A practical guide
Build and lead charitable foundations
in Switzerland

Charitable foundations

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Authors

Prof. Dr. iur. Dominique Jakob
M.I.L. (Lund), professor of private law and director of the Center for Foundation Law at the University of Zurich; independent advisor, Zurich

Prof. Dr. iur. Dominique Jakob, M.I.L. (Lund), has been a professor of private law at the University of Zurich since 2007. He established the "Center for Foundation Law" in 2008 and the "Zürcher Stiftungsrechtstag" in 2010.

His research and advisory work focuses on national and international foundation law, along with (international) estate planning and asset management.

He is a sought-after commentator and speaker both in Switzerland and abroad and a board member of various institutions, and acts as counsel to governments, financial institutions, companies, foundations, associations, private clients, and families. He is a member of the International Academy of Estate and Trust Law (TIAETL), among others, and has been selected by American Lawyer/Legal Week for inclusion in the Private Client Global Elite directory since 2017.

Dominique Jakob is the author of chapters 1, 2, 3, and 5.

Contact: dominique.jakob@rwi.uzh.ch

Prof. Dr. rer. pol. Georg von Schnurbein
Associate professor of foundation management and director of the Center for Philanthropy Studies (CEPS) at the University of Basel

Prof. Dr. rer. pol. Georg von Schnurbein is associate professor of foundation management and director of the Center for Philanthropy Studies (CEPS) at the University of Basel, an initiative of SwissFoundations, the Association of Swiss Grant-making Foundations.

He studied business administration, with a minor in political science, at the universities of Bamberg, Fribourg, and Bern. Georg von Schnurbein is co-author of the Swiss Foundation Code and the annual Swiss Foundation Report.

His research focuses on non-profit governance, impact measurement, and foundation management. He is a member of multiple boards of trustees and advises foundations on strategic matters.

Georg von Schnurbein is the author of chapters 4 and 5.

Contact: georg.vonschnurbein@unibas.ch

Foreword

Long-term social commitment is at the heart of the work of charitable foundations – a core value that is also important to Credit Suisse. This is why we are committed to the charitable sector at various levels with a forward-looking perspective.

The intention behind founding a charitable foundation is to promote a specific philanthropic goal which demonstrates the founder's desire to lay the cornerstone for future generations. Foundations are therefore an excellent way for founders to keep their fingers on the pulse of the times and support a certain sector. Among other things, foundations serve to implement the UN Sustainable Development Goals (SDGs). By combining professional expertise and financial resources, many foundations create invaluable societal added value in addition to government services – this is one of the reasons for their ongoing important role in Swiss society.

Concrete and practical suggestions for the founding and, in particular, the professional management of a foundation, are key factors in the successful running of a foundation and in managing the social responsibility it assumes. We maintain regular contact with our foundation partners and foundation clients to address any questions they have about the foundation's work. We are also familiar with the issues they raise due to the bank's long-standing philanthropic commitment and our proximity to the non-profit sector. For example, we work together with four corporate foundations worldwide and offer programs to train employees as board members and place them in a suitable role. In Switzerland, we also operate three umbrella foundations and a wide range of social projects in collaboration with around 70 charitable organizations.

Given this background, we decided to create a guide for foundations to address the most common questions: Which aspects must be taken into account when setting up foundations? How can goal-oriented and effective foundation management be ensured? What are the rights and obligations of a board of trustees? How should the foundation's asset management be regulated? How can the foundation's impact be optimized? In this guide, we will tackle these topics together with two renowned foundation experts. Although the following statements focus primarily on charitable foundations, various points are also relevant to charitable associations.

We are pleased to present to you the second edition of our foundation guide, which is intended to support you in pursuing your own social commitment. We hope that the guide will also be relevant for the next generation of philanthropists who want to promote the sustainable development of the environment and of society.

André Helfenstein
CEO
Credit Suisse (Schweiz) AG
Trustee, Credit Suisse Foundation

Laura Hemrika
Head of Corporate Citizenship & Foundations
Credit Suisse AG
Managing Director, Credit Suisse Foundation

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Background Information

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The following chapter covers the principles of civil and tax law under Swiss foundation law. It contains an explanation of the basic concepts of foundation law, along with the key aspects relating to setting up and organizing a foundation; it also covers practical aspects of zero-rating for tax purposes for charitable foundations.

1.1 Facts and figures

By international comparison, Switzerland offers an environment that is extremely **favorable to founders and foundations** and that is highly regarded domestically and abroad as a model of success. The liberal principles of the Swiss economic and legal systems, combined with a fine-tuned equilibrium between legally certain governance and future-oriented freedoms, are seen as the safeguards of Switzerland’s exceptional “foundation habitat.”

One look at the **figures** illustrates the enormous significance of the Swiss charitable foundation sector. According to current surveys, approximately 13,500 foundations with charitable purposes were entered in the Commercial Register at the end of 2020, and the number has been gradually increasing for decades. Charitable foundations in Switzerland have assets of approximately CHF 100 billion. From an economic perspective, therefore, these foundations form a significant branch of the Swiss national economy.

Looking at the **distribution between the cantons**, we see that the canton of Zurich currently has the highest number of registered foundations in absolute figures, with 2,211. In terms of growth, the canton of Geneva has stood out for a number of years, with average annual net growth of 3.04% between 2016 and 2020. The canton of Basel-Stadt, however, has the highest concentration of foundations with approximately 45.3 per 10,000 residents. A look at the figures for Germany gives a sense of what this value actually means in terms of international comparison. The city with the highest concentration of foundations in Germany is Würzburg, with 9.9 foundations per 10,000 residents (as of December 2019). This value is only slightly higher than that of the canton of Aargau, which with 7.0 foundations per 10,000 residents has the lowest concentration in Switzerland. These figures illustrate the importance of the charitable foundation sector in Switzerland and highlight its special position in Europe. (For the figures in full: GUGGI/JAKOB/JAKOB/VON SCHNURBEIN, Der Schweizer Stiftungsreport 2021, p. 6 et seq.)

1.2 The foundation as a special legal concept under private law

The word “foundation” has various meanings. While it denotes, on the one hand, the phenomenon of institutionalized giving, on the other it also encompasses a number of different legal structures. The basic form of Swiss foundation law is the **“traditional” independent foundation** under private law. This is a legal entity that is regulated in **Art. 80 et seq. of the Swiss Civil Code (SCC)** which can accommodate both charitable and private-benefit foundation structures. There are also other, special forms of foundations. These include ecclesiastical foundations, staff pension funds, and investment foundations (in which staff pension funds “pool” their assets), each of which is subject to special legal provisions.

Another important special legal form of foundation is the **family foundation** as defined in **Art. 87 and 335 SCC**. Unlike traditional foundations, the family foundation – as a purely private-benefit, family-centered vehicle – did not require registration in the Commercial Register and was not subject to state supervision until 2016. The former point was amended by the legislator as part of the FATF legislation (Federal Act for Implementing Revised FATF Recommendations of 2012, BBl 2014 9689); consequently, since January 1, 2016 family foundations must also be entered in the Commercial Register when they are first formed. The transitional period for registering existing “old foundations” expires on December 31, 2020. As a result of the strict requirements set out in **Art. 335(1) SCC** and restrictive case law on this subject, the scope for Swiss family foundations is severely limited, by contrast to foreign family foundations or trusts. In particular, family foundations continue to be prohibited from providing unconditional financial support to family members. Legislative bodies are therefore currently examining whether to liberalize the family foundation and/or to introduce a Swiss trust.

It is possible to have a mix of charitable and private-benefit purposes; however, a **mixed-purpose foundation** of this kind must always fulfill the requirements of a traditional foundation.

Whether a foundation with a charitable purpose also fulfills the requirements for **charitable tax status**, and may therefore benefit from zero-rating for tax purposes, is subject to its own criteria (see 1.7.1 for more details).

Furthermore, a foundation does not always have to be the founder’s “own foundation”: Charitable objectives can also be realized via **alternative legal forms that are similar to a foundation**. Alongside simply donating to charitable organizations or making “**financial endowments**” to existing foundations, there are also so-called **dependent foundations**, which are often found in umbrella foundation models. These are based on a – usually contractual – agreement with a sponsoring natural person or legal entity and are, therefore, a kind of obligation-law replica of the independent foundation under private law described above (for more detailed information on the phenomenon of umbrella foundations, see 1.8). The association, (charitable) **corporation**, and **cooperative** are other alternatives to the foundation.

Among the legal forms made possible by the legislation, the foundation stands out in several respects. In the system of legal entities under Swiss private law, only the foundation is an **institution (Art. 52 SCC)**. This means that foundations, unlike corporate legal entities such as corporations, associations, and cooperatives, have neither members nor owners. Rather, they are considered self-owned special-purpose assets that directly or indirectly benefit a group of persons – the beneficiaries – depending on the foundation purpose. In order to ensure that this purpose is realized and to protect it from the people who actually execute the foundation’s activities, ownerless foundations, as the only legal entity under private law, are subject to supervision by the state authority (foundation supervisory authority).

The law does not in itself contain a **definition of a foundation in Art. 80 et seq. SCC**.
A traditional foundation is generally understood to mean a legal entity holding assets that a founder has committed to a specific purpose. Through this commitment of assets, the foundation becomes an autonomous legal construct that is independent of its founder. The founder irrevocably separates him/herself from the donated assets; founder and foundation become two legal entities that are independent of one another; the deed of incorporation consolidates the founder’s intent (principles of separation and consolidation). However, the founder and foundation are permanently connected by the foundation purpose set out by the founder (and, where applicable, by certain organizational rights reserved when the foundation was formed).

1.3 Motives for setting up foundations

There is no “one” motive for setting up a foundation. Just as individual founders have very different personalities, their motives also differ. (For more on this subject: GEORG VON SCHNURBEIN, Motivationen zur Stiftungsgründung, in: Jakob/von Orelli (eds.), Der Stifterwille: Ein Phänomen zwischen Vergangenheit, Gegenwart und Ewigkeit, Zurich 2014, p. 19 et seq.)

Some foundations are established as an expression of highly personal experiences or strokes of fate. Other founders want to use their foundation as an outlet for their passion (art, for example). Others see setting up a foundation as an opportunity to express gratitude for what they have achieved in their lives and to give something back to society. Striving for social recognition, looking to create a “monument,” or the simple desire to create something enduring may also serve as – legitimate, of course – sources of motivation. Only in rare cases is there just one motive; most often, it is a combination of motives. It may well fall to the advisor to identify **the founder’s motivations** as the foundation is being set up. Together with the prospective founder, it is then important to work out and prioritize the individual (partial) motives, including how they relate to one other.

What many successful foundations have in common is that their founders have given them a clear strategy and vision from the outset. At the beginning of every foundation, therefore, the founder must reflect on what drives them personally and adopt a somewhat critical approach in order to ascertain their own desires. While by no means exhaustive, the following questions can help in determining a person's reasons and personal motivation for setting up a foundation:

- What specifically do I want to achieve?
- What social, cultural, medical, ecological, etc. concerns are especially close to my heart? Is a/the foundation suitable for making an effective contribution in this area?
- Is there a need for an (another?) independent foundation in a particular area? All things considered, (why) is my cause so specific that setting up an independent foundation is the most reasonable option?
- Suppose I could not make enough capital available for my cause: How would I personally convince third parties to provide assets to help realize my idea? Is the project credible enough in terms of its cause that it will function without me as a founding donor?
- Do I want my name associated with a foundation after my death? Do I want the key features of the foundation to be assured even after my death? To what extent am I prepared to place my trust in future generations and allow them to have an influence over the values and goals of the foundation?

1.4 Setting up a foundation

1.4.1 General information

In order to acquire legal capacity, traditional foundations require constitutive **entry** in the Commercial Register, based on the **deed of foundation** to be submitted along with the registration **(Art. 52(1) and Art. 81(2) SCC, Art. 94 Commercial Register Ordinance)**. This includes both the unilateral founder's deed (deed of commitment) – which does not require acknowledgment of receipt – and the foundation articles.

The founder's deed itself may be drawn up as a public document **(Art. 81(1) SCC)** if the founder is still living, or in the form of a testamentary disposition or inheritance contract if the founder is deceased **(Art. 81(1)** in conjunction with **Art. 493 SCC)**. Generally speaking, setting up a **foundation inter vivos** is preferable to an **"inheritance foundation"** because the founder is still themself able to get the foundation off the ground; they can "embody" the founder's intent; adjust the regulations if necessary, and benefit from the expiration of the five-year time limit for claims in abatement under inheritance law **(Art. 527(3) SCC)**. However, an inheritance foundation may be suitable if the founder wishes to reserve the foundation (in reserve, so to speak) for the event of their death, they wish to maintain confidentiality, or specific circumstances have created time and logistical constraints that preclude the creation of a public document (for example, lockdown during the COVID-19 pandemic, in the event of worsening illness).

It should be noted that by 2023, the **compulsory portion** for children will be reduced from ¾ to ½; from an inheritance law perspective, this will create increased scope for foundations to be set up.

The following elements must be included in the deed of foundation; they also serve to outline the **foundation concept** under Swiss law:

- Intent in setting up the foundation
- Foundation assets
- Purpose of foundation

> **"What many successful foundations have in common is that their founders have given them a clear strategy and vision from the outset.**

Beyond these mandatory requirements, the founder has a great deal of freedom to shape and organize the foundation: this is called **"founder's freedom."** For example, the founder is free to only provide a rough outline of the foundation's organizational structure in the foundation articles, and to provide for the structure to be set out in more detail in an (organizational) regulation.

When formulating the foundation documents, founders should ask themselves the following **control questions:**

- Is it really my wish to set up a foundation with legal capacity? Could my cause be just as effectively, or even more effectively, addressed by other means – for example, via a donation or financial endowment?
- What purpose(s) should the foundation serve? Is the purpose so "timeless" that it can be pursued in perpetuity, and will it also give me, as the founder, a lasting feeling of satisfaction?
- Should the foundation pursue its purpose indefinitely or should the project only last for a limited period of time, for instance by setting up the foundation for a defined period from the outset, or by consuming its assets to achieve its specific purpose?
- What assets will I commit to the foundation? Do the prospective foundation assets have special (non-material) significance for me? Should donating them therefore not be permitted, or permitted only under certain circumstances (for example, a particular art collection to be given to an art foundation)?
- Am I really prepared to part with what could be a significant portion of my assets during my lifetime? Will my loved ones and I also be cared for financially in case of unforeseen circumstances? Have I sufficiently taken into account any claims from spouses or from heirs entitled to a compulsory portion? Where applicable, is it sensible to commit only part of the assets during my lifetime and to only make the rest available to the foundation after my death?
- Are all of my motives, wishes, and expectations adequately reflected in the founding documents (foundation articles, regulations, non-binding guidelines, etc.)?

1.4.2 Intent in setting up the foundation

In order to set up a foundation with legal capacity, the **intent** behind the foundation on the part of the founder (or, in case of a majority, the founders) must first be established. Where the foundation has been set up during the founder's lifetime, the intent in setting up the foundation can usually be verified by means of the publicly recorded deed of foundation.

However, caution is required when setting up a **"foundation by testamentary disposition"** in accordance with **Art. 81(1) SCC.** In order to avoid misunderstandings, ambiguities, or other irremediable errors, foundations via testamentary disposition or inheritance contract should be set up and integrated in overall **estate planning** at an early stage, and always on the basis of professional, independent, and comprehensive advice.

1.4.3 Purpose of the foundation

The foundation purpose is **at the core** of any foundation. This gives the foundation its individual character and forms the basis for its identity and existence. The linchpin of a successful foundation, therefore, is a thoughtfully defined, future-oriented purpose.

In principle, the founder is free to **define the purpose** (founder's freedom), although the general limitations of the legal system – in particular, mandatory statutory requirements and fundamental moral principles – must be observed. The foundation purpose converts, so to speak, the founder's intent into the deed of foundation, in which the founder sets out the central tenets to guide subsequent foundation activity. When the foundation is set up, the founder's intent becomes consolidated (consolidation principle) and becomes the pivotal point for subsequent foundation and supervisory activity. In particular, participants in the foundation must, in principle, be guided exclusively by the founder's original intent – as codified in the foundation purpose – and not by any modified interpretation of the purpose.

With regard to the formulation of the foundation purpose, the **principle of legal certainty** must be taken into account: The founder must set out the foundation purpose in such a way that it serves as an adequate basis and guideline for future foundation activity and is also able to be monitored by future generations and by the supervisory authority. In particular, the governing bodies of the foundation must not have the power to arbitrarily determine the specific foundation purpose themselves or to otherwise have control over the founder's original intent.

When **drawing up the foundation purpose**, founders are typically faced with the question of whether the purpose should be narrowly or more broadly defined. The broader the foundation purpose, the more the governing bodies have room to maneuver in terms of the actual implementation of the purpose. Founders also have the option to provide for multiple purposes to be pursued cumulatively or successively or to give a broad, more general purpose, including detailed example cases that are non-definitive in cases of doubt. A broader or multifarious formulation of the foundation purpose is advantageous in that it allows the foundation's activities to be adapted in the event of a change in circumstances – for example if a particular (partial) purpose has been achieved, can never be achieved, or simply becomes less meaningful or effective. However, it must be assessed whether, and to what extent, a more flexible purpose could conflict with the founder's wish to pursue very specific and narrowly defined objectives.

