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Swiss foundations and associations law

2023/2024 Legal Update*

Giulia Neri-Castracane | Vincent Pfammatter**

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I. Introductory remarks

2023 and the first semester of 2024 have witnessed significant legal and regulatory developments impacting associations and foundations. This trend shows no signs of abating, with further substantial changes already in progress.

In 2023, reforms in corporate law and related amendments to the Swiss Code of Obligations (SCO),¹ the Swiss Civil Code (SCC),² the Swiss Federal Act on Debt Enforcement and Bankruptcy (DEBA),³ and the Ordinance on the Commercial Registry (OCR)⁴ brought about pivotal changes in laws governing associations and foundations. Furthermore, amendments to the Value Added Tax Act (VAT Act),⁵ along with the new Federal Act on Data Protection (FADP),⁶ have also significantly affected the activities of Swiss foundations and associations.

The introduction of mandatory registration with the commercial registry for certain associations, driven by pressure from the Financial Action Task Force (FATF), has required a review of the statutes of number of associations, which also presented an opportunity to update and modernize outdated articles.

Additionally, new transparency requirements, particularly concerning compensation for foundation board members and management, and the draft proposal for a new register of beneficial owners, have raised pertinent questions regarding the effectiveness of transparency in achieving specific policy objectives.

Moving into 2024, significant changes have emerged following parliamentary debates and votes related to aspects surviving from the *Luginbühl* initiative.⁷

In addition, debates on compensating board members of tax-exempt entities have sparked considerable discussion and led to divergent practices or regulations in cantons such as Zurich and Vaud (III). These discussions have also highlighted existing dis-

* This update covers the period from January 1, 2023 to June 30, 2024.

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¹ RS/SR 220.

² RS/SR 210.

³ RS/SR 281.1.

⁴ RS/SR 221.411.

⁵ RS/SR 641.20.

⁶ RS/SR 235.1.

⁷ Initiative 14.470, available (in German, French and Italian) at: <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20140470>> (last consulted: 1st July 2024).

crepancies in practices among cantonal and federal authorities.

There is a palpable desire for harmonization of practices in the future, evidenced in initiatives like the attempt to establish a joint supervisory region comprising nine cantons (IV.2) and the Federal Supervisory Authority for Foundations (FSAF)'s participation in the annual conference of cantonal supervisory authorities for the first time.⁸ However, respecting each canton's autonomy under federalism remains crucial for allowing them to maintain attractiveness on specific policy issues.

The recent liberal and favorable announcements as to the application of tax regulations for the philanthropic sector in the Canton of Zurich underscores this regional autonomy, especially in response to concerns over its philanthropic hub status.⁹ Similarly, other cantons¹⁰ like Vaud have also issued new guidelines with respect to compensation of Board members¹¹ and Geneva¹² is exploring measures to ensure increased attractiveness, while adhering to the parameters of Swiss law.

The new guidelines issued by the Canton of Zurich and Vaud tax authorities on compensation are not, *per se*, a novelty in the field of benefits for tax-exempted entities. That being said, while such practices were authorized on a case-by-case basis, the issuance of these guidelines present the advantage of a clear(er) framework and more transparency. Notably, Zurich

⁸ See Retrospective de l'ASF 2023, available (in German, French and Italian) at: <<https://www.edi.admin.ch/edi/fr/home/fachstellen/eidgenoessische-stiftungsaufsicht/esa/actualites.html>> (last consulted: 1st July 2024).

⁹ Grassi Sabrina/Jakob Dominique/von Schnurbein Georg, Rapport sur les fondations en Suisse 2024, Centre d'études de la philanthropie en Suisse (CEPS), Université de Bâle, CEPS Forschung und Praxis, Volume 31, 7.

¹⁰ This is notably the case of Basel-Stadt and Geneva, see for Basel, Sugimoto Takashi, Wettbewerb der Stiftungsstandorte, in *The Philanthropist*, 19 February 2024; von Schnurbein Georg/Suissa Noam, Stiftungsstadt Basel/Zeigen, was Basels Stiftungen bieten, CEPS Forschung und Praxis Spezialheft, 2023.

¹¹ Administration cantonale des impôts (AFC-VD), Directives en matière d'indemnisation des membres d'organes d'entités exonérées d'impôts en raison de leur but de pure utilité publique (PUP), 29 janvier 2024, available (in French only) at: <<https://www.vd.ch/themes/etat-droit-finances/impots/impots-pour-les-societes/exoneration-fiscale>> (last consulted: 1st July 2024).

¹² See <<https://www.ge.ch/dossier/geneve-philanthropie/contexte-genevois/etat-promeut>> (last consulted: 1st July 2024).

tax administration is a pioneer in establishing formal guidelines on tax exemption and entrepreneurial financing models.

Case law developments in 2023 and the first half of 2024 have reaffirmed the competencies and responsibilities of authorities such as the commercial registry and foundations' supervisory authorities. While current jurisprudence has not overturned established precedents, a decision from the European Court of Human Rights sheds light on the rights and powers of associations standing in climate litigation.

Looking ahead, foundation law is expected to garner increased attention with the (potential) lifting of restrictions on fee tail foundations and the broadening of admissible purposes for employer pension foundations. Overall, ongoing legislative projects reflect a growing emphasis on professionalization of the non-profit sector while providing a «safe harbor» for those entities. One drawback is however to be deplored; while qualified non-profit entities have been excluded from automatic exchange of tax information, they are likely to be included in the future federal register of beneficial owners, signaling continued regulatory scrutiny and a fundamental mismatch with the concept of *beneficial owner* in charitable entities.

These developments, which will be reviewed in more detail in the present article, underscore a dynamic period for Swiss associations and foundations, marked by regulatory evolution and the ongoing quest for maintaining effective governance in an evolving compliance framework.

II. Amendments to Swiss law

1. Foundations and Associations: 2023 Novelties

In 2023, several provisions entered into force that impacted both foundations and associations, or exclusively one of the two legal forms.¹³ The reform of Swiss

¹³ See also Neri-Castracane Giulia/Pfammatter Vincent, Nouveautés pour les associations et les fondations/Modifications législatives 2023, EF 6/2023, 262–267 ; Jakob Dominique/Kaufmann Marc/Mathis Marco/Savanovic Ivana/Studhalter Laura/Wittkämper Thimo, Verein-Stiftung-Trust/Entwicklungen 2023, Bern 2024; Jakob Dominique/Savanovic Ivana, Entwicklungen im Vereins- und Stiftungsrecht/Le point sur le droit des associations et fondations, SJZ 119/2023, 1060–1067; Grüniger Harold, Aktuelles aus dem Stiftungs- und Gemeinnützigenbereich – Neue

corporate law affected how the governing bodies of foundations and associations may meet and make decisions, as well as the rules regarding insolvency and over-indebtedness. New transparency requirements were also adopted in both foundation and association law. Additionally, the VAT-relevant turnover threshold was increased for certain associations and foundations, and both entities became subject to data protection obligations.

1.1 Meeting modes and decision-making process

Following the corporate law reform and the application of Art. 701 para. 3, 701a to 701f and 713 para. 2 (3) SCO to foundations and associations, the principles of uniformity among Swiss legal forms were reinforced.

As of last year, associations may now hold assembly meetings virtually, in hybrid mode, abroad, or in different locations simultaneously. A provision in the articles of association is necessary for a meeting abroad or a purely virtual meeting, while a decision by the committee is sufficient for a hybrid mode assembly. For virtual meetings, an independent representative must be designated to ensure that those unfamiliar with new technologies can still express themselves,¹⁴ unless the statutes of the association have renounced to the latter representative.¹⁵

Meetings of foundation boards and association committees may also be held virtually and in hybrid mode without any specific provision in the articles of association or the deed.

In all cases (virtual or hybrid modes), the identity of the participants must be verified, simultaneous transmission of the debate must be ensured, each participant must be able to participate as if the meeting were in person, the results must not be falsified, and data protection must be guaranteed.¹⁶

Decisions of the foundation board and the association committee may also be taken by circular decision with the required majority. Due to the unchanged wording of Art. 66 para. 2 SCC, specific clarification in

Stiftungen, Literatur, Entscheide, successio 2/2023, 141–155; Künzle Hans Rainer, Aktuelle Entwicklungen im schweizerischen Stiftungsrecht, PRIVATE, Das Geld-Magazin 2/2023, 6–7.

