

EFC LEGAL AND FISCAL COUNTRY PROFILE

*The operating environment for
foundations*

SWITZERLAND – 2014

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The operating environment for foundations

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Contents

I. Legal framework for foundations	3
II. Tax treatment of the foundation.....	12
III. Tax treatment of donors of public benefit foundations	20
IV. Tax treatment of the beneficiary (receiving a grant or other benefit from a foundation)	22
V. Gift and inheritance tax	23
VI. Trends and developments.....	23
Useful contacts	25
Selected bibliography	25
Selected law texts online:	25
About the EFC Legal and Fiscal Country profiles	26
About the European Foundation Centre.....	26

I. Legal framework for foundations

1. Does the jurisdiction have a basic legal definition of a foundation (Description where applicable)? What different legal types of foundation exist (autonomous, non-autonomous without legal personality, civil law, public law, church law, corporate foundations, enterprise foundations)?

While the term “foundation” is not legally defined in Swiss law, Art. 80 et seqq. Zivilgesetzbuch (ZGB – Swiss Civil Code) provide the legal framework for foundations in Switzerland. According to Art. 80 ZGB the formation of a foundation requires assets being endowed for a specific purpose.

Types with own legal personality: “Conventional/ordinary” foundations (Art. 80 et. seqq. ZGB); ecclesiastical foundations (Art. 87 ZGB); foundations concerning employee benefits schemes (Art. 89a ZGB, Art. 331, 331 a-f, 361, 362, 673, 674 para. 3 OR – Swiss Code of Obligations), which are subject to certain special regulations; family foundations (Art. 355 ZGB); corporate foundations.

Dependent Foundations: A dependent foundation is not a legal person but comprises special funds transferred by the founder to a natural or legal person and which are permanently linked to a specific purpose.

2. What purposes can foundations pursue?

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

3. What are the requirements for the setting up of a foundation (procedure, registration, approval)? What application documents are required? Are there any other specific criteria for registration?

According to the so-called register or normative system, foundations acquire the status of a legal entity with full legal personality upon their entry into the commercial register (Art. 52 para. 1 and Art. 81 para. 2 ZGB, Art. 94 Handelsregisterverordnung – Swiss Commercial Register Ordinance). In addition to its publicity effect, the entry also has a constitutive effect (BGE 120 II 137, 141). Prior to the entry, the foundation may obtain the legal position of a *nasciturus* (Art. 31 para. 2 ZGB). Public law, family and ecclesiastical foundations do not require an entry into the commercial register to obtain legal personality (Art. 52 para. 2 ZGB). A voluntary entry of these foundations only has declaratory effect.

The actual foundation transaction, the act of endowing assets, is a one-sided legal transaction not requiring an acknowledgement. The desired legal effect is achieved by the mere declaration of intent made by the founder.

The foundation deed requires the following information:

- The intention to form an independent foundation;
- The identification of the assets to be transferred to the foundation;
- The description of the foundation's purpose.

As for the rest, the founder may set up and organise the foundation virtually at his or her own discretion. It is possible to establish a foundation by means of a legal transaction *inter vivos* (Art. 81 para. 1 ZGB) or by a disposition *mortis causa* (Art. 81 para. 1 in connection with Art. 493 para. 1 ZGB). Ever since the revision of Swiss Foundation Law which came into effect in 2006 and contrary to a previous judgment of the Swiss Federal Supreme Court (BGE 96 II 273), it is also permitted to establish a foundation by way of a contract of inheritance and not only by way of a last will.

The documents required in the registration process are further specified in Art. 95 HRegV.

4. Is State approval required? (approval by a State Supervisory Authority with/without discretion? Registration with a state authority or court? Notarisation by a Notary public?)

No (family foundations and ecclesiastical foundations).

Yes for other foundations, with discretion. Registration with a state authority.

5. Do foundations have to register? If yes, in what register?

Family foundations and ecclesiastical foundations do not have to register.

For all other foundations registration with the commercial register is mandatory.

a) If foundations are registered, what information is kept at the register?

The information kept in the register is stipulated in Art. 94 HRegV. Amongst others, the entry in the commercial register contains the following information:

- the fact that the legal entity which is entered into the commercial register is a foundation;
- the name of the foundation as well as its VAT-Number;
- the seat of the foundation as well as its legal domicile;
- the date of the foundation deed or the date of the disposition *mortis causa* establishing the foundation;
- in case of a reservation to amend the purpose according to Art. 86a ZGB, a reference to the foundation deed outlining the details of such reservation;
- the names of the members of the foundation's governing body;
- the names of the individuals authorized to represent the foundation vis-à-vis third parties;
- the competent supervisory authority;

- the name of the external auditor or, in case of an exemption, a reference to the exemption and the date of the supervisory authority's underlying decision.

b) If foundations are registered, is the register publicly available?

The register is publicly available.

6. Is a minimum founding capital required? Is the foundation required to maintain these assets or any other specified asset level throughout its lifetime?

Not by law. However, according to the practice adopted by the Federal Foundation Supervisory Authority (*Eidgenössische Stiftungsaufsicht*), the initial capital must be at least CHF 50,000 (approx. € 40,000)

7. What governance requirements are set out in the law?

The foundation's governing body and the manner in which it is to be administered are set forth in the foundation deed (Art. 83 para. 1 ZGB). The founder may set up written regulations providing for the organisation of the foundation in more detail; this procedure may help implementing required changes or modifications more easily (BGE 76 I 77). The foundation always requires a governing organ which ensures the foundation's legal capacity and which is entitled to management and representation of the foundation.