The foundation purpose may be **charitable or private-benefit** in form. Mixed forms are also permissible (mixed-purpose foundations), which are subject to certain tax-related questions. However, the purpose must always be altruistic in nature. Setting up a foundation in one's own interest is not permitted in Switzerland, unlike in jurisdictions that allow for private foundations, such as the Principality of Liechtenstein. Consequently, foundations "for the founder's benefit" are excluded, as are foundations "acting in self-interest" that serve only to perpetuate their assets. Political purposes are permitted within the overall limitations.

For some time now, it has been recognized in Switzerland that foundations can be set up not only for non-material purposes, but also for (purely) economic ones; in particular, a foundation may itself operate a commercial enterprise (direct support foundation), hold an interest in such an enterprise as a holding foundation, or operate and govern the enterprise as "head of group." When used correctly, company-affiliated foundations, particularly in relation to business estate planning, can combine a desire for economic continuity and stability with the individual founder's social concerns and vision.

Furthermore, founders can expressly state when setting out the purpose that the foundation will not exclusively serve its own objectives. As an **umbrella foundation**, for example, it may (also) function as a platform for realizing other philanthropic projects, e.g. by incorporating other, primarily dependent, subfoundations (see 1.8 for more details).

Admittedly, we often see in practice that even founders who have made especially meticulous and forward-looking plans cannot predict everything that will happen in the future and take precautions for all eventualities. The circumstances in which the foundation was set up may change and – either suddenly or gradually – cast a new light on the organization or on the foundation purpose. In this case, a **subsequent modification** may be made to a foundation's organizational structure by way of exception, where this is urgently required in order to preserve the foundation's assets or to safeguard the pursuit of its purpose, pursuant to **Art. 85 SCC**. If, however, the significance or effect of the original purpose has altered over time to such an extent that the foundation has plainly become estranged from the founder's intent, the **foundation purpose** may be amended in line with the changed circumstances, pursuant to **Art. 86 SCC.** In accordance with **Art. 86b SCC**, minor amendments may be made to the deed if these appear to be objectively justified and do not impair the rights of any third party. In all cases, the competent supervisory or converting authority must be involved. However, the governing bodies may independently amend the regulations, within the limits of statutory provisions.

Furthermore, **Art. 86a SCC** has, since 2006, provided for the genuine **right of a founder to change the foundation purpose**, as a consequence of a partial relaxation of formerly strict separation and consolidation principles. Pursuant to this provision, founders themselves may request amendments to the foundation purpose, where:

- The founder has expressly reserved this right in the deed of foundation.
- At least ten years have passed since the foundation was set up or the foundation purpose was last changed.
- The foundation retains its original charitable purpose – and therefore remains zero-rated for tax purposes – after the purpose has been changed.

The right to change the purpose is strictly linked to the individual, i.e. it can neither be inherited nor transferred to another person, and expires after a maximum period of 20 years in cases where the founder is a legal entity. Discussions are currently underway to expand this provision so that the founder may also reserve the right to make organizational changes.

"The foundation purpose is at the core of any foundation. This gives the foundation its individual character and forms the basis for its identity and existence.

1.4.4 Foundation assets

In principle, this is the **nature and scope** of the foundation's assets committed in order to fulfill the purpose. It is possible to commit both movable and immovable assets, in particular real estate, cash, intangible assets, securities, or receivables.

The assets must be appropriate in relation to the purpose being pursued (**purpose/means relationship**). The – sometimes criticized – standard practice by the Swiss Federal Supervisory Authority for Foundations requires a minimum capital base of CHF 50,000 and is used as an indicator for decision-making by many cantonal supervisory authorities. If the assets donated actually prove to be insufficient in relation to the purpose, the assets are to be transferred, by analogous application of **Art. 83d(2) SCC**, to another foundation with a purpose that is as similar as possible. A continuously undercapitalized foundation is neither viable nor worthy of special protection.

If the foundation is initially set up with insufficient basic assets, but there is the prospect of sufficient contributions by the founder (subsequent endowments) or by third parties (financial endowments or donations) at a later stage, a generally appropriate purpose/means relationship will be assumed. One example of this is a "successive" capital base: A founding couple sets up a foundation and initially endows it with a limited amount of assets in order to also nominate the foundation as heir or legatee as part of the overall inheritance contract arrangements (including inheritance waiver agreements with descendants, where applicable). So-called **"amassing clauses"** offer another possibility for gradually increasing the foundation's assets. These clauses allow a foundation to add to its assets over a certain period of time, until the assets have reached a certain, appropriate level.

Target-oriented consumption is the counterpart to amassing. When setting up the foundation, the founder can also establish whether he or she wishes to permit – or even stipulate – that the governing bodies use up the endowed foundation capital **in line with the foundation purpose** (until it is ultimately consumed), or whether foundation activities are to be financed solely from current income or revenues and the basic assets therefore to be permanently preserved. Where a so-called asset-consuming foundation is preferred, this should be expressly provided for in the foundation articles. For more detailed information on questions concerning the **investment and management of assets**, see Chapter 3.

As has already been mentioned, the question of whether the existing or prospective assets are sufficient for an **independent foundation project** must be factored into the founder's key considerations. As a result of the numerous inactive foundations or ineffective (too small) foundations that exist, we are currently seeing a trend toward consolidation or "pooling" (for more information on the phenomenon of **umbrella foundations**, see 1.8). Consequently, rather than setting up a small foundation, it may be advisable to instead participate in existing, larger projects. On the other hand, giving just one child a full belly, or one female student a sponsorship, are respectable and noble goals, if this is the founder's intent. For guidance:

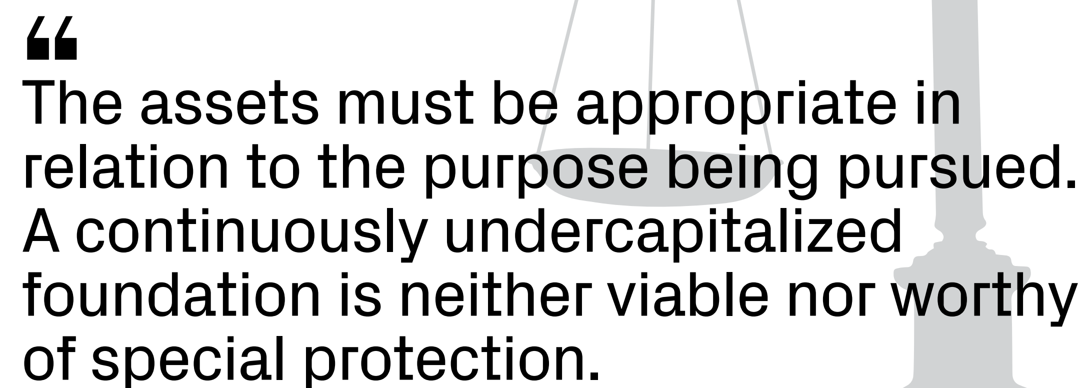
- A foundation with assets of up to approximately CHF 10 million is considered small.
- A foundation with assets between CHF 10 million and CHF 50 million is considered a medium-sized foundation.
- A foundation is only considered large if its assets exceed CHF 50 million.

(See ECKHARDT/JAKOB/VON SCHNURBEIN, Der Schweizer Stiftungsreport 2014, p. 31 with further notes.)

1.5 Organizational structure of the foundation

The foundation's organizational structure is the main functional link ("How?") between the foundation assets ("What?") and the foundation purpose ("Why?"). The **governing bodies** must execute the foundation purpose while safeguarding the foundation's legal capacity and effectiveness by ensuring that the foundation's funds are used as they were intended; consequently, the foundation purpose takes on a more concrete form in external relationships.

One characteristic feature of Swiss foundation law is the extensive **freedom given to founders to shape and organize** their foundation. Pursuant to **Art. 83(1) SCC,** the deed of foundation stipulates the foundation's governing bodies and the manner in which it is to be administered. However, the founder may also outline, partially or in full, the foundation's organizational structure in a written (organizational) regulation. The decision to **separate organizational matters out** in a **regulation** – which is positioned lower in the hierarchy – rather than in



> **"The assets must be appropriate in relation to the purpose being pursued. A continuously undercapitalized foundation is neither viable nor worthy of special protection.**

the foundation articles offers the advantage of making them easier to amend. While modifying a deed of foundation requires the involvement of the respective competent authority (**Art. 85 et seq. SCC,** see 2.4.4 for more details), regulations can be modified independently by the board of trustees in accordance with statutory provisions. The **appointment of a supreme body** is mandatory; this body is responsible for managing and representing the foundation. This governing body entrusted with managing and representing the foundation (usually referred to as the **board of trustees**, sometimes as the foundation council or advisory board) binds and entitles the foundation vis-à-vis third parties (**Art. 55 SCC**). The board of trustees may comprise one or more natural persons or legal entities; the founder may be one (or even the sole) member of the governing body.

Pursuant to **Art. 83b SCC**, foundations are in principle obligated to appoint an independent **auditor**. Ecclesiastical foundations and family foundations are generally exempt from this audit requirement (**Art. 87(1bis) SCC**). Furthermore, on the basis of **Art. 83b(2) SCC** in conjunction with the Ordinance on the Auditor of Foundations, foundations may request an exemption from the auditing obligation ("opting-out"), provided that the foundation's balance sheet total is less than CHF 200,000 for two consecutive financial years. In addition, the foundation may not publicly appeal for donations or other contributions, and an audit must not be necessary in order to reliably assess the foundation's financial position and financial performance.

Founders may optionally provide for **additional governing bodies or operational functions** – for example, managing directors or committees within the board of trustees, or independent awarding bodies, electoral bodies, advisory bodies, or supervisory bodies (usually referred to as advisory boards). Often, a secondary governing body is composed of recognized experts in the field of the foundation's specific purpose; this body is granted the right to express an opinion and the right of veto with respect to specific decisions made by the board of trustees.

If **organizational defects** are present from the outset or subsequently appear, **Art. 83d SCC** applies. In such cases, the supervisory authority will take the necessary measures and set a time limit in order for the foundation to restore the legally required situation. In cases of non-compliance, the body that is lacking, or an administrator, is to be appointed; the costs will be borne by the foundation.

1.6 Protecting the foundation or "foundation governance"

Foundations differ significantly from other legal entities under Swiss federal private law in one further respect. Provided that they are not family foundations or ecclesiastical foundations, foundations are **subject to state supervision** (**Art. 84(1) SCC**). This is because there are gaps in protection that are common to this legal form: by contrast to associations, foundations do not have any members; nor do they have owners who could monitor the executive bodies, unlike corporations. Depending on the foundation's purpose and its geographical sphere of impact, foundations may be subject to supervision by the authorities at communal, cantonal or federal level. On January 1, 2012, the cantonal supervisory system was restructured through the establishment of public supervisory bodies and inter-cantonal concordats. (For more information, see ECKHARDT/JAKOB/VON SCHNURBEIN, Der Schweizer Stiftungsreport 2012, p. 18 et seq.)

The supervisory authority monitors that the foundation purpose is being realized, that the founder's intent is observed, and that the foundation is not compromised in any other way by its governing bodies. In order to effectively perform its supervisory role, the supervisory authority has access to both "preventive" and "repressive" tools under administrative law (and is also subject to the principles of this law, such as the principle of proportionality). **Preventive supervisory tools** include the following: Regulations on the investment of assets, along with obligations on the part of foundation governing bodies to provide (annual) reports, and to submit their regulations, or to inform the authority of any modifications.

Repressive tools are aimed at retroactively eliminating the negative consequences of errors made by the foundation's governing bodies. These include, in particular: Reminders, warnings, reprimands, the annulment of resolutions made by the foundation's governing bodies, substitution measures, fines, and criminal charges, along with – in particularly serious cases – the removal of the board of trustees (see 2.5 for more details).

In respect of its **official supervisory activities**, which are always subject to the principle of proportionality, the supervisory authority may only monitor the exercise of discretion by the board of trustees (see 2.4.2 for more detail) with regard to its lawfulness, but not with regard to its expediency (so-called **principle of legal supervision**). In other words, the supervisory authority does not have the power to substitute its judgment for that of the board of trustees. If the decision-making process is followed correctly, it is therefore not possible for a decision made by the board of trustees that is justifiable in terms of its content to be overturned on the grounds that another, possible alternative is objectively "more correct" or "better."

In addition to external supervision, the founder can take steps to ensure that the foundation is **internally monitored**. The following tools are available in order to ensure a suitable system of **checks and balances:**

- An optional secondary governing body.
- Provisions relating to conflicts of interest.
- Internal mechanisms for appointing the board of trustees.

The mandatory official supervision of foundations cannot be substituted or modified in terms of its content. However, founders can **draw up the foundation articles** in such a way that the supervisory authority, in light of the principle of subsidiarity, must display a certain degree of restraint, if and to the extent that effective, functioning mechanisms for monitoring and rectifying issues are in place within the foundation.

These considerations ultimately lead to the wider concept of **"foundation governance"**, the aim of which is to establish a comprehensive system of protection and to engage the various individuals responsible for protection as effectively as possible. If a founder wishes to act prudently here, they must first ask themselves two questions. First, which specific conflicts of interest are to be expected within my constellation and which mechanisms for governance appear the most sensible with regard to the foundation itself? And second, at what level should the respective aspects of governance be embedded?

Alongside the possibilities provided for at the **legislative** level, there is also the level of the **founder**, who may include individual aspects of governance that are personally important to him or her when drawing up the foundation articles. There is also the level of the **executive bodies**, which are subject to certain rules of conduct; these rules aim to guide the executive bodies in the effective management of the foundation. These rules include all measures that encourage best practices by the foundation governing bodies, as well as already-known foundation governance codices such as the "Swiss Foundation Code," adherence with which can also be stipulated to a greater or lesser extent by the founder in the foundation articles.

The **Swiss Foundation Code** is a privately compiled, purely voluntary set of regulations containing four principles and 28 recommendations; its fourth edition will be published in 2021. We advise boards of trustees to at least look through the code to determine whether any of the measures – and if so, which ones – could be logically applied to the respective foundation. (For more information, see SPRECHER/EGGER/VON SCHNURBEIN, Swiss Foundation Code 2021, Grundsätze und Empfehlungen zur Gründung und Führung von Förderstiftungen, Basel 2021.)

Effective foundation governance also includes filing a complaint with the supervisory authority if misconduct is discovered within the foundation's sphere of impact. Consequently, Swiss law recognizes the so-called "**foundation supervision complaint**," an unwritten legal remedy sui generis based on **Art. 84(2) SCC**. A legitimate controlling interest is required in order to make such a complaint; however, these are handled surprisingly strictly by the authorities and courts. Anyone is permitted to file a **supervisory notification**, although this does not confer party rights. (For more on this subject, see JAKOB, Die Schweizer Stiftungsaufsicht – Grundlagen und Entwicklungen, in: Eckhardt/Sprecher (eds.), Beste Stiftungsratspraxis – Welche Aufsicht haben und welche brauchen wir? Zurich 2019, p. 7 et seq.)

Recommendations on foundation law principles:

- Always evaluate whether setting up a foundation is appropriate in your individual wealth and estate planning circumstances, can be sensibly incorporated into any claims on marital property and to an inheritance, and provides flexibility in the event of unforeseen circumstances.
- Make sure you are clear on your motives for setting up a foundation and consider or seek advice on how you can best incorporate these motives into the structure of the foundation.
- Reflect on what your personal foundation purpose looks like specifically and how it can best be formulated. The foundation purpose embodied in the deed of foundation will set the direction for all future foundation activities – including the actions you take as the founder.
- Consider the amount of assets you want to use for the foundation project, can realistically raise, and expect to be contributed by third parties; align the specific foundation project with the foundation assets and find the appropriate legal form to avoid setting up an ineffective foundation or a foundation that quickly becomes inactive.
- Find an organization that enables you to be involved in the manner that you want to be and in accordance with your skills and expertise. However, make sure that your foundation will also function without you.
- Consider it your responsibility to find an individual internal governance system for your foundation that – alongside external state supervision – provides optimum protection for your foundation and the founder's intentions against conflicts of interest and misconduct.

1.7 Basic principles of tax law

Tax law aspects are critically important for prudent and effective estate and wealth planning. Particularly with regard to setting up a foundation, there may also be **tax-related** motives or particular implications – advice on civil law should therefore always be sought alongside tax law advice from the outset. This overview mainly deals with taxes on income and profits, as well as cantonal inheritance and gift taxes. In practice, however, there are other types of tax that should be considered in a foundation's daily activities, for instance real estate gains tax, value added tax, and withholding tax.

1.7.1 Zero-rating for charitable foundations

Private-benefit foundations (for example, family foundations or company-affiliated foundations with a purely economic purpose) are considered equal to other legal entities with regard to tax law aspects and therefore do not benefit from tax privileges.

For **mixed foundation models,** in which other – non-privileged – purposes are also pursued alongside charitable purposes, a partial zero-rating may be considered in individual cases. In this case, taxation practice requires separate and clearly distinguishable bookkeeping (segment accounting). However, practice among the tax authorities appears to be increasing in this regard and in general, and partial zero-rating is therefore slowly becoming an outdated model.

Unlike private-benefit foundations, foundations that are exclusively **charitable foundations** benefit from extensive **tax privileges**; in particular, they are exempt from taxation for profits that are exclusively and irrevocably committed to these charitable purposes, pursuant to **Art. 56(g) Direct Federal Taxation Act (DBG).** The same applies to cantonal taxes on profit and capital (**Art. 23(1)(f) Federal Act on the Harmonization of Direct Cantonal Taxation and Direct Community Taxation**). Pursuant to **Art. 56(g) DBG**, the acquisition and management of significant capital stakes in companies is considered to be charitable where the interest in maintaining the company is subordinate to the charitable purpose and no management activities are carried out.

