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L'IMPACT POUR LES FONDATIONS ET ASSOCIATIONS DE LA RÉVISION DU DROIT DE LA SA ET DE L'INITIATIVE LUGINBÜHL

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INTRODUCTION

Mara De Monte

Directrice exécutive du Centre en Philanthropie

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MODÉRÉ par
Prof. Henry Peter
Directeur, Centre en philanthropie

Prof. Dominique Jakob

Chair for Private Law and Director of the Center for
Foundation Law, University of Zurich

Prof. Giulia Neri-Castracane

Professeure associée au département de droit
commercial, affiliée au Centre en philanthropie

Dominique Favre

Directeur, Autorité de surveillance LPP et
des fondations de Suisse occidentale

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**L'impact pour les Fondations et Associations de la Révision
du Droit de la SA et de l'initiative Luginbühl**

The Impact of the Revision of Foundation Law

**University of Geneva, Center for Philanthropy
Philanthropy Lunch
Thursday, 15 December 2022**

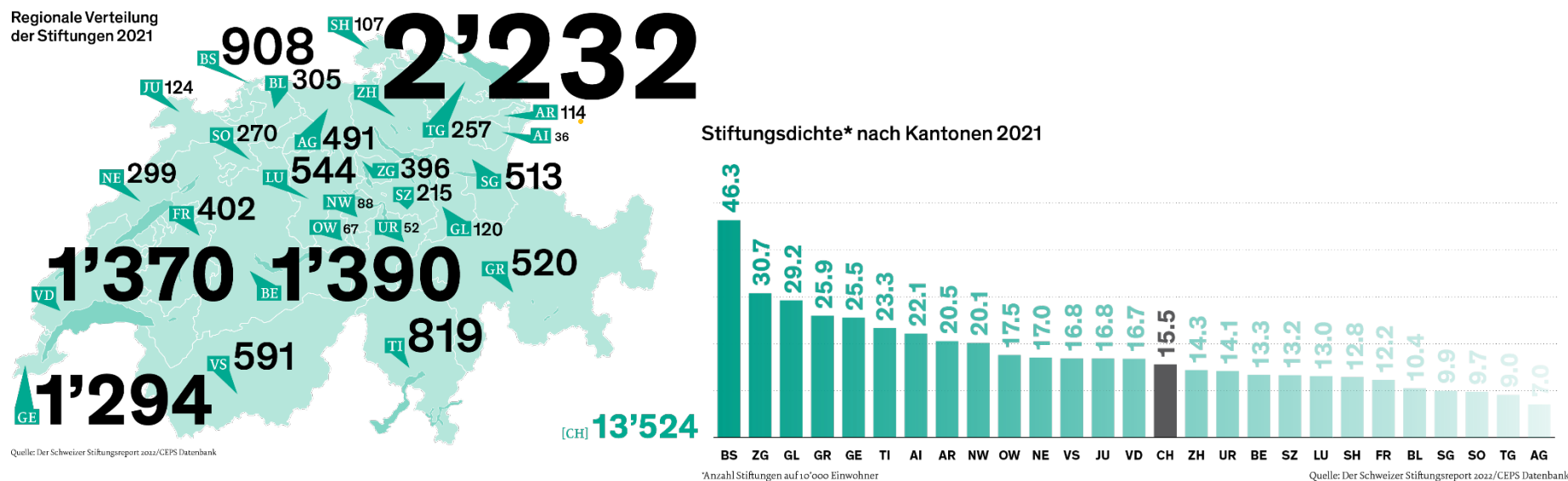
Prof. Dr Dominique Jakob, M.I.L.
Full Professor of Private Law
Head of the Center for Foundation Law
Independent Advisor
University of Zurich



The impact of the revision of foundation law

- A. Revision of Swiss foundation law
- B. Further developments
- C. Development of the foundation locations
- D. Summary and outlook

The impact of the revision of foundation law



- Currently 13,524 classical foundations with foundation assets of approx. 100 billion CHF
- Foundation density: 15.5 per 10,000 inhabitants (Basel 46.3 → Geneva 25,5 → Aargau 7.0)