Over the last couple of years the implementation of corporate governance rules into Foundation Law has gained significant momentum resulting in a "foundation governance". A lot of work has already been done with regard to self-regulatory mechanisms/guidelines: The Swiss Foundation Code 2009 of Swiss Foundations, the Association of Grant-Making Foundations in Switzerland, which was published in a second edition in 2009, is designed for grant-making foundations and includes 3 principles, 26 recommendations and an extensive commentary. The Swiss NPO Code of the Conference of Presidents of Large Relief Organisations of Switzerland (KPGH [*Konferenz der Präsidentinnen und Präsidenten grosser Hilfswerke der Schweiz*]), established on 31 March 2006, is generally applicable to all non-profit organisations and pursues the principle of "comply or explain".

a) Is it mandatory to have a supervisory board?

No.

b) What are the requirements concerning board members? Is a minimum/maximum number of board members specified? What are the rules concerning appointment of board members? And their resignation/removal?

No formal requirements.

c) What are the duties and what are the rights of board members, as specified by national legislation?

Duties according to the foundation deed. The members of the governing body responsible for the management of the foundation confer rights to the foundation and, according to Art. 55 ZGB, bind the foundation by concluding transactions as well as by their other actions.

d) What are the rights of founders? Can fundamental decisions, such as change of purpose, be made at the discretion of the founder? What are the legal requirements in such circumstances?

Since 1 January 2006 a founder may request an amendment of the foundation's purpose if the founder has reserved this right in the foundation deed and provided that at least ten years have elapsed since the foundation was established or since the last amendment has been requested by the founder (Art. 86a ZGB). Additionally, in case of charitable or public purpose foundations the foundation must preserve its non-profit purpose following the amendment.

e) What are the rights of beneficiaries (e.g. right of information)?

The law does not provide special rights for beneficiaries. A general right of information is accepted by parts of the doctrine. However, there is the possibility to file an official complaint with the competent state supervisory authority in case of a legitimate interest.

f) What rules are in place to ensure against conflict of interest? What is the legal definition of a conflict of interest under your legislation? How is self-dealing prohibited?

Rules according to the foundation deed, if provided.

There is no explicit rule in the Foundation Law prohibiting self-dealing. According to the Swiss Federal Court contracts resulting out of self-dealing are permitted and valid if the nature of the contract excludes the danger of causing a disadvantage for the substituted party. Possibly Art. 718b OR, which addresses contracts between a company limited by shares and its representative, can be applied by way of an analogy to foundations. This provision stipulates that such contracts have to be composed in writing.

g) Can staff (director and/or officers) participate in decision making? How and to what extent?

Yes, if provided for in the foundation deed.

8. Who can represent a foundation towards third parties? Is this specified in law or is it up to the statutes of the organisation?

The governing body represents the foundation towards third parties. All modifications are up to the statutes.

a) Do the director and officers have powers of representation?

The governing body responsible for management confers rights to the foundation and, according to Art. 55 ZGB, binds the foundation by concluding transactions and by its other actions. The governing body, which may consist of one or several natural or legal persons, is often referred to as a foundation council (board of trustees / *Stiftungsrat*), foundation board of directors (*Stiftungsvorstand*), foundation commission (*Stiftungskommission*) or curatorship (*Kuratorium*).

9. Liability of the foundation and its organs

a) What is the general standard of diligence for board members? Does your country differentiate between voluntary (unpaid) and paid board members?

There is no general standard. The diligence is derived from the underlying contractual relationship between the foundation and the individual board member. A differentiation between voluntary and paid board members is discussed controversially in the literature. The supporters of a differentiation

refer to Art. 99 para. 2 OR which provides for a less strict liability for a party acting without any personal benefits.

b) Is there a “business judgment rule”, giving a board member a “safe harbour”, if she/he (1) acts on an informed basis; (2) acts in good faith, (3) acts in the best interests of the corporation, (4) does not act out of self-interest (duty of loyalty concept plays a role here), and (5) is not wasteful?

No, there isn't (although a discussion is emerging on this issue in literature). However, liability is excluded if a board member has not acted negligently (Art. 97 and 41 OR).

c) What is the liability of executive staff?

Foundation Law does not provide for a specific basis for the liability of the organs. The appointed organ is thus liable according to the general provisions, i.e. internally (towards the foundation) according to the underlying contractual relationship as well as for any unlawful acts (Art. 41 et seqq. OR), and externally (towards beneficiaries, contractual counter-parties and any other third parties) only for unlawful acts (Art. 55 para. 3 ZGB in connection with Art. 41 et seqq. OR). Internally (towards the foundation), a factual organ may be held liable according to the basic principles for (management) activities and actions performed without due authority (Art. 419 et seqq. OR) as well as for any unlawful acts (Art. 41 et seqq. OR). Externally (towards beneficiaries, contractual counter-parties and any other third parties), a factual organ is liable only for unlawful acts (Art. 55 para. 3 ZGB in connection with Art. 41 et seqq. OR).

Internal relationship: In general, an organ is established by the “organ agreement”, an agreement *sui generis* which is mainly based on the provisions of Employment and Contract Law. The organ is liable only if actual damages occur in connection with a breach of contract on the basis of negligence and if an adequate causality between the breach of contract and the occurred damage can be established. Art. 419 and 420 OR constitute the basis for the internal liability of the factual organ; the factual organ has to exercise the same due diligence in terms of quality as an appointed organ because the same basic principles for a contractual liability apply for both organs.

External relationship: Externally, the foundation is liable with all its assets. In addition, the acting organs may be held personally liable if they acted negligently (Art. 55 para. 3 ZGB)

d) Can the founder modify the standard of diligence for board members in the foundation's statutes?

Whether such a modification (i.e. exclusion of liability in case of slight negligence) should be regarded permissible is controversially discussed in literature.

e) Can board members be held **civilly** and/or **criminally** liable in the following cases?