In light of limited tax law regulations on charitable status, the **practices of the cantonal tax authorities** are critically important. In relation to zero-rating for taxation purposes for legal entities, taxation authorities are generally guided – though not always consistently – by the now outdated "Circular No. 12 issued by the Federal Tax Authority from 1994" (accessible at http://www.estv.admin.ch). Not least because of this dearth of legal standards and the high level of discretion on the part of the authorities, the tax-related elements of a foundation project often hinge on the ability to strike a balance of interests with the tax authorities. Informal prior clarification is almost always advisable. Where a foundation project is independent of the canton, there is also the possibility of legitimate "forum shopping" – i.e., the opportunity to select, from among the various possibilities, a tax authority that will take a favorable stance toward a given project.

In order to fulfill the definition of a **charitable organization for tax purposes**, two conditions in particular must be fulfilled cumulatively. Firstly, the pursuit of a public interest objective and, secondly, the altruistic nature of the activity being carried out.

The extent to which a purpose is **in the public interest** is assessed in line with the prevailing popular opinion. In general, activities that are charitable, humanitarian, health-promoting, ecological, educational, scientific, or cultural are not problematic. Taxation practice also requires an open circle of beneficiaries. If the group of persons who can benefit from the foundation is too narrowly defined – for example, it is limited to the employees of a specific company, the members of a particular association, or those who practice a particular profession – this will generally preclude recognition as a charitable foundation.

The public interest objective is not limited to Switzerland and may also be fulfilled as part of **foundation activities abroad**. In principle, a foundation may therefore also be exempted from taxation if it does not perform its activities in Switzerland but is partially or exclusively active abroad, for example in a grant-making capacity, provided that its specific activities are deemed worthy of support from the perspective of Swiss society as a whole. However, once again practice is inconsistent among the cantons in this regard, making early clarification with the tax authorities essential.

From the perspective of the tax authorities, an activity is considered **altruistic** if it is not connected with the legal entity's own economic or personal interests, or those of its members (or any associated persons). The foundation, and even its governing bodies, are required to make a "sacrifice." In particular, the members of the board of trustees are generally expected to work for the foundation on an honorary basis. Reimbursement of expenses is considered permissible, whereas payment to board members in line with the market is regarded as detrimental to the public interest. This outdated and restrictive view of altruism has been met with widespread criticism in teaching and foundation practice. Demanding that board members work on an honorary basis in all cases, without considering the specific circumstances, does not adequately reflect the changes to legal, regulatory, and financial framework conditions that impact the current reality regarding foundations. Rather, this practice remains an obstacle to the necessary professionalization of the sector. However, foundations must continue to act cautiously in this regard if they do not wish to jeopardize their charitable status. Compensation for extra-mandatory services, i.e. services not forming part of the core activities of the board of trustees, is in principle considered permissible. Where a member of the board of trustees works for the foundation beyond the execution of the body's mandate, this member may be appropriately compensated in line with the market (for example, legal representation for the foundation during legal proceedings by an attorney who is also a member of board of trustees) (for more on this subject, see OPEL, Ehrenamtlichkeit als Voraussetzung der Steuerbefreiung – ein alter Zopf? StR 74/2019, pp. 84–94.)

A foundation's altruistic objective is also jeopardized if the foundation pursues a **profit-making** purpose. Something that might sound logical can become **difficult to delineate**: for example, when using entrepreneurial funding models or when classifying realized profits from capital participation in a company (for more details on the investment of assets by foundations, see 3.2).

If a charitable foundation is granted the status of a zero-rated institution, it becomes exempt from tax on profits at federal level, and becomes exempt from **tax on profit and capital at cantonal level**. As a result, so-called non-material sources of income, which are committed for zero-rated purposes, are not subject to taxation. These include, for example:

- Donations
- Financial endowments
- Subsequent endowments
- Legacies
- Inheritance
- Income generated from the management of foundation assets, including dividends, interest, or rental income

However, it would be wrong to assume that charitable foundations are generally not subject to taxation. Alongside taxation on profit and capital, there are numerous **other types of taxes** from which charitable foundations can be exempted if all criteria are met. In each individual case, it must therefore be assessed whether special provisions (privileges or exceptions) for charitable institutions are provided for in relation to a particular tax. For example, real estate gains tax is not affected by the charitable status of an entity liable for tax. If a charitable foundation sells a property belonging to the foundation's assets and makes a profit in the process, real estate gains tax will be levied – despite the foundation's overall zero-rating with regard to tax on profit and capital. Value added tax also represents a special case where charitable status does not necessarily confer tax privileges.

1.7.2 Tax deduction for founders or donors

Endowments to domestic charitable institutions are generally exempted from **inheritance and gift taxes** at cantonal level. However, in the absence of a standardized definition of zero-rating based on charitable status, the inheritance and gift tax regulations applicable in each individual case must always be checked when setting up a foundation – and, in cases of doubt, the authorities consulted – in order to ensure that specific requirements are fulfilled.

Where a charitable foundation is zero-rated, its donors (the founder or third-party) who voluntarily make a contribution to the foundation in the form of money or other assets benefit from a **tax deduction** on their income tax and any tax on profits. From a tax law perspective, these voluntary contributions include financial donations, provision of resources, subsequent endowments, and financial endowments.

For **natural persons**, cash benefits and benefits in kind may be deducted at federal level from income above a threshold of CHF 100 per tax year, pursuant to **Art. 33(a) DBG**. The absolute upper limit for deductions is 20% of taxable income, minus certain expenses (**Articles 26–33(a) DBG**). The cantons independently determine the maximum permissible tax deduction under cantonal and communal tax law. These include upper limits of between 5% and (usually) 20% of taxable income, minus deductible expenses. One exception is the canton of Basel-Land, which allows for an unlimited tax deduction.

At federal level, **legal entities** may also deduct, as a business-related expense, voluntary contributions to charitable foundations from their net income (before deduction of these endowments) up to 20% (**Art. 59(1)(c) DBG**). Cantonal tax laws for legal entities also provide for a tax deduction, the amount of which is limited depending on each canton (again with the exception of Basel-Land).

With respect to tax privileges of endowments to charitable foundations, both federal and cantonal tax laws still require that the charitable foundation be **domiciled in Switzerland**. Therefore, if a natural person or legal entity subject to taxation in Switzerland wishes to set up a charitable institution domiciled abroad or make a donation or endowment to such an institution, this will generally not be tax deductible in Switzerland. In order to attenuate this tax disparity between funding for domestic and foreign institutions in practice, founders and donors can, for a fee, make use of an international network of foundations in individual cases. Before such arrangements are implemented, both civil and tax law advice should be sought in order to achieve the desired results as effectively as possible.

Recommendations on tax law principles:

- Do not think exclusively about the tax effect – always start with civil law and progress to tax law. The arrangement must work under civil law and the result must always stand up under foundation law. It can then be optimized from a tax law perspective.
- Any form of foundation that is designed to be charitable should be discussed with the tax authorities beforehand in terms of the criteria for tax exemption.
- Extra caution is required if planning a foundation with an international element and expert advice must always be sought.

1.8 Umbrella foundations

The umbrella foundation has become increasingly popular in recent years. Its significance is based on the key idea of cooperation within the foundation sector, coupled with the understanding that, particularly with regards to smaller projects or projects with a shorter duration, the founder does not always have to set up their "own" independent foundation. The **umbrella foundation** is a special form of foundation with legal capacity (as defined by **Art. 80 et seq. SCC**) that is created in practice and that functions, metaphorically speaking, as an "umbrella," or sponsor, for (usually) dependent or (less frequently) independent foundations. This arrangement is characterized by the assumption by the umbrella foundation of organizational and administrative tasks on behalf of the respective subfoundations. The pooling of grant-making activities and of asset management is also common.

The subfoundations of this type of umbrella foundation are usually **dependent foundations** (sometimes also unofficially referred to as **donor-advised funds**), that do not have legal capacity and require a third party as a legal entity to manage them. These are set up during the founder's lifetime, by means of a written contract, in the form of a gift with constraints imposed or (less frequently) a trusteeship agreement; it is also possible to set up a subfoundation following death by means of the appointment of an heir or a bequest with constraints. The founder of the subfoundation can determine its **name** (for example, XY Fund) and **purpose**; its purpose must not contradict the purpose of the umbrella foundation. As the subfoundation is not an independent legal entity, its zero-rating is dependent on the zero-rating of the umbrella foundation. If the subfoundation does not pursue a charitable purpose, zero-rating will not be granted, or the umbrella foundation's zero-rating will be limited with regard to the non-charitable subfoundation.

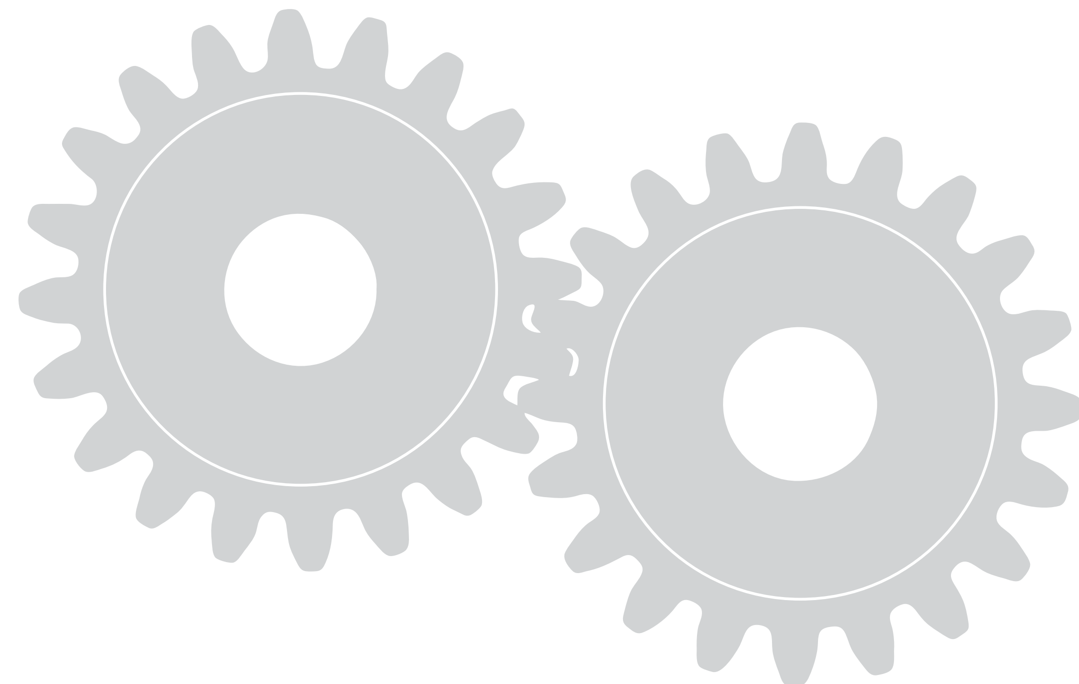
The subfoundation's lack of legal capacity also impacts its **assets** and **organizational structure**. On the one hand, the subfoundation possesses no assets of its own. Rather, all assets are owned by the umbrella foundation, which must use them for a specific purpose in accordance with existing constraints or agreements (or **subfoundation regulations or fund regulations** based on these). Secondly, the subfoundation does not have its own governing bodies; the bodies of the umbrella foundation act on its behalf. In order to give the subfoundation a certain degree of independence and ensure co-determination for its subfounders, it is possible to set up dedicated "committees" and to delegate certain monitoring tasks or administrative powers. Alternatively, a simple right to express an opinion can be agreed for the subfounder. With regard to the establishment of rights and obligations, it is always the umbrella foundation – being the only one with legal capacity – that is active externally. The dependent subfoundation is indirectly subject to supervision as part of the umbrella foundation monitoring.

Dependent subfoundations can serve as an **alternative** to a founder's own (independent) foundation. Particularly in the case of foundation projects with limited assets, qualified umbrella foundations can act as suitable sponsors for the effective pursuit of the foundation purpose. Through asset pooling, asset management costs can be kept low and returns optimized, thereby increasing the grant benefits. Umbrella foundations are often considered in cases where the founder favors a simple set-up process; wants to forgo the time, administrative, and financial commitments associated with setting up their own independent foundation; or wishes to benefit from the umbrella foundation's available experience, professionalism, and expertise. Alternatively, they may simply wish to first test out their foundation concept. The advantages of subfoundations are that they are easy to set up, do not have a minimum asset requirement, can more quickly allocate resources, are not subject to direct supervision, it is easier to make changes to their organizational structure and purpose, and they can be abolished more easily.

In addition to dependent subfoundations, **independent subfoundations** may also be affiliated with an umbrella foundation. In terms of organizational structure, the umbrella foundation may, for example, assume the role of administrative office in these independent subfoundations if a contract is in place for the administration of the subfoundation. Because independent subfoundations have their own legal capacity, there is, in principle, a separation between the assets of the umbrella foundation and those of the subfoundation. However, the assets can be managed by the umbrella foundation by means of a discretionary mandate. In addition, independent subfoundations are directly supervised by their respective state foundation supervisory authority.

Finally, a "normal" foundation can also **de facto** become an "umbrella foundation" if, within the framework of applicable statutory provisions, it is suitable to acquire and accommodate a dependent foundation. The major university foundations are well-known examples of this.

(For more information on umbrella foundations, see SPRECHER/STUDEN, Kooperation unter einem Dach – zur Funktionsweise der Dachstiftung, successio 2014, pp. 36–53; STUDEN/GEINOZ, Zweckgebundene Mittel und Stiftungsartige Vermögensbindungen, Terminologie und Grundlagen (Part 1) and Foundation Governance (Part 2), EF 3/18, p. 172 et seq. and EF 4/18, p. 272 et seq.)



2

The board of trustees

2.1 Appointment, composition, and dismissal
2.2 Rights and obligations of the board of trustees
2.3 Handling of conflicts of interests
2.4 Autonomy of action of the board of trustees
2.4.1 Fundamental decisions on determining the identity and development of the foundation
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2.5 Issues of representation and liability

As the highest governing body, the board of trustees implements the founder's specifications. In this context, the following provisions set out the legal framework conditions of the actions of the board of trustees and – in particular – they clarify the rights and obligations of the board of trustees, the scope and extent of the autonomy of the board of trustees, and issues relating to liability.

As already explained, the board of trustees is the highest agent and representative body of a foundation. However, it is essential that readers understand that, unlike the bodies that are corporately structured with legal entities (for example, the general meetings of an association, or the AGM of Credit Suisse), the board of trustees is simply a **governing body**, not a decision-making body. In other words, the board of trustees fundamentally has no independent decision-making capacity, but rather is tasked with fulfilling the original intention of the founder as set out in the purpose of the foundation. This is established in the purpose of the foundation, which is the highest guiding principle for the activity of the board of trustees. The autonomy of the board of trustees is restricted to the following:

- Properly exercising the discretion granted to it within the fulfillment of the purpose of the foundation (for more details, see 2.4.2).
- Interpreting the intention of the original founder correctly and appropriately.
- Continuing to develop the foundation in accordance with this intention.

These basic principles also apply if the founder is also a member (including if they are the sole member) of the board of trustees. If this is the case, then the founder will also act as the board of trustees and must fulfill the intention that they originally specified.

2.1 Appointment, composition, and dismissal

The board of trustees can consist of one or more **natural persons** and is entered in the Commercial Register. The founder can – and should – set out the details of the term of office, appointment, composition, and dismissal of members when establishing the foundation (if necessary, at regulatory level). This will avoid uncertainty and conflicts of interest. When exercising their freedom as a founder, the founder can:

- Appoint themselves to the board of trustees.
- Grant themselves a lifetime power of appointment.
- Specify an electoral body.
- Set out formal or material criteria for admission to the board of trustees (for example, approval or a specific nationality).
- Impose specific incompatibility provisions (see also 2.3).

If the founder wishes to **remunerate** members of the board of trustees, it is advisable to include explicit authority in the foundation articles or regulations to this effect. Equally, steps should be taken to ensure that this does not endanger the non-profit status of the foundation from a tax perspective (for more details, see 1.7.1).

The **mandate of the board of trustees** is fundamentally inseparably linked to the person appointed (**ad personam**) and, without explicit arrangement by the founder, appointment to the board of trustees cannot be transferred to a third party, nor is it hereditary. Moreover, the founder can make arrangements stating that a specific person (such as a chair of the board of directors, university dean, or mayor) should sit on the board of trustees due to the position they hold or based on their office ("ex officio" boards of trustees). In order to prevent legal uncertainties, it should be explicitly set out in such cases whether the mandate of the board of trustees is an accessory, which automatically ends when the relevant position or office comes to an end. The office of a member of the board of trustees must also be exercised **in person**. While the use of a deputy is in principle possible for individual legal transactions and sessions, effectively assigning a position on the board of trustees to a third party is not permitted and benefits neither the foundation nor the board of trustees. The same applies to the long-term absence of the member of the board of trustees in question.

In the absence of explicit specifications from the founder, the board of trustees will constitute itself and make arrangements to add to its number (**co-opting**). The statutory duties and legal obligations that are associated with the mandate of the board of trustees mean that admission to the board of trustees must be **accepted** by the member of the board of trustees (to be notified to the Commercial Register).

