



## New developments in Swiss foundation law\*

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On **January 1st, 2024**, various amendments to Swiss foundation law will come into force. New provisions will be introduced in the following areas:

- Complaint on supervisory matters regulated by law (Art. 84 para. 3 Swiss Civil Code, hereinafter "CC");
- Extension of the founder's rights through a reservation of the right to amend the organization (Art. 86a CC);
- Simplification of minor amendments to the foundation's deed (Art. 86b CC);
- Form applicable to amendments of the deeds (Art. 86c CC).

Although these amendments to foundation law will not come into force until January 1st, 2024, a **reservation of the right to amend the organization** when establishing new foundations can already be stipulated **today when a foundation is established**.

In addition, since the entry into force of the Swiss stock corporation law amendment on **January 1st, 2023**, two further new provisions exist concerning:

- Procedure in the event of impending insolvency and over-indebtedness (Art. 84a CC);
- Disclosure of remuneration (Art. 84b CC).

The new provisions are discussed in more detail below.

## 1 Foundation Supervisory Complaints

### 1.1 General

#### 1.1.1 Governmental supervision

Foundations are subject to supervision under public law.<sup>1</sup> Supervision serves, on the one hand, the realization of the foundation's purpose by ensuring that the will of the founder is observed and implemented<sup>2</sup>, and, on the other hand, the functionality of the foundation.<sup>3</sup> The supervisory authority ensures that the assets of the foundation are used in accordance with the purposes which the founder is in principle free to determine, which includes that the foundation deed and regulations are observed and that discretion is not exceeded or abused.<sup>4</sup>

#### 1.1.2 Foundation supervisory complaints

In addition to the direct supervision of foundations by supervisory authorities, certain third parties may lodge a complaint with the competent supervisory authority against actions or omissions of the foundation's bodies that violate the law or the articles of association and request its intervention.<sup>5</sup>

Up to now, the right of complaint against acts and omissions of foundation bodies has not been explicitly regulated by law. Doctrine and case law derive foundation supervisory complaints from Art. 84. para. 2 CC.<sup>6</sup>

A new third paragraph has been created in Art. 84 CC, which in the future will contain an explicit legal basis for complaints in foundation law.

## 1.2 Previous law

A foundation supervisory complaint presupposes the complainant's own interest in having the measures he seeks ordered.<sup>7</sup> The requirements placed on this interest must not be too high.<sup>8</sup> Therefore, any person who may actually be in a position to obtain a benefit or other advantage from the foundation must be entitled to complain.<sup>9</sup> However, in the case of ordinary foundations, the circle of potential beneficiaries may be very large or largely unlimited or open; for this reason, according to case law, only those who have a special proximity to the foundation and are particularly affected by a contested decision, as well as those who have an interest worthy of protection in its annulment or amendment, are entitled to file a foundation supervisory complaint as beneficiaries.<sup>10</sup> Furthermore, anyone who otherwise has an interest of his or her own in ensuring that the assets of the foundation are used for the intended purpose is entitled to file a complaint.<sup>11</sup> Whether a foundation supervisory complaint is legitimate must always be assessed on a case-by-case basis.<sup>12</sup>

*As parties with the right to act, actual and potential beneficiaries<sup>13</sup>, (overruled) members of the board of the foundation<sup>14</sup> as well as founders<sup>15</sup> can be considered in particular. Under certain circumstances, donors, benefactors or other supporters mentioned in the foundation deed may also have the right to act, in particular to object to a misappropriation of their contributions.<sup>16</sup> The right of other persons who have a special relationship of proximity to the foundation, for example heirs, the executor of a founder's will, other foundation bodies (controlling body, electoral body) and their members, to take action is conceivable, but must also be assessed in the specific individual case.<sup>17</sup>*

Parties with a *passive right of action* are primarily the *supervised foundation*, the foundation bodies subject to supervision as well as the *auditors*.<sup>18</sup>

A complaint may be lodged against acts and omissions of the foundation bodies that are contrary to law, to documents or to the articles of association, against any resolutions of the foundation board as well as against actual actions of the foundation board.<sup>19</sup> Because foundations have autonomy in their decision-making, the foundation supervisory authority decides with a rescinding decision.<sup>20</sup>

### 1.3 Future law

In the future, Art. 84 para. 3 CC will read generally as follows: Beneficiaries or creditors of the foundation, the founder, benefactors and former and current members of the foundation board who have an *interest* in ensuring that the administration of the foundation complies with the law and the foundation deed may lodge a complaint with the supervisory authority against acts and omissions of the foundation bodies.