The impact of the revision of foundation law

A. Revision of Swiss foundation law

I. Initial situation and background

- Reforms of foundation law in the past
- Motion Luginbühl "Increasing the attractiveness of Switzerland as a foundation location" (09.3344) of 20.3.2009, written off on 27.3.2013 (in detail Jakob, ZSR 2013 II, p. 185-340)
- Parliamentary initiative Luginbühl „Swiss foundation location. Strengthening" (14.470) of 9.12.2014
 - Finally adopted by the NC on 19.10.2017
 - LAC CS presents preliminary draft and opens consultation procedure on 28.11.2019 with deadline until 13.3.2020

The impact of the revision of foundation law

A. Revision of Swiss foundation law

I. Initial situation and background

– Parliamentary initiative Luginbühl "Swiss foundation location. Strengthening" (14.470) of 9.12.2014

Me fondant sur les articles 160 alinéa 1 de la Constitution et 107 de la loi sur le Parlement, je dépose l'initiative parlementaire suivante:

Le Parlement est chargé de procéder aux modifications législatives qui s'imposent pour améliorer les conditions-cadres applicables en Suisse au secteur des institutions d'utilité publique et des fondations et assurer ainsi un fonctionnement libéral et efficace de ce secteur, notamment par les mesures suivantes:

1. publication régulière par l'Office fédéral de la statistique (OFS) de données concernant les organisations exonérées d'impôts en raison de leur utilité publique;
2. réglementation plus claire de la légitimation pour déposer une plainte auprès de l'autorité de surveillance des fondations, prévoyant de donner qualité à agir aux personnes ayant un intérêt légitime à contrôler l'activité des organes d'une fondation;
3. optimisation des droits du fondateur par l'extension du droit de modification aux modifications portant sur l'organisation, lorsque l'acte de fondation prévoit cette possibilité;
4. simplification des modifications de l'acte de fondation par des procédures non bureaucratiques, sans acte notarial et par une réglementation ouverte applicable aux modifications mineures de l'acte de fondation;
5. limitation de la responsabilité des membres bénévoles d'organes de fondation par l'exclusion de la responsabilité en cas de négligence légère (sous réserve d'une réglementation statutaire contraire);
6. institution d'un régime de faveur pour les libéralités consenties par des héritiers au débit de la succession, en accordant à ceux-ci une augmentation unique de la déduction fiscale pour les dons l'année du décès ou l'année suivante, ou encore l'année du partage successoral;
7. possibilité de reporter un don sur des périodes fiscales ultérieures si la limite maximale de la déduction pour les dons est dépassée;
8. ni refus ni retrait de l'exonération fiscale pour les organisations d'utilité publique qui versent des honoraires appropriés aux membres de leurs organes de direction stratégique; cette pratique est conforme au Code civil et doit donc également être possible au regard du droit fiscal.



The impact of the revision of foundation law

A. Revision of Swiss foundation law

I. Initial situation and background

- Consultation report of the LAC CS of 6.8.2020
 - 67 comments were received
 - Result: LAC CS decides in February 2021 to pursue only two of the eight points further
 - Extension of the founder's rights to organisational changes
 - Simplification of amendments of the foundation deed
 - Reason: the other aspects were received "hesitantly" or "controversially"; especially in tax law "cantonal resistance"
 - Yet, the proposals were precisely made to subject controversial issues to a uniform solution or to change or standardise cantonal practice



The impact of the revision of foundation law

A. Revision of Swiss foundation law

I. Initial situation and background

- CS adopted reduced proposal on 10.6.2021
- However, NC takes up 2 points again (foundation supervisory complaint and remuneration of the governing bodies) and passes submission unanimously on 14.9.2021
- Compromise found on 13.12.2021
 - New formulation of the foundation supervisory complaint
 - Remuneration finally shot down by the CS
- Entry into force on 1.1.2024



The impact of the revision of foundation law

A. Revision of Swiss foundation law

II. Content of the new foundation law

- Content of the law adopted on 17.12.2021
 - Facilitated amendment of foundation deeds
 - New Art. 86b CC: insubstantial changes newly possible, if they "appear justified on objective reasons"
 - Clarified that amendments to the statutes do not require notarial certification (Art. 86c CC)

