

Delphine Bottge

HOLDING FOUNDATIONS IN SWITZERLAND

The Foundation-owned company
model from theory to practice



UNIVERSITÉ
DE GENÈVE

CENTRE EN PHILANTHROPIE



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Foreword

Throughout my career as a lawyer, I have worked alongside foundations and companies that conduct meaningful, worthwhile, impactful work. This has convinced me that profitability and the general good, as well as business and philanthropy, are not inherently opposed. In fact, they are parts of a coherent continuum that can strengthen social cohesion.

Holding foundations are a part of that continuum. They combine family considerations with economic and philanthropic matters, all while ensuring the survival of the company which will contribute to the common good through the allocation of dividends.

The studies conducted by Professor Steen Thomsen at the University of Copenhagen as well as those carried out by the Think and Do Tank Prophil, which performed the first European study on the topic in 2015, stirred my interest in this governance and holding model. At the same time, I was struck by the fact that no book had been dedicated to holding foundations in Switzerland, except for a thesis published by Roger Schmid in 1997. As such, it seemed important to me to conduct my own study within the Centre for Philanthropy at the University of Geneva to address their actuality. This work presents the results of my research conducted on more than one hundred Swiss holding foundations,

while also approaching the incentives and the issues that come with this model. I have provided an annotated bibliography as well, mainly for academics and professionals.

This book would not have been possible without Professor Henry Peter and the team of the Centre for Philanthropy at the University of Geneva, where I have had the pleasure of being an Academic Fellow since its creation in 2017. They supported me in my research when I went to meet key foundations and experts in Denmark, Germany and France, encounters that helped develop my thoughts and analysis. My conversations with Virginie Seghers and the members of De Facto (European Dynamic in Favour of Holding Foundations) further convinced me of the relevance of my research in Switzerland. My deepest thanks go out to them.

I would also like to express my gratitude to all the members of the foundations with whom I was able to speak, particularly to Caroline Kant, Stéphanie La Roche, Costin van Berchem, Didier Fischer and Carl Elsener Jr., who opened the doors to the EspeRare, Baur, Wilsdorf, 1890 and Victorinox foundations to me. In doing so, they illustrated my reflections with case studies that were as fascinating as they were instructive.

I would finally like to thank Lise Trémeaud, my partner in crime, who waded through the material with me, as well as Vincent Mottet and Bettina Ferdman, for their precious support and revisions. I would also like to thank Mona Brandt, a student at the Law School of the University of Geneva, who managed the difficult task of compiling the data collected.

Finally, my thoughts go out to my children, my sources of daily inspiration as I reflected on hybrid models. I hope they will contribute to the society in which they will grow up tomorrow.

Geneva, January 2022

Preface

by Professor Henry Peter,
Director of the Centre for Philanthropy at the University of Geneva

The role and responsibility of companies are on the move. Is this the result of growing public awareness of duties that, up until now, have been ignored or downplayed? Or is it due to a new understanding of the broader role companies have? Both are probably true. The corporate situation in Switzerland is no exception to what some are considering to be a paradigm shift. This shift has been accentuated by the very rapid emergence of global companies and immense levels of wealth. It creates societal expectations for numerous stakeholders, evolving from the dogma of 'shareholders value' to that of 'stakeholders value.' In other words, the new paradigm takes into account not only the interests of the company's owners but also those of the stakeholders, employees, providers and clients, as well as public communities and the environment, to mention a few. This recalibration necessarily prompts reflections regarding governance – that is, 'good' governance. This, in turn, implies that the preliminary matter of knowing to what purpose this is done, and therefore in what interests, has been resolved, as well as which factors and values to prioritise. This is the fundamental question of corporate social responsibility. Consequently, these reflections look to the timeframe established to discover what some consider the only sustainable (i.e., for the very long-term), practicable approach.

Foundations play a central role in this movement. They are necessarily set up for the long term, and they do not have owners but rather beneficiaries. This is especially true for holding foundations, the characteristics of which are particularly apt for meeting the fundamental challenges of our time. Delphine Bottge has rightly identified this before most others. She also deserves credit for dedicating herself to a deep study of this relatively unknown subject. Her initiative, her research, and the results that she today has made available to the public are remarkable and should be applauded. There are many qualities in her work, all of which feed into each other synergistically. First, thanks to her practice, she has outstanding knowledge of the world holding foundations operate in. Secondly, she has devoted herself to empirical research, collecting data from a large number of holding foundations. Empirical data collection is a notoriously difficult task, as it requires gaining access to information that is often confidential. This, in turn, requires both personal and professional credibility, as well as the capacity to properly process the data obtained. Thirdly, she has been able to structure her text in an efficient and useful way. Finally, she has the know-how for analysis, not only with a strictly legal perspective but also by considering other relevant factors, given the subject's multidisciplinary nature.

The Centre for Philanthropy at the University of Geneva (GCP) defines philanthropy as 'voluntary contributions to the common good' and states that the 'common good' was essentially defined during the "codification" of the Sustainable Development Goals (SDG). As Bottge explains, holding foundations are ideal instruments for pursuing SDG goals. The circle of direct or indirect foundation beneficiaries very often overlaps with that of the SDGs, even in the long term – long-term survival being, as previously stated, a fundamental characteristic of foundations.

It is precisely because of her qualities, interests and her sensitivity to purpose that Delphine Bottge is one of the Centre for

Philanthropy's highly valued Academic Fellows. Therefore, the Centre encouraged her to carry out her project; today, we can thank her for having accomplished her task to such a degree of excellence. Her contribution arrives at an opportune moment in a world where business leaders, companies, their directors as well as the financial world, in general, have begun to re-examine their roles and responsibilities. Entrepreneurs are increasingly looking for the best way to structure the ownership of their companies, in which they can instill their own values for a long time to come.

This work will be very useful to teachers, students, investors, advisors and researchers alike. As such, it will create a solid basis for other works and developments in this essential field. In the name of the Centre for Philanthropy, and my position as the GCP's head and as a professor having dedicated his career to corporate law, we all would like to sincerely thank Delphine. Our gratitude goes out to Slatkine Editions. By accepting to publish this book, Slatkine has reaffirmed their interest and support in bringing to light a subject that has been little explored yet carries significant societal impact.

Introduction

Holding foundations are foundations that hold companies. This is a poorly-known model of governance, even though it has existed for decades and is very topical today. It allows for long-term economic performance while also contributing greatly to the common good.

Bosch, Ikea, Lego, Novo Nordisk, Pierre Fabre, Rolex, Tata... These and thousands of other groups or SMEs around the world are partially or completely foundation-owned. This type of structuring is common in Northern Europe:

- There are almost 1,000 such groups in Sweden.
- There are more than 500 in Germany, including the iconic foundation that has held the Bosch group since 1842 (today boasting 400,000 employees in over 60 countries). In 2020, it made donations of almost CHF 90 million.
- In Denmark, the 1,350 companies held by foundations represent almost half of listings on the stock market and finance 60% of Danish research. In 2019, they made donations of roughly CHF 1.78 billion.

This model is also slowly spreading to countries where a particularly strong cultural barrier has existed between business and

philanthropy, such as France. This is thanks to pioneer entrepreneurs who have adopted this model and regrouped themselves within the De Facto (*Dynamique européenne en faveur des fondations actionnaires*, [European Dynamic in Favour of Holding Foundations]) community.

With more than 13,000 foundations and an average of almost one new establishment per day over the last decade, Switzerland is often considered the pinnacle of philanthropic countries. Holding foundations have flourished there since the first half of the 20th century, providing structure for both the Swiss economy and Swiss philanthropy. However, they remain largely ignored, especially considering the famous Swiss culture of secrecy.

Chapter 1

Foundation Ownership: the Model

Foundation ownership (or holding foundation) is not a legal status. Rather, it corresponds, according to the Federal Court (ATF 127 III 337 = SJ 2002 I 193.C.2.a), to a simple statement of facts: **a holding foundation, independent of its purpose, is a foundation that holds significant stakes in one or more commercial company(ies).**

Its main elements are the following:

A foundation

According to Article 80 of the Swiss Civil Code (CC), 'a foundation is established by the endowment of assets for a particular purpose.' The strength of Swiss law is drawn from its liberal legal framework and its pragmatism. The founder's will is the determining factor; he or she is entitled to lay out the purpose and the organisation in the foundation's statutes.

Swiss private law foundations are placed under the surveillance of the public corporation (the Confederation, the canton or the municipality) they report to in relation to their purpose.

According to Article 84 para. 2 of the Swiss Civil Code (CC), the supervisory authority oversees that the foundations' assets are used in accordance with their declared purpose. Surveillance covers both the management as well as the use of the assets.

A specific purpose

A holding foundation may have a **public utility purpose**. Shareholding would then be one of the ways the foundation can accomplish its statutory purpose, thanks to the dividends touched as a shareholder. It may have an **economic purpose**, such as maintaining the company, into which all the foundation's net profits would be reinvested. Finally, a holding foundation may have a **mixed purpose**, combining both purposes cited above. In practice, it is not always easy to see which of these two purposes is predominant, one often being tied to the other.

It is also common for there to be some confusion among stakeholders regarding the foundation's economic activity (meaning, in the case of a holding foundation, the fact that it holds shares) and its statutory purpose. Shareholding by a foundation must primarily be seen as a statement of fact, a means that a foundation disposes of to achieve its purpose. This will be expressly and exhaustively determined in a specific article of its statutes.

Significant shareholding in one or more commercial companies

While there is no unanimous position regarding the exact level of shareholding (SCHMID, 1994), definitive shareholding is still required. Nonetheless, the essential criterium is one of **control** with 'the chance of influencing the company market' (VEZ, 2004).

This is obvious in cases where a foundation holds the entirety or a majority of shares in a company; however, Swiss law also permits control of the company by a foundation with as little as 10% of stakes and sometimes even less, according to the way the capital is structured (existence of different share classes, veto rights, etc.).

Holding foundations are not:

- Foundations established by a company and supported by donations from said company, at its discretion, as a sign of its social commitment (Swiss Foundation Code, 2021). In the foundation ownership model, the company does not allocate donations to a peripheral foundation; rather, the foundation holds the company itself and uses the dividends it receives in exchange in accordance with its statutory purposes.
- Trustees, which manage assets and rights to generate revenue for a third-party beneficiary or for the settlor itself. By establishing a foundation with a public utility purpose and by transferring his or her shares, the founder irrevocably removes himself or herself from his or her assets. These will be managed by the foundation, in accordance with the purpose specified by its statutes.
- Foundations that operate on their own and at their core an economic activity (called foundation enterprises or *Unternehmensträgerstiftungen* in Swiss law). These would be tax-exempted due to their public utility purpose. As for companies held by foundations, they are subject to taxes on profit and capital at the normal rates.

Chapter 2

Overview of Holding Foundations in Switzerland

A Study on 106 holding foundations in Switzerland,
holding roughly 2,000 companies

Holding foundations in Switzerland elude statistics. In fact, Switzerland does not even have a public register of shareholders. In 2014 the country did introduce an obligation for Swiss companies to establish internal registers of beneficial owners holding 25% or more of shares or voting rights in Swiss companies not listed on the stock exchange (Art. 697j CO). However, these registers are held by the companies themselves, and not by a central authority. As such, it is difficult to know exactly which shares a foundation holds in a company. At the same time, while foundations are required to be registered in the commercial register, whether they benefit from tax exemption is covered by tax secrecy (Art. 110 LIFD in particular). Nevertheless, we have tried to conduct a study on holding foundations in Switzerland and the companies that they hold. This investigative study has confronted both the culture and the obligation of secrecy among the Swiss foundation world, supervisory authorities and tax administration.

Our approach relied on cross-referencing different sources (commercial registers, foundation and/or company websites, group or company yearly reports, press articles, etc.). This process was made easier by my career and the network it has provided me with;

at the same time, it was made more difficult by the reserve certain foundations have in communicating.

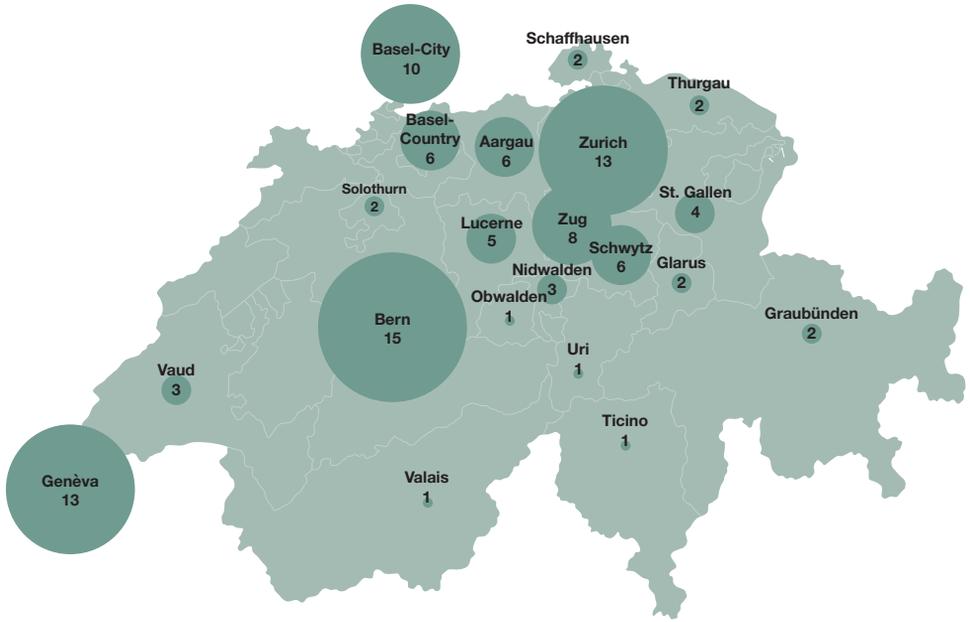
Our study focused on 106 holding foundations that we were able to identify. Each had different purposes and structures and responded to different motivations; they were included regardless of whether they were still active. Still, we do not claim that this study is fully comprehensive. To us, it seems reasonable to assume that there are twice as many holding foundations in Switzerland.

The study is based on the data collected as of the day of this work's writing, which is in constant evolution. As in some cases only fragmented or non-verifiable data could be sourced, some of the conclusions below are based on a more limited scope. This chapter therefore seeks to sketch out an order of scale and of trends to encourage further reflexion. By no means does it seek to present information and statistics to be considered without reserve or perspective.

Geographic distribution of holding foundations in Switzerland

The distribution of holding foundations in Switzerland is similar to that of the 13,514 foundations in Switzerland presented in the Report on Foundations in Switzerland 2021¹.

¹ Report published by the Centre of Studies in Philanthropy in Switzerland (CEPS) at the University of Basel, SwissFoundations, an association of Swiss donation foundations and the Centre for Foundation Law at the University of Zurich.

