Civil Code

Last change: 30.09.2025

PDF generated on: 18.09.2026

ONLINE COMMENTARY
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LEGAL COMMENTARY

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COMMENTARY ON

Art. 52 CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 52 CC, in: Nils Güggi/ Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 52 CC N. XXX.

Title Two: Legal Entities

Chapter One: General Provisions

A. Legal personality

Art. 52

[1] Associations of persons organised as corporate bodies and independent bodies with a specific purpose acquire legal personality on being entered in the commercial register.

[2] Public law corporations and bodies, and associations that do not have a commercial purpose do not require registration.

[3] Associations of persons and bodies which pursue an immoral or unlawful purpose may not acquire legal personality.

CONTENT

I. SUBJECT OF THE REGULATION

Art. 52 CC regulates the final point in the process of formation of legal entities, namely the **acquisition of legal personality**. Contrary to what the marginal note ("personality") suggests, it is only about the acquisition of legal personality and not about its content and scope, which are regulated in Art. 53 CC ("legal capacity"). 1

Art. 52 CC actually only regulates the *effect of* the **last step in the process of creating a legal person** (usually its entry in the commercial register). The step itself is regulated in detail in the CRO, while its fundamentals (articles of association or foundation deed) are regulated in substantive and formal terms (resolution, formation of the foundation, other possible formal requirements) in the respective legal provisions for the individual legal entities. 2

II. FORMATION PRINCIPLES FOR LEGAL ENTITIES

A. Compulsory registration vs. freedom of establishment

Swiss law is based on the **principle of the so-called compulsory registration** or normative system in Art. 52 para. 1 CC. The formation of a legal entity is thus dependent on the mandatory, constitutive entry in the commercial register, to which there is a right if the legally determined requirements are met. The normative system is the opposite of the so-called concession system, which requires a sovereign act by an authority – an approval or recognition – as a prerequisite for its creation. 3

The compulsory registration or **normative system** applies to all legal entities not covered by the exception in para. 2. This results in a duty to register for the corporations under the CO and for foundations under private law. 4

Conversely, the **principle of freedom of establishment applies to the legal entities listed in para. 2,** which provides for the free formation of corporations. In this case, registration is also possible on a regular basis – this can be done voluntarily or required by law for other reasons, e.g. for non-profit associations that operate a commercial business, are subject to audit or are mainly involved in directly or indirectly collecting or distributing assets abroad (Art. 61 para. 2 no. 1, 2 and 3 CC) – but in this case it is always purely 5 declaratory. The scope of para. 2 has been increasingly restricted over time – most recently, the so-called GAFI Act of December 12, 2014, which came into force on January 1, 2016, extended the compulsory registration requirement to include ecclesiastical foundations and family foundations. The scope of para. 2 thus remains restricted in federal private law to the non-profit association under Art. 60 et seq. CC. This arises – regardless of any registration requirements under Art. 61 para. 2 CC, which only lead to a declaratory entry – "as soon as the will to exist as a corporation is apparent from the statutes" (Art. 60 para. 1 CC).

B. Relationship to official approvals under other enactments

6 The official granting of a **license to operate an activity requiring a license** by the legal entity is to be separated from the attainment of legal personality. However, the legislator links these two questions in part via the requirement of entry in the commercial register.

III. LEGAL SITUATION BEFORE LEGALLY EFFECTIVE FORMATION

7 Before legal entities come into existence with legal effect, the law of the **simple partnership** (Art. 530 et seq. CO) applies to associations and other bodies (subject to special provisions, cf. Art. 645 CO) (Art. 62 CC). According to the controversial but prevailing view, however, foundations are considered *nasciturus* before they come into legal existence and are therefore subject to subsequent registration (Art. 31 para. 2 CC analogously).

IV. LEGAL ENTITIES WITH AN ILLEGAL OR IMMORAL PURPOSE

A. Non-acquisition of legal capacity

8 According to Art. 52, para. 3 CC, associations and institutions with **illegal or immoral purposes** cannot acquire the right of legal personality. This provision only applies to the *initial* illegality or immorality of the pursuit of the purpose; if a purpose becomes unlawful only *subsequently*, the legal entity must be dissolved.

The purpose of a legal entity is **illegal** if it violates mandatory written or unwritten norms of private or public law. Not least because of changing social attitudes, there is a less clearly defined picture with regard to **immorality**; a common formula describes it as “a violation of the sense of decency of all fair-minded people”. Both the purpose defined in the articles of association and the purpose actually pursued can justify the invalidity; according to case law (if the scope is sufficient), even the means used. According to doctrine and, in our opinion, rightly so, a distinction must be made with regard to the effect of the behavior of the governing body on the effectiveness of the legal entity: If a (permissible) statutory purpose is only substantiated by the actually pursued impermissible purpose and this was also originally intended, this constitutes a “simulation” (Art. 18 para. 1 CO); in this constellation, the impermissible actual pursuit of the purpose overrides the statutory purpose that is actually in line with the law and morality, which is why it is to be assumed that it was originally impermissible. If, on the other hand, the original intention was to pursue a permissible purpose and the governing bodies exceed the limits of this properly conceived purpose, which is set out in the statutes, then this is correctly recognized as a violation by the governing bodies, which may result in their liability (or the supervisory or judicial enforcement of conduct in accordance with the statutes), but cannot call into question the admissibility of the legal entity. 9

The legal consequence of a violation of these barriers is usually **nullity**. According to legal doctrine, non-recognition of legal personality is only appropriate for a small portion of the cases that fall under Art. 52, para. 3 CC and, in accordance with the **protective purpose of the violated standard, it must be determined** whether traditional nullity is the appropriate legal consequence for remedying the defect. Consequently, a decision must be made regarding **partial nullity** if this proves to be appropriate in the individual case. 10

If a legal entity is deemed null and void under Art. 52, para. 3 CC, it has in principle **never existed**. Nevertheless, doctrine and jurisprudence are unanimous in the opinion that a **legally perfect legal entity** must first be **declared null and void by a civil court in a formal procedure** before it can be legally treated as non-existent. Until that time, it is considered a legal entity. In other words, the lack of legal personality is to be established for the sake of legal certainty by (judicial) annulment. 11

12 The **temporal onset** of such an **ascertainment of initial nullity** is disputed. Some legal scholars assume that, in the case of an initially unlawful or immoral purpose, "although they would be void from the outset, if they have already entered into a relationship with third parties or have otherwise been implemented, they do not fall away *ex tunc* as entities that did not exist from the outset, but are recognized in their formal existence and repealed *ex nunc* in liquidation proceedings". Another part of the doctrine – and this is probably the majority, especially in the context of foundations – assumes, on the other hand, that a legal entity that initially formally existed can also be declared null and void by the court with **effect** *ex tunc*. In the area of foundations, the Federal Supreme Court also appears to assume an *ex tunc* effect and thus an initial invalidity of the foundation transaction despite the "corresponding application of Art. 88 para. 2 CC"; in the context of associations, the Federal Supreme Court expressly assumes an *ex tunc* dissolution. However, at the same time, it seems to at least implicitly assume **(at least in the external relationship) the existence of special assets** to be **liquidated** *ex nunc*, whereby the liabilities towards possible (putative) debtors could be settled. This case law of the Federal Supreme Court is criticized in legal doctrine with the apt reasoning that no liquidation can take place without an existing legal entity. In the case of corporate bodies under the CO, the Federal Supreme Court assumes, with reference to the cure under Art. 643 para. 2 CO in the case of a stock corporation (and accordingly in the case of a limited partnership, Art. 764 para. 2 CO), that the legal entity is dissolved *ex nunc*; according to Riemer, this can also be assumed for the other corporate bodies under the CO (GmbH, cooperative).

B. Confiscation of assets

13 A **confiscation of assets as defined by Art. 57 para. 3 CC** is the fundamental consequence of *ex tunc* dissolution proceedings with liquidation – which applies to legal entities that were entered in the commercial register despite the original error or were not entered due to Art. 52 para. 2 CC. This applies to corporations under the CO, but *not* to family foundations that violate Art. 335 CC (in which case the foundation assets revert to the founder or their heirs upon declaration of nullity, the foundation assets revert to the founder or his heirs; for details, see the commentary in <u>OK-Brugger/Humbel, Art. 57 CC N. 8 et seq.</u>). The doctrine assumes that this should apply *a fortiori* in the event of the purpose becoming unlawful or immoral *after the fact*.

C. Possibility of a "healing" effect of the entry

An effective entry in the commercial register can indeed "heal" certain **defects in formation, but in principle not defects of purpose** within the meaning of Art. 52 para. 3 CC, because such a legal entity cannot come into existence. On closer inspection, this is a matter of preserving legal appearance for the sake of protecting third parties. 14

The possible **exception for the joint-stock company** according to Art. 643 para. 2 CO, according to which the right of personality is acquired through registration even if the conditions for registration were not actually met, is the subject of some controversy in doctrine. On the one hand, its applicability to *initial* defects of purpose is disputed, as is its transferability to other corporate bodies of the CO. However, this doctrinal dispute does not concern the **legal entities of the CC**: there is no obligation to register associations (Art. 52 para. 2 CC); with regard to foundations, the Federal Supreme Court has stated in BGE 96 II 273 E. 2, the principle of legal certainty must be judged differently for foundations than for other legal entities, which is why the entry in the commercial register is not to be awarded any remedial effect in the event of the nullity of the foundation transaction or the formal invalidity of the foundation deed. 15

D. Demarcation: Non-recognition of legal capacity due to "interference"

The non-*recognition of* the legal capacity of a legal entity due to the barriers of Art. 52 para. 3 CC must be distinguished from the non-*recognition of* the legal capacity due to a so-called **"interference"**. This non-recognition of legal capacity is based on the prohibition of abuse of rights (Art. 2 para. 2 CC; in some cases, para. 1 is also/additionally referred to) and makes it possible in cases where a legal entity is misused or used as a front (usually to avoid liability), the "veil of the legal entity" can be pierced to reach the (natural or legal) persons behind it. In the case of ordinary or direct piercing through, a third party controlling the legal entity is identified with the legal entity itself; in the case of reverse or indirect piercing through, the controlling third party is attributed "its" legal entity or its behavior. As always when applying Art. 2 para. 2 CC, restraint is required. 16

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Short citation: OK-Humbel, N. XXX zu Art. 53 ZGB.

B. Legal capacity

Art. 53

Legal entities have all the rights and duties other than those which presuppose intrinsically human attributes, such as sex, age or kinship.

CONTENT

I. NORMATIVE PURPOSE AND SYSTEMATIC POSITION

After Art. 52 CC regulates the acquisition of legal capacity by legal persons, Art. 53 CC deals with the scope and content thereof. 1

The starting point is the principle of the general legal capacity of legal persons, which, as independent bearers of rights and obligations, are compared to natural persons in legal transactions as fundamentally equal legal subjects. This principle of equality between legal and natural persons is, however, considerably restricted: those rights and duties which are linked to being a human being can only be assigned to natural persons. In other words: If certain abilities and characteristics are intrinsically linked to the "nature" of the human being (the law mentions, for example, "gender, age or relationship"), legal persons cannot acquire them. 2

This supposedly simple formula – legal persons are entitled to all those rights and duties which do not have to be excluded for reasons of factual logic – can in practice harbour difficult questions of delimitation and has led to a rich and differentiated case law (cf. in detail II.). If one were to look only at this formula, one would overlook the fact that there are also rights and duties from which legal persons would be excluded not because they are "non-human", but because the legislature has deliberately excluded this. 3

Finally, it should be noted that the rights and duties of legal persons do not only form a subset of the rights and duties of natural persons. Rather, the legal capacity is extended by areas of legal capacity genuinely related to legal persons. Examples of such rights and obligations, which "naturally" only legal persons (and in part also legal communities) can or should have, are, for example, the facts of mergers, demergers or conversions pursuant to the Merger Act or employee benefits pursuant to Art. 331 para. 1 CO. 4

II. INDIVIDUAL ASPECTS OF LEGAL CAPACITY

A. Private law

1. Property law and general law of obligations

5 Legal persons are regularly holders of property rights, rights of claim, rights in rem and intellectual property rights (with the exception of copyright). They participate in economic competition and can sue or file criminal charges if their rights are violated under the CC and the UCA. Because the actions of the organs of legal persons are imputed to them not only in the aforementioned area of legal transactions, but also for their "other conduct" (Art. 55 para. 2 CC), they are liable in tort within the meaning of Art. 41 et seq. OR and may be liable extra-contractually (e.g. from culpa in contrahendo, unjust enrichment according to Art. 62 ff. OR or from management without a mandate pursuant to Art. 419 ff. CO). A differentiation must be made in the (fundamentally possible) assertion of claims for satisfaction under Art. 49 CO.

2. Personal law and personal rights

6 A distinction must be made in the area of personal rights. Here there are some legal relationships which, although relevant to legal persons, are subject to their own norms (such as legal capacity and the question of domicile). Other aspects, such as age (or the age of majority), are hardly ever relevant for legal persons. Other aspects of the right of personality (such as kinship, citizenship, birth and death, as well as civil status) have no direct counterpart in legal persons, but are covered by separate sets of norms with comparable content (for example, parent companies and subsidiaries, domestic or foreign control, the formation and dissolution/liquidation of companies, as well as entry in the commercial register).

7 With regard to the protection of personality, on the other hand, the fundamental applicability of Art. 27 et seq. CC to legal persons. However, this must be qualified in various ways: The "binding capacity" of legal persons is considerably stronger than that of natural persons. Art. 28 CC partly concerns aspects of personality that only humans can have (right to existence, physical and mental integrity, privacy, freedom and religious development; furthermore, protection against "stalking" in the sense of Art. 28b CC, the rights under the GlG as well as the personality rights under Art. 328 OR), but legal per-

sons are also partly covered by the scope of protection of Art. 28 CC (e.g. when it comes to questions of honour, reputation or privacy – but not privacy). They can also make use of the right of reply under Art. 28g ff. Civil Code. A differentiation must also be made with regard to the protection of names and, accordingly, only Art. 29 CC is applicable, although this is primarily of importance in the case of legal persons under the CC (the company law provisions of Art. 944 et seq. CO are also applicable to legal persons under the CO) and, even there, elements of company law must be resorted to in order to concretise individual issues.

3. Family law

Against the background of the "natural" criteria of Art. 53 CC and the human essence of family law, it is hardly surprising that only very few provisions apply to legal persons in this area. Family foundations are of some practical relevance (Art. 87 and 335 CC). Otherwise, legal persons are excluded from almost all rights and obligations under family law. In the area of child and adult protection, however, this exclusion only occurs by virtue of positive legislative orders. 8

4. Inheritance law

By their nature, legal persons are not capable of inheritance (active right of inheritance). On the other hand, they are capable of inheritance (passive right of inheritance), i.e. they can inherit in principle (special cases: Art. 493, 539 para. 2 CC). The latter is limited to cases of voluntary succession (Art. 467 ff. CC) and in principle does not extend to intestate succession (Art. 457 ff. CC, exception Art. 466 CC). Finally, the legal person may be appointed to various offices under inheritance law (i.e. as executor, administrator of the estate, liquidator and representative of the heirs; cf. Art. 517, 554 para. 2, 595, 602 para. 3 CC, but not as witness, Art. 502 ff. CC) may be appointed. 9

B. Capacity to be a party, to sue and to be sued

Legal persons have both active and passive capacity to be parties and to institute proceedings. This must also apply to disputes in which their legal capacity is the subject matter of the dispute. Legal persons have the capacity to sue and be sued. 10

C. Public law (including criminal law)

11 In public law, what has been said for private law applies mutatis mutandis: there are rights and duties that legal persons cannot have due to their nature, such as human dignity (Art. 7 FC), certain aspects of equality of rights (Art. 8 FC; para. 1 is also applicable mutatis mutandis to legal persons), the right to life and personal freedom (Art. 10 FC), the protection of children and young people (Art. 11 FC), the right to marriage and family (Art. 14 FC) and freedom of faith and conscience (Art. 15 para. 1 FC). Furthermore, there are those to which they could be entitled but are not supposed to be due to a legislative decision, e.g. party representatives within the meaning of Art. 40 para. 1 FSCA must be natural persons. In a mirror image, legal persons are initially entitled to those rights and duties that neither presuppose natural human characteristics nor have been excluded by the legislature, such as the freedom of worship (Art. 15 para. 2 FC), the freedom of expression (Art. 16 FC), the freedom of assembly (Art. 22 FC) and (according to doctrine) the freedom of association (Art. 22 FC) and (according to doctrine) also freedom of association (Art. 23 FC), the guarantee of property (Art. 26 FC) and economic freedom (Art. 27 FC), the guarantee of the judge of domicile (Art. 30 para. 2 FC), the prohibition of double taxation (Art. 127 para. 3 FC) as well as Art. 13 para. 2 FC (protection against misuse of personal data) and the DPA. Finally, there are certain rights and obligations that only legal entities, but not natural persons, can or should have, such as the facts of the Merger Act, for example in the area of health insurance law.

12 The criminal-law capacity of legal persons to commit offences is generally denied, except in the case of ancillary criminal legislation. First of all, it is the organs that are personally responsible. And this is the case even if certain constituent elements of the offence do not apply to them personally but to the legal person in general (Art. 29 SCC). An important exception to this principle lies in Art. 102 SCC, according to which subsidiary or even original liability of the legal person itself may come into question if the act cannot be attributed to the specific person acting.

