

# EFFECTIVE CORPORATE GOVERNANCE OF FOUNDATIONS

## Directional best practice for impact-oriented Swiss foundations

**Nonprofits – especially foundations – are increasingly expected to operate as effectively as possible and, in recent years, calls for improved accountability and transparency have become more strident than ever. In addition, foundations compete with new forms of mission-driven for-profits. If they want to stand out in this competitive environment, foundations must undertake an important shift from good intentions to real impact. One way to support this change is to formalise foundations’ corporate governance.**

### 1. INTRODUCTION

With 15.6 foundations per 10 000 inhabitants in 2018 [1], Switzerland actively positions itself internationally as a paradise for foundations. By comparison, the USA – which is also regarded as a major centre for foundations, has only 2.6 per 10 000. In Switzerland, charitable foundations manage assets estimated at around 97 billion Swiss francs. These numbers have shown no signs of slackening in the past few years; indeed, half of all the country’s charitable foundations have been created in the last 20 years. Despite the dynamism driving the Swiss foundation sector, concerns over the allocation of its resources raise many as-yet-unanswered questions. While a lot of academic research has been undertaken on private enterprises, only a few works focus on the corporate governance of nonprofit organisations – despite their growing contributions to the economic, social and environmental quality of our societies.

The fact that nonprofit organisations have always been seen as “different” from business organisations may explain this lack of interest. Nowadays, however, the line separating them seems more blurred than ever. And the line between these two worlds will continue to blur. For-profits are increasingly pursuing mission-driven cultures, implementing long-term strategies and trying to take the lead on social and environmental change. At the same time, nonprofits are increas-

ingly expected to operate as effectively as possible in achieving their missions: there is clearly an economic mandate, and organisations that fail to articulate how they use funding and to demonstrate their performance face difficulties in raising new funds. As a consequence, directors are increasingly applying management practices originally developed for the business sector to measure and maximise their impact, such as strategic planning, risk analysis, market analysis, financial accounting and auditing, and quantitative performance evaluation. This remains true to some extent even where it is not the foundation itself that manages its assets, but where they are owned by one or more subsidiaries.

Although it has been argued for decades that “the adoption of structures and practices from the for-profit sector is neither a feasible nor even a desirable solution to problems facing many nonprofit organisations” [2], this statement now seems outdated. The economic importance of the nonprofit sector has reached unprecedented proportions. However, the skills, resources and experience of directors seem inadequate to meet the new needs of most foundations. According to a recent study, more than a quarter of nonprofit directors do not have a deep understanding of their organisation’s mission and strategy [3]. Nearly one-third are dissatisfied with the board’s ability to evaluate organisational performance, and a majority do not believe that their fellow board members are very experienced or engaged with their work [4].

Effective governance practices are critical for every firm that wants to achieve great impact, be it for-profit or nonprofit. While foundations continue to distinguish themselves from their business counterparts (cf. *infra*, 1.) on a number of measures, nonprofit board governance is structurally similar to for-profit governance (cf. *infra*, 2.). Much like corporate directors, foundation board members have the primary responsibilities of strategic planning (cf. *infra*, 2.1.), adopting the organisational structure (cf. *infra*, 2.2.) and monitoring the foundation’s finances (cf. *infra*, 2.3.). The



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similarities end, however, where mission fulfilment takes precedence over shareholders' interest in maximising returns. A multi-stakeholder approach offers a satisfactory solution to the apparent lack of accountability on the part of foundation boards (cf. *infra*, 3). This external accountability creates a specific need to maintain the highest possible degree of transparency with regard to the financial statements, governance structures, strategic objectives and results (cf. *infra*, 4.).

## 2. SPECIFICITIES OF FOUNDATIONS

Swiss law governing foundations is part of a constitutional order characterised by responsible freedom, a subtle balance of powers and the subsidiarity of state activity [5]. As such, Swiss foundation law is considered quite liberal and relatively flexible, and differs in this regard from other models [6]. This freedom is, however, limited to the establishment of the foundation. Once established, the founder is no longer able to freely modify its core organisation. Future organisational changes are only permitted in exceptional cases and under very strict material and formal conditions. Aside from tax considerations (not covered here), the founder should take three specific characteristics of foundation governance into account when deciding how the foundation should be administered: a foundation does not have any members or owners (cf. *infra*, 1.1.), it follows a special purpose (cf. *infra*, 1.2.) and it is subject to supervision by a public authority (cf. *infra*, 1.3.).

**2.1 A legal form without owners or members.** A foundation can be established relatively easily and without excessive bureaucracy, simply “by the endowment of assets for a particular purpose” [7]. Four defining features are laid down in art. 80 of the Swiss Civil Code (CC): (i) an independent pool of assets, (ii) with legal personality, (iii) organised and (iv) dedicated to a special purpose. These elements must be made explicit in the act of dedication – i.e. the declaration of intent made by the founder – and the foundation deed. This endowment is what distinguishes a foundation from other non-profit organisations, and in particular from associations [8]. Foundations under Swiss law are indeed institutional in nature [9] and are therefore self-sufficient entities: they have no members or owners, only beneficiaries.