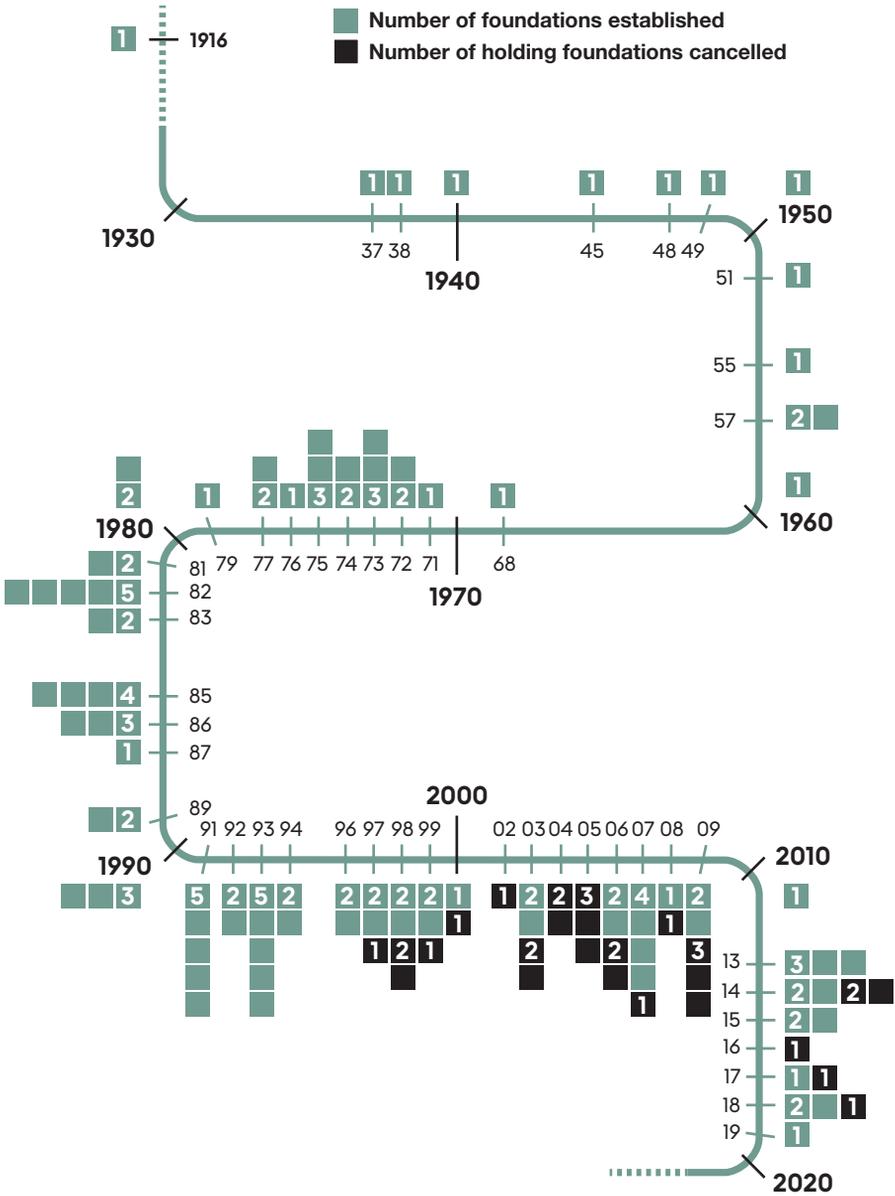


Establishment and cancellation of holding foundations in Switzerland

The first recorded foundation under Swiss law with statutes mentioning the holding of a company is the Stiftung EK Schaffhausen. Established in 1937, it was meant to take over the Schaffhouse Savings Bank, which had previously been held by a charitable association. Its statutory purpose mentions both the maintenance of this bank created in the 19th century as well as the support of philanthropic institutions.²

We noticed an increase in the number of holding foundation established in Switzerland starting in the 1980s, and then again in

² The DSR Foundation, whose establishment in 1919 under the name *‘Département social roman des Unions chrétiennes de jeunes gens et des sociétés de la Croix-Bleue’* is shown in Fig. 2.2, did not become a shareholder until 2016, after a reorganisation of its activities.



2010. We should specify, however, that due to the obstacles described above (absence of an official shareholder register, the culture and obligations regarding secrecy), we did not have access to holding foundations established more recently.

The cancellations we considered took place around the 2000s and mainly concerned foundations with a purely economic purpose involving the holding of audit companies or shares favouring the staff of the company held.

Fields of public utility interest of holding foundations (according to their statutory purpose)

Our study demonstrated that foundations that effectively held one or more companies had very different statutory purposes:

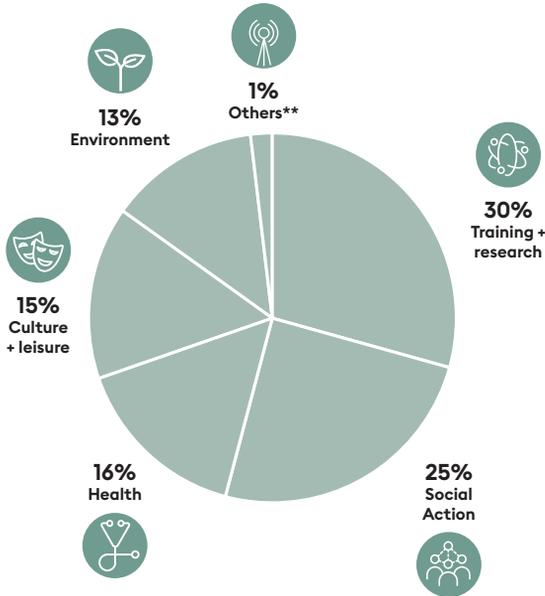
- public utility for some: the foundation's actions were thus made possible by its shareholder statutes and the receipt of dividends;
- economic for others: the foundation's sole statutory purpose is the survival of the company, its independence or its holding according to the principles laid down by the founder;
- mixed, the statutes combining these two purposes in certain cases.

We also took note of other kinds of legal forms (pension funds or family foundations) that turned to this means of holding.

We analysed the purposes of the foundations as they were written in the commercial register, as well as the concerned foundation's statutes, when they were available.

Our first observation was that the statutory documents do not systematically indicate the statement of fact necessary for a

Fields of public utility interest for foundations (according to their statutory purpose)*



* several answers possible

** concerns 3 foundations the purpose of which is to act for the independence or quality of the press/the media/publishing

foundation to hold a company. In 38% of cases, the statutes make no mention whatsoever of the held company. In 62% of cases, however, the company is mentioned, in contexts that can vary greatly (economic purposes, mixed purposes or a means to attain a public utility purpose).

Our second observation concerned the fields of public utility interest of holding foundations. This graphic therefore only looks at holding foundations that pursue, according to their statutes, a public utility purpose, exclusively or in combination with an economic purpose, i.e. 72 of the 106 foundations observed.

Distribution of the fields of interest among these 72 foundations is equivalent to that generally found among the 13,514 foundations in Switzerland, as presented in the Foundations in Switzerland 2021 cited above.

Except for specific cases (holding of a company to attain the foundation's statutory purpose, see p. 46), we can therefore observe that there is no permeability between a holding foundation's public utility purpose and the field of activity of the company that it holds.

The companies held by holding foundations

Our study identified over 1,700 companies held by the 106 foundations under Swiss law mentioned above, either directly or via one or several holding companies.

This number is to be considered a minimum value, as several large groups held by foundations do not communicate the number of companies they are composed of, both in Switzerland and abroad.

As a result, we can reasonably estimate that the 106 foundations that we have identified actually hold a much larger number of companies in total.

The foundation ownership model in Switzerland is not limited to holding one type of company. There is wide diversity among the companies held, as much in terms of size (from SMEs to start-ups and multinationals) and location (local or international) as in turnover.

Some company groups held in part by foundations are also listed on the stock exchange (Novartis AG, Kühne + Nagel International AG, Dätwyler Holding AG, DSV Panalpina A/S (Denmark), Bossard Holding AG, Barry Callebaut AG, Vontobel Holding AG, Chocoladefabriken Lindt & Sprüngli AG). As shown on the

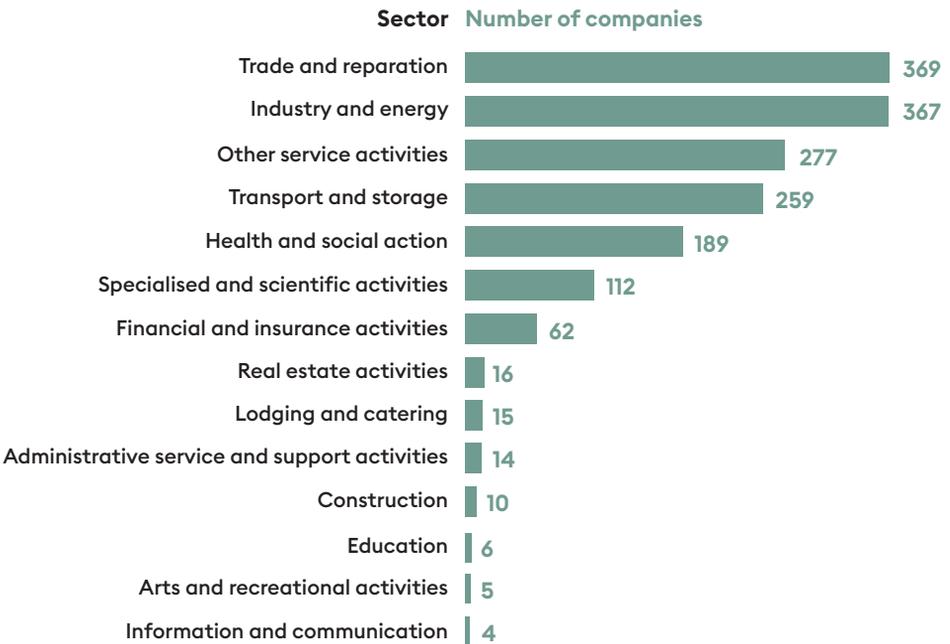
graphic on page 27, the companies held perform very different activities, beyond the sectors listed in the graphic³. For example:

- Industry (beyond those previously cited, shoes: the Bata group, held by Bata Schuh Stiftung; automobile: Merbag Holding AG held in part by the Fondation Gertrude Hirzel. There are other, more artisanal examples, such as a bell foundry: Glockengiesserei H. Rüetschi AG held by the foundation of the same name)
- Food (for example: Lindt & Sprüngli (see below, p. 36), Barry Callebaut AG held in part by the Jacobs Stiftung through a holding company, Ricola held in part by Emil und Rosa Richterich-Beck-Stiftung)
- Insurance (Swica, Helsana, Visana, held in part by foundations of the same name)
- Education (Fondation de l'École hôtelière de Lausanne, EHL which holds the EHL Education group)
- Culture (Beyeler Stiftung which holds the operating company for the museum of the same name)
- Hospitality (Parkhotel Giessbach AG held by Giessbach dem Schweizervolk)
- Restaurant industry (Groupe Eldora held by the Fondation DSR)
- Finance (Ethos Services SA held by the foundation of the same name)
- Press (*Le Temps*, held by the Fondation Aventinus, Bote der Urschweiz AG by the Triner Medien Stiftung)
- Sports training (Servette FC and HC, held by the Fondation 1890. This foundation is the subject of a more detailed study on p. 67).

³ Categories based on those listed with the Cantonal Office for Statistics (OCSTAT Geneva)

The sectors represented in the graphic above correspond to sectors where important groups held by foundations are active (groups that may each hold several hundred companies). The foundation ownership model is therefore not more specific or relevant to one sector in particular.

Activity sectors of companies held by holding foundations

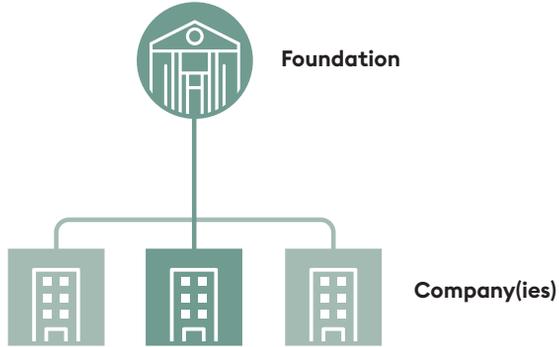


2.5 Types of holdings by a foundation

We identified several models of company holding by a foundation:

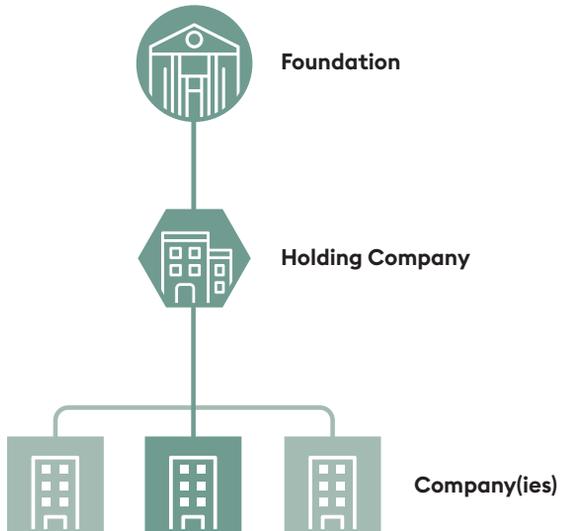
Direct holding model

The foundation holds, singly or jointly with other shareholders, direct stakes in one or several companies.



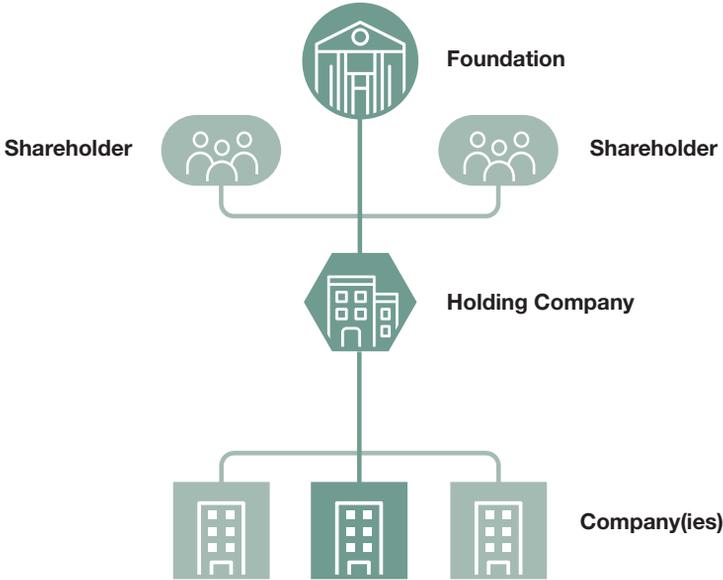
Holding model via a holding company (sole shareholder)

The foundation holds one or several companies through a holding company of which it is the sole shareholder.



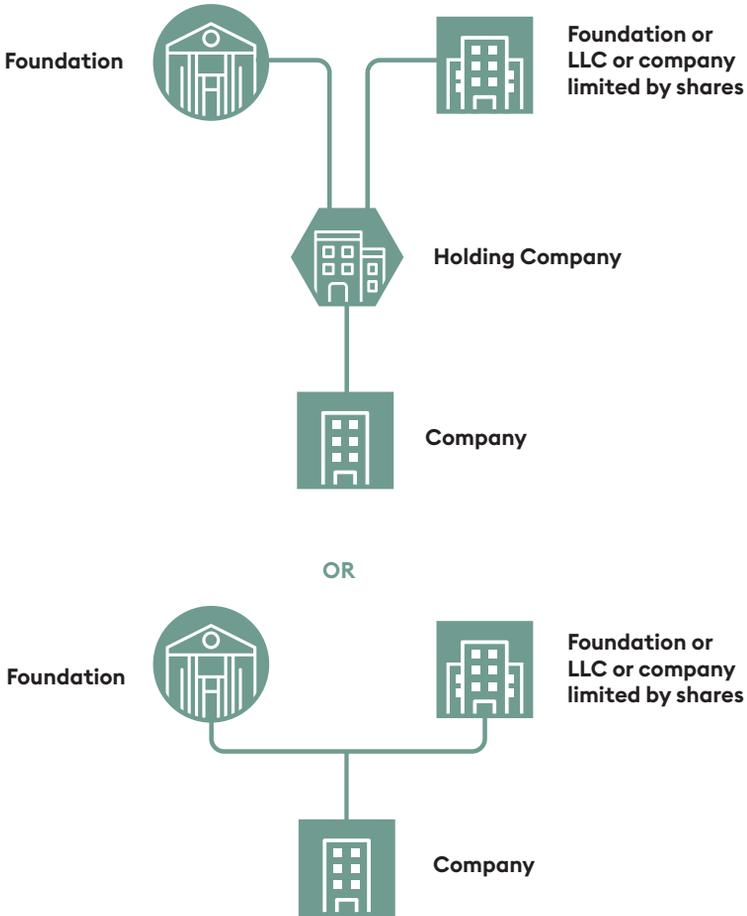
Holding model via a holding company (several shareholders)

The foundation holds one or more companies through a holding company alongside other shareholders.