The impact of the revision of foundation law

A. Revision of Swiss foundation law

II. Content of the new foundation law

– Content of the law adopted on 17.12.2021

- New founder's right
 - Art. 86a CC extended to changes of organisation
 - Possible, for example, the creation and abolition of organs, changes to the electoral guidelines or the guidelines for asset management
 - New margin for founders to react to changes; but also new influence (pressure?) on the foundation council
 - Separate run of the 10-year period
 - Subsequent reservation of the right?
 - New "Art. 86a clause to be included in foundation drafting from now on

The impact of the revision of foundation law

A. Revision of Swiss foundation law

II. Content of the new foundation law

- Content of the law adopted on 17.12.2021
 - Codification of the foundation supervisory complaint
 - Sui generis remedy derived from Art. 84 para. 2 CC
 - However, the right to complain is very controversial and handled erratically by the courts
 - Further procedural requirements unclear (complaint deadline, object of complaint etc.)
 - Foundation supervisory complaint is a means of internal governance, correctly based on "justified control interest"

The impact of the revision of foundation law

A. Revision of Swiss foundation law

II. Content of the new foundation law

- Content of the law adopted on 17.12.2021
 - Codification of the Foundation Supervisory Complaint
 - In the parliamentary proceedings rather arbitrary compromise on new Art. 84 para. 3 CC:

"Beneficiaries or creditors of the foundation, the founder, subsequent donors and former and current members of the foundation council who have an interest in ensuring that the administration of the foundation complies with the law and the foundation deed may lodge a complaint with the supervisory authority against acts and omissions of the foundation bodies."
 - Just missed is also off the mark: Circle of persons too narrow, "interest" too wide



The impact of the revision of foundation law

A. Revision of Swiss foundation law

II. Content of the new foundation law

- No regulation of the remuneration issue
 - Unfortunate statements in the consultation procedure
 - Regulation of "adequate" remuneration should have precisely prevented abuse and inequality
 - Interaction with new disclosure obligation according to new Art. 84b CC
 - Devastating sign towards professionalisation and generational change in the foundation sector
 - Worst case scenario: Tax authorities might invoke the tight and improper refusal



The impact of the revision of foundation law

A. Revision of Swiss foundation law

II. Content of the new foundation law

- How to deal with the question of remuneration in practice
 - Already in 2006: > 60% of foundations remunerated their governing bodies
 - Tax authorities and courts negative; politics, doctrine, supervisory authorities, and sector positive
 - An "expensive", professional foundation board can be favourable for the foundation, a "cheap" unprofessional foundation board can cost the foundation dearly



The impact of the revision of foundation law

A. Revision of Swiss foundation law

II. Content of the new foundation law

- How to deal with the question of fees in practice
 - Adequacy of the compensation
 - Relationship to activity and foundation purpose
 - Written regulations/guidelines (amount and procedure)
 - To be approved by tax authority if necessary
 - From 2023: According to new Art. 84b CC, total amount of remuneration must be reported to the supervisory authority (legal supervision!)

The impact of the revision of foundation law

A. Revision of Swiss foundation law

III. Summary and outlook

- There seems to be an ongoing suspicion towards the foundation sector; knowledge and understanding of politics remain low
- Powder for further reforms spent for now, without much gain
- No sustainable reform
- Combination of results (no remuneration, more complaints, increased power of founders) could even deter foundation board members
- Strengthening the foundation location looks different

On the whole issue see JAKOB, Die Reform des Stiftungsrechts ist beschlossen - was ist gewonnen, was ist verloren, was bleibt, in: Stiftungsreport 2022, p. 20 ff.



