

KEY POINTS

What is the issue?

Swiss foundations are often technically confused with foundations in other jurisdictions.

What does it mean for me?

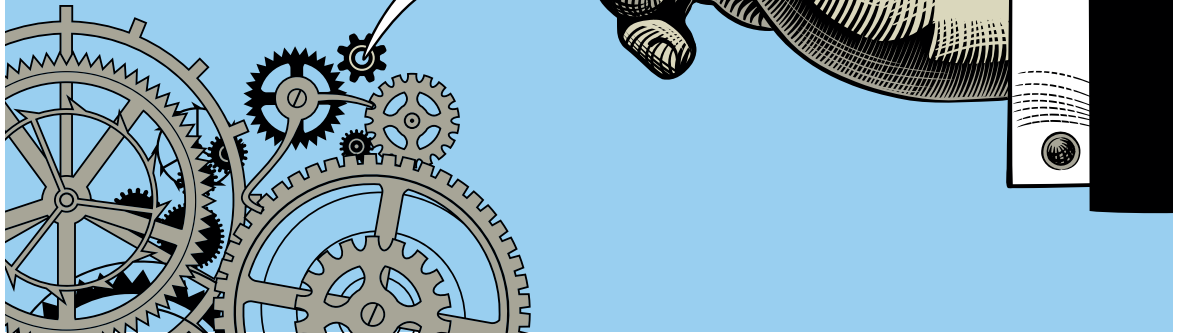
Practitioners should be aware of the scope and utility of Swiss foundations.

What can I take away?

Clarity on the difference between Swiss foundations and foundations in other jurisdictions, including what they may be used for.

Like clockwork

DR ARIEL SERGIO GOEKMEN-DAVIDOFF PROVIDES AN UPDATE ON THE USEFULNESS OF SWISS FOUNDATIONS



Most readers will know about the Liechtenstein foundation; however, its financial service offerings are often confused with those of Swiss foundations, even by international experts. This article will not discuss the Liechtenstein foundation in great detail, but rather will provide clarity on the scope and utility of Swiss foundations.

Swiss foundations can indeed be used for a number of purposes: charitable, employee benefit, even to hold companies. However, the great majority of foundations, about 13,000, are active in the field of charity. It is widely believed by the Swiss foundation community¹ that the OECD's intention to include beneficiaries of Swiss charitable foundations in automatic exchange of information was the result of its recognising no difference between the Liechtenstein and Swiss models.²

The Swiss model cannot be abused to evade taxes, as Swiss foundations are supervised by a special authority and scrutinised by the tax authorities at the same time. A Swiss foundation cannot be controlled by the founder or the beneficiaries. The foundation council can only move within the restrictions of the law and the funds settled into a Swiss foundation are irrevocable.

However, thanks to the intervention of SwissFoundations (an industry association) and the Swiss government, this misunderstanding is now cleared up and no information exchange on Swiss charitable foundations will take place for the time being. Imagine sitting on the board of a foundation that supports humanitarian causes in certain countries where the rule of law is not as well established, and the names of perceived

adversaries to the existing governments (who received your donations) get exchanged. Soon, the foundation would have no more beneficiaries to support.

Switzerland has one of the highest densities of foundations per capita in the world. This is because Swiss foundations are mainly used for charitable causes and therefore donations can, under certain conditions, be deducted from income and profit. There are more than 13,000 charitable foundations registered in Switzerland, which means there are nearly 16 foundations per 100,000 inhabitants.³ By contrast, Germany has ten times the population of Switzerland and has more than 20,000 charitable foundations.⁴

A foundation is created based on the Swiss *Civil Code* (the Code)⁵ and is its own legal person with its own dedicated assets. Under the Swiss tax system, and based on art.335 of the Code, it is difficult to establish a foundation that would pay for the maintenance of a family, although it is possible under certain circumstances to allow benefits for the family, e.g. for educational purposes. Therefore, the overwhelming majority of Swiss foundations are founded for exclusively charitable purposes. This is probably the main difference to the Liechtenstein foundation.

It is possible to create foundations that hold enterprises; in the author's view, however, these are mainly established to ensure that a family corporation is not sold off by later generations. This does not always work, as sometimes the foundation council decides to sell the shares of the company it holds, e.g. to ensure the continuation of the business as the foundation founders stipulated. ➔



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It is relatively easy to form a Swiss foundation, as there is no minimum capital required per se, although in practice the capital should be at least CHF50,000. The foundation starts its life by being registered in the Swiss commercial registry. This can be done during the lifetime of the founder or by virtue of the last will and testament. The disadvantage with the latter is that the founder cannot amend certain potential defects of their foundation, which will only become clear in practice.

The foundation by virtue of the last will and testament can be established in this way if the majority of assets are, for example, an art collection or real estate and therefore illiquid. The foundation requires financial assets to execute the founder's wish, which is, contrary to a board of directors of a corporation, what the foundation council has to implement.