¹⁴ Art. 701d para. 1 SCO.

¹⁵ Neri-Castracane/Pfammatter (n. 13), 262.

¹⁶ Art. 701e SCO.

the articles of association is necessary for this possibility when there is no unanimous vote.

1.2 Insolvency and over-indebtedness rules

The corporate law reform introduced significant changes to insolvency and over-indebtedness rules. Key amendments include the removal of the mandatory intermediary balance sheet at liquidation value, and the requirement to appoint an auditor in case of capital loss, even if the entity had previously opted out or opted down from audit obligations. There is also a clarification that interest must be covered in a subordination of claims to avoid notifying the judge about over-indebtedness. Additionally, there is now a possibility to postpone notification to the judge if there are valid reasons to believe that the over-indebtedness can be resolved within 90 days. Further clarifications were made regarding the valuation of real estate and participations, and bankruptcy stays have been unified under the DEBA.

These rules, outlined in Art. 725, 725a, and 725b SCO, emphasize the duty to take early action in cases of insolvency. They apply to foundations and associations through the amended Art. 84a SCC and the new Art. 69d SCC. Under these provisions, the foundation board must notify the judge through the supervisory authority rather than directly. Consequently, the supervisory authority holds the responsibility for deciding the necessary measures. Additionally, for associations required to be registered in the commercial registry, Art. 69d SCC increases the liability of committee members when association face financial difficulties and distress.¹⁷

1.3 Increased transparency in compensation of foundation board members and directors

As of the financial year 2023, the foundation board must report to the supervisory authority any compensation directly or indirectly received by their members as well as by the management (if any).¹⁸ The first reports are currently being released.

By reference to Art. 734a para. 2 SCO, the compensation to be disclosed includes allowances, fees, salaries, bonuses, royalties, profit-sharing arrangements, credit notes, benefits in kind, debt write-offs, and all

¹⁷ Neri-Castracane/Pfammatter (n. 13), 265.

¹⁸ Art. 84b SCC.

compensation for overtime work or work exceeding the mandate. The benefits received must be disclosed by individuals. The FSAF authorizes the publication of an aggregated amount if the total is below 50,000 Swiss francs, and an individualized disclosure if the amount is above.¹⁹

Each supervisory authority has established its own practice for how compensation must be disclosed. Some, like the FSAF, require the information to be included in the annual report (using Form A1),²⁰ while others, such as in Geneva, request it as an appendix to the accounts.²¹

1.4 Registration of associations with the commercial registry

Since January 1, 2023, Art. 61 para. 2 (3) SCC mandates that associations primarily collecting or distributing assets abroad for charitable, religious, cultural, educational, or social purposes must register with the commercial registry.

However, certain associations are exempt from mandatory registration if they cumulatively meet the following criteria: (i) the collected or distributed funds do not exceed 100,000 Swiss francs over the last two accounting periods, (ii) they distribute their funds through a financial intermediary, and (iii) they have a representative of the association with single signature power (or two representatives with joint signature) domiciled in Switzerland.²²

Mandatory registration with the commercial registry entails several obligations: maintaining a list of

members with their names and addresses (Art. 61a SCC), designating a representative domiciled in Switzerland (Art. 69 para. 2 SCC), keeping accounts as per the SCO (Art. 69a SCC and Art. 957 para. 1 (2) SCO), applying the rules in case of insolvency or over-indebtedness (Art. 69d SCC and Art. 39 para. 1 (11) DEBA), and registering all members of the committee and authorized representatives, unless they are referred to in Art. 90 para. 2 (c) OCR, which allows for the registration of only (but at least) a member of the direction and a representative domiciled in Switzerland.

Registration should have been completed by July 1, 2024. Associations not registered by this date risk a fine according to Art. 153 of the Swiss Criminal Code.²³

1.5 VAT exemption

As of January 1, 2023, the annual turnover threshold for VAT exemption for non-profit, voluntarily-run sporting or cultural associations, and charitable organizations has been increased to 250,000 Swiss francs.²⁴ Entities that wish to benefit from this exemption must annually²⁵ request deregistration from the VAT register with the Federal Tax Administration within 60 days from the end of the tax period.²⁶ For those starting a commercial activity, the exemption can be based on an estimated turnover.²⁷

To determine whether the threshold has been reached, contributions that are out of the VAT scope, such as advertising contributions, sponsorships, and restaurant income, must not be counted.²⁸

1.6 Data protection

Since September 1, 2023, foundations and associations, like any other entity, are subject to the revised FADP and the new Data Protection Ordinance (DPO)²⁹

¹⁹ Autorité fédérale de surveillance des fondations (ASF), Mémo relatif à la déclaration des indemnités du conseil de fondation et de la direction, version valid as of March 1, 2024, available (in German, French and Italian) at: <<https://www.edi.admin.ch/edi/fr/home/fachstellen/eidgenoessische-stiftungsaufsicht/conseils/merkblaetter.html>> (last consulted: 1st July 2024).

²⁰ Autorité fédérale de surveillance des fondations (ASF), Formulaire A1 – Remise du rapport de gestion annuel pour les fondations soumises à révision, version valid as of January 1, 2024, available (in German, French and Italian) at: <<https://www.edi.admin.ch/edi/fr/home/fachstellen/eidgenoessische-stiftungsaufsicht/conseils/formulaires-pour-la-revision.html>> (last consulted: 1st July 2024).

²¹ Autorité cantonale de surveillance des fondations et des institutions de prévoyance (ASFIP), Annexe aux comptes annuels, available (in French only) at: <<https://www.asfip-ge.ch/publications-et-communications/>> (last consulted: 1st July 2024).

²² Art. 90 para. 2 OCR.

²³ RS/SR 311.0.

²⁴ Art. 10 para. 2 (c) VAT Act.

²⁵ Art. 9 para. 3 VAT Ordinance, RS/SR 641.201.

²⁶ Art. 9 para. 3 VAT Ordinance. On the 60-days deadline, see Federal Council, Assujettissement à la TVA: le Conseil fédéral assouplit les conditions pour les associations, Press release of March 18, 2022, available (in German, French and Italian) at: <<https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-87665.html>> (last consulted: 1st July 2024).

²⁷ Art. 9 para. 1 VAT Ordinance.

²⁸ FF 2021 1100, 6.

²⁹ RS/SR 235.11.

if they process personal data. There are no specific exceptions for public utility entities.

Amongst the most significant changes, one may note the extension of the rights of the individuals concerned (Art. 25 FADP), an active obligation for the processing entity to provide information (Art. 19 FADP), the obligation to report data protection breaches (Art. 24 FADP), and the requirement to maintain a record of data processing for large foundations or those processing high-risk data (Art. 12 FADP). Noteworthy also, responsible individuals acting voluntarily (e.g. it could be board members of a foundation) and failing to comply with these regulations may risk fines of up to 250,000 Swiss francs (Art. 60 to 63 FADP).

2. Foundations: 2024 SCC Amendments

After nearly seven years of debate following *Luginbühl* parliamentary initiative,³⁰ the Swiss Parliament adopted the revision of Swiss foundation law on December 17, 2021, with the changes taking effect on January 1, 2024. As of the beginning of 2024, Switzerland has a slightly revised foundation law, introducing changes³¹ to the founder's right, ancillary amendments to the foundation deed, formal requirements, and recourse to the supervisory authority.

2.1 Extension of founders' rights organizational changes

Until now, the founders of a Swiss foundation could only change its purpose under Art. 86a SCC if they had explicitly reserved this right. However, as of the recent revision, the founder's rights have been expanded to include the ability to modify the organization of the foundation as well.

Under the revised Art. 86a para. 1 SCC, the competent federal or cantonal authority may, at the request of the founder or as a result of a disposition *mortis causa* (testamentary disposition) made by the founder, modify either the purpose or the organization of the foundation. This is permissible if the deed of founda-

³⁰ Initiative 14.470, available (in German, French and Italian) at: <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaft?AffairId=20140470>> (last consulted: 1st July 2024).

³¹ See also Jakob Julia/Freiburghaus Aline/Jakob Dominique/von Schnurbein Georg, Rapport sur les fondations en Suisse 2023, Centre d'études de la philanthropie en Suisse (CEPS), Université de Bâle, CEPS Forschung und Praxis, Volume 30, 21–22.

tion reserves this possibility and at least 10 years have passed since the establishment of the foundation or since the last modification of the purpose or organization requested by the founder.

