



# Shareholder Foundations in Switzerland

**Julie Wynne**  
**Partner, Froriep**



1. Family businesses and the role of foundations
2. Foundations
3. Family Foundations
4. Company-affiliated foundations
5. Shareholder foundation
6. Tax issues

# 1. FAMILY BUSINESSES AND THE ROLE OF FOUNDATIONS

- Family businesses = a family owns a significant share and can influence important decisions, particularly the election of the chairman and CEO.
- As family businesses expand from their entrepreneurial beginnings, they face unique performance and governance challenges:
  - The generations that follow the founder, for example, may insist on running the company even though they are not suited for the job.
  - And as the number of family shareholders increases exponentially generation by generation, with few actually working in the business, the commitment to carry on as owners can't be taken for granted.
  - Less than 30 percent of family businesses survive into the third generation of family ownership.

# 1. FAMILY BUSINESSES AND THE ROLE OF FOUNDATIONS

- Types of foundations which can be used
  - Charitable foundations
  - Holding foundations, attractive to entrepreneurs as a way to preserve the family business
  - Family foundations
  - Mixed purpose foundations (combination of holding foundation purposes with family and charitable purposes)

## 2. FOUNDATION : GENERAL FEATURES

- 13,172 charitable foundations registered in Switzerland as of end 2016, more than 50% of them have been established in the past 20 years. 349 new foundations established in 2016
- A foundation is established by the endowment of assets for a particular purpose (art. 80ff CC):
  - the intention to establish a foundation
  - a purpose
  - assets
  - an organization.
- Established by public deed or testamentary provision
- The foundation has no members.
- Great flexibility for the organization of the foundation in the Articles of Association and internal regulations

## 2. FOUNDATION: ORGANISATION AND PURPOSE

- Freedom to determine the purpose of the foundation: public benefit, solely private or mixed purpose
  - Right for the founder to amend the purpose of the foundation only if provided for in the Articles and if ten years have passed since the establishment of the Foundation or since the last amendment;
  - Change by the competent Supervisory Authority only in exceptional circumstances.

## 2. FOUNDATION: SUPERVISION

- Placed under the supervision of Swiss public authorities which can be federal or cantonal depending on the nature and the scope of the Foundation's purpose:
  - Cantonal Supervisory Authority for foundations with activities on a local and cantonal level
  - Federal Supervisory Authority for foundations with activities on a national or international level
- Ecclesiastical and family foundations are not subject to supervision
- The Supervisory Authority
  - acts at its own initiative or further to a complaint
  - monitors the Foundation to ensure that it carries out its activities in accordance with its purpose, the will of the founder and complies with the law
  - reviews the audited annual accounts and the annual report of the Foundation
  - can sanction any committed misconduct.

## 2. FOUNDATION: TAX TREATMENT

- Same taxation as for companies.
- Charitable foundations can apply for tax exemption based on their public benefit purpose if:
  - The foundation serves a public benefit purpose, e.g. charitable, humanitarian, healthcare, ecological, educational, scientific and cultural purposes. The number of beneficiaries must not be limited.
  - It must actually carry out its public benefit purpose.
  - It must not have an economic purpose.
  - The members of the Foundation Board shall as a rule not be compensated.
  - In the case of the foundation being dissolved, the assets should be allotted to a tax exempt entity pursuing similar public benefit purposes
  - The assets cannot be returned to the founders or members, nor be used to their own profit.



### 3. FAMILY FOUNDATIONS: IN GENERAL

- Family foundations primarily serve to support or provide education to family members who are dependent.
- The purpose must satisfy strict criteria and may only pay for the costs of raising, endowing or supporting family members (Art. 335 para. 1 CC). This list is exhaustive.
- Family foundations which grant funds to family members without preconditions for maintenance or pleasure purposes are prohibited. The foundation therefore may not serve to ensure a mere financial alimony or higher living standard for the family.
- Family foundations are void ab initio if they have an illegal or unlawful purpose (Art. 52 para. 3 CC). Family foundations that are aimed at profiting family members in contradiction with the rules provided by Art. 335 CC are void.

### 3. FAMILY FOUNDATIONS: IN GENERAL

- The circle of beneficiaries is limited to the members of a particular family. Family members are people who are related by blood, marriage or adoption. In-laws are also included if there is a blood relation to one of the spouses.
- Generally, the same rules for normal foundations apply to family foundations. However:
  - Family foundations are not subject to State supervision (Art. 87 para. 1 CC);
  - They are not required to be audited (Art. 87 para. 1bis CC).
- Family foundations cannot apply for tax exempt status of foundations as they lack of public benefit purpose and their circle of beneficiaries is limited.