The impact of the revision of foundation law

B. Further developments

I. A trust law for Switzerland

- Preliminary draft of 12.1.2022
- Relationship to the family foundation and the charitable foundation
- Waiting for consultation report
- See JAKOB/KALT, Der Vorentwurf für einen Schweizer Trust, Jusletter of 8.8.2022



The impact of the revision of foundation law

B. Further developments

II. Family foundations and registration

- Basic problem known
- Practice of the commercial registers at registration goes incomprehensibly astray
 - Invalidity of foundation purposes
 - Foundation deed and statute amendments
 - Fall-back clauses
- BVGer case law (B-951/2020 of 16.8.2021) protects commercial registers
- BGer (5A_20/2022 of 7.7.2022) refuses to intervene because the amount in dispute (of the registration!) is too low
- The only remaining option is to go to the civil courts
- See JAKOB/HUMBEL, Die Eintragung existierender Familienstiftungen, SJZ 2022, p. 736 ff.

The impact of the revision of foundation law

C. Development of the foundation locations

- Initiative "Foundation Location Canton Zurich"
- Attached to Department of Economic Affairs/Division of Business and Economic Development
- First summary from summer 2022: improvement of the tax framework, more flexibility in adapting foundation purposes, relationship of cooperation instead of mistrust between foundations and authorities/politics



The impact of the revision of foundation law

D. Summary and outlook

- Foundations are in a field of tension between numerous interests and norms
- Increasing demands on foundation boards and advisors
- Development of the legal and political framework conditions remains to be observed with interest
- Elaboration of all raised topics and questions at the 6th Zurich Foundation Law Day on 31 January 2023 at the University of Zurich





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Prof. Dr Dominique Jakob

Thank you for your attention!



Zentrum für Stiftungsrecht



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Chair of Private Law, Center for Foundation Law
University of Zurich

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Expert opinions and legal advice:

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www.dominique-jakob.com

Registration for Foundation Law Day:

Online per QR Code
oder online per Link

ema.uzh.ch/R6KLM





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Corporate Law Reform's impact on the philanthropic sector

Prof. Giulia Neri-Castracane

Topics – 3 on the agenda

1. Equity (and accounts) in foreign currency (CO 621)
2. Arbitration clause in the articles of association (CO 697n)
- 3. Meeting/decision-making modes**
- 4. Transparency on pay**
- 5. Illiquidity and over-indebtedness**



Meeting/decision-making modes – new

associations and foundations
FF 2017 353, 421 (N. 1.4.11)

With place of meeting

Meeting in person (CO 701 I/II, CO 713 II (1))

Hybrid meeting* (CO 701c, CO 713 II (2))

Without place of meeting

Virtual meeting* (CO 701d, CO 713 II (2))

Circular resolution (CO 701 III, CO 713 II (3))

} One place/lieu unique
} Multisites (CO 701a III)
} **Abroad/à l'étranger** (CO 701b)

For GM only

Decision of the board

Provision in the articles of association + independent proxy

* simultaneous retransmission, possibility to take part as if it was in person, ID control, no falsification of the results, data protection

*If technical problems, within the company's sphere of influence, leading to a non-compliant meeting => duty to reconvene an assembly (CO 701f)
Problems shall be mentionned in the minutes (CO 702 II (6))*

Transparency on pay in foundations - tomorrow

Supervisory authority's role:

- CC 84 II (allocation of funds according to the purpose)
- CC 83d (ensure the existence of a proper organisation)
- **CC 84b (control of compensations received by FB and management)**

Legal basis for compensation:

- **CO 734a II (cum CC 84b)**
- For those not covered
 - provision in the articles of association and internal regulation
 - CO 394 III by analogy (with related decision of the board)

WARNING
Restrictions for tax
exemptions
(Practical information to
cantonal tax authorities
(18.01.2008) of the Swiss
Tax Conference)

Separate information on **global** amounts (compensation of CO 734a II)
Control under general administrative expenses (other compensation)



Transparency on pay in foundations – Limited Scope

CO 734a II

- ✓ Direct and indirect* compensation (CO 734a II)
- ✗ Loans and credits (CO 734b)
- ✗ Functions in other organizations (CO 734e)

to

- ✓ Current board members/managers**
- ✗ Former board members/managers (CO 734a I (4))
- ✗ Members of a consultative board (CO 734 I (3))
- ✗ Close persons (CO 734 c)

* Indirect = paid by another entity of the group (FF 2017 353, 536)

** Management = Body – formed by natural persons to which the board has delegated some tasks – which is directly subordinated to the latter (second hierarchical level) (FF 2017 353, 534)

CC 83d, 84 II

Margin of manoeuvre of supervisory authority to ask for additional/other information



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Transparency on pay in foundations – Examples

- Remuneration of board members without voting rights
- Compensation for professional work/access to mandates paid by subsidiaries or group's entities
- Payment of pension fund rights, with amounts paid by the entity
- Foundation board position coupled with remunerated board position in a commercial company (minority shareholding)
- Remuneration for position in sub-committees (consultative or as of third hierarchical level)
- Mandates given to person close to the board members/managers (e.g. partner in the same law firm, mandate given to the company owned by the board member) or former members
- Loan at conditions below market

Transparency on pay in foundations - Impact

Impact on practice ?

- Information in the annex to annual accounts
 - BSABB (Informationsrundschriften zur Berichtersattung 2021, 5) - new
 - ASFIP/As-So – confirmation of current practice

N.B. As-So circular 2022: *La mention de toute rémunération (au sens large), y compris de tout mandat supplémentaire, des membres du conseil de fondation est obligatoire.*

N.B. Sample annex to annual accounts and circular of ASFIP not yet fully aligned with CC 84b
- Separate section in the expenses (*Aufwand*)
 - BVS Zürich – Aktualitäten zur Berichterstattung, Januar 2022, section 2b
 - Federal supervisory authority: sections 3.18 and 3.19 of Formular A1 and B
- No move at the moment on tax authorities' side

Risk of loss of the tax exemption

Illiquidity and Over-Indebtedness - foundations

No real change

84a cum CO 725, 725b-c
Not CO 725a since no capital similar to share capital (*FF 2017 353, 571-572*)

- Risk of illiquidity already covered
- Rules on capital loss not applicable
- No interim balance sheet in case of threat of illiquidity
- Supervisory authority's duty to notify the court

Adaptation of the wording of CC 84a to new wording of CO 725 – 725c

Illiquidity and Over-Indebtedness - associations

Art. 69d (new)

Les dispositions du droit de la société anonyme régissant la menace d'insolvabilité et le surendettement ainsi que la réévaluation des immeubles et des participations s'appliquent par analogie **aux associations tenues de requérir leur inscription au registre du commerce.**

CC 69d cum CO 725, 725b-c

Not CO 725a since no capital similar to share capital (FF 2017 353, 571-572)

→ **Increased risks of liability for the members of the committee**

CC 61 (new) (cum ORC 90)

2. Est tenue de s'inscrire toute association:

1. qui, pour atteindre son but, exerce une industrie en la forme commerciale;

2. qui est soumise à l'obligation de faire réviser ses comptes;

3. qui, à titre principal, collecte ou distribue directement ou indirectement des fonds à l'étranger à des fins caritatives, religieuses, culturelles, éducatives ou sociales.



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CO 725, 725b, 725c - (selected) novelties

- Early warning system in case of illiquidity and impending illiquidity (CO 825)
- Codification of case law/Clarifications on over-indebtedness (CO 725b)
 - Opting-out/down: appointment of *ad hoc* auditor
 - Interests to be covered in the subordination agreement
 - Silent restructuring exception
 - Well founded prospects to eliminate the over-indebtedness within 90 days max.
 - Creditors' claims not jeopardized any further
- Codification of the use of latent capital gains (for real estate and participations) (CO 725c) / separate reserve
- Judicial measures only as per the Debt Enforcement and Bankruptcy Act (moratorium)



Thank you



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Q&A
avec **les membres
du panel**

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CONCLUSION

Prof. **Henry Peter**

Directeur, Centre en philanthropie

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ACTUALITÉS DU CENTRE

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ENSEIGNEMENTS

Cours semestriels – Printemps 2023

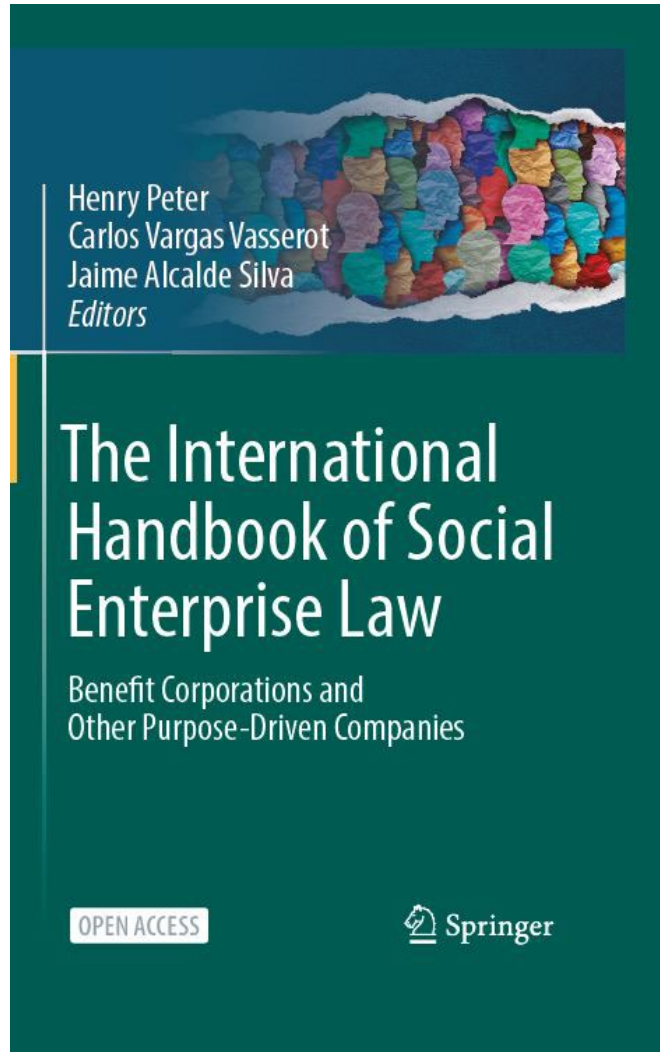
- **Entreprises sociales**, Droit, Prof. Giulia Neri-Castracane
 - Du 20 février au 29 mai 2023, Lundi 12h-14h, Uni-Mail
- **Entreprises, capitalisme et objectifs de développement durable**, Droit, Prof. Giulia Neri-Castracane
 - Du 23 février au 1 juin 2023, Jeudi 16h-18h, Uni-Mail
- ***Innovation and philanthropy***, GSEM, Dr Thomas Maillart et Prof. Giuseppe Ugazio
 - Du 20 février au 29 mai 2023, Lundi 14h-18h, Campus Biotech
- **La Philanthropie culturelle et le droit**, Droit, Dre Anne Laure Bandle
 - Du 22 février au 31 mai 2023, Mercredi 16h-18h, Uni-Mail

ENSEIGNEMENTS

Formation continue

- 2^{ème} édition [*DAS in strategic and operational philanthropy*](#), Faculté de GSEM, sept. 2022-juin 2023
 - CAS in Operationnal philanthropy (janvier – juin 2023)
 - Modules individuels

PUBLICATIONS



- **44 articles** d'expert-es internationaux/ales reconnu-es dans leur domaine, dont **7 chercheurs/euses UNIGE**
- Avant-propos rédigé par Prof. **Colin Mayer**, Blavatnik School of Government, et professeur émérite, Saïd Business School, Université d'Oxford, Royaume-Uni
- Parution décembre 2022

PUBLICATIONS

Version anglaise à paraître en décembre 2022



PROCHAINS ÉVÉNEMENTS

- **9 Février 2023 | 12h15-13h30: Philanthropy Lunch « Dettes et santé, une affaire de dignité »**
 - **Prof. José Ramirez**, Professeur d'économie, Haute École de gestion-Genève
 - **Johanna Velletri**, Directrice, Fondation genevoise de désendettement
 - **Prof. David Sander**, Directeur du Centre interfacultaire en Sciences Affectives, UNIGE
 - Modération de **Prof. François Bellanger**, Président, Fondation genevoise de désendettement

EVALUATION

Nous vous remercions de prendre quelques minutes pour compléter le questionnaire d'évaluation:

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