provided that all cooperatives' members approve, no audit is required if the society does not have more than an average of ten full-time employees (*opting-out*; art. 727a para. 2 in connection with art. 906 para. 1 OR).

### 6. Limited Liability Companies

The regulations as set forth in the Stock Company Law apply accordingly (art. 818 para. 1 OR). A partner that is obligated to make additional contributions to the capital may demand that an official audit of the annual financial statements be conducted. (art. 818 para. 2 OR)

## 7. Voluntary audit division

All other company forms are permitted to establish an audit division on a voluntary basis.

### b) Liability

A main difference between communities based on law and corporations is that in the latter case only the company is liable for its debts. And the foundation with its institutional “touch” is liable for its obligations essentially with its foundation assets.

The following will provide details about the liability of associations (1) and foundations (2), as well as general information about the liability of companies (stock company, limited liability company, cooperative) (3).

#### 1. Liability under the Law on Associations

##### 1.1 Liability of associations

As a legal person, the association is liable towards external persons with its own assets. By carrying out legal transactions and other activities, the organs make the association liable (art. 55 para. 2 ZGB); a person is personally liable only if he or she acted with willful negligence (art. 55 para. 3 ZGB; cf. below IV. b. 1.3).

##### 1.2 Liability of association members

Since 1 June 2005, the following liability provision has been effective for association members: membership contributions may be demanded if the articles of association provide for those (art. 71 ZGB). But the liabilities of the association are limited to the association’s assets unless provided otherwise in the articles of association (art. 75a ZGB). Such regulation is effective toward third parties only upon the association’s entry into the commercial register pursuant to art. 90 para. 1 lit. f HRegV. Due to the general norms pertaining to the legal transition from old to new provisions (art. 1-4 SchlT [*Schlusstitel = final provisions*] ZGB), this new regulation also applies to associations established prior to the amendment of the law (Riemer 2005, p. 52), whereas previous debts remain subject to the former legal provisions (BGE 133 III 105).

As an exception, a creditor may indirectly access the contributions to be paid by the association members. Provided that the contributions have been attached for the benefit of the creditors and as soon as the period of realization of those objects seized has begun, the association’s outstanding debts to be paid by its members may be transferred or assigned to the creditors pursuant to art. 131 and 260 SchKG; in this case, the creditor may have the right to assert claims against the association member.

##### 1.3 Responsibility of the organs

Art. 69 ZGB provides for the rights and duties of the association’s committee. The committee is linked to the association as an organ. The articles of association and the law define the due diligence standard (Heini/Scherrer 2006, BSK, Art. 69 ZGB N 36; BGE 110 II 391, 394). In addition, a contractual relationship may exist that allows the association to assert liability claims against its organs, for example a contract or employment agreement. In this case, the due diligence duties are regulated by art. 321a OR.

i) Internal relationship

In the event that the association suffers any damages, it may assert claims against the organs which violated against any of their due diligence duties. Such claims are based on the articles of association, the Law on Associations or a separate agreement (e.g. art. 97 et seqq. OR, art. 398 OR, etc.).

ii) External relationship

Pursuant to art. 55 para. 3 ZGB, as an exception, third parties may assert claims directly against the organ. However, the organ is liable only if it acted with willful negligence. Art. 55 para. 3 ZGB primarily aims at non-contractual liability provisions contained in art. 41 et seqq. OR, whereas other elements of unlawful acts and even strict liability regardless of negligence or fault might apply. In all cases, problems may arise due to the requirement that the damages have to be direct damages. If several members of the committee or other organs jointly caused any damages, the organs are jointly liable towards third parties.

iii) Appointed and factual organs

With reference to liability, a difference is made between appointed and factual organs. While appointed organs have a contractual relationship with the foundation, factual organs carry out material activities but are not bound by a contract. The factual organ is liable internally (towards the association) for management activities without the existence of a contract (art. 419 et seqq. OR) and for unlawful acts (art. 41 et seqq. OR). Externally, liability is limited to unlawful acts (art. 55 para. 3 ZGB in connection with art. 41 et seqq. OR).

iv) Limited liability

If the committee of an association is a voluntary board, it generally tries to limit its liability. It is possible to limit liability to gross negligence and willful acts in accordance to art. 248 para. 1 OR applicable under the Law on Gifts. Liability may also be limited by dividing the work or by measures stipulated in the articles of association, e.g. limited representation authority towards third parties, exclusion of liability or an indemnification clause (Pachmann 2007, p. 255 et seqq.).

## **2. Liability under the Law on Foundations**

### *2.1 Liability of foundations*

The foundation, too, is a legal person acting through its organs that represent the foundation's rights and obligations towards third parties by carrying out legal transactions and other acts (art. 55 para. 1 and 2 ZGB). The foundation is liable towards third parties with its assets.