	Yes	Probably yes	Unclear	Probably no	No
The foundation distributes money for a purpose which is a public benefit purpose but not accepted in the foundation's statutes.	X				
The foundation loses its status of a tax benefit foundation (because one requirement in tax law was not fulfilled).			X		
The foundation loses money because a board member has acquired some stocks in a company which unexpectedly went bankrupt.				x	

The foundation sells immovable property to the spouse of a board member. The board member was unaware that the price was too low.		X			
The foundation sells immovable property to a third person. The board member was unaware that the price was too low.		X			

10. Are economic activities¹ allowed (related/unrelated)? If so, is there a ceiling/limit on economic activities (related/unrelated)?

Yes, Foundation Law does not stipulate a ceiling/limit on economic activities. However, tax law may impose (factual) limitations on economic activities.

11. Are foundations permitted to be major shareholders?

Yes, Foundation Law does not prevent foundations from being major shareholders. There might, however, be implications regarding the tax exemption of public benefit foundations.

12. Are there any rules/limitations in civil and/or in tax law regarding foundations' asset management? What, if any, types of investment are prohibited?

Not within the rules applicable to conventional foundations. There are, however, some rules developed by jurisprudence and guidelines established by associations. Additionally, specific rules are laid down in the Federal Law on Occupational Retirement (BVG) which apply for foundations concerning employee benefits schemes. These rules may also serve as an "orientation" for the asset management of conventional foundations.

13. Are foundations legally allowed to allocate grant funds towards furthering their public benefit purpose/programmes which (can) also generate income? (recoverable grants; low interest loans; equities)

Yes.

14. What are the requirements for an amendment of statutes/amendment of foundations purpose?

Changes of a foundation's organisation are permitted as an exception pursuant to Art. 85 ZGB provided that the reorganisation is indispensable for the preservation of the assets or for the protection of the purpose of the foundation. If the original purpose of the foundation has significantly or effectively changed and the foundation apparently does not represent the founder's will any longer, the purpose of the foundation may be amended in light of the changed circumstances pursuant to

¹ For the purposes of this profile economic activity can be understood as "trade or business activity involving the sale of goods and services". "Related" economic activity is in itself related to and supports the pursuance of the public benefit purpose of the foundation. According to the above, normal asset administration by foundations (including investment in bonds, shares, real estate) would not be considered as economic activity.

Art. 86 ZGB. In both cases a federal or cantonal authority is competent to implement the change(s), as set forth in Art. 85 and Art. 86 para. 1 ZGB.

With respect to changes of the organisation, only the supervisory authority is allowed to request such changes while the governing organ has only the right to be heard. Following the revision of the Foundation Law, which is in force since 1 January 2006, the governing organ of the foundation may now request an amendment of the purpose of the foundation.

Since this revised law was adopted, minor or insignificant changes of the foundation's purpose, as well as minor organisational changes may also be realised in a simplified procedure pursuant to Art. 86b ZGB. The provision in Art. 86a ZGB is completely new: Since 1 January 2006 a founder may request an amendment of the foundation's purpose.

The founder himself may request a change of the foundation's purpose if he has reserved this right in the foundation deed and provided that at least ten years have elapsed since the foundation was established or since the last amendment has been requested by the founder. Additionally, in case of charitable or public purpose foundations the foundation must preserve its non-profit purpose (and, therefore, keep its tax exemption status) following the amendment. This provision was politically and dogmatically highly disputed because it may be considered as a – partial and limited – breach of the principle of separation which has traditionally been a fundamental pillar of Swiss Foundation Law.

15. What are requirements with regard to reporting, accountability, auditing?

a) What type(s) of report must be produced?

- annual financial report
- annual activity report
- public benefit/activity report,
- tax report/tax return,
- other reports, as the case may be.

b) Must all/any of the reports produced by the foundation be submitted to the supervisory authorities? If so, to which authorities (e.g. foundation authority, tax authority)?

If the foundation's range of activity is not limited to a single canton but includes the whole of Switzerland, the Federal Foundation Supervisory Authority will be the competent supervisory authority. On this federal level, non-profit foundations are supervised by the General Secretary of the Federal Department of the Interior. It demands an activity report, annual financial statements, audit report (in case that the foundation is under an auditing obligation), list of the board members, and the board's approval of the annual reports. Pursuant to Art. 84 para. 1bis ZGB, the cantons may subject foundations at communal level to supervision at the cantonal level. The internal cantonal competence with a view to the supervisory authorities is regulated by cantonal laws.

Tax reports have to be submitted to the tax authorities. The supervisory authority does not decide about tax exemptions.

c) Are the reports checked/reviewed? By whom (supervisory/tax authorities)?

Supervisory authorities. Foundations are supervised by the state authority (Confederation, canton, commune) to which they are assigned (Art. 84 para 1 ZGB).

However, it is the competent tax authority's responsibility to check if an organisation meets the necessary material requirements for a tax exemption.

Hence, the competent supervisory authority does not decide on the question of whether or not a foundation should be exempted from taxes based on its non-profit status; in addition, the competent supervisory authority does not monitor whether a foundation fulfils the requirements required for tax exemption. However, in practice the competent supervisory authority may inform the competent tax authority in case of doubtful or problematic activities which could have an impact on the foundation's tax status.

d) Do any or all of the reports and/or accounts of foundations need to be made publicly available? If so, which reports and where (website, upon request)

No.

e) What are the legal requirements concerning external audit? Is external audit required by law for all foundations?

