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# LEGISLATIVE AND REGULATORY CHANGES FOR SWISS FOUNDATIONS AND ASSOCIATIONS

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## INTRODUCTION

**Julien Beauvallet**

Head of Civil Society Service, International  
Geneva Welcome Centre (CAGI)

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## PRESENTATION

Prof. **Giulia Neri-Castracane**

Director of the Commercial Law Department and  
Associate Professor, Faculty of Law, UNIGE

**Vincent Pfammatter**

Partner at Walder Wyss, Member of the board of  
proFonds and Academic Fellow of the GCP

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# Philanthropy Lunch

## Legislative and Regulatory Changes for Swiss Foundations and Associations

**18 September 2024**

### **Giulia Neri-Castracane**

Associate Professor, Director of the  
Department of commercial law

Faculty of Law/Geneva Centre for  
Philanthropy, University of Geneva

### **Vincent Pfammatter**

Attorney-at-law, Partner  
Walder Wyss

Academic Fellow of the Geneva Centre for  
Philanthropy, University of Geneva

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# Agenda

1. Amendments to Swiss Law (2023 & 2024)
2. Compensation of board members: The new Vaud and Zurich practices
3. Entrepreneurial support models : the new Zurich practice
4. New Fee Ordinance of the Federal Foundation Supervisory Authority
5. In the legislative pipeline
6. Selected case law

# **Amendments to Swiss Law**

## **2023**

(recap)

# Meeting modes and insolvency

## Virtual and hybrid meetings or meetings abroad allowed for foundation boards and association committees

- Virtual or abroad meeting of the assembly : provision in the articles of association + independent representative (for virtual meetings)
- Hybrid meeting of the assembly: decision of the committee
- For foundations boards and association committee: no requirement, also by circular resolution (provision in the articles of association or unanimous vote for associations – Art. 66 para. 2 SCC)

## Insolvency and over-indebtedness: Art. 69d and 84a SCC

- Early action
- Appointment of auditors in case of capital loss (also if opting out/exemption of audit)
- Subordination of claims must cover the interests
- Foundation board must notify the judge through the supervisory authority in cases of insolvency
- Increased liability for committee members in associations with financial difficulties

# Transparency on compensation of board members and directors

- Art. 84b SCC: Foundations must disclose remuneration of board members to the supervisory authority
- Compensation includes fees, salaries, bonuses, and other benefits (including in kind and work exceeding the mandate)
- FSAF authorizes the publication of an aggregated amount if total < CHF 50,000
- Variety of practices: FSAF: Form A1 in the annual report, GE: appendix to the accounts



# Registration with the commercial registry

Art. 61 para. 2 SCC: Associations primarily collecting or distributing (directly or indirectly) assets abroad for charitable, religious, cultural, educational, or social purposes must register. Associations not registered by July 1, 2024, may face fines.

## Exemptions exist for small associations under certain thresholds

- < CHF 100,000 over the last two accounting periods
- membership fees, state subsidies, income from the association's activities, sponsorship services ≠ collected funds
- Distribution through a financial intermediary
- Representative of the association with single signature power domiciled in CH

## Consequences of registration

- ⇒ List of members (names and addresses) up to 5 years after deregistration => data protection
- ⇒ Representative in Switzerland
- ⇒ Holding accounts as per CO
- ⇒ Registration of all members of the committee or one member domiciled in Switzerland elected as representative

# VAT and data protection

VAT exemption threshold increased to 250,000 CHF for charitable organizations, and voluntary-run sporting or cultural association

- Only for services that are not excluded from the scope of taxation, namely advertising services, catering, and sponsorship
- Deregistration from the VAT register must be requested within 60 days from the end of the tax period

Foundations and associations now subject to the revised Federal Act on Data Protection (FADP)

- Rights of individual concerned
- Obligations to report data breaches
- Obligation of maintaining records of processing activities
- Risk of fines (also for individuals, such as board members)

# **Amendments to Swiss law**

## **2024**



# Organizational changes, ancillary amendments, form of amendments

**(1)** Expanded rights for founders to modify the foundation's organization (as for the purpose) – Art. 86a CC

- Only for new foundations
- Provision in the articles of association + 10 years have passed (max 2 times if founder is a legal person)

**(2)** Simplified conditions for ancillary amendments to the foundation deed (justified for objective reasons and not objectively necessary) – Art. 86b CC

**(3)** Written form is sufficient for amendments to the statutes; submission to the register of commerce and approval by supervisory authority still required

## **(4) Recourse to the supervisory authority**

- Right to appeal in matters of foundation supervision codified in Art. 84 para. 3 SCC
- Beneficiaries, creditors, current and former board members can lodge complaints with the supervisory authority
- Heirs of the founder are absent from the list