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COMMENTARY ON

Art. 54/55 CC

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SUGGESTED CITATION

Claude Humbel, Kommentierung zu Art. 54/55 ZGB, in: Nils Güggi/Lukas von Orelli (Hrsg.), Onlinekommentar zum Zivilgesetzbuch

Short citation: OK-Humbel, N. XXX zu Art. 54/55 ZGB.

C. Capacity to act

I. Requirements

Art. 54

Legal entities have capacity to act once the governing bodies required by law and their articles of association have been appointed.

II. Action on behalf of the legal entity

Art. 55

[1] The governing bodies express the will of the legal entity.

[2] They bind the legal entity by concluding transactions and by their other actions.

[3] The governing officers are also personally liable for their wrongful acts.

CONTENT

I. CONTENT AND PREREQUISITES OF THE CAPACITY TO ACT OF LEGAL PERSONS

1 The capacity to act concretises the legal capacity of the legal person with regard to its ability to acquire rights and to create obligations (shaping of the law). At the same time, this capacity to shape the law is always limited by the legal capacity of the legal person: Without legal capacity, there can also be no rights of formation. In civil procedure, the capacity to act is the capacity to bring legal proceedings, which allows a legal person to bring legal proceedings on its own.

2 While legal persons do not have the capacity to act of their own accord, their capacity to act requires firstly legal capacity, secondly the necessary organisation and thirdly the appointment of the "indispensable organs" according to the law and the articles of association. (Art. 54 CC), which are then to "express the will of the legal person" (Art. 55 para. 1 CC). In other words: The actions of the organs are attributed to the legal person as its own. The (executive) organs do not act on behalf of the legal person (as representatives or third parties bound by power of attorney), but their actions are those of the legal person, of which the organs are "components". Consequently, Art. 54 CC stipulates that the legal person only acquires the capacity to act through the actual and proper appointment of organs. As long as the prescribed organs are missing or not properly constituted, the legal person is in principle incapable of acting. By way of exception, the law provides that a defective organisation may be remedied by the court or the supervisory authority on application.

II. ORGANS OF THE LEGAL PERSON

A. Concept of organ

3 The term "organ" can have two different meanings, which must be distinguished: On the one hand, it refers to the respective body or organisational unit that has a specific function within the legal person. On the other hand – and this understanding of a body is also used as a basis for Art. 54 et seq. CC – it is understood to mean the respective member of the organ, i.e. the respective natural or legal individual person as the "function bearer" who enables the externalisation of the will of the legal person in the first place.

The organ members must at least have capacity of judgement, capacity to act is not required. Thus, minors who are capable of judgement can also function as organs of a legal person. 4

1. Formal and de facto organs

In determining the person with organ functions, the legal doctrine and case law distinguish between formal and de facto organs. 5

Formal organs are designated by the body competent by law or statute to perform their function. In addition, persons are regarded as organs if they de facto act as such (de facto organs). It is required that they "have a decisive influence on the formation of the company's will" and at the same time are endowed with legal or actual decision-making authority, which would in itself be reserved for the actual organs. The decisive factor is therefore correctly a "functional concept of organs", which is of importance on the one hand with regard to the external representation of legal persons and on the other hand with regard to the liability of the organs. 6

In addition to this pair of terms, the term "material organs" is also sometimes mentioned in the literature. This refers to the managing directors who are appointed by a formal act, but who are not formal organs in the sense described above. It is disputed in the doctrine to what extent this term really (still) has a delimitation function. 7

2. Typology of the organs

Typically, legal persons have the following organs, which can be divided typologically into (i) organs for the formation of wills (e.g. the members', general or shareholders' meetings, cf. Art. 65 CC, Art. 698, 804, 879 CO), (ii) organs for the management and representation (e.g. the association board, Art. 69 CC; the foundation board, Art. 83 CC; the board of directors of the AG, Art. 707 et seq. OR, the management of a GmbH, Art. 809 ff. CO, or the management of the limited partnership or the cooperative, Art. 765 ff., 894 ff. CO), (iii) controlling bodies (such as the auditors, Art. 69b, 83b ZGB, Art. 727 ff., 907 ff. CO) and (iv) further bodies – provided for by law or the articles of association. Whether the concrete organ structure of a particular legal person corresponds to this basic structure or deviates from it is to be taken from the respective special provisions. 8

3. Relationship between organ and legal person

9 Dogmatically, the relationship between the organ and the legal person is, according to the prevailing view, to be described as an organ relationship. A distinction must be made between this and the actual employment contract, which, however, cannot take the place of the organ relationship. Rather, it is a flanking and at best supplementary legal relationship between the legal person and the person acting as a member of the executive body. The statement occasionally found in doctrine that there is a uniform "contract of agency" must therefore be clarified to the extent that its components under the law of obligations and the relationship with the organ must be assessed separately in each individual case. The consequence of this dual relationship under debt and company law is that the executive body member in an employment or commissioned relationship is equally bound by the obligations under debt law and those under company law.

B. Legal representation of organs

1. General

10 Organs express the will of the legal person in external relations. It follows that the legal acts of the organs that are performed for the legal person are attributed to the legal person and thus directly bind it. If, on the other hand, a person with an organ function acts in his or her own name, no imputation takes place.

2. Power of representation and representation authority

11 According to unanimous opinion, a distinction must be made between the power of representation in the external relationship (the "legal ability") and the power of representation in the internal relationship (the "legal permission").

12 The power of representation is related to the legal person's capacity to act and determines by which legal acts of the organ it can be bound externally. It is limited by the purpose of the legal person and in principle extends to all activities presumably covered by the purpose. Only those acts are excluded from the power of representation which are diametrically opposed to the purpose of the legal person and are virtually excluded by it. Transactions that are not part of the usual business of the legal person are also covered by the power of

representation if they are in conformity with the purpose. Nevertheless, the following restrictions must be observed: First of all, the limitation of the power of representation may result from the function of the respective organ within the organ structure. Further limitations of the power of representation may result from an announcement to third parties or from entries in the commercial register (e.g. requirement of a collective or branch signature). So-called "self-dealing" (i.e. cases of double representation or self-dealing) also prevent the legal entity from being effectively represented. Finally, those acts of the executive body of the legal person that prove to be an "abuse of the power of representation" – i.e. acts of representation contrary to interests or duties – are not attributable to the legal person, provided that this circumstance was recognisable to the contracting third party or the third party should have recognised it with due diligence.

The power of representation, on the other hand, determines the extent to 13
which the body is internally entitled to conclude certain legal transactions. However, the internal restrictions of the power of representation, which are permissible in principle and which do not at the same time fall under one of the exceptions mentioned above, remain irrelevant in principle vis-à-vis third parties acting in good faith. While they cannot prevent the legal person itself from being bound vis-à-vis the third party in the event that the power of representation is exceeded, they lead at most in the internal relationship to a liability of the acting person vis-à-vis the legal person.

3. Representation of knowledge

The knowledge of an organ is deemed to be the knowledge of the legal per- 14
son as a whole. According to part of the doctrine, this applies even if only one of several members of the organ possesses certain information that should have been communicated to the remaining members of the organ within the framework of adequate communication. It should be noted, however, that the principle of "absolute knowledge representation" has been considerably relativised by more recent doctrine and – subject to a culpable disregard of the knowledge of other organs – only knowledge (-must) be attributed to the person effectively dealing with a matter.

C. Obligation of the Legal Person by "Other Conduct"

15 In the non-legal sphere, Art. 55 para. 2 CC applies. According to this, organs can bind the legal person "by their other conduct". For the imputation of conduct of organs outside the legal business sphere, a (formal or de facto) organ must act "in the exercise of a business activity". In other words, the act in question must not only occur "on the occasion" (i.e. in the same local or temporal context) of the business transaction, but must be functionally related to the organ's competence. On the other hand, it is not necessary that the act is covered by the organ person's power of representation. Purely private interests of the organ are not sufficient for the act to be attributed to the legal person, but a parallel self-interest of the organ does not prevent attribution.

16 Art. 55 of the Civil Code merely forms the attribution norm for a certain conduct, but not an independent basis for a claim. This must result from a separate norm. For example, a claim based on unlawful damage (according to Art. 41 et seq. CO or according to the provisions of the UWG) or unjust enrichment (Art. 62 et seq. CO), management without mandate (Art. 419 et seq. CO), culpa in contrahendo etc. may be considered.

D. Organ liability

17 The organs of the legal person may be personally jointly liable for tortious conduct towards third parties (Art. 55 para. 3 CC), namely with all their personal assets. The German wording requires "fault". However, a comparison with the French wording ("fautes commises") shows that this wording is too narrow and must be interpreted broadly: Any personal misconduct leading to the fulfilment of the respective fact giving rise to liability is sufficient, even if this does not presuppose any actual fault.

18 In the case of simultaneous liability of the legal person under Art. 55 para. 2 CC, there is neither exoneration of the acting organ nor recourse of the organ against the legal person, but joint liability of the organ and the legal person against the injured third party (Art. 50 para. 1 and Art. 143 et seq. CO). In the case of actions by several members of a body or members of different bodies, there is also joint liability in the external relationship, and in the internal relationship there is apportionment according to fault within the meaning of Art. 50 para. 2 CO as well as the principles of Art. 759 CO (solidarity and recourse). The possibility of an individual reduction of liability of only one liable party

according to Art. 43 para. 1 CO (minor own fault) or Art. 44 CO (consent or aggravation) in the external relationship is debatable, but in view of Art. 759 para. 1 and 2 CO it is probably to be affirmed for the other legal persons as well.

Liability towards the legal person in the internal relationship is not governed 19
by Art. 55 para. 3 CO, but by the legal relationship between the controlling body and the legal person.

III. LEGAL CONSEQUENCES OF LACK OF CAPACITY TO ACT

Ensuring proper organisation and the effective appointment of organs are in- 20
dispensable prerequisites for the capacity of legal persons to act (see n. 2 above). In a situation where a lack of organisation or a defective appointment of organs is already established before the legal person is entered in the commercial register, the commercial registrar may point out the defect to the parties so that they can remedy it. If there is an organisational defect, the court (or, in the case of foundations, the supervisory authority) may be called upon to take the "necessary measures". Possible measures are (i) the setting of a deadline to (re)establish the proper state of affairs, (ii) the appointment of the missing body or (iii) a so-called custodian, and (iv) as ultima ratio, the dissolution and liquidation of the legal entity. When deciding on the measures to be taken, the court or the supervisory authority must exercise its dutiful discretion, which also includes consideration of the principle of proportionality.

According to case law and doctrine, the interim representation of the legal 21
entity by improperly appointed persons is then permissible in accordance with the provisions of Art. 419 et seq. CO.

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COMMENTARY ON

Art. 56 CC

A commentary by Claude Humbel

SUGGESTED CITATION

Claude Humbel, Kommentierung zu Art. 56 ZGB, in: Nils Güggi/Lukas von Orelli (Hrsg.), Onlinekommentar zum Zivilgesetzbuch

Short citation: OK-Humbel, N. XXX zu Art. 56 ZGB.

D. Seat

Art. 56

The seat of the legal entity is located where its administration is carried out, unless its articles of association provide otherwise.

CONTENT

I. NATURE OF THE SEAT AND GENERAL PRINCIPLES

Legal persons require a local connecting factor at which they can be spatially anchored. The ratio of the seat as the local connecting factor of the legal person can be explained in terms of organisational and economic law: Thus, in order to deal with the commercial register, supervisory, court, tax and, if applicable, debt collection authorities, a place is required where the legal relationships of the legal person concerned are concentrated. This need for concentration and fixation means two things: on the one hand, that every legal person must have a registered office, and on the other hand, that in principle it may only have one registered office (and not several) (so-called principle of unity of the registered office, although there are exceptions for historical and political reasons). 1

II. DELIMITATIONS

A. Branches

The seat must be distinguished from so-called branches ("succursale"), i.e. business establishments which are independent of the main enterprise from a local and economic point of view, but not from a legal point of view. The independence required for a branch requires that "the branch business could be run independently without substantial changes". It must be examined on a case-by-case basis, taking into account the external relationship, whether this is the case. Internal directives or internal procedures are not essential, but rather it must be determined whether there is a separate office organisation with its own management, in which at least one employee is authorised to sign. While in practice there are gradations and the overall situation is always decisive, mere production sites, goods depots, delivery points and the like are not likely to constitute branches. 2

Under certain circumstances, branches can establish a special place of jurisdiction (Art. 12 CPC), but not a special place of debt collection, which – subject to the so-called branch bankruptcy of Swiss branches of foreign legal entities – always remains at the place of the legal entity's registered office (cf. Art. 46 para. 2 SchKG). 3

B. Legal domicile

4 Not to be confused with the seat or branch is the so-called legal domicile, i.e. the address at which the legal entity can be reached at its seat (i.e. at its own office premises or as a c/o address) (Art. 2 lit. b and 117 HRegV).

III. DETERMINATION OF THE REGISTERED OFFICE

A. General

5 Whereas the territorial connection for natural persons is compulsorily predetermined by the legislator (Art. 23 para. 1 CC: place of permanent residence), Art. 56 CC grants the founding persons or organs of the legal person the possibility of a privately autonomous determination of the seat. In other words: Legal persons may in principle freely choose their seat in their articles of association at their own discretion (so-called "statutory seat"). Subject to deviating provisions of public law and the prohibition of abuse of rights pursuant to Art. 2 para. 2 CC, a seat may also be determined that deviates from the place of the legal person's actual administration (see below n. 7). In the absence of a statutory seat, Art. 56 CC provides for a substitute statutory provision according to which the seat in such a case is at the place of actual administration (see below n. 9 f.). However, this legal determination of the seat only applies to associations and foundations, because the determination of the seat in the articles of association is part of the necessary content of the articles of association for the corporations of the CO and the substitute regulation of Art. 56 CC cannot therefore apply (see n. 6 and 9 below). Thus, with regard to the seat, a distinction must be made between the legal entities of the CC and those of the CO, without this being directly expressed in Art. 56 CC.

B. Determination of the registered office in the articles

6 All legal persons can (and those of the CO must) designate their seat in the articles. The principle of freedom of choice applies, a regulatory principle under civil law and not an expression of the freedom of establishment under constitutional law. Freedom of choice means that the statutory seat does not have to be located either at the place of actual activity or at the place of intellectual management of the legal person.

In addition to any provisions of public law (such as concessions, state contracts or the receipt of subsidies) and the prohibition of abuse of rights (such as the choice of remote seats that make it excessively difficult to enforce simple creditor claims) as barriers, the following elements in particular must be observed: Legal persons must have a fixed address for service at their registered office at which they can be reached, whereby a letterbox (which also effectively ensures that a natural person can receive notices for the legal person) is sufficient. In addition, legal persons must be able to show that they have chosen their domicile when dealing with third parties (e.g. when initiating debt collection proceedings or lawsuits). 7

The actual determination of the place of the registered office is regularly made by naming a Swiss political municipality in the articles (Art. 117 para. 1 HRegV), in which the fixed address for service guarantees effective accessibility (cf. n. 7 above). Since the domicile of associations and foundations – unlike that of corporate bodies under the CO – does not have to be determined by statute, a link to an objectively determinable criterion is sufficient. Thus, the determination of a floating or alternating seat ("siège errant") is also permissible for these legal entities, as long as it remains objectively determinable. Often mentioned in this context is, for example, the domicile of the respective chairperson of the board of directors or president of the foundation board. Furthermore, it is possible for associations and foundations to provide for a delegation of the determination of the domicile in the articles of association and to delegate this in favour of the board of directors (board resolution) or the foundation council (foundation council resolution or foundation regulations). This makes it more flexible than the statutory seat, which – especially in the case of foundations – is difficult to change. 8

C. Legal determination of the seat

Since the determination of the registered office is part of the compulsory minimum content of the articles of association of corporate bodies under the Swiss Code of Obligations (Art. 626 No. 1, Art. 764 para. 2, Art. 776 No. 1, Art. 832 No. 1 CO), Art. 56 CC can only have an effect in the remaining area of legal persons under the CC. For associations and foundations, the CC does not formulate an obligation to determine the registered office in the articles. In the absence of such a provision, the registered office is located "at the place where its administration is conducted" (so-called actual registered office). 9

Normatively, this ensures that associations and foundations always have a registered office.

10 Doctrinal opinions differ as to the exact content of this objective connection: While one doctrine assumes that the place of the actual administrative centre is meant, according to a divergent opinion, the place where the decisive instructions are issued is to be taken into account. The Federal Supreme Court, on the other hand, follows a pragmatic approach that can probably also be described as "mediating": According to this approach, the place of actual management is the place where the acts that in their entirety serve to achieve the statutory purpose are performed; if these management acts are not concentrated locally at a single connecting point, the focus of action is to be taken (for example, the place where the legal person concludes its contracts; the naming of corresponding c/o addresses in the correspondence of the legal person, which indicate a specific place of action; as well as, in the area of trade, the trade volumes that are processed via a specific place). By its very nature, this also requires a case-by-case approach.