It is important to note that this new right applies only to foundations established after the entry into force of the revision; there is indeed no retroactive effect on existing foundations.

2.2 Simplification of ancillary amendments to the foundation deed

The revision of Swiss foundation law also relaxes the conditions for ancillary modifications to the deed of foundation. Under the revised Art. 86b SCC, such amendments will be permissible if they are justified by objective reasons and do not prejudice the rights of third parties.

The previous requirement that such modifications must appear «necessary» for valid objective reasons has been replaced with a less stringent requirement that they appear justified for objective reasons. The practical implications of this change remain to be seen.

2.3 Lighter form for amendments to the deed

The new Art. 86c SCC clarifies that amendments to the foundation deed under Art. 85 to Art. 86b SCC, requested by the competent federal or cantonal authority, or by the supervisory authority, do not require an authenticated deed. The written form is sufficient for these amendments. However, the amended version must be submitted to the commercial registry for registration.

2.4 Recourse to the supervisory authority

Until now, the right to appeal in matters of foundation supervision lacked explicit legal basis but is now codified in Art. 84 para. 3 SCC. Issues surrounding this right have prompted a comprehensive list in the law defining those entitled to appeal. According to this list, beneficiaries or creditors of the foundation, subsequent contributors, as well as former and current members of the foundation board who have an interest in ensuring compliance of the foundation's administration with the law and the foundation deed, may lodge a complaint with the supervisory authority against acts or omissions of the foundation's bodies. Notably absent from this list, however, are the heirs of the founder.

III. New practices of tax administration: Zurich and Vaud new guidelines

1. Vaud guidelines

On January 29, 2024, the cantonal tax administration of the Canton of Vaud (AFC-VD) clarified its policy through the publication of Guidelines on the compensation of members of governing bodies of entities exempt from taxation due to their purely public benefit purpose (Guidelines).³² These Guidelines provide detailed instructions on compensation, covering principles governing the reimbursement of expenses and indemnities for members of governing bodies of tax-exempt entities engaged in activities of public benefit.

It is important to note that these Guidelines specifically apply to members of governing bodies (such as foundation boards or association committees) of tax-exempt entities and do not address salaried or volunteer staff. Regarding salaried staff, the AFC-VD has articulated a principle that generally prohibits including relatives of a member of the board/committee of the tax-exempt entity. This reflects a stringent stance from the AFC-VD on an important issue, particularly for family-run entities.

The Guidelines underscore the fundamental principle that members of governing bodies are expected to serve on a voluntary basis, with no direct or indirect remuneration allowed. For example, a board/committee member who is also employed by a company owned by the tax-exempt entity cannot be considered as acting on a voluntary basis. However, the Guidelines recognize exceptions in exceptional circumstances.

Further elaborating on the principles, the Guidelines categorize three distinct situations:

1. Members devoting less than 60 hours per year

Typically, a commitment of up to 60 hours per year is considered standard for volunteers. In such cases, a lump sum payment of up to 300 Swiss francs per meeting (equivalent to 3600 Swiss francs annually) is permissible as an alternative to reimbursing actual ex-

penses.³³ This practice requires formalization through a dedicated internal regulation, which must be submitted to the AFC-VD for approval.³⁴ Importantly, these amounts are exempt from taxation and are not considered as salary.³⁵

2. Members devoting more than 60 hours per year

If considering remuneration for members of governing bodies dedicating more than 60 hours annually, comprehensive regulations must be established.³⁶ These regulations should specify the terms and conditions governing the remuneration, including details on indemnities, the methodology for determining payments, payment terms, the declaration of indemnities as taxable income in tax filings, and the issuance of a salary certificate. Furthermore, these regulations and any subsequent amendments must be approved by the AFC-VD.³⁷

3. Mandates conferred by the tax-exempt entity to members of its governing body or their close relations

The Guidelines also address mandates given by the tax-exempt entity to members of its governing body or individuals closely associated with them. Generally, one-time mandates that fall outside the regular scope of activities do not pose significant challenges. However, the systematic allocation of such mandates is discouraged due to potential conflicts of interest. Therefore, exceptional one-time mandates, such as during a crisis or temporary replacement, should not affect the tax-exempt status. In contrast, recurring mandates require prior consultation with the AFC-VD, particularly when involving members of the governing body or their close relations.³⁸

In addition to these considerations, responsibilities such as bookkeeping, auditing, and administrative tasks may be entrusted annually (and thus, on a recurring basis) to a member of the governing body or their firm. This is permissible under the conditions that (i) neutrality and independence are maintained, and (ii) the annual remuneration does not exceed 10,000 Swiss francs.³⁹

³² Administration cantonale des impôts (AFC-VD), Directives en matière d'indemnisation des membres d'organes d'entités exonérées d'impôts en raison de leur but de pure utilité publique (PUP), 29 janvier 2024, available (in French only) at: <<https://www.vd.ch/themes/etat-droit-finances/impots/impots-pour-les-societes/exoneration-fiscale>> (last consulted: 1st July 2024).

³³ AFC-VD (n. 32), 7.

³⁴ AFC-VD (n. 32), 7.

³⁵ AFC-VD (n. 32), 7.

³⁶ AFC-VD (n. 32), 8.

³⁷ AFC-VD (n. 32), 8.

³⁸ AFC-VD (n. 32), 9.

³⁹ AFC-VD (n. 32), 9.

While these Guidelines largely align with existing practices of the AFC-VD, this initiative enhances transparency and provides a comprehensive understanding of regulations governing the compensation of governing body members in tax-exempt entities serving the public interest in the Canton of Vaud. This approach enables organizations to improve their practices, promoting optimal compliance with tax requirements. It particularly emphasizes the principle of selflessness and aims to ensure equal treatment between tax-exempt entities and their respective governing bodies. However, the established criteria, while clear, may be seen as somewhat arbitrary, especially the 60-hour threshold for volunteer work before considering compensation beyond 3600 Swiss francs annually.

2. Zurich guidelines

In early 2023, the Government of the Canton of Zurich took steps to enhance the Canton's appeal to foundations, mostly from a tax perspective. Following a study⁴⁰ and a legal opinion,⁴¹ various measures were initiated to achieve this goal, with the primary focus on improving the tax regulatory framework.

This adjustment was largely driven by amendments to applicable Swiss legal framework for foundations (see above section II), effective January 1, 2023. According to Art. 84b SCC, foundations are now indeed required to disclose the remuneration of their board members to the supervisory authority, which demonstrates that civil law does not oppose such remunerations.

⁴⁰ Eckhardt Beate/Gehringer Theresa/von Schnurbein Georg, Stiftungen im Kanton Zürich – Die unterschätzte Ressource/Analyse, Vision und Strategie für einen starken und innovativen Stiftungsstandort Zürich, Standortförderung, Amt für Wirtschaft und Arbeit, Kanton Zürich und Swiss-Foundations, Verband der Schweizer Förderstiftungen Zürich, available (in German only) at: <https://www.zh.ch/bin/zhweb/publish/regierungsratsbeschluss-unterlagen/2021/1482/RRB-2021-1482_Stiftungen_im_Kanton_Zuerich.pdf> (last consulted: 1st July 2024).

⁴¹ Opel Andrea, Rechtsgutachten zu den steuerlichen Rahmenbedingungen für ein wirkungsvolles Stiftungswesen im Kanton Zürich, September 2023, available (in German only) at: <https://www.zh.ch/content/dam/zhweb/bilder-dokumente/footer/news/2024/02/Gutachten_Opel_Stiftungs-praxis_2024.pdf> (last consulted: 1st July 2024).

As of February 1, 2024,⁴² three main areas have been significantly addressed and enhanced by the Zurich tax authorities, namely:

1. Appropriate compensation for board members

Lining up with the wording of Art. 84b SCC, and also with statements of the FSAF, the Zurich tax authorities have announced that there should no longer be obstacles to providing reasonable compensation to board members of charitable foundations that benefit from tax exemptions.

Like the Canton of Vaud, the Canton of Zurich has now taken position on this question, which has long been a form of taboo for tax authorities.

The Zurich tax authorities did however not provide further details on what was to be understood by *reasonable compensation*, and pushed the burden of this decision towards the supervisory authorities, which indeed have to review and assess this question under the new Art. 84b SCC.