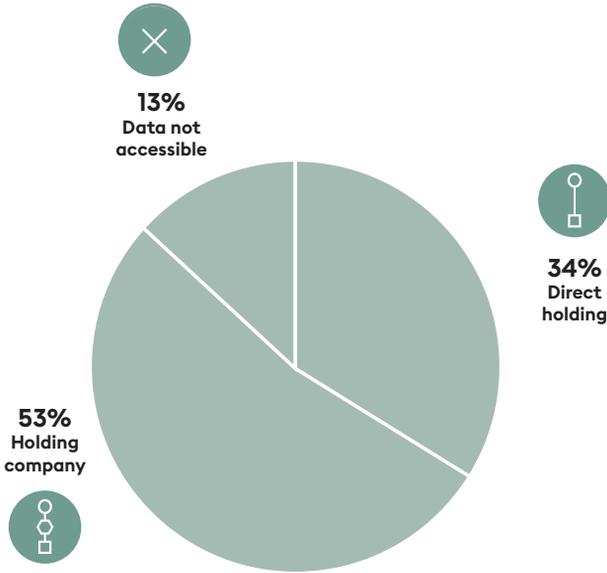
Double foundation model (through a holding company or directly)

A public utility foundation and another structure (foundation, company limited by shares, LLC) hold shares together (directly or through a holding company). This model is notably used to allow clear distinctions/differentiations between the altruistic interests of the foundation and the continuing management of the group/the company. Companies/groups such as Bosch in Germany, Naos in France or Victorinox in Switzerland have adopted this structuring, occasionally splitting dividend rights from voting rights.



The two schemes (direct holding or through a holding company) can be encountered at nearly the same frequency, with holding companies standing as a slightly more prevalent model among 56 of the identified foundations.

Types of holding by a foundation



Number of companies held directly by a holding foundation

In general, we can notice that foundations choose direct holding when there is a lower number of companies held (for 24 of them, only one company was held). On the other hand, whether the foundation is the sole shareholder or not does not seem to be a factor. The foundation will directly hold the company together with family shareholders or other structures (family holding company, other foundation(s) or company(ies)).

The two foundations identified as directly holding more than five companies involve two very specific models. One is the Schweizer Paraplegiker-Stiftung, the regional intervention centres of which are set up as companies limited by shares, some being for public utility. All, however, are held by the foundation.

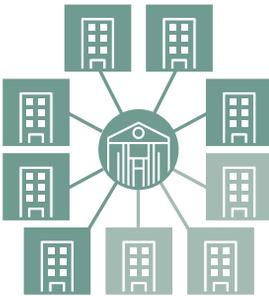
24
foundations
hold
1
company



10
foundations
hold
2 to 5
companies



1
foundation
holds
6 to 9
companies



1
foundation
holds
10 companies
or more



The second is the Purpose Stiftung, the statutory purpose of which is to promote economic and entrepreneurial behaviour focused on the companies' goals and social objectives, not necessarily profit. It also aims to participate directly or indirectly in companies as a shareholder by observing the end purpose of the company at stake: *'In the context of these shares, the Foundation will ensure that the rules with regard to the purpose are respected, in particular (1) that the ownership function is tied to the entrepreneurial function and (2) that revenue be a means to pursue*

the commercial purpose and not as an end in itself (free translation of Purpose Stiftung's statutes).

Companies held by a holding foundation through one or more holding companies

Structures with holding companies are normally used to hold several companies. This also allows for a neat split between the activities of the company held and those, of public utility, of the holding foundation.

In the 37 cases identified of holding companies holding several companies, we can identify two options:

- the foundation is the sole shareholder of the holding company in nine cases and holds several companies;
- the holding company itself has several shareholders in 19 cases and holds several companies.

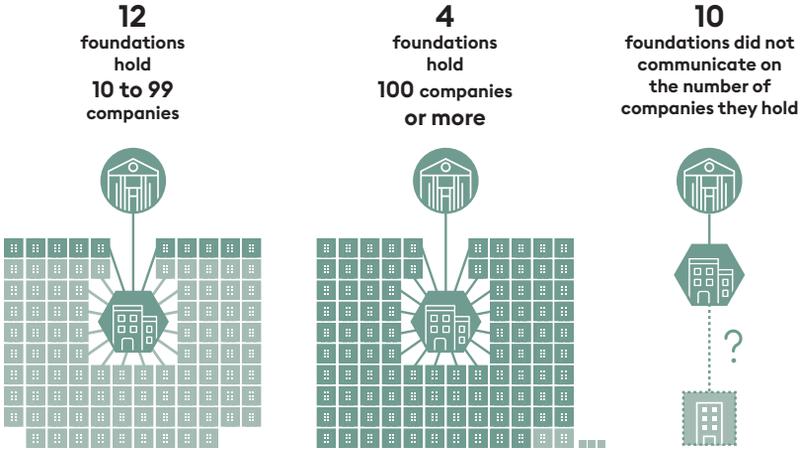
For the remaining nine cases, the exact holding ratio by the foundation is not accessible for the reasons cited below.

3
foundations
hold
1
company

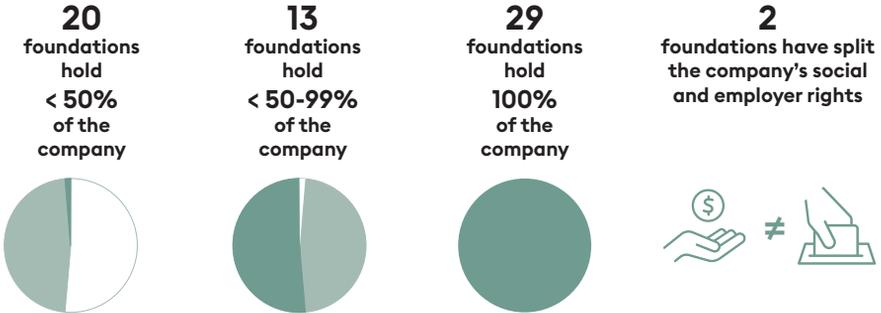


21
foundations
hold
2 to 9
companies





Ratios of company holdings by the foundation⁴



This graphic is established based on the 64 foundations for which we had access to the exact holding ratios.

For the 42 other foundations, lack of data on this point is due to the following reasons:

⁴ For holding foundations of holding companies, we have included here shares in the holding company

- The exact holding ratios were not communicated by the foundation. Nevertheless, the holding by the foundation comes from (1) the foundation's statutes or (2) communications from the foundation/the group/the company held (website, yearly reports, press communications, etc.): 31 foundations are concerned. With regards to these foundations, communications indicate holdings that are at least majority, if not exclusive, holdings;
- the foundation is cancelled or in liquidation and the exact historic holding ratio cannot be identified: 9 foundations are concerned;
- the company historically held by the foundation was cancelled: 2 foundations are concerned.

In most of the cases analysed, the foundation was the sole shareholder of the group or company held.

In cases where the foundation held less than 50% of the shares, it was however the controlling shareholder (majority holder or holding shares bearing specific rights).

We noted two cases where the foundation, pursuing a public utility purpose, was a shareholder of a group alongside another structure:

- The Carl und Elise Elsener-Gut Stiftung, with a public utility purpose, holding 10% of shares of Victorinox AG. This is alongside Victorinox Stiftung, the purpose of which is the maintenance, on solid grounds, of Victorinox AG as an independent company, all while maintaining its prior social purpose, by exercising the shareholder rights of Victorinox AG in such a way as that the company may prosper as much as possible. This foundation is the object of a more detailed study on p. 61.

- The Lindt Cocoa Foundation, with a public utility purpose, holds, with the Lindt Chocolate Competence Foundation and two of the company’s pension funds, 20.5% of Chocoladefabriken Lindt & Sprüngli AG, a holding company listed on the stock market.

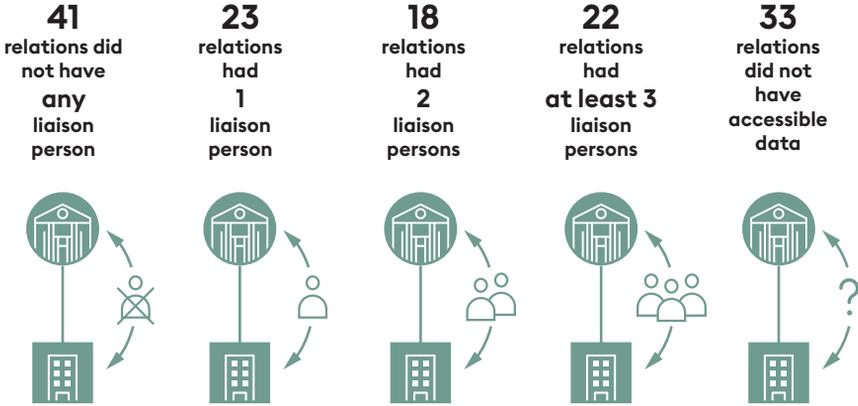
It is not common in Switzerland today to resort to the splitting voting rights from dividend rights – with the foundation profiting mainly from dividend rights. In the context of our study, we identified two such cases:

- One foundation, the purpose of which is to support the group’s preservation as an independent family company (economic purpose), which holds 56.3% of voting rights and 27.9% of group dividend rights along with a family holding company (Bossard Unternehmensstiftung);
- one foundation with a public utility purpose, which holds 100% dividend rights and 10.1% voting rights in a group alongside family shareholders (Jacobs Stiftung).

Finally, we noted Purpose Stiftung’s particular model. In order to achieve its statutory purpose, it directly holds limited shares in its member companies along with a veto right on the company’s mission.

Number of liaison persons between the holding foundation and the company(ies) directly held

The Federal Tax Administration, in its Circular No. 12 of 8 July 1994 (see p. 79 *et seq.*), sets as a condition for tax exemption for holding foundations that there be a clear separation between the foundation board and the board of directors of the



company held. Therefore, according to the Administration, these boards must be independent of each other. However, a liaison person between the two is tolerated. With this in mind, we have analysed the composition of these bodies in the structurings studied.

This rule of course only concerns foundations pursuing public utility purposes and benefitting from a tax exemption. It therefore does not concern foundations with a solely economic purpose.

We first analysed the composition of the boards of directors of the entities held directly by the foundations (companies directly held and holding companies). Our analysis involved:

- 92 foundations (either benefiting from a tax exemption or not);
- 68 relations between foundations and companies directly held with registered offices in Switzerland;
- 68 relations between foundations and holding companies under Swiss law.

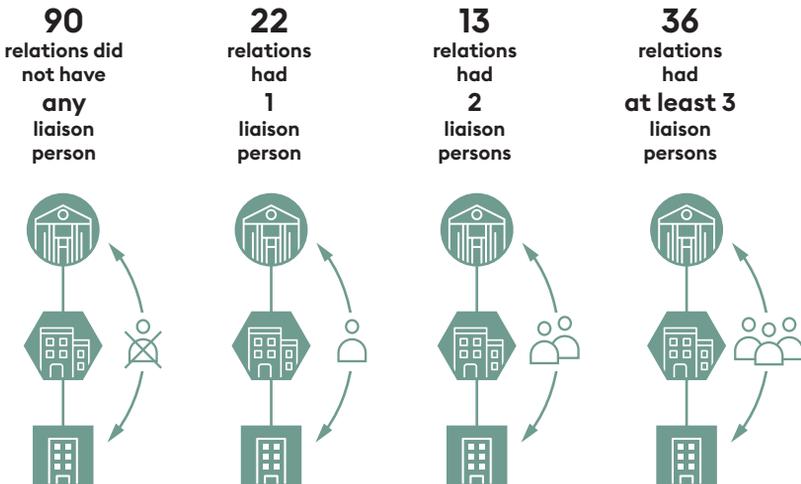
However, we did not examine the ties between the foundation boards and the boards of directors of companies under foreign law, due to a lack of access to data concerning them.

For most cases (41 relations), there was a clear separation, with no liaison person. In 23 cases, there was a liaison person between the two boards. In 18 cases, two people were members of both boards, and in 22 cases 3 people or more were.

Number of liaison persons between the holding foundation and the company(ies) held through a holding company

Our analysis then looked at the 161 relations between foundations and company(ies) held through a holding company (the other cases involved companies with registered offices abroad (for 1183 relations) or that were cancelled (for 5 of them)).

In the large majority of cases (90 relations), no member was both a member of the foundation board and the company's board of directors. In 13 cases, two members of the foundation board were members of the company's board of directors and in 36 cases, three or more members were.



Chapter 3

The Incentives behind Foundation Ownership

Preliminary remarks

Based on the many structures that we have analysed in Switzerland and abroad, we were tempted to create a typology of the different incentives we encountered. These were often varied and complementary, in a kind of 'double virtuous effect' (GAUTIER *et al.*, 2015).

Following the example of the Carl-Zeiss-Stiftung in Germany in 1889, the first holding foundations were created by visionary men. Inspired by humanistic ideals, they were eager to anchor their social ideals of companies all while developing public utility actions. Today, we can still see a strong attachment between a foundation and the company that it holds, as opposed to short-term share ownership, which has only a financial approach. The foundation ownership model is therefore also one of the tools that ensure good familial governance or stability for the company in times of crisis. This is the basis of its use in social entrepreneurship.

Here we will list the incentives we came across most frequently. At the same time, we remind readers that the foundation ownership model, while bearing many advantages, can in practice come

up against solid obstacles or difficulties. These we will mention in Chapter 4 of this work.

Long term share ownership

Foundation ownership is long-term ownership by essence, according to Steen Thomsen (THOMSEN, 2017). Foundations are indeed usually established for an undetermined duration. This necessarily places them in a long-term investment horizon and influences their role as shareholder.

The Friedman doctrine, which states that the sole and unique social purpose of a company is to increase its profits, has been put in doubt today. There are concerns that volatile shares, the markets, media pressure and intense global competition lead to short-termism and an irresponsible approach to business management and company behaviour. At the same time, the nature and quality of shareholding themselves help establish long-term oriented company governance, which significantly impacts the company and its strategy.

As such, some shareholder profiles (such as foundations, but also family owners, governments and some financial investors) have the capacity to orient their companies towards long-term, sustainable value creation. In fact, as shareholders, they have the right to expect clear strategic vision. During general meetings they will influence transparency, the taking into account of all interests of the company's stakeholders (including of course shareholders, but also employees, providers, clients and, more generally, the community in which it operates), the composition and the functioning of the board of directors, the payment of managers or even the independence of the auditing mechanisms.

1. The continuation of the company and its founder's vision

Foundations are an attractive instrument that allows their founders to lastingly determine the effective control of the company and to ensure its survival and independence (VEZ, 2004). The model helps preserve the company founder's vision and visionary ideals, as well as his or her idiosyncratic values.

If we analyse the incentives of the Swiss entrepreneurs who have transmitted their companies to foundations established under their care, we can see that there is a will to ensure long-term vision within the company and to preserve both the company and its values. To illustrate this, we will cite examples from the Fondation Alfred et Eugénie Baur and the Fondation Hans Wilsdorf, explained in more detail on pages 49 and 55.

2. Lifespan, performance and stability of the company in times of crisis

A study published in 2018 by Steen Thomsen, Thomas Poulsen, Christa Børsting and Johan Kuhn concluded that companies held by Danish foundations have a lifespan that is longer than average:

' - The probability of surviving beyond age 40 is 30 percent for foundation-owned firms and 10 percent for other firms. The survival probability is always higher for foundation-owned firms.