### *2.2 Liability of the foundation organs*

The Law on Foundations does not provide for a specific basis for the liability of the organs. The appointed organ is thus liable according to the general provisions, i.e. internally (towards the foundation) according to the contract and for unlawful acts (art. 41 et seqq. OR), and externally (towards recipients and third parties) only for unlawful acts (art. 55 para. 3 ZGB in connection with art. 41 et seqq. OR).

Internally (towards the foundation), the factual organ is liable according to the general basic principles for management activities carried out without the existence of a contract (art. 419 et seqq. OR) and for unlawful acts (art. 41 et seqq. OR). Externally (towards recipients and third parties), the organ is liable only for unlawful acts (art. 55 para. 3 ZGB in connection with art. 41 et seqq. OR).

#### i) Internal relationship

In general, an organ is established by the “organ agreement”, an agreement *sui generis* which is mainly based on the provisions of the Employment and Contract Law. The organ is liable only if actual damages occurred in connection with a contract breach, willful negligence and an adequate causality between the contract breach and the damage. The due diligence standard to be met by the organ is based on art. 321e para. 2 OR even if it is assumed that the provisions under the Contract Law generally apply, as art. 391 para. 1 OR of the Contract Law also refers to the provisions under the Employment Law (Lanter 2001, p. 191).

Art. 419 and 420 OR constitute the basis for the internal liability of the factual organ; the factual organ has to exercise the same due diligence in terms of quality as the appointed organ because the contractual liability basis applies to both accordingly.

#### ii) External relationship

Externally, the foundation is liable with its assets. But in addition, the acting organs may be personally liable if they acted with willful negligence (art. 55 para. 3 ZGB; Huguenin 2006, BSK, Art. 55 ZGB N 30 et seq.).

Here, the question arises whether the recipients of the foundation may assert claims directly against the foundation’s organs, for example if the organs decreased the foundation’s assets by fault resulting in a decrease or elimination of the recipients’ benefits. In Switzerland, the recipients’ right to assert claims in favor of the foundation in the sense of an *actio pro fundatione* is dismissed. Also dismissed under the Law on Foundations are the recipients’ claims against the foundation organs. Any effect of the organs’ relationship on third parties is denied because the Law on Foundations does not stipulate any norms that extend the contractual relationship between the organs and the foundation to third parties and because the special provisions of the Law on Stock Companies and Cooperatives are not to be applied accordingly. A contract in favor of a third party is possible but practically of no significance (Jakob 2006, p. 359). The non-contractual liability makes a difference between direct and indirect damages. Only if direct damages occur, the recipient may assert claims pursuant to art. 55 para. 3 ZGB in connection with art. 41 OR (Jakob 2006, p. 360).

### 3. Liability under the Corporate Law

#### 3.1 General

A person’s engagement in a company bears economic risks because the shareholder holds a share in the company and the stockholder could lose a portion of its stock value. However, with reference to the liability of a legal person with its own assets, it is primarily the company that is liable with its assets towards its creditors. The assets of the individual shareholders may either not be claimed at all (stock companies, limited liability companies) or only subsidiarily and by exception (cooperative).



### 3.2 Responsibility under the Stock Company Law

#### i) General

The stock company is a company form that mandatorily prohibits any liability of the shareholders both internally (obligation to make additional contributions to the capital) and externally (liability towards third parties; art. 620 para. 1 OR). However, the shareholders of a stock company may indirectly be liable (art. 754 et seqq. OR).

#### ii) Responsibility of the acting person

Under the Stock Company Law, art. 752 - 760 OR includes provisions about the personal liability for any wrong conduct of persons, mainly the members of the administrative board, the executive board, and the audit division but also persons involved in the filing and emission of a prospectus. These regulations also apply to the limited liability company (art. 827 OR); the cooperatives, on the other hand, are subject to a simplified responsibility law (art. 916 et seqq. OR; Meier-Hayoz/Forstmoser 2007, p. 527).

The organs' liability based on their responsibility under the Stock Company Law does not represent a liability for the company's obligations but for an individual's actions. The organs are responsible for any damages that they cause by a willful or negligent breach of their duties (art. 754 OR). They are liable without limitation with their entire assets if their conduct resulted in any damages for the company, creditors and stockholders.

If the company incurred damages but no bankruptcy was filed, only the company and the individual stockholders may assert any claims (art. 756 para. 1 OR) but not the creditors themselves (even if they incurred damages due to actions carried out by the administrative board). Only after a company goes bankrupt are its creditors also entitled to demand that damages be addressed; but first it is the receivership being competent for such a request (art. 757 OR).

### 3.3 Limited liability company

The provisions of the Stock Company Law apply accordingly. However, the shareholders' obligation to make additional contributions to the capital is to be noted (art. 795 et seqq. OR). Even if a company files for bankruptcy, the members may be required to make such contributions which could have the same effect as a liability.