The law now *definitively* lists the eligible persons who are entitled to lodge a complaint if an *interest* is given. This means that in future, for example, heirs of the founder, at most the executor of the founder's will, members of other foundation bodies or other foundation bodies themselves, for example electoral or control bodies<sup>21</sup>, are excluded from the entitlement to file a foundation supervisory complaint.

With regard to the required "interest" of the person entitled to file a foundation supervisory complaint, nothing has been gained by the revision of foundation law; it will continue to be left to case law under which conditions an interest in filing a foundation supervisory complaint is affirmed.

## 2 Organisational Change Reservation

### 2.1 Preliminary note

Since January 1, 2006, founders have been able to include a *reservation of the right to amend the purpose* in the foundation deed. If an amendment of purpose has been reserved in the foundation deed and at least ten years have elapsed since the establishment of the foundation or since the last change requested by the founder, the competent federal or cantonal authority shall amend the purpose of a foundation at the request of the founder or on the basis of the founder's testamentary disposition.<sup>22</sup>

Similar to the provision reserving the amendment of purpose, a reservation for an *organizational* amendment will be introduced in the future.

### 2.2 Applicable law

Under current law, amendments to the organization can only be made if the preservation of the assets or the preservation of the foundation's purpose urgently requires such amendment (so-called *material amendments to the organization*)<sup>23</sup> or if it is a minor amendment to the foundation deed that appears to be necessary for valid factual reasons and no rights of third parties, including beneficiaries, are affected (so-called *minor (organizational) amendments*).<sup>24</sup> According to the case law of the Federal Supreme Court, minor amendments to the foundation deed must serve interests that are worthy of protection<sup>25</sup>, whereby this criterion has practically no independent significance in relation to the valid factual reasons. In any case, it is not necessary that an important reason exists, but it is sufficient that the purpose of the foundation can be better fulfilled by the minor amendment of the foundation deed.<sup>26</sup>

The distinction between material and minor organizational amendments is not easy to make. In principle, amendments are deemed of minor importance if they do not fundamentally change the nature of the foundation and do not affect any provisions of the foundation deed which, according to the founder's presumed intention, are essential and are intended to remain unchanged.<sup>27</sup> If, on the other hand, organizational changes interfere with characteristics of the foundation that determine its identity, these are no longer minor organizational changes, and consequently the requirements for material organizational amendments must be met.<sup>28</sup>

The following provisions, in particular, may be amended in a foundation deed under the procedure of a minor organizational amendments:

- Eligibility requirements of the foundation bodies;
- Number, function and competences of the members of the foundation bodies;
- Term of office, term limits or age limits of the foundation bodies;
- Election and deselection of the foundation bodies;
- Details and formalities of the foundation's internal procedures, e.g. powers to convene meetings, deadlines for convening meetings, questions relating to the agenda, quorum and quorum requirements, procedures in the event of a tied vote, voting rights and voting obligations, formalities relating to the casting of votes, taking of minutes, honoraria, signature regulations;
- Editorial amendments;
- Name of the foundation; and
- Seat of the foundation.<sup>29</sup>

It is disputed whether provisions in a foundation deed stipulating that foundation board meetings must be held physically with compulsory attendance can be amended under the minor organizational amendment procedure to provide, for example, for virtual meetings (telephone conferences, online meetings, etc.) in the future, or whether this is a material organizational amendment.<sup>30</sup>

In addition, *regulations that are to be regarded as specific to the foundation* in question are reserved, the changes to which are always to be regarded as material, for example foundation-specific representations of certain persons on the foundation board or ineligibility of certain foundation board members.<sup>31</sup>

### 2.3 Additional possibility of organisational amendments

The revision creates an *additional possibility* to amend the organisation of a foundation. The competent federal or cantonal authority now also allows the amendment of the organisation of a foundation at the request of the founder or on the basis of the founder's testamentary disposition if an amendment of organisation has been reserved in the foundation deed and at least ten years have elapsed since the establishment of the foundation or since the last amendment of organisation requested by the founder.<sup>32</sup>

A reservation of the right to amend the organisation - just like a reservation of the right to amend the purpose - must, if such a reservation is to be provided for, already be stipulated when a foundation is established. A subsequent reservation cannot be added to the foundation deed. Due to the revision of the foundation law, existing foundations do not have the possibility to include a reservation of the right to amend their organisation in the foundation deed. However, when setting up new foundations now, it is advisable to already check whether or not, in addition to a possible reservation of the amendment of the purpose, a reservation of the right to amend the organisation should be included in the foundation deed.