### 3. FAMILY FOUNDATIONS – EXAMPLES

#### Sandoz Family Foundation – Purpose clause

- The Sandoz Family Foundation was established in 1964 by the sculptor and painter Edouard-Marcel Sandoz, the son of the founder of Sandoz SA of Basel (now Novartis SA).
- **Purpose clause:** support the descendants of Edouard Constant Sandoz (1853-1928) as beneficiaries under specific circumstances. In practical terms, members of the family can obtain money from the Foundation if they wish to make themselves independent at the beginning of their professional career and need start-up capital. They do this by submitting a business plan to the other members of the family and the latter give their consent, provided they are convinced of the viability of the plan.
- **Aim:** to encourage entrepreneurial commitment through long-term holdings in companies in a variety of sectors. Apart from commercial criteria, the Foundation is dedicated to the encouragement of entrepreneurship and innovation as well as to the cultivation of Swiss entrepreneurial tradition. The Foundation reinvests the income from its various investments in an entrepreneurial manner that encourages the creation of new jobs.
- **Activities:** directly or indirectly involvement in the pharmaceutical industry and agribusiness, the hotel trade, the watch industry, telecommunications and the internet through a variety of organisations and holding companies.

### 3. FAMILY FOUNDATIONS – EXAMPLES

#### Sandoz Family Foundation – Purpose clause

- The purpose of the Sandoz Family Foundation set out in the foundation instrument is to support the descendants of Edouard Constant Sandoz (1853-1928) as beneficiaries under specific circumstances.
- In practical terms, members of the family can obtain money from the Foundation if they wish to make themselves independent at the beginning of their professional career and need start-up capital. They do this by submitting a business plan to the other members of the family and the latter give their consent, provided they are convinced of the viability of the plan.



## 4. COMPANY AFFILIATED FOUNDATIONS

- Company affiliated foundations are neither regulated nor mentioned in the Swiss foundation law but are a common feature in practice.
- Company affiliated foundations exist in three forms:
  - **directly supporting foundations** (*Unternehmensträgerstiftung, fondation-entreprise*): they conduct a commercial, manufacturing or other business in the pursuit of an economic or non-economic purpose, and are therefore directly the responsible body of the enterprise itself. e.g. foundations that directly provide social services by means of operating hospitals, schools, care centres, foster homes,...
  - **holding foundations / shareholder foundations** (*Holdingstiftung, fondation actionnaire*): foundations holding a significant share in a corporation which operates a commercial business.
  - **corporate foundations** (*Unternehmensträgerstiftung, fondation d'entreprise*): foundation established by a company to support its philanthropic activities. It derives the majority of its income from that company.

## 5. SHAREHOLDER FOUNDATIONS

### Landmark decision of 18 May 2001 (ATF 127 III 337) - Facts

- Group O is a group of companies, mainly active in aviation; the companies are held by O. Industrial Holding Ltd, which has a share capital and participation certificates.
- On 16 April 1985, O, deceased in 1995, established the O. Foundation whose purpose is (a) the maintenance and development of the group as a family business, (b) the support to vocational training for talented young people, (c) the support to scientific research and (d) pension in favour of employees of the group and their family.
- In 1986, the members of the O. family assigned to the foundation 92% of the share capital.
- On 5 September 1997, the widow took legal action to have the first paragraph of the purpose considered as void ab initio.

## 5. SHAREHOLDER FOUNDATIONS

### Landmark decision of 18 May 2001 (ATF 127 III 337) – key elements

- The Federal Supreme Court confirmed the legitimacy of corporate foundations pursuing an economic purpose.
- It confirmed that Swiss law does not provide limitations to the purpose of a foundation: a foundation can therefore have a purpose to hold a participation in a for-profit company. In particular, the explicit prohibition of a commercial purpose only for associations (Art.59 para. 2 CC) implies the admissibility of such a purpose for foundations.
- The Federal Supreme Court recalled that a bill had been subject to a public consultation in 1993 to introduce a partial prohibition to corporate foundations. Under this bill, only ideal purposes would have been allowed for corporate foundations. This bill had caused a fierce opposition and was abandoned.

## 5. SHAREHOLDER FOUNDATIONS

### Landmark decision of 18 May 2001 (ATF 127 III 337) – key elements

- The foundation could not be considered as a family foundation as the circle of beneficiaries was not limited to family member of O (see purpose para. 2b to d).  
Considering that a legal entity (the group of companies) was beneficiary of the foundation, the foundation could neither be considered as a family foundation (purpose clause para. 2a).
- The fact that family members are holders of participation certificates cannot lead to qualify the foundation as a family foundation prohibited by Art. 335 CC. Even though family members benefit from a good financial health of the group of companies as holders of participation certificates, they do not have unconditional benefits levied from the capital of the foundation.



## 5. SHAREHOLDER FOUNDATIONS

- Open questions:
  - Can the foundation interfere in the operational activities of its affiliated enterprise, which it by majority or wholly owns,
  - how existing and subsequently added subsidiaries of a holding should be dealt with,
  - how instructions of the foundation board for exercising voting rights in the companies which are held by the foundation should be handled,
  - how the foundation board should be compensated.