Art. 83b ZGB provides for the general obligation to appoint external auditors. This obligation to conduct audits is subject to certain exceptions: Family and ecclesiastical foundations are generally exempted (Art. 87 para. 1bis ZGB). Furthermore, individual foundations may be exempted by the supervisory authority according to Art. 83b para. 2 ZGB and an ordinance based upon this provision (opting-out) if they have small assets (total assets are below CHF 200,000 [approx. € 160,000] in two consecutive business years) and if they do not publicly collect donations.

However, the exemption from the obligation to conduct audits does not release the foundation from its obligation to report to the supervisory authority. Of course, exempt foundations may very well voluntarily conduct a limited or official audit or an audit that is not based on statutory regulations (opting-in, Art. 83b para. 4 ZGB). In this regard, Art. 83b para. 3 ZGB refers to the provisions of the Code of Obligations on external auditors for public limited companies.

A foundation is subject to an official audit to be conducted by an external auditor if it exceeds two of the following parameters in two consecutive business years: Total assets of CHF 20 million (approx. € 16 million); revenue of CHF 40 million (approx. € 32 million); an annual average of 250 full-time employees (Art. 727 para. 1 No. 2 and 727b para. 2 OR in connection with Art. 83b para. 3 ZGB). If these limits are not exceeded, the foundation is subject to a limited audit of its annual financial statements (Art. 727a and 727c OR in connection with Art. 83b para. 3 ZGB). Thus, foundations are at least subject to a limited audit, unless they have been exempted by the supervisory authority according to Art. 83b para. 2 ZGB and an ordinance based upon this provision (opting-out).

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

f) By whom should audits be undertaken? Do requirements/guidelines exist regarding international and national auditing agencies and standards?

The RAG (Audit Admission and Oversight Law) implements an admission procedure that is to be followed by all natural persons and auditing agencies wishing to provide auditing services. The supervisory authority checks if the applicant meets the statutory requirements (Art. 2 lit. a and Art. 3 et seqq. RAG).

16. Supervision (which authority – what measures / sanctions?)

a) Does the supervisory authority comprise of a public administrative body, a public independent body, a combination of a governmental body and a court, or a public body and an independent body?

Public administrative body.

The legal relationship between the foundation and the supervisory authority is subject to Public Law since the state acts in its sovereign capacity.

Ever since the reorganization of the supervisory system in 2012, certain cantons consolidated their classical foundation supervisory and the oversight of foundations concerning employee benefits schemes within a single public, but independent body. In addition, some cantons created joint inter-cantonal supervisory bodies. Furthermore, some cantons separated the supervision of classical public benefit foundations from the oversight of foundations concerning employee benefits schemes.

b) What is the extent of the supervision? Does the body review reports and make inquiries? Are public benefit organisations subject to inspection?

The supervisory authority has to monitor the foundation to ensure that its purpose is fulfilled, the founder's will is complied with and that the foundation organs do not make any decisions which are in contradiction to the foundation deed or the stipulated regulations and/or that are illegal or immoral.

c) Is approval from the authority required for certain decisions of the Board of Directors?

No.

d) Is it mandatory to have a state supervisory official on the board?

No.

e) What enforcement measures are in place (including compliance measures and sanctions for non-compliance) concerning registrations, governance, reporting, and public benefit status?

The supervisory authority is entitled to give instructions that are binding for the foundation organs and has the right to sanction the foundations if they fail to follow the instructions.

Doctrine and legal practice differentiate between preventive (precautionary) and repressive (restoring) supervisory measures. Preventive supervisory measures are, for example, regulations pertaining to the investment of assets, the foundation organs' obligation to provide an annual report, and the submission of regulations and changes thereto. The repressive measures aim at eliminating the consequences of mistakes made by the foundation organs; for example, reminders, warnings, reprimands, the revocation of a decision made by the foundation's organs, replacement of measures, fines, criminal complaint, and in serious cases even the removal of the foundation's organ. However, the supervisory authority may only control the foundation organs' discretion on misuse and it must not replace the organs' decisions by its own discretion. In addition, the supervisory authority must always adhere to the general principle of proportionality when implementing supervisory measures.

17. When and how does a foundation dissolve?

Since a foundation is bound by the will of the founder, it cannot dissolve itself - in contrast to corporations. Certain circumstances are required for the dissolution of a foundation. The competent federal or cantonal authority will dissolve the foundation upon request or *ex officio* if the purpose of the foundation can no longer be achieved and if the foundation cannot be maintained by amending

the foundation deed or if the purpose of the foundation has become illegal or immoral (Art. 88 para. 1 ZGB). Any interested party may file an application or bring an action for the dissolution of a foundation (Art. 89 ZGB). The dissolution must be reported to the commercial registrar so that the entry may be deleted.

18. Under what conditions does the civil law in your country recognise a foreign foundation?

The recognition is assessed according to Art. 154 IPRG (Swiss Federal Code on Private International Law). A foundation will be recognised if it was incorporated correctly in its country of origin. There are only few exceptions, e.g. if the recognition would be considered contrary to the Swiss “*ordre public*”.

19. Does the civil law in your country allow a foundation to conduct (some or all) activities (grant-making, operating, asset administration, fundraising) abroad? Is there any limitation?

Yes, without limitations. There might, however, be an effect on the tax evaluation of the foundation.

II. Tax treatment of the foundation

1. What are the requirements to receive tax exemptions (pursuing public benefit purposes, non-distribution constraint, being resident in the country?). Is there a special approval process for receiving tax exemption? If so does the process have to be repeated every year?

Pursuant to Art. 56 lit. g DBG (Swiss Federal Law on Direct Federal Taxes), legal persons pursuing public or charitable purposes are exempt from taxes on profits that are exclusively and irrevocably dedicated to such purposes. This regulation applies accordingly to cantonal taxes imposed on profit and capital (Art. 23 para. 1 lit. f StHG – Swiss Federal Law pertaining to the Harmonisation of Direct Taxes of the Cantons and Municipalities).