**2.2 A legal form with a special purpose.** Under art. 80 CC, a foundation is established “by the endowment of assets for a particular purpose”. The latter is “the soul and the heart of the foundation” [10] and must be respected in all the foundation's operations. It is up to the founder to freely determine the object pursued by the foundation [11]. Foundations generally pursue an ideal purpose [12], but this need not be legitimised by a public interest or an overriding social interest [13]. Of course, general legal restrictions apply: the purpose may not be in violation of objectively mandatory laws or fundamental moral values [14]. The kinds of goals that can be pursued are very extensive. Non-exhaustively, a foundation can be established for artistic, charitable, cultural, educational or scientific purposes. In any case, the founder's will

is the starting and reference point for all the foundation's activities [15].

**2.3 A legal form subject to a supervisory authority.** Foundations are subject to supervision by Swiss public authorities, which may be federal, cantonal or municipal, depending on the nature and scope of the foundation's purpose [16] (art. 84 al. 1 CC). The mandate of the authority is the same, regardless of its level: ensuring that the foundation's assets are used for the declared purpose (art. 84 al. 2 CC). The monitoring covers both the management and the use of assets [17]. The mandate of the supervisory authority must be understood in broad terms [18]. It also covers the foundation's overall organisation [19].

## 3. OVERALL MANAGEMENT OF THE FOUNDATION

“Responsibility for the foundation does not lie with the founder, nor does it lie with the supervisory authorities, but rather it lies with the foundation board.” [20] The board is thus the governing body of the foundation. It manages all of its activities and affairs and is responsible for the “overall management of the foundation”. This notion covers all aspects of a foundation, from its strategic direction (cf. *infra*, 2.1) to its organisation (cf. *infra*, 2.2.) and its finances (cf. *infra*, 2.3.).

### 3.1 Strategic direction of the foundation

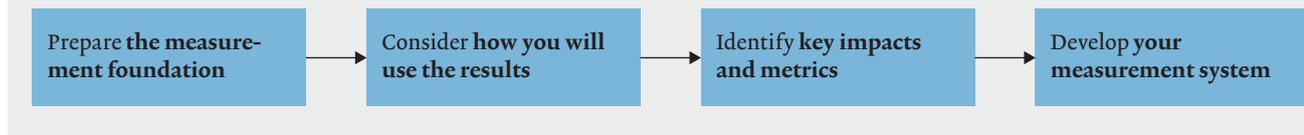
**3.1.1 The choice of philanthropic goals.** Their mission-oriented strategy is what distinguishes nonprofits from their for-profit counterparts. Nonprofits have missions instead of owners or shareholders [21]. While the primary precept for board members of for-profit organisations is to enhance shareholder value (although stakeholder theory does allow for consideration of the impact on all stakeholders of an enterprise), non-profit board members' primary responsibility is to ensure mission fulfilment (in an effective way).

A foundation is specifically established to pursue a particular purpose [22]. Whereas the founder can freely determine the purpose of the foundation, once set, it is the responsibility of the foundation board to ensure that this will be respected and implemented on a day-to-day basis. The members of the board act in a fiduciary capacity and must therefore be well acquainted with the mission, vision and purpose of the foundation in order to regularly reinterpret it over time and as circumstances evolve.

The board's mission obviously does not end there. Achievement of the main purpose of the foundation requires precise and clear goals and programmes to be defined, focusing both on the near and the long term. One of the fundamental criteria in choosing among various goals should be the expected (social) return [23]. As resources are limited, the ultimate objective of a strategy should be to achieve the greatest possible impact, which is “at the opposite end of the spectrum from good intentions” [24].

As the concept of expected (social) return accounts for the risk involved in achieving the intended outcome [25], it first requires a risk assessment to be conducted. Such an evaluation provides indications about the likelihood of success of specific goals or programmes and forces management bod-

Figure 1: EPSTEIN AND YUTHAS, THE IMPACT MEASUREMENT ROADMAP



ies to be realistic about failure – but can also bring up innovation opportunities. On this basis, they are also able to understand the foundation’s risk tolerance, which is fundamental in choosing the right approach to achieve the objectives (promoting knowledge, improving individual lives or lobbying and influencing policymakers and businesses).

Once the foundation has determined its risk appetite, it is then appropriate to design a strategic plan, i.e. a plan for achieving impact. Many in philanthropy prefer the term “theory of change” when describing the planning process, which is the core of the organisation’s strategy. As the empirical basis underlying any social intervention, a theory of change “embodies the causal links between the activities the organisation will perform and the ultimate outcome” [26]. In other words, it outlines how a set of activities can lead to an organisation’s intended outcomes. Depending on the field in which the foundation operates, its directors can rely on existing theories of change, which may be more or less developed (apparent, demonstrated or proven effectiveness) [27].

**3.1.2 Implementation of the strategic plan.** “Without good implementation, the best of strategies is worthless” [28]. That said, implementation is hardly ever automatic. Board members cannot merely set goals, adopt theories of change and expect that effectiveness will follow [29]. Rather, they must ensure that the necessary resources are well allocated – first financially, but also at an organisational level. It is therefore essential to assign the right responsibilities to the right executives and, if necessary, to make changes to the foundation’s organisational structure to enable them to work on the front lines of strategy [30].

As the formulator of the strategy, the board should definitely be involved in the implementation process. Doing so can help bridge the gap between action and control, and ultimately help the proper implementation of the plan. The degree of engagement essentially depends on the size of the foundation, or sometimes on the leadership skills of one particular member. Visionary leaders – rightly or wrongly associated with small organisations – will typically be strongly committed and will stay in close contact with the minutiae of implementation [31]. In a more complex and hierarchical structure, board members will prefer to eschew any role in executing strategy and limit their duty to a monitoring function [32]. This latter model therefore requires an appropriate management information system (MIS), allowing immediate feedback of relevant information.