Swiss foundation law does not recognize any **legal incompatibility provisions**. As a result, the founder themselves, their close family members, and beneficiaries may sit on the board of trustees. However, founders are free to impose their own explicit statutory or regulatory incompatibility rules to prevent certain people or groups of people from holding a board of trustees mandate or, in contrast, to set out specific criteria for admission. Of course, even if a board of trustees is properly composed, ad hoc conflicts of interest are still possible (for more details, see 2.3). The board of trustees is required to respond to such cases by appropriately complying with the general rules of withdrawal, which the founder can also specify in the foundation documents.

The intention of the founder also takes priority with regard to **procedures for removal from office**. The founder has the power to set out concrete specifications for the dismissal of members of the board of trustees, and also to provide for a particular procedure. In the absence of statutory or regulatory rules, the board of trustees must act in accordance with general principles. In cases of doubt, Swiss association law may offer guidance. An official removal of the board of trustees is considered as a last resort if:

- Its behavior with regard to an activity of the foundation in accordance with the law and foundation articles is no longer acceptable.
- The appropriate utilization of the foundation's assets is impaired or endangered.
- Other, more lenient measures do not promise to be successful.

Culpable behavior by the board of trustees is not necessary in this instance; the focus is exclusively on the **vulnerable position** of the foundation. This means that, in an exceptional case, a board of trustees acting to the best of its knowledge and judgment can also be dismissed if this is the only way to protect the foundation's interests.

In this context, the **legal dispute relating to the "Stefanini Foundation"** caused a stir. Once the founder lost his capacity to act, his children – as explicitly stipulated in the foundation articles – were permitted to appoint the board of trustees and to form a new board of trustees themselves. At the same time, the sitting members of the board of trustees attempted to amend the foundation articles and to replace the appointment clause that favored the children with a co-optation clause. The Swiss Federal Supreme Court ruled that the co-optation clause was not conclusively better suited to safeguard the foundation purpose than the appointment clause, and that the amendment of the foundation articles was therefore not urgently required (as **Art. 85 SCC** implies, however). The legal dispute, which dragged on for many years, could have been avoided had the governance system been more finely nuanced. (See ruling 144 III 264 of the Swiss Federal Supreme Court)

2.2 Rights and obligations of the board of trustees

The board of trustees as the **governing, management, and steering body** is both entitled and obligated to handle foundation matters relating to legal and statutory provisions, and to represent the foundation to third parties (creditors, debtors, project partners, donors, beneficiaries, authorities, courts, etc.) (**Art. 55 SCC**). A contract of employment under the law of obligation is sometimes concluded between the foundation and the member of the board of trustees. Naturally, this is at most a supplement to the executive rights and obligations and by no means a substitute for them.

However, any attempt to find a comprehensive regulation of the **specific rights and obligations** of the board of trustees in **Art. 80 et seq. SCC** will be to no avail. In point of fact, the nature and scope of the framework of rights and obligations must at a minimum also be guided by the individual functional and practical organizational structure within the foundation in question. The board of trustees can be assigned various roles, depending on its structure and size. One extreme might be a far-sighted strategic body that plans well ahead and is responsible for the big picture, which delegates the actual arrangements to an office or to management; the other extreme might be a board of trustees that handles day-to-day business itself and is the sole point of contact for all matters.

Fundamentally, the **duties** of the board of trustees can be broken down into three main categories, each of which then consists of a multitude of subtasks:

- The obligation to get value for money and the related obligation to pursue the purpose of the foundation.
- The obligation to ensure proper financial management.
- The obligation of bookkeeping and financial reporting, including the obligation to prepare and approve the financial statements.

The general **obligations relating to tax law** – such as the submission of tax returns – are of particular relevance, as are the obligations relating to **social insurance law** (including the registration of employees with the competent authorities and the deduction of social insurance contributions, for which the board of trustees may even be personally liable under **Art. 52 (2) of the Federal Act on Old Age and Survivors' Insurance**).

In addition, the **company law reform** (which is expected to enter into force in 2022) has introduced two new specific obligations of the board of trustees: the notification obligation in the event of impending excessive debt or insolvency (**Art. 84a (1) revised SCC**) and the disclosure obligation for remuneration of the board of trustees and a potential executive board (**Art. 84b revised SCC**).

The **general duties of due diligence** require the members of the board of trustees to be appropriately informed about relevant topics within the foundation. This includes preparing for the regular meetings of the board of trustees, regularly attending these meetings or, if unable to attend, promptly obtaining information about the agenda items that were dealt with and, in particular, the decisions that were made. Furthermore, members of the board of trustees may be subject to specific duties of loyalty to the foundation, to each other, but also in relation to third parties (for example, duties of discretion and confidentiality).

The reality for foundations these days is that a board of trustees will face **numerous challenges** requiring a diverse range of knowledge and skills, including financial matters, project-related questions, staff support, and legal problems. This is in addition to the ever-increasing number of regulatory requirements. For this reason, various areas of responsibility can be designated within the board of trustees as a collective body and assigned to members with the appropriate qualifications (or to appropriate **committees** or **commissions** in larger boards of trustees). At the same time, the board of trustees is not necessarily left to its own devices when it comes to handling its range of duties; it has the fundamental right to bring in external third parties to carry out specific tasks (and to delegate tasks, such as for asset management and investment; for more details, see 3.3). If this is done, then the board of trustees is responsible for carrying out regular careful checks and for monitoring activities. This is because the board of trustees is the highest governing body and is therefore responsible for the proper management of the foundation in line with its purpose (for more details on issues of liability when delegating tasks, see 2.5). The same applies in principle for the monitoring of individual members where duties are shared internally within the board of trustees.

2.3 Handling of conflicts of interest

In practice, foundations frequently face the issue of how to deal with **conflicts of interest**. A conflict of interest is a situation where a member of the board of trustees is also exposed to personal, external, or other interests in addition to the interests of the foundation when a decision is to be made by the board of trustees or when a specific legal transaction is to be concluded, and where the fact that the various interests are not necessarily congruent creates the risk that the actions of that member of the board of trustees when the decision is made are not governed solely by the interests of the foundation (for example, the sale to the foundation of a property belonging to the wife of that member of the board of trustees).

When creating the foundation, the founder should provide **instruments** that aim to define relevant conflicts of interests and, where possible, to prevent them (for example, by implementing the principle of dual control when concluding legal transactions, or the prompt involvement of independent expert panels). In addition, an appropriate and graduated method of handling conflicts of interests should be guaranteed.

> The reality for foundations these days is that a board of trustees will face numerous challenges requiring a diverse range of knowledge and skills.

Requiring comprehensive **disclosure** at an early stage to other members of the board of trustees concerned when conflicts of interests arise goes a long way toward successfully resolving the situation. If this approach is used, the board of trustees should hold a discussion to examine in detail whether the specific case in question actually constitutes a conflict of interest. If the answer is yes, then the foundation documents can specify that recusal is required, for example, and withdraw the voting right of the member of the board of trustees in question as part of the resolution. Ultimately, it is recommended that the significant considerations and the actual decision be documented in sufficient detail in writing, so that the reasons for the decision can be presented in a way that is transparent and traceable in the event of a dispute.

If there is any doubt about whether there is a conflict of interest, then the member of the board of trustees in question should consider recusing themselves to avoid any semblance of disreputable conduct from even occurring. If doubts before a decision is made are not dispelled in full (such as in a situation where the board of trustees consists of one single person), steps should be taken to ensure that any legal transaction will bear **objective scrutiny by a third party** and is carried out at arm's length.

If the foundation documents do not include any arrangements for handling conflicts of interests, the general legal principles – and specifically the criteria on **insider trading** – should be observed. However, while insider trading is always a conflict of interest, different conflicts of interest are ranked differently in terms of severity (particularly as there may also be outside interests that are aligned with those of the foundation). Boards of trustees are therefore well advised to give detailed consideration to conflicts of interest and, if a waiver is not subject to a corresponding rule in a **regulation**, to at least draw up **internal guidelines** for dealing with conflicts of interest. In important economic cases, it may also be necessary to contact the supervisory authority at an early stage and to agree what happens next with that body.

In order to identify conflicts of interests at an early stage and to be able to respond appropriately, boards of trustees should ask themselves the following **questions** before making a decision:

- Am I directly or indirectly affected by this specific decision either commercially or non-materially? What about close family members and other natural persons or legal entities who are connected to me?
- If I am involved in making the decision, is there a risk that I will expose myself to the suspicion of not acting solely in the foundation's interests?
- Is the decision important enough to me that I am not prepared to recuse myself to avoid potential legal uncertainties?
- Can the legal transaction in question still be carried out even if I am not involved? Seen from another angle, could my involvement endanger the legal certainty of the transaction?
- If necessary, am I prepared to abstain from the specific legal transaction or, as a last resort, to resign as a member of the board of trustees?

Essentially, although how conflicts of interests are handled is also about avoiding liability for the board of trustees in question, the priority is to prevent any loss or damage to the foundation.

2.4 Autonomy of action of the board of trustees

As already discussed (see 2.2), the primary duty of the board of trustees is to **carry out the original intention of the founder** as established in the purpose of the foundation. However, the founder may not be willing or able to provide specific instructions for every last detail. They must rely on their intention being followed and realized by the governing bodies of the foundation. In other words, the founder creates the framework to be observed for the fundamental characteristics that define the identity of the foundation, and the board of trustees is responsible for translating the foundation purpose into concrete day-to-day actions. You could compare the board of trustees to a **helmsman** on a boat, who follows the course that is set by the founder and has to navigate through the prevailing weather conditions.

Of course, the forecast conditions frequently change and the route may occasionally encounter turbulence, so **navigating** can become a **challenging task**. If the foundation finds itself heading for an iceberg, for example, the board of trustees will have to temporarily deviate from the preset course, or it may even decide to take a completely new course to avoid any danger. This may occasionally create a challenging situation in terms of harmonizing the duty to protect the founder's legitimate interests with the obligation of the board of trustees to act as meaningfully and effectively as possible in the interests of the foundation.

Striking this **balance** between fulfilling the intention of the founder – which is often historic – and acting in an effective and contemporary way on behalf of the foundation is one of the biggest challenges in the daily life of a foundation. Understanding the following four elements is crucial in this context:

- Where is the line between fundamental decisions that determine the identity of the foundation and the permitted or even prohibited continuing development of the foundation?
- What do we mean by properly exercising discretion?
- What do we mean by interpreting the intention of the founder?
- And how do the statutory facts of amendment operate?

2.4.1 Fundamental decisions on determining the identity and development of the foundation

The **founder's freedom** gives the founder the power to perpetuate in the long term the fundamental decisions of the foundation that determine its identity and thus to remove them from the disposition of the board of trustees. However, it only takes a few years for what was state of the art when the foundation was established to become outdated. This is where the **autonomy of the governing bodies** comes in. This autonomy allows the board of trustees to adapt its management of the foundation to the changing circumstances to the best of its knowledge and belief; in other words, to continue to develop the foundation, where necessary including by making decisions that deviate from the intention of the founder and, if appropriate, through unpopular measures.

This means that the lines between healthy and permitted autonomy of the board of trustees on the one hand and inadmissible disregard of the intention of the founder that is contrary to the duty of the board of trustees on the other are blurred and not always easy to identify. Members of the board of trustees can use the following formula as a **guiding principle**: The core of the intention cannot be changed autonomously by the board of trustees and includes the fundamental decisions that determine the identity of

> “In line with its duties of loyalty and due diligence, the board of trustees must base its discretionary judgment on a considered process of preparation, deliberation, and decision-making.

the foundation relating to its purpose, assets, and organization. Any change to these would mean that the foundation no longer had the identity that it was given by the founder. The softer part of the intention, on the other hand, covers the areas where the board of trustees is permitted to continue to develop the foundation. This area consists of those parts of the founder's intention that were specified initially, but where changes will not affect the realization of the purpose of the foundation in a way that affects its identity (see also the example in 2.4). The statutory defined core of the intention can only be modified; as previously, this is done via the facts of amendment (see also 2.4.4).

2.4.2 Proper exercise of discretion

When actually implementing the frequently abstract and generally formulated intention of the founder, the board of trustees has a degree of freedom in terms of structure, decision-making, and implementation referred to as its **discretion**. As something of a counterbalance to this autonomy, however, the board of trustees is also required to exercise this discretion properly. Although the founder is not able to influence the results of specific decisions, they must and can rely on the presence of a considered decision-making process. In other words, the board of trustees has a duty to the founder to exercise its discretion properly and must also answer to the supervisory body in this regard.

The existence, scope, and limits of this discretion depend firstly on the intention of the founder. The founder has a degree of freedom to set specific provisions on whether and how members of the board of trustees must exercise their discretion on certain issues. If the foundation documents contain instructions from the founder that do not leave any room for maneuver, then the discretion of the board of trustees can also be withdrawn on specific issues. The board of trustees would then be making a discretionary error and thus fundamentally acting inadmissibly if and to the extent that it used the discretion that it had not been granted instead of following the provisions set by the founder. In addition to these discretionary limits set by the founder, there are also general limits, most notably mandatory legal provisions and sensitive legal positions of third parties.

However, even if the board of trustees has discretion on a particular issue, it cannot simply act or decide as it pleases. In line with its duties of loyalty and due diligence outlined above, the board of trustees must rather base its discretionary judgment on a considered process of **preparation, deliberation, and decision-making**.

If a decision by the board of trustees is based on an incorrect or insufficient decision-making process – if, for example, it exercised discretionary freedom that was not actually available, if irrelevant matters were taken into consideration, or if necessary arguments were given the wrong weighting – then this represents a **discretionary error.**

Any decision by the board of trustees that contains discretionary errors may be the subject of legal action and may lead to the board of trustees being held **liable**. In addition, the authorities and courts will be involved in the event of discretionary errors. Admittedly, the foundation supervisory authority will only check a decision by the board of trustees in terms of its legality and not in terms of its expediency (referred to as legal supervision, see 1.6). In other words, the authority is not permitted to exercise its discretion instead of the discretion of the board of trustees. However, the responsible body is still entitled and obligated to check the proper procedure of exercising discretion for any discretionary errors.

In this context, there are **typical questions** that apply to decisions by boards of trustees and resolutions, which should be discussed during transparent dialogues within the board of trustees:

- Do the foundation documents for the issue in question contain provisions from the founder which must be followed? In certain circumstances where the founder has not provided any instructions, are there any other indications that may point to specific original intentions on the part of the founder? Are there any reasons not to heed these indications?
- Where the foundation documents do not contain any provisions and thus the board of trustees is free to exercise its discretion: Which decisions are conceivable? Can certain alternative actions and decisions that were initially in play be ignored on closer examination – for example – due to a lack of financial resources?
- Overall, which decision parameters can be included and, if necessary, can they be sorted hierarchically by significance?
- On a personal basis, am I being guided solely by relevant criteria when I make my decision, or are elements that do not or must not have any significance for the decision also playing a part – possibly unnoticed? These elements may include a personal preference for or aversion to parties involved, or improper “instructions” from the founder that contradict the original intention.
- Has the decision-making process been documented throughout? In the event of a dispute, can the decision be scrutinized adequately against the relevant documentation (such as the minutes of board meetings or advisory opinions that have been sought), so that it can be demonstrated that the proper decision-making process was followed?

2.4.3 Interpretation of the intention of the founder

Once both the autonomy of action of the board of trustees and the proper exercise of discretion have been aligned with the **intention of the founder**, the importance of **interpreting** this intention cannot be overstated. This leads us to a typical legal phenomenon relating to the foundation, which may take some getting used to. What needs to be implemented is the original intention of the founder as set out in the foundation purpose, not the intention of the people currently governing the foundation. This creates tension between two different priorities. On the one hand, the founder's intention needs to be adapted in line with changing conditions and new generations while, on the other, the foundation needs to be protected against unauthorized subsequent modifications by the people involved with the foundation and/or the founder themselves.

The more uncertain the terrain, the greater the importance of observing **dogmatic principles**. The interpretation of the foundation's business as a unilateral legal procedure is essentially based on the principle of natural consensus: the deciding factor is what the founder wanted to happen and not what a potential recipient of a declaration might understand based on the principle of trust. In addition, the required form for the founder's declaration must also be observed (notarial certification or testamentary disposition), and the objectives of form for this (such as a warning, clarification, and evidential function) can only relate to the content of the deed.

In this context, **three situations** in particular pose problems in the daily life of a foundation:

- Circumstances or declarations of intent that fall outside the statutory documents.
- Subsequent statements of intent by the founder.
- Changes in circumstances.

Whether and the extent to which circumstances that fall **outside the foundation documents** and/or statements during the interpretation of the intention of the founder can be or even must be taken into consideration can be determined by applying the **theory of suggestion**. This theory states that an element of the founder's intention for a document requiring a particular form, which is based on circumstances that fall outside of the document, only requires consideration if it is at least indicated in the deed. Ultimately, the theory of suggestion attempts to reach a compromise between safeguarding the objectives of form on the one hand and implementing the actual intention of the author on the other.

Technically, there are **two stages** to the theory of suggestion. The first step is to determine this intention using all obvious aspects; in other words, including those that fall outside the deed. The second step is to check whether this intention is also stated in the proper form, or is at least indicated in the deed. The requirements for a suggestion must not be overstated in the process. It must be sufficient for the content determined through the interpretation to be referred to or mentioned in the deed of foundation, however briefly.

Accordingly, even a **subsequent declaration of intent** by the founder can still be used, but only to clarify the original intention of the founder suggested in the foundation documents.

After all, any **change in circumstances** can be taken into consideration through an additional interpretation for the purpose of investigating the **hypothetical intention** of the founder. Acting in good faith, what instructions would the founder give if they were aware of the changed circumstances? Of course, the result of the interpretation must also be indicated and, above all, it must not be allowed to contradict the explicitly stated intention. In cases where there is no ambiguity, the limit of interpretation is reached and, at best, there is room for changes to the foundation articles that amend or expand the wording (see also 2.4.4).