- foundation-owned firms have higher survival rates even after the first 30 years. Among the non-foundation-owned firms, 80 percent of the remaining population at age 30 is gone at age 60, while only 30 percent of the foundation-owned population at age 30 is gone at age 60.'

Thomsen (THOMSEN *et al.*, 2018) analysed the performance of companies held by Danish foundations, including between 2008 and 2010, and concluded that they are just as efficient as family companies traditionally held by investors.

Arthur Gautier (2020) gave examples to this effect during the 2008 crisis. For instance, Handelsbanken, a bank held at 10.3% by the Oktogonen Foundation in Sweden, was untouched by the situation. Then there is Bosch in Germany as well, foundation-owned at 92% since 1964 and which avoided massive firings in 2008 and increased its turnover by 24% in 2010 – all while maintaining the strong philanthropic activity of its holding foundation.

As a result, we can suppose that during periods of economic slowdown or financial crisis, foundation-owned companies are more likely to draw from their resources to maintain their activities. They are therefore more resilient, as I explained in an article dedicated to this idea (BOTTGE, 2021).

3. An appetite for innovation and creativity

Innovation often requires long-term investments, where outcomes are not guaranteed by nature. Removed from at-all-costs yield culture, foundation-owned companies are supposedly more inclined to make this sort of risky, long-term investment. This explains their enthusiasm for innovation and creativity. The budget they devote to research and development (R & D) is usually higher than average.

In a similar light, Christa Børsting and Steen Thomsen (2017) noted that ideas of the company's environmental and social responsibility hold a dominant place in this type of company, due to the nature of its shareholding, which is fine-tuned to this topic. It is

often brought up in general meetings. These companies also benefit from better reputations.

4. The independence of the company and its activities

Foundation ownership also ensures the company's independence. Indeed, foundations are legal structures that do not have owners: the members of a foundation board, its supreme authority, have a fiduciary duty to administer its assets while respecting the founder's wishes. Individually, they do not have the right to any economic interest liable to influence the company's management, strategy or activities.

This particularity has proven attractive to press companies, eager to preserve their powers and independence against any risk of private interference. Following the example of The Guardian in the United Kingdom or Mediapart in France, we can cite Bote der Urschweiz AG, held by the Triner Medien Stiftung, or even *Le Temps*, held by the Fondation Aventinus.

5. Conditions that favour employees

'All else being equal, a foundation-owned firm could be less likely to renege on implicit contracts with employees, banks or other firms because it values the extra profits less highly [...] Foundation charters indicate that they often make special provisions regarding the use of high ethical standards in business conduct, including concerns for the welfare of employees or for product quality' (THOMSEN, 2017).

The statutes of many foundations contain framework conditions in favour of employees. Some even have the statutory purpose of ensuring the shareholding rights of company employees

(Metron Stiftung für Mitbestimmung, W + S Stiftung für Mitarbeiter). Some staff retirement foundations are also shareholders (Personalvorsorgestiftung WIFAG / POLYTYPE).

In general, and independently of the foundation's statutory purpose, we also noted that company employees were accounted for by installing a social and salary policy in their favour, as well as work conditions that contribute to their well-being. In this vein, Victorinox highlighted their absentee and work accident rates, which were lower than the Swiss average.

The model also seems to positively impact employee motivation, which results from a strong company culture, its history and its founder.

Some companies involve their employees in foundation-supported projects. Every year, the Hempel Foundation (Denmark) offers the chance for 12 company employees to contribute to a project it finances during their vacations. Often, the foundation chairman mentions its actions in front of executives during the general meeting. The foundation ownership model does not, by definition, give executives access to the company's capital. As a result, one could expect that performance would be diminished and that there would be a certain kind of inertia. However, the Bosch company (Germany) shows that to the contrary this model is a motivating factor for executives.

6. Protection against acquisitions – preservation of local installations

Foundation ownership is also seen as an excellent tool for protecting the company's capital and to avoid buy-outs or even hostile takeover bids. In some cases, the foundation's statutes also make express mention that it cannot relinquish the shares it holds, unless market conditions and the company's interest so require. This

model effectively preserves local installations of the companies held, creating value and jobs at the local, regional and/or national levels.

A systematic approach to familial governance

Entrepreneurs who transferred their shares to a foundation in the first half of the 20th century mainly did not have any direct descendants. Their primary motivation was to ensure the survival of both the company that they had created and their unique humanitarian vision. The new generation of entrepreneurs today, however, is more concerned with passing on meaning and responsibility to future generations. In general, parents seek to transmit legitimacy to their children through actions, which is more easily induced by passing on family values rather than family shares. They are also aware of the skills needed to successfully run a company, skills that their descendants do not always possess. Finally, they sometimes seek to not single out one of their children, thereby leaving both their fortune and family unity intact.

As a result, they decide to transfer all or part of their shares to a foundation. This foundation will hold the role of a neutral third party, a moderator, even a unifier or a vigil, in a context of well-thought-out familial governance, alongside family shareholders that will subsist from generation to generation. A family charter will cement the principles of this governance and establish the applicable rules for transfers or sales of company shares (often with preferential rights for the foundation or other family members). As for the foundation, it may pursue a public utility purpose and be a vehicle for expressing the family's public actions. We can therefore see that this model may be not just a tool, but a real inciting blend for family governance as well. Professor Dominique

Jakob, director of the Institute for Foundation Law at the University of Zurich, has recently published an article on this subject (JAKOB, 2020).

Examples of this are the Carl und Elise Elsener-Gut Stiftung and the Victorinox Stiftung, which will be further studied on page 61.

Some entrepreneurs also create a foundation during their lifetimes and expressly mention in its statutes the possibility that in the future it will become a part of a group or a designated company, all while integrating their descendants into the foundation's governance (see for example the Fondation Paul Dubrule).

Achieving the foundation's public utility purpose

In some cases, acquiring or establishing the company allows the foundation to achieve its public utility purpose. The company therefore directly serves this purpose. One such example is that of the Fondation 1890, which holds, among others, the Servette Football Club in Geneva. A further study of this case is included on page 67.

Foundation financial self-sufficiency

Not all foundations have large amounts of capital readily available to finance their public utility activities. Many of them are supported by donations, which can make them dependent. For a few years now, we have witnessed changes among foundations in terms of assuring their financial autonomy and continuing their actions.

In this vein, foundations develop activities that generate profit (commercialisation of goods or services, holding intellectual

property rights, etc.), sometimes by 'affiliating' these activities into one or more commercial law companies, of which the foundation becomes the sole shareholder. This allows the foundation to diversify and continue financing its public utility activities.

One such example is that of the Swiss Foundation for Mine Action (Crosstech SA).

Social entrepreneurship

The necessity to outstrip the profit-dominated shareholding model with an approach that combines 'profit' and 'non-profit' meets the needs of the social entrepreneurship sector, which has been flourishing since the beginning of the 21st century. We have written an article (PETER, VENTURA, BOTTGE, PFAMMATER, 2019) about the different legal forms that allow for the structuring of these companies that search both for profit and a positive social impact (companies limited by shares, limited liability companies, cooperatives, non-profit companies, foundations, associations, even benefit corporations or mission-based companies in certain jurisdictions). However, some authors (MAYER, 2017) believe that combining public utility and profit in one sole entity is not always easy, as it brings about a number of issues (on the one hand, evaluating concrete company commitment and an absence of tax incentives for commercial forms; on the other, dependence on donations for foundations, etc.). They highlight the importance of the holding foundation, which brings into play two distinct entities to treat two different objectives: profit for the company, and public utility for the foundation that holds it.

An example of this is the Fondation EspeRare (EspoirXLHED), which is the object of further study on page 73.

Opting for the foundation ownership model has also become interesting for some start-ups with social missions, looking to

preserve said missions through various fundraisers and seeking to find investors that share their ideals. To do so, the founder's right to transfer all or part of his or her shares to a foundation is included in the company's by-laws at its establishment, and then later in the shareholding agreements and successive share subscription contracts. Investor agreement is not needed for this; they will be entered into the capital or allowed pre-emption on their shares.

The Fondation Alfred et Eugénie Baur

Holding a foreign company, a museum
and a public utility action

Background and motivation of the founder

Alfred Baur, an entrepreneur born in Andelfingen in the canton of Zurich in 1865, belongs to the generation of pioneers who left to try their luck abroad to escape the poverty that was prevalent in Switzerland at the end of the 19th century. He ended up on the island of Ceylon, and in November 1897 created the company 'The Ceylon Manure Works', which would later become A. Baur & Co. (Pvt) Ltd. Originally the company specialised in the manufacturing of organic fertiliser and the operation of large coconut plantations, which were nationalised in 1975. Later, starting in 1932, it began activities in tea and tea exports, as well as the import into Ceylon of pharmaceutical products. Upon his return to Switzerland with his Genevan wife in 1906, he became an important collector of Japanese and Chinese works of art and ceramics. Childless, at the end of his life Alfred Baur decided to create foundations in order to pass on his passion and to ensure the survival of the Baur companies, all while developing charitable missions. As a result, in 1944 he created the Fondation Alfred et Eugénie Baur-Duret (Collections), which today holds the Museum of

Far-Eastern Arts in Geneva. In 1949, he created the Fondation Alfred et Eugénie Baur, the sole shareholder of the Baur companies through a holding company.

The foundation

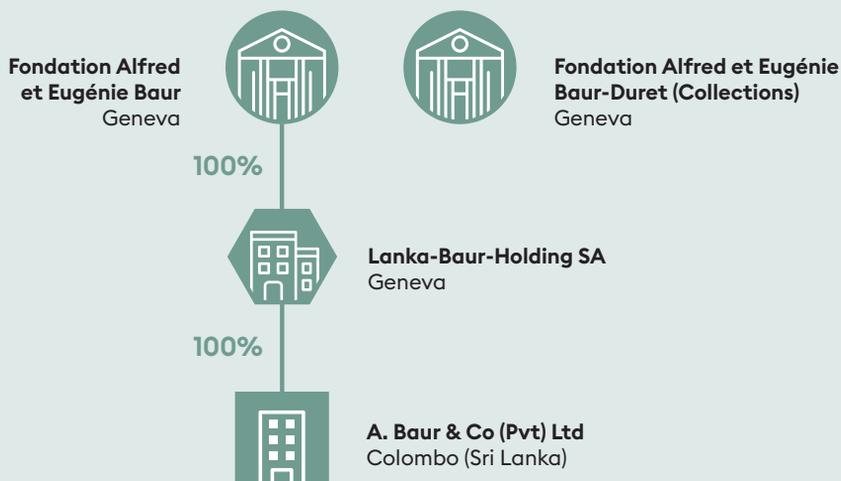
The Fondation Alfred et Eugénie Baur was registered in the Commercial Register of the Canton of Geneva on 30 December 1949.

According to its statutes, the foundation's activities include '1) *ensuring the continuation of the A. Baur & Co. Ltd company in Colombo (Sri Lanka), which is the reason behind the foundation's existence; the foundation must therefore in turn provide it with the means necessary to maintain it. Rather than attempt to enlarge it, the company should be consolidated at its current size. Thanks to the maintenance of the A. Baur & Co Ltd company in Colombo, the economic prosperity of certain Swiss citizens abroad may be ensured;* 2) *making available to the Fondation Alfred et Eugénie Baur-Duret (Collections) in Geneva the means necessary for purchasing works of art as well as the upkeep of the collections and the establishment of catalogues;* 3) *supporting philanthropic work as well as work that is meant to protect nature and folklore.'*

Today, the foundation supports more than one hundred recognised public utility foundations and associations in Geneva, in Switzerland and abroad, and ensures the philanthropic financing of the Museum of Far-Eastern Arts in Geneva.

The foundation is subject to surveillance from the Cantonal Supervisory Authority for Foundations and Retirement Institutions in Geneva (ASFIP).

Holding and governance



Holdings

The foundation is the sole shareholder, through the holding company Lanka-Baur Holding SA, created in 1951 in Geneva, of the company A. Baur & Co (Pvt) Ltd in Colombo (Sri Lanka). This holding company is meant to ensure a separation between the group's commercial activities and the foundation's philanthropic ones.

The main company's, A. Baur & Co (Pvt) Ltd, main purpose is the manufacturing of fertiliser as well as the import and distribution of pharmaceutical products and consumer goods into Sri Lanka. It employs more than 750 people in Sri Lanka.

Governance

The foundation board is made up of four members, including one person who acts as liaison with the holding company.

Key figures

1949

Date of the foundation's
establishment

750

Number of employees
of A. Baur & Co (Pvt) Ltd
in Sri Lanka

75 million CHF

Turnover in 2018 of
A. Baur & Co (Pvt) Ltd

A closer look

We can see in this case (a founder without children) that a holding foundation can be an excellent planning tool for founder assets (continuation of the company) and continuing their values (developing their philanthropic actions) over the long term. More than 70 years after the establishment of the foundation and the transmission of the company to it, we can see that (a) the founder's will was respected, (b) the company prospered, (c) the Baur collection and its museum, considered important cultural facets of Geneva, still keep their doors open to the public and ensure their mission and that (d) the foundation developed important public utility activities in Genevan and Swiss philanthropic spaces.

Also, the very nature of shareholding influenced the company's policy in favour of staff (salary conditions, management conditions favouring staff, development of a CSR⁵ policy in the heart of the company).

⁵ Corporate social responsibility

This model also explains the relevancy, in some cases, of an intermediary holding company that allows for a clearer distinction between the company, subject to taxation in the country where its registered office is located, and the foundation, which benefits from tax exemption, as regards its public utility purpose in the use of the dividends it receives.

Holding a foreign company still carries a contextual risk (exchange rates, changes to the political environment or the local economy, etc.) which can damage the foundation's purpose expressed in the statutes by the founder, that is ensuring the survival of the company.

The foundation board could then find itself in a deadlock between economic and political reality (which could lead to the sale of the company) and respect, over the long term, of the founder's wishes.

The Fondation Hans Wilsdorf

An outstanding watchmaker acting as a support
for social cohesion in Geneva

Background and founder incentive

Hans Wilsdorf, a visionary entrepreneur, was born in Bavaria in 1881. Orphaned at an early age, he began a career in watchmaking at a time when pocket watches were still in vogue. Early on, he had the ground-breaking idea of a high-precision, water-proof bracelet watch – a real revolution in time measurement instruments. He created his first company at age 24 in London, in association with Alfred Davis and by working with precision watchmaking workshops in Biel/Bienne. To build on his immediate success, he created a powerful trademark, pronounceable in any language: Rolex. During the First World War, he delocalised his company to Geneva and integrated himself into the local community.

After the death of his wife, and lacking any children, in 1944 Hans Wilsdorf decided to create a foundation to ensure the survival of his company and its values. The foundation later became the sole shareholder of the company. Hans Wilsdorf passed away in 1960.

The foundation

The Fondation Hans Wilsdorf was registered in the Commercial Register of the Canton of Geneva on 7 September 1945. According to its statutes, its primary purpose is to ensure the survival of its assets *‘to maintain their homogeneity, to ensure their continuous control and to see that they be used in the spirit and traditions of their promoter’*, as well as supporting charitable institutions throughout the canton of Geneva. The only exception to the territorial rule is support for animal protection.

The foundation’s purpose is therefore mixed. All the same, the statutes give priority to the preservation of the group, which must have the means to develop itself seamlessly.

The foundation is known for the large projects it supports in Geneva (HEAD, Plaza, Servette, etc.). However, it currently allots 50% of the amount of its annual financings to social projects, 30% to education, 15% to culture and the remaining 5% to humanitarian and animal preservation projects. For the 2019-2020 fiscal year, it adapted its distribution to the exceptional situation tied to Covid-19 (63% to the social/health sector). More than 4,000 support actions were financed during this fiscal year, including scholarships, aid to individuals, donations to local associations, etc.