2. What are reporting/proof requirements to claim tax exemptions? What does the foundation have to submit to the authorities (statutes, financial reports, activity reports, other?)

The foundation has to file an application for tax exemption with the competent tax authority.

3. Is specific reporting required for the use of state funds?

No.

4. Is there an obligation to report on donors and beneficiaries?

No.

5. Are there specific accounting rules for foundations?

Accounting rules according to the general rules applicable for legal persons (Art. 84b ZGB).

6. Is there a statutory definition in the civil law (foundation law, trust law) of your country what a public benefit purpose (charitable purpose) is? If yes, please give us the definition.

No.

7. Is there a statutory definition in the tax law of your country of what a public benefit purpose is? If yes, please give us the definition.

Both the Swiss Federal Law on Direct Federal Taxes (DBG) as well as the Swiss Federal Law pertaining to the Harmonisation of Direct Taxes of the Cantons and Municipalities (StHG) use the general legal term “non-profit” in their description of the requirements for a tax exemption. The relevant regulations (Art. 56 lit. g DBG and Art. 23 para. 1 lit. f StHG) are essentially the same. The only difference is that the StHG not only allows for an exemption from profit taxes but also from capital taxes because the cantons, in contrast to the Confederation, impose capital taxes on legal persons.

In its circular no. 12 of the year 1994, the Swiss Federal Tax Administration defines the term “non-profit” in more detail and provides that two cumulative requirements must be met: On the one hand, promotion of the general public interest and on the other hand, disinterestedness/altruism. The relevant public opinion is decisive when determining if an activity is in the general public interest. Public benefit may be promoted by activities in charitable, humanitarian, health promoting, ecological, educational, scientific and cultural areas (circular no. 12 no. II. 3. a)). Circular no. 12 names as examples social care, art and science, education, the promotion of human rights, the protection of the environment, homeland and animals, as well as development assistance. Public benefit is determined by the overall opinion of society (BGE 114 Ib 277, 279). Furthermore, circular no. 12 demands an open circle of beneficiaries and states that the restriction to one family, the members of an association or certain professionals is too limited (circular no. 12 no. II. 3. a). An activity is considered disinterested/altruistic if it is neither linked to the legal person’s own economic or personal interests nor to those of its members or close related persons (BGE 114 Ib 277). Based on the rulings rendered by the Swiss Federal Court, a non-profit organisation and its employees have to make sacrifices in the public’s best interest (BGE 113 Ib 7, 9 et seq.). In general, there is a lack of disinterestedness/altruism when a business purpose is pursued unless such activity is subordinate to the non-profit purpose. The operation of a business may only have a supporting function; furthermore, it must not represent the sole economic basis of the legal person (BGE in ASA vol. 19, p. 328 et seqq.). In the event that essential capital contributions are made to companies, the non-profit purpose must prevail over the maintenance of a company; this presumes that the organisation is supported by substantial funding from its company and that these funds are actually used for non-profit activities (Koller 2007, p. 453 et seq.; circular no. 12 no. II. 3. c).

The general public interest is not limited to domestic activities. A legal entity which is not active in Switzerland but abroad may also be exempted from taxes, provided that its activities are in the general public interest and that they are disinterested/altruistic. The actual implementation of such purposes must be proven by way of proper records, e.g. annual reports and annual financial statements (circular no. 12 no. II. 3. a). Also, legal persons with their registered office located abroad can be exempted from taxes if they would be subject to taxes in Switzerland based on an economic connection, e.g. as a real estate owner.

8. Please indicate whether the following purposes would or would not be accepted for tax privileges in your country:

Public benefit purpose	Accepted in tax law (for tax privileges)			
	Yes	Probably yes	Probably no	No
Arts, culture or historical preservation	X			
Environmental protection	X			
Civil or human rights	X			
Elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination	X			
Social welfare, including prevention or relief of poverty	X			
Humanitarian or disaster relief	X			
Development aid and development cooperation	X			
Assistance to refugees or immigrants	X			
Protection of, and support for, children, youth or elderly	X			
Assistance to, or protection of, people with disabilities	X			
Protection of animals	X			
Science, research and innovation	X			
Education and training	X			
European and international understanding		X		
Health, well-being and medical care	X			
Consumer protection		X		
Assistance to, or protection of vulnerable and disadvantaged persons		X		
Amateur sports			X	
Infrastructure support for public benefit purpose organisations			X	
<i>Other – please list other purposes accepted in tax law for tax privileges in your country</i>				

9. Support of “the public at large”

a) Do the activities of a tax-exempt foundation generally have to benefit “the public at large”?

Yes.

b) If yes, can a tax-exempt foundation support a small number of disadvantaged/ underprivileged individuals?

It depends: Above mentioned circular no. 12 demands an open circle of beneficiaries and states that the restriction to one family, the members of an association or certain professionals is too limited

(circular no. 12 no. II. 3. a). However, in practice it will depend on the quality of such limitation, the quantity of (potential) beneficiaries and other elements.

Examples: Do the following purposes promote the public at large?

	Yes	Probably yes	Unclear	Probably no	No
For benefit of the inhabitants of a city with 1,000,000 inhabitants	X				
For benefit of the inhabitants of a village with 10,000 inhabitants	X				
For benefit of the employees of a company					X
For benefit of the members of a family					X
For benefit of the students of a university		X			
Award for the best student of a university		X			

10. Non-Distribution Constraint

a) Does a tax-exempt foundation generally have to follow a “non-distribution constraint” which forbids any financial support of the foundation board, staff, etc?