**3.1.3 Monitoring progress and increasing impact.** Strategy is a process. Implementation is also too “complex to assume that

strategy can be developed at just one point in time and remain fixed” [33]. Performance measurement helps the board to monitor how investments are creating – or not – the expected (social) return. On this basis, the board can learn and adjust its strategy and, ultimately, take action to increase effectiveness.

However, measuring impacts can be a difficult process, and organisations often do not know how to do it. Working through the stages of the “impact measurement roadmap” [34] can help the board identify robust methods of assessment and maximise the foundation’s impact (*figure 1*).

Many proven evaluation methods already exist in practice, each with its own strengths and limitations [35]. Using techniques that have already proven their effectiveness can save time, limit costs and increase the reliability and comparability of the findings [36]. It is important here to apply the same method over time. Finally, by using measures adopted by other organisations in the same field, the board will be able to benchmark the foundation’s performance against its “competitors” or partners [37].

Once the outcome data have been collected and analysed, they should be used – in a strategic way – to increase the impact of the foundation’s activities. The board should therefore use data to identify weaknesses that can be improved upon its strategy, but also opportunities that can be capitalised on. Three strategic approaches can be considered for increasing impact: innovation, scaling and sharing [38].

**3.2 Organisation of the foundation.** Under art. 83 CC, the foundation charter “shall stipulate the foundation’s governing bodies and the manner in which it is to be administered.” Like business corporations, foundations are generally governed by a board of directors. By stating that “the board of trustees” shall appoint external auditors, the law (in art. 83b CC) explicitly assumes that the supreme governing body of the foundation should be established in the form of a board of directors. However, this rule is not mandatory, and in some cases, the supreme governing body may not take the form of a board. For example, some foundations have assemblies of founding or accredited members (*Trägerversammlung*), which are considered the supreme governing body [39]. Clearly defined beneficiaries (*Destinatärversammlung*) with decision-making and election powers may also be constituted by the deed of foundation [40].

No other legal rules address the issue of organisation. However, everyone agrees that, as the highest body for governance of the foundation, it is the responsibility of the board to determine the organisational structure of the foundation. One of the legal duties of the board is indeed to ensure that the foundation has a proper organisation for (effectively) imple-

menting the foundation purpose. This generally includes the internal organisation of the foundation's board (cf. *infra*, 2.2.1.) and the determination of the management system (cf. *infra*, 2.2.2.). Note that if the planned system of organisation appears inadequate or insufficient, the supervisory authority must intervene (art. 83d CC).

**3.2.1 Organisation of the board.** The organisation and functioning of the board shall first comply with the mandatory legal rules (very rare), and only then with the provisions of the foundation charter, the articles of association and the organisational regulations. When drawing up the organisational regulations, the foundation board may – or should – take into account current best practice. There are two key themes to address in relation to structural efficiency, and therefore impact: the composition of the board and its committees.

**3.2.1.1 Board composition.** Finding the optimal board composition is not easy and depends on internal and external circumstances. The “magic formula” is that “the board of directors should be small enough in numbers for efficient decision-making, but large enough for its members to contribute experience and knowhow from different fields and to allocate management and control functions among themselves” [41]. Although one size does not fit all, best practice recommends that the board of a foundation should ideally be composed of five to seven members [42].

The founder or major donors will often be interested in being members of the board. Nevertheless, board membership should not be tied directly to the contributions the foundation receives. Rather, the board should be composed of persons with the required specialist and personal skills, resources, diversity and dedication so that an “independent formation of will” [43] is made possible. Competence in the area of the foundation purpose is not sufficient on its own.

**3.2.1.2 Board committees.** Structurally, the board of directors can divide some of its tasks among its members, grouped into committees. This best practice, developed in for-profit companies, is now becoming the norm for foundations that want to be highly effective. To this end, the Swiss Foundation Code (SFC) recommends that the board “examines whether to form permanent or *ad-hoc* committees for certain tasks and projects” [44].

Unlike the Swiss Code of Best Practice for Corporate Governance, the SFC does not impose any specific committee. If the focus is on efficiency and impact, then at least three types of permanent committees can be expedient: a governance committee, a strategic committee and an audit committee. Other committees may be advisable depending on the specific characteristics of the foundation, typically an investment committee or a grant-making committee. As the non-profit sector grows, more risks emerge. Setting up a risk committee is the best way to identify, mitigate and manage these risks, which already appears to be a best practice.

The question has been raised as to whether committees may include persons who are not formally members of the foundation board, for example members of the management,

or even third parties. Stating that “committees that do not possess the necessary decision-making competence can also call upon persons external to the foundation to become members,” [45] the SFC seems (wrongly) to admit this possibility. Distribution of functions and tasks within the board

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means that committees are necessarily composed of members of the board [46]. However, they can use the services of third parties to assist them in certain tasks [47]. It is thus possible – and in some cases advisable – to invite external persons or experts to committee meetings; however, that does not make them formal members of the board.