# **Compensation of board members: Zurich and Vaud practices**



# Compensation of board members

## Vaud practice



### ***(1) Members < 60h of work per year***

- Principle: governing bodies expected to serve on a voluntary basis
- Exception: up to CHF 300.- / meeting or CHF 3'600.- per year for members devoting less than 60 hours – alternative to reimbursing actual expenses (Internal regulation needed, to be submitted to AFC-VD for approval; not considered as salary, hence no taxes or social charges)

### ***(2) Members > 60h of work per year***

- Remuneration for members devoting more than 60 hours is possible but it requires comprehensive regulations (with issuance of salary certificate)

### ***(3) Additional mandates given to board members or relatives***

- One-time mandates : no significant challenges but must be justified and documented
- Recurring mandates: not encouraged; to be cleared with tax authorities (potential Col)
- Exception: bookkeeping and auditing/administrative tasks for max 10,000 CHF per year

# Compensation of board members

## Zurich practice



- Compensation must be **reasonable** and aligned with the foundation's objectives and be governed by written rules
- Supervisory authorities must review compensation under new Art. 84b SCC based on three categories of criteria (foundation, mandate, person)
- Compensation also possible if prohibited by former articles of association : amendment = minor amendment
- Foundations can avoid formal compensation regulation if total compensation is below 10,000 CHF and 3,000 CHF per member (3,000/10,000 limit)

# Entrepreneurial support models (impact investing)

## Zurich practice



- Support no longer limited to non-repayable contributions and loans
- Impact investments and other entrepreneurial financing models now permissible (Social Impact Bonds; Development Impact Bonds)
- Conditions:
  - Operating where there is no existing market to avoid competition : e.g. not appropriate to promote Swiss start-ups (considered as market oriented activities)
  - Funds returned to the foundation to be reinvested for the charitable purpose
  - Beneficiaries should be social enterprises (implicit requirement), and the investment should be made in line with the purpose of the foundation (not merely as a financial investment)



# **New Fee Ordinance of the Federal Foundation Supervisory Authority**

- New Fee Ordinance took effect on January 1, 2024
- Annual reporting fees categorized by complexity: 750 (simple), 1,300 (medium), or 2,000 CHF (complex)
- Objective: Provide FSAF with additional resources to address backlog

# Canton of Geneva - framework conditions

- Generally, the Canton of Geneva has been more flexible than Zurich and Vaud
- The *Département de l'économie et de l'emploi (DEE)* is carrying out, through the GCP, an assessment of the framework conditions in the Canton

# **Legislative Pipeline**



# Automatic exchange of information

- Switzerland to implement the OECD's Crypto-Asset Reporting Framework (CARF)
- Consultation initiated on extending international automatic exchange of information
- Qualified Non-profit Entities may be exempt upon confirmation from tax authority
  - entities established and operated exclusively in Switzerland for religious, charitable, scientific, artistic, cultural, sports, educational purposes, or are professional associations, economic associations, chambers of commerce, trade unions, agricultural or horticultural organizations, civic organizations or entities promoting social welfare
  - be exempt from income or profit tax in Switzerland
  - have no shareholders or members with ownership rights over their income or assets
  - have prohibited (by law or by their statutes) the distribution of income or assets to individuals or profit-oriented entities, except for charitable activities or reasonable compensation for services rendered or payment for goods acquired at fair market value
  - have their assets be transferred upon liquidation to a public entity or one meeting the above criteria, or devolved to the Swiss government, a canton, or a municipality.

# Federal register of beneficial owners

- New draft law to introduce federal register of beneficial owners
- Aims to combat money laundering and terrorism financing
- Foundations and associations required to register must identify beneficial owners
  - For foundations: founder (not the beneficiaries)/ if founder is a legal entity: beneficial owner of this entity/ or any person with control
  - Only for associations required to register with the commercial registry
  - If no one identified, register the chairman of the board/of the committee with the commercial registry

# **Employer pension foundations, family foundation, and legal status of social enterprises**

- Amendments to expand employer pension foundation purposes to include distress benefits
- Revision of Art. 335 to allow maintenance family foundations
- Proposal to create legal status for sustainable enterprises based on US benefit corporation model

# **Case law review**

# Retroactive effect of tax exemption

- Case involved tax exemption for a Geneva-based association with real estate asset (hotel used as summer camp) in Valais
- Tax exemption requested in Valais instead of Geneva
- 2018 Valais decision warned the association about partial taxation for real estate assets
- In 2020 Geneva tax authority issues a tax exemption with retroactive effect
- Valais tax authority refuses the reimbursement of tax levied between 2015-2018
- Federal Supreme Court ruled against retroactive tax exemption for 2015-2017
- Association failed to act diligently in not lodging a claim against 2018 Valais tax decision

(TF 9C\_674/2022)