Depending on their scope and activities, foundations of the Canton of Zurich are typically supervised by either the Zurich cantonal supervisory authority (BVS) or the FSAF. To ensure consistency in their assessment of this question, both authorities have worked towards a uniformized practice, which materialized in a *memento* and template internal regulations.⁴³

The *memento* provides for some key indicators as to what is to be considered as reasonable compensation, namely:

⁴² Kanton Zürich, Zukunftsgerichtete Stärkung des Stiftungsstandorts Zürich, Press release of February 9, 2024, available (in German only) at: <https://www.zh.ch/de/news-uebersicht/medienmitteilungen/2024/02/zukunftsgerichtete-staerkung-des-stiftungsstandorts-zuerich.html?mtm_campaign=Newsletter&mtm_kwds=Steuern-Finanzen&mtm_source=immediately&mtm_medium=Zukunftsgerichtete-St%EF%BF%BDrkung-des-Stiftungsstandorts-Z%EF%BF%BDrich> (last consulted: 1st July 2024). On this topic, see also Sprecher Thomas, Steuerbefreiung für gemeinnützige Stiftungen (sowie Vereine und andere Organisationen), Jusletter, 15. April 2024.

⁴³ Eidgenössisches Stiftungsaufsicht (ESA), Merkblatt Steuerbefreiung für gemeinnützige Stiftungen: Praxisänderung des Steueramts des Kantons Zürich, June 26, 2014, available (in German only at this stage) at: <<https://www.edi.admin.ch/edi/fr/home/fachstellen/eidgenoessische-stiftungsaufsicht/conseils/merkblaetter.html>> (last consulted: 1st July 2024).

- the compensation's appropriateness can be determined following a list of criteria, which are grouped under three categories: (i) foundation-related criteria (size, assets, purpose, etc.), (ii) mandate-related criteria (time spent, level of responsibility, etc.) and (iii) personal criteria related to the concerned board member (experience, reputation value, etc.);
- compensation must not hinder or prevent the achievement of the foundation's objectives, but must in turn contribute to them;
- the deed of the foundation must allow for compensation or must be silent in this respect. If the deed prevents compensation, it must be amended (this will be considered as a minor amendment; Art. 86b SCC) but the amendment may be deferred by a board decision communicated to the supervisory authority;
- the compensation of foundation board members must generally be governed by written rules. The supervisory authorities' websites provide for two models of compensation regulation (individual and flat-rate compensation); and
- a compensation regulation can be omitted if the annual compensation does not exceed 3000 Swiss francs per board member or 10,000 Swiss francs for the entire board (so-called «3000/10,000 limit»).

2. Activities abroad

Charitable activities conducted abroad will now be evaluated based on the same standards as those performed domestically. This adjustment aims to attract internationally active foundations to establish themselves in the Canton of Zurich. While this can be seen as an improvement in the Canton of Zurich, other cantons – such as Geneva – have had longstanding practices to be tolerant and welcoming to international foundations with activities abroad.

That said, in Zurich like in other cantons, necessary transparency must be ensured, notably by implementing proper controls and documentation of the financial flows.

3. Entrepreneurial support models (impact investments)

Finally, the Zurich Tax Administration has updated its approach regarding entrepreneurial support models. Accordingly, support activities are not anymore limited to non-repayable contributions and loans, but impact investments and other entrepreneurial financ-

ing models (e.g. Social Impact Bonds & Development Impact Bonds) are also permissible.

However, certain conditions must be met: these activities should operate where there is no existing market to avoid competition with non-exempt investors. Promoting Swiss startups is generally considered as a market-oriented activity.⁴⁴ Additionally, any funds returned to the foundation must be reinvested for charitable purposes. Finally, the qualification of the beneficiary as a social enterprise is also considered implicitly necessary and the investment should be made in line with the purpose, not merely as a financial investment.

The methods to demonstrate the absence of a market and to verify that the beneficiary is a social enterprise are not clearly defined, which could hinder the smooth implementation of the new Zurich guidelines. Hence, while such investment models are encouraged, they must be duly reported and documented within the framework of the annual report to the supervisory authority.

IV. New or amended regulations of the supervisory authorities

1. New Fee Ordinance of the Federal Foundation Supervisory Authority

On January 1, 2024, the new Fee Ordinance of the Federal Foundation Supervisory Authority (OEmol-ASF),⁴⁵ which resulted in an increase in fees, came into force. The objective was to provide FSAF with additional resources to address the accumulated backlog of work.⁴⁶ The fees are now categorized based on the complexity of the annual report submitted: (i) simple annual re-

⁴⁴ Eidgenössisches Stiftungsaufsicht (ESA), Merkblatt Steuerbefreiung für gemeinnützige Stiftungen: Praxisänderung des Steueramts des Kantons Zürich, June 26, 2014, available (in German only at this stage) at: <<https://www.edi.admin.ch/edi/fr/home/fachstellen/eidgenoessische-stiftungsaufsicht/conseils/merkblaetter.html>> (last consulted 1st July 2024).

⁴⁵ RS/SR 172.041.18.

⁴⁶ Département fédéral de l'intérieur (DFI), Révision totale de l'ordonnance du 19 novembre 2014 sur les émoluments perçus par l'autorité fédérale de surveillance des fondations (OEmol-ASF), Rapport explicatif du 25 octobre 2023, 2, available (in German, French and Italian) at: <<https://www.edi.admin.ch/edi/fr/home/fachstellen/eidgenoessische-stiftungsaufsicht/rechtsgrundlagen/emoluments.html>> (last consulted: 1st July 2024).

porting (750 Swiss francs), (ii) annual reporting of medium complexity (1300 Swiss francs), and (iii) complex annual reporting (2000 Swiss francs).⁴⁷

2. Roadmap for joint supervisory region of Zurich and Eastern Switzerland

In March 2022, the supervisory authorities for pensions funds and foundations in the Canton of Zurich (BVS) and Eastern Switzerland (OSTA) announced their intention to establish a joint supervisory region encompassing nine cantons. Following a roadmap titled «Roadmap gemeinsame Aufsichtsregion Ostschweiz und BVS»⁴⁸ the Department of Justice and Interior of the Canton of Zurich conducted a consultation until December 18, 2023 on a first draft of concordat addressing organizational, financial, dispute resolution, termination, and dissolution conditions.⁴⁹ The outcome and future of the project remain uncertain.

V. In the legislative pipeline

1. Automatic exchange of information

In October 2022, the Organisation for Economic Co-operation and Development (OECD) published the update to the common reporting and due diligence standard for financial account information (CRS) and the new Crypto-Asset Reporting Framework (CARF). The associated recommendation of the OECD Ministerial Council states that both sets of rules are binding automatic exchange of information standards that must be implemented globally. Subject to parliamentary approval, Switzerland intends to implement the CARF as well.

On May 15, 2024, the Federal Council decided to initiate the consultation on extending the international automatic exchange of information in tax matters (AEOI), which is set to apply as of January 1, 2026.

⁴⁷ Art. 3 para. 1 (e) OEmol-ASF.

⁴⁸ Regierungsratsbeschluss Nr. 1338/2022 des Kantons Zürich vom 5. Oktober 2022, available (in German only) at: <<https://www.zh.ch/bin/zhweb/publish/regierungsratsbeschluss-unterlagen/2022/1338/RRB-2022-1338.pdf>> (last consulted: 1st July 2024).

⁴⁹ Kanton Zürich, Vernehmlassungen, Suchbegriffe Stiftung, available (in German only) at: <<https://www.zh.ch/de/politik-staat/gesetze-beschluesse/vernehmlassungen.html>> (last consulted: 1st July 2024).

The preliminary draft of the Federal Law of the Automatic Exchange of Tax Information (AP-LEAR)⁵⁰ exempts «qualified non-profit entities» from the automatic exchange of information upon presentation of a corresponding confirmation from the tax authority (Art. 3 para. 9bis AP-LEAR).