IV. LEGAL SIGNIFICANCE OF THE SEAT

A. Jurisdiction of authorities

11 As a general rule of thumb, the local authority jurisdiction follows the seat of the legal person. However, this principle is not absolute and should be specified as follows:

- Commercial register authorities: Legal entities are to be entered in the commercial register of the place of domicile. The decisive factors are, on the one hand, the political municipality (Art. 117 HRegV) and, on the other hand, the legal domicile (Art. 2 lit. b HRegV) as the address for service. If there is no legal domicile, the legal consequences of Art. 152 HRegV apply. The commercial registry office sets a deadline for the legal entity with the request to make the required application or to prove that no registration, amendment or deletion is required (para. 1). The request also contains a reference to the relevant provisions and the legal consequences in the event that it is not complied with (para. 2).
- Judicial authorities: In principle, the courts at the domicile of legal persons have territorial jurisdiction for actions against them (Art. 10 para. 1 lit. b

CPC). However, this principle – based on the guarantee of the court of domicile – is qualified by a large number of exceptions (cf. Art. 12 ff. CPC). See also, in the context of international private law, Art. 151 para. 1 PILA, which establishes jurisdiction for corporate actions at the seat of the company, and Art. 165 PILA on the recognition of foreign decisions on corporate claims.

- Debt enforcement and bankruptcy authorities: The ordinary place of debt collection for legal entities registered in the Commercial Register is their (civil law) registered office; that of legal entities not registered in the Commercial Register is the head office of their administration (Art. 46 para. 2 SchKG). It should be noted that not every place of debt collection also constitutes a place of bankruptcy; in addition to the ordinary place of debt collection, the following may be considered for legal persons: the place of business of a debtor domiciled abroad (Art. 50 para. 1 SchKG), the place of assets in the case of an auxiliary bankruptcy (Art. 166 et seq. PILA).

- Retention of title: a retention of title under Art. 715 para. 1 CC must be entered at the registered office of the legal person in a public register to be kept by the debt enforcement office in order to be effective.

- Tax authorities: The registered office has limited significance in tax law. First of all, it should be noted that the concept of domicile for tax purposes is not the same as that under civil law. Furthermore, although "personal affiliation" in principle gives rise to a tax liability under federal or cantonal law (cf. e.g. Art. 20 para. 1 StHG; § 55 StG ZH; § 62 StG AG), tax law often focuses on economic aspects, which is why a mere domicile in a letterbox is not yet able to establish a domicile relevant under tax law if the actual business activity takes place at another location.

- Other authorities and in particular supervisory authorities: As a connecting factor for the jurisdiction of supervisory authorities, the domicile is of importance above all in social security law (cf. Art. 61 para. 1 BVG for pension funds in general; Art. 89a para. 6 item 12 ZGB for staff welfare foundations). In the case of ordinary foundations, on the other hand, the domicile is not the sole decisive factor for the establishment of supervision, but the sphere of activity; thus, in the case of foundations operating throughout Switzerland or internationally, the Federal Supervisory Authority for Foundations (ESA) is always the supervisory authority.

B. Further aspects

12 The registered office may also be of importance for company law. In principle, geographical designations, such as names of mountains, passes, rivers, lakes or seas, may be used freely. However, because the average public perceives municipality names and other indications of place as an indication of the registered office of the legal entity, federal court jurisprudence, commercial register practice and doctrine are of the unanimous opinion that the indication of the name of a political municipality (or a locality within it) is permissible as a company component if this corresponds to the actual registered office of the legal entity in question. This must be taken into account in particular with regard to the truthfulness requirement of Art. 944 CO, according to which a misleading company name could even have consequences under the law of unfair competition.

V. TRANSFER OF REGISTERED OFFICE

A. Transfer of domicile within the country

13 A necessary correlate of the free choice of the registered office in the articles of association is that domestic relocations of the registered office must in principle always be permissible. Supervised foundations are an important exception if the seat has been determined in the articles: In this case, a change of organisation is regularly required pursuant to Art. 85 et seq. ZGB, which may require the involvement of the supervisory authority.

14 Under commercial register law, Art. 123 para. 1 HRegV applies, according to which a legal entity must apply for registration at the new registered office if it moves its registered office to a district other than the previous register district. The application and registration procedure is then governed by Art. 123 para. 2–6, Art. 124 ff. HRegV. In the case of a transfer of registered office that is subject to registration (e.g. in the case of a company limited by shares, cf. Art. 647 CO), the validity is governed by Art. 936a para. 1 CO. Seat transfers not subject to registration (for example, of certain associations) become binding at the time of the effective passing of the resolution.

15 Subject to certain exceptions – such as the fixing of the place of debt collection under Art. 53 SchKG and the perpetuatio fori in the case of lis pendens

under Art. 64 para. 1 lit. b CPC – the transfer of the registered office establishes the principal jurisdiction of the authorities at the new place of business.

Finally, changes of domicile due to mergers, demergers and transformations are governed by the provisions of the Merger Act. 16

B. Transfer of registered office abroad

1. The domicile of legal persons in Swiss private international law

In private international law, the term "company" rather than "legal person" is used. According to Art. 150 para. 1 PILA, this includes both organised associations of persons and organised property units. Although this evokes the definition of Art. 52 para. 1 CC, the international private law definition does not presuppose legal personality. In other words, the international private law definition can encompass more entities than that of the CC. 17

According to Art. 21 para. 1 PILA, the seat of companies and trusts is deemed to be the "domicile". The domicile of a company is understood to be the place designated in the articles of association of a legal entity or in the partnership agreement of a partnership. Subsidiarily, the place of actual administration is deemed to be the domicile. Thus, the PILA mirrors the provision of Art. 56 CC.However, the statutory seat is subject to a fiction reservation with regard to questions of jurisdiction. 18

For jurisdiction in the area of the PILA, see above n. 11. The law applicable to companies under international private law is determined according to Art. 154 PILA: According to its para. 1, the personal statute is determined on the basis of the incorporation or formation theory, i.e. the company is subject to the law under whose rules it was formed and organised, irrespective of its current place of administration. If, however, this state does not have such registration or publicity regulations or the company does not comply with them, paragraph 2 applies as a subsidiary rule, according to which the law applicable to the company is that of the state in which it is actually administered (so-called seat theory). 19

2. Transfer of seat under Swiss private international law

a. Preliminary note on terminology

20 From the perspective of Swiss private international law, the immigration or emigration of a Swiss company always requires an actual "change of law", because on the basis of the theory of incorporation prevailing in Switzerland, the mere "change of domicile", understood as a simple transfer of the administrative seat, has no effect on the company's statute.

b. Transfer from abroad to Switzerland

21 The transfer of the registered office of a foreign company to Switzerland is governed by Art. 161 et seq. PILA. According to Art. 161 para. 1 PILA, a foreign company may subject itself to Swiss law without liquidation and new formation if the foreign law (so-called emigration statute) permits it, the company fulfils the requirements of the foreign law and the adaptation to a Swiss legal form is possible (due to the principle of fixation of forms). Ratio legis of this provision is a possibility to adopt a personal statute as far as possible in accordance with the formation theory.

22 In relation to the member states of the EU, the (limited) scope of application of the freedom of establishment (Art. 49 and 54 TFEU) to companies must also be taken into account, which has, however, been successively extended by the ECJ.

c. Transfer from Switzerland to a foreign country

23 Mirroring Art. 161 para. 1 PILA, Art. 163 para. 1 PILA provides for the possibility of a formal transfer out of Switzerland: A Swiss company may subject itself to foreign law without liquidation and re-incorporation if the requirements under Swiss law are met and it continues to exist under the foreign law (Art. 163 para. 1 PILA).

d. Immigration and emigration merger

24 Finally, it should be noted that cross-border seat transfers may also result from merger situations, which are each possible as absorption or combination mergers (Art. 163a f. PILA).

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COMMENTARY ON

Art. 57 CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 57 CC, in: Nils Güggi/ Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 57 CC N. XXX.

E. Dissolution

I. Application of assets

Art. 57

[1] On dissolution of a legal entity, and unless provided otherwise by law, the articles of association, the founding charter or the governing bodies, its assets pass to the state authority (Confederation, canton, commune) to which the entity had been assigned according to its objects.

[2] Such assets must be used as far as possible for the original purpose.

[3] Where a legal entity is dissolved due to its pursuit of immoral or unlawful objects, the assets pass to the state authority even where contrary provision has been made.

CONTENT

I. SUBJECT OF THE REGULATION

Art. 57 CC (**"Use of assets"**) is linked to Art. 58 CC ("(Asset) liquidation"). The interaction of these two provisions regulates (although in reverse order) the process of dissolving legal entities with asset liquidation. The procedures standardized in the FusG (merger, division, transformation and asset transfer) regularly do not include asset liquidation and in certain cases not even the dissolution or liquidation of all participating legal entities. The dissolution of a legal entity due to bankruptcy is also not the subject of Art. 57 CC. 1

The **grounds for dissolution** themselves are not outlined in CC Art. 57, but are assumed by the provision as a constituent element. The conditions for the annulment or dissolution of the individual legal entities are to be found, on the one hand, in the **respective normative complexes**; on the other hand, **legal grounds for annulment** are conceivable, such as statutory time limits (e.g. in an association or in a foundation for a limited period) or resolutory conditions. In principle, except for foundations (see Art. 88 para. 1 CC), **freedom of dissolution** prevails due to private autonomy. In legal doctrine, it is argued with good reason that although Art. 57 para. 3 CC regulates the use of assets for an immoral or unlawful purpose, the corresponding grounds for dissolution are only explicitly standardized for legal entities under the CC (Art. 78, 88 para. 1 no. 2 CC), para. 3 could be qualified as a ground for dissolution for legal entities under the CO. 2

II. USE OF ASSETS

A. Normal case (paras. 1 and 2)

1. Standard content and systematic classification

Art. 3
57 para. 1 CC stipulates that the assets of a dissolved legal entity shall pass **to the community** to which they belonged by destination. This provision is to be read in conjunction with the corresponding foundation law requirement in Art. 84 para. 2 CC. The practical significance of the devolution of assets to the community (para. 1 and para. 2) is limited because, in the hierarchy of norms, it is a *lex generalis* that **takes a back seat to** deviating provisions in the law,

statutes, foundation deed or a resolution of the competent bodies. In practice, such a statutory deviation is particularly common among tax-exempt charitable organizations because the tax authorities require the assets to be tied to the tax-exempt purpose. Consequently, the devolution to the community is usually overridden by the right of self-determination, which is why a corresponding statutory provision must be sought first. If there is no such provision, the subsidiary devolution of assets to the community applies to legal entities under the CC, with the proviso that the assets be used for a purpose that corresponds as closely as possible to the previous one (para. 2). In the case of corporate bodies under the CO, on the other hand, the respective statutory provisions for the distribution of the proceeds take precedence over Art. 57 para. 1 CC. Subject to para. 3 (see N. 8), both the legal entities of the CO and those of the CC can therefore control the use of assets in the event of dissolution by private contract.

4 Notwithstanding the clear wording, the EHRA has recently taken the position that **ultimate beneficiary clauses** are inadmissible under foundation law (and would lead to the full nullity of the foundation). The practice under foundation law, which provides for the use of assets in the event of the dissolution of a (family) foundation and an entitlement of the founder or his or her legal successors, is widespread. The EHRA's view can be justified neither in terms of the wording nor with regard to the telos or the history of the legislation. It is based on the intention to prevent the statutory introduction of lifetime revocation or retrieval rights for the founder – as discussed in the context of the Schiesser parliamentary initiative and rejected in view of the principle of separation. Dogmatically, such “founder's rights” are, of course, to be clearly distinguished from a final beneficiary in the event of dissolution within the meaning of Art. 57 para. 1 CC; a blanket prohibition of asset allocation clauses in the event of dissolution of the foundation under Art. 88/89 CC cannot be derived from this under any circumstances.

2. Scope of application of the standard

5 The applicability of Art. 57 paras. 1 and 2 CC to **immoral or illegal legal entities** *subsequently recognized* is undisputed. By contrast, the proprietary consequences of the declaration of nullity of a legal entity that is illegal *initially* (Art. 52 para. 3 CC) are convoluted and the subject of a wide range of controversial opinions. Both case law and the majority of scholars (even if dis-

solution *ex tunc* is assumed) advocate the applicability of the *liquidation rules* **also to initially defective legal entities**, provided that these have already entered into relationships with third parties. Consequently, if the initial unlawfulness of a legal entity is subsequently established, liquidation must first be carried out to satisfy the debts (see the procedure in Art. 58 CC in conjunction with Art. 913 and 739 et seq. CO, and the commentary on Art. 58 in OK-Humbel, Art. 58 CC N. 5 et seq.)

Furthermore, the question of whether the *distribution rules* **under Art. 57 CC** also apply to legal entities with initially unlawful or immoral purposes is also disputed. The wording of Art. 57 CC speaks of a “dissolution” (French: “personnes morales dissoutes”, Italian: “sciolta una persona giuridica”), which implies a pre-existing legal entity. There are also good reasons, with regard to the wording and the purpose of the norm, not to apply Art. 57 paras. 1 and 2 CC to legal entities with founding defects: In the case of a legal entity that never came into existence, the assets can neither be used in accordance with the statutory provisions or the resolutions of the governing bodies (para. 1) nor “as closely as possible in accordance with its previous purpose” (para. 2). Nevertheless, there are those who would like to apply Art. 57 paras. 1 and 2 CC to legal entities with formation defects as well. These legal opinions refer primarily to two individual rulings by the Federal Supreme Court that related exclusively to the applicability of Art. 57 para. 3 CC and that were issued in the specific and politically influenced context of the acquisition of real estate by persons abroad. 6

Finally, it should be noted that, according to the opinion of the supreme court, Art. 57 paras. 1 and 2 CC are also applicable to family foundations. 7

B. Confiscation of assets (para. 3)

1. Normative content and systematic classification

The confiscation rule of Art. 57 para. 3 CC is a special provision, which – as far as can be seen – does not exist in this form in Switzerland's neighboring countries and which is therefore a *“Helvetian unicum”*. The teleological motivation for this is that those natural or legal persons who pursue an immoral or unlawful purpose through the use of a legal entity should not be able to dispose of the corresponding assets again or simply establish a new legal entity. 8

9 This state asset confiscation is to be understood as a *lex specialis* that takes precedence over any legal or statutory provisions regarding the use of assets when a legal entity is dissolved for pursuing immoral or unlawful purposes. In view of the far-reaching intervention in the property of the legal entity concerned, confiscation is only permissible as a *last resort*.

10 In conjunction with paras. 1 and 2, the following **order of priority** must therefore be followed when reviewing the use of assets after liquidation: (i) First, the conditions for the possible application of Art. 57 para. 3 CC and the associated confiscation of assets must be examined. (ii) Then any – statutory or statutory – orders under Art. 57 para. 1 CC must be examined. (iii) Finally, a possible surplus of assets in the sense of a rescue solution falls to the community.

2. Scope of the standard in general

11 The scope of application of Art. 57 para. 3 CC is controversial, not least because of the far-reaching effects of its application. The prevailing view in legal doctrine is that a comprehensive application of Art. 57 para. 3 CC to all legal entities with defective purposes is **too far-reaching**.

12 The various attempts to justify a reduction of this excessive provision can be summarized in three strands, although there may also be differences within the respective lines of argument: (a) The first line of argument interprets the criterion of "illegality of the purpose" restrictively; for an application of Art. 57 para. 3 CC, for example, a particular "reprehensibility" of the act or even a violation of *ordre public* is required. (b) Other authors would like to use the unlawful result caused by the accrual of assets as a criterion. (c) A third view ultimately favors confiscation of the assets of the persons behind the illegal or immoral legal entity. (d) Finally, a last group of authors is of the opinion that the solution approaches in (a)–(c) would artificially redefine the concept of illegality in order to mitigate the unsatisfactory results of Art. 57, para. 3 CC. It would seem more appropriate to interpret the confiscation rule as a winding-up provision similar to the law of unjust enrichment. This should contribute to the elimination of the unlawful situation while preserving the will of the parties and the other legitimate interests to the greatest extent possible (principle of the least possible interference). A liquidation norm is not to be interpreted in isolation, but in the light of the protective purpose of the norm establishing

the unlawfulness. Based on this, the measures to eliminate the unlawful situation are to be derived.

3. Applicability also to initially void legal entities

a. Legal entities in general

The question also arises as to whether the confiscation rule under Art. 57 para. 3 CC also applies to **initially void – because unlawful or immoral – legal entities**. This has long been the subject of heated controversy. As is also the case with paras. 1 and 2, the wording of Art. 57 para. 3 CC indicates that Art. 57 para. 3 CC can only be applied in the event of a subsequent illegality, since the verb “to abolish” implies that the legal entity existed prior to this. The original materials as well as those of the revision in the context of the parliamentary initiative Schiesser (00.461) point in this direction. Nevertheless, the practice of the Federal Supreme Court has extended the (analogous) application of the confiscation rule to corporations under the CO as well as to legal entities with an initially illegal or immoral purpose. These rulings were handed down in the context of joint-stock companies that were set up to circumvent the provisions of the former Federal Act on the Control of Foreigners (or the current Foreign Nationals Act, ANRA). 13

b. Not applicable to family foundations

It is unclear whether these rulings handed down in the context of joint-stock companies also apply to family foundations. In rulings related to family foundations, handed down *prior to* the rulings on corporations under the CO, the Federal Court had explicitly **exempted** family foundations with a purpose that was in conflict with Art. 335, para. 1 CC from the scope of application of Art. 57, para. 3 CC. Whether the explicit exclusion of family foundations ordered by the Federal Supreme Court continues to apply despite its more recent case law is the subject of heated debate. Although the Federal Supreme Court did not make a reservation to that effect, doctrine and cantonal practice assume that Art. 57 para. 3 CC does not apply merely because the purpose of a foundation goes beyond the limits of Art. 335 para. 1 CC. We believe this is justified for the following reasons: First and foremost, in the case of “mere” or “simple” violations of Art. 335 para. 1 CC, the “particular reprehensibility” required by some legal scholars (see above N. 12) is lacking, unless further violations of the law are added. The description of permissible purposes in Art. 14

335, para. 1 CC does not constitute a sufficiently strict legal framework that could justify confiscation in the light of proportionality if these are exceeded, even unconsciously. Furthermore, the restriction of purpose of Art. 335, para. 1 CC is only intended to help a legislative assessment to be accepted, but is not a penalized standard (such as the provisions of the ANRA, for example).