The yearly amount of the donations allocated during the 2019-2020 fiscal year by the foundation totals at about CHF 250 million. This amount is submitted to the surveillance of the Cantonal Supervisory Authority for Foundations and Retirement Institutions in Geneva (ASFIP).

Holding and governance



Holdings

The foundation is the sole shareholder of the Rolex group, through Rolex Holding SA created in 1946 in Geneva, and Rolex SA. The group is made up of several entities around the world.

The main company, Rolex SA, is known worldwide for its excellence in the manufacturing and sales of watches, time measurement instruments and all of their components. It applies the secrecy common to the watchmaking industry, particularly as concerns its turnover.

Governance

The foundation board is made up of eight members, including two people who act as liaison with the holding company, as well as with Rolex SA. Membership of both of the boards of directors of the holding company and of Rolex SA is identical.

Key figures

Roughly **10 000**

Company employees
in Switzerland

770 000

Rolex watches sold in 2017
(approximately)

roughly **250 million**
CHF

Yearly foundation donations
(2019-2020 fiscal year)

A closer look

We can see that the model chosen by Hans Wilsdorf has allowed to 'isolate' the company and the brand that he created while also ensuring the survival of his charitable works in his adoptive city.

Even today, the company's strong values are the backbone of its culture, shaped by its founder's genius vision: a passion for quality, creativity and entrepreneurial spirit, as well as a flair for performance and pride in its product. Aware of its social responsibility, the company is actively committed to supporting the arts, sport and the environment through a wide array of sponsoring and philanthropic programmes, independent of those of its holding foundation.

One of the specificities of the Fondation Wilsdorf is in the territorial limits that were laid down in the statutes by its founder. Its support activities largely take place in the canton of Geneva, which makes the foundation a key player for Geneva and its social

cohesion.⁶ Some may worry about the foundation's weight and the risk public corporations take in relying on private support to handle certain sectors and numerous projects. Yet there is no doubt that the Fondation Wilsdorf, aware of its responsibilities and how its actions complement those of the government, is essential to Geneva.

Therefore, starting in 2020 the foundation has decided to renounce its tax exemption, as it wished to contribute to public corporations through taxation. Effectively, following the example of the foundation, any entity benefiting from a tax exemption is free to give up this right and to spontaneously decide to pay taxes according to the usual system. The foundation board members have nevertheless specified that this choice does not impact the foundation's activities at all, which remain for public utility purposes. This therefore is not necessarily replicable in other cases.⁷

⁶ For another example, we can cite the Jakob et Emma Windler Stiftung, shareholder of Novartis, which restricts support activities to the canton of Schaffhouse and to Stein am Rhein.

⁷ 'La Fondation Wilsdorf lève le voile sur ses activités' [The Fondation Wilsdorf lifts the veil on its activities] *in* Tribune de Genève, 20 November 2019.

The Carl und Elise Elsener-Gut Stiftung and Victorinox Stiftung

Ownership by two foundations as a family
governance model: A Swiss Army Knife

Background and founder incentive

When Karl Elsener founded a knife-making workshop in 1884 in Ibach in the canton of Schwytz, followed by the Swiss Association of Master Knife-makers a few years later, he intended to create jobs at a time when the work perspectives in Switzerland were terrible. He also planned to allow association members economies of scale when buying primary raw materials. As such, he provided the first large delivery of knives to the Swiss army, and thus the famous 'Swiss Army Knife', known throughout the world today, was born! The company, was renamed over the years as 'Victorinox' after Victoria, the founder's mother. It has stayed in family hands over the five generations that have survived up until today: eleven children in the fourth generation, with eight working for Victorinox, and twenty-four descendants in the fifth, with six also working for the company. The company itself has since diversified. In order to solidify family governance, Carl Elsener, the founder's grandson, along with his own son, Carl Elsener Jr, came

up with a holding model with a philosophy that ensured the survival and the prosperity of the company, while respecting the founder's values, spirit of solidarity and his attachment to Switzerland. In this spirit, in 2000 the family members transferred the entirety of the shares they held, representing all of the share capital, to two foundations with distinct purposes.

The foundations

The Victorinox Stiftung, entered into the Commercial Register of the Canton of Schwytz in 2000, holds 90% of Victorinox AG's share capital.

According to its statutes, the foundation's purpose is to lastingly sustain Victorinox AG as an independent company, all while conserving the company's initial social purpose on solid grounds. It also exerts the shareholder rights of Victorinox AG in a way that ensures the development of the company in the best way possible over the long term (economic purpose).

The Carl und Elise Elsener-Gut Stiftung, initially established under the form of an association in 1994, and also entered in the Commercial Register of the Canton of Schwytz, holds 10% of Victorinox AG's share capital. From its establishment, it has also been granted significant financial resources.

This foundation's purpose is to support non-profit and charitable activities in various different fields e.g. health, humanitarianism, education and support for victims of environmental and natural disasters (public utility purpose). It is active in Switzerland, Africa, Brazil and Indonesia.

Holding and governance



Holding

The foundations are the sole shareholders of the company Victorinox AG, which has diversified itself beyond its iconic main product (kitchen knives, luggage, watches, perfumes and clothing) and bears a brand that is recognised worldwide.

The purpose of this structuring was to guarantee unity in the holding of company shares and to ensure both the survival of the company over generations as well as its long-term, sustainable development, all while respecting its founder's altruistic values.

The Victorinox Stiftung does not receive any dividends: all profits generated are kept as reserve funds, thereby allowing the company to reinvest in its development and in implementing its strategy.

Governance

The boards of each of the foundations are composed of six members, including one person who acts as liaison with the

company and two other individuals who act as liaison with the company's other holding foundation.

Key figures

5

generations

2

holding
foundations

480 million
CHF

Company turnover
in 2019

2,300,
including 1,200
in Switzerland

Number of
Victorinox employees

A closer look

We can see in this case that the holding foundation has been set up in a context of well-thought-out family governance, ensuring the survival of the company and the continuation of its values (trust and mutual respect, openness, gratitude) over generations. As a result, the Elsener family members abide by a code of conduct that compels them to give the company their highest priority. The twenty-four descendants in the fifth generation share the family values which are those of the company and meet two to three times a year during Family Days around these values..

The holding foundations have allowed the company to maintain a vision based on taking various stakeholders into account while prioritising social and ethical considerations over pure share yields.

Starting in the 1970s, at a time where there were no statutory guidelines for the sector on a national level, Victorinox became interested in environmental protection and sustainability, not only as part of its duties as a company, but also as a key to its success. Today, the company's innovative products and professional environmental and energy management show its engagement over the long term.

The company also communicates its policy in favour of its employees as well as on its desire to maintain production and jobs in Switzerland. It secures apprenticeship positions by devoting particular importance to respect and identification with the company. As a result, every newly hired employee receives a brochure outlining company's history, as well as its values of the family. The fact that it reinvests its dividends into the company also allows it to protect jobs during periods of crisis, such as in 2001 when the company saw its turnover drop by more than 30% following the September 11 attacks and the ban on transporting any type of blade or knife in carry-on luggage.

The Fondation 1890

Holding sport clubs to ensure their mission,
their survival and exemplary governance

Background and incentive

The Fondation 1890 was established to buy out two iconic Genevan sport clubs, the Servette Football Club and the Genève-Servette Hockey Club, both of which had been close to bankruptcy in 2015 and 2018, and to provide them with structure and ensure their survival.

As specified by Didier Fischer, the foundation's chairman: *'The Fondation 1890 acts as a holding company, holding shares in companies limited by shares. We support individuals who are leaders in football, hockey or rugby. However, it is up to them to create the primary solid and competitive teams according to the objectives they establish, each for their own club, as well as the youngsters involved in the youth movements.'*⁸

⁸ 'Pourquoi la Fondation 1890 a sauvé et détient le SFC et le GSHC ?' [Why did the Fondation 1890 save and hold the SFC and the GSHC?], *Tribune de Genève*, 19 April 2018.

The foundation

The Fondation 1890 was entered into the Commercial Register of the Canton of Geneva on 27 July 2015. According to its statutes, its purpose is to promote sport as well as athletic training and education for youngsters, especially via the Servette Football Club in Geneva and the existing Geneva Cantonal Association of Football.

The foundation supports sport and its fundamental role in Geneva and its community, guaranteeing that *‘the structure of the clubs can take on its responsibilities’* with an obligation to good governance and good management. In this way, *‘Servette belongs collectively to Genevans [...] to create a solid pathway with youngsters at the base. One Swiss franc invested in sport to provide a child with a solid framework and structure is 10 francs saved from social programmes. Therein lies its virtue.’*⁹

The foundation is subject to surveillance from the Cantonal Supervisory Authority for Foundations and Retirement Institutions in Geneva (ASFIP).

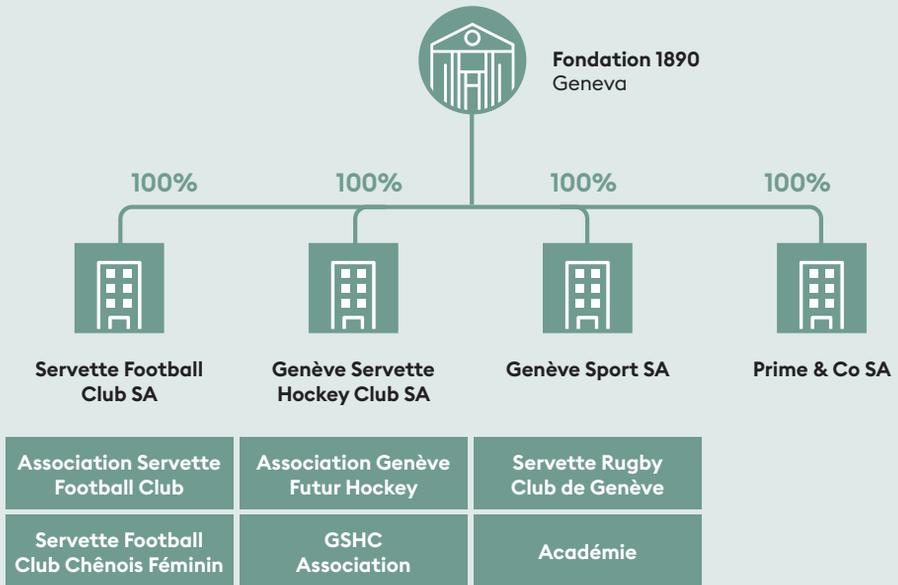
Holding and governance

Holdings and associations

The foundation is the sole shareholder of four companies, all involved in the Geneva athletic world:

- Servette Football Club 1890 SA;
- Genève-Servette Hockey Club SA, both of which ensure the management of professional teams;

⁹ *Ibidem*



- Genève Sport SA, which ensures coordination 1) for sport as regards training and means of performance, 2) for administration and organisation, logistics, financial management, human resources, legal issues, 3) for sales, marketing and communications;
- Prime & Co SA, which ensures restaurant services, catering services and drink distribution, especially for stadiums and sports centres.

In parallel with these structures, the foundation ensures the management of non-professional or amateur teams, as well as youth training, through associations, with two per sports facility:

- Association Servette Football Club (SFC)
- Servette Football Club Chênois Féminin (SFCCF)
- Association Genève Futur Hockey

- Genève-Servette Hockey Club (CSHC)
- Servette Rugby Club de Genève
- Académie Servette Rugby Club (SRC)

Governance

The foundation board is made up of four members.

No Foundation patrons sit on its board.

No members of the board sit on the boards of the companies held, except for the liaison person with Genève Sport SA and the Association Servette Rugby Club.

Financing

The foundation set precise rules for dividend distribution and the provision of sustained structures to ensure the survival of the totality of operations.

The amount of yearly donations received by the foundation is kept confidential. All the same, we know that patrons cover the operational deficit, which is supposed to diminish, if not disappear, over time. This is thanks to development of the activities and profits of Prime & Co, which ensures via the holding foundation the financing of clubs and training associations, which are unprofitable by nature. The associations in charge of training youngsters also benefit from state subsidies.

Key figures

2015

Date of establishment
of the foundation

600

Number of young people regis-
tered with the clubs

220 000

Number of spectators per year
(3 elite sports combined)

17

times Swiss champion
Servette Football Club

A closer look

Today, many European countries are looking for a way to structure their sports clubs to avoid a power struggle with overpowered shareholders, such as the current situations in France or Italy. Here the foundation ownership model can be applied as well, in a way similar to the *Vereine* in Germany or the *Socios* in Spain.

It is important to remember that the umbrella association of football clubs (Swiss Football Association, Swiss Football League for professional footballers) imposes certain rules ((1) clubs must be formed as companies limited by shares, (2) youth training must be done under the form of associations, (3) complete airtightness as regards bookkeeping and governance between the two structures). The foundation ownership model respects these rules and helps envision a virtuous sport club model to avoid the risk of putting both the club and its entire social purpose in danger, including youngster training.

Otherwise, the very nature of shareholding has influenced the salary policy of the companies held (payment of managers being fixed by internal regulations accepted by the cantonal tax

administration), as well as the ethics of management for young players (establishment of a threshold age upon which a young player leaves the academy and is engaged by a professional contract in the club's contingents; large training indemnities are paid to the association should the young player be 'sold' to another club, etc.).

The Fondation EspeRare

A major foundation in medical innovation
and in genetic diseases – An advantage
for the Swiss Health Valley

Background and incentive

There are roughly 7,000 rare diseases in the world, only 5% of which have recognised and approved treatments. With this in mind, in 2013 three executives from the Merck Serono laboratories, Caroline Kant, Florence Porte and Béatrice Greco, created the Fondation EspeRare following the laboratories' decision to close their Geneva headquarters.

The foundation developed a unique research and development (R&D) model, which allows for the therapeutic repositioning of molecules abandoned by the pharmaceutical industry in the underserved field of rare diseases. Using this model of non-profit entity focused on patient needs, the foundation plays a unifying role among the key actors in the rare disease sector. It uses the pharmaceutical know-how of its founders and its teams to allow and accelerate the development of treatments identified as having a large therapeutical potential, but which have lost the interest of the industry's large laboratories, given their weak commercial potential. As a result, the foundation successfully redeveloped Rimeporide for Duchenne muscular dystrophy, a debilitating rare

disease that affects children, even though the treatment had been abandoned by a pharmaceutical company.

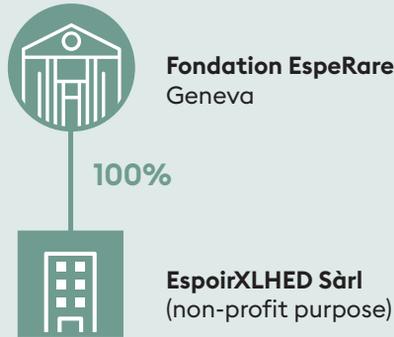
Another example is ER-004, a treatment for XLHED, a disease that impacts roughly four births for every 100,000 per year. It in turn carries a risk of infant mortality, as the baby cannot sweat and regulate its body heat. Discovered at the University of Lausanne and initially developed by an American biotech firm, the treatment was found to be ineffective when administered to new-borns. However, it proved to be very promising when delivered via intra-amniotic injection before birth. Still, it did not hold the company's interest, given its weak commercial potential and the risks tied to its ground-breaking development. Its impact on patients, though, was revolutionary: it would become the first medication to correct genetic diseases before birth. To give it a chance to see the light of day, the foundation was able to demonstrate to and convince regulatory authorities of the relevance of *in utero* treatment. In this vein, it created the social company EspoirXLHED, a non-profit limited liability company, in order to redevelop ER-004 to be administered via intra-amniotic injection to treat XLHED.

The foundation

The EspeRare Foundation was entered into the Commercial Register of the Canton of Geneva on 27 March 2013, and was housed in the Biothec Campus. According to its statutes, its purpose is to promote research and development for new therapeutic solutions and, more generally, to improve medical care for patients afflicted with rare, incurable diseases.