The related draft Ordinance (P-OEAR)⁵¹ defines the «qualified non-profit entities» as those fulfilling five criteria (Art. 6a P-OEAR). They are established and operated exclusively in Switzerland for religious, charitable, scientific, artistic, cultural, sports, educational purposes, or are professional associations, economic associations, chambers of commerce, trade unions, agricultural or horticultural organizations, civic organizations, or entities promoting social welfare. They must be exempt from income or profit tax in Switzerland. They must have no shareholders or members with ownership rights over their income or assets. Swiss law or their founding documents must prohibit the distribution of income or assets to individuals or profit-oriented entities, except for charitable activities or reasonable compensation for services rendered or payment for goods acquired at fair market value. Upon liquidation, their assets must be transferred to a public entity or one meeting the above criteria, or devolved to the Swiss government, a canton, or a municipality.

2. Federal register of beneficial owners

On August 30, 2023, the Federal Council launched a consultation on the preliminary draft law to introduce a federal register of beneficial owners (AP-LTPM), aimed at strengthening the fight against money laundering and terrorism financing according to FATF rec-

⁵⁰ The preliminary draft and related documents are available (in German, French and Italian) at: <https://www.efd.admin.ch/efd/fr/home/le-dff/nsb-news_list.msg-id-101030.html> (last consulted: 1st July 2024).

⁵¹ The draft and related documents are available (in German, French and Italian) at: <https://www.efd.admin.ch/efd/fr/home/le-dff/nsb-news_list.msg-id-101030.html> (last consulted: 1st July 2024).

ommendations⁵² and 24,⁵³ and the Global Forum standard.⁵⁴

Foundations and associations required to register in the commercial registry must identify beneficial owners and, if applicable, verify and report to the national transparency register. Following criticisms,⁵⁵ the concept of beneficial owner for associations and foundations has been revised in the final draft (P-LTPM).⁵⁶ The Federal Council adopted the message of the revised law on May 22, 2024.⁵⁷

Effective control over a foundation is deemed to be exercised by the founder if he has decisive influence (Art. 19 para. 1 (a) P-LTPM). Beneficiaries are gener-

ally not considered beneficial owners unless specifically designated and granted distribution rights (Art. 19 para. 1 (b) P-LTPM). When founders or beneficiaries are legal entities, their beneficial owners are also the foundation's beneficial owners (Art. 19 para. 1 (c) P-LTPM). Any other person who ultimately controls the foundation must be identified, relevant in control chains (Art. 19 para. 1 (d) P-LTPM).

In associations, the beneficial owner is the person who effectively controls it (Art. 19 para. 2 P-LTPM), typically by significant financing. Only associations required to register in the commercial registry are subject (Art. 2 para. 1 (b) P-LTPM). Identification does not apply to all associations, such as small neighborhood or sports associations.

A foundation or association can confirm that it has not identified any beneficial owner other than the highest-ranking member of its management when registering (Art. 19 para. 3 P-LTPM). For foundations, this is generally the chairman of the Board; for associations, it would be the chairman of management. In such cases, information provided to the commercial registry are sufficient (Art. 20 para. 2 and 21 para. 2 P-LTPM). Direct reporting to the transparency register is not required.

Verification measures and reporting to the transparency register are required only when other individuals are identified (Art. 20 para. 3 P-LTPM). Foundations or associations must then collect and verify their data, keeping information updated (Art. 20 P-LTPM). These measures align with those for companies. These beneficial owners must report and update their data, cooperating with verification processes, similar to third parties in control chains (Art. 22 P-LTPM).

The Federal Council further stresses that there is a distinction between individuals identified under Art. 19 P-LTPM and those for whom financial intermediaries collect information using specific forms (K for operational foundations and S for other foundations).⁵⁸

It remains to be seen if foreign authorities will easily understand the distinction in practice, and what adverse effect it will have on members of Swiss foundations or associations identified as beneficial owners.

⁵² The FATF Recommendations, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, Updated November 2023, available at: <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html> (last consulted: 1st July 2024); Best Practices on Combating the Terrorist Financing Abuse of Non-Profit Organisations, November 2023, available at: <https://www.fatf-gafi.org/en/publications/Financialinclusionandnpoissues/Bpp-combating-abuse-npo.html> (last consulted: 1st July 2024).

⁵³ FATF Guidance on Beneficial Ownership of Legal Persons, March 2023, available at: <https://www.fatf-gafi.org/en/topics/beneficial-ownership.html> (last consulted: 1st July 2024).

⁵⁴ OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, Standard on Transparency and Exchange of Information on Request, available at: <https://www.oecd.org/tax/transparency/documents/exchange-of-information-on-request.htm> (last consulted: 1st July 2024); see also OECD/IDB, Building Effective Beneficial Ownership Frameworks/A joint Global Forum and IDB Toolkit, Second edition, Global Forum on Transparency and Exchange of Information for Tax Purposes, OECD, Paris 2024, available at: <https://www.oecd.org/tax/transparency/documents/effective-beneficial-ownership-frameworks-toolkit-second-edition.pdf> (last consulted: 1st July 2024).pdf.

⁵⁵ State Secretariat for International Financial Matters (SFI), Consultation Procedure on the Preliminary Draft of the Federal Law on Transparency of Legal Entities (AP-LTTPM), May 22, 2024, available (in German, French, and Italian) at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-101100.html> (last consulted: 1st July 2024).

⁵⁶ Draft law on Transparency of Legal Entities, available (in German, French and Italian) at: <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-101100.html> (last consulted: 1st July 2024).

⁵⁷ Federal Council, Message concerning the Law on Transparency of Legal Entities, May 22, 2024, available (in German, French and Italian) at: <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-101100.html> (last consulted: 1st July 2024).

⁵⁸ Federal Council, Message concerning the Law on Transparency of Legal Entities, May 22, 2024, available (in German, French and Italian) at: <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-101100.html> (last consulted: 1st July 2024), 98.

⁵⁹ Initiative 19.456, available (in German, French and Italian) at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20190456> (last consulted: 1st July 2024).

⁶⁰ Parliamentary initiative, Benefits Paid for Preventive Pur-

3. Employer pension foundations

Following the National Councilor Daniela Schneebberger's parliamentary initiative of June 26, 2024,⁵⁹ a draft proposal was issued to amend Art. 89a para. 8 SCC. The new paragraph enlarges the purpose of employer pension foundations to the financing of other pension institutions (Art. 89a para. 8 (4), 1st sentence P-SCC) as well to allocation of benefits in other specific situations that go beyond strict occupational pension fund purposes (Art. 89a para. 8 (4), 1st sentence P-SCC). The amendment will allow the payment of benefits in distress situations, benefits in case of illness, accident, and disability, benefits in case of unemployment, benefits for training and continuing education measures, benefits for measures to reconcile family and professional life, and benefits for health promotion and prevention measures. The last three types of benefits pose a problem for the Federal Council, which sees them as an unacceptable expansion of the purpose of the employer pension foundation.⁶⁰ Despite this, the project has received the approval of both chambers of Parliament and their respective social security and public health committees.

4. Family foundations

On December 15, 2022, State Counsellor Thierry Burkart presented the motion «Strengthen Swiss family foundations by removing the ban on maintenance foundations».⁶¹

To date, Art. 335 para. 1 SCC permits to establish a family foundation in order to «meet the costs of raising, endowing or supporting family members or for similar purposes». However, the second paragraph of Art. 335 SCC prohibits fee tail: family foundations are

⁵⁹ Initiative 19.456, available (in German, French and Italian) at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20190456> (last consulted: 1st July 2024).

⁶⁰ Parliamentary initiative, Benefits Paid for Preventive Pur-

poses are an Important Task of Employer Charity Foundations. Report of August 31, 2023 by the Social Security and Public Health Committee of the National Council, Opinion of the Federal Council, FF 2023 2481, available (in German, French and Italian) at: <https://www.fedlex.admin.ch/eli/fga/2023/2481/fr> (last consulted: 1st July 2024).

⁶¹ Motion 22.4445, available (in German, French and Italian) at: <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20224445> (last consulted: 1st July 2024).

permissible only for very limited purposes; purely maintenance foundations are prohibited, with the result that many people resort to foreign instruments, such as Anglo-Saxon trusts or Liechtenstein family foundations, for family wealth and succession planning.

After the failure of the Swiss trust project,⁶² the motion in favor of revising family foundations was finally adopted by both chambers of the Parliament.⁶³

The Federal Council has now been instructed to submit to Parliament an amendment to Art. 335 para. 2 SCC, in order to remove the current ban on the setup of so-called maintenance family foundations or *fee tail*.