By means of a reservation of the right to amend the organisation, a founder may, for example, change the *structure of the foundation's governing bodies* every ten years, modify the *election procedure* of the foundation board or other foundation bodies, or modify the *provisions on the foundation's investment of assets*.<sup>33</sup> Likewise, a founder may in future convert a foundation intended for perpetuity into a *consumer foundation* by means of a reservation of the right to amend the organisation.<sup>34</sup>

The Federal Supervisory Authority for Foundations announced on 9 January 2023 that it accepts the supervision of foundations with a foundation deed that already contains the new reservation of amendment of the organisation before the new provisions in foundation law come into force.<sup>35</sup> Accordingly, a reservation of amendment of organisation can be provided for with immediate effect when setting up new foundations, if desired by the founder.

### 3 Minor amendment of the foundation deed

Amendments to the foundation deed will be easier in future. In the case of *minor amendments to the foundation deed*, the factual reason no longer has to be *valid*, as was previously the case. Accordingly, the supervisory authority may in future make minor amendments to the foundation deed after hearing the highest foundation body, provided that this appears to be justified on *objective grounds* and no rights of third parties are impaired.<sup>36</sup>

### 4 Form of amendments to the foundation deed

Amendments to foundation deeds<sup>37</sup> are ordered by the competent federal or cantonal authority or by the supervisory authority.<sup>38</sup> Public notarisation of the amendments is no longer required in the future.<sup>39</sup>

### 5 Procedure in the event of imminent insolvency and over-indebtedness

In the event of imminent insolvency or over-indebtedness, the highest foundation body must notify the supervisory authority immediately.<sup>40</sup> If the auditors determine that the foundation is insolvent or overindebted, they shall notify the supervisory authority.<sup>41</sup>

The supervisory authority holds the highest foundation body responsible to initiate the necessary measures.<sup>42</sup> If the latter fails to act, the supervisory authority shall take the necessary measures or notify the court.<sup>43</sup> The provisions of the Companies Act on the determination of over-indebtedness as well as on the revaluation of real estate and participations are applicable accordingly.<sup>44</sup>

With the reference to the provisions of company law on insolvency and over-indebtedness, an obligation to prepare a liquidity plan in the event of imminent insolvency is introduced. In foundation law, these obligations apply to the highest foundation body. The reference to the provisions of company law is also accompanied by the duty of all persons and bodies involved to act with due haste.

## 6 Disclosure of remuneration

The highest foundation body must disclose separately to the supervisory authority on an annual basis the total amount of remuneration paid directly or indirectly to it and to the management, if any, within the meaning of Article 734a paragraph 2 of Swiss company law.<sup>45</sup>

According to the provision of Swiss company law, which now also applies to foundation law, the following are deemed to be remunerations:

- Fees, wages, bonuses and credits;
- Royalties, participation in turnover and other participation in business results;
- Services and benefits in kind;
- The allocation of equity securities, conversion and option rights;
- Entrance bonuses;
- Sureties, guarantee obligations, pledges and other collateral;
- The waiver of claims;
- Expenses that create or increase entitlements to pension benefits;
- Any services for additional work;
- Compensation in connection with non-competition clauses.<sup>46</sup>

In practice, the duty to provide information is likely to become significant in particular with regard to services for so-called additional work of foundation board members, for example on the basis of consulting, marketing, administration, trustee or fundraising mandates.

According to the view expressed here, the information on remuneration - within the meaning of Art. 734a para. 3 Swiss Code of Obligations (hereinafter "CO") - must include in particular:

- The total amount for the foundation board and the amount attributable to each board member, stating the name and function of each board member concerned;
- The total amount for the management and the highest amount attributable to each member, stating the name and function of the member concerned;



- The total amount for any advisory councils or other bodies and the amount attributable to each member, stating the name and function of the member concerned.