15 If one assumes, in line with the prevailing view, that Art. 57 para. 3 CC does not apply to family foundations, the legal consequence of initial nullity is a reversion of the assets **to the original founder or founders** or their heirs or descendants. In the case of a fiduciary establishment of a foundation, the assets of an invalid family foundation do not pass to the fiduciary (formal founder), but to the beneficiary (beneficial founder).

16 In this context, the question arises as to how **statutory succession clauses** are to be dealt with in the event of initial nullity. As far as can be seen, this question is hardly dealt with in the literature. In our opinion, in the case of an initial nullity, the statutory reversion clauses do not apply due to the lack of actual formation of the legal entity, regardless of when one would like to set the effective date of a judgment of nullity: While a reversionary clause could never take effect in the case of a judgment with an *ex tunc* effect, this is also the case in the case of a *ex nunc* liquidation or the assumption of special assets, because this could only take place for reasons of protection of trust and in the external relationship. If the foundation charter contains a provision stating that the assets are to revert to the founder's heirs upon the dissolution of the foundation, this provision is irrelevant if it is null and void. In no case does the inclusion of such a provision in the foundation charter result in the foundation's nullity, especially since it leads to the same result as the reversion of assets as postulated by the prevailing legal opinion and case law.

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Short citation: OK-Humbel, N. XXX zu Art. 58 ZGB.

II. Liquidation

Art. 58

The procedure for liquidating the assets of the legal entity is governed by the regulations for cooperatives.

CONTENT

I. PRELIMINARY REMARK

Like the "sister provision" in Art. 57 CC, Art. 58 CC – contrary to the title "Dissolution" – does not regulate the prerequisites for the dissolution of legal persons, but presupposes this as a factual element. 1

From a systematic point of view, it is surprising that the legislator has placed the regulation of the liquidation procedure behind that of the use of assets. Thus, in practice, upon the occurrence of a ground for dissolution, the assets of a legal person must first be liquidated privately and only then can the net proceeds be distributed (Art. 57 CC). 2

II. LIQUIDATION PHASE AND LIQUIDATION PROCEDURE

A. Legal personality in liquidation

The legal capacity of the legal person continues to exist after entry into the liquidation phase. However, there is a change of purpose to be recorded in the commercial register and liquidation becomes the sole purpose of the legal person (addition: "in liquidation"). The powers of the previous organs are thereby limited to those acts that are necessary for the liquidation but cannot be carried out by the liquidators. 3

The actual end of legal capacity occurs in the case of legal persons entered in the commercial register with the deletion from the commercial register, in the other cases with the conclusion of the liquidation. 4

B. Double reference to the procedural provisions of company law

For the actual course of the liquidation proceedings, Art. 58 CC first refers to the cooperative provisions (Art. 913 para. 1 CO), which in turn (for the procedural aspects) refer to the liquidation provisions under company law for application. As a result of this (dynamic) chain of references, the provisions of company law (Art. 739 et seq. CO) are applicable to all legal persons under private law. 5

In the case of liquidation, the peculiarities of the respective legal entity must be taken into account, e.g. the provisions of commercial register law do not 6 apply to associations not entered in the commercial register and, in the case of supervised foundations, the liquidation must be supervised by the competent supervisory authority.

C. Overview of the course of ordinary liquidation proceedings

7 Essentially, liquidation is a matter of winding up all legal relationships that still exist.

1. Determination of the liquidators

8 Unless the articles of association or resolutions provide otherwise, this is usually the executive body. In the case of judicial dissolutions, the court also appoints the liquidators, who are then considered extraordinary bodies and may be liable accordingly under Art. 55 para. 2 CC. Finally, in the case of bankruptcy, the bankruptcy administration is responsible.

2. Liquidation activity

9 The liquidators then draw up the balance sheet and issue a debt call. They then terminate the current business, collect any outstanding amounts and realise the assets. At the same time, they must fulfil the legal entity's obligations. In the event of over-indebtedness, the court must be notified, which then orders the opening of bankruptcy proceedings (in this case, the special provisions of bankruptcy law must be applied, cf. Art. 740 para. 5 CO and Art. 197 ff./221 ff. SchKG).

3. Distribution of the surplus assets

10 Only if a surplus of assets remains after all the debts of the legal person have been repaid is this to be distributed.

4. Conclusion of the liquidation proceedings

11 The legal person ends with the conclusion of the liquidation proceedings. After the termination of the liquidation, the termination of the company must be notified by the liquidators to the commercial registry office in accordance with Art. 746 CO. If a legal entity is deleted from the commercial register after the liquidation has ended, its legal existence ceases.

5. Re-registration

Re-registration is possible (Art. 935 CO): Anyone who can credibly show an interest worthy of protection may apply to the court to have the deleted legal entity re-registered in the commercial register (para. 1). The interest worthy of protection is specified in para. 2, which is an exemplary list. 12

In nuce, this concerns constellations in which, after the deletion of the legal entity from the commercial register, it turns out that the liquidation had not yet been completed. In order to give the legal entity the necessary capacity to act so that it can take the actions necessary to complete the liquidation, it must be re-registered in the commercial register. Only then does the legal personality revive and the liquidation that has not been completed can be terminated. Thereafter, the reason for re-registration ceases to exist and the legal entity must be deleted again. 13

D. Simplified procedure for legal persons under the CC

It is true that Art. 58 CC is mandatory law. However, in simple cases (namely if the creditors and their claims are clear), the doctrine permits silent liquidation in the case of associations and foundations, in which the activity of the legal entity in question is brought to an end without the note "in liquidation" and possibly without a debt call. Only after the actual liquidation activity has been completed is there a notification to the Commercial Register Office, which includes both the transfer to the liquidation stage and the deletion. Silent liquidation is rightly excluded in the case of CO corporations and should also only be used with great caution in the case of associations and foundations – for creditor protection considerations. 14

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Short citation: OK-Humbel, N. XXX zu Art. 59 ZGB.

F. Reservation of public law and company law

Art. 59

[1] Public and ecclesiastical corporations and institutions are governed by federal and cantonal public law.

[2] Associations of persons which pursue a commercial purpose are subject to the provisions on companies and cooperatives.

[3] Common land cooperatives and similar bodies remain subject to the provisions of cantonal law.

CONTENT

I. REGULATORY CONTENT

A. General

With the last norm of the General Provisions on legal persons, the direct scope of Art. 52–58 CC is again limited. Art. 59 CC is not a substantive provision, but a pure reference provision with a partly programmatic character. Accordingly, for four different groups of legal persons, reference is made to different sets of norms (public federal or cantonal law; private law of the cantons or provisions under the law of obligations) or these are reserved. 1

Categorically, a distinction is made between public-law corporations and institutions (para. 1, first variant), public-law ecclesiastical corporations and institutions (para. 1, second variant), associations of persons with an economic purpose (para. 2) as well as municipal cooperatives and similar corporations (para. 3). 2

B. Declaratory vs. constitutive rules of reference

If the applicable law already results from the general principles as well as from other provisions, as is the case in paras 1 and 2, it is a purely declaratory or a non-genuine reference. Thus, the referral result of para. 1 already results from the general reservation of Art. 6 para. 1 CC, according to which the public law powers of the cantons may not be restricted by federal private law. The applicability of the provisions of company and cooperative law to associations of persons with an economic purpose also already flows from the general principles concerning legal persons, which is why this reference is also to be regarded as declaratory. 3

Because, without the reference in para. 3, federal private law would be applicable to allied cooperatives and similar corporations on the basis of Art. 5 para. 1 CC, it is a constitutive (genuine) reference, which "originally invokes the complex of norms referred to". 4

II. PUBLIC CORPORATIONS AND INSTITUTIONS (PARA. 1, FIRST VARIANT)

A. Concepts and delimitation

5 Public law corporations are defined as "administrative bodies constituted by membership, based on public law and endowed with sovereign power" for the independent fulfilment of state tasks. In addition to territorial authorities (Confederation, cantons, municipalities), they also include personal corporations (student associations organised under public law) and real corporations (especially so-called "Meliorationsgenossenschaften", alpine corporations and the like). Mixed forms between these categories are also conceivable.

6 Public-law institutions are those administrative units to which a specific group of persons and objects is grouped by legal statute and made permanently available to its users for a specific administrative task. A distinction is made between independent and dependent public-law institutions: the former have legal personality, the latter do not. A special form of public-law institutions are public-law foundations, i.e. assets made independent by an act of foundation, which as administrative units are subject to public law and fulfil a public task. Foundations under public law may also be independent or dependent, i.e. they may or may not have their own legal personality.

7 Whether or not a legal entity under public law exists in an individual case is rarely disputed in practice; an allocation regularly results without further ado from the basis of establishment. On the other hand, the entry in the commercial register is not a valid indication for the demarcation.

B. Applicable law

8 In principle, public corporations and institutions are subject to the public law of the Confederation and the cantons. This is to be clarified insofar as this reference only concerns the internals of these legal entities, such as establishment, purpose and organisational constitution (including its amendment) as well as dissolution.

9 With regard to external relations, however, a distinction must be made: Public law is applicable if the legal person, with the sovereign power conferred on it by the community, at the same time performs public duties and is thus consid-

ered a sovereign entity. If, on the other hand, the public-law corporation or institution is equal to its counterpart in the external relationship and does not act in a sovereign manner (e.g. when purchasing office equipment), a private-law relationship is to be assumed.

Furthermore, not only public law but also federal private law (incl. commercial register and merger law) contains special norms for legal persons under public law. 10

Finally, it should be noted that public law can conversely also apply to legal persons under private law under the Civil Code or the Code of Obligations. This is particularly the case when the fulfilment of public duties (possibly in connection with the exercise of sovereign power) is involved, such as in the case of private-law health insurance companies as providers of compulsory health insurance or shooting clubs as providers of compulsory off-duty shooting. 11

III. BODIES AND INSTITUTIONS UNDER ECCLESIASTICAL LAW (PARA. 1, SECOND VARIANT)

A. Term

The concept of an ecclesiastical legal person under public law is ambiguous and is interpreted differently in doctrine. It is certain that public law applies instead of civil law to those legal persons which are recognised by the church and canton as public law or which have been created by a canton for ecclesiastical purposes. 12

The question of the applicable set of norms should not be confused with the constitutional protection of freedom of faith and conscience under Article 15 FC, which is granted to any legal person that pursues a religious purpose according to its articles of association. 13

B. Applicable law

In principle, the same procedure applies to public-law ecclesiastical legal persons as to other legal persons under public law (cf. II.B. above), i.e. federal or cantonal public law is applicable first in internal relations and then in external relations in the case of sovereign activities. On the one hand, federal private 14 law applies when a non-sovereign (e.g. commercial) activity is pursued. On the other hand, federal private law provisions can be introduced as cantonal public law by means of a reference or as a gap-filling measure. Finally, internal church law (e.g. canon law) can be applied by means of such a reference in cantonal public law.

IV. FEDERAL PRIVATE-LAW ENTITIES WITH AN ECONOMIC PURPOSE (PARA. 2)

A. Term

1. "Associations of persons"

15 Para. 2 subjects "associations of persons" that pursue an economic purpose "to the provisions on companies and cooperatives". According to a literal interpretation, this would include not only legal persons but also so-called legal communities. However, according to the prevailing and, in my opinion, correct interpretation, only the former are meant. This is supported above all by the systematic element: the entire Art. 59 CC is embedded in the "General Provisions" on legal persons, which do not deal with legal communities. Another indication in the same direction is provided by Art. 52 para. 1 CC, which speaks of "associations of persons organised as corporate bodies". Insofar as Art. 52 para. 3 CC and Art. 59 para. 2 CC refer to the same term, but without the addendum of "corporate organisation", this is probably also meant.

16 The corporately organised associations of persons with an economic purpose are regulated in the CO. Because there are no establishments according to the CO, one regularly speaks simply of the "corporations of the CO". In concrete terms, this means the joint-stock company (Art. 620 ff. CO), the limited partnership (Art. 764 ff. CO), the limited liability company (Art. 772 ff. CO) and the cooperative (Art. 828 ff. CO).

2. Economic purpose

17 Paragraph 2 is particularly important with regard to the association under Art. 60 ff. CC: The pursuit of an economic purpose is at the same time a delimitation criterion for the admissibility of the form of association (Art. 60 para. 1 CC). If an economic purpose is present in an association of persons organised

as a corporation, a legal form of one of the "corporations of the CO" must be chosen.

An "economic purpose" exists if economic advantages or other benefits of monetary value are sought for the members of the corporation. On the one hand, this means at the same time that economic benefits for third parties are not prohibited even in the case of a non-economic, i.e. ideal purpose. On the other hand, this reference also does not mean that the corporations of the CO may not pursue non-economic purposes or that in such a case they would have to be subject to the provisions of the CC. It should be noted that the original civil law term "ideal purposes" should not be confused with the tax law term "charitable purposes", which follows its own criteria and is decisive for tax exemption. 18

B. Applicable law

The reference to the CO in para. 2 is to be understood broadly insofar as it includes the corporations of the CO even if they permissibly pursue an ideal purpose. Insofar as the legislator has created a legal person primarily for the pursuit of economic purposes, the CO is thus always the primarily applicable group of norms. The third section of the CO on commercial companies and cooperatives (Art. 620 ff. CO) applies. 19

Opinions differ as to the direct applicability of Art. 52–58 CC to the corporations of the CO. While some doctrine and jurisprudence assume direct applicability and at the same time maintain the primacy of the leges speciales contained in Art. 620 et seq. CO take precedence over the General Provisions, another part of the doctrine would like to differentiate between the various norms and examine whether they were (also) tailored to the legal forms of the CO. Regardless of which approach is preferred in this respect, the results are likely to be the same on a regular basis. Thus, it can be assumed, in accordance with the prevailing opinion, that in any case Art. 52 paras. 1 and 2, Art. 53 to 55 CC are, in terms of their content, tailored to legal persons in general and not only to those of the CC. 20

V. CORPORATIONS UNDER CANTONAL LAW (PARA. 3)

A. Term

21 "Allmendgenossenschaften and similar corporations" under cantonal private law are regularly old, cooperative (or comparable, e.g. association-like) forms of organisation for direct land management, for example in agriculture or forestry. Modern farmers' cooperatives that only indirectly serve land management (e.g. purchasing, credit and machinery cooperatives) are not covered by Art. 59 para. 3 CC, but by the general cooperative law in Art. 828 ff. CO.

B. Applicable law

22 With the constitutive reference to the cantonal private law – mostly contained in the cantonal introductory laws – the legislator wanted to take into account the historical cooperative structured cooperations for the joint use of common land, agricultural land, pastures, forests and the like and leave them in their traditional forms. Cantonal private law applies to the formation and organisation as well as to questions concerning membership. Federal private law may be applied as supplementary cantonal law and in those areas in which the cooperatives enter into equivalent relationships with third parties (e.g. protection of personality, liability). The application of public law also remains possible.

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COMMENTARY ON

Art. 80 CC

A commentary by Lukas Brugger

SUGGESTED CITATION

Lukas Brugger, Kommentierung zu Art. 80 ZGB, in: Nils Güggi/Lukas von Orelli (Hrsg.), Onlinekommentar zum Zivilgesetzbuch

Short citation: OK-Brugger, N. XXX zu Art. 80 ZGB.

Chapter Three: Foundations

A. Formation

I. In general

Art. 80

A foundation is established by the endowment of assets for a particular purpose.

CONTENT

I. MAIN FEATURES OF SWISS FOUNDATION LAW

Swiss civil law does not contain a legal definition of a foundation. Rather, the legal form of a foundation is based on a general basic concept: a foundation is a special fund without an owner, dedicated to a special purpose and with its own legal personality. 1

A. Sole establishment under private law

The foundation has neither owners nor members, but is an independent asset dedicated to a specific purpose ("special purpose asset"). It is thus the only institution under private law in the distinction between corporations and institutions as set out in Art. 52 CC. Due to its institutional nature, the organs do not form the will of the foundation autonomously, but are merely called upon to implement the purpose laid down in the act of establishment. The persons involved in the foundation – first and foremost the founder, the foundation bodies, creditors, beneficiaries, etc. – are not its members, but mere participants with separate legal relationships with the foundation and rights and obligations arising therefrom. The fact that the foundation has neither owners nor members results in a control deficit typical of the legal form, which is why the foundation is the only legal entity under private law that is subject to a state supervisory authority under Art. 84 CC only because of its legal form (family foundations and ecclesiastical foundations are, however, exempt from state supervision, see below N. 14). 2

B. Principle of separation and solidification

The institutional nature of the foundation is expressed above all in two basic principles of foundation law, the separation principle and the solidification principle. 3

1. Separation principle

The principle of separation states that the dedication of assets to a specific purpose, which is made within the framework of the act of establishment, creates a legal entity separate from the founder with its own assets and organisation. 4

5 As a rule, too much influence of the founder on the foundation comes into conflict with the principle of separation. The founder may – in addition to the right to change the purpose provided for in Art. 86a CC – also reserve further rights of information, appointment, dismissal, proposal, approval or veto. However, if the rights of influence and control assume an extent no longer worthy of the autonomy of the foundation – which is to be determined in the individual case – this may lead to a breach of the principle of separation and constitute a case of encroachment and, in the case of tax-exempt charitable foundations, may moreover lead to the rejection of the tax exemption.