5. Legal status of sustainable enterprises

The Alliance for Sustainable Enterprises suggested through a group of legal experts the creation of an opt-in legal status of «sustainable enterprises» under Swiss law. A detailed proposal of the provisions to be amended under Swiss law was suggested in a white paper,⁶⁴ following signs of openness to the idea by the Federal Council.⁶⁵ Mainly targeting the enterprises

⁶² See Motion 18.3383, text and results available (in German, French and Italian) at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20183383> (last consulted: 1st July 2024); Initiative 16.488, available (in German, French and Italian) at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20160488> (last consulted: 1st July 2024); Interpellation 23.4076, available (in German, French and Italian) at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20234076> (last consulted 1st July 2024); Federal Council, Le trust suisse n'est pas susceptible de rassembler une majorité politique, Press release of September 15, 2023, available (in French, German and Italian) at: <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-97717.html> (last consulted: 1st July 2024).

⁶³ The motion was adopted on December 12, 2023 by the Council of States and on February 27, 2024 by the National Council.

⁶⁴ Neri-Castracane Giulia/Chenau Jean-Luc/Peter Henry/Barba Germana/Humbel Claude/Jaccard Michel/Burckhardt Christoph/Milano Umberto/Pfammatter Vincent, Legal Status for Sustainable Enterprise in Switzerland – White Paper from the Legal Experts Group, Alliance for Sustainable Enterprises, December 2023, also available (in German and French) at: <https://www.alliance-sustainable-enterprises.ch/keydocuments> (last consulted: 1st July 2024).

⁶⁵ See answer of the Federal Council to the interpellation 24.3679, para. 8, available (in German, French and Italian) at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20243679> (last consulted: 1st July 2024).

structured with a legal form of the SCO, the white paper suggests possible legislative interventions to include associations and foundations within the targeted entities.

The status is inspired by the US benefit corporation model, which was then imported in Italy, Spain, South America and Rwanda, as well as the corporate purpose doctrine.⁶⁶ The idea of a legal status was supported by an interpellation of the National Councilor *Adèle Thorens Goumaz*,⁶⁷ a postulate of National Councilor *Josef Dittli*,⁶⁸ and the parliamentary initiative of National Councilor *Sophie Michaud Gigon*.⁶⁹

At the time of writing this legal update, a vote of the Committee of the legal affairs of the National Council is expect on August 15, 2024.

VI. Resolved parliamentary motions and interpellations

Various motions and parliamentary interpellations have targeted Swiss associations and foundations. Amongst those rejected or resolved, many were related to the introduction of a register and were indirectly addressed by the P-LTPM.⁷⁰ Some specifically

focused on issues such as the risk of abuse within organizations working with children and young people,⁷¹ and those anti-abortion.⁷²

Two interventions targeted special entities: social enterprises⁷³ or high-revenue associations such as FIFA.⁷⁴

One motion addressed the question of adequate compensation of the members of foundations and associations' board, with the imposition of the Swiss GAAP FER as accounting norm,⁷⁵ while another – not considered urgent – questioned whether it was acceptable to have the same members at the foundation board and the company board.⁷⁶

VII. Case law review

1. Authority of the commercial registry

A religious foundation applied for registration in the commercial registry as an ecclesiastical foundation, as per Art. 52 para. 1 SCC. The commercial registry refused to register the foundation, arguing the designated supervisory authority (Committee of the *Freie Evangelische Gemeinde U* association) did not meet the requirements for supervision, lacking notably inde-

pendence because of too many close links between the foundation and the association.

The commercial registry's refusal was confirmed by the Federal Administrative Court. Upon appeal, the Federal Supreme Court overturned the decision ruling that the commercial registry had no authority to refuse registration of the ecclesiastical foundation.⁷⁷

This decision referred to the established case law on the scope of the commercial registry's review authority. The Federal Supreme Court reaffirmed that the commercial registry's authority in matters of substantive law is limited to compliance with mandatory legal provisions enacted in the public interest or for the protection of third parties. An entry in the commercial registry may therefore only be refused if it is clearly and unequivocally contrary to the law, but not if it is based on a legal interpretation, the assessment of which must be left to the supervisory authority.

If there are any doubts about the application of Art. 87 para. 1 SCC and compliance with the requirements for an ecclesiastical foundation, the commercial registry must suspend the registration procedure and refer the matter to the competent supervisory authority.

2. Limited retroactive effect of tax exemption

An association with seat in the Canton of Geneva owned a building in the Canton of Valais exploited as hotel and summer camp for kids.

The Canton of Valais taxed the association on capital and real estate for the tax periods 2015 to 2018. In 2018, the association requested a tax exemption from the Canton of Valais, which was rejected because of its seat in the Canton of Geneva. In 2020, the Geneva tax authorities granted the association with a tax exemption with retroactive effect over five years. The Valais tax authorities, as well as the cantonal court refused the reimbursement of the tax levied during the period of 2015 to 2018.

The Federal Supreme Court confirmed the cantonal appeal court decision in a reasoning in two stages.⁷⁸ First, for the period 2015 to 2017 a revision of the

tax decisions was refused because the association never requested a tax exemption. Second, for the year 2018, even if a tax exemption was requested, the Valais tax authorities made no declaration that could let the association believe that the tax decision may be overturned. On the contrary, Valais tax authorities had expressly warned the association that, notwithstanding a possible future tax exemption decision issued by the Geneva tax authorities, the association would remain partially subject to capital tax and land tax in Valais.

The association's bodies were criticized to have failed to act diligently in omitting to lodge a claim against the 2018 tax decision in due time.

3. Tax qualification of family foundation contributions

The Federal Supreme Court had to determine whether contributions received by spouses from a family foundation should be taxable as income under the general clause of Art. 16 of the Federal Act on Federal Direct Tax (FDTA),⁷⁹ or if they would qualify for exemption under one of the exceptions listed in Art. 24 FDFA. The Court specifically analyzed three exceptions:⁸⁰

Regarding the exception outlined in Art. 24 (a) FDFA concerning gifts, the Court noted that contributions made by foundations to fulfill a legal obligation imposed by their deed are not tax-exempt. This is because the foundation, having become legally autonomous from the founder, lacks the intent to make a donation.

The Court also determined that contributions disbursed by a family foundation in accordance with its deed do not fall under the scope of the exception in Art. 24 (d) FDFA (subsidies from private funds), particularly if the basic needs of the beneficiaries are already covered.

Furthermore, the contributions did not qualify as benefits paid in fulfillment of family law obligations (as per Art. 24 (e) FDFA), since the family foundation's benefits are not provided due to family law obligations (such as the duty of assistance under Art. 328 SCC). It was clarified that any family relationship relevant under family law could only exist with the founder or members of the foundation board, not with the foundation itself.

⁶⁶ *vista/geschaef?AffairId=20233679* (last consulted: 1st July 2024).

⁶⁷ See *Neri-Castracane et al.* (n. 64); *Neri-Castracane Giulia, Sustainable Purpose-Driven Enterprises/Where do we stand in Switzerland and what could be a possible policy option?*, SZW/RSDA 4/2023, 416; *Neri-Castracane Giulia, Sustainable purpose-driven enterprises/Swiss legal framework in a comparative law perspective*, Geneva (Faculty of law), 2023, available (in German, French and Italian) at: <<https://archive-ouverte.unige.ch/unige:173603>> (last consulted: 1st July 2024).

⁶⁸ Interpellation 23.3679, available (in German, French and Italian) at: <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20233679>> (last consulted: 1st July 2024).

⁶⁹ Postulate 23.4062, available (in German, French and Italian) at: <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20234062>> (last consulted: 1st July 2024).

⁷⁰ Initiative 23.454, available (in German, French and Italian) at: <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20230454>> (last consulted: 1st July 2024).

⁷¹ Interpellation 22.3346, available (in German, French and Italian) at: <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20223346>>; Interpellation 23.3430, available (in German, French and Italian) at: <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20233430>> (last consulted: 1st July 2024).

⁷² Federal Supreme Court, case 5A_368/2022, judgement of 24 August 2023, and case 5A_367/2022, judgment of 30 August 2023.

⁷³ Federal Supreme Court, case 9C_674/2022, judgment of 12 April 2023.

⁷⁴ RS/SR 642.11.

⁷⁵ Federal Supreme Court, case 9C_637/2022, judgement of 28 August 2023.