**3.2.2 Delegation of business management.** The foundation board is granted all rights and powers that are not expressly delegated to another body, which means that it may delegate all or part of its “transferable powers”. The delegation may be in favour of one or multiple members of the foundation board (delegated director), a third party (director) or even an external third party (service provider) – contrarily to the division of tasks. The notion of “transferable powers” must be understood as opposed to the “non-transferable duties”, i.e. the overall management of the foundation (discussed in this section), the choice of executive director and the appointment of the auditors. As such, boards can delegate to executives beyond those three required duties.

Concretely, the foundation board will delegate the operational management of the foundation. This delegation is essential: it creates a two-tiered governance system, which is an indispensable prerequisite for functioning checks and balances [48]. Board members indeed often recognise that they cannot run the company themselves and therefore limit their authority to the oversight of the foundation – without crossing the line into management. This means that the board does not necessarily have to assume the day-to-day management of the foundation itself but must determine its fundamental orientations and oversee every aspect of the decisions it has delegated to management. For example, the board will set and plan the strategy as described above but entrust the implementation to the executives. Also, since the assets allocated play a decisive role in the life of the foundation, the board is responsible for initiating an investment policy that clearly outlines the investment objectives, the roles and responsibilities, and the performance expectations; management is then responsible for implementing this. From a financial perspective, this includes the validation of the foundation's planning and financial control, which also means that the board is not supposed to be directly responsible for keeping the accounts.

**3.3 Financial monitoring.** Since the introduction of the new accounting principles in 2013, all legal entities – foundations included – must keep accounts and file financial reports in accordance with the law (art. 957 al. 2 of the Swiss Code of Obligations [CO]). Foundation law indeed states that the provisions of the CO on commercial bookkeeping and accounting apply *mutatis mutandis* (art. 83a CC). Some exceptions apply. Typically, foundations that are not required to be entered in the commercial register or that are exempt from the requirement to appoint an auditor under art. 83b para. 2 CC are only required to keep accounts on income and expenditure and on their asset positions (art. 957 al. 2 lit. 2 and 3 CO). The others must keep accounts, filed in an annual report, which contains the balance sheet, the profit and loss account and the notes to the accounts (art. 958 al. 2 CO). Additional requirements apply when a foundation fulfils the criteria for an ordinary audit by an auditor (cf. art. 727 CO)[49]. In any event, it is the responsibility of the foundation board to maintain its business ledgers. In accordance with art. 83b CC, the board shall also appoint an independent external auditor, who must annually audit the foundation's accounts. Finally, the auditor must monitor compliance with the provisions of the articles of association (the deed of foundation and other regulations of the foundation). The audited annual accounts and the annual report are generally further reviewed by the (public) supervisory authority.

Irrespective of its size, it is now recommended that every foundation put in place an internal control system (ICS)[50]. This largely involves implementing policies and procedures for supervision and proper management that protect the assets of an organisation, create reliable financial reporting and promote compliance with laws and regulations. Effective internal controls help protect and manage the foundation assets against fraud, embezzlement and inaccurate financial reporting. Therefore, the ICS serves as another crucial mechanism of checks and balances, and facilitates efficient operations. A large part of the doctrine considers that the ICS should go beyond mere accounting procedures and include all areas of the organisation [51]. That is also the solution adopted in practice [52]. Ultimately, the objective of internal control is to properly exercise the overall management of the organisation, which implies including both the strategic and organisational aspects. Having an overview of all levels of operation and organisation is particularly important when it comes to conducting a risk assessment and thereby avoiding losses being incurred.

#### 4. ACCOUNTABILITY

Unlike business corporations, the board of a foundation is not elected by shareholders precisely because, as previously stated, foundations have no shareholders, but only beneficiaries. The foundation charter may vest in some foundation-accredited members or some beneficiaries to elect the board of directors periodically, but this is rarely done. It is generally the founder who sets up the first members of the foundation board. They will then renew themselves by a cooptation process [53]. Most boards are in consequence self-perpetuating [54]. As a result, board members can feel

little responsibility for their actions since they are accountable to no one [55] – provided they obey the law.

**4.1 Classic (corporate) duties.** In the absence of any specific rule in the law of the foundation, it has been suggested that members of the board should – as fiduciaries – obey the same duty of loyalty prevailing in a mandate agreement [56], under which “the representative is liable to the principal for the proper and faithful execution of the mandate” [57]. This analogy is also used to assign to the board of a foundation – just as to any corporation board – three primary legal duties: (i) the duty of care, (ii) the duty of loyalty and (iii) the duty of obedience.

(i) *The duty of care.* The members of the board must exercise their activity with care and ensure prudent use of assets, people and goodwill. This implies that they are sufficiently available and have the necessary skills.

(ii) *The duty of loyalty.* The members of the board must subordinate their personal interests in good faith to those of the foundation and its mission at all times. This also means publicly disclosing any conflicts of interests.