### 3.4 Cooperative

The articles may provide for the liability of the cooperatives' members for debts of the society, as well as for the obligation to make additional contributions to the capital (art. 869, 870 OR). The articles may provide for unlimited and joint liability; or liability may be limited to a certain amount (art. 870 para. 1 OR), may subsequently be effective, increased, decreased or eliminated. Liability is subsidiary and requires that the cooperative has filed for bankruptcy (art. 869 para. 2 OR). The members of the executive board are liable according to the provisions of the Stock Company Law (art. 916 OR).

#### 4. Excursus: failure to comply with the obligation to pay social contributions

Additional legal provisions may be the basis for the organs' liability, for example the personal and joint liability in connection with outstanding social insurance contributions based on the legal liability of employers pursuant to art. 52 AHVG (Christen 2005, p. 54).

### V. CORPORATE GOVERNANCE AND NONPROFIT ORGANIZATIONS

#### a) General

As seen above (Section II. b.), in Switzerland, associations and foundations are the main legal entities for the pursuit of ideal purposes. Contrary to the for-profit entities under the Code of Obligations (in particular the stock company), the regulations for associations and foundations under the Civil Code (art. 60 - 89 ZGB) are intentionally relaxed due to their pursuit of ideal purposes. With the exception of accounting and auditing reforms, as explained above (D. I. 1.), the parties involved (association members, founder) are given wide leeway for organization (Riemer 2006, p. 501) which corresponds to the autonomy of associations and the freedom of foundations.

However, over the past few years, more international efforts have been made to apply corporate governance principles to nonprofit organizations (foundation or nonprofit governance). Relevant organizations join to develop "codes" to provide certain conduct guidelines.

#### b) Developments

In Switzerland, the Law on Associations (Pachmann 2007, Sportverbände und Corporate Governance [*Sports Associations and Corporate Governance*]) and primarily the Law on Foundations also consider implementing corporate governance rules that would be applicable to foundation governance (Jakob 2006, p. 528 et seqq.). A lot of work has already been done with regard to the codification of conduct guidelines: the Swiss Foundation Code of the Association of Swiss Foundations, which was published on 25 October 2005, is designed for foundations and includes recommendations. The Swiss NPO Code of the Conference of Presidents of Large Relief Organizations of Switzerland (KPGH [*Konferenz der Präsidentinnen und Präsidenten grosser Hilfswerke der Schweiz*]), established 31 March 2006, is generally applicable to all nonprofit organizations and pursues the principle "comply or explain."

Despite skepticism (Riemer 2006, p. 513 et seqq.), in practice, these regulations, based largely on voluntary implementation, are gaining significance and – despite some weaknesses in the details – certainly contribute to increased transparency and good governance in the nonprofit sector (Jakob 2008, p. 19).

Additional points that can be summarized under the term “corporate governance” are:

- **Measures taken in the event of over-indebtedness and insolvency:** With respect to the laws on foundations already, the reform act of 8 October 2004 implemented the principle of creditor protection ( art. 84a ZGB) which shall be implemented under the Law on Associations only by the recent revision of the Code of Obligations (art. 69d E-ZGB; cf. Message Regarding the Change of the Code of Obligations; BBl 2008 1589, 1738 et seqq.). If reasonable concern exists that a foundation is over-indebted or is unable to meet its obligations in the long term, the highest foundation organ is required to submit an interim financial statement to the audit division. The supervisory authority may take necessary measures.
- **Disclosure of salaries paid:** In order to strengthen foundation governance, a new regulation in art. 84b E-ZGB (also included in the intended revision of the Code of Obligations, BBl 2008 1589, 1738 et seqq.) is to provide that the highest foundation organ shall be required to submit to the supervisory authority an annual report about any salaries paid. Any salaries paid to executive board members are to be reported as well.
- **Management costs:** Basically, the foundation has to indirectly or directly use all of its funds to fulfill its purpose. A foundation may lose its nonprofit status if it utilizes less than 50% of its funds for the purpose that the tax privileges are based upon. It is difficult to compare foundations in regard to the ratio between total expenses and management costs, but it may be assumed that management costs below 10% are considered low and should not cause any problems; 10-20% are considered appropriate (Lang/Schnieper 2008, p. 143 et. seq.).