6 The so-called special rights, which are generally recognised as permissible, are to be distinguished from the founder's rights, with which the usability of certain dedicated assets is restricted, for example by a right of residence to a contributed property in favour of the founder.

2. Solidification principle

7 The organs of the foundation cannot form their own will for the foundation, but are called upon to implement the purpose of the foundation laid down in the deed of formation and thus the founder's will, which has become fundamentally unchangeable – i.e. solidified.

8 Due to the principle of solidification of the foundation, foundations are, by their very nature, fixed and extremely stable entities. The organisation, once laid down in the foundation deed and made independent by the founder's will, should in principle no longer be able to be modified at will after the foundation has been established. However, since even the most prudent founder cannot take into account all future eventualities, Art. 85–86b of the Civil Code provide for the possibility of adapting the foundation in a way that allows for certain breaches of the principle of solidification.

9 A dynamic understanding of the foundation also means that the foundation bodies must be guided by the original will of the founder, but may also develop the foundation further within the framework of the proper exercise of discretion, their own autonomy of action and within the limits of Art. 85 et seq. of the Civil Code, they can and must also develop the foundation further.

C. Interpretation of the founder's will

Against the background of the institutional nature of the foundation, the interpretation of the foundation's purpose and the founder's will laid down therein as a guideline for the actions of the foundation's participants is of paramount importance. As a unilateral legal transaction, the foundation transaction is interpreted according to the principle of will and not according to the principle of trust: What is decisive is what the founder intended and not what a potential recipient of the declaration was entitled to understand. 10

Circumstances outside the foundation documents or subsequent circumstances (e.g. oral statements, accompanying documents, letter of wishes, etc.) may be taken into account according to the so-called theory of intimation when determining the true intention if they are at least hinted at in the foundation deed. In the event of a change of circumstances, the hypothetical founder's intention may be determined by means of a supplementary interpretation, whereby the result of this interpretation must also be at least indicated in the foundation deed. 11

D. Types of foundation

1. The "classical" foundation and the special types

Foundation law distinguishes between different types, the so-called "classical" foundations (also called ordinary or normal foundations) and the special types. There are legal special forms with their own regulations (such as the family foundation, the ecclesiastical foundation and the staff welfare foundation) and de facto special forms, such as the corporate foundation, where the particularity results from the foundation assets themselves (an active enterprise or company shares) or the purpose (such as holding or developing the enterprise). 12

The "classical" foundation is not to be equated with a charitable purpose. Civil foundation law does not only permit charitable foundations, but allows all charitable and private-benefit foundation purposes that are not unlawful or contrary to good morals (Art. 52 para. 3 Civil Code). Moreover, non-profit status is basically a legal concept under tax law (cf. Art. 56 subpara. g DBG, Art. 23 para. 1 subpara. f StHG), which is neither specifically defined for foundation civil law nor is it a permissibility requirement for the establishment of a 13 foundation. In this context, "classical" is to be understood as meaning that Articles 80–89 of the Swiss Civil Code are applicable to the foundation, without foundation-specific special provisions being applicable, such as Article 87 of the Swiss Civil Code, which provides for an exemption from state foundation supervision or the obligation to have an auditor for family foundations and ecclesiastical foundations (Article 87 para. 1 and para. 1^{bis} of the Swiss Civil Code).

2. Significance of the distinction

14 Due to the differentiated approach according to the type of foundation, there is no one foundation law applicable to all foundations in Switzerland, but rather it must be examined on a case-by-case basis which provisions are applicable. The differentiation according to foundation type has serious effects on the legal structure and governance of the foundation: For example, state foundation supervision is provided for in the case of traditional foundations, whereas this is completely absent in the case of family foundations, so that the court, rather than the state supervisory authority, is responsible for complaints by the beneficiaries (Art. 87 para. 1 and para. 2 ZGB). Ecclesiastical foundations, on the other hand, are exempt from the supervision of a state supervisory authority because they are subject to internal church supervision.

3. Mixed foundations

15 If a foundation pursues several purposes (which is permissible without further ado), so-called mixed foundations may exist. Mixed foundations are foundations in which purposes of different types of foundations are pursued together, such as the combination of charitable purposes and benefiting family members (so-called charitable family foundations). Which provisions of foundation law apply to mixed foundations must be determined in each individual case. In addition, the classification of a foundation can be difficult due to the fact that Swiss foundation law differentiates according to the type of foundation, especially since the distinction is usually based on the purpose pursued or the beneficiaries. The family foundation (Art. 87 and 335 CC) is defined, for example, by the fact that its beneficiaries are family members. However, what is to be understood by the legal term "family" is subject to unpredictable and changeable socio-political evaluations, which is why the boundary between the pure family foundation, the mixed family foundation and the classic foundation is often unclear.

E. Legal foundations of foundation law

Articles 80–89 of the Swiss Civil Code (CC), as the substantive core law, regulate the basic features of all foundations (establishment, organisation, organs and their duties, changes of purpose and organisation as well as dissolution). The provisions of the special legal types of family foundation, ecclesiastical foundation and staff welfare foundation supersede or supplement these general norms as lex specialis. 16

In addition, the provisions on bookkeeping and accounting (Art. 957–963b CO) as well as the provisions of audit law (Art. 727–731a CO) apply by dynamic reference. Art. 78–87 FusG regulate mergers and asset transfers and Art. 94–98 HRegV the provisions on the entry of foundations in the commercial register. 17

F. Delimitations

1. Foundations under private law and foundations under public law

Foundations under Art. 80 et seq. CC are foundations under private law. In addition, there are foundations under public law which are subject to the public law of the Confederation or the cantons (Art. 59 para. 1 CC). Public-law foundations are generally established by public-law bodies (Confederation, cantons, communes) by a decree of establishment in the form of the law, such as the Confederation's public-law foundation Pro Helvetia. The provisions applicable to the foundation under public law are defined by the act of establishment. Of course, a public-law corporation may also establish a private-law foundation in accordance with Art. 80 ff. CC. 18

2. Independent and dependent foundations

The prototype of the foundation is the so-called independent foundation endowed with its own legal personality. A distinction must be made between these independent foundations and the so-called dependent foundations. Although these are also special assets with their own purpose and (if applicable) their own organisation, they lack their own legal personality, as they are not legally independent legal entities, but are assigned to a third party (usually an existing independent foundation) with a special purpose. A dependent foundation is usually based on a gratuitous donation subject to a condition in the 19 form of a gift, bequest or legacy or on a trust agreement. How the assets donated for a specific purpose are to be administered by the receiving third party is primarily determined by the respective substantive law (in particular the condition according to gift or inheritance law); the extent to which foundation law can also be applied by analogy is disputed. Independent foundations are of particular importance in umbrella foundation models. Umbrella foundations are special structures in which an independent foundation acts as an umbrella (umbrella foundation) for several different assets in the form of dependent foundations (subfoundations). With the dedication of assets to an already existing umbrella foundation (so-called sub-foundation), charitable commitment can also take place without having to establish a foundation structure of its own.

3. Temporary foundations and consumer foundations

20 By their nature and especially historically, foundations are legal entities for eternity. However, the founder's freedom also permits the establishment of foundations for a limited period of time, e.g. if a testator wishes her foundation to be dissolved 15 years after her death. These so-called temporary foundations have been steadily gaining in importance in recent years, not least because under the keyword "impact" the short- and medium-term effect of the funds invested is increasingly in the foreground.

21 Connected with the duration of the foundation (and yet clearly delimited) is the question of whether a foundation may only use the income from the foundation capital to achieve its purpose or whether it may also use the assets (so-called consumption foundations). The use of assets has become the focus of attention, especially during the low-interest environment, as foundations often invest their assets conservatively and as a result the returns on the foundation's assets have become increasingly low. In the case of foundations, the capital can be used to achieve the purpose in any case if the foundation statutes provide for this. Even without an explicit provision in the statutes, the foundation council is, according to the view expressed here, permitted, within the framework of the ordinary exercise of discretion, to temporarily also use parts of the foundation assets for the purpose, i.e. to draw from the foundation capital without, however, consuming it completely. If there is to be a complete switch to consumption, an amendment to the articles must be applied for (as a rule, via Art. 85 of the Civil Code).

II. ELEMENTS OF THE CONCEPT OF A FOUNDATION

A. Purpose

The purpose of a foundation is at its heart. The purpose gives the foundation its individual character, constitutes its identity-determining basis of existence, acts as the pivot of the foundation's activity and is the maxim of action of the foundation's participants. Accordingly, the foundation purpose must have a minimum degree of definiteness (principle of definiteness); foundation purposes that are too vague (e.g. "the purpose of the foundation is charitable activities") are inadmissible. 22

Civil foundation law not only permits charitable foundations, but also all charitable and private-benefit foundation purposes that are not unlawful or contrary to morality (Art. 52 para. 3 Civil Code). Within the framework of the founder's freedom, the founder may therefore specify any – permitted – purpose for the foundation, including those based on inequality or perceived as unfair. However, the purpose of the foundation must be for the benefit of others and thus directed outwards; a "foundation for the founder" with the founder as the sole beneficiary is not permitted. Economic purposes are also permissible (BGE 127 III 337: "The freedom of legal transactions in general and the freedom of foundations in particular do not permit a restriction to ideal purposes"). The borderline between permissible economic purposes and impermissible purposes in themselves in the case of corporate foundations (so-called corporate self-purpose foundation or "perpetuum mobile foundation") is disputed in detail. 23

B. Assets

No statutory minimum assets are provided for the establishment of a Swiss foundation. The type and extent of the foundation's assets can be freely determined by the founder. In addition to cash, securities, receivables or NFT are also possible, at least as long as they are of value. However, it is necessary that the assets are appropriate with regard to the purpose pursued (so-called purpose-means ratio). The practice of the Federal Supervisory Authority for Foundations (ESA) requires a "seriousness threshold" of CHF 50,000. 24

A successive endowment of assets is permissible, for example by means of so-called accumulation clauses, whereby the foundation's income is added to the 25 capital until the latter has reached a certain amount. However, it is also permissible for the founder to increase the foundation's assets through subsequent endowments or for third parties to increase the foundation's assets through additional endowments.

C. Organisation

26 The organisation of the foundation, i.e. the organs of the foundation and the type of administration are determined by the foundation deed (art. 83 para. 1). The supreme organ of the foundation entrusted with the administration – in Switzerland usually called the foundation council – authorises and obliges the foundation within the framework of Art. 55 ZGB. In addition to the supreme body, classical foundations – but not family foundations and ecclesiastical foundations, cf. Art. 87 para. 1^{bis} CC – must also designate an auditing body as a governing body (Art. 83b CC).

27 The founder is free in the organisation of the foundation. They may designate further bodies – e.g. consultation or control bodies – or provide for special mechanisms for the appointment of bodies (co-optation, designation by a third body or heirs of the founder). A defective organisation may be remedied by the supervisory authority (Art. 83d).

III. FOUNDATION BUSINESS

28 Foundations acquire their legal personality upon entry in the Commercial Register (Art. 52 para. 1 and Art. 81 para. 2 CC, Art. 94 HRegV; so-called register or normative system). The actual foundation transaction is the so-called act of dedication. This is a unilateral, non-receivable obligation transaction inter vivos or by reason of death, by which the assets are dedicated to a corresponding purpose. The necessary contents of the deed of dedication are: the will to establish an independent foundation; the designation of the assets to be dedicated to the foundation and the description of the special purpose of the foundation. These essentialia negotii must be contained in the deed of formation (or the disposition upon death) and cannot be outsourced to subordinate regulations or delegated to bodies or third parties.

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COMMENTARY ON

Art. 84 CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Kommentierung zu Art. 84 ZGB, in: Nils Güggi/Lukas von Orelli (Hrsg.), Onlinekommentar zum Zivilgesetzbuch

Short citation: OK-Brugger/Humbel, N. XXX zu Art. 84 ZGB.

C. Supervision

Art. 84

[1] Foundations are supervised by the state authority (Confederation, canton, commune) to which they are assigned.

[1bis] The cantons may subject foundations at communal level to supervision at cantonal level.

[2] The supervisory authority must ensure that the foundation's assets are used for their declared purpose.

CONTENT

I. NORMATIVE PURPOSE AND LEGITIMACY OF FOUNDATION SUPERVISION

The "classic" foundation is the only legal entity under Swiss private law that is subject to state supervision due to its legal form. Essentially, two main reasons are cited for this: The protection of the founder's will on the one hand and the safeguarding of the public interest on the other. Due to its legal form, a foundation has neither members nor owners who can ensure that the foundation's assets are used by the acting foundation bodies in accordance with its purpose and that the founder's will, the law and the statutes are observed. Therefore, a so-called protection deficit typical of the legal form arises, which is to be addressed by state supervision. Furthermore, it is argued in the literature that the foundation purposes, which are often oriented towards the common good, should also be protected by the community. Because the public interest is lacking in the case of family foundations and ecclesiastical foundations are subject to equivalent ecclesiastical supervision, they are exempt from general foundation supervision (Art. 87 para. 1 CC). However, mixed family foundations, i.e. foundations that pursue both family-related and traditional purposes, are subject to overall foundation supervision. In the exercise of its duties, the foundation supervisory authority must safeguard both the private and the public element in equal measure, whereby the founder's will always remains the guiding principle for the concretisation of supervision in individual cases. Of course, the foundation supervisory authority must respect the autonomy of the foundation and may only intervene in the case of actual errors of judgement (abuse, exceeding or falling short). 1

Foundation supervision is mandatory law and the founder may not exempt the foundation from it by issuing orders to the contrary. Conversely, foundations that are not subject to supervision may also be subject to foundation supervision. 2

Notwithstanding the location of foundation supervision in the CC, it is materially a matter of public (administrative) law, which is why the supervisory authorities are also bound by the general constitutional principles of public action (in particular the principle of legality and the principle of proportionality). However, due to their proximity to civil law, decisions of the foundation 3 supervisory authority are subject to appeal in civil matters to the Federal Supreme Court (Art. 72 para. 2 subpara. b no. 4 BGG).

II. COMPETENT SUPERVISORY AUTHORITY (PARA. 1)

A. Federal, cantonal or communal supervisory authority

4 Foundations are subject to the supervision of the community to which they belong according to their designation. Para. 1 differentiates between the responsibility of the Confederation, the cantons and the communes. The Federal Supervisory Authority for Foundations (ESA) is organisationally attached to the General Secretariat of the Federal Department of Home Affairs. Which cantonal authority is entrusted with foundation supervision is determined by cantonal legislation and is usually regulated in the cantonal introductory laws to the CC. Often, therefore, supervisory activity by authorities at communal or district level is also found. Some cantons have combined foundation supervision via the concordat route and created supracantonal structures, such as the Central Switzerland BVG and Foundation Supervisory Authority and the Eastern Switzerland BVG and Foundation Supervisory Authority. Basel-Stadt and Basel-Land as well as the cantons of Vaud, Valais, Neuchâtel and Jura have also combined their supervision.

B. Determination of jurisdiction

5 Whether the federal, cantonal or communal foundation supervisory authority is competent is determined by the purpose of the foundation and its territorial scope; the seat of the foundation or the founder's intention are of no decisive importance. Jurisdiction follows the territorial extension of the foundation's activities, whereby it is also argued in the doctrine that it should be asked which community would be responsible if the foundation did not exist. Foundations operating throughout Switzerland (so-called national) and/or across borders or abroad (so-called international) are subject to the supervision of the ESA. Otherwise, the responsibility of the ESA is generally subsidiary. This means that the ESA is competent if no clear focus of activity can be determined with regard to a single canton or the area of competence of a supracantonal supervisory authority.

C. Communal supervision (para. 1^{bis})

According to this provision, cantons have the authority qua federal law to concentrate the foundations subject to the supervision of their communes with themselves. This centralisation of communal supervision at the cantonal level has already been taking place for several years, although there are still some communes that supervise their foundations themselves (which is to be rejected both from a governance perspective and because of the potential conflicts of interest). 6

D. Assumption of supervision

Pursuant to Art. 96 HRegV, the Commercial Register Office notifies the supervisory authority, which it considers competent, of the establishment of a foundation and sends it a copy of the foundation deed (para. 1), whereupon the supervisory authority notifies the assumption of supervision or forwards the establishment of the foundation to the competent authority (para. 2). However, only the commercial registry office has to decide on the admissibility of registration of the foundation and it may not make the registration dependent on the consent of the supervisory authority. In practice, it has proven useful to voluntarily submit the foundation documents to the supervisory authority for preliminary examination, whereupon the supervisory authority declares, as a precaution, that it will take over the supervision. In this way, adjustments can still be made and any questions of competence clarified before the foundation is entered in the commercial register. 7

III. SUPERVISORY MANDATE AND SUPERVISORY INSTRUMENTS (PARA. 2)

A. Content of supervision

The supervisory authority must ensure that the foundation's assets are used in accordance with its purposes. Accordingly, supervision is comprehensive and covers the entire activity of the foundation. Supervision is legal supervision and not technical supervision, which means in particular that the supervisory authority must respect the autonomy of the foundation and may not substitute its own discretion for that of the foundation bodies. In particular, the supervisory authority must monitor that the governing bodies respect the law, good 8 morals, the foundation deed or regulations and do not unlawfully exceed or abuse their discretionary powers.