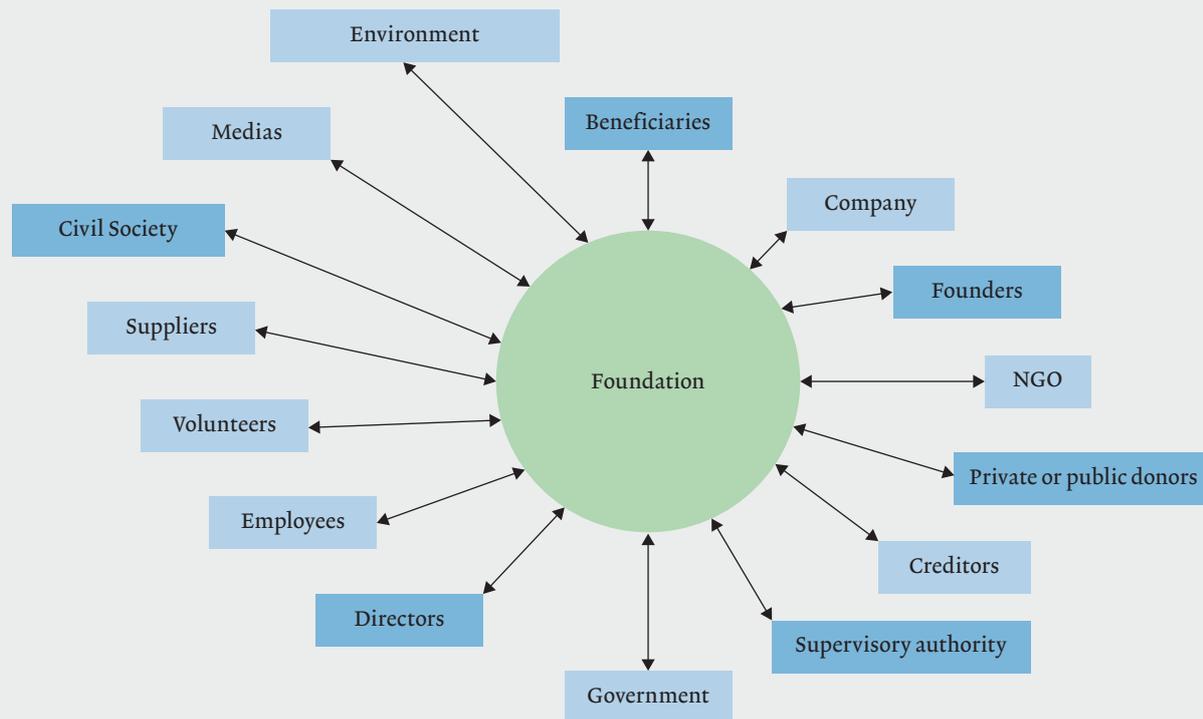
(iii) *The duty of obedience.* The members of the board must ensure that the foundation obeys all applicable laws and regulations and does not engage in any illegal activities. This also means that the board must carry out the foundation's purpose as stated by its founder.

Thus, the board acts solely on behalf of the foundation itself; hence, these three duties are addressed to the board itself, which in reality gives rise to a circular reasoning. As such, the good governance of a foundation essentially rests on the moral and ethical qualities of its board. A more systematic approach is therefore required to ensure that boards are effectively accountable for their actions.

**4.2 Stakeholders (broader) approach.** In the corporate governance literature, the most suitable – or predominant – legal and economic framework for analysing relationships in organisations is the principal – agent theory. The agency relationship has been defined as “a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision-making authority to the agent” [58]. However, in nonprofit organisations, it is unclear who should be regarded as the principal, since there are no owners in the sense of shareholders [59]. Although a foundation has no owners, there are organisational stakeholders whose stake in the organisation and utilities is affected by its activities – or by the lack of them.

The concept of “stake” can, in its broadest sense, be interpreted as a mere interest in an organisation [60], whether legal, intellectual, moral or political. Very concretely but not exhaustively, a foundation's stakeholders may be founders, creditors, private or public donors, beneficiaries, managers, employees, volunteers, suppliers and even direct or indirect

Figure 2: FOUNDATIONS' STAKEHOLDERS



“competitors” of the foundation. Public authorities, communities, non-governmental organisations (NGOs), some important media and, more generally, civil society also represent other influential actors [61]. It is no longer contested that the preservation of the environment and living species, as well as the needs of future generations, constitute interests worthy of protection which should be considered by any foundation (figure 2) [62].

Under Swiss law, the foundation – and its directors – are not the agent of a particular stakeholder, whether the founder(s), major donors or the beneficiaries. Whether the foundation should – or wants to – favour a specific constituent over another is therefore a purely normative question. Answering it requires a balancing of economic, sometimes legal and even moral interests. However, the task seems simpler for non-profit organisations (compared with for-profits), in particular foundations. In the absence of owners, the “sacrosanct” question of ownership does not arise, since no one can claim any residual rights attached to property, not even the founder.

Nevertheless, there is (unfortunately) no reason to expect that all stakeholders have identical objectives. Indeed, each of the foundation’s constituencies has its own goals, which can be furthered through a subtle interplay of pressures (either by imposing conditions on the contract or by withholding future donations or dealings) [63], but also through alliances or lobbies. In this complex and dynamic environment, the objective and the mission of the board should be to identify, arbitrate between and integrate the interests of multiple stakeholders into the foundation’s decision-making process [64]. In carrying out their task, directors can rely on existing frameworks and typologies [65].

## 5. TRANSPARENCY

“Sunlight [being] the best of disinfectants” [66], it quickly became apparent that the dissemination of information was – or should be – at the heart of good corporate governance practices [67]. It has been pointed out that greater transparency would promote better management [68]. Organisations (i.e. foundations) should therefore understand their interest in spontaneously disclosing certain information [69].