## VI. THE JOHNS HOPKINS LAW INDEX

	LEGAL FEATURE	COUNTRY SCORE	SCORE DEFINITIONS		
			0	1	2
1	Nondistribution Constraint	1	Constraint not embodied in law	Provision embodied only in tax laws	Provision embodied in general laws
2	Personal Benefit Restrictions	2	No restrictions for any kind of NPOs	Restrictions for at least some types of NPOs or limited general restrictions applicable to most NPOs	Restrictions for all or most types of NPOs
3	Reporting Requirements	2	No restrictions for any kind of NPOs	Restrictions for at least some types of NPOs or limited general restrictions applicable to most NPOs	Restrictions for all or most types of NPOs
4	Public Availability of Information	1	None	Limited public access for most NPOs or broad access for some types	Broad public access to information on all or most NPOs
5	Governance	1	No requirements	Specification of responsible organ only; or specification and decision rules for some types of NPOs	Specification of responsible organ and decision-making rules for all or most NPOs
6	Fundraising Regulation	0	None, or few under narrow circumstances, or basic requirements for only some NPOs	Basic registration or permit requirements for collections or fundraising campaigns for all or most types of NPOs or substantive restrictions of some types	Substantive Restrictions (e.g. fundraising costs, types of activities and solicitors) for all or most NPOs
7	Right of Association	2	Not guaranteed	Right granted through laws or legal tradition	Guarantee embodied in Constitution
8	Allowable Purposes	1	Narrow, i.e. significant limitations beyond general legality, morality or public order	General prohibition of immoral purposes or activities against the public order	Broad, i.e. no restrictions beyond general legality and nondistribution of profit
9	Allowable Political Activities	2	Narrow, e.g. limitations on lobbying and advocacy	Limitations on political campaigning	Broad, i.e. hardly any restrictions
10	Unincorporated organizations permitted?	1	Unincorporated organizations prohibited	Unincorporated organizations lawful	Some degree of legal protection for unincorporated organizations
11	Membership Requirements	2	Not clearly specified	Clearly specified, but burdensome	No Requirements or clearly specified and not unduly burdensome
12	Capital Requirements	1	Not clearly specified or specified and highly burdensome	Clearly specified and moderately burdensome	Clearly specified and not unduly burdensome
13	Governmental right to appoint board members	2	Authorities may appoint board members as a condition for granting legal status for all or most types of NPOs	Authorities may appoint board members as a condition for granting legal status for only some types of NPOs	Authorities may not appoint board members for any type of NPOs

	LEGAL FEATURE	COUNTRY SCORE	SCORE DEFINITIONS		
			0	1	2
14	Governmental discretion in granting legal personality	2	Discretion for all or most NPOs, even if minimum requirements are fulfilled.	Discretion for certain types of NPOs, even if minimum requirements are fulfilled.	If NPOs comply with legal minimum requirements, legal personality must be granted.
15	Appeal Procedures	2	Registration decisions cannot be appealed.	Registration decisions can be appealed with registering authority	Registration decisions can be appealed independently (i.e. courts)
16	Broadness of Organizational Tax Exemptions	2	Specification of limited set of eligible organizations	Relatively narrow definition of eligible purposes	Relatively broad definition of eligible purposes
17	Income Tax Exemptions	2	No exemption from corporate income tax	Partial Exemption in terms of coverage or tax rates	Nearly or full exemption from corporate income tax
18	Real Estate/Property Tax Exemption	1	No exemption from real estate/property taxes	Partial Exemption in terms of coverage or tax rates	Nearly or full exemption from real estate/property taxes
19	Stamp and Other Duties	1	No exemption from Duties	Partial Exemption in terms of coverage or tax rates	Nearly or full exemption from Duties
20	Indirect Tax Exemption (e.g. sales tax, VAT)	1	No exemption from indirect taxes	Partial Exemption in terms of coverage or tax rates	Nearly or full exemption from indirect taxes
21	Unrelated Business Activities	1	Not permissible	Permissible, but fully taxed	Partially or fully exempt from tax or subject to reduced rates
22	Organizational Tax Benefits for donations and bequests	2	No benefits, such as gift or inheritance tax exemptions	Partial Exemption in terms of coverage or tax rates	Nearly or full exemption from taxes on donations and bequests
23	Tax Benefits for Individuals (donator or legator)	1	No or few tax deduction or credit	Tax deduction or credit for limited set of purposes or types of organizations and general percental limitation	Tax deduction or credit for broad range of purposes
24	Tax Benefits for Corporations (donator)	1	No or few tax deduction or credit	Tax deduction or credit for limited set of purposes or types of organizations and percental limitation	Tax deduction or credit for broad range of purposes

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## The Johns Hopkins Comparative Nonprofit Sector Project

The Johns Hopkins Comparative Nonprofit Sector Project is a systematic effort to analyze the scope, structure, financing, and role of the private nonprofit sector in a cross-section of countries around the world in order to improve our knowledge and enrich our theoretical understanding of this sector, and to provide a sounder basis for both public and private action towards it.

The Project utilizes a comparative empirical approach that features heavy reliance on a team of Local Associates in the target countries, a common framework, set of definitions, and information-gathering strategies; and a network of national and international advisory committees to oversee progress and help disseminate results. Project work began in 1990 in 13 countries and now extends to more than 40 countries spanning all the regions of the world.

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