B. Supervisory instruments

9 The supervisory authority has both preventive and repressive means at its disposal as supervisory instruments. The preventive means of supervision are first and foremost the obligation to report annually to the supervisory authority (consisting of the annual financial statement as well as an activity report with the most important occurrences in the business year, the awards, etc.), furthermore the notification of changes to the regulations, as well as compliance with the requirements on investment, which vary according to the supervisory authority, and the information in the case of impending insolvency or overindebtedness (Art. 84a CC). A new Art. 84b ZGB (coming into force on 1 January 2023) also obliges the supreme foundation body to disclose separately to the supervisory authority the total amount of remuneration paid directly or indirectly to it and to any executive management.

10 Repressive supervisory instruments include warnings, reprimands, the annulment of resolutions, substitute measures, fines, the appointment of a trustee (Art. 83d para. 1 item 2 CC), the implementation of organisational changes or changes of purpose (Art. 85, 86 CC) or, as ultima ratio, the removal of a member of the governing body or of the entire governing body. These measures, which usually sanction misconduct on the part of the organs, are subject to the principles of proportionality and subsidiarity, i.e. no more drastic measures may be taken as long as milder measures are possible and lead to the same goal.

C. Liability of the supervisory authority

11 Since the relationship between the supervisory authority and the foundation is of a public law nature, cases of state liability may arise from official activities in breach of duty. Particularly in the case of corporate foundations, the supervisory authority is accordingly reluctant to act.

IV. LEGAL PROTECTION

A. Foundation supervisory complaint

The foundation supervisory complaint is a proprium of foundation law and is described by doctrine and case law as a sui generis remedy derived from Art. 84 para. 2 CC. It provides the foundation participants with an instrument to complain to the supervisory authority against acts or omissions of the foundation bodies and thus to ensure the correct pursuit of the purpose and use of assets. In other words, it grants the participants a permanent possibility of participation and control, which is why it is also regarded as a means of internal foundation governance. There is a right to treatment and the final authority decision can be appealed in court. 12

The lynchpin of the foundation supervisory complaint is the question of how wide the circle of legitimacy to file a complaint should be drawn. Thus, it is agreed that "no excessive demands" may be made in order to ensure effective protection, but that there must also be a certain threshold of seriousness, since otherwise the foundation could be blocked by so-called popular complaints. Where this borderline should be drawn, however, is disputed in detail. According to the practice, any person who might once be in a position to obtain a benefit or other advantage from the foundation, or who has another personal, direct and current interest, is entitled to complain. However, the practice based on this is strongly influenced by individual cases and hardly conducive to legal certainty. The doctrine therefore regularly argues with the formula of the "justified interest in control", which also requires concretisation, whereby the question is whether there is a legitimate interest in control with regard to the measure asserted or contested in each case. Such an interest would then in any case be attributed to persons with a claim or expectancy vis-à-vis the foundation (e.g. beneficiaries, donating or sub-founding persons who have a claim to the intended use of their donation) as well as to persons with an interest protected under foundation law (i.e. members of governing bodies and the founder). Only those persons who have only an abstract interest in the foundation would be excluded. 13

Within the framework of the Luginbühl parliamentary initiative, the foundation supervisory complaint was also regulated by positive law and the question of the legitimacy of the complaint was clarified. Thus, a new Art. 84 para. 3 CC (coming into force on 1 January 2024) was adopted, according to which 14 "beneficiaries or creditors of the foundation, the founder, sub-founder and former and current members of the foundation council, 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". This was a compromise negotiated in parliament. The proposal to introduce the criterion of "legitimate control interest" into the law was rejected in the course of the parliamentary debates. Instead, an enumeration was introduced that originally included "founders, beneficiaries, creditors of the foundation, members of the foundation council or donors or persons close to them" and was then narrowed down again. This was heavily criticised by some scholars, mainly because the enumeration was arbitrary and thus allowed loopholes, and because only an "interest" was mentioned instead of a "legitimate interest". For example, heirs or descendants of the founder are wrongly not covered by the wording of the new Art. 84 para. 3 CC. At least there should be a certain legal certainty compared to the previous, often unclear situation.

B. Notice

15 In addition to the supervisory complaint, there is the possibility of a supervisory complaint, which is also admissible without an actual interest in legal protection. However, this guarantees neither party status nor the possibility of further proceedings. Whether the authorities are obliged to deal with complaints or only to take note of them is determined by the applicable cantonal law.

V. PRACTICE OF THE ESA

16 The supervisory practice of the ESA is published in various leaflets, FAQs and general information on its website. In terms of their legal nature, these publications mostly qualify as internal administrative ordinances and reflect the practice of the authorities; however, they are fundamentally not independent sources of law and thus do not contain their own legal principles with concrete rights and obligations. Fact sheets published so far deal with the takeover practice of the ESA, the exemption from the auditor's duty, regulations and their acceptance, the disclosure of remuneration to the foundation board and the executive board as well as the application of organisational reservations prior to the entry into force of the revised foundation law.

Since 2022, the ESA has digitised its supervisory system with the so-called eESA project. Via a digital link of the foundations subject to supervision with the EasyGov platform, the submission of annual reports will be standardised and supervision will be more data-based. Moreover, communication between the foundation and the supervisory authority (e.g. supervisory services, enquiries, etc.) will take place via EasyGov. Foundations that are not registered on EasyGov must use forms provided by the ESA for reporting and other enquiries. Both the onboarding of foundations to the EasyGov platform and further information on the ESA's digitalised supervision and the use of forms are described in detail in separate fact sheets and on the ESA's website. 17

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COMMENTARY ON

Art. 85 and 86 CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 85 and 86 CC, in: Nils Güggi/Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 85 and 86 CC N. XXX.

D. Modification of the foundation

I. Reorganisation at the request of the supervisory authority

Art. 85

At the request of the supervisory authority and having heard the board of trustees, the competent federal or cantonal authority may modify the foundation's organisation where such a step is urgently required in order to preserve the foundation's assets or safeguard the pursuit of its objects.

Art. 86

[1] At the request of the supervisory authority or the board of trustees, the competent federal or cantonal authority may amend the objects of the foundation where the original objects have altered in significance or

effect to such an extent that the foundation has plainly become estranged from the founder's intentions.

[2] Subject to the same requirements, conditions that are detrimental to the objects of the foundation may be revoked or amended.

CONTENT

I. SUBJECT MATTER

A. Starting point: Organizational and purpose changes as options for dealing with the “rigidity” of foundations

1 The **institutional nature** of the foundation and the **principle of separation and rigidity** (see OK-Brugger, art. 80 CC N. 4 ff.) mean that the founder's will, which is fixed at the time the foundation is established, is in principle irrevocable and must be followed as such by the foundation's organs. It is therefore fundamentally up to the founder to give the foundation as sustainable a structure as possible, enabling it to pursue the founder's will for a long time and, if necessary, long after the death of the person who established it. On the one hand, it is obvious that structures created in this way are relatively rigid (and must be so in order to shield the foundation and the founder's will from third-party influences) and that the foundation's governing bodies primarily have an administrative and implementation function, but no actual decision-making function. However, this also implies risks, because (intended) rigidity can also be disadvantageous if the legal or actual environment of a foundation changes in a way that was not foreseen by the founder. For example, the founders cannot anticipate every social, economic, or other societal change, nor can they foresee radical upheavals such as wars, pandemics, or economic crises. If the foundation has been given a statutory framework that does not allow it to respond adequately to such changes, whether gradual or immediate, its existence is potentially at risk.

2 Swiss foundation law provides foundations with various **instruments** to proactively mitigate this problem or deal with it retrospectively. While there is no legal and therefore automatic right in Switzerland for the founder, the foundation bodies or third parties to amend the statutes (because this would conflict with the nature of the foundation and the principles of separation and rigidity), the following options are available:

- Firstly, the founder is free to regulate organizational arrangements that go beyond the mandatory content of the statutes in easily (or more easily) amendable **organizational or foundation regulations** instead of laying them down in the statutes (see N. 12 below). Furthermore, the founder is free to design the foundation so that it is not “eternal” by means of **statu-**

tory provisions and/or appropriate endowment. The freedom of the founder also allows for the foundation to be established for a limited period of time (a so-called temporary foundation) or for its assets to be used up and consumed on an ongoing basis (a so-called consumable foundation). From a practical point of view, it is also conceivable to have so-called dependent foundations, which do not acquire their own legal personality and whose assets are placed under the umbrella of a so-called umbrella foundation, although this may also be subject to conditions.

- Secondly, Swiss foundation law allows the founder to reserve the right **in the foundation deed to make changes to the organisation or purpose,** but the assertion of this right is not unrestricted and is subject to certain conditions (Art. 86*a* CC, see OK-Brugger/Humbel, art. 86a CC N. 10 ff.).
- Thirdly, and most importantly, the provisions on purpose and organization laid down in the statutes are not absolute, even in Switzerland. The legislature has recognized the **need for foundations to be adaptable** and has therefore introduced provisions in **Art. 85 ff. CC**, the application of which is, however, subject to objective conditions in order to prevent abuse of the foundation form. Subsequent **changes to the organisation are permissible under Art. 85 CC** in exceptional cases if they are urgently necessary to preserve the foundation's assets or to maintain the foundation's purpose (see N. 15 ff. below); According to **Art. 86 CC**, changes to the **purpose of the foundation** require that the original purpose of the foundation has taken on a completely different meaning or effect, so that the foundation has clearly become alienated from the original intention of the founder. This is, as it were, a **legal application of the** *clausula rebus sic stantibus*, which is why **strict requirements** must also be imposed on its application.

B. Liberalization by the legislature

In this context, a steady **development** from an originally less change-friendly foundation law **towards a more modern and dynamic understanding of foundations** can be observed. This understanding seems sensible to us, not least from a pragmatic point of view, because foundations are increasingly exposed to rapidly changing normative and fiscal conditions. These are not only connoted by the slow-grinding wheels of the federal government in Bern, but 3 are also shaped by the speed of regulation by inter- and supranational organizations. Against this background, it is logical that the legislature has also provided a dogmatic basis for **adapting existing foundation structures to this change**. This was achieved, on the one hand, by codifying the *praeter legem* distinction between material and immaterial changes (Art. 86*b* CC, see OK-Brugger/Humbel, Art. 86b CC N. 3) and by introducing the possibility of a reservation of purpose (Art. 86*a* CC, see OK-Brugger/Humbel, art. 86a CC N. 4 f.) as of January 1, 2006. On the other hand, the threshold for insignificant changes within the meaning of Art. 86*b* CC has recently been lowered again, in that they no longer require "valid" objective reasons and no longer have to be "necessary" but only 'justified' or "appear to be justified."

C. Distinctions

4 Changes in purpose and organization must be distinguished from **measures taken by the supervisory authority** under Art. 83*d* para. 1 CC in the event of organizational deficiencies and originally inadequate organizational arrangements, as well as from orders issued by the supervisory authorities under Art. 84 para. 2 CC. The removal of an auditor provided for in the articles of association requires that the conditions of Art. 85 CC and Art. 83*b* para. 2 CC are met. According to the practice of the supervisory authorities, amendments to the articles of association with regard to the obligation to have an auditor are approved if the conditions of the Ordinance on Auditors for Foundations are met, i.e. if the foundation's balance sheet total is less than CHF 200,000 in two consecutive years, the foundation does not publicly solicit donations or other contributions, and the audit is not necessary for a reliable assessment of the foundation's assets and income.

5 The amendments to Art. 86 CC must also be distinguished from the occurrence of the successive purpose in so-called **successive foundations** (or – less precisely, because two purposes never coexist at the same time – successive mixed foundations). In such foundations, only *one* foundation purpose is pursued *at the same time*; however, the founder may stipulate a specific or objectively determinable event as the reason for the transition from one purpose to the other. At the time of the transition, there is a **change of purpose without conversion within the meaning of Art. 86 CC;** the change thus takes place *by virtue of* the foundation deed without the involvement of the founder or the organs. If the time of the transition is not precisely determined

(but only objectively determinable), the foundation organs must notify the competent supervisory and commercial register authorities of this circumstance.

In the event of a possible **dissolution of the foundation** within the meaning of Art. 88 para. 1 CC, changes to the purpose or organization take precedence based on the principles of proportionality and subsidiarity. 6

The **FusG** refers to Art. 86 CC (Art. 78 para. 2 sentence 3 FusG) for changes of purpose in the context of **mergers** and **assignments of assets** (Art. 86 para. 2 sentence 1 FusG), but does not comment on organizational changes. However, these may be necessary in the context of mergers or asset transfers in order to adapt the foundation's organization to the new structure and must then be assessed against the general requirements of Art. 85 CC (or, in the case of insignificant organizational changes, Art. 86*b* CC). Because Art. 78 ff. FusG do not provide for the division or conversion of foundations, circumstances such as transfers of registered offices (insofar as they require an amendment to the statutes, see N. 9) must also be treated within the scope of the provisions on significant or insignificant organizational changes (see N. 8 ff. below). 7

II. ORGANIZATIONAL CHANGES (ART. 85 CC)

A. Scope

The **personal scope** of Art. 85 CC applies not only to “classic” foundations but also to employee welfare foundations and family foundations. In contrast to classic foundations, however, in the case of the latter it is the supreme foundation body that is responsible for verifying that the conditions for change are met. 8

The **material scope** of Art. 85 CC covers all factors that affect the *organization of* the foundation and are not of a minor nature. These include, for example, the organization, appointment, and composition of the foundation's governing bodies (professional or personal requirements for accepting a mandate, term limits, age limits, etc.), internal procedural rules, as well as regular rules on the investment or management of assets, rights of influence of the founder, beneficiaries, or third parties, and changes of name and registered office. Some authors argue that name changes and transfers of registered offices should always be classified as insignificant changes under Art. 86*b*. In our 9 opinion, although it may generally be true that transfers of registered offices are insignificant changes, it must nevertheless be verified in each individual case what significance the transfer of the registered office has within the foundation structure and how the change affects the foundation's assets or the pursuit of its purpose. A change of registered office does not necessarily lead to a change in the competent supervisory authority, especially since the competence of the supervisory authority does not result from the registered office but from the geographical scope of the foundation's activities (see OK-Brugger/Humbel, art. 84 CC, N. 5). Thus, the same supervisory authority (cantonal or federal foundation supervisory authority) may continue to be responsible for the foundation before and after a change of registered office. In our opinion, a change is in any case significant if the foundation is to become a consumptive foundation.

B. Requirements and practical implementation

10 Organizational changes by the supervisory authority require that "the preservation of the assets or the fulfillment of the foundation's purpose urgently requires the change" (according to the previous wording, "urgently necessary"). In practice, high requirements are placed on the **necessity of the change**, which is assessed differently in the literature. While some of the literature explicitly welcomes or at least accepts the strict case law with reference to the *clausula*-like nature of this provision, the opposing view holds that it is sufficient if the change is in the interest of fulfilling the foundation's purpose or if it means that the purpose can be achieved "significantly better" than with the previous organizational form. According to von Orelli, when organizational changes are made, it must always be asked whether the change can improve the foundation's effectiveness in line with the founder's intentions, whereby, if there are different options, the one that maximizes the effect intended by the founder must be chosen. In our opinion, how to describe the threshold of necessity ultimately remains a semantic question. However, it is much more important to channel this **requirement into practical channels**. This situation can be determined on the basis of various – ideally **objectively determinable – auxiliary criteria**, such as (imminent) blockages of foundation bodies (which are relevant to the pursuit of the purpose); excessive costs caused by a dysfunctional organization that eat into the foundation's assets to such an extent that they are no longer sufficient for the long-term pursuit of

the purpose; lack of foundation governance instruments, without which the internal governance of the foundation is called into question.

When **formulating the modified organizational provisions**, the **purpose must again serve as a guideline**: the modified statutes should eliminate the aforementioned threat to the foundation's purpose and ensure its **best possible realization.** It also follows *a maiore ad minus* from Art. 86*b* CC that the change in the foundation's organization must not adversely affect any third-party rights. 11

C. Organizational or foundation regulations

Against the backdrop of this high threshold set by case law, the practical significance of **organizational or foundation regulations** should be noted. Under foundation law, it is **permissible to** establish the organization in whole or in part in regulations below the statutory level. This approach has the advantage of significantly **increasing adaptability and speed of implementation compared to a statutory provision:** The supreme foundation body can make organizational changes at the regulatory level **within its own competence**. 12

Whereas supervisory authorities used to routinely request regulations "for approval" as part of their supervisory activities, today this is usually only done "for review," which is more appropriate, especially since approval by the supervisory authority has no constitutive effect and is not required under foundation law. Changes must be brought to the attention of the supervisory authority so that it can perform its supervisory function, **take note** of the content of the regulations and, if necessary – i.e. in the event of violations of objective law or the statutory order – intervene. 13

The fact that the supreme foundation body is responsible for amending the organizational or foundation regulations on its own authority does not mean that this is reserved to it. The **supervisory authorities** also have the **authority** arising from their supervisory mandate to **order amendments to the regulations** necessary to protect the foundation's assets and purpose. This follows, on the one hand, *a maiore ad minus* from the competence of the supervisory authorities to take measures in the event of organizational deficiencies within the meaning of the non-exhaustive list in Art. 83*d* CC and, on the 14 other hand, from the principle of subsidiarity. A corresponding order would then have to be issued in the form of a contestable decision.

III. CHANGES IN PURPOSE (ART. 86 CC)

A. Scope

15 The **personal scope** of Art. 86 CC applies not only to “classic” foundations but also to employee welfare foundations and family foundations. As with organizational changes, the supreme body of family foundations must verify that the conditions for change are met.