Yet, despite the (*a priori* virtuous) power of transparency, it has long had pejorative connotations for all kinds of organisations – and their directors – which have not taken a very favourable view of state interference in their affairs [70]. This is particularly true of the nonprofit sector, and of foundations in particular, which precisely undertake activities of a public character that are not addressed by the state or pursue unpopular tasks that may arouse a harsh reaction [71]. It has been argued that in pursuing their objectives, foundations sometimes need to operate “under a veil of discretion” [72], especially when they operate in undemocratic countries.

Nevertheless, transparency helps to attract, and to retain, funding, volunteers (or talents), members and other stakeholders. Most importantly, it also “communicates a message to society that foundations warrant people’s trust” [73]. This requires the transparency to be properly defined, regulated and perhaps above all wisely applied. Yet the law is essentially silent. Private regulation promotes a functional approach to transparency: “neither secrecy for secrecy’s sake, nor transparency for transparency’s sake” [74]. Organisations must therefore find the optimal balance in their disclosure exercises. In any case, these should cover two specific types of information: financial (cf. *infra*, 4.1.) and organisational (cf.

*infra*, 4.2.). Hence, in order to signal their financial and organisational efficiency, nonprofits must also demonstrate the value of their outcomes or impact with regard to their mission (cf. *infra*, 4.3.).

**5.1 Financial transparency.** In terms of internal management, it has been said that transparency forces directors to confront the sometimes unpleasant reality of the figures submitted to them, as well as any market criticism [75]. This makes accounting an essential tool for proper management of the organisation. However, accounting and financial information also enables investors (i.e. donors) and creditors – current or potential – and other stakeholders to understand and assess the foundation’s financial performance and efficiency. Over the past decade, this interest in the effectiveness of foundations has been steadily increasing among all stakeholders.

While foundations are required to keep accounts and file financial reports in accordance with the law [76], they are, however, not legally obliged to disclose this information, either to their stakeholders or to the public. It is nevertheless now widely accepted that “strict confidentiality of financial information is no longer compatible with the contemporary understanding of the work of a foundation” [77]. The Swiss Foundation Code therefore recommends that the board should “ensure that interested members of the general public can obtain a sufficient picture of the financial position of the foundation” [78]. Therefore, foundations that produce an annual report should certainly make it available to the public. In the other cases, basic financial statements – i.e. the balance sheet, income statement and the notes to the accounts – should be disclosed. Since a majority of foundations are required to obtain an audit, the disclosure of their results should also be a common practice.

Considering the particular nature of foundations and their activities, specific information about the asset management costs, the total amount of grants paid out and their destination (if possible with a list of individual funding) and foundation operating revenues and costs should also be provided [79]. If necessary, some measures can be taken to protect the privacy of some individuals or parties, such as donors or beneficiaries.

**5.2 Organisational transparency.** While accounting and financial transparency makes it possible to monitor the sound management of the organisation through the figures, it reveals only part of the picture. In particular, it does not reflect the general organisation of the entity. The disclosure of important points relating to the company’s corporate structures and management is, however, essential to understanding the company’s operations. Every organisation should therefore present its operational structure, i.e. the internal components that serve as the basis for management decision-making.

Under current positive law, there is no rule requiring generalised transparency in this area. No particular format of presentation is *a fortiori* prescribed, and foundations – i.e. their directors – have a great deal of latitude in the choice, scope and quality of the information they intend to commu-

nicate in relation to their corporate governance system. The Swiss Foundation Code nevertheless recommends that the foundation “informs the public in an appropriate manner about its (...) organisational structure (...)” [80]. In this respect, information relating to the internal organisation of the board of directors, i.e. the distribution of tasks within it, as well as its composition (with brief biographical information highlighting the skills and contributions of these individuals), and the allocation and delimitation of tasks of its committees, if any, should be disclosed.

Information relating to the management of the organisation is also essential, especially when this has been delegated. In this case, clear indications on the division of powers between the board and the executive management should be provided. This should include the extent of the relations and the frequency of interaction between the board and the management team, as well as the tools and the means implemented to monitor the management bodies.

**5.3 Performance-related transparency.** Unlike businesses, foundations cannot use financial returns as common measures of success. While measuring impact can be a difficult process and requires careful planning [81], finding a good way to transparently communicate results can be even more difficult. Philanthropy is indeed “a field with poor feedback and messy signals – and those signals are often distorted by the pervasive flattery that colours transactions in the money-giving business” [82].

A performance report provides information on the effectiveness and efficiency of the funds used. It allows the foundation to disseminate transparent information on its work and its results. It is therefore also an important tool for communicating with stakeholders – especially with founders and donors, which have a legitimate interest in knowing whether the organisation is actually achieving impact [83]. The Swiss Foundation Code recommends that “the foundation informs the public in an appropriate manner about its purpose, grant-making policy and strategy” [84]. While the purpose actually defines the foundation, it is always worth pointing this out clearly and regularly. Obviously, this is not enough. The specific philanthropic goals that translate the main purpose into concrete objectives and the strategies put in place to reach these programme goals should also be disclosed with clarity. The concrete activities in which the foundation has been involved during the year should also be reported.

If, as suggested in the second part of this paper, the foundation has clearly defined the goals pursued and continuously monitored its progress, the next step is to disclose the achieved outcomes – be they positive or negative. There is no standard or best practice in the field. It is certainly useful to provide guidance on how impact has been measured and assessed [85]. In any event, the information provided must be reliable, relevant and above all comparable. To that end, if a programme extends over several years, it is essential to use the same evaluation method each year. The same should apply to similar programmes being implemented within the foundation, but also to programmes being carried out by other organisations.