However, the wording of Art. 84b CC is limited to the obligation that the highest foundation body only disclose separately to the supervisory authority the *total amount* of the remuneration paid directly or indirectly to it and to any management within the meaning of Art. 734a para. 2 CO on an annual basis. There is no explicit legal reference to Art. 734a para. 3 CO, according to which this information should also include the total amount for *each individual member of the foundation board*. Likewise, there is no explicit reference to the fact that the maximum amount of remuneration of a member of the management or compensation paid to any advisory boards or other foundation board bodies (electoral body, supervisory body, other committees, etc.) other than the foundation board would have to be disclosed.

In concretisation of this new provision, the Swiss Federal Supervisory Authority for Foundations has announced that every foundation, in analogous application of Art. 734a para. 3 CO, must disclose the total amount for the foundation board and the amount attributable to each member, stating the name and function of the member concerned, and that the same regulation also applies to the disclosure of the remuneration of the management.<sup>47</sup>

\* This article is an abridged but verbatim version of Arter O./Odermatt C., Revision des Stiftungsrechts, ExpertFocus 2022, 444 et seq.

<sup>1</sup> Riemer H.M, Handkommentar ZGB, Vereins- und Stiftungsrecht (Art. 60-89<sup>bis</sup> ZGB), Bern 2012, N 2 zu Art. 84 ZGB. Cf. BGE 107 II 385 ff., 388, E. 2.

<sup>2</sup> Bundesgericht, Urteil vom 25. Mai 2016, 2C\_1059/2014 E. 6.3.1; Geiser T./Fountoulakis C., Basler Kommentar, Zivilgesetzbuch I, Art. 1-456 ZGB, Basel 2018 (zit. BasK-Bearbeiter), BasK-Grüniger, N 1 zu Art. 84 ZGB.

<sup>3</sup> BGE 111 II 97 ff., 99 E. 3; Bundesgericht, Urteil vom 19. Januar 2009, 5A\_274/2008, E. 5.1; Bundesgericht, Urteil vom 25. Mai 2016, 2C\_1059/2014, E. 6.3.1.

<sup>4</sup> BGE 100 Ib 132 ff., 134 f. E.3. Cf. Arter O./Cincelli R., Die Aufsicht über Stiftungen durch die Eidgenössische Stiftungsaufsicht – Grundlagen und Revisionsvorhaben, Jusletter 12. Juni 2017, N 29 ff.

<sup>5</sup> Baumann Lorant R., Die Stiftungsaufsichtsbeschwerde, SJZ 2013, 517 ff., 517.

<sup>6</sup> BGE 112 Ia 180 ff., 190 E. 1; BGE 110 II 436 ff., 440 E. 2; BGE 107 II 385 ff., 388 E. 2; Bundesgericht, Urteil vom 23. März 2012, 9C\_823/2011, E. 2.1; BasK-Grüniger, N 17 zu Art. 84 ZGB; Riemer H.M., Berner Kommentar zum Schweizerischen Privatrecht, Die Stiftungen, Art. 80-89<sup>bis</sup> ZGB, Bern 2020 (zit. BerK-Riemer), BerK-Riemer, N 117 ff. zu Art. 84 ZGB; Baumann Lorant. op. cit., 517 ff.

<sup>7</sup> BGE 107 II 385 ff., 391 E. 4; siehe auch: BGE 144 III 433 ff., 438 f. E. 6.1; Bundesverwaltungsgericht, Urteil vom 29. September 2009, B-383/2009, E. 3 f.

<sup>8</sup> BGE 107 II 385 ff., 391 E. 4.

<sup>9</sup> BGE 107 II 385 ff., 391 E. 4.

<sup>10</sup> BGE 107 II 385 ff., 391 E. 4; Bundesgericht, Urteil vom 24. Februar 2017, 2C\_684/2015, E. 6.5.2; Bundesverwaltungsgericht, Urteil vom 29. September 2009, B-383/2009, E. 4; BerK-Riemer, N 118 zu Art. 84 ZGB.

<sup>11</sup> BGE 144 III 433 ff., 439 E. 5, E. 6.1.

<sup>12</sup> BGE 144 III 433 ff., 439 E. 5, E. 6.1.