16 The **material scope** of the provision relates to the purpose of the foundation, i.e. the actual **“core” of the foundation.** Any amendment affects the “foundations of the foundation.” The decisive factor with regard to the applicability of Art. 86 CC is that the amendment concerns an element that defines the identity of the foundation. Mere formal or linguistic adjustments (including to the purpose) therefore do not fall within the scope of Art. 86 CC, but must be made under the simplified conditions of Art. 86*b* CC. Due to this narrow scope of application, cases of changes in purpose are rather rare in practice, with the important exception of older family foundations, which had to adapt their purposes to the case law of the Federal Supreme Court before they could be entered in the commercial register.

17 The scope of application of the provision also covers **restrictions and conditions** (Art. 86 para. 2 CC) which are laid down in the statutes but outside the actual purpose and which jeopardize the realization of the purpose.

B. Prerequisites and practical implementation

18 Given the importance of the founder's intention as enshrined in the foundation's purpose as a central institution of foundation law, it is right to impose **high requirements** on a change of purpose. Otherwise, the basic concept of the foundation would be undermined and the institution would be vulnerable to abuse. Before a change of purpose can be considered in more detail, the provisions on the purpose contained in the statutes must be interpreted, whereby the true original intention of the founder must always be ascertained in accordance with the principle of intent. It is initially the task of those involved in the foundation – above all the foundation bodies – to interpret the

provisions of the foundation statutes in such a way that the foundation can pursue a genuine activity. In doing so, the foundation bodies must always bear in mind that they are not decision-making bodies, but are solely responsible for carrying out the will of the founder – the foundation is not a corporation, but an institution. For the day-to-day activities of a foundation, this starting point means that the statutes must be constantly interpreted and explained. There are virtually no foundation statutes that anticipate every conceivable option and leave no room for interpretation by the governing bodies as to how the foundation's assets are to be used to achieve the foundation's purpose. Changes in purpose are modifications to the substance of the foundation's legal actions and can therefore only be considered if the raw material has been exhausted and it is no longer possible, or virtually impossible, for the foundation to carry out its activities. One of the greatest difficulties in prudent foundation planning is the realization that the wording chosen today will no longer serve as a guide for the foundation's prosperity in a few decades' time, but will instead prove to be an obstacle if the actual environment changes significantly. It is generally advisable to formulate the purpose of the foundation in broad terms in order to leave the foundation's governing bodies sufficient room for interpretation even decades (or centuries) after the foundation has been established. Particularly in the case of broad foundation purposes, it is helpful to document the considerations and intentions of the founders for future generations of members of the foundation bodies – this can also take the form of legally non-binding foundation documents such as letters of wishes or guidelines, which set out the intentions, values, and wishes and are usually merely supplementary guidance. On the other hand, the purpose of the foundation must be precise enough to specifically reflect the founder's wishes and to bind the organs to the founder's wishes instead of leaving the decision to them (so-called requirement of specificity), and to satisfy tax requirements, which also require a precise classification of the purpose of the foundation.

According to Art. 86 para. 1 CC, a change of purpose requires an **objective** 19
and a **subjective component**: from an objective point of view, a **change in the meaning and effect** of the purpose is necessary; from a subjective point of view, the purpose must have **clearly deviated from the original intention of the founder**. The former is the case if the original purpose of the foundation is nonsensical, completely outdated, or uneconomical, or in situations where the founder's expectations have not been fulfilled. The latter must be answered by asking whether, in view of changed circumstances, the origi-

nal intention of the founder can still reasonably be realized as set out in the foundation deed. Typical examples of such purposes that are worthy of change because they are **outdated, nonsensical, or have already been (largely) fulfilled** include the fight against a disease that has since been eradicated, the pursuit of political goals that are obsolete because they have already been achieved (introduction of women's suffrage or abolition of the death penalty in Switzerland) or the promotion of education that is no longer appropriate or has been taken over by state institutions. According to one school of thought, a **distorted relationship between ends and means** may also suggest an adjustment of the purpose: this may have become economically inefficient, for example, because too many resources are available for a purpose that is too narrow, or too few resources are available for a purpose that is too broad but cannot be divided into sub-purposes, so that an adjustment of the purpose is also justified in this case. Before proceeding with a change of purpose, we believe that, in the event of overfunding, a dynamic interpretation of the foundation's purpose must first be carried out with regard to the primacy of the original intention of the founder. If this fails, further alternative courses of action, such as partial liquidation, should be examined before changing the purpose. If, on the other hand, a foundation has insufficient funds, we believe that other measures within the scope of the purpose, such as mergers or asset transfers, should also be examined before considering modifications to the purpose.

20 The competent body or authorities are not free to **formulate the amended purpose of the foundation**. Rather, it must be as **closely aligned as possible with the previous purpose** and also be based on the **previous subject area and group of beneficiaries**. The guiding principle here is the **hypothetical or presumed intention of the founder,** which may need to be determined by interpretation; in other words, the question to be answered is what the founder would have decided if he or she had been aware of the current circumstances and conditions. Finally, it should be noted that a change of purpose must be waived and the foundation dissolved (Art. 88 para. 1 no. 1 CC) if an adjustment would not lead to a meaningful result that is in accordance with the (hypothetical) original intention of the founder.

IV. PROCEDURE

The **procedure** for changing the organization and purpose is **usually initiated by the highest foundation body**, as it is best placed to assess the situation of the foundation. The specific procedure depends on the type of foundation and the nature of the change: 21

- In the case of **traditional foundations**, responsibility lies with a special **"conversion authority,"** which is in fact identical to the supervisory authority at both the federal and cantonal levels. This has been the case at federal level since January 1, 2006, when foundations under **federal supervision** ceased to be converted by the Federal Council and became **the responsibility of the FDHA**. This development is also reflected at cantonal level. As a result, the legal requirement that the competent conversion authority act at the request of the supervisory authority no longer makes much sense. It is in line with prevailing doctrine and also with the practice of the authorities that the **supreme foundation body** has not only a **right to be heard** but also a **right to submit proposals** not only in the event of changes to the purpose pursuant to Art. 86 CC – where this is explicitly enshrined in the text of the law – but also in the event of organizational changes pursuant to Art. 85 CC. However, in view of the current wording of the law, it is questionable in our opinion whether this is a justiciable claim or – more likely – merely a *de facto* right of initiative (in the sense of a right of notification, as other parties involved in the foundation are also likely to have). In the authors' experience, virtually all changes to the purpose or organization of a foundation originate from its governing bodies. Accordingly, in our opinion, the unjustified unequal treatment between Articles 85 and 86 CC should be amended *de lege ferenda*: Firstly, the unequal treatment of these situations is based on an omission on the part of the legislature, which failed to coordinate these two processes. Furthermore, and above all, teleological considerations also argue in favor of a justiciable right of application for the supreme foundation body, even in the event of organizational changes: It is just as important for the foundation and its prosperity that the supreme foundation body be able to respond to organizational shortcomings and prompt the conversion authority to take action. This is currently also possible in the event of a **refusal by the supervisory authority** to submit an application or, in the normal case where the supervisory and conversion authorities are identical, to issue a decision, but this must be fought for through the **appeal process** and, in the final instance, through a **civil appeal** to the Federal Supreme Court. Once the change has been ordered, the supreme foundation body does not have an actual right of veto. However, an appeal procedure is also available here. An appeal is open not only to the foundation bodies, but also to the **beneficiaries,** who, however, according to Federal Supreme Court case law, have neither party status nor a prior right to be heard in the amendment procedure. In our opinion, however, they should be involved in the amendment process as early as possible in the interests of forward planning and greater legal certainty in order to avoid subsequent appeals.

- In the case of **family foundations**, the older and fundamentally still valid **case law of the Federal Supreme Court** and the **prevailing opinion** assume that the foundation board has an **independent right to make changes** and can decide on changes without prior court approval. However, it remains bound by the substantive requirements of Art. 85 f. CC and by the requirement to exercise its discretion properly. In the event of violations, the supreme foundation body is liable. An older **minority opinion** is that the court must always be involved in changes to the organization or purpose. In practice, the problem arises that the Federal Office for the Commercial Register (EHRA) also appears to require such a court order, which is not based on the wording of the law, leading to lengthy proceedings and considerable costs for family foundations (see also OK-Brugger/Humbel, art. 57 CC, N. 13 ff.).
- According to **Art. 62 para. 2 BVG**, the **competent supervisory authority** pursuant to Art. 61 ff. BVG is also the conversion authority within the meaning of Art. 85 ff. CC for those pension funds that are constituted as **employee welfare foundations**. This is usually the same authority that also supervises foundations at the cantonal or supra-cantonal level.

22 The amendment to the articles of association must be reported to the **commercial register** (Art. 97 para. 1 lit. c CRO), which in the case of “classic” foundations and employee welfare foundations is done ex officio by the conversion authority itself. Contrary to previous cantonal practice, which required a public document subject to approval by the conversion authority, the amendment decision no longer requires **public certification** according to the express wording of the law (new Art. 86*c* CC, see OK-Brugger/Humbel, art. 86c CC N. 2).

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COMMENTARY ON

Art. 86a CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 86a CC, in: Nils Güggi/ Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 86a CC N. XXX.

II. Amendment of objects or organisational form as a result of a reservation by the founder

Art. 86*a*

1 The competent federal or cantonal authority shall amend the objects of the foundation or its organisational form at the founder's request or in accordance with his or her disposition mortis causa, provided that the charter reserves the right to amend the objects or the organisational form and that at least ten years have elapsed since the foundation was established or since the last amendment to the objects or the organisational form was requested by the founder. The limitation periods run independently of each other.

2 Where the foundation pursues public or charitable objects within the meaning of Article 56 letter g of the Federal Act of 14 December 1990

on Direct Federal Taxation, such new objects must likewise be public or charitable.

[3] The right to amend a foundation's objects or organisational form is neither transferable nor heritable. If the founder is a legal entity, the right extinguishes at the latest 20 years after the establishment of the foundation.

[4] Joint founders may only jointly request an amendment of the foundation's objects or organisational form.

[5] The probate authority shall inform the competent authority of any disposition mortis causa concerning the amendment of the foundation's objects or organisational form.

CONTENT

I. DEVELOPMENT, SUBJECT MATTER, AND PURPOSE OF THE STANDARD

1 The "fundamental conflict of all foundation law" between the original intention of the founder, as set out and manifested in the foundation deed when the foundation was established, and the need that may arise later to exercise influence over the "own" foundation has long been resolved in Switzerland strictly in favor of the original intention of the founder. Because this could (in theory) lead to potential founders being reluctant to choose the legal form of a foundation, this **conflict of objectives** was selectively defused in the course of the parliamentary initiative (00.461) "Revision of foundation law" by (former) Council of States member Fritz Schiesser. The "civil law core" of the amendments to foundation law that came into force on January 1, 2006, as a result of the parliamentary initiative, also provided for a **relaxation of the principle of separation and rigidity**: under certain conditions, it should now be possible to relax the principle of the immutability of the foundation's purpose by means of a selective reservation. As part of the parliamentary initiative (14.470) "Swiss foundation location. Strengthening" by (former) Council of States member Werner Luginbühl, this reservation option was extended to organizational changes in the same way, i.e., under the same conditions.

2 The introduction of this reservation option was aimed at the **core of the Swiss foundation law concept:** In **classical traditional foundation law** such as that in Switzerland (before the reform) and Germany, the principle of separation and rigidity is upheld, and changes to the legal situation once it has been perpetuated are only possible and permissible under strict conditions. This contrasts with the basic concept of so-called **private foundation models,** such as those underlying the legal systems in Austria or the Principality of Liechtenstein: in these legal systems, founders can secure significant influence over "their" foundation through the privately autonomous granting of so-called founder's rights (such as the right to change the purpose or even revoke the foundation).

3 Art. 86*a* CC only concerns **genuine or authentic founder's rights** or **founder's rights in the strict sense.** This only describes those rights with which the founder can influence the foundation after its establishment because they can revert to the role of *founder*. Genuine founder's rights are

therefore at odds with the central premise of foundation law, according to which the founder separates himself from his assets when the foundation is established and henceforth stands in relation to the foundation as an independent third party, and ultimately allow for *subsequent* decision-making. If the founder merely reserves rights that could also be granted to any *third party* (e.g., the right to serve on the foundation board or to appoint organs), these are merely **third-party rights**. Finally, **special rights** are rights reserved in favor of individual persons to use, dispose of, or consume the substance or income of the foundation's assets, which are generally reserved (and permissibly so) for this reason so that the establishment of the foundation does not have to be postponed.

The aim of the parliamentary initiatives to introduce and extend the reservation of the right to change the purpose under Art. 86*a* CC was to **moderately increase the flexibility of the foundation structure.** Unlike in genuine private foundation legal systems, the parliamentary debates also refrained from introducing a right of revocation for the founder and "merely" adopted the possibility of reserving the right to change the purpose as a compromise. 4

In the literature, the introduction of this founder's right was **partly welcomed, partly critically questioned** due to its potential susceptibility to abuse and low practical necessity. With regard to the possibility of a reservation of the right to change the purpose, it can be said that neither the fears of widespread abuse nor the expectations of great benefits in foundation practice have materialized. On the contrary, this instrument seems to have been used only **rarely**, at least so far. It remains to be seen whether extending this instrument to organizational reservations will lead to more active use of this option. In practice, however, other instruments have long been used, such as organizational regulations that are easier to modify and can be amended by simple written resolution unless otherwise specified. 5

II. SCOPE

A. Personal scope

According to the materials and the prevailing opinion in doctrine (which refers to them), Art. 86*a* CC is **exclusively applicable to traditional foundations and not to family and church foundations or employee welfare foundations** because this is a case of "qualified silence" on the part of the 6 legislature. The opposing view emphasizes, in our opinion with good reason, that there are hardly any objective reasons for treating family foundations and church foundations differently from traditional foundations and that the exception does not correspond to the usual system of norms for family and church foundations, whose special provisions would otherwise be included *expressly* in the law (see also OK-Brugger/Humbel, art. 87 CC N. 16). The legislature should remedy this unequal treatment in the upcoming revision of family foundation law.

B. Material scope

7 For systematic reasons (marginal notes I, II, and III on the one hand and marginal note IV on the other), it follows that the amendments within the meaning of Art. 86*a* CC are, in principle, **significant changes to the organization or purpose**. Within the scope of the amendment process, *a maiore ad minus* **also an** *insignificant* **change** within the meaning of Art. 86*b* CC may be required.

8 The reservation of the right to change the purpose also covers **charges and conditions** within the meaning of Art. 86 para. 2 CC.

C. Temporal scope

9 With regard to the **temporal scope**, the question arises as to whether and to what extent reservations regarding changes of purpose and organization can also be introduced retroactively. This concerns, on the one hand, (newly established) foundations that have included such clauses in their statutes between the adoption of the amendment and its entry into force and, on the other hand, pre-existing foundations that wish to introduce this option retrospectively. The former is correctly permissible according to official practice. In our opinion, this should be accepted if the start of the ten-year period is set at the date of entry into force of the amendment. The latter is rejected in part with reference to Art. 1 and 2 SchlT CC and the materials. However, as Sprecher has demonstrated, the relevant references are not relevant, which is why no clear answer can be found in the materials. In agreement with Riemer, in the case of founders who are still alive or legal entities as founders, the **risk of circumventing** Art. 86 and 86*b* CC must be emphasized if the subsequent introduction is unreservedly approved. In our opinion, the wording of Art. 86*a* CC already provides a decisive indication by requiring that the reservation of

the right to change the purpose must be included in the foundation deed. In our view, this means that a subsequent introduction of the right to change the purpose should not be possible *de lege lata*. Insofar as it is argued in doctrine that the reservation of the right to change the purpose pursuant to Art. 86*a* must be made within the framework of an amendment to **Art. 85 ff. CC** and must be subject to the **fulfillment of its conditions**, it should be noted that, in the absence of clear transitional provisions, the authorities are reportedly critical of or even opposed to such subsequent amendments. In our opinion, a legal clarification of the admissibility of a subsequent introduction of the reservation of the right to change the purpose within the framework of the upcoming revision of the law on family foundations would therefore be welcome.

III. REQUIREMENTS AND RESULT OF THE AMENDMENT

The **requirements** for the introduction and exercise of a reservation of the right to change the organization or purpose are **relatively low.** 10

Firstly, it is required that, when the foundation is established (or, within the scope of what is permissible in the event of a subsequent amendment to the statutes), a corresponding **reservation** regarding the purpose or organization is included **in the foundation deed**. The reservation should be made explicitly in order to clarify that a change of purpose or organization within the meaning of Art. 86*a* CC is possible. In our opinion, however, it is not absolutely necessary to mention the provision, nor is it necessary to specify the direction or content of the changed purpose or organizational provision. The latter may, but need not, be left open; a restriction in the statutes is not necessary and is usually not recommended for planning reasons. Art. 86*a* CC also allows a traditional foundation to be converted into a family foundation or a church foundation. While the new purpose or organization may therefore differ fundamentally from the original arrangement, para. 2 sets certain **content limits:** According to this provision, foundations that pursue a **public or charitable purpose** under Art. 56 lit. g DBG may change their purpose, but the amended purpose must also be public or charitable. This provision is intended to legitimately prevent attempts to circumvent the law, but its anchoring in civil law raises dogmatic questions, especially since tax law has its own instruments for combating circumvention. When granting tax exemption to a foun- 11 dation, most tax authorities therefore stipulate in the relevant decision that the foundation must fulfill the tax-exempt purpose on a permanent basis.