## 6. CONCLUSION

Impact-oriented foundations are quite simply enterprises (i.e. an activity combining resources and work in order to achieve a specific goal). Contrarily to other private companies, however, the foundation is not the agent of its founder, major donors or its beneficiaries; it is solely (institutionalised) assets dedicated to a particular purpose. While it is true that this specificity distinguishes the foundation from other legal forms, it seems more a question of degree than of kind. In achieving their missions, foundations also respond to an economic mandate and face the same forces as for-profit organisations. If they want to survive in this competitive environment, foundations must undertake an (important) shift from good intentions to real impact, governing themselves in an effective and efficient way. One way (among many) to support this change is to formalise the foundation's corporate

governance. This first requires a strong and effective board, which is able to assume the overall management of the foundation. It also requires a sufficient level of accountability towards all stakeholders of the foundation and the public in general. Finally, it requires the foundation to operate with the greatest transparency. Implementing strong and reliable processes and procedures with regard to these three aspects will almost certainly help the foundation maximise its impact. However, past events have shown that even the best structural governance has never been enough on its own to prevent business failure. Nonprofits may have a card to play here. When boundaries between nonprofit and for-profit entities have never been so blurred, a moral and ethical orientation, alongside a thriving corporate culture, will certainly play a critical role in the future success of any organisation. ■

**Footnotes:** 1) Rapport sur les Fondations en Suisse, 2018, p. 6. 2) Jeffrey A. Alexander and Bryan J. Weiner, The Adoption of the Corporate Governance Model by Nonprofit Organizations, in: *Nonprofit Management & Leadership*, Vol. 8, No. 3 (1998), pp. 223 to 242, p. 223; see also: Alex Fischer, *Corporate Governance bei Stiftungen – von der Selbstverständlichkeit des Guten*, in: FS für Peter Böckli zum 70. Geburtstag, Zurich 2006, p. 649. 3) David F. Larcker, Nicholas E. Donatiello, Bill Meehan and Brian Tayan, 2015 Survey on Board of Directors of Nonprofit Organizations, Stanford GSB, Rock Center for Corporate Governance, BoardSource, and GuideStar (2015), p. 3. 4) *Ibidem*. 5) Loïc Pfister, La fondation, Guide pratique des personnes morales et des sociétés, Schulthess (2017), No. 51, p. 22. 6) Henry Peter, Les avocats et la philanthropie, *Revue de l'avocat* (2018), pp. 79 to 85, p. 81. 7) Art. 80 CC. 8) Lucas R. Arrivillaga and Georg von Schnurbein, The Swiss Legal Framework on Foundations and its Principles About Transparency, *International Journal of Not-for-Profit Law*, Vol. 16, No. 1 (2014), p. 32. 9) Cf. art. 52 al. 1 CC. 10) Loïc Pfister, La fondation, No. 100, p. 35. 11) The freedom of the founder is a fundamental principle of Swiss foundation law, termed the “freedom of foundation”. 12) ATF 120 II 137. 13) Loïc Pfister, La fondation, No. 82, p. 30. 14) See art. 52 al. 3 CC, art. 19 and 20 CO. 15) Swiss Foundation Code (2015), p. 16. 16) Although this may be surprising, the seat is not a decisive factor. 17) Loïc Pfister, La fondation, No. 787, p. 205. 18) *Ibidem*. 19) Loïc Pfister, N 792, p. 206, mentioning art. 81 al. 2 and 83d CC. 20) Swiss Foundation Code, p. 40. 21) Richard Graziano, Vincent Hillyer and Donald Layden Jr., *Being Deliberate About Strategy Through Leadership and Governance*, in: Michael Mortell and Tine Hansen-Turton (eds.), *Making Strategy Count in the Health and Human Services Sector: Lessons Learned from 20 Organizations and Chief Strategy Officers*, Springer (2013), p. 249. 22) Cf. supra, 1.2. 23) Paul Brest and Hal Harvey, *Money Well Spent: A Strategic Plan for Smart Philanthropy*, Second Edition, Stanford University Press (2018), pp. 24ss. 24) Brest/Harvey, p. 11. 25) Brest/Harvey, p. 25. 26) Brest/Harvey, p. 54. 27) See Paul Brest, *The Power of Theories of Change*, *Stanford Social Innovation Review* (2010), pp. 47 to 51. 28) Paul Brest, *Strategic Philanthropy and Its Discontents*, *Stanford Social Innovation Review* (2015), pp. 47 to 51. 29) Patricia Patrizi and Elizabeth Thompson, *Beyond the Vener of Strategic Philanthropy*, *Foundation Review*, Vol. 2, Issue 3, p. 59. 30) Patrizi/Thompson, p. 59. 31) John