The foundation is subject to surveillance from the Federal Supervisory Authority for Foundations and Retirement Institutions.

Holding and governance



Holding

The foundation is the sole shareholder of the limited liability corporation EspoirXLHED, established in 2018, the purpose of which is research and development in the field of biological pathways implicating Ectodysplasin and related diseases.

Governance

The foundation board is made up of five members, whose skill profiles are in line with the company's mission: engagement with patients, knowledge of therapeutical development, knowledge of NGOs and also financial management.

Three people make up the foundation's executive board, including two who are also managers of the LLC, *ex gratia*.

Financing

By using public and charitable financing, EspeRare and EspoirXLHED's mission is to relaunch and develop treatments

solely during the R&D stages. For example, the commercialisation of ER-004 was trusted to a commercial partner – the Pierre Fabre laboratories, also tied to a foundation under French law – which is committed to putting the treatment on the market at a price accessible for patients and the healthcare system.

The confidential co-development deal between EspoirXLHED and Pierre Fabre provides for any consequent financial gains (initial payment, milestones, royalties on sales) that will be reinvested in the pursuit of its purposes and those of the Fondation EspeRare.

Key figures

2013

Date of establishment
of the foundation

7000

Number of rare diseases
throughout the world

1st medication

meant to be administered
via intra-amniotic injection

4

out of 100 000

Number of babies affected
by XLHED at birth

A closer look

This example shows that the foundation ownership model can be relevant in a field dominated by an exclusively commercial business model. A foundation can indeed create a non-profit, social company whose profits are paid back to it in order to carry out its purpose.

The Fondation EspeRare's innovative model maximises social and humanitarian impact on patients afflicted with rare diseases and opens the path to new prenatal therapies that are able to block genetic diseases before birth. With its patient-focused approach, the foundation collaborates with patient associations at every step in the medicinal development process and ensures through its ethical charter that its commercial partners also work with them to develop the treatment, which must be accessible to patients. The foundation benefits from financial returns stemming from its R&D activities, allowing eventually for its financial independence and the extension of its research to other abandoned disease treatments.

We should bring up another specificity of EspoirXLHED: non-profit companies are authorised by Swiss law and are usually used by social and solidarity economic players. They are however subject to various conditions, such as not being able to distribute dividends to associates. It is therefore possible for a foundation in this specific case to hold a non-profit company that allows it to pursue its purpose all while ensuring its financial survival.

Chapter 4

Issues and Critical Approach

As we have seen, the foundation ownership model is very topical today and offers many advantages for various different aspects. However, its hybrid nature raises several issues in the current legal context.

Tax law

1. Legal provisions and applicable circulars

While Articles 56 g LIFD (Federal Act on Direct Federal Taxation) and 23 para. 1 f LHID (Federal Act on the Harmonisation of Direct Taxation at Cantonal and Communal Levels) specify that 'economic purposes cannot be considered in principle as being in the public interest', they add that 'the acquisition and administration of important equity stock in companies has a public utility nature when interest to maintain the company occupies a subalternate position in relation to the public utility purpose and when management activities are not exercised'. Holding foundations may therefore rely on these provisions to benefit from tax exemptions, so long as they fulfil the other exemption conditions for foundations as listed in Federal Tax Administration

Circular No. 12 of 8 July 1994 (FTA Circular No. 12). In summary, exemption for public utility reasons presupposes cumulatively: 1) that the foundation pursues a public utility purpose; 2) in a disinterested manner; 3) that the funds are irrevocably affected to the purpose and exclusively used to serve this purpose and 4) the effective pursuit of this purpose.

The circular cited above adds a further condition for holding foundations: 'The law expressly specifies that economic purposes are not in principle public utility purposes. Pure capital placements – even if it is a question of shareholdings of more than 50% in companies – are no longer contrary to tax exemption when these placements do not allow for an exertion of influence on the company's management. This is notably the case when a legal subject holds voting rights. Share ownership must therefore not allow for influencing the concerned company's economic activity, which implies a clear distinction between the foundation board and the board of directors (which must therefore be independent of each other), even if an individual ensuring the liaison between them is tolerated'.

The circular specifies as well that for cases of significant shareholding, 'the law demands that interests aiming to maintain the company be subordinate to the public utility purpose. The company held must therefore provide regular, significant contributions to the foundation, which must dedicate them effectively to an altruistic activity in the public interest, therefore for public utility'.

2. Understanding and critique

The above implies that, while holding foundations with purely economic purposes cannot benefit from a tax exemption, those with a public utility purpose can, at least in theory. All

the same, however, the foundation must not ensure any direct management activities. In practice, tax administration will study, case by case and often *ex ante*, the regime the foundation is subject to, according to its purpose, its governance and its economic and philanthropic activities. This is admirably pragmatic.

All the same, for our purposes FTA Circular No. 12 significantly restricts the freedom of action of holding foundations and brakes developments of new holding foundations in Switzerland. In fact:

- FTA Circular No. 12 recognises that shareholding of more than 50% of companies does not exclude tax exemption. As for recent jurisprudence, it has decreed that a foundation, as sole shareholder of a company, can also benefit from a tax exemption. All the same, exemption for both is subject to the condition that the placements do not allow for the exercise of influence over the company's management. To us, this condition seems to misunderstand the respective role and rights of the shareholder, of the board of directors and the legal management of companies limited by shares.
- We wondered whether the governance rules imposed by FTA Circular No. 12 (including the distinct separation between the foundation board and the board of directors, excluding the liaison person) clash or not with the principles of good governance and risk management, by forbidding *de facto* shareholder representation on the board of directors. It is important to remember that the latter ensures high surveillance and not management tasks, which are delegated to management (PETER/MERCKT, 2019).
- In practice, an intermediary holding company will often be established to exert control over the company's management,

while the foundation, supported by upturns in the holding company's dividends, will concentrate on the foundation's philanthropic activity. This solution is recommended by FTA Circular No. 12 itself.

In any event, these requirements are meant in practice to dissuade entrepreneurs, urged by concerns of cost effectiveness to combine the company's survival with public utility, by putting in place rigid rules that stymie entrepreneurial dynamism. We can thus see areas of tension in some cases between the tax administration and foundations that may desire more favourable executive conditions. In order to be able to meet the motivations that we see today and to correctly handle all the applications and issues of this holding model, there is room to adapt FTA Circular No. 12.

Otherwise, foundations interested by the foundation ownership model to 'affiliate' their profit-generating activities, thereby lastingly financing their public utility activities, must be vigilant to not create a situation of 'reciprocal financial dependence'. This, according to the Federal Court, is incompatible with tax exemption, and certainly with complete tax exemption, for the foundation (for more on this subject, see our review of the ruling published in ATF 147 II 287, below on page 107).

Governance of holding foundations

1. In general

The matter of holding foundation governance is tightly linked to the tax considerations evoked above. While a holding foundation with a non-exempted economic purpose may freely determine its ties with the company, this not the case for foundations

that do benefit from tax exemption, as we have seen above. The matter is especially relevant for mixed-purpose holding foundations.

Generally, issues of governance touch upon the skills that the foundation board must group together within itself, according to the purpose pursued and the organisation of the ties between the foundation and the company held, as well as the managerial distance between the two entities.

2. In practice

Our observations have nevertheless noted that the initial board of a holding foundation is often comprised of the founder, his/her family or trusted individuals, all of whom co-opt their own successors. In most of the cases studied, we noted that the choice of board members was done in the following ways, integrating different, often cumulative criteria:

- expertise in one or more of the foundation's fields of interest;
- understanding of the activities of the companies held, or professional expertise, necessary for sustainable, lasting yields compatible with the company's development;
- adhesion to the founder's vision and the culture of the companies held, which often leads to initiation periods before the nomination of members to the board.

In a minority of cases, we noted the prevalence of attachment to the founder's family or his/her circle of trusted friends (or, following his/her death, those of the members of the board themselves), whether this be in the context of a familial charter or through tacit rules.

Surveillance of holding foundations

Foundation surveillance, an object of debate in Switzerland for several years now, has brought about several questions as to the extent and relevance of such surveillance for holding foundations.

1. Relevance of surveillance

In general, two principal reasons are given as the basis for state surveillance of foundations: protection of the founder's intentions (as the foundations do not have shareholders or members to control their management) and the safeguarding of public utility (as the foundations most often pursue public utility purposes, they must be careful that their assets be used in accordance with their purpose). We can therefore wonder whether it is relevant to submit holding foundations with exclusively economic purposes to state surveillance.

These questions are even more relevant when we note a trend among supervisory authorities to be more restrictive in a context that is becoming more complex. This can, in general, conflict with the liberal framework in which Swiss foundations have evolved and, in the case of holding foundations, lead to state influence on companies operating in the private sector.

2. Extent of surveillance

The question here is knowing whether the surveillance a foundation is submitted to also applies to the company it holds. This would be *de facto* the case if the foundation establishes consolidated accounts. According to Article 963 CO, 'where a legal person that is required to file financial reports controls one or more companies

that are required to file financial reports, the entity must prepare consolidated annual accounts (consolidated accounts) in the annual report for all the undertakings controlled'. The mere possibility of exerting control is enough to impose the keeping of consolidated accounts in the meaning of this provision, whether it is really exerted or not.

Foundations may transfer the obligation to establish consolidated accounts to an intermediary holding company, if this holding company brings together all the other companies under one single management by holding the majority of votes or through a different method, and can prove that it effectively controls them. Other reasons may free the foundation from the obligation to create consolidated accounts (according to the company's balance sheet, its profits and its staff). However, in any case, the supervisory authority may derogate these reasons and demand the establishment of consolidated accounts within the foundation. The regulations of the supervisory authorities usually recall that they carry 'the broadest powers' (Art. 3 para. 1 RSFIP-Surv (ASFIP Geneva)) or can request 'in addition to the documents that must be transmitted to it [...] other indications, reports and documents' (Art. 18 RLPPF of 12 May 2017 (Supervisory Authority AS-SO)).

Whatever it may be, the principles of proportionality and subsidiarity apply to the access, via the supervisory authority, to the organisation and to the financial states of the companies held by the foundations. Everything depends on the structuring for each case (existence of an intermediary holding company, for example).

Inheritance law

Any donation to a foundation implies a divestment of assets to attribute them to said foundation, whether this be via donation during the individual's lifetime (Art. 239 CO) or via a deed with

cause of death in the meaning of Article 245 CO. Swiss inheritance law restricts disposing rights, when it comes to donations to a foundation, to the available proportion (Art. 493 para. 1 CC). As such, transferring one share in a company to a foundation, whether it comes from a donation between living parties or an attribution following a death, is subject to a reduction if it impacts the reserves (Art. 475 and 527 CC).

In practice, the existence and importance of reserves dissuades some entrepreneurs from considering establishing holding foundations, insofar as all of their assets combined, independent of the company, do not allow for their rightful heirs to be negatively impacted. The only means possible are therefore to install an inheritance agreement, a complex process for some family configurations.

The new inheritance law, in effect starting 01 January 2023, increases the testator's freedom to dispose due to a reduction of the hereditary rights. Indeed, those concerned by these reductions are, on the one hand, the descendants, and on the other, the parents. The hereditary reserve of descendants goes from three-fourths to half of the inheritance rights, while that of the parents is entirely removed. All the same, the hereditary reserve of a surviving spouse or registered partner remains intact, i.e. half of their inheritance rights.

This revision therefore gives a wide manoeuvring margin to the testator and will facilitate transmission of companies via inheritance or the establishment of holding foundations in Switzerland.

Conclusion

Are holding foundations a type of cure-all?

Although, as we have seen, this alternative long-term governance and ownership model can help strengthen the survival and prosperity of the company, this survival still depends on the company's success when it was led by its historical founder and his/her enduring charisma (THOMSEN, 2017).

If in theory it allows for performance at the same or even better levels than classic companies, everything will depend on the manner in which long-term ownership is exerted in practice as well as in its ability to avoid the 'pitfalls of procrastination, cronyism or nepotism' (HANSMANN/THOMSEN, 2013).

Although some authors (GAUTIER, 2021) promote the longevity and stability of foundation-owned companies in times of crisis, others (GILSON, 2014) wonder if this model is capable of assuming both the stability and the quick decisions necessary to adapt to the changes that rise up from the economic environment when the company has to face a crisis situation.

If this model also, in theory, facilitates innovation and the company's social approach, executing this model will require good management, anchored on the company's values, and financial solidity (BØRSTING/THOMSEN, 2017).

It would also be interesting to examine whether a foundation's statutory purpose (either purely economic or of public utility, the holding structure being a means to attain this purpose) influences its behaviour over time and on the issues we have pointed out. That, however, is not the purpose of this work.

Whatever the outcome, the establishment of a holding foundation must be carefully considered, and its governance must be elaborated while taking into account both the founder's motivations and the legal, fiscal and economic matters mentioned above. It is under this condition that this alternative long-term governance and ownership model can today create value for companies and society as a whole.

Indeed, while we can praise Swiss pragmatism, which treats each case according to its specificities, we still do not have a clear framework, rooted in an official position, that could prompt entrepreneurs to take the plunge. This can lead some to think that the model is still incomplete.

It will be interesting to follow the evolution in practice of the supervisory authorities and tax administration, which will exert a rather significant influence on the development of foundation ownership in Switzerland. It adheres to models that are becoming ever more topical within the context of the 21st century.

Bibliography

I. Literary Review

1. Works

GAUTIER Arthur/BOTHELLO Joel/SEGHERS Virginie/DELSOL Xavier/LE BRUN François (edit.), *Les Fondations actionnaires : première étude européenne* [Holding foundations: first European study], Paris, Prophil, 2015.

This study provides a first overlook of holding foundations in Europe. It focuses on four countries: Denmark, Germany, Switzerland and France. Each of the authors present a panorama of the general situation, but also the legal situation in which the holding foundations are listed. All of this is illustrated by key figures and specific examples of holding foundations. Furthermore, the study brings together contributions by invited authors.

GRÜNINGER Harold, *Die Unternehmensstiftung in der Schweiz: Zulässigkeit, Eignung, Besteuerung* [Corporate foundations in Switzerland: Legitimacy, suitability, taxation], Basel thesis, Basel, Helbing Lichtenhahn, 1984.

This thesis analyses corporate foundations and their sub-groups: those that are active in an industry (Unternehmensträger-

stiftung) and those that hold shares in an entity that is active in an industry (Holdingstiftung). It looks at its admissibility in Swiss law and takes on the issues tied to state surveillance, in a fiscal context, as well as the rigidity of the legal form of the foundation in an economic context.

MEIER Philippe/DE LUZE Estelle, *Droit des personnes : Articles 11-89a CC*, [Law of persons: Articles 11-89a CC] Geneva, Zurich, Schulthess, 2014.

This work discusses the law of persons (Art. 11 to 89a CC). It presents the concept of foundations and gives a view into corporate foundations (N1322 et seq.).

MEIER-HAYOZ Arthur/FORSTMOSER Peter, *Droit suisse des sociétés : avec mise à jour 2015* [Swiss corporate law: with a 2015 update], Bern, Stämpfli, 2015.

The work handles corporate law as a whole. It reviews all the different kinds of companies and also takes on the other connected fields such as accounting law and commercial register law. The work also analyses corporate foundations (p. 852 et seq.). It takes on the concept, its legal nature, its admissibility in Swiss law – which is recognised today – and its economic importance.

MERKT Benoît, *Droit des fondations d'utilité publique* [Public utility foundation law], Bern, Stämpfli, 2021.

This work is a multi-disciplinary study of civil, administrative and fiscal law applicable to Swiss public utility foundations. It takes on the particular case of holding foundations in the context of tax exemptions for public utility foundations (N701 et seq.). It also looks at the requirements in order to benefit from tax exemption set down by the Federal Tax Administration Circular No. 12 of 8 July 1994.