No. However, too large a compensation for board members can be detrimental to tax exemption.

b) What happens with the foundation’s assets in case of dissolution?

Foundation Law does not provide for the distribution of assets and liquidation. Thus, the general provisions laid down in Art. 57 and 58 ZGB apply which refer *inter alia* to the liquidation regulations pertaining to companies limited by shares and cooperatives (Art. 913 OR).

11. “Altruistic” Element

a) Is remuneration of board members allowed in **civil law** and in **tax law**? If remuneration is allowed, are there any limits in **civil law** and/or in **tax law**?

No limits in civil law.

The tax authorities expect the board members to be working on an honorary basis, if the foundation should be exempted from taxes, though expenses should be repaid. Only if board members render services outside of their regular obligations as board members, remuneration in line with general market conditions may be paid. The Swiss tax authorities recommend that this remuneration principle is stated in the statutes. However, certain authors argue in favour of allowing a (modest) remuneration of board members.

b) Does **tax law** allow a donor/funder to receive some type of benefit in return for a donation? (e.g. postcards, free tickets for a concert)

Yes.

c) Is there a maximum amount that can be spent on office/administration costs in **civil law** and in **tax law**?

Basically, the foundation has to indirectly or directly use all of its funds to fulfil its purpose. A foundation may lose its non-profit status if it utilizes less than 50% of its funds for the purpose that the tax privileges are based upon. It is difficult to compare foundations in regard to the ratio between total expenses and management costs, but it may be assumed that management costs below 10% are considered low and should not cause any problems whereas costs in the region of 10-20% are generally considered appropriate.

If yes, how are “administration costs” defined? Please indicate which of the following types of expenditures would/would not be considered as “administration costs”:

- Personnel costs (staff salaries/payroll costs)
→ Administration costs
- Board remuneration
→ Administration costs
- Costs of external audit
→ Administration costs
- Other legal/accounting costs
→ Administration costs
- General office overheads (rent/mortgage payments, utilities, office materials, computers, telecommunications, postage)
→ Administration costs
- Insurance
→ Administration costs
- Publicity and promotion of the foundation (e.g. website, printed promotional materials)
→ Administration costs
- Asset administration costs
→ Administration costs
- In the case of an operating foundation – costs related to programmes/institutions run by the foundation
→ No administration costs
- Costs related to fundraising
→ Administration costs

12. Hybrid Structures (elements of private benefit in public benefit foundations)

a) Does the **civil law** of your country accept the following provisions/activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X

The founder retains a beneficial reversionary interest in the capital of a property or other asset for his own continuing use.		X			
The gift is of only the <i>freehold reversion</i> (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favor of the founder (or another member of her/his family) as tenant.		X			
A foundation distributes a (small) part of its income to the founder or his family.				X	

b) Does the **tax law** of your country accept the following provisions/activities of a tax-exempt foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X
The founder retains a beneficial <i>reversionary</i> interest in the capital of a property or other asset to retain for its own continuing use.					X
The gift is of only the <i>freehold reversion</i> (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favor of the founder (or another member of her/his family) as tenant.			X		
A foundation distributes a (small) part of its income to the founder or his family.					X

13. Distributions and Timely Disbursement

a) Are foundations allowed to spend down their capital?

Yes.

b) Are they allowed to be set up for a limited period of time only? If so, is there a minimum length of time for which the foundation must exist?

Yes.

c) Does the **civil law** and/or the **tax law** of your country require a foundation to spend its income (or a certain amount of the income) within a certain period of time, e.g. within the next financial year? If so, is there a specific amount/percentage of the income that must be spent within this time? Which resources would be considered as income? E.g. would donations/contributions designated as being for building up the endowment be included in /excluded from the income to be spent? What expenditures would count towards the disbursement of income (e.g. would administration costs be included/excluded?)?

No.

d) Does the **civil law** and/or the **tax law** of your country require a foundation to spend a percentage of its overall assets in the form of a "pay-out rule"?

No.

Example: Does the **civil law** of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.		X			

Example: Does the **tax law** of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.		X			

14. Does activity abroad put the tax-exempt status at risk?

The general public interest is not limited to domestic activities. A legal entity which is not active in Switzerland but abroad may also be exempted from taxes, provided that its activities are in the general public interest and that they are disinterested/altruistic. The actual implementation of such purposes must be proven with proper records, e.g. annual reports and annual financial statements (circular no. 12 no. II. 3. a). Although not clear on what legal basis, some cantonal tax authorities have in practice adopted a very strict approach with a view to activities performed abroad by requesting that a minimum threshold amount of overall distributions be spent domestically (e.g. 30-50% of all distributions).

Also, legal persons with their registered office located abroad can be exempted from taxes if they would be subject to taxes in Switzerland based on an economic connection, e.g. as a real estate owner.

15. Are there any civil and/or tax law rules regulating cross-border grants by a foundation? If yes, please provide a description of the requirements the foundation must fulfil in such cases.

No. However, as to the controversial practice of certain cantonal tax authorities with a view to activities performed abroad, see above.

16. Income tax treatment

How are the following types of income treated for income tax purposes?

Grants and donations

No taxation.

Investment income (asset administration)

- Interest from fixed rate bonds
- Equities
- Income from leasing of a property that belongs to the foundation

No taxation.

Economic activities related/unrelated)

- Income from running a hospital/museum/opera
- Income from producing/selling books (e.g. art books sold by a cultural foundation)
- Income from running a bookshop inside a museum/opera run by the foundation
- Income from running a café in the hospital/museum run by the foundation
- Income from selling T-shirts (activity not related to the pursuance of the public benefit purpose)
- Income from intellectual property (e.g. royalties and licence fees)

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

Income deriving from grant expenditure towards public benefit purpose/programme activities (such as loans, guarantees, equities)?