# Family foundations: contribution and purpose

Case 1 analyzed whether a family foundation established in 1947 could be registered with the commercial registry

Court refused due to a prohibited purpose (maintenance foundation)

(TF 5A\_669/2022)

Case 2 analyzed whether contributions from family foundations are taxable

Court ruled family foundations' benefits do not qualify as tax-exempt gifts

Contributions were not provided due to family law obligations but as per the deed

(TF 9C\_637/2022)



# Foundation's asset management

- Case involved conflict of interest in a foundation's use of external asset managers
- Asset managers' dual role created conflicts in managing umbrella funds
- Informed consent is required in case of conflicts of interest
- Foundation was awarded partial compensation due to lack of informed consent (partial liability due to compromission of the oversight task)

(TF 4A\_350/2023)

GCP Philanthropy Lunch on November 28th at UniDufour dedicated to «*Gestion d'actifs des fondations – Analyse et benchmarking*», co-organised with SwissFoundations

# **Liability of the supervisory authority**

- Case involved an incorrect settlement approved by the Federal Foundation Supervisory Authority (FSAF)
- Supervisory authority held liable for losses suffered by the foundation
- Foundation awarded 6 million CHF in damages plus interest

(Federal Administrative Court, case A-4514/2021)

# Exclusion of a member of an association

- Federal Supreme Court confirmed the exclusion of a member from an association without cause
- Exclusion deemed lawful under Art. 2 para. 2 SCC and Art. 28 para. 1 SCC
- Exclusion was not abusive or in violation of personality rights, since association was not in a monopoly situation and was pursuing an ideal purpose

(Geneva Court of Justice, C/19938/2021)

# Thank you and Q&A

For more details, see : Neri-Castracane/Pfammatter, Swiss foundations and associations law\_ 2023/2024 Legal Update, RSDA 5/2024 (forthcoming)



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## Q&A

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## UPDATE ON THE ACTIVITIES OF THE CAGI, GCP & MIA

**Mara De Monte**

Executive Director, Geneva Center for Philanthropy (GCP)

**Hervé Pichelin**

Director, Maison Internationale des Associations (MIA)

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# GCP - EVENTS TO COME

**2 October 2024 | 12 pm - 2 pm | Philanthropy Lunch | Art Donations to Museums | Uni-Dufour (room 408)**

- In collaboration with the Art Law Foundation
- Speakers: Dr. Anne Laure Bandle, Dr. Peter Mosimann, Prof. Dr. Xavier Oberson and Adèle Aschehoug

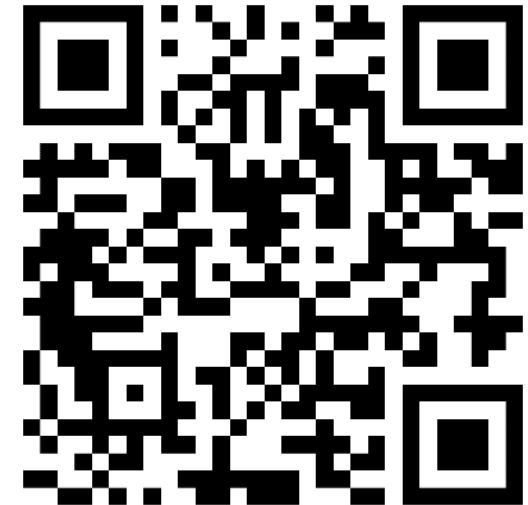
**8 octobre 2024 | 18h15 – 20h00 | Semaine de la démocratie | Conférence “Démocratie et lutte contre la polarisation: quel rôle pour la philanthropie?” | IHEID**

- Coorganisée avec l’Office cantonal de l’économie et de l’innovation (OCEI), le [Centre Albert Hirschman \(IHEID\)](#) et [SwissFoundations](#)

**28 novembre 2024 | 12h00 – 14h00 | *Philanthropy Lunch* | Gestion d’actifs des fondations – Analyse et benchmarking | Uni-Dufour (salle 408)**

- Coorganisé avec [SwissFoundations](#)

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# PROFONDS - EVENTS TO COME

**23 septembre 2024 | 15h00 – 16h30 | *proFonds-Arbeitskreis: Konfliktmanagement in Organisationen* | En ligne ou à Bâle**

- *L'événement se déroulera en allemand*

**9 octobre 2024 | 16h00 – 17h00 | Expériences pratiques pour les membres de conseils de fondation | En ligne**

- En collaboration avec **StiftungSchweiz**
- *L'événement se déroulera en français*

**12 novembre 2024 | 09h00 – 17h00 | La Journée suisse des Fondations 2024 - Vive la résilience! | Hotel Marriott Zürich**

- *L'événement se déroulera en français*

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# MIA - EVENTS TO COME

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