Ultimately, the interpretation of the intention of the founder remains a case-specific and individual negotiation of the tension between the principle of solidification and the actual intention of the founder. In many cases, the **material compatibility** of a (hypothetical) intention of the founder or fact that is found outside the documents with the original declaration in the foundation documents can be decisive.

2.4.4 Statutory facts of amendment

If the autonomy of the board of trustees reaches the limits of the fundamental decisions that determine the identity of the foundation, or if the foundation articles need to be amended for other reasons, this must be approached via the statutory amendment rights (**Art. 85, 86, 86a, 86b SCC**). As already indicated, regulations, by contrast, can essentially be amended autonomously by the responsible body (see 1.5).

In this context, it must be noted that proper exercising of discretion may not only entitle but also actually **obligate** the governing bodies of the foundation to amend the foundation documents or structure. In specific individual cases, this may even result in the termination of the foundation or another form of reorganization that changes its existence (such as a merger). If, for example, a foundation that funds specific categories of student is no longer able to sensibly share out its money because of outdated statutory distribution criteria, the board of trustees must apply to amend the foundation articles. It is then incumbent on the supervisory authority to also comply with this dynamic understanding of the foundation. Collectively, managing the foundation is about finding a contemporary way to express the **core ideas** of the founder so that they can always be **as effective as possible**, not about preserving every historic detail of the intention of the founder so that nothing ever changes. It goes without saying that properly exercising discretion and accurately interpreting the intention of the founder are imperative in these cases.

Procedurally, **changes to the foundation articles** in Switzerland are currently handled exclusively via the supervisory or modification authorities. Any such changes must comply with **Art. 85 SCC** (reorganization), **Art. 86 SCC** (amendment of purpose), or **Art. 86b SCC** (minor amendments). If the founder has reserved the right to amend the foundation purpose in accordance with **Art. 86a SCC**, the authorities must implement the amendment if the other prerequisites are met. It is recommended that the founder and the board of trustees familiarize themselves with this conflict-prone issue before establishing a foundation or amending its structure, and that they obtain advice from a civil and tax law perspective on the matter if necessary.

Practical example: Amendment of asset provisions and switch to consumption
When the interest rate situation on the markets changed a few years ago, many traditional foundations, who were supposed to retain their foundation assets and were only permitted to operate on their income, started questioning whether, when and to what extent they would be entitled to draw on its total assets, either by way of exception or even on an ongoing basis. Based on the above, their thought process could be something like this:

- The first step is to examine the foundation articles for the foundation to establish whether the foundation articles give any indications on the matter, including outside the documents themselves. What would the founder have done, had they considered this situation? If the interpretation – potentially without any indications – does not point toward consumption, then the asset base should fundamentally be viewed as permanently committed.
- And yet, drawing on the total assets may be possible in individual cases in the context of foundation autonomy and after due and proper consideration if exceptional situations require flexible handling in order to prevent the permanent paralysis or inactivity of the foundation, or to rescue current projects. In other words, deviating from the preset course to avoid the iceberg!
- If, however, the ongoing consumption of the basic assets or an actual (statutory) switch to consumption is being considered, then this affects the fundamental decisions that determine the identity of the foundation. This involves charting a completely new course! In this case, the approach must usually be via **Art. 85 SCC.**

2.5 Issues of representation and liability

In its relationship with third parties – such as foundation creditors or beneficiaries – the foundation has rights and obligations as a result of the **actions of its governing bodies**, both by concluding legal transactions and also through other actions (**Art. 55 (2) SCC**). In addition, wrongful acts attract (joint) personal liability on the part of the member of the board of trustees carrying out the act (**Art. 55 (3) SCC**).

Here, the **internal power of representation** can be restricted by internal foundation provisions, such as a restriction on signatories. By contrast, the admittedly simply relevant outward **representative power** is not restricted if the transaction can in theory be included in the purpose of the foundation; in other words, not actually excluded. The following restrictions should also be noted: a restriction of the representative power that is declared in the Commercial Register or that is otherwise made known to the third party; the prohibition of insider trading; recognizable abuse of the representative power for the third party.

In addition, the Zurich commercial court ruled in 2019 that any foundation without explicit statutory rules does not have the **right to take legal action** to assign claims for damages en masse, to which no objection was raised by the Federal Supreme Court. However, this ruling (which was sharply criticized in the literature) was based on extremely specific circumstances (class action in the VW emissions scandal) (see BGer 4A_43/2020 dated July 16, 2020).

If a board of trustees acts inadmissibly when carrying out the duties of the board of trustees and this causes the foundation to suffer a loss, this may be grounds for a **liability claim** by the foundation against the member of the governing body in question. Liability due to non-performance or improper performance (**Art. 97 et seq. Swiss Code of Obligations (OR)**) may relate to contractual or employment law, depending on whether there are concrete contractual regulations in place between the foundation and members of the board of trustees (for example, as part of a contract of employment). In addition, tortious liability by reason of unlawful action may also apply; for example, in the event of property damage (**Art. 41 et seq. OR**). What are referred to as **de facto controlling companies** (which, although not formally appointed, are de facto granted legal and actual decision-making powers) can also become liable both inside the foundation and externally.

If several or all members of the board of trustees jointly cause a loss, they are jointly liable to the foundation. If the board of trustees is aware of a loss that is caused by one, several, or all members of the board of trustees acting inadmissibly and fails to take action, **measures by the supervisory authority** will be considered. These measures range up to and including the dismissal of some or all members of the board of trustees and/or the appointment of an administrator. In order to avoid conflicts of interests, one option for reasons of efficient enforcement of claims is to assign the procedural enforcement of claims for damages within the foundation against members of the board of trustees to an optional second governing body, such as an advisory board.

The liability of the board of trustees can then not be excluded by statute (and even the waiver of slight negligence is disputed). Nevertheless, delegation in compliance with the foundation articles of tasks or subtasks will result in a practical **limitation of liability**: if the board of trustees exercises its delegation authority in an admissible manner, it will be liable solely for the proper selection, instruction, and supervision of the delegated party or parties. What is referred to as the business judgment rule will also apply, although this is currently without a legal basis. This rule states that obligations have not been breached if the member of the governing body was not guided by extraneous interests when making a business decision and could reasonably assume that they were acting on the basis of appropriate information for the benefit of the legal entity. Whether or not a lessening of liability in line with **Art. 99 (2) OR** can also be considered in the event of voluntary work by the board of trustees at all, or only in the case of express statutory order is also disputed and therefore uncertain ground.

Of course, if the activities of the foundation involve activities that are prone to risk and that have a high potential for loss (such as operating a hospital), or if the complexity or the sheer size of the foundation's assets mean there is a danger of compensation claims that threaten its existence, then consideration should be given to taking out **indemnity insurance for the board of trustees** (known as D&O, or "Directors and Officers," insurance). In order to avoid subsequent legal uncertainties, the founder themselves can specify the conclusion of such an insurance policy in the foundation articles, if they so wish.

In order to identify **liability risks** in good time and to be able to respond appropriately on a case-by-case basis, the founder and members of board of trustees should give thought to the following points:

- Is the intended or existing organizational structure appropriate to the size of the foundation?
- Is a separation of personnel between the management and strategic levels advisable?
- Is a functional internal controlling and risk management process in place in order to identify potential misconduct at an early stage and to take appropriate action?
- Is the risk associated with a legal transaction proportionate to the potential income or profit (not necessarily monetary) for the foundation?
- Is taking out D&O insurance advisable and financially feasible in terms of the insurance premiums? Which risks does the insurance actually cover? If D&O insurance is taken out, could this create a risk of a moral hazard in the long term, such as if reliance on the insurance coverage causes people to act negligently or more negligently?
- What are the legal and financial risks in cases involving foreign countries? Are appropriate risk avoidance measures available here? Are insurance solutions on site possible and feasible?
- Finally, the parties involved should also be clear on the fact that in addition to damage that reduces the value of the assets, there are also what are referred to as soft risks. Although these soft risks are difficult to measure, they can still be just as relevant for a foundation (for example, reputational risks).

Recommendations for the founder in terms of organizational issues regarding the board of trustees:

- As the founder, when setting up the foundation, consider what the future foundation organization will look like and how the board of trustees will be configured. Ensure that you can support the foundation with your skills, but that the foundation can also function without you, particularly after your death.
- As the founder, think about how much freedom you want to give the board of trustees. Understand that you are only able to predict future developments to a limited extent, so avoid overly rigid instructions and give the governing bodies the opportunity for dynamic ongoing development of the foundation in a way that follows your guidelines.
- As the founder, proactively address liability issues, conflicts of interest, and internal control mechanisms, as well as the issue of the permissibility and, where applicable, the amount of remuneration for members of the board of trustees.
- As the board of trustees, you should make sure you are clear on whether the founder has granted you scope for development and to make decisions and, if so, how much scope, and whether fixed, identity-defining stipulations exist.
- Perform your duties on the board of trustees properly and without abusing your discretion. Especially if no founder specifications exist, develop an appropriate and transparent resolution procedure and carefully document the relevant decision-making process, particularly for controversial, risky, and important issues.
- Avoid conflicts of interest and establish mechanisms to deal with them.
- If, as a member of the board of trustees, you are not sure whether you are involved in a conflict of interest, you should discuss the matter transparently with the board of trustees. In cases of reasonable doubt, you should consider voluntarily stepping down.

3

Asset management and investment strategy

3.1 The search for modern investment concepts for foundations

3.2 Legal framework conditions and options for structuring foundations in practice

3.3 Focus 1: Impact investments and entrepreneurial funding models

3.3.1 Assessment levels

3.3.2 Types of investment

3.3.3 Eligibility criteria

3.4 Focus 2: Investment guidelines

One of the main responsibilities and duties of the board of trustees is ensuring that foundation assets are managed properly. Based on the legal framework, the following chapter covers the practical elements of a modern investment and management strategy.

3.1 The search for modern investment concepts for foundations

The investment of assets can present some major challenges for those involved in the foundation. Confronted with a global investment universe and the low interest rate environment of recent years, the board of trustees has to strike a **balance** between careful management, consistent returns, and adequate risk allocation. It is therefore no surprise that there are few areas with a greater need for competent and comprehensive advice at present.

Given this situation, the foundation sector has recognized that in an age of low returns, many foundations can no longer survive as traditional, purely returns-oriented legal forms. They need to work with the assets themselves, and use them more creatively and/or more effectively than as mere “low-risk fixed-income investments.” This is creating **new trends** in the foundation world, such as the pooling of foundation assets in umbrella or investment foundations or concepts that focus on sustainability or investments with a specific purpose (key words: social, responsible, sustainable, impact- or mission-related investments, venture philanthropy, and entrepreneurial funding models). However, these developments are raising **new issues**, in particular with regard to the compatibility of individual investment strategies with the legal foundation and tax requirements. And these new trends and the issues that they raise are not always harmonious or easily resolved. For example, there are sometimes gaps between what banks, asset managers, foundation advisors, and investment advisors offer or what founders and boards of trustees want and what foundations are actually able and permitted to do under civil and tax law. An increasing number of models are also being developed that strive not only to achieve a particular purpose through the management of the foundation’s assets, but also aim to make asset

management more flexible in general. New approaches are being sought for the **relationship between founders and foundation assets**, for instance, as a new, entrepreneurial-minded generation of founders is increasingly seeking:

- To maintain an influence over the assets designated for the foundation.
- To evaluate projects themselves based on entrepreneurial criteria and determine the consequences on this basis.
- To retain flexibility for unforeseen events (not least their own emergencies).

This means that foundation assets are often no longer conventional, complete one-off donations of the total amount; instead, **phased models** are used that are in some cases also combined with **consumption elements**.

As to the issue of which arrangements are permitted in practice, that must ultimately be determined by **assessments from a foundation law perspective**, focusing in particular on the principles of an appropriate purpose-funds relationship, the reasonable expectation that the foundation will secure sufficient assets (particularly even in the event of the death of the founder), and any founder specifications in terms of the preservation, consumption, investment, and management of assets. At the same time, in each specific case, the autonomy of the founder must be reconciled with the autonomy of the foundation as previously outlined (for further details, see 2.4).

We are currently seeing a paradigm shift with regard to foundation assets. What used to be mere asset management is now a crucial part of the **foundation strategy**.

3.2 Legal framework conditions and options for structuring foundations in practice

The Swiss Civil Code (SCC) does not contain any **provisions on asset management**; even the regulations contained in some cantonal ordinances on the supervision of foundations provide only rudimentary points of reference at best. Solutions must therefore generally be derived from the general principles of foundation law.

As a starting point, for example, the **founder's intention takes priority** in asset management as well. When setting up a foundation, each founder is free, in the foundation articles, to both define individual regulations on the investment of assets and to stipulate that the foundation assets can or must be used to achieve the relevant purpose. If the persons currently carrying out the foundation activities believe such stipulations to be outdated, perhaps because they result in risk concentration or (as used to be common) prescribe trustee security status, the autonomous development options for the foundation must first be determined by interpreting the relevant stipulations and exercising appropriate discretion. Where this approach reaches its limits, an amendment to the deed of foundation in accordance with **Art. 85 or 86b SCC** must then be considered (for further information, see 2.4.4).

If the foundation articles do not contain any specifications regarding the investment of assets, under **Swiss legal precedent**, the board of trustees must generally act in accordance with the principles of **diligent asset management**. These include:

- Asset maintenance
- Security
- Risk diversification
- Profitability
- Liquidity

According to these principles, while the board of trustees should avoid speculative investments, assigning "trustee security status" to investments is not advisable. In addition, according to the Federal Supreme Court, the investment principles laid down in the Ordinance on Occupational Retirement, Survivors' and Disability Pension Plans (BVV 2; dated April 18, 1984, Official Compilation of Federal Laws and Ordinances 1984 543) for **staff pension funds** can be used by boards of trustees of traditional foundations as a guide (see ruling of the Swiss Federal Supreme Court 108 II 352), although the details and limits of this **"guidance"** admittedly remain unclear. Since the suitability of these principles of legal precedent for many, particularly modern, forms of foundation and investment is limited, when designing a foundation, the focus must be on defining a concrete strategic position for the foundation with regard to assets.
However, the day-to-day balancing of the need for investment security against the generation of returns generally remains at the individual discretion of the board of trustees, and these decisions must be made according to the board's **best judgment** (see 2.4.2). The aspects that play a role in the management of the foundation's assets – and therefore also in the related discretionary decisions made – can generally be divided into two different levels.

- At the **foundation level**, there are the aspects that arise from the fundamental principles of foundation law or the structure of the relevant foundation, in particular how it is configured based on the purpose of the foundation or the detailed investment specifications defined by the founder in the foundation articles.
- The **investment level**, meanwhile, can include general investment principles that apply not just to the management of foundation assets, but to all professional asset management activities. These investment principles may include, for example, the aforementioned basic criteria of the Federal Supreme Court, as well as the principles of modern portfolio theory or general sustainability criteria – an aspect that is becoming increasingly important.

This **two-level model** is intended to make it easier to understand how the relevant aspects in the two different levels relate to one another. As the board of trustees must first and foremost implement the purpose of the foundation and the founder's intentions, the foundation level defined by the founder generally takes precedence over the investment level. The question of which risks are deemed "appropriate" when investing the foundation's assets, for example, can be resolved at the investment level by referring to the fundamental rules of modern portfolio management. However, the decisions must always be assessed at foundation level, that is those aspects relating specifically to the purpose and structure of the foundation concerned.
For instance, at foundation level, the founder may permit a **"purpose-related" investment approach** or may even stipulate that work to achieve the purpose must be intensified by investing in activities that are connected to the purpose of the investing foundation. When it comes to the (necessarily to be duly executed, of course) exercise of discretion by the board of trustees, too, the purpose of an investment can take priority over the traditional criteria of the Federal Supreme Court.

It will become clear that, when it comes to the specific treatment of different forms of investment, there is a **difference** between the individual foundations. What is possible for one foundation may not be permitted for another. General information sheets like those occasionally issued by supervisory authorities are therefore only of limited use. (More detailed information on this topic can be found in JAKOB/PICHT, Responsible Investments by Foundations from a Legal Perspective, International Journal of Not-for-Profit Law 1/2013, p. 53 et seq.) See also 3.3 on the special case of impact investments.

3.3 Focus 1: Impact investments and entrepreneurial funding models

The conventional understanding is that the activities of a charitable foundation are largely limited to the management of the foundation's assets and the use of income to the benefit of its charitable purpose. However, the calls for a more **impact-oriented approach** are growing louder in the foundation sector, not least due to the shift in values in society and a strong social entrepreneurship movement, which has seen new mechanisms of action employed in philanthropy.

3.3.1 Assessment levels

The question of whether and when **purpose- or impact-related investments** are "permitted" for a certain foundation is therefore a common issue on the current foundation scene. This question can generally be assessed on three levels: the commercial/business level, the foundation law level, and the tax law level.

At the **commercial/business level**, an investment must be assessed to determine whether it makes sense from a commercial perspective. What kind of investment is it? What is the risk/return ratio? How well aligned is the investment with the purpose of the foundation and how is the desired impact measured? The answers to these questions can also be used when assessing the investment at foundation and tax level.