## 5. SHAREHOLDER FOUNDATIONS – EXAMPLES

### Jacobs Foundation

- In 1991, Klaus J. Jacobs founded the global companies Adecco (an HR solutions provider) and Barry Callebaut (a manufacturer of cocoa and chocolate products), both now leaders in their respective global markets.
- Jacobs was socially engaged throughout his life, with a particular focus on helping young people.
- In 2001, Jacobs transferred his interests in Jacobs Holding AG to the Jacobs Foundation by means of a donation.
- The Jacobs Foundation invests in the future of young people so that they become socially responsible and productive members of society. It provides various kinds of support for individuals and institutions active in research and practice in childhood and youth development. It also operates its own programs focusing primarily on early childhood by which it seeks to improve overall conditions and encourage the adoption of a comprehensive early childhood policy.
- Over CHF 500 million in cumulative grants has been paid out since the Foundation's establishment in 1989.

## 5. SHAREHOLDER FOUNDATIONS – EXAMPLES

### Hans Wilsdorf Foundation

- In 1905, at the age of 24, Hans Wilsdorf founded a company in London specialising in the distribution of timepieces, Swiss movements and English components.
- In 1919, Rolex moved to Geneva.
- The Hans Wilsdorf Foundation was established on 7 September 1945, just after Hans Wilsdorf's wife died. Hans Wilsdorf was sole owner of Roles and, with no heirs, gave all his shares to the Foundation. Wilsdorf himself died in 1960.
- The Foundation continues to hold all the shares of the group of companies with the best-known and most talked about watch brand on the planet.
- Charitable activities in particular through The Rolex Institute (which furthers the company's charitable activities), The Rolex Awards for Enterprise (which recognizes pioneering men and women around the world who work to improve live on Earth), and The Rolex Mentor and Protégé Arts Initiative (which supports a number of extremely talented young artists).

## 5. SHAREHOLDER FOUNDATIONS – EXAMPLES

### Hans Wilsdorf Foundation – Purpose Clause (ART. 3)

*«La fondation poursuit les buts suivants:*

- a) Recueillir tous les biens qui lui seront affectés et en assurer la sauvegarde, l'entretien et la rentabilité, conformément aux instructions et aux vœux des donateurs. Pour tous les actifs à caractère économique à lui échoir et notamment pour l'ensemble des actions des sociétés et des droits qui pourraient lui être apportés par le fondateur, la fondation a pour mission d'en maintenir l'homogénéité, d'en assurer le contrôle de façon continue et de veiller ce que leur exploitation soit poursuivie dans l'esprit et les traditions de leur promoteur.*
- b) Affecter en première ligne tous les revenus et toutes les ressources au maintien et au développement normal des biens appartenant à la fondation.*
- c) Allouer, en cas de disponibilité, des dons annuels à des œuvres de bienfaisance et à des patronages poursuivant les buts suivants:...»*



## 6. TAX ISSUES

- Can be granted a tax exemption
  - Foundations whose purpose is only charitable
- Cannot be granted a tax exemption
  - Foundations whose purpose is to maintain and develop a family business
  - Foundations whose purpose is to support family members of the founder

Thank you for your attention

## JULIE WYNNE

jwynne@froriep.ch | Geneva Office | +41 22 839 63 00

**Julie is specialised in all aspects of international estate planning and non-profit organisations.**



- Julie advises parties on Swiss and international estate planning. She also provides advice in the field of wills, probate and estate administration, application of international succession laws, including international inheritance and tax issues
- Julie advises non-profit organisations, B Corps and social enterprises for their set-up and tax issues and assists them with mergers, reorganisations, joint ventures and other forms of collaborative working, as well as constitutional reviews.
- In addition, she regularly provides advices on grant-making, fundraising, intellectual property, corporate philanthropy and governance.
- Julie is a Board member of the European Social Enterprise Law Association and of B Lab (Switzerland).
- She is a member of the Legal Advisory Board of Sustainable Finance Geneva and of the STEP Philanthropy Advisors SIG Steering Committee.

# CHARITY AND SOCIAL ENTERPRISE

**We act for a diverse range of charities, not-for-profit organisations and social enterprises.**

Philanthropy and social enterprise require detailed knowledge of a wide range of legal disciplines including private client, commercial, corporate and tax law as well as social finance. We take pride in being able to offer the full service. With in-depth experience and expertise in these fields and awareness of the very latest developments in the sector, our clients, donors and social entrepreneurs, benefit from a realistic and pragmatic approach to problem-solving in this dynamic environment.



Not-for-profit organisations and social enterprises can adopt a variety of legal structures (associations, foundations, cooperatives, corporations). We are experienced in all of these structures and so are well able to advise on the principles applying to each. We can carefully guide you through the formation process and the establishment of good governance policies and practices. We also help boards understand their fiduciary obligations and industry best practices so they can provide meaningful oversight to their organizations.

Our Charity & Social enterprise team assists clients on a wide range of operational matters, such as effective governance, mergers, fundraising, intellectual property, joint-ventures, as well as on all aspects of charitable giving.

We have expertise in advising charities in an international context which includes charities undertaking cross-border activities and foreign charities who wish to have a charitable branch in Switzerland.





# FRORIEP

ZURICH | GENEVA | ZUG | LONDON | MADRID