See above.

Is major shareholding considered as an economic activity and taxed accordingly?

See above. Holding foundations are permitted and Foundation Law does not impose any restrictions on foundations being major shareholders.

17. Are capital gains subject to tax? If so, are they taxed as income or liable to a separate tax?

No. However, income derived from a position as a substantial shareholder of a company is only exempted from taxes if the organisation's interest in maintaining the company serves a non-profit purpose.

18. Does any kind of value added tax (VAT) refund scheme for the irrecoverable VAT costs of public-benefit foundations exist in your country?

Basically, the rules applicable to the direct federal taxes also apply to the MWStG (Swiss Law on Value Added Tax): Only legal persons who waive distributions of the net profit to members, partners and organs may be recognised as non-profit organisations.

Non-profit organisations that achieve annual revenues of up to CHF 150,000 (approx. € 120,000) are exempted from the subjective obligation to pay taxes (Art. 10 para. 2 lit. c MWStG). In addition, certain revenues of non-profit organisations are also exempted from the objective obligation to pay taxes (Art. 21 no. 12, no. 13, no. 17 and no. 27 MWStG). For the definition of a tax exempted organisation Art. 3 lit. j MWSTG refers to Art. 56 lit. g DBG. Donations are so-called non-revenues which are not subject to the value added tax (Art. 18 para 2 lit. a and d MWSTG).

19. Is capital tax levied on the value of assets, where applicable?

Non-profit organisations do not have to pay profit taxes for capital interest, dividend income etc. On the other hand, income from capital shares in companies is only exempted from taxes if the organisation's interest in maintaining the company serves a non-profit purpose.

20. Are there taxes on the transfer of assets by foundations?

Yes, e.g. the real estate gains tax or stamp duties.

21. Are there any other taxes to which public-benefit foundations are subject there (e.g. real property tax)?

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

22. Can a foreign foundation get the same tax benefits as a national foundation according to the wording of the tax law in your country? If yes, under what conditions – if they have to fulfil exactly the same requirements as local based public benefit foundations, please refer to above but indicate which documents need to be provided and translated:

- Statutes (translation required?)
- Last annual financial report (translation required?)
- Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes, which may not be required by the organisation's country of seat but are required according to the legislation of the country from which tax benefits are sought?
- Other?

Yes, non-profit organisations with their registered offices abroad are entitled to direct privileges in the form of an exemption from profit taxes and capital taxes payable in the cantons under the same conditions as national foundations.

23. Does your country apply withholding tax to the income from local investments held by domestic and/or foreign-based foundations? If so, can domestic or foreign-based foundations reclaim all or part of the withholding tax under domestic law?

No specific rules for foundations.

III. Tax treatment of donors of public benefit foundations

1. System of tax credit² or tax deduction³?

Deduction.

² For the purposes of this profile tax credit can be defined as an amount that can be deducted from the actual tax to be paid (reduction in amount of tax paid)

³ For the purposes of this profile tax deduction can be defined as a reduction in the gross amount on which tax is calculated (reduction in taxable income/tax base)

2. Tax treatment of individual donors

The Swiss Income Tax Law allows natural persons certain socio-politically motivated deductions (e.g. donations, alimony and support payments under Family Law) a complete list of which is provided by the law (Art. 9 para. 2 StHG, Art. 33 DBG). Art. 33a DBG, which has been in force as of 1 January 2006, also includes the abovementioned voluntary contributions. On a federal level, monetary contributions as well as contributions in kind of CHF 100.00 (approx. € 80) or more per fiscal year made by natural persons are deductible from the income, whereas the maximum deductible is 20% of the taxable income decreased by certain expenditures (Art. 26 – 33 DBG resp. Art. 33a DBG). The transfer of assets from an individual donor to a tax-exempt foundation is usually exempted from gift taxation.

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

a) What tax relief is provided for individual donors? Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?

Monetary contributions as well as contributions in kind of CHF 100.00 (approx. € 80) or more per fiscal year made by natural persons are deductible from the income, whereas the maximum deductible is 20% of the taxable income decreased by certain expenditures (Art. 26 – 33 DBG resp. Art. 33a DBG).

The transfer of assets from an individual donor to a tax-exempt foundation is usually exempted from gift taxation.

b) Which assets qualify for tax deductibility?

Both monetary contributions as well as contributions in kind.

3. Tax treatment of corporate donors

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

a) What tax relief is provided for corporate donors? Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?

See above.

b) Which assets qualify for tax deductibility?

Both monetary contributions as well as contributions in kind.

4. Tax treatment of donations to non-resident public-benefit foundations – do donors get the same tax incentive?

The law clearly states that the receiving organisation must have its registered office in Switzerland (Art. 33a and Art. 59 para. 1 lit. c DBG; Art. 9 para. 2 lit. i and Art. 25 para. 1 lit. c StHG). Donations made to organisations having their registered office abroad are thus not deductible from direct taxes.

5. Other frameworks such as percentage law systems

Not applicable.

6. What are the requirements that the donor must fulfil/ information they must provide in order to claim tax benefits?

What information do donors have to provide to their tax authority in order receive tax incentives for their donation (e.g. submitting details on the organisation they support: statutes, annual financial report, documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes?)?

General information on the organisation they support. Basically, if the supported organisation is in itself tax-exempt, the tax authority responsible for the donor's tax return will rely on this information. However, it may demand further documentation if deemed necessary.

7. Are there any different or additional requirements to be fulfilled when a donor is giving to a foreign-based foundation?

What information do donors to foreign-based organisations have to provide in order receive tax incentives for their donation (e.g. Statutes (translation required?)? Annual financial report (translation required?)? Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes?)?