However, the Federal Supreme Court partially upheld the appeal for one of the disputed tax years based on the statute of limitations.

4. Family foundation, prohibited purposes

A family foundation validly established in 1947 tried to get registered with the commercial registry, as required by Art. 52 para. 1 SCC (which entered into force on January 1, 2016).

The foundation's purpose was to preserve an estate for the beneficiaries and to grant them contributions from this estate for their living expenses, recreation, education, and dowry.

The competent commercial registry office refused to register the foundation and notified it a fine. The refusal was motivated by the purpose of the foundation, which made the foundation unlawful as maintenance foundation under Art. 335 SCC. The refusal was confirmed by the Administrative Court, and by the Federal Supreme Court.⁸¹

In the absence of the slightest indication in the foundation deeds of any condition precedent for the disbursement of funds (e.g. «in case of need», «in a situation of distress», «in case of illness»), the foundation must be qualified as a *maintenance* foundation (*Unterhaltsstiftung*; *Fondation d'entretien*) prohibited by Art. 335 para. 2 SCC prohibiting *fee tails* (*fidéicommis de famille*).

The Federal Supreme Court dismissed the foundation's appeal and referred the foundation back to the civil courts as regards the question of partial nullity.

5. Foundations' asset management, conflict of interest, and retrocessions

The Federal Supreme Court addressed issues arising from a pension fund foundation utilizing an external asset management company to oversee its assets, predominantly invested in two umbrella funds («funds of funds»).⁸² This setup, common in practice, posed several concerns highlighted in the ruling.

⁸¹ Federal Supreme Court, case 5A_669/2022, judgment of 2 February 2024.

⁸² Federal Supreme Court, case 4A_350/2023, judgement of 21 November 2024. For a commentary on this decision, see *Thévenoz Luc/Emmenegger Susan/Liégeois Fabien/Brander Teymour/Bürgi Philipp/Reber Martina, Le droit bancaire privé suisse 2023 – Das schweizerische Bankprivatrecht 2023*, SZW/RSDA 2/2024, 223; *Hirsch Célian, Conflits d'intérêts et*

Initially, conflicts of interest arose as the asset management company, whose CEO and another employee served on the foundation's board, managed and invested in the umbrella funds. The company earned remuneration based on these investments, potentially prioritizing the umbrella funds over the foundation's best interests, resulting in unnecessary costs. The foundation was insufficiently informed about these conflicts and additional costs, leading to improper approval of investments and necessitating indemnification.

The asset management company argued that the investments had been approved by the foundation because of the dual roles held by its board members. However, the Court ruled that informed consent was required due to conflicts of interest, and board members in such conflicts should have recused themselves. Consequently, the foundation could not be held accountable (under Art. 55 para. 2 SCC) for the knowledge of (some) conflicted board members, though its oversight duty was compromised. As a result, compensation was halved due to the foundation's concurrent fault (as per Art. 44 para. 1 SCO).

Additionally, the asset management company received retrocessions from the underlying funds, which the Court determined the pension fund had a right to be informed about under Swiss law.

This case underscores the risks associated with conflicts of interest in umbrella fund investments, particularly when the asset manager also oversees the foundation. It emphasizes the importance of transparent asset management practices in pension fund foundations. While conflicts of interest are not uncommon among foundation board members who provide services like asset management or legal advice, these situations necessitate clear documentation and explanation to the entire board to ensure compliance with legal obligations and effective oversight of the foundation's activities.

6. Liability of the Supervisory Authority

In 1998, a founder designated the foundation she had set up as her sole heir. Following her demise in 2000,

imputation de connaissance, available at: www.lawinside.ch/1433/ (last consulted: 1st July 2024); *Olivier Nicolas, Rétrocessions, Quelle restitution lors d'investissements dans un fonds de fonds?*, available at: <https://cdbf.ch/1327/> (last consulted: 1st July 2024).

some of her previously unknown accounts containing several dozens of millions of Swiss francs were uncovered. A member of the foundation board claimed that part of these funds belonged to him personally, and should therefore not be attributed to the foundation.

As the conflict threatened to jeopardize the work of the foundation, the curator appointed at that time approached the FSAF in 2001 with a settlement proposal. This agreement provided for the split of the funds, with one part going to the foundation and the other to the board member personally. The FSAF approved the settlement agreement.

Subsequently, however, Courts have ruled that the board member had no legitimate right to the funds allocated to him by the settlement, resulting in the foundation having suffered a loss of several millions of Swiss francs, since it was entitled not to part but to all of the funds.

Damages amounted to approximately 6 million Swiss francs plus interests, hence close to 10 million Swiss francs. Reimbursement claim was filed against the Confederation. The Federal Administrative Court⁸³ held the Confederation liable due to an incorrect decision of the FSAF.

7. Exclusion of a member of an association without cause

An association, whose purpose is to maintain and develop an aerodrome, train the next generation of aeronautical professionals, promote air sports and organize circuits and flying days, decided to exclude one of its members without cause, in compliance with its statutes. After taking the case successively to the two cantonal authorities, both of which confirmed the removal, the dismissed member appealed to the Federal Supreme Court.

The Federal Supreme Court recalled that the exclusion of a member of an association cannot in principle be challenged on material grounds, except for abuse of law (Art. 2 para. 2 SCC)⁸⁴ or violation of the personality rights (Art. 28 para. 1 SCC).⁸⁵

⁸³ Federal Administrative Court, case A-4514/2021, judgement of 2 May 2023.

⁸⁴ Federal Supreme Court, case 5A_792/2022, judgement of 20 February 2023.

⁸⁵ Geneva Court of Justice, case C/19938/2021, judgement of 11 May 2023.

The Federal Supreme Court had considered that the economic or professional importance of membership to a professional organization or economic association, particularly as regards a member's commercial reputation and right to economic development, required the freedom to exclude members to be limited to just cause (teleological reduction of Art. 72 para. 2 SCC). Thus, an association in a monopoly position or which presents itself to the public as a decisive organization in the profession or economic sector concerned must be limited in its freedom to exclude its members. The restriction on freedom of exclusion also applies to associations with economic purposes.

In this case, however, the association was not in a monopoly position, and it was pursuing an ideal purpose, so that the exception to the principle of material unenforceability did not apply. The Federal Supreme Court therefore confirmed the exclusion of the member.

8. Commercial activities

In case A-865/2021, decided on December 1, 2023, by the Federal Administrative Court, two pension fund foundations were reclassified as securities dealers under Art. 13 para. 3 (1) Stamp Duty Tax Act.⁸⁶ One foundation acquired shares of the parent company of the group on the stock exchange to offer them to employees at a discounted price. The other foundation provided loans to company executives under favorable terms, enabling them to purchase shares of the parent company, backed by guarantees in the form of put and call options.

In another case, the Administrative Court of St. Gallen⁸⁷ overturned the decision of the Administrative Appeal Commission of St. Gallen, confirming the withdrawal of tax exemption from an association operating an inn. The Court determined that the association's primary activity was not ancillary, thus failing to meet the condition of selflessness.⁸⁸

⁸⁶ RS/SR 641.10.

⁸⁷ St. Gallen Administrative Court, case B 2023/196, B 2023/197, judgment of 7 February 2024.

⁸⁸ St. Gallen Administrative Appeal Court, case I/1-2022/57 und 58, judgment of 17 August 2023.

9. Tax exemption and financial interconnection

A foundation established in 1921 aims to operate and maintain a convalescent or long-term care home. The foundation owns a real estate property that is rented out to an association at a rate below the market value.

Until 2014, this association operated a social-medical facility in Geneva. Subsequently, its purpose was amended to operate a facility for elderly care or as a daycare center. The foundation's articles stipulate that in case of dissolution, assets are to be transferred to the foundation or, alternatively, to a similar institution. Since 2014, the association no longer qualifies as a social-medical establishment (EMS).

In 2018, the tax exemption for public service was revoked for both the association and the foundation, primarily due to the association losing its EMS status and transforming into a private facility. The foundation was thus considered engaged in commercial activity and pursuing economic objectives. Additionally, the association lost its exemption because the rates charged limited the number of beneficiaries, thereby not sufficiently opening the circle of beneficiaries.

The lower Court upheld the cantonal tax administration's decision in both cases, referring notably to the Supreme Court ruling ATF 147 II 287.