<sup>13</sup> BGE 144 III 433 ff., 439 E. 5, E. 6.1; BGE 112 Ia 180 ff., 190 E. 1aa; BGE 110 II 436 ff., 440 f. E. 2; BGE 107 II 385 ff., 389 f. E. 3; Bundesgericht, Urteil vom 23. März 2012, 9C\_823/2011, E. 2.1; Bundesgericht, Urteil vom 22. Dezember 2008, 5A\_798/2008, E. 1.2.

<sup>14</sup> Affirmative: BGE 144 III 433 ff., 439 E. 4, E. 6.1; Bundesgericht, Urteil vom 25. Juli 2000, 5A.19/2000, E. 1.b; Bundesverwaltungsgericht, Urteil vom 11. September 2012, B-3773/2011, E. 1.2; BerK-Riemer, N 118 zu Art. 84; negative: Bundesgericht, Urteil vom 23. März 2012, 9C\_823/2011, E. 2.

<sup>15</sup> Baumann Lorant, op. cit., 522.

<sup>16</sup> BerK-Riemer, N 117 zu Art. 84 ZGB.

<sup>17</sup> Cf. BGE 144 III 433 ff., 439 E. 5, E. 6.1; BerK-Riemer, N 117 zu Art. 84 ZGB.

<sup>18</sup> Baumann Lorant, op. cit., 519.

<sup>19</sup> Baumann Lorant, op. cit., 519.

<sup>20</sup> Cf. Baumann Lorant, op. cit., 523; BasK-Grüniger, N 17 zu Art. 84 ZGB.

<sup>21</sup> On the electoral body cf. Arter O., Wer soll den Stiftungsrat meiner philanthropischen Stiftung wählen?, Expert Focus 2018, 464 ff.; as for the Foundation supervisory complaint of the electoral body cf. Bundesverwaltungsgericht, Urteil vom 4. Oktober 2016, B-565/2015, B-812/2015.

<sup>22</sup> Art. 86a Abs. 1 ZGB.

- <sup>23</sup> Art. 85 ZGB.  
<sup>24</sup> Art. 86b ZGB.  
<sup>25</sup> BGE 103 Ib 161 ff., 164 f. E. 2.  
<sup>26</sup> BerK-Riemer, N 23 zu Art. 86b ZGB.  
<sup>27</sup> BGE 103 Ib 161 ff., 164 f. E. 2; BasK-Grüniger, N 3 zu Art. 86b ZGB.  
<sup>28</sup> BasK-Grüniger, N 3 zu Art. 86b ZGB.  
<sup>29</sup> BerK-Riemer, N 20 zu Art. 86b ZGB.  
<sup>30</sup> Discenting BerK-Riemer, N 20 zu Art. 86b ZGB.  
<sup>31</sup> BerK-Riemer, N 7 zu Art. 85 ZGB, N 20 zu Art. 86b ZGB.  
<sup>32</sup> nArt. 86a Abs. 1 Satz 1 ZGB.  
<sup>33</sup> Jakob D., Die Reform des Stiftungsrechts ist beschlossen – was ist gewonnen, was ist verloren, was bleibt?, in: von Orelli L. et al. (Hrsg.), Der Schweizer Stiftungsreport 2022, 20 ff., 21.  
<sup>34</sup> Jakob, op. cit., 21.  
<sup>35</sup> Eidgenössische Stiftungsaufsicht, Merkblatt zum Anbringen des Organisationsänderungsvorbehalts vor Inkrafttreten, 9. Januar 2023.  
<sup>36</sup> nArt. 86b ZGB.  
<sup>37</sup> According to Art. 85 – 86b ZGB.  
<sup>38</sup> nArt. 86c Satz 1 ZGB.  
<sup>39</sup> nArt. 86c Satz 2 ZGB.  
<sup>40</sup> nArt. 84a Abs. 1 ZGB.  
<sup>41</sup> nArt. 84a Abs. 2 ZGB.  
<sup>42</sup> nArt. 84a Abs. 3 ZGB.  
<sup>43</sup> nArt. 84a Abs. 4 ZGB.  
<sup>44</sup> nArt. 84a Abs. 4 ZGB.  
<sup>45</sup> nArt. 84b ZGB.  
<sup>46</sup> Art. 734a Abs. 2 OR.  
<sup>47</sup> Eidgenössische Stiftungsaufsicht, Merkblatt Offenlegung von Vergütungen an Stiftungsrat und Geschäftsleitung, 9. Januar 2023.

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