M. Bryson, *Strategic Planning for Public and Nonprofit Organizations: A Guide to Strengthening and Sustaining Organizational Achievement*, 5<sup>th</sup> Edition, Wiley (2017), p. 301. 32) Richard P. Chait, William P. Ryan and Barbara E. Taylor, *Governance as Leadership: Reframing the Work of Nonprofit Boards*, Wiley (2011), p. 75. 33) Patrizi/Thompson, p. 54. 34) Marc J. Epstein and Kristi Yuthas, *Measuring and Improving Social Impacts: A Guide for Nonprofits, Companies, and Impact Investors*, *Stanford Social Innovation Review* (2014), p. 31. The roadmap is discussed in depth in Chapter 9 of their book. 35) For examples, see Brest/Harvey, pp. 78 to 84. 36) Epstein/Yuthas, p. 103. 37) *Ibidem*. 38) Epstein/Yuthas, p. 149. 39) Pfister, N 212, p. 65. 40) *Ibidem*. 41) Swiss Code of Best Practice for Corporate Governance, *Economiesuisse* (2015), p. 10. 42) Swiss Foundation Code, Recommendation 6, p. 50. 43) *Ibidem*. 44) Swiss Foundation Code, Recommendation 10, p. 64. 45) *Ibidem*. 46) CR CO II-Peter/Cavadini, N 58 ad art. 716a CO. 47) *Ibidem*. 48) Swiss Foundation Code, p. 41. 49) Such foundations must provide additional information in the notes to the annual accounts, include a cash flow statement and prepare an annual report presenting the economic situation of the foundation and highlighting aspects not included in the annual accounts (art. 961 ff. CO). The annual report must provide information on the conduct of a risk assessment (art. 961c para. 2 lit. 2 CO). 50) Swiss Foundation Code, p. 45. Note that, in the case of “economically significant foundations”, the auditing agency is legally obliged to verify the existence of an internal control system, see: art. 728a al. 1 lit. 3 CO. 51) See CR CO II-Peter/Cavadini, N 25 ad art. 716a CO, with further references. 52) Swiss Foundation Code, p. 45. 53) Loïc Pfister, No. 226, p. 68. 54) George W. Dent, Jr., *Corporate Governance without Shareholders: A Cautionary Lesson from Non-Profit Organizations*, 39 *Del. J. Corp. L.* 93 (2014), p. 97. (2005). 55) Joshua B. Nix, *The Things People Do When No One Is Looking: An Argument for the Expansion of Standing in the Charitable Sector*, 14 *U. Miami Bus. L. Rev.* 147, p. 159. 56) Loïc Pfister, No. 269, p. 78. 57) See art. 398 al. 2 CO. 58) Michael C. Jensen and William H. Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure*, *Journal of Financial Economics*, Vol. 3 (1976), No. 4, pp. 305 to 360, p. 308. 59) Cf. supra, 1.1. 60) See Archie B. Carroll and Ann K. Buchholtz, *Business and Society: Ethics and Stakeholder Management*, 7<sup>th</sup> Edition (2008), p. 84. 61) Thomas Donaldson and Lee Preston, *The stakeholder theory of the*

modern corporation: Concepts, evidence and implications, *Academy of Management Review* 20, 1995. 62) Rob Gray, Dave Owen and Adams Carol, *Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (1996), p. 46; Starik Mark, *Is the Environment an Organizational Stakeholder? Naturally!* *International Association for Business and Society (IABS)* (1993), pp. 466 to 471. 63) Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, *New York Law School Law Review* (1996), p. 461. 64) See Henry Peter and Guillaume Jacquemet, *Corporate Social Responsibility, Sustainable Development et Corporate Governance*, *RSDA 3/2015*, p. 175, defending an extended principal-agent theory of for-profit organisations. 65) See, Mitchell Ronald K., Agle Bradley R., Wood Donna J., *Toward a Theory of Stakeholder Identification and Saliency: Defining the Principle of Who and What Really Counts*, *The Academy of Management Review*, Vol. 22, No. 4 (1997), pp. 853 à 886. 66) Louis D. Brandeis, *Other People's Money and How the Bankers Use It*, *New York* (1914), p. 92. 67) Peter Böckli, *Corporate Governance und “Swiss Code of Best Practice” – Leitlinien für die Gestaltungsarbeit des Verwaltungsrats*, in: Hans Caspar von der Crone, Rolf H. Weber, Roger Zäch, Dieter Zobl (eds.), *Neuere Tendenzen im Gesellschaftsrecht – Festschrift für Peter Forstmoser*, pp. 257–286, p. 260. 68) Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, *Columbia Law Review*, Vol. 96 No. 5 (1996), pp. 1335 to 1362, p. 1336: “(...) good disclosure has been a most efficient and effective mechanism for inducing managers to manage better.” 69) As the first beneficiaries of transparency, see: Peter, *Devoir de transparence des entreprises*, p. 29. 70) Increased transparency mainly benefiting the tax authorities. 71) Arrivillaga/von Schnurbein, p. 39. 72) *Ibidem*. 73) *Ibidem*. 74) See Swiss Foundation Code, p. 71, using the term “functional transparency”. 75) Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, *Columbia Law Review*, Vol. 96, No. 5 (1996), pp. 1335–1362, p. 1342. 76) Cf. supra, 2.3. 77) Swiss Foundation Code (2015), Recommendation 29, p. 123. 78) *Ibidem*. 79) Swiss Foundation Code (2015), Recommendation 29, pp. 123 and 124. 80) *Ibidem*. 81) Brest/Harvey, p. 10. 82) Cf. supra, 2.1. 83) Paul Brest, *The Power of Theories of Change*, p. 47. 84) Swiss Foundation Code (2015), Recommendation 12, p. 69. 85) Cf. supra, 2.1.