On appeal, the Geneva Court of Justice (in two separate rulings) overturned the lower Court's decisions and upheld the Geneva tax authority's rulings, reinstating tax exemption for both the foundation⁸⁹ and the association.⁹⁰

The association had demonstrated that its facility continued to accommodate individuals receiving supplementary benefits. Therefore, the foundation's operation alleviated the burden on medical-social establishments (EMS) by continuing to meet the state's needs, justifying its tax exemption for public service.

The foundation's situation was linked to that of an entity investing its assets, and as long as there was no conflict of interest jeopardizing its long-term goals, there was no reason to revoke the tax exemption. Moreover, renting the building below market rate was considered a way to implement its public service purpose.

⁸⁹ Geneva Court of Justice, case ATA/375/2024, judgement of 12 March 2024.

⁹⁰ Geneva Court of Justice, case ATA/374/2024, judgement of 12 March 2024.

10. Right to appeal of associations

In a recent case before the European Court of Human Rights (ECHR),⁹¹ individuals advocating for climate action alleged that Switzerland's inaction on climate issues violated their rights. The ECHR's landmark decision affirmed the right of associations to appeal and provided clearer guidelines on the requirements for standing.

The Court emphasized that associations generally cannot invoke health concerns or complaints that only affect natural persons under the ECHR.⁹² It stressed that for an association to bring a case, there must be a direct impact on its members or «special considerations» warranting their involvement.

Expanding on this, the Court introduced three new criteria for associations focused on combating climate change:⁹³

- Associations must be legally established or have standing in the relevant jurisdiction;
- They must demonstrate a dedicated purpose aligned with statutory objectives, specifically defending human rights against climate threats; and
- they must prove their qualification and representativeness to act on behalf of individuals facing climate-related risks.

Critically, the Court did not require separate proof of victim status for individuals represented by associations. If domestic courts restrict association standing despite meeting Convention criteria, the ECHR may assess whether affected individuals had fair access to domestic proceedings.

Despite criticism from the Swiss Parliament,⁹⁴ this decision is likely to influence climate litigation in Switzerland.

Presently, Swiss courts grant standing to associations if they defend members' rights collectively and

if these interests are common among the majority, with each member potentially having standing individually.⁹⁵ In the context of public procurement, the Federal Supreme Court even ruled in 2024 that professional associations have standing to appeal only if they can demonstrate that it is probable that a majority or a significant number of their members would both have the ability and the willingness to submit a bid for the specific market in question.⁹⁶

The conditions for standing in climate litigation for associations with a non-profit purpose, even when their members do not have standing rights under Swiss law, are quite similar to those developed by the ECHR.⁹⁷ However, there are some deviations, notably the 10-year existence requirement under Swiss law. It is yet unknown whether this requirement could qualify as a restriction to standing within the meaning of the ECHR ruling. Additionally, it remains to be seen whether Swiss law will be slightly amended to adapt to this ruling.

11. Liquidation of a foundation for unattainable purpose

The Federal Administrative Court⁹⁸ examined whether the Basel State Personnel Pension Fund could be dissolved after deciding to transfer its mandatory occupational pension scheme to another pension fund. Initially, the foundation board had ordered the liquidation but later reversed this decision to continue as a non-registered pension institution.

The appellant, a former board member involved only in the liquidation decision, contested this continuation, arguing the original purpose of the foundation had become unattainable.

The Federal Administrative Court acknowledged the foundation's original purpose had ceased but stressed that dissolution should be a last resort, suggesting the supervisory authority first consider whether amending the foundation charter could preserve its function. Consequently, the Federal Admin-

istrative Court overturned the lower court's ruling and remanded the case for further assessment regarding the admissibility of altering the foundation's purpose.

12. Various

1. The Geneva Court of Justice recalled that a member of association may lose the right to vote and elect committee members when transitioning from an active member to a passive member, if the articles of association grant voting rights only to active members.⁹⁹
2. The 2014 Federal Supreme Court decision condemning the École Polytechnique Fédérale de Lausanne (EPFL) for breaching the freedom of association and the principle of equal treatment by refusing accreditation to the Vaud section of Zofingue, due to its male-only membership policy,¹⁰⁰ remains valid in 2023. The Federal Administrative Court confirmed this ruling following a new, identical decision by EPFL against Zofingue dated August 3, 2020.¹⁰¹
3. The one-month deadline stipulated in Art. 75 SCC, which grants members the right to oppose any decision breaching the articles of association or the law, is not a matter of public order.¹⁰²
4. In Solothurn, the Court¹⁰³ confirmed the tax administration's conclusion that a foundation aimed at fostering industry in a specific area, which effectively support only two companies whose management includes individuals also active in the foundation, may not be granted tax exemption. This is because the foundation does not fulfill the criteria of selflessness, given that there are only two beneficiaries.
5. The Federal Supreme Court confirmed that a foundation managing day-care centers offering professional childcare, compensated by subsidized and non-subsidized parental contributions,

⁹¹ European Court of Human Rights, case 53600/20, judgement of 9 April 2024.

⁹² European Court of Human Rights, case 53600/20, judgement of 9 April 2024, §473.

⁹³ European Court of Human Rights, case 53600/20, judgement of 9 April 2024, §502.

⁹⁴ Swiss Parliament, Le parlement critique le verdict de la CEDH, News of June 12, 2024, available (in French) at: <https://www.parlement.ch/fr/services/news/Pages/2024/20240612105315238194158159026_bsf053.aspx> (last consulted: 1st July 2024).

⁹⁵ See as first occurrence of this case law, ATF 28 I 235, para. 1 and recently, ATF 145 V 128, para. 2.2.

⁹⁶ Federal Supreme Court, case 2C_196/2023, judgement of 7 February 2024, para. 4.4 and references.

⁹⁷ Art. 55f Federal Act on the Protection of the Environment (RS 814.01); Art. 12 Federal Act on the Protection of Nature and Cultural Heritage (RS 451).

⁹⁸ Federal Administrative Court, case C-6289/2020, judgement of 27 February 2023.

⁹⁹ Geneva Court of Justice, case ACJC/620/2023, judgement of 11 May 2023.

¹⁰⁰ ATF 140 I 201.

¹⁰¹ Federal Administrative Court, case B-3985/2021, judgement of 7 December 2023.

¹⁰² Federal Supreme Court, case 4A_176/2023, judgement of 24 July 2023.

¹⁰³ Tax Court of the Canton of Solothurn, case SGSTA.2022.24, judgement of 3 April 2023.

is deemed to pursue a commercial purpose.¹⁰⁴ The Court emphasized that even if all profits are reallocated to the charitable purpose, the commercial activity itself renders the purpose commercial, unless such activity directly supports the implementation of the charitable purpose. This was not the case in the decision at hand.¹⁰⁵

6. For VAT purposes, the Federal Supreme Court confirmed that the (ancillary) commercial activities and (main) charitable activities of a musical association must be clearly separated.¹⁰⁶
7. The suspension of membership rights following a contested association resolution regarding a member's exclusion does not constitute an ir-

reparable disadvantage for the member within the meaning of Art. 93 para. 1 (a) Federal Supreme Court Act.¹⁰⁷ Consequently, the member has no grounds for appealing the interim decision on the temporary suspension of membership rights.¹⁰⁸

8. In the Canton of Bern, the Administrative Court confirmed in two separate decisions that the conditions for private schools to obtain tax exemptions for providing public service are quite strict. The private school must offer a complete primary school curriculum¹⁰⁹ and its fee must be sufficiently low to be reasonably affordable for individuals, based on their income.¹¹⁰

¹⁰⁴ Federal Supreme Court, case 9C_328/2023, judgement of 18 March 2024.

¹⁰⁵ Federal Supreme Court, case 9C_328/2023, judgement of 18 March 2024, para. 5.1.2.

¹⁰⁶ Federal Supreme Court, case 9C_651/2022, judgement of 5 October 2023; Federal Supreme Court, case 9C_612/2022, judgement of 18 August 2023.

¹⁰⁷ RS/SR 173.110.

¹⁰⁸ Federal Supreme Court, case 5A_974/2022, judgement of 28 March 2023.

¹⁰⁹ Administrative Court of the Canton of Bern, case 100.2022.15/16U, judgement of 6 February 2024.

¹¹⁰ Administrative Court of the Canton of Bern, case 100.2022.17/18U, judgement of 13 March 2024.