At **foundation law level**, the investment must be compatible with the foundation's statutory documents, as well as the general principles of foundation law. The persons taking the relevant action must have the responsibility and autonomy to make the investment decision, and the decision must be the result of an appropriate decision-making process (see 2.4.2 and 3.2). As there are specific rules for asset management in foundations (see 3.2), adherence to these rules must also be ensured. If it is not, the supervisory authority will review the decision to determine whether it is lawful and may impose sanctions.

At **tax law level**, the criteria for tax exemption must be met and continue to be met so that a tax-exempt foundation does not lose its tax exemption. The criteria for charitable status are admittedly not easy to understand in this respect or in terms of how they differentiate from for-profit status, and depend on the precise "type" of investment concerned.

3.3.2 Types of investment

Such purpose or impact-related investments are often referred to as **impact investments**. However, this term is not used consistently in Switzerland or internationally and its underlying phenomena are constantly evolving. At present, it is helpful to differentiate between three types of investment:

- "Traditional" investments, which are predominantly based on financial criteria but also incorporate certain impact or ESG considerations (they could also be referred to as **"socially responsible investments"** or **"SRIs"**).
- Investments whose main purpose is to generate a return on the assets invested but also support the purpose of the foundation, which in turn permits certain compromises in the investment criteria (for example, higher risk or lower returns); these investments could also be referred to as **"mission-based investments"** or **"impact investments"**).
- Investments that apply an entrepreneurial funding approach; investments are mostly in companies (using equity or debt capital) with the primary aim being not to generate a fixed return on the invested assets but to achieve an impact in line with the purpose of the foundation by entrepreneurial means (therefore also referred to as **"entrepreneurial funding models"**). Such investments can naturally generate a return if the project proves to be financially viable and successful, but the main aim is to support the foundation's purpose.

The **challenge** is that the boundaries between these different types of investment are often fluid and their permissibility under foundation and tax law is assessed by authorities on a case-by-case basis. Furthermore, because the Swiss authorities have only recently started to engage more closely with the concept of impact investments, the process of categorizing and developing legal admissibility requirements is still ongoing.

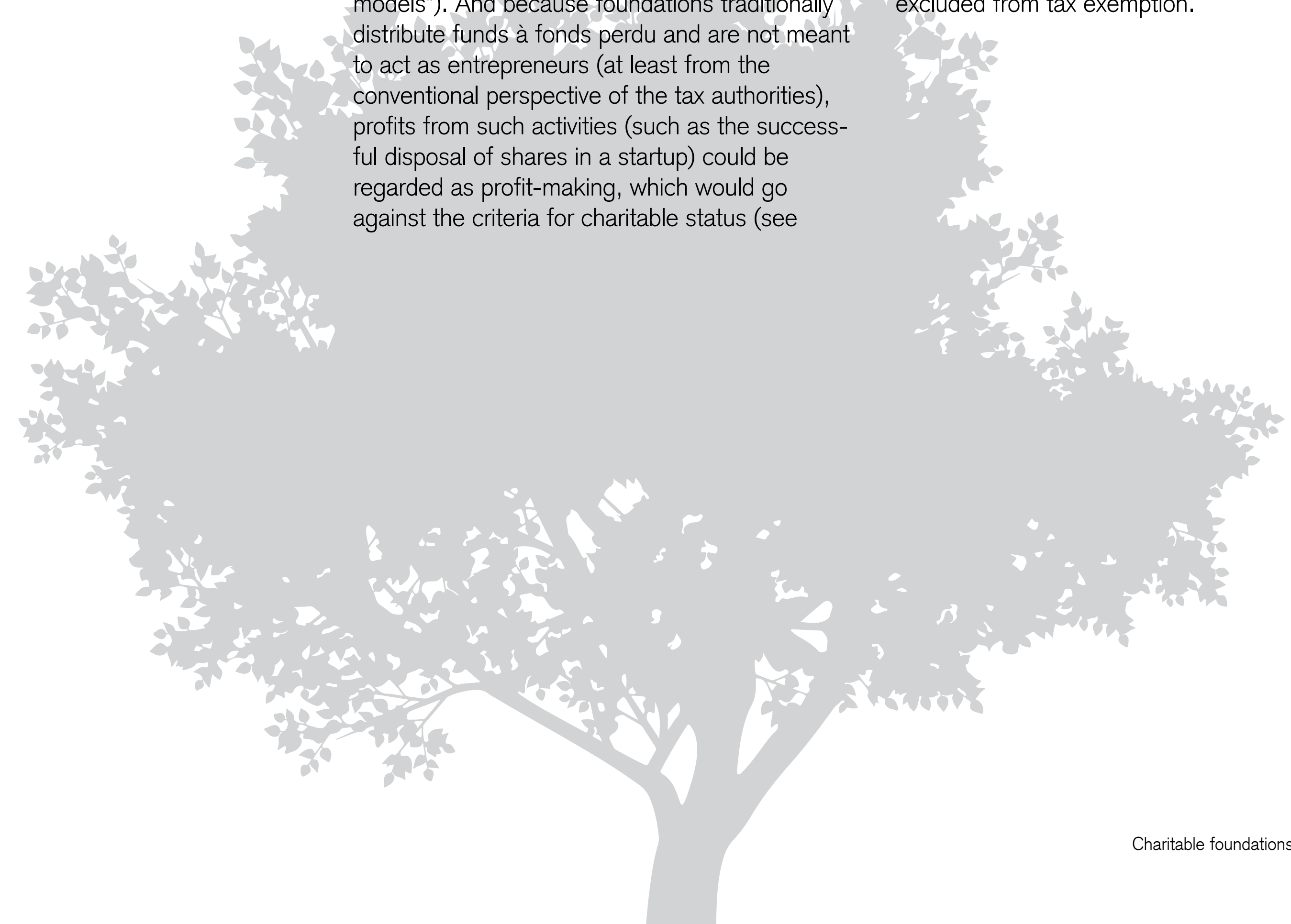
3.3.3 Eligibility criteria

If the foundation in question is in one of the first or second groups above, such **SRIs** or **impact investments** are made in the context of foundation **asset management** with the aim of generating net revenues and having a positive impact in terms of the foundation purpose. For these foundations, the same rules generally apply as for asset management in general, i.e. the foundation supervisory authority will keep an eye on whether the impact in terms of the foundation purpose justifies any negative effects in relation to security, profitability, liquidity, or risk diversification (see 3.2 above). If these requirements are met, there should not be any problems in terms of tax because the foundation is doing exactly what it should: generating a return to fulfill the foundation purpose.

Entrepreneurial funding models, on the other hand, are generally implemented using income from asset management, i.e. using funds that are principally reserved for activities to support (fund) the foundation purpose (hence the term "funding models"). And because foundations traditionally distribute funds à fonds perdu and are not meant to act as entrepreneurs (at least from the conventional perspective of the tax authorities), profits from such activities (such as the successful disposal of shares in a startup) could be regarded as profit-making, which would go against the criteria for charitable status (see 1.7.1). It is therefore important to demonstrate that such models do not aim to generate profit, but rather must be assessed based on their effectiveness at fulfilling the foundation purpose; furthermore, any income from the entrepreneurial approach is only the byproduct of the exceptionally effective fulfillment of the purpose.

Indeed, the basic principle of entrepreneurial funding models is to **use resources** (both financial resources and expertise as social and intellectual capital) in an **entrepreneurial manner** to achieve a **greater impact when fulfilling the foundation purpose**. This basic principle is linked to the central idea of a **loop**, whereby all income from such funding models can be reinvested (and thus be reused more frequently) in support of the purpose. Essentially, these approaches take successful entrepreneurial models and apply economic maxims to the non-profit sector, but they do this exclusively to fulfill their purpose and therefore work on a non-profit basis, not a for-profit basis.

As these entrepreneurial funding models are still relatively new, cantonal tax authorities are cautious when it comes to making a decision about **tax exemption**. The main question is therefore: Under what conditions can charitable foundations use entrepreneurial funding models without losing their tax exemption, and how can the fiscal authority prevent foundations from abusing their charitable status? Criteria therefore need to be defined that can help to differentiate between genuine entrepreneurial funding models and disguised profit-making activities that would (legitimately) be excluded from tax exemption.



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Socially Responsible Investments or Impact Investments are made in the context of foundation asset management with the aim of generating net revenues and having a positive impact in terms of the foundation purpose.

The following criteria could be used as proof as these criteria could be regarded as indicators that prevent the abuse of charitable status. The more of these indicators the foundation and the investments fulfill, the more likely it is that the tax authorities will class them as charitable. Practice shows that it is possible to find sensible solutions by taking these criteria into account. And rightly so:

- The planned activity is consistent with the foundation purpose and helps to fulfill this purpose.
- The investments are made using income from the foundation's assets (or other funds designated for allocation), not using investment funds (i.e. foundation capital). The investments can therefore be regarded as actual "funding activities."
- The foundation will not acquire a controlling role in the company or organization supported by the investment.
- The investment concerned is not involved in competition on the market to raise capital via the regular channels, i.e. either the raising of capital via the traditional capital market is not possible for the project (for example, due to the risk profile or yield prospects), meaning that the project could not be implemented without the foundation's investment, or the investment is being made in parallel to such capital raising efforts and makes this process easier because expertise and more patient capital are available. Prima facie evidence is sufficient; it is then assumed, to the benefit of the foundations, that there will not be any distortive effects on competition.
- The project itself is at the heart of the investment, i.e. its impact, not the potential profit; a return is possible, but not essential (this intention can be further proven to the fiscal authority by writing off the investment as with à fonds perdu contributions).
- If the investment does actually generate a profit, this income is fully reinvested or distributed as à fonds perdu contributions so that the charitable loop remains intact.
- In principle, the "entrepreneurial" aspect of the foundation activity is subordinate to the traditional funding methods, such as à fonds perdu contributions. The foundation's overall activities do not break even.

Under Switzerland's liberal foundation law, the **principles of founder freedom and foundation autonomy** allow the foundation to decide for itself how to implement its purpose. The practices of the tax authorities must not erode these freedoms. If a funding activity is justified by the foundation purpose, the means used to implement the purpose should be irrelevant as long as any profit is used exclusively for charitable purposes and the foundation's activities do not have any distortive effects on competition, thereby **preventing any abuse of the charitable status**.

3.4 Focus 2: Investment guidelines

The considerations above on the "proper" investment of assets lead us to the central issue of the **specific implementation of investment criteria** and the implementation of a timely and proper investment strategy for foundations in practice.

From the perspective of a future founder, the investment strategy of the foundation is a key element of **foundation planning**. The founder has to make a fundamental decision: whether to stipulate that the foundation governing bodies must pursue a specific type of investment and asset management or to leave the definition of the asset strategy to the discretion of the board of trustees.
While it makes sense to provide basic directions in the foundation articles (for example, to invest "in accordance with the purpose as far as possible" and/or "sustainably" and/or "on a profit-oriented basis"), excessively detailed investment criteria and investment requirements in the foundation articles are seldom recommended owing to uncertainty regarding future developments. This is because as instructions issued at the highest level, at the deed of foundation level, they do not allow any flexible adjustments to changes in circumstances. In practice, regulations laid down in separate **investment regulations** are a more suitable means of defining specific founder requirements concerning the investment of assets. These regulations can serve as a guide for the board of trustees and, if necessary, allow flexibility, as well as the option of developing or even revising individual or all guidelines – at the board's discretion. Specifications and guidelines concerning the investment of assets defined in the deed of foundation and the regulations must be taken into account by the board of trustees (on either a mandatory or discretionary basis, depending on how they are formulated) and usually take precedence over the general principles developed by the Federal Supreme Court.

With regard to asset management, investment guidelines could certainly include the following information:

- Definition of an investment strategy, taking into account short-term, medium-term, and long-term objectives.
- Regulation of organizational matters: Who is responsible for what, and how are conflicts of interest avoided?
- Regulations on the specific execution, monitoring, and, where applicable, adaption of the implemented investment strategy.

Even where investment guidelines are available, there is still scope and need for **discretion to be exercised**. From the various investment approaches under consideration, the foundation governing bodies must select or develop and gradually implement the approach that is best suited to the nature and resources of the foundation. It is also essential to establish adequate structures that allow the successful implementation of the relevant investment strategy.

The board of trustees must therefore also establish an **investment organization** that is deemed to be adequate and appropriate based on the size of the foundation and the complexity of the foundation assets, taking into account the deed of foundation and any regulations. Specifically, as well as appointing a managing director, the appointment of an investment commission as an optional additional governing body should also be considered. Consideration should also be given to the formation of an investment committee within the board of trustees and the involvement of external investment experts or asset managers.

However, even if tasks are delegated and external experts are involved, the proper definition and implementation of the investment strategy is and remains **the responsibility of the board of trustees**. If the board of trustees consults **third parties outside of the foundation** regarding the investment of assets, for example an asset manager, the board must also ensure that these parties are selected, instructed, and supervised with care (for information on the impact of the organizational structure on liability, see 2.5).

In this context, it is clear that investment guidelines should also contain regulations on avoiding and handling **conflicts of interest** (for information on conflicts of interest, see 2.3). With regard to the awarding of discretionary mandates in particular, it is important to be aware of arrangements that typically have the potential to cause a conflict (for example, the conclusion of a discretionary mandate agreement between the foundation and a member of the board of trustees or a person associated with a member of the board of trustees). Or from another perspective: Does it make sense in a specific case to make a member of a particular bank or asset management institution a member of the board of trustees or entrust this person with asset management? Or should this be avoided to ensure independence with regard to asset management, including when considering the banks involved?

In any case, the investment of assets must be **reviewed** by the board of trustees on a regular basis and with reference to the existing investment guidelines. The board of trustees should always critically examine whether the investment return has fulfilled and can continue to fulfill the expectations and objectives associated with the investment in view of the risk taken. If required, the board of trustees should adapt the investment strategy or take appropriate corrective action. In practice, it is recommended that the specific investment strategy of the foundation is **reviewed periodically** every two to three years, if no unusual incidents occur that necessitate earlier action. The results of the investment review should also be documented in writing as proof.

When developing a new investment strategy or implementing an existing one, foundation participants should consider the following **aspects** in particular (this list is not exhaustive):

- What type of investment does the specific foundation activity require?
- What target return should be achieved in the short, medium, and long term in consideration of the purpose of the foundation?
- Should the board of trustees aim for a certain benchmark? Should the board of trustees generate a return that approximately corresponds to the performance of a stock exchange index?
- What is the foundation's risk capacity?
- Are the foundation's assets adequately diversified and how will risk concentration be dealt with?
- Which asset categories will assets be permitted to be invested in (for example, liquidity, bonds, equities, real estate)? Should percentage ceilings be planned for certain asset classes, for example limiting investment in equities to 50% of the foundation's assets?
- Is there a connection between the foundation purpose and certain forms of investment?
- Are alternative forms of investment (key words: mission-based investments, SRI, entrepreneurial funding models) to be permitted or even advisable?
- What organizational structures does the foundation require to implement the relevant investment strategy?
- Should the board of trustees draw on the expertise of external third parties? Is it ensured that those making decisions are free from conflicts of interest when making investment decisions?

Recommendations for the asset management and investment strategy:

- As the founder, consider at an early stage how the assets of the future foundation will be constituted and what asset management will look like in general.
- Develop investment guidelines based on your wishes, objectives, and realistic expectations and ensure that these guidelines allow appropriate asset management or necessary adaptations even if circumstances changes.
- When setting up the foundation, make it clear whether the foundation is also permitted to make entrepreneurial, potentially risky, investments. Familiarize yourself with the various concepts of sustainability-driven and/or purpose-related asset management.
- Consider whether the foundation would be able to meaningfully and effectively pursue its purposes exclusively using the income from the foundation's assets or whether, and under what conditions, access to the foundation's core assets ought to be possible. For example, a foundation with assets of several million using only its income might have a smaller impact than a limited-term foundation endowed with CHF 500,000. With that in mind, ask yourself the following question: Perpetual but possibly with a smaller impact in terms of purpose, or time-limited but with a more intense pursuit of the foundation's purpose?
- As to the issue of whether a desired investment strategy makes sense and is permitted under the laws on foundations and non-profit organizations, you as the founder or the board of trustees should clarify this in advance if there is any doubt. If an investment concept that violates the law or foundation articles has nevertheless been implemented, this will not only need to be corrected at a later date, but may also result in liability or the loss of tax exemption.
- As the board of trustees, you should not switch to autopilot when it comes to the investment strategy: What was an appropriate investment yesterday may already be inadvisable tomorrow. If you are not directly responsible for the investment yourself, you should regularly consult the responsible board member or asset manager to make sure that you are fulfilling your monitoring obligations.
- Do not delay when it comes to speaking about the investment of assets on the board of trustees, even if you are not an expert on all the details. If anything is unclear, seek independent advice. If doubts still remain, you should have the courage to step away from a certain investment where necessary. Consider the following: “Ignorance is no excuse for abdicating responsibility or liability.”

Sustainable investments at Credit Suisse

By investing sustainably a foundation can, at a minimum, ensure that its investments are consistent with the foundation's goals, but – what's more – it can actively give additional weight to its purpose in this way. But what does sustainable investment mean and how does a specialist investment advisor address this topic?

Sustainable investments mean something different for every investor. For some, it might mean excluding companies that are suspected of violating international standards; others view it as investing in companies working on technological breakthroughs with the hopes of one day solving the most pressing issues of humankind. The common factor in all approaches is that the key aims of the ESG* criteria must be taken into account at all stages of the investment process – from exclusion screening to high-conviction impact investing.