THE FOUNDATION'S PURPOSE

Although it seems straightforward to establish a foundation, there are complications. The founders of a charitable foundation must make certain that the foundation's purpose is accepted as charitable by the tax authorities. This will happen when the authorities are convinced that the purpose benefits Switzerland and its population and, in general, is truly charitable.

In the tradition of Switzerland, which is a depositary state for 79 international treaties, including the Geneva Conventions, a foundation with a purpose that focuses on humanitarian causes anywhere in the world is acceptable. Therefore, great care has to be taken when formulating the purpose. For example, a foundation that intended to create a 'retirement home' for old riding horses would not be seen as charitable; it would perhaps be recognised as such if the purpose had been set as 'providing a home for old horses that are not kept in accordance with animal welfare laws'.

TAX CONSIDERATIONS

Under Swiss tax law, it is also important to consider when the initial donation to establish the foundation is made. If the foundation is not definitely recognised as charitable, the donation will be seen as a gift among third parties, which carries a relatively high tax burden, which must be paid by the foundation. If the donation is given to a recognised charity, gift tax will not be applied. In the event of larger donations of millions, it is prudent to obtain a tax ruling from the cantonal tax authorities.

It is a relatively cumbersome process to establish a new foundation and ensure that all aspects are satisfied. As is stated above, the purpose must be

'The founders of a charitable foundation must make certain that the foundation's purpose is accepted as charitable by the tax authorities'

clearly defined and, especially when the foundation has a charitable purpose, must be acceptable to the tax authorities. Although it is not a legal requirement, it is recommended to populate the foundation council, which carries a responsibility similar to that of a board of directors of a company, with people who understand what is expected from them and are able to implement the founder's wish, even after they pass away. There must be enough capital and a capability to check projects submitted to the foundation to ensure that they do not conflict with the tax exemption of the charity. Therefore, in the Swiss foundation community, there is an opinion that a foundation that does not have at least CHF10 million in capital is not a viable project.

The Swiss Federal Tax Authority, as well as the Swiss supervising body (*Eidgenössische Stiftungsaufsicht*), regularly monitors a foundation's payments and activities, and it would be suboptimal if, after three years, the tax exemption were withdrawn from a charitable foundation due to a payment made to a beneficiary that is not in accordance with the exceptions foreseen in the tax law for charities.

Dachstiftung

In Switzerland, there is another alternative for which there has been growing demand in recent years: the *Dachstiftung*, an umbrella foundation. This foundation can be established with a relatively wide purpose and therefore permits other foundations to be attached under it, similar to the concept of a protected cell company.⁶ The foundations under the umbrella of this foundation are considered to be 'non-independent', yet enjoy the same benefits as the independent foundation they are attached to. However, they cannot change the wide purpose of the *Dachstiftung* but must be able to act within it.

This means the umbrella foundation provides the fundament for all activities of the sub-foundation. There is already a pre-existing foundation board, with selected experts and personalities, which

can support the sub-foundation in the implementation of the founder's wishes. The founders of the sub-foundation may be added to their own board, or advisory board, as appropriate. The umbrella foundation will have headquarters, usually with a director who leads all activities there and also receives correspondence for the sub-foundations, which do not have their own legal personality.

Accounting and finances will be maintained separately for the sub-foundation and a website outlining the work of the sub-foundation and indicating where donations must be paid should also be established. Most importantly, before distributions are accepted from the sub-foundation, they are approved by the foundation board and, therefore, checked to ensure that the payment is indeed charitable and compliant. This excludes any later surprises when officials arrive either from the Swiss tax authorities or the supervising body for foundations.

Thanks to this umbrella, the founders of the sub-foundation have an 'all-care package', which includes every aspect of the foundation's life. The founders can focus solely on doing their charitable work and, of course, attract donations to their sub-foundation. One of the advantages of using an umbrella foundation is that its non-independent sub-foundations can be quickly established and closed again, as negotiations of the terms are only agreed upon with the umbrella foundation and a contract is drawn up to determine the main points of the agreement. The other advantage is that the establishment and maintenance of a sub-foundation only carries a fraction of the cost of a large foundation.

Usually, initial costs are around CHF10,000 for the establishment of a sub-foundation, compared to up to ten times as much for a customised, independent stand-alone foundation. The running costs are equally low, normally fixed at a percentage of the distributions performed by the sub-foundation.

CONCLUSION

The Swiss foundation has seen an increase in take-up, with one foundation being formed daily on average, and its advantages to charity are widely recognised.⁷

#FOUNDATIONS #TAXATION
#CHARITIES #PHILANTHROPY

1 bit.ly/35HwdFq 2 bit.ly/2Hbyxei 3 Source: Professor Dr Dominique Jacob, University of Zurich 4 bit.ly/35FXTPC, accessed 4 July 2020 5 bit.ly/3JJOA2a, accessed 4 July 2020 6 A protected cell company (PCC) is a legal entity that consists of a core linked to several cells. Cells in a PCC have separate assets and liabilities and are independent of one another. 7 The author wishes to thank Nicole Tschirky, attorney-at-law, Wenger-Plattner, for her support.