Not applicable since direct donations to foreign-based organisations are not eligible for tax deduction (Art. 33a and Art. 59 para. 1 lit. c DBG).

IV. Tax treatment of the beneficiary (receiving a grant or other benefit from a foundation)

1. Individuals

Depends on factual circumstances of the individual case. For instance, an exemption from income tax would be granted if the grant or other benefit cumulated with other income of the beneficiary does not exceed the means for maintenance of the beneficiary at question.

2. Legal entities

Depends on factual circumstances of the individual case.

3. Are there any different or additional requirements that must be fulfilled by a beneficiary receiving funding from abroad?

No.

V. Gift and inheritance tax

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

1. Does gift and inheritance tax/transfer tax exist in your country and if yes who has to pay the tax in the case of a donation/legacy to a public-benefit organisation (the donor or the recipient organisation)?

In some cantons yes. However, donations to non-profit organisations are usually exempted from gift taxation.

2. What are the tax rates? Is there a preferential system for PBO's? Which PBO's qualify? Is there a difference according to the region or the legal status of the PBO?

The gift tax rates vary on a cantonal basis. However, donations to non-profit organisations are usually exempted from gift taxation.

3. Is there a threshold (non-taxable amount) from gift and inheritance tax for donations/legacies to public-benefit organisations?

No.

4. Is there a legal part of the estate that is reserved for certain protected heirs and which a donor cannot give to third parties?

Yes.

5. What is the tax treatment (inheritance and gift tax) of legacies to non-resident public benefit foundations?

Donations to foreign non-profit foundations are only exempted from gift or inheritance taxes in certain cantons in case of a treaty providing for reciprocity.

VI. Trends and developments

1. Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations and their donors are protected by the

fundamental freedoms of the EC Treaty? Have there been any changes to your country's legislation, resulting from the Persche, Stauffer, Missionswerk or other relevant ECJ judgments, or are changes being discussed?

There is no direct impact for Switzerland as it is not a member state of the EU. There is, however, a discussion among scholars as well a debate on the political level.

2. Has the fight against terrorism and financial crime led to the introduction in recent years of new laws / rules affecting the foundation sector (e.g. implementation of EU Anti Money Laundering Directive, or reactions to recommendations of the Financial Action Task Force)?

a) Is there a specific national/regional anti-terrorism act (legislation) in your country, (which one and date of entry into force or adoption)?

Yes, the Swiss Federal Act on Preventing Money-Laundering and Terrorism Financing, in force since 1 April 1998. As a member state of the Financial Action Task Force on Money Laundering, Switzerland regularly revises and modernises its anti-money laundering and anti-terrorism financing regulations.

b) If so, has this law introduced new legal and regulatory requirements for foundations (please describe)?

The Swiss Financial Market Supervisory Authority introduced new regulations against money laundering. A financial intermediary is therefore obliged to ask for specific information about the founder, the authorised representative, the categories of persons which may be beneficiaries and the board members of the foundation before entering into a new business relationship with a foundation.

c) Has the foundation supervisory authority introduced new regulatory/oversight requirements to comply with counter terrorism measures/law?

No.

d) Has the foundation supervisory / regulatory authority(ies) introduced guidance tools to assist foundations to comply with counterterrorism measures/law?

No.

e) If so, did the foundation supervisory authority engage in a consultation with the foundation sector on counter terrorism measures/ does it plan such a consultation?

No.

3. Are there any other recent trends or developments affecting the legal and fiscal environment for public benefit foundations in your country?

The legislative body accepted a parliamentary "Motion" (Motion Luginbühl) and agreed to make Switzerland a more attractive location for non-profit organisations. To achieve this goal it was planned – amongst others – to frame the taxation environment in a way that is more attractive to non-profit organisations. In February 2013 the Swiss Federal Council refused the parliamentary Motion Luginbühl arguing that Swiss Foundation Law does neither require a modernisation in private nor in tax law provisions. This decision has led to criticism in literature where some authors argue that Swiss tax rules pertaining to non-profit foundations should have been modified in order to better reflect the globalized economic reality of the 21st century.

4. Public fundraising

Are there any specific laws that regulate fundraising and do they affect foundations?

New regulations have been introduced on 1 January 2013 in Art. 89 ZGB pertaining to funds raised through public collection for public benefit purposes. Such funds (so-called “*Sammelvermögen*”) are legally qualified as dependent foundations. This revision does not affect foundations with own legal personality.

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Selected bibliography

Please list here any books/articles which provide further information on the any of the topics discussed in the profile. Links to online articles/resources are also appreciated

Selected law texts online:

Please list here the links to relevant national laws where these are available online
www.admin.ch

About the EFC Legal and Fiscal Country profiles

This profile is part of a series of profiles of the legal and fiscal environments for foundations in 42 different countries across the wider Europe, as well as some countries in other world regions. The aim of these profiles is to paint a picture of the current operating environment for foundations in these countries to better understand the legislative landscape foundations inhabit. The profiles are produced in collaboration with foundations, legal experts, and associations in each country. Each profile is written by the national-level expert. A comparative overview of the country profiles from wider Europe can be downloaded from the EFC website: “Comparative Highlights of Foundation Laws: The Operating Environment for Foundations in Europe.”

www.efc.be

About the European Foundation Centre

The European Foundation Centre, founded in 1989, is an international membership association representing public-benefit foundations and corporate funders active in philanthropy in Europe, and beyond. The EFC develops and pursues activities in line with its four key objectives: creating an enabling legal and fiscal environment; documenting the foundation landscape; building the capacity of foundation professionals; and promoting collaboration, both among foundations and between foundations and other actors. Emphasising transparency and best practice, all members sign up to and uphold the EFC Principles of Good Practice.