Credit Suisse's framework for action illustrates three main approaches to sustainable investments:

Exclusions: These strategies are primarily intended to provide clients with investments that do not cause harm or that are consistent with their values.

Integration of ESG criteria: These strategies integrate material ESG factors into investment processes with the goal of delivering superior risk-adjusted returns.

Sustainable thematic investments and impact investing: These strategies are designed to mobilize capital for companies that provide solutions to societal challenges.

- Thematic and impact-oriented: In recent years, certain sectors such as education, healthcare, and renewable energy have grown strongly. Fund managers have created funds that invest in companies in these sectors in both public and private markets.
- Impact investments refer to a subgroup of sustainable investing strategies that have the intention to deliver measurable impact.

Each of these approaches create their own added value and are suitable for specific types of investors with different investment objectives.

* ESG: A company's environmental (E = Environment), social (S = Social), and corporate governance (G = Governance) responsibility.

A set of rules for sustainable investments such as this is not intended to impose values on investors or the financial center, but to ensure that the words and actions of all those involved are in keeping with the motto: "We say exactly what we do and we do exactly what we say." This is particularly true of charitable foundations, which are very often measured against their claim to be ambassadors of a certain sustainable subject area. When compiling their investment portfolios, these foundations should therefore make sure they use the appropriate sustainability strategies and choose an offering with precise classification and complete reporting to ensure the greatest possible level of transparency.

Credit Suisse, Sustainability, Research and Investment Solutions

Client journey (advisory services and reporting)

Full transparency of the ESG-related risks, opportunities, and impact within the portfolio.

Active ownership and collaborative leadership

Collaborative leadership has the potential to transform our role as a company that allocates capital to become a driving force of change. Our entrepreneurial commitment, active exercising of voting rights, and collaborative approach give us the ability to influence and help companies to become more sustainable

(Hard) exclusions Avoid harmful investments	**Integration** Better investment decisions through the inclusion of ESG criteria	**Thematic and impact-oriented** investment solutions for sustainable development
▪ Systematic avoidance of exposure to controversial areas or unethical behavior. ▪ Rule-based exclusions. ▪ Value-based exclusions. ▪ Exclusions due to business conduct (violations of the UN Global Compact).	▪ Consideration of financially significant ESG risks and opportunities. ▪ Industry-specific sustainability principles as a basis. ▪ Expression of the Credit Suisse House View on ESG topics. ▪ Integration of ESG criteria into investment processes in conjunction with financial analysis. ▪ Approach according to the investment class, product features, and investment objectives.	**Thematic and impact-oriented** ▪ Participation in topics related to sustainable growth. ▪ Companies with a positive contribution to the SDGs. ▪ Primarily liquid strategies. **Impact investment** ▪ Products that fully and completely meet the IFC definition of impact investing: Tangible positive social or environmental effects as well as financial returns. ▪ Contribution of investors to the impact of companies by means of growth financing or active ownership (shareholder activism). ▪ Primarily liquid strategies.

4

Managing a modern foundation

4.1 An open purpose for the foundation enables opportunities for interpretation and scope for design

4.2 The board of trustees must be capable of making decisions and taking action

4.3 Potential is required to fulfill the purpose of the foundation

4.4 An entrepreneurial mindset – for a good cause

4.5 A foundation is measured by its achievements

4.6 Outlook

This chapter sets out the basic principles for goal-oriented and effective foundation management, which must be considered before establishing the foundation. The focus here is on formulating the purpose for the foundation, organizing the foundation, the foundation's assets, and the grant-making approach.

John D. Rockefeller was an exceptional entrepreneur and a generous philanthropist. Not only did he build an oil empire but he also set up a foundation, which is still one of the largest in the world – the Rockefeller Foundation. Although the oil empire was broken up during his lifetime, the foundation still exists. John D. Rockefeller's children also made use of his fortune and in turn established the Rockefeller Brothers Fund, with aims that include the promotion of democracy, sustainable development, and working for peace. In 2014, the foundation made headlines around the world when it announced that it would no longer invest in the oil industry, as the foundation's leadership felt that the original source of their assets was no longer compatible with the foundation's current purpose.

The Rockefeller Brothers Fund demonstrates several essential criteria for managing a modern foundation. The Board of Trustees has chosen the interests of the foundation's purpose over its history and this example impressively illustrates that a foundation that is established on a lasting basis must be able to **reinterpret** its purpose and respond to societal changes.

4.1 An open purpose for the foundation enables opportunities for interpretation and scope for design

In the past, the standard approach was to formulate the purpose of a foundation as precisely as possible. Various criteria were usually applied to restrict the beneficiaries or specific formulas were used to determine the distribution. Actions that were intended to safeguard the founder's aims frequently ended up holding subsequent boards of trustees hostage. Predicting future social developments is virtually impossible – particularly in our high-tech society. This is amply illustrated in the business world: In 2002, Nokia was the world's largest manufacturer of mobile phones, but just a few years later, in 2014, their brand name had all but vanished from those products. Although you can buy Nokia mobile phones again, the market is dominated by other brands, such as Apple, Samsung, and Huawei. Ultimately, ensuring that the foundation's activities are aligned with **the founder's values** and fulfill the desired intention is far more important than a word-for-word interpretation of the foundation's purpose.

The fundamental decisions about a foundation's objectives, ethos, and organization are essentially made before it is established. Once facts are set out in the foundation's charter, they can only be amended under strict conditions and subject to the decision-making powers of the supervisory authority (see 1.4.3). Before establishing a foundation, a founder must therefore strike a **balance** between safeguarding their personal intentions and ensuring that the foundation is able to take the required actions. Therefore, as well as formulating the purpose of the foundation, the founder should create a business plan to check whether their foundation is economically viable – again, before the foundation is established. This involves, firstly, investigating which foundations and beneficiaries are already operating in the desired area of activity and how the future foundation can make an effective contribution in this area and, secondly, calculating the future costs that can be expected and the available funding. In addition to the costs of establishing the foundation, the annual costs for supervision, audit, and asset management in particular must be calculated. These expenses cannot be avoided by using volunteers and will unavoidably reduce the amounts that are available for grants.

The management structure and thus primarily the composition and function of the board of trustees is another important decision that must be made before the foundation is established.

4.2 The board of trustees must be capable of making decisions and taking action

The board of trustees is both the **head and the heart of the foundation** (see 2.4). This is where all important decisions are made and it is also required to embody the purpose of the foundation. Alongside the supervisory authority, which carries out formal legal inspections, the board of trustees is not accountable to anyone for its actions. This only emphasizes the importance of it setting clear rules for itself and regularly inspecting its own actions with a sufficiently self-critical attitude.

The **Swiss Foundation Code** provides practical help in this respect. The Code sets out four principles that underpin foundation governance (see 1.6):

- Effective implementation of the foundation's purpose: Foundation governance helps to ensure that the decision-making processes and all other foundation activities are aligned with fulfilling the foundation's purpose. If the board of trustees sets itself a coherent constitution and operates in accordance with it, this will leave more time to pursue the essential role of the funding activities.
- Checks and balances: Although the board of trustees is the overarching responsible body, it can delegate individual tasks. As the board of trustees tends to be both the executive and the supervisory body rolled into one, particular attention should be paid to the balance of power.
- Transparency: The limited legal requirements means that foundations tend to lack transparency. Transparent processes are required in the foundation to ensure effective implementation of its purpose, and these processes are underpinned by documents such as organizational and investment regulations, sound financial reporting, and active communication about the foundation's goals and funding activities.
- Social responsibility: Although foundations have a high degree of autonomy, that is precisely why they cannot develop independently of society. Reflecting societal changes and getting involved in higher-level societal problems should be considered in the context of the purpose of the foundation.

> “Succession planning is an important aspect in ensuring that the board of trustees is effective. As most boards of trustees select and appoint new members through existing members (co-opting), searches for new members are often restricted to immediate friends and acquaintances.

The Swiss Foundation Code provides specific implementation guidelines for these four principles in the form of 28 recommendations that give boards of trustees the necessary capacity to make decisions and take action so that they can run their foundations professionally and help them to become strong social protagonists.

Succession planning is an important aspect in ensuring that the board of trustees is effective. As most boards of trustees select and appoint new members through existing members (co-opting), searches for new members are often restricted to immediate friends and acquaintances. Replacements frequently have to be found at short notice, so questions about skills and interests tend to take lower priority. This means that succession planning is a continuous task, even for boards of trustees of smaller foundations. Potential strategies for overcoming the challenges listed above include maintaining a list of potential candidates and offering people the opportunity to sit in on meetings.

The provisions on governance and on the composition of the board of trustees are only a means to an end, however, and are ultimately useless if the foundation does not have the **resources it needs** to fulfill its purpose.

4.3 Potential is required to fulfill the purpose of the foundation

A foundation is made up of its assets, and without assets a foundation will be unable to take action. This is why the board of trustees needs to pay close attention to this essential resource. Investment regulations are standard these days and are also required by most supervisory authorities. This document forms the basis for instructions to asset managers and is intended to guarantee that the assets are managed such that sufficient liquidity is available at the right time for the funding activities. Fundamental questions about asset management relate to (see 3.2):

- The preservation of capital (nominal or actual?).
- The availability of capital (non-committed funds vs. funds committed by deed?).
- Liquidity requirements (are regular inflows necessary?).
- Competency within the board of trustees.

In Switzerland, more than 80% of charitable foundations hold assets of less than CHF 5 million. The current situation in the financial markets means that many of these foundations are experiencing difficulties relating to **fulfilling preservation of capital requirements** at the same time as implementing funding activities. Alternative forms of foundations can be considered in cases like these; for example, an endowment foundation, where capital is gradually spent until it reaches liquidation, or an umbrella foundation with shared costs. The board of trustees is also responsible for ascertaining the degree to which the purpose of the foundation can be taken into consideration when investing assets (mission investing).

Financial reporting is closely linked with asset management. In addition to the audit requirement, foundations are also subject to increased requirements in this area as a result of the Rechnungslegungsrecht [Swiss financial reporting law], which came into force in 2013. Charitable foundations are now subject to bookkeeping and financial reporting requirements, while there are still certain exceptions for small foundations, which means that an income statement and proof of the financial situation may be sufficient. All things considered, however, the requirement for transparency means that double-entry bookkeeping and financial statements with notes, a balance sheet, and a management report are advisable. The Swiss GAAP FER 21 standard that was published in its revised form in 2015 is also a sound foundation for this. As a result of the auditing regulations, large foundations in particular must also introduce an Internal Control System (ICS) to assess risks.

It would be wrong to reduce the potential of a foundation solely to its financial resources, since foundations have far more to offer and can support beneficiaries in many different ways. One important resource for a foundation is its **network**, or rather the connections of the members of its board of trustees. A supporting phone call can be more useful for a project than additional financial resources. The foundation can also provide benefits in kind, such as the use of premises, or it can act as a coordinator to bring various parties together. Since foundations are independent, they can also operate as mediators or exchange platforms.

In this context, a foundation is far more than simply a "bank for non-profit organizations" – it actually plays an **entrepreneurial role in society!**

4.4 An entrepreneurial mindset – for a good cause

A foundation is not a savings account from which occasional withdrawals can be made; viewing distributions as investments in society rather than as acts of giving to those in need is a completely fresh way of looking at things. When seen from this perspective, the foundation becomes an interface that provides valuable services by distinguishing good projects from bad, uses discourse to improve projects, and forges links between individual partners. A foundation creates value less through the financial return on its capital and far more through its **selection and grant-making processes.** Selecting good projects benefits not only the foundation but also society as a whole, so a foundation should take the same approach as a company and discuss strategic goals, define measures to implement them, and set out measurement criteria.

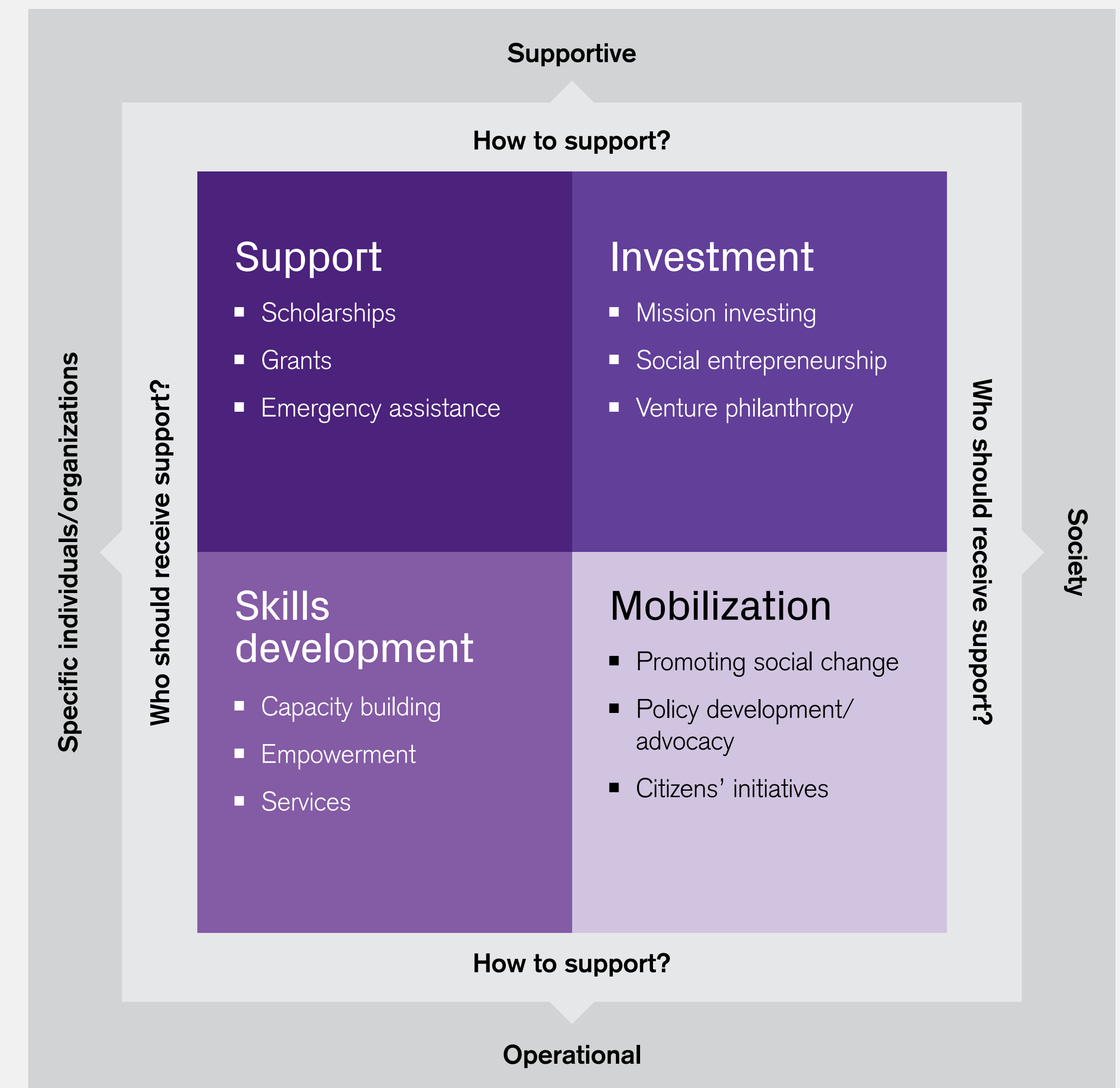
In terms of implementation, a foundation should consider the following questions and formulate its own basic principles for each one:

- Who should receive support? A foundation can support individuals, organizations, and institutions. Application processes, selection procedures, and communication must be designed to meet the different needs of each.
- How should support be given? Instead of passively waiting for requests to arrive, a foundation can choose a proactive approach to making grants; for example, competitions, grant programs, requests for proposals, or matching funds.
- When should support be given? Many foundations prefer to give start-up grants to make sure that they are funding something innovative and because even small amounts of money can have a significant effect at this stage. However, foundations can also have the goal of scaling up projects, providing working capital finance, or even full financing. In other words, the point at which grants are made depends on the financial potential.
- How much support should be given? The foundation's job is easier if the board of trustees can make some fundamental decisions in terms of grant amounts and funding intensity. When it comes to deciding contribution amounts, the foundation must decide whether it wishes to fund lots of small projects or just a few larger ones, as well as deciding the total amount of support to be given. It may also make sense to set maximum amounts and to communicate these limits. The funding intensity depends on the relationship with the beneficiaries. A foundation can stay well in the background and simply make financial resources available or it can closely manage projects – and there is plenty of scope between these two extremes. Even if the funding intensity depends on individual projects, the board of trustees should apply a basic principle for default procedures and communicate with external parties accordingly.

The **Philanthropy Toolbox** (see fig.) gives an overview of the range of opportunities that support foundations can use to pursue their purpose. Distinctions can either be made by beneficiary (whether the foundation is aiming at specific recipients who are targeted for selection or at society as a whole) or by use of resources (whether the foundation exclusively offers money or will also provide other resources, such as networks, expertise, etc.).

The four quadrants are not mutually exclusive and can also be linked together. Conventional grant applications come under the **Support** area, where projects receive individual support or are combined into programs. **Skills development** is based on the principle of helping people to help themselves, so that beneficiaries acquire knowledge and skills that enable them to not be dependent on financing from the foundation in the long-term. **Mobilization** is the chance to bring about social change by funding networks and interaction, which can be done through political activism or specific projects such as district associations. Finally, **Investment** relates to both aspects; providing resources and utilizing resources. When providing resources, some of the foundation's capital can be used in a way that helps to achieve the purpose of the foundation (impact investment, see 3.3.2). Venture philanthropy applies principles from venture capital funding to use funding resources with a clear income and development aspect.