MONTAVON Pascal/MONTAVON Michael, *Abrégé de droit commercial : entreprise individuelle, sociétés de personnes, SS – SNC – SCM, sociétés de capitaux et mixtes, SA – SARL – SCOOP, registre du commerce, droit comptable, droit concordataire, loi sur la fusion, groupes – cartels – concurrence, papiers-valeurs, titres inter-médiés, placements collectifs, aspects de droit boursier, loi sur la surveillance de la révision, droit pénal économique, législation anti-blanchiment, droit international privé des sociétés, 6^e éd.* [Abstract of commercial law: single-member companies, partnerships, SS – SNC – SCM, corporations and joint enterprises, company limited by shares – LLC – SCOOP, commercial register, accounting law, concordat law, merger law, groups – rings – competition, securities, intermediary securities, collective investments, aspects of stock market law, law on review surveillance, economic criminal law, anti-laundersing legislation, private international corporate law, 6th ed.], Geneva, Schulthess, 2017.

This work is a technical, practical presentation covering the entirety of commercial law. It mentions holding foundations and provides a definition for them (p. 907).

PFISTER Loïc, *La fondation* [Foundations], Zurich, Schulthess, 2017.

This work looks at foundations under Swiss law as a whole. With the goal of offering a practical guide, it looks at foundations, from their establishment to their dissolution, all while explaining their organisation and their functioning. It also examines important questions such as governance, the responsibility of the foundation board, modification of the foundation or taxation. PFISTER looks at holding foundations in relation to the legality of economic purposes.

PRAZ Emilie M., *L'Entreprise de l'un des époux en droit matrimonial* [Companies of one of the spouses in matrimonial law], thesis, Zurich, Schulthess, 2018.

This thesis from the University of Fribourg examines the impacts that holding a company can have on matrimonial law. These reflections are enforced when the entrepreneur operates a company under a foundation. In this case, the entrepreneur spouse divests himself/herself of his/her assets and can then infringe on the mass of acquests.

PROPHIL, *Voyage au pays des fondations actionnaires : le premier guide pratique* [Travels in the land of holding foundations: the first practical guide], Paris, Prophil, 2020.

This guide establishes the four stages of creating a holding foundation. This is defined as having a mission that is both philanthropic and economic. The stages are: identification of key factors for engagement, definition of the economic mission, structuring of efficient governance between the foundation and the company and the installation of a lasting philanthropic strategy. The work also brings together contributions from the authors invited, including 'Switzerland: land of philanthropy' by Delphine BOTTGE (p. 78 et seq.). This contribution explains why Switzerland is favourable to holding foundations. It provides a brief look at the legal framework while also examining questions of taxation and surveillance.

PROPHIL, *Fondations actionnaires et investisseurs : un intérêt commun* [Holding foundations and investors: a common interest], Paris, Philrouge, 2020.

This work analyses the conditions under which a foundation that only holds part of the shares of a company can cohabitate with aligned impact investors without renouncing company growth or performance. It collects testimonies from entrepreneurs who have chosen this model and convinced investors.

SCHMID Roger, *Die Unternehmensstiftung im geltenden Recht, im Vorentwurf zur Revision des Stiftungsrechts und im*

Rechtsvergleich [Corporate foundations in applicable law in the preliminary draft of the revision of foundation law and in comparative law], thesis, Zurich, Schulthess, 1997.

This thesis studies the corporate foundation model in Swiss law. The author analyses under a Swiss law perspective (current law within the context of the preliminary draft of the revision of foundation law in 1993) and a comparative law perspective (German, Liechtensteiner, Austrian and U.S. law). SCHMID also presents the foundation ownership model (p. 15 et seq.), while examining its concept, establishment, possible purposes, scope in Switzerland, fiscal treatment and implications within the context of the preliminary draft in question. The author also systematically surveys 63 holding foundations, while applying at the same restrictive criteria (direct shareholding of more than 20% in a Swiss company and/or a company the purpose of which is to ensure the existence of a company).

SPRECHER Thomas/EGGER Philipp/VON SCHNURBEIN Georg, *Swiss Foundation Code 2021*, Bern, Stämpfli, 2021.

This work is the fourth edition of the Swiss Foundation Code, a general reference framework for good governance of a public utility foundation. It offers best governance practices under the form of 4 principles and 28 recommendations, also applicable to holding foundations. The main update of this edition is the addition of the principle of social responsibility, which targets taking the company's evolution into account and its new issues in interpreting the foundation's purpose. The Code examines the establishment, conduct, support and finances of the foundations.

THOMSEN Steen, *The Danish Industrial Foundations*, Copenhagen, Djøf, 2017.

This work is a reference for Danish holding foundations, which the author calls 'industrial foundations.' The author conducts a complete analysis of the model: he looks at this type of foundation's

functioning, governance, fiscal treatment, performance and role in the Danish economy and in philanthropy.

VEZ Parisima, *La Fondation: lacunes et droit désirable : une analyse critique et systématique des articles 80 à 89 CC* [Foundations: gaps and desirable law: a critical and systematic analysis of Articles 80 to 89 CC], Bern, Stämpfli, 2004.

This study, published in 2004, is meant to propose a new approach to the concept of foundations under Swiss law. The author highlights the weaknesses of the system controlling foundations and comes up with solutions to mitigate them. She examines in the first part their classification (positive law, critiques of received ideas and suggestions) and in the second part their regulation (establishment, organisation, surveillance, modification and dissolution). She discusses holding foundations in the context of foundations with economic purposes. Although recognised by jurisprudence, they remain controversial in doctrine. The author presents arguments for rejecting and admitting economic purposes.

2. Articles

ACHLEITNER Ann-Kristin/BAZHUTOV Dmitry/BETZER André/BLOCK Jörn/HOSSEINI Florian, 'Foundation ownership and shareholder value: An event study', in *Review of Managerial Science* 14/3 2020, p. 459 et seq.

This study examines the effects of holding a company by a foundation on its shareholder value. According to the study, announcing a decrease of shares by a foundation has a positive effect on stock markets, although announcing an increase has no effect at all. In general, the authors conclude that the stock markets are wary of holding foundations. All the same, the results do not provide solid reasons for this scepticism.

BADDELEY Margareta, 'L'utilisation des fondations à des fins successorales' ['The use of foundations for inheritance purposes'], in *Journée de droit successoral 2017* [STEINAUER Paul-Henri/MOOSER Michel/EIGENMANN Antoine, ed.], Bern, Stämpfli, 2017, p. 73 *et seq.*

The author analyses foundations through the perspective of inheritance planning. She presents first the characteristics of foundations, then illustrates different means through which the settlor can carry out its choice. Finally, she addresses several questions specific to the field. The article brings to light the many benefits a foundation offers when it is used for inheritance purposes: greater flexibility (principle of founder's freedom) as well as a guarantee of the existence and functioning of the foundation in alignment with its chosen purpose.

BLOCK Jörn/JARCHOW Svenja/KAMMERLANDER Nadine/HOSSEINI Florian/ACHLEITNER Ann-Kristin, 'Performance of foundation-owned firms in Germany: The role of foundation purpose, stock market listing, and family involvement', in *Journal of Family Business Strategy* 11/4 2020.

This empirical study examines the performance of companies held by foundations in Germany. The analysis has three results. Firstly, companies held by family foundations outperform companies held by charitable foundations. Secondly, stock listings have no effect on the performance of foundation-owned companies. Thirdly, participation by the founder's family within the board of directors or the supervisory board seems to have a positive effect on the company's performance.

BØRSTING Christa/THOMSEN Steen, 'Foundation Ownership, Reputation, and Labour', in *Oxford Review of Economic Policy*, 33 (2), 2017 p. 317 - 38.

By using paired data on companies and their employees, the authors of this study bring to light the fact that companies

belonging to foundations are more stable employers that pay their employees better and keep them for longer. Altogether, solid evidence indicates that foundation ownership is associated with commercial behaviour that is more responsible for employees.

BOTTGE Delphine, 'The foundation-owned company model: the path to build tomorrow's society by unifying long-termism and philanthropic impact', in *Philanthropy Impact Magazine* 01/2021, p. 12 *et seq.*

The coronavirus pandemic has had a significant social and economic impact, and the philanthropic sector was not spared. The author presents the foundation ownership model and its relevance in this context. She also addresses the performance of companies held and the taking into account, by their care, of all stakeholders.

BOTTGE Delphine, 'Shareholder foundations (holding foundations) in Switzerland, Overview from a legal perspective', in *Expert Focus* 3/2019, p. 180 *et seq.*

The author provides a legal overview of holding foundations in Swiss law. She provides a functioning definition of the model via the determined criteria. She also addresses the legal issues that the model brings up, such as the issues regarding surveillance, tax law, governance and inheritance law. She also discusses the relevance of holding foundations, including a comparison with Denmark and Germany.

CIEPLEY David, 'How America's corporations lost their public purpose, and how it might be (partially) restored', in *Accounting, Economic, and Law: A Convivium* 10/3 2020, p. 1 *et seq.*

The author conducts a historical, critical analysis of commercial companies in the United States. Originally developed with ties to public utility purposes, they operate today with short-term vision, which is ultimately detrimental to the company and generally

undesirable. The author also explores the foundation ownership model as a solution allowing to re-establish, in part, a long-term vision that is beneficial to the company's interests.

GAUTIER Arthur, 'La fondation actionnaire un modèle à explorer pour construire le monde d'après' [The holding foundation, a model to explore to create 'tomorrow's world'], in *The Conversation*, May 2020.

The author emphasises the slow yet steady growth of companies held by foundations. He relies on European examples to underline these companies' resilience.

GETZ Isaac/MARBACHER Laurent, 'Pourquoi les entreprises "altruistes" sont-elles plus capables que les autres d'affronter l'avenir' [Why 'altruistic' companies are more capable than others to face the future], in *Harvard Business Review*, May 2020.

The authors define the concept of 'altruistic' companies, which unconditionally serve their employees, their clients, their providers and the communities where they operate, through their activities at the heart of their fields. They cite as an example Handelsbanken, held at 10.3% by the Oktogonen foundation in Sweden.

GILSON Ronald J., 'The Nordic Model in an International Perspective: The Role of Ownership', in *The Nordic Corporate Governance Model* [LEKVALL Per ed.], SNS Forlag 2014, p. 94 *et seq.*

This essay, dedicated to the governance model in the Nordic countries, presents different shareholding systems and compares this model to that prevailing in the United States. It shows the reticence of institutional investors – to which he associates Swedish foundations – to being proactive by illustrating some of the governance rights associated to their positions as shareholders.

HANSMANN Henry/THOMSEN Steen, 'Managerial Distance and Virtual Ownership: The Governance of Industrial Foundations', in *European Corporate Governance Institute (ECGI) Finance Working Paper No. 372/2013*.

This article explores the reasons explaining why foundation-owned companies outperform companies with classic holding models. For this, the authors compare the performances of 113 Danish foundation-owned companies, using the criterium of 'managerial distance'. This helps evaluate to what extent a foundation creates a distinct identity from the company that it holds. The results of this work reveal that a greater distance between the two structures leads to better performance for the company. This is due to the heightened intensity, clarity and objectivity that the foundation demonstrates when it concentrates on matters of performance for the company held.

HENREKSON Magnus/JOHANSSON Dan/STENKULA Mikael, 'The rise and decline of industrial foundations as controlling owners of Swedish listed firms: the role of tax incentives', in *Scandinavian Economic History Review* 68/2 2020, p. 170 et seq.

This study examines why holding foundations were used in Sweden, starting from the First World War, in general – exerting control on an important part of large Swedish companies listed on the Stockholm Stock Exchange – and why they have declined over the last decades. The authors explain these phenomena largely with fiscal reasons.

JAKOB Dominique, 'The role of foundations in family governance', in *Trusts & Trustees* 1/2020, p. 4 et seq.

This article discusses the role that foundations can play in maintaining family governance within family companies. The author presents the different possible models in this context, including

holding foundations; in other words, holding foundations with a purely economic purpose (or holding a company), holding foundations with purely philanthropic purposes, holding foundations with mixed purposes (economic and philanthropic) and the 'double foundation' model (a holding foundation with economic purpose and a holding foundation with a purely philanthropic purpose both hold the family company). The models presented integrate the family values and thereby ensure reinforced familial governance.

JAKOB Dominique/STUDEN Goran, 'Foundation Law in Switzerland – overview and current developments in civil and tax law', in *Developments in Foundation Law in Switzerland* [PRELE Chiara ed.], Dordrecht (Springer) 2014, p. 283 *et seq.* *This article presents the legal framework for foundations in Switzerland, including holding foundations. The authors also discuss questions of auditing, responsibility, fiscality and governance.*

KOLLER Thomas/DIAS Raoul, 'Die Steuerbefreiung gemeinnütziger Holdingstiftungen und die Wettbewerbsneutralität', in *Grundfragen der juristischen Person : Festschrift für Hans Michael Riemer zum 65. Geburtstag* ['Tax exemption for non-profit holding foundations and competitive neutrality', in *Fundamental questions for legal persons: commemorative publication for Hans Michael Riemer for his 65th birthday*] [BREITSCHMID Peter/PORTMANN Wolfgang/REY Heinz/ZOBL Dieter, edit.], Bern, Stämpfli, 2007, p. 151 *et seq.* *This article examines the question of tax exemption for holding foundations under Swiss law. The authors handle the conditions and issues, especially as regards competitive neutrality.*

KÜNZLE Hans Rainer, 'Unternehmensstiftung – Quo Vadis?' [Corporate foundations – Quo Vadis?] in *L'expert-comptable Suisse* [*The Swiss Accounting Expert*] 05/2007, p. 369 *et seq.*

This article examines the regulatory framework of corporate foundations in Swiss law. According to KÜNZLE, it is too rigid and not attractive enough, especially from the point of view of civil law rules for family foundations and fiscal law rules in general. He provides solutions to this inspired by an analysis of German, Austrian and European law.

LIDEIKYTE HUBER Giedre, 'Philanthropy and Taxation, Swiss legal framework and reform perspectives', in *Expert Focus* 3/2018, p. 209 *et seq.*

The author addresses the fiscal implications of philanthropy in Swiss law. She analyses the applicable scheme to entities pursuing a public utility purpose (exemption) and that applicable to donors (deduction). She also provides an overview of the European legal framework and the Swiss legal framework's perspectives for evolution with the Luginbühl initiative.

MAYER Colin, 'Who's responsible for irresponsible business? An assessment', in *Oxford Review of Economic Policy*, Volume 33, Number 2, 2017, pp. 157 *et seq.*

The author brings to light the systemic failings of capitalism and recommends partnerships between the government, legislators, investors and companies to bring about reforms that respect the roles of everyone. He advocates working on new shareholding and governance models and states the relevance of holding foundations as a hybrid model that ensures the pursuit of two distinct purposes (profit and non-profit) by two distinct entities. He also highlights studies on the performance of foundation-owned companies.

PETER Henry/MERKT Benoît, 'Utilité publique et activité économique' [Public utility and economic activity], in *Expert Focus* 3/2019, p. 209 *et seq.*

This article focuses on recognised public utility entities exerting an economic activity. To this effect, the authors clarify the distinction between economic purpose and economic activity. They discuss the tax regime applicable to these entities: the conditions for exemption due to public utility and the particular exemption conditions, respectively, for corporate foundations and for holding foundations. The article critiques some of the criteria adopted by Circular No. 12 of 8 July 1994 (which describes said exemption conditions) and suggests improvements.

PETER Henry/VENTURA Livia/BOTTGE Delphine/PFAM-MATER Vincent, 'Profit and non-profit purposes: Can legal entities serve two masters at once?' in *Expert Focus* 3/2019, p. 163 *et seq.*

The authors provide a general overview of different types of hybrid entities and tandem structures in Switzerland and abroad – including holding foundations, which help pursue distinct objects at the same time (profit and non-profit).