12 Secondly, the entitled founder(s) must submit a corresponding **application** to the **competent authority** to amend the foundation deed or this must be done by means of a **disposition of property upon death** and the amendment authority must be notified of this by the authority opening the succession (para. 5). It should be noted that, in the event of a reservation and valid exercise of the **right to apply**, the amending authority has no discretion (unlike under Art. 86 CC) and must order the amendment. The right to apply is **highly personal** and cannot be **inherited or transferred** (para. 3, first sentence), but may be exercised by an **authorized representative**. The highly personal nature of this right means that a founder who is under guardianship but capable of judgment can assert rights of amendment independently (Art. 407 in conjunction with Art. 19*c*–19*d* CC).

13 In the case of **legal entities**, this right expires **20 years after the establishment** of the foundation (para. 3, 2nd sentence), whereby, in our opinion, the date of entry in the commercial register is to be used as the reference point. The legislature wanted to prevent perpetuation through the interposition of a legal entity. If there are **several founders,** they must exercise the **right of amendment jointly** (requirement of unanimity, para. 4). This requirement is mandatory; if one of the founders dies, the right to make changes can no longer be exercised. According to the legislative concept, the exercise of the right to make changes is not a right to shape the foundation; rather, the change requires the cooperation of the authorities and is therefore **revocable** by the founder(s) until the actual decision is made.

14 Finally, there is a time requirement that **at least ten years** must have elapsed since the foundation was established or the last amendment requested by the founder. The purpose of this period is to ensure a certain degree of stability for the foundation and not to expose it to the “whims” of the founder, which could have a negative impact on its activities. The **time limit** is calculated from the **date of entry in the commercial register** when the foundation was established and, in the event of subsequent amendments, from the date on which they become legally binding. This applies contrary to the wording (time of the “request by the founder”) and results from the fact that it is not the application but the subsequent decision by the amending authority that amends the foundation deed (see N. 12 above), which is why the time of the

application cannot be decisive. In the case of time-delayed changes to the purpose and organization, the time limits can be triggered and run independently of each other (para. 1, last sentence). It is unclear whether a change expressed before the expiry of the ten-year period is valid and whether the authority must keep the application "on hold" until the expiry of the time limit but pending and then decide accordingly. The materials argue in favor of this. Riemer considers such premature applications by the founder to be null and void and requires the authority to reject such applications. The question of the validity of anticipated expressions of intent is particularly relevant where the founder is no longer able to make a decision after the ten-year period has expired, whether due to incapacity or death. Riemer is correct in stating that the intention to change must exist after the ten-year period has expired. Riemer also correctly allows for a disposition of property upon death to be made before the expiry of the ten-year period, provided that the founder dies after the expiry of the period. In our opinion, an authority should proceed in the same way in the event of imminent incapacity to make a decision: if the application is made before the expiry of the ten-year period and the settlor becomes incapable of making a decision after the expiry of the period, the application for amendment should be granted unless there are circumstances indicating that the settlor no longer had the intention to amend at the time of capacity to make a decision.

The **calculation of the time limit** is based on Art. 7 CC in conjunction with 15
Art. 77 para. 1 no. 3 CO and covers ten years; the phrase "at least" cannot be interpreted to mean that a longer period must be observed due to other circumstances. Of course, an application for amendment may also be submitted after (significantly) more than ten years. Amendments are permissible even many years after the foundation was established or the last amendment was made, provided that the persons making the disposition are still legally competent.

IV. PROCEDURE

The procedure for an amendment based on a reservation of the right to 16
amend is initiated by an **application** or the corresponding provision in a disposition of property upon death. Upon receipt of a legally valid application, the competent amendment authority is obliged to make the amendment and issue a corresponding order. The **authority has no discretion** in this matter:

it may only check that the above conditions are met. If the conditions are met, the founder(s) have a corresponding right to a change of purpose or organization.

17 The amendment authority shall notify the competent **commercial register** of the amendment for entry. The **effects** of the commercial register entry vis-à-vis third parties are governed by **Art. 936*b* CO**.

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COMMENTARY ON

Art. 86b CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 86b CC, in: Nils Güggi/ Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 86b CC N. XXX.

IV. Minor amendments to the charter

Art. 86*b*

Having heard the board of trustees, the supervisory authority may make minor amendments to the foundation charter provided these are objectively justified and do not impair the rights of any third party.

CONTENT

I. DEVELOPMENT OF STANDARDS

Art. 86*b* CC has been shaped by practical needs like hardly any other provision in Swiss foundation law. Originally, against the backdrop of a strictly interpreted principle of separation and rigidity, Swiss foundation law only allowed for very limited possibilities to amend the statutes under the conditions of Art. 85 f. CC (see OK-Brugger/Humbel, art. 85/86 N. 2). However, these provisions were aimed at substantial amendments to the foundation deed or statutes. The correct handling of less far-reaching amendments had not been regulated by law, which led doctrine and practice to assume that there was a genuine gap in the law and, in the sense of finding the law *modo legislatoris* pursuant to Art. 1 para. 2 and 3 CC, to distinguish between essential and non-essential amendments. The latter were to be permissible if they were in the interest of more effective fulfillment of the purpose, appeared necessary for "valid objective reasons," and did not infringe on the rights of third parties. 1

The rules established by Art. 85 f. CC for traditional foundations were too restrictive, particularly for employee welfare foundations, as these require a greater ability to adapt to changing circumstances, which could not be achieved under the statutory rules. Notwithstanding this, the Federal Supreme Court recognized the above distinction in a landmark decision concerning a personnel welfare foundation not only in this sub-area, but for all foundations. 2

This *praeter legem* case law was then incorporated into law for the first time by the Reform Act of October 8, 2004 (Art. 86*b* CC). In practice, this provision was (and is) used much more frequently than the conversion provisions in the strict sense (Art. 85 and 86 CC), and the conversion authorities took a mostly pragmatic approach to minor changes. In order to cement this liberal stance, the parliamentary initiative of former Council of States member Werner Luginbühl proposed a further simplification in no. 4, second half-sentence. After the Council of States' Legal Affairs Committee deemed this request capable of gaining a majority, the Federal Assembly adopted the version currently in force. According to this, an insignificant change will no longer require "valid" objective reasons and will no longer have to be 'necessary' as of January 1, 2024. Rather, it will be sufficient if the change "appears justified." 3

II. SCOPE OF APPLICATION, PREREQUISITES, AND PRACTICAL IMPLEMENTATION

A. Scope of application

4 Art. 86*b* CC applies to all legal and de facto types of foundations. In particular, it applies not only to traditional and personal welfare foundations, but also to ecclesiastical and family foundations (for the procedure, see N. 9 ff. below).

5 In terms of content, the limits of applicability are fluid. The decisive factor for the applicability of Art. 86*b* CC is that the adjustments do not fundamentally alter the nature of the foundation and leave its identity-defining characteristics unchanged. Because this cannot be verified *ex ante* across the board, it must be determined individually in each case whether the change is actually *insignificant*. Of course, various case groups have emerged in practice in which an insignificant change is likely to exist. These include changes of name and registered office (see, however, OK-Brugger/Humbel, art. 85/86 N. 9), the introduction of an auditor due to changes in legal requirements (introduction of Art. 83*b* CC), the adaptation of liquidation provisions to changes in tax law, minor modifications to procedural steps (convening deadlines, quorums for resolutions, recording of minutes, remuneration, etc.) and clarifications of the circle of beneficiaries (e.g. in the context of an adjustment of the circle of beneficiaries to changed social views, as expressed, for example, in the PartG and "marriage for all," but only if these correspond to the original or hypothetical intention of the founder). According to certain authors, changes to provisions in deeds regarding the non-depletion of the foundation capital (in order to continue pursuing the foundation's purpose in the event of a sharp decline in investment income) and the expansion of welfare purposes in personnel welfare foundations are also insignificant. In our opinion, however, this depends heavily on the individual case in these potentially consequential areas and must therefore be carefully verified. In such situations, the founder's intention is particularly worthy of protection.

B. Requirements

6 According to the new wording of the law, insignificant changes are permissible under the following conditions: First, they must appear justified for factual (i.e., objective) reasons. The interests worthy of protection required by the

Federal Supreme Court in BGE 103 Ib 161 are always given if there is an objective reason. They therefore do not constitute an independent prerequisite.

Secondly, it is still necessary that the amendment does not affect the rights of third parties. According to case law, this also includes the rights of beneficiaries or special options. In practice, due to this requirement, discussions are often held with affected third parties in advance of a change and their written consent to the amendment of the articles of association is obtained. 7

In connection with mergers and asset transfers, a reservation as required by Art. 86 CC was necessary because the requirements for a merger (pursuant to Art. 78 para. 2 FusG) and a transfer of assets (pursuant to Art. 86 para. 2 FusG) correspond *in substance* to those for an insignificant amendment to the deed pursuant to Art. 86*b* CC. This requires that the merger (or transfer of assets) be “objectively justified and, in particular, consistent with the purpose of the foundation” and that it preserve the “legal claims of the beneficiaries of the foundations involved.” However, such a process cannot counteract a deliberate decision by the founder (as evident from the foundation deed) to establish separate entities instead of making an endowment to an existing foundation. In such cases, the discretion of the acting foundation bodies naturally remains bound by the original intention of the founder, the amendment of which would in turn have to satisfy the requirements of Art. 86 CC. 8

III. PROCEDURE

The procedure depends on the type of foundation: In the case of traditional foundations and employee welfare foundations, it is up to the supervisory or conversion authority to make the change after consulting the highest foundation body and then officially registering it with the commercial register authorities. In practice, however, the initiative usually comes from the supreme foundation body, whose right to be heard is already guaranteed by an approving amendment order. 9

In the case of family foundations, the power to make amendments rightly lies with the supreme foundation body according to established case law and in our opinion. This body is responsible for independently verifying that the conditions for amendment are met and then implementing the amendment. 10

11 Finally, the procedure for ecclesiastical foundations is governed by the rules applicable to them (approval by ecclesiastical bodies may be required, for example).

12 The amendments must also be entered in the commercial register, whereby – as with amendments under Art. 85 and 86 CC – a new version of the statutes must be submitted (see Art. 22 para. 3 and Art. 97 para. 1 CRO, see also OK-Brugger/Humbel, art. 85/86 CC n. 22).

13 The same legal remedies are available against the amendment order as against amendments under Art. 85 or 86 CC and against orders of the supervisory authority under Art. 84 CC.

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COMMENTARY ON

Art. 86c CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 86c CC, in: Nils Güggi/ Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 86c CC N. XXX.

V. Form of the amendments

Art. 86*c*

Amendments to the foundation charter in accordance with Articles 85–86b shall be subject to a ruling from the competent federal or cantonal authority from the supervisory authority. A public deed is not required for the amendments.

CONTENT

I. LEGAL POLICY BACKGROUND OF THE PROVISION

One of the few **demands** of the parliamentary initiative (14.470) to strengthen Switzerland as a location for foundations, which was deemed politically acceptable by the competent Committee for Legal Affairs of the Council of States (RK-S), concerned the **“simplification of amendments to the foundation deed through unbureaucratic changes without notarization”** (no. 4, first half-sentence). This demand was intended to respond to the fact that amendments to the foundation deed ordered by the competent conversion authority by means of an amendment order had to be notarized in certain cantons, but not in others. 1

II. FORM OF AMENDMENTS TO THE FOUNDATION DEED

Art. 86*c* CC, which came into force on January 1, 2024, now provides uniformly for the whole of Switzerland that amendments by the competent authority are possible **without additional notarization**. This eliminates the threat of duplication, depending on cantonal practice, whereby an amendment to the statutes resulting from a sovereign amendment order must also be publicly certified. In light of the **functions of public notarization** (protection against hasty decisions; implementation of the true, complete, and unadulterated will of the parties; protection of transactions), it should be noted that these are already guaranteed by the sovereign involvement of the state in the amendment of documents. The amendment is therefore to be welcomed, as it speeds up the procedure without creating new gaps in protection. Art. 86*c* CC does not apply to (pure) family foundations and ecclesiastical foundations, as these are not subject to any state supervisory authority. 2

In the case of “classic” foundations and employee welfare foundations, the amendment to the statutes must be reported to the **commercial register** ex officio by the conversion authority (Art. 97 para. 1 lit. c CRO; for general information on the procedure for amending statutes, see OK-Brugger/Humbel, Art. 85/86 CC N. 22). To ensure that both the foundation and the foundation supervisory authority have a complete version of the foundation deed or statutes, a consolidated version must be prepared which contains the latest amendments as well as the previous provisions. 3

4 This **completely new version** must be submitted to the commercial register office as evidence in accordance with Art. 22 para. 3 CRO.

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COMMENTARY ON

Art. 87 CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 87 CC, in: Nils Güggi/ Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 87 CC N. XXX.

E. Family and ecclesiastical foundations

Art. 87

[1] Family and ecclesiastical foundations are not subject to supervision, unless otherwise provided by public law.

[1bis] They are exempt from the duty to appoint external auditors.

[2] Private law disputes are decided by the courts.

CONTENT

I. SUBJECT OF THE REGULATION

Swiss foundation law as set out in the CC differentiates between the law of the so-called "classical" foundations of Art. 80 et seq. CC and the *statutory* special forms of the family foundation and the ecclesiastical foundation. Art. 87 CC is a special provision that essentially defines the legal framework for family and ecclesiastical foundations by exempting these two special forms from both state foundation supervision (para. 1) and the obligation to appoint an auditor (para. 1^{bis}). 1

II. FAMILY FOUNDATIONS

A. Definition

A family foundation is characterized by the earmarking of assets for a family (or several families) for a specific purpose. The decisive factor is, on the one hand, the concentration of the group of beneficiaries on members of a particular family, which is based on the meaning of the foundation deed, the purpose and the beneficiaries. On the other hand, family foundations are characterized by the restriction of their purpose to the payment of the costs of the education, provision or support of family members or similar purposes, as well as by the prohibition of family entailments in accordance with Art. 335 para. 1 and para. 2 CC. 2

However, the law does not define the legal concept of a family foundation, which can lead to uncertainties in its qualification as a family foundation. There is already controversy over what is meant by a "family". For example, there are different views on whether, in addition to persons related by blood, adoption, marriage or registered partnership, cohabiting partners or stepchildren, as well as children conceived through artificial insemination or surrogacy, may also be included, which would probably correspond to a contemporary understanding of family. The question of whether housemates, patients and staff may also be counted as family members is also controversial and is likely to have little practical relevance. Finally, it is controversial whether the founder himself may belong to the circle of family beneficiaries, which in our opinion should be affirmed. *De lege ferenda* the family foundation as a means 3 of perpetuating assets for private benefit should generally be open to the favoring of “private individuals”.

4 If a foundation has beneficiaries who do not belong to a family (natural or legal persons) or if the foundation also pursues other purposes without a specific group of beneficiaries, such as charitable purposes, then it is not a pure family foundation, but a mixed foundation (see below N. 18 et seq.).

B. Legal Framework of the *Purely* Family Foundation

1. Principle

5 The legal framework for family foundations consists of provisions scattered throughout the law. In principle, the general foundation law of Art. 80 et seq. applies to family foundations, in particular for the form of establishment by public deed or disposition of property upon death (Art. 81) and the organization including the accounting obligation (Art. 83 and 83*a*). The application of the general foundation law of Art. 80 et seq. is modified for family foundations in certain respects, namely by Art. 335 (permissible purposes), Art. 87 (exemption from supervision and auditors) and Art. 88 para. 2 (dissolution of the family foundation by the court). Special provisions for family foundations also exist in the FusG, such as Art. 79 para. 3 FusG (public notarization of the merger agreement), Art. 84 FusG (appeal of the merger resolution to the court), Art. 85 FusG (responsibility of the supreme foundation body for measures of creditor and employee protection). Likewise, commercial registry law provides for special features, such as the fact that the entry in the commercial registry must include a reference to the family foundation status (Art. 95 para. 1 let. o CRO) and, in the case of a merger of family foundations, the acquiring foundation must keep the merger resolutions of the supreme foundation bodies of the participating foundations (Art. 140 para. 2 CRO) and, in the case of asset transfers, the excerpts from the minutes of the supreme management or administrative bodies of the participating legal entities regarding the conclusion of the transfer agreement (Art. 141 para. 2 CRO).

2. Permissible purposes

6 Family foundations may only be established for the purposes listed in Art. 335 para. 1, namely education, provision of means, support of family members or

similar purposes (for details see OK ZGB-Brugger/Humbel, Art. 335 N. 20 et seq.).

3. Entry in the commercial register

Since January 1, 2016, all newly established family foundations must be registered in the commercial register in order to acquire their independent legal personality; an exemption from the obligation to register for family foundations, which was previously provided for in Art. 52 para. 2 aCC, has been deleted. The obligation to register in the commercial register also extends to existing family foundations. Existing family foundations had a period of five years (i.e. until December 31, 2020) to register with the relevant commercial registry offices. However, a family foundation established before January 1, 2016 that was not entered in the commercial register by the end of 2020 does not automatically lose its legal personality as a result, but remains legally valid. 7

The entry in the commercial register of family foundations, some of which are very old and were established many decades ago, has led to a variety of problems, proceedings and legal disputes in recent years, as original foundation deeds or other documents could often no longer be found or some amendments to the statutes made in the meantime were not accepted by the commercial registry offices. However, the biggest problem was that some commercial registry offices – exceeding