As seen above, a foundation can offer a wide range of opportunities for creativity and ingenuity in fulfilling its purpose. Rather than being driven solely by the foundation itself or even by specific people, it depends far more on how the foundation builds **relationships with the community and the people around it.** Cultivating open communication and a partnership with beneficiaries will result in more interesting and innovative projects.



This will only happen if the foundation's activities don't stop once the resources have been provided, as **project support** is just as important. Finally, it's highly unlikely that a project lasting several years will be implemented just as it was originally planned, down to the last detail. Quite the opposite; any project that delivers exactly the results that were expected will probably not be very innovative and not produce any new results. By supporting projects, the foundation offers beneficiaries its help in managing all those uncertainties in the process and does not leave them to face these problems on their own.

4.5 A foundation is measured by its achievements

The decision of the Rockefeller Brothers Fund to break with its own history makes it clear that foundations are increasingly under public scrutiny, which only increases the requirements for foundations to demonstrate their performance capability. Unlike companies, they cannot do this by simply publishing figures on their financial position, as these do not indicate whether a foundation is fulfilling its purpose. Nor can the goal be to commit foundations to elaborate and expensive evaluation models. But foundations should still have to deal with the question of whether they are impactful. **Theory of Change**, which underpins the work of foundations, is an essential basis for effect-oriented funding. This theory refers to an idea or concept of how grants made by the foundation will help to achieve a desired social change.

A foundation could believe, for example, that reducing childhood illnesses increases a country's level of education, because children then miss less school. However, this correlation would be difficult to measure directly and would be very expensive, so the foundation focuses on providing medical care and does not investigate all of the interim steps and additional measures that would be necessary to achieve the educational objective. The following aspects should be clarified to define a Theory of Change:

- Input: Which financial, personal, and structural resources does the foundation provide for a project?
- Output: What are the targeted, measurable results? In the example project mentioned, for instance, this is the number of children treated.
- Outcome: What is the direct benefit of the activity? In the example project mentioned, for instance, this is that children are ill less often.
- Impact: What is the social benefit of the project? In the example project mentioned, for instance, this is a reduction in absences from school-based education or a higher proportion of school-leaving certificates.

Based on this kind of Theory of Change, a foundation can discuss the planned benefits of a project with beneficiaries, mutual goals can be set, and both positive and negative consequences for the project can be defined.

4.6 Outlook

Despite many new forms and tools, foundations are still seen as the gold standard for philanthropy. They link tradition with the future, current effects with long-term responsibility, and private commitment with public benefit.
If a foundation is to fulfill all these promises, then both the founder (before the foundation is established) and the board of trustees as the supreme governing body must ensure that the foundation has an entrepreneurial and impact-oriented ethos. This is the only way that an old institution like the Rockefeller Brothers Fund can continue to lead the way in the present day and have a positive impact on society.
(Detailed information on foundation management taken from: VON SCHNURBEIN/TIMMER, Die Förderstiftung, 2nd edition, 2015)

Recommendations for implementation

- Conduct a market analysis and make certain that there is actually demand for your funding idea.
- Put your funding idea to the test: Get information from people involved in that funding area or talk to other foundations.
- Check that the assets, purpose, and organization of the foundation are congruent. Your foundation is only guaranteed to be effective if these three aspects are aligned with each other.
- Prepare a business plan for your foundation and check which ongoing costs you will incur annually. Are the remaining resources sufficient to fulfill the purpose of your foundation?
- Create management tools, especially guiding principles and organizational and investment regulations, alongside the deed of foundation.
- Set out funding guidelines in a set of funding regulations.

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Recommendations for action

This section summarizes the recommendations for the different areas for you as the founder or board of trustees.

Recommendations on the fundamentals of foundation law

- Always evaluate whether setting up a foundation is appropriate in your individual wealth and estate planning circumstances, can be sensibly incorporated into any claims on marital property and to an inheritance, and provides flexibility in the event of unforeseen circumstances.
- Make sure you are clear on your motives for setting up a foundation and consider or seek advice on how you can best incorporate these motives into the structure of the foundation.
- Reflect on what your personal foundation purpose looks like specifically and how it can best be formulated. The foundation purpose embodied in the deed of foundation will set the direction for all future foundation activities – including the actions you take as the founder.
- Consider the amount of assets you want to use for the foundation project, can realistically raise, and expect to be contributed by third parties; align the specific foundation project with the foundation assets and find the appropriate legal form to avoid setting up an ineffective foundation or a foundation that quickly becomes inactive.
- Find an organization that enables you to be involved in the manner that you want to be and in accordance with your skills and expertise. However, make sure that your foundation will also function without you.
- Consider it your responsibility to find an individual internal governance system for your foundation that – alongside external state supervision – provides optimum protection for your foundation and the founder’s intentions against conflicts of interest and misconduct.

Recommendations on the fundamentals of tax law

- Do not think exclusively about the tax effect – always start with civil law and progress to tax law: The arrangement must work under civil law and the result must always stand up under foundation law. It can then be optimized from a tax law perspective.
- Any form of foundation that is designed to be charitable should be discussed with the tax authorities beforehand in terms of the criteria for tax exemption.
- Extra caution is required if planning a foundation with an international element and expert advice must always be sought.

Recommendations on formal organizational matters concerning the board of trustees

- As the founder, when setting up the foundation, consider what the future foundation organization will look like and how the board of trustees will be composed. Ensure that you can support the foundation with your skills, but that the foundation can also function without you, particularly after your death.
- As the founder, think about how much freedom you want to give the board of trustees. Understand that you are only able to predict future developments to a limited extent, so avoid providing instructions that are too rigid and allow the foundation to be dynamically developed by the foundation bodies in line with your guidelines.
- As the founder, proactively address liability issues, conflicts of interest, and internal control mechanisms, as well as the issue of the permissibility and, where applicable, amount of remuneration for members of the board of trustees.
- As the board of trustees, you should make sure you are clear on whether the founder has granted you scope for development and to make decisions and, if so, how much scope, and whether fixed, identity-defining stipulations exist.
- Perform your duties on the board of trustees properly and without abusing your discretion. Especially if no founder specifications exist, develop an appropriate and transparent resolution procedure and carefully document the relevant decision-making process, particularly for controversial, risky, and important issues.
- Avoid conflicts of interest and establish mechanisms to deal with them. If, as a member of the board of trustees, you are not sure whether you are involved in a conflict of interest, you should discuss the matter transparently with the board. In cases of reasonable doubt, you should consider voluntarily stepping down.

Recommendations for the asset management and investment strategy

- As the founder, consider how the assets of the future foundation will be constituted and what asset management will look like in general at an early stage.
- Develop investment guidelines based on your wishes, objectives, and realistic expectations and ensure that these guidelines allow appropriate asset management or necessary adaptations even if circumstances changes.
- When setting up the foundation, make it clear whether the foundation is also permitted to make entrepreneurial, potentially risky, investments. Familiarize yourself with the various concepts of sustainability-driven and/or purpose-related asset management.
- Consider whether the foundation would be able to meaningfully and effectively pursue its purposes exclusively using the income from the foundation's assets or whether, and under what conditions, access to the foundation's core assets ought to be possible. For example, a foundation with assets of several million using only its income might have a smaller impact than a limited-term foundation endowed with CHF 500,000. With that in mind, ask yourself the following question: Perpetual but possibly with a smaller impact in terms of purpose, or time-limited but with a more intense pursuit of the foundation's purpose?
- As to the issue of whether a desired investment strategy makes sense and is permitted under the laws on foundations and non-profit organizations, you as the founder or the board of trustees should clarify this in advance if there is any doubt. If an investment concept that violates the law or foundation articles has nevertheless been implemented, this will not only need to be corrected at a later date, but may also result in liability or the loss of tax exemption.
- As the board of trustees, you should not switch to autopilot when it comes to the investment strategy. What was an appropriate investment yesterday may already be inadvisable tomorrow. If you are not directly responsible for the investment yourself, you should regularly consult the responsible board member or asset manager to make sure that you are fulfilling your monitoring obligations.
- Do not delay when it comes to speaking about the investment of assets on the board of trustees, even if you are not an expert on all the details. If anything is unclear, seek independent advice. If doubts still remain, you should have the courage to step away from a certain investment where necessary. Consider the following: "Ignorance is no excuse for abdicating responsibility or liability".

Recommendations for implementation

- Conduct a market analysis and make certain that there is actually demand for your funding idea.
- Put your funding idea to the test: Get information from people involved in that funding area or talk to other foundations.
- Check that the assets, purpose, and organization of the foundation are congruent. Your foundation is only guaranteed to be effective if these three aspects are aligned with each other.
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List of sources and further reading

Baumann Lorant, Roman, Der Stiftungsrat: Das oberste Organ gewöhnlicher Stiftungen, Zurich 2009.

Frumkin, Peter, Strategic Giving, 2006, Chicago: Chicago University Press.

Grüninger, Harold, Vor Art. 80-89a ZGB, in: Geiser/Fountoulakis (eds.), Basler Kommentar, Zivilgesetzbuch I, 6th edition, Basel 2018.

Guggi, Katharina/Jakob, Julia/Jakob, Dominique/von Schnurbein, Georg, Der Schweizer Stiftungsreport 2021, CEPS Forschung und Praxis Vol. 14, Basel 2021 (issued annually).

Jakob, Dominique, Reformen im Stiftungsrecht – eine Agenda, Zugleich ein Beitrag des Zentrums für Stiftungsrecht an der Universität Zürich zum Vernehmlassungsverfahren der parlamentarischen Initiative Luginbühl (14.470), Jusletter dated April 20, 2020.

Jakob, Dominique, The role of foundations in family governance, Trusts & Trustees 1/2020, pp. 4–10.

Jakob, Dominique, Die Schweizer Stiftungsaufsicht – Grundlagen und Entwicklungen, in: Eckhardt/Sprecher (eds.), Beste Stiftungsratspraxis – Welche Aufsicht haben und welche brauchen wir? Zurich 2019, p. 7 et seq.

Jakob, Dominique, Vor Art. 80-89a ZGB, in: Büchler/Jakob (eds.), Kurzkommentar ZGB, 2nd edition, Basel 2018.

Jakob, Dominique (ed.), Universum Stiftung, Basel 2017.

Jakob, Dominique (ed.), Stiftung und Familie, Basel 2014.

Jakob, Dominique, Ein Stiftungsbegriff für die Schweiz, Gutachten zum Schweizerischen Juristentag 2013, ZSR 2013 II, pp. 185–340.

Jakob, Dominique (ed.), Stiften und Gestalten – Anforderungen an ein zeitgemässes rechtliches Umfeld, Basel 2012.

Jakob, Dominique, Schutz der Stiftung: Die Stiftung und ihre Rechtsverhältnisse im Widerstreit der Interessen, Tübingen 2006.

Jakob, Dominique et al., Verein – Stiftung – Trust, Entwicklungen 2020, njus.ch, Bern 2021 (issued annually).

Jakob, Dominique/von Orelli, Lukas (eds.), Der Stifterwille: Ein Phänomen zwischen Vergangenheit, Gegenwart und Ewigkeit, Bern 2014.

Jakob, Dominique/Picht, Peter, Responsible Investments by Foundations from a Legal Perspective, International Journal of Not-for-Profit Law 2012.

Schönenberg, Daniela/von Schnurbein, Georg, Was macht die Attraktivität eines Stiftungsstandortes aus? In: Zeitschrift zum Stiftungs- und Vereinswesen, No. 3/11, 2011, pp. 87–94.

Sprecher, Thomas, Stiftungsrecht in a nutshell, Zurich/St.Gallen 2017.

Sprecher, Thomas/Egger, Philipp/von Schnurbein, Georg, Swiss Foundation Code 2021, Grundsätze und Empfehlungen zur Gründung und Führung von Förderstiftungen, 4th edition, Basel 2021.

Studen, Goran, Die Dachstiftung: Das Tragen und Verwalten von Unterstiftungen unter dem Dach einer selbstständigen Stiftung, Basel 2011.

von Schnurbein, Georg/Timmer, Karsten, Die Förderstiftung, 2nd edition, Basel 2015.

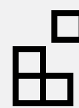
Checklist for setting up a foundation

The following checklist provides an introduction to the process of setting up a foundation. It serves as a guideline for founders, from initial considerations through to the final establishment of their foundation, while at the same time allowing scope to further develop individual ideas.

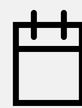
In line with the approach of the practical guidelines, this checklist does not claim to be exhaustive; rather, it contains a concise overview of the actions and process steps that are especially relevant to this process.

Irrespective of the size of the foundation, the complexity of its structures, or the focus of its subsequent activity, the process of setting up a foundation can generally be divided into four phases that influence and build on each other:

Idea



Concept



Plan

Implementation

1. Phase 1: The idea

- At the beginning there is the idea. Whether you have been thinking of setting up a foundation for years or are only now considering it for the first time, you should be aware that the groundwork for the foundation's future impact is laid right at the beginning.
- This phase focuses on the following question: **"What social impact do I want to make?"**
- In light of this, you should consider – based on the appropriate information and initial clarifications, and taking into account alternative forms (association, cooperative, charitable GmbH, or AG [public limited company]) – whether a foundation is the most suitable legal form for your project. Alternatively, could your idea be realized just as effectively by means of a donation or financial endowment, or as a subfoundation under the umbrella of an existing foundation?

2. Phase 2: The concept

- Once you have decided that setting up a foundation with legal capacity is the best way to realize your wishes and ideas, the next step is to give further detail to your rudimentary foundation idea.
- This phase focuses on the question: **"How do I want my foundation to look?"**
- During the concept phase:
  - The rough foundation idea is fleshed out.
  - The foundation's scope of impact is clearly delineated.
  - The foundation purpose is set out and the degree of detail is determined – where multiple purposes are to be pursued, it must be clarified whether these are of equal or subsidiary status, or if these are to be pursued successively.
  - It is decided whether the foundation is to generally act independently or is to be integrated into a superordinate structure, for example an umbrella foundation.
- In addition to the "how", this stage also addresses the "where": Geographical borders are set out and it is determined where the future foundation is to be headquartered and where it will operate, on a regional, national, and international scale.

Phase 3: The plan

Now that your foundation is finally beginning to take shape, the planning phase is the time to engage legal and tax expertise; this will enable you to further develop your ideas and to embed these into your personal life planning and estate planning: **"What is the best possible form for my foundation project with regard to foundation law, property law, and tax law?"**

The following points are important during this step:

- Clarify what assets will be made available to the future foundation and whether all assets are to be given to the foundation during your lifetime, or whether part of the assets will come from your estate or from third parties.
- Assess whether setting up the foundation violates any compulsory portions and whether concluding an agreement with the persons concerned – e.g. in the form of a waiver of compulsory portion in favor of the foundation to be established – is feasible.
- Taking into consideration the purpose of the future foundation, assess whether sufficient assets are available (purpose/means relationship) in order to ensure long-term viability while, at the same time, ensuring that the foundation's purpose is fulfilled effectively; alternatively, you should consider establishing an "asset-consuming" or "limited-term" foundation.
- Equally important is the question of whether you and your dependents are sufficiently provided for financially elsewhere, or whether special rights under property law (e.g. usufruct and residential rights) should be granted or reserved with regard to any foundation assets that are built up.
- Make concrete plans for the organizational structure of your foundation. In particular, it should be determined whether the foundation – in addition to the mandatory board of trustees, as the supreme governing body of the foundation, and legally required independent auditors – is to appoint additional (optional) governing bodies in order to ensure the involvement of different expert groups or stakeholders, or even your family. Where the foundation's organizational structure has multiple levels, it is important to clearly define the competencies and powers of the individual governing bodies, and how they relate to one other, in order to ensure that foundation governance is as harmonious as possible.

4. Phase: The implementation

- Once you have successfully completed the first three phases, the last step is to formalize your findings in the foundation documents and to register the foundation – following a preliminary audit, where necessary – with the competent authorities, including the supervisory authority, tax authority, and Commercial Register.
- The aim of the implementation phase is to transform your expectations, wishes, and ideas – in particular with regard to the foundation's purpose, assets, and organizational structure – into concrete provisions and regulations, and tailor them to the individual requirements of your foundation.
- The deed of foundation must be properly drawn up; this document, comprising the foundation articles and commitment of assets, contains mandatory information on the establishment of the foundation. Optional regulations also allow for flexible control of organizational, administrative, and strategic matters.
- Speaking of strategy – with regard to the foundation's assets, you should ask yourself the following question: **"What investment strategy should the foundation pursue and how do I want the management and administration of its assets to look?"** Depending on the size of the foundation and the complexity of its asset arrangements, it may be sensible to put investment regulations in place for these matters. In particular with regard to whether the investment strategy corresponds to the foundation's values and objectives, it is worth considering the issue at length and seeking professional advice. The regulations may serve as binding instructions or simply as recommendations/guidelines for the board of trustees (or another specific committee).
- Comprehensive legal and tax advice should be sought during the implementation phase. This ultimately benefits your project idea, which then completes the cycle. Errors during this phase can have serious consequences for the impact of the foundation and can often be remedied only with considerable additional effort and expense.

The way is now clear for your project to start. As soon as the foundation has been entered in the Commercial Register, it can begin its activities. We wish your foundation every success and hope that it brings you a great deal of personal fulfillment.

This document is a translation of the original German text. In case of discrepancies, only the original German version is valid.

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CH-8070 Zurich
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