ROGUET Jean-Charles, 'Un modèle injustement méconnu' [An unjustly unknown model], in *Les fondations actionnaires : première étude européenne* [Holding foundations: a first European study] [GAUTIER Arthur/BOTHELLO Joel/SEGHERS Virginie/DELSOL Xavier/LE BRUN François, ed.], Paris, Prophil, 2015, p. 38 *et seq.*

The author provides an overview of the state of law as concerns Swiss holding foundations. To do so, he presents the different foundation categories (public utility, economic, family and public law) and their functioning.

SØREN Friis Hansen, 'Die gemeinnützige Stiftung in Dänemark' [Non-profit foundations in Denmark], in *Gemmeinnützige Stiftung und Stiftungsmanagement* [Non-profit foundations and

foundation management] [SCHURR Francesco, ed.] Zurich, Basel, Geneva, Schulthess, 2010, p. 55 *et seq.*

This article is a presentation of the Danish foundation model. The author addresses the history, concept and different types of foundations as well as specific questions, such as supervisory and tax treatment of these structures. Among the different types of foundations that exist, the author presents the corporate foundation model (Unternehmensstiftung), of which the holding foundation is a sub-group.

THÉVENOZ Luc, 'La transmission d'entreprise au moyen d'un trust suisse' [Company transmission through Swiss trusts], in *Vers les sommets du droit : Liber amicorum pour Henry Peter* [To the heights of the law: *Liber amicorum* for Henry Peter] [TRIGO TRINDADE Rita/BAHAR RASHID/NERICASTRANE Giulia, ed.], Geneva, Schulthess, 2019, p. 239 *et seq.*

The author examines the question of the transmission of a company, which requires reconciling two objectives that are often hard to combine: on the one hand, concentrating decisive power in the hands of a restricted number of people and, on the other hand, ensuring an equitable distribution of assets between future heirs. A trust under Swiss law seems like an adequate solution: indeed, THÉVENOZ presents the model and its functioning, and explains its benefits for this problem. Trusts, as conceived in common law, are an alternative model to holding foundations.

THOMSEN Steen, 'Foundation ownership and firm performance: a review of the international evidence', in *Corporate Governance in Contention* [DRIVER Ciaran/THOMPSON Grahame, edit.], Oxford (Oxford University Press) 2018, p. 66 *et seq.*

This chapter attempts to evaluate the viability of the foundation ownership model by examining the performance of foundation-

owned companies. The author reviews data coming from Scandinavia, the Netherlands, Germany, Italy and the United States.

THOMSEN Steen/POULSEN Thomas/BØRSTING Christa/KUHN Johan, 'Industrial foundations as long-term owners', in *European Corporate Governance Institute (ECGI) Finance Working Paper* No. 556/2018.

The authors state, on the basis of data regarding Denmark, that holding foundations are 'long-term owners', that is they practice long-term governance. They bring to light the following points: these foundations are more stable and have a longer lifespan than their alternatives; the companies held use conservative capital structures with limited financial leverage. The managers of these companies are less frequently replaced.

VILLALONGA Belen/AMIT Raphael, 'How do family ownership, control, and management affect firm value?', in *Journal of Financial Economics* 80/2 2006, p. 385 *et seq.*

This contribution examines the performance of family companies in relation to non-family companies by distinguishing three fundamental elements: shareholding quality, control and management. The foundation ownership model is used in the context of family company governance.

WERMELINGER-KURMANN Erika, 'First foundation experiences with the new accounting law', in *La Suisse – pays de fondations 2016* [proFonds, Association faitière des fondations d'utilité publique de Suisse, ed.] *Switzerland – land of foundations 2016* (proFonds, umbrella association of public utility foundations in Switzerland, ed.)] Basel, proFonds, 2016, p. 16. *The author addresses the new accounting law (introduced on 01 January 2013) in the context of foundations – which is applied*

'by analogy'. She provides a brief overview of the points to be retained for this type of structure.

WÜRMLI Martin, 'Das gemeinnützige Unternehmen' [Non-profit companies], in *Pratique juridique actuelle* [Current judicial practice] (PJA/AJP) 07/2010, p. 901 *et seq.*

This article addresses the matter of whether a company can benefit from a tax exemption if it uses all its net profits for a public utility purpose. The author declares that he is in favour of such exemption, which according to him is justified because of the altruistic process such a company adopts. This solution helps favour 'companies of a public utility nature' and thereby encourages activities geared towards long-term, sustainable projects.

ZANETTI Andrea, 'Établissement de comptes consolidés selon le droit comptable actuel' [Establishment of consolidated accounts according to current accounting law], in *L'expert-comptable Suisse* [The Swiss Accounting Expert] 06-07/2014 p. 482 *et seq.*

This article explains in detail the process of establishing consolidated accounts under the new accounting law that came into effect on 01 January 2013. The obligation to establish consolidated accounts also applies to holding foundations under certain conditions, as detailed by the author.

ZIHLER Florian, 'Zulässigkeit von Holdingstiftungen aus der Sicht der Handelsregisterbehörden' [Legitimacy of holding foundations within the perspective of the commercial register], in *Droit des sociétés et droit du registre du commerce : revue de la législation et de la pratique (REPRAX) 2018* [Corporate law and commercial register law: review of legislation and practice (REPRAX) 2018], p. 69 *et seq.*

The author examines holding foundations under the perspective of commercial register law. He analyses the question of whether a

holding foundation with an exclusively economic purpose can be registered in the commercial register. According to him, this is admissible, even if the position of the Federal Court is uncertain when it applies to foundations. Taking into account the situation, ZIHLER suggests opting for a mixed purpose.

ZÖBELI Daniel/ZIHLER Florian, 'Le nouveau droit comptable vaut également pour les fondations' [The new accounting law also applies to foundations], in *Rapport sur les fondations en Suisse 2012* [2012 report on foundations in Switzerland] [ECKHARDT Beate/JAKOB Dominique/VON SCHNURBEIN Georg, ed.], p. 18 *et seq.*

This contribution addresses the adoption of the new accounting law on 23 December 2011 and its implications for foundations. Indeed, it creates obligations for foundations, by distinguishing small and large foundations. In particular, for large foundations, the obligation for a foundation to establish consolidated accounts when it is a foundation subject to the obligation to establish yearly accounts that controls one or more companies (equally obligated to establish yearly accounts) and that, with them, the foundation outstrips the value thresholds.

ZURKINGEN-ERISMANN Linda/SIEBER Hans, 'Unternehmensstiftung als Instrument der Nachfolgeregelung, Gestaltungsmöglichkeiten und rechtliche Schranken' [Corporate foundations as instruments of succession regulation, organisational possibilities and legal limits] in *L'expert-comptable Suisse* [*The Swiss Accounting Expert*] 10/06 2006, p. 740 *et seq.*

This article provides an overview of the foundation ownership model in Swiss law. It also addresses points of interests such as the motivations of the founder to create this type of foundation and the possible statutory purposes.

3. Commentaries

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GEISER Thomas/FOUNTOULAKIS Christiana, *Basler Kommentar, Zivilgesetzbuch I* [Basel Commentary, Civil Law Book I], 6th ed., Basel, Helbing Lichtenhahn, 2018.

NOËL Yves/AUBRY GIRARDIN Florence (ed.), *Commentaire romand, Impôt fédéral direct (LIFD)* [French-speaking Switzerland Commentary, Federal Direct Tax (LIFD)], 2nd ed., Basel, Helbing Lichtenhahn, 2017.

PICHONNAZ Pascal/FOËX Bénédicte/FOUNTOULAKIS Christiana (ed.), *Commentaire romand, Code civil I* [French-speaking Switzerland Commentary, Civil Code I], 2nd ed., Basel, Helbing Lichtenhahn, 2022.

4. Press articles

BANQUE DU LUXEMBOURG, 'Les fondations actionnaires : l'entreprise au service du bien commun' [Holding foundations: companies serving the common good], *in écho des entreprises*, 22 May 2018.

BOISSEAU Laurence, 'Bercy pourrait encourager l'essor des fondations actionnaires' [Bercy could encourage the growth of holding foundations], *in Les Échos*, 14 February 2018.

- BOISSEAU Laurence, 'Bercy veut donner un coup de pouce aux fondations actionnaires' [Bercy wants to encourage holding foundations], in *Les Échos*, 2 May 2017.
- DELSOL Xavier, 'Les fondations actionnaires permettront un financement privé plus important des associations' [Holding foundations will allow for larger private financing than associations], in *Associations mode d'emploi*, 29 November 2018.
- DELSOL Xavier, 'La (trop) rare fondation actionnaire' [The (too) rare holding foundation], in *Juris Associations*, 01 May 2018.
- DELSOL Xavier, 'Pour maintenir les entreprises, leur capital, leurs emplois en France, créons des fondations actionnaires !' [To keep companies, their capital and their jobs in France, let's create holding foundations!], in *L'Opinion*, 16 March 2017.
- FLORET Elsa, 'Les fondations actionnaires sont en phase avec une économie durable', [Holding foundations are in line with a sustainable economy], in *L'Agefi*, 6 March 2019.
- GAUTIER Arthur, 'Les fondations actionnaires, un modèle de gouvernance très répandu et efficace' [Holding foundations, a very widespread and effective governance model], in *Harvard Business Review France (HBR France)*, 13 April 2015.
- LELONG Patrick, 'Philanthropie, un moyen efficace de renforcer la cohésion familiale' [Philanthropy, an effective means of reinforcing familial cohesion], in *Le Monde*, 06 June 2017.
- MADÉLINE Béatrice, 'La fondation, gardienne des consciences' [Foundations, conscience keepers], in *Le Monde*, 15 April 2018.

SEGHERS Virginie, 'Une fondation actionnaire suppose une vision de long terme, la volonté de contribuer à l'intérêt général et d'inventer une nouvelle gouvernance' [Holding foundations allow for long-term vision, a desire to contribute to public utility and the creation of a new type of governance], in *Le Monde*, 26 October 2020.

SPRENGER Anne-Sylvie, 'La révolution philanthropique est en marche' [The Philanthropic revolution is underway], in *Le Temps*, 25 May 2018.

VICENTINI Daniel, 'Pourquoi la Fondation 1890 a sauvé et détient le SFC et le GSHC?' [Why did the Fondation 1890 save and hold the SFC and the GSHC?], in *Tribune de Genève*, 19 April 2018.

ZUMBACH Caroline, 'La Fondation Wilsdorf lève le voile sur ses activités' [The Fondation Wilsdorf lifts the veil on its activities], in *Tribune de Genève*, 20 November 2019.

Jurisprudence review

ATF 147 II 287

This judgment confirms that holding a 100% share is compatible, in theory, with tax exemption for a public utility foundation. 'Having the quality of unique or majority shareholder does not allow a priori for recognition that a foundation acts as manager for a company and therefore the exclusion of its exemption in the meaning of Art. 56 para. g LIFD; other factual elements must confirm the endangerment of the public utility purposes pursued by the foundation due to its implication in the held company and its interest in maintaining this'. In this judgment, the Federal

Court highlighted a 'reciprocal financial dependence' between the foundation and the company completely held and thereby confirmed a refusal of exemption pronounced by the cantonal tax administration of the canton of Vaud, specifying in its analysis that the result would 'perhaps' have been different if 'the foundation had placed its fortune in accordance with the principles of security, liquidity and risk distribution, as required by Art. 84 para. 2 CC [...], and, as a result, invested in various companies'. This argumentation is based on the existence of a loan contract between the crediting foundation and the debtor company, capable of creating a conflict of interest according to the Federal Court.

We must still keep in mind the particular context behind this judgment: the foundation exerted itself the commercial activity of its subsidiary before transferring it to the latter and asking for a tax exemption. This led the Court to conclude that it 'is in any case clear that Art. 56 para. g LIFD was not meant to allow a foundation originally subject to tax due to its commercial activities to continue to indirectly reap the revenues with the benefit of a tax exemption following a simple transfer of companies to a holding company, of which it is the sole shareholder'.

ATF 127 III 337 in JdT 2002 I 359, SJ 2002 I 193.

This judgment of principle establishes the legality of economic purposes for foundations, outside of family foundations in the meaning of Art. 335 para. 1 CC. It would be interesting to lay out the facts. A foundation was established in 1985 by Mr O. with the purpose of maintaining and promoting the O. group (a group of companies held by the holding company OIHL) as a family company. The following year, the members of the O. family, except for E., transferred 92 of the 100 shares of the OIHL company to the foundation, corresponding to 92% of the voting rights in the company and 9.2% of its share capital. Mr O. passed away in 1995. Two years later, his widow along with two other individuals sought to sue the O.

Foundation, concluding that the Court should state that the above-mentioned purpose was null and void from its establishment and, as a result, that said purpose should be struck out from the deed of foundation, where it figured. The Court arrived at the conclusion, after examining the jurisprudence and related doctrine, that an economic purpose was admissible.

ATF 120 II 137.

This judgment regards the question of entrance into the commercial register of a foundation's bodies. It establishes that the bodies able to represent the foundation are required to be entered into the commercial register (Recital 3).

ATF 111 II 97.

This judgment touches upon the extent of the power of appreciation of the foundation supervisory authority (Recital 3). The authority must respect the foundation's autonomy: it must show restraint and cannot intervene unless the foundation's bodies exceed or take advantage of their freedom of discretion.

ATF 110 Ib 17 in JdT 1986 I 207.

This judgment touches upon the obligation for foundations to perform bookkeeping (Recitals 2 and 3). This is necessary when a foundation operates a commercial company. In addition, this obligation has consequences regarding taxation of capital gain.

Judgment of the Federal Administrative Court B-6161/2011, B-6165/2011 of 4 October 2013.

This judgment touches upon the foundation supervisory authority (Recital 3). It explains its general mandate evoked in Art. 84 para. 2 CC, its powers (including the measures it disposes of) and the means of referral (denunciation and complaint). It also addresses

the question of distributing jurisdiction between the supervisory authority and the civil judge.

Judgment of the Federal Court 2C_251/2012 of 17 August 2012.
The Federal Court specifies the compatibility of an economic activity with tax exemption for reasons of public utility. In fact, in order to pursue its public utility purpose, a foundation may exert an economic activity if it is ancillary (Recital 3.1.1).

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Table of Abbreviations

CC	Swiss Civil Code of 10 December 1907 (RS 210)
CO	Swiss Code of Obligations of 30 March 1911 (RS 220)
LIFD	Swiss Federal Law on Direct Federal Taxation of 14 December 1990 (RS 642.11)
LIPM	Geneva Law on the Taxation of Legal Persons of 23 September 1994 (RS/GE D 3 15)
LHID	Swiss Federal Law on the Harmonisation of Direct Taxes of Cantons and Municipalities of 14 December 1990 (RS 642.14)
RSF-VD	Vaud Regulation on Foundation Surveillance of 30 April 2008 (RS/VD 211.71.1)
RSFIP-Surv.GE	Geneva Regulation on Civil Law Foundation and Retirement Institution Surveillance of 29 March 2012.
RLPPF-VD	Vaud Regulation on LPP and Foundation Surveillance of 12 May 2017

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This book presents the results of her analysis on more than one hundred Swiss foundations, which hold companies, and highlights the diversity of structures and incentives, presenting case studies of prominent foundations (Victorinox and Carl und Elise Elsener-Gut, Hans Wilsdorf (Rolex), 1890 (Servette), Baur, EspeRare, etc.).

This book will be of interest to academics (students, researchers) as well as to practitioners (business leaders, foundation board members, lawyers, notaries, family offices) and anyone addressing philanthropy, corporate sustainability, governance and hybrid models generating a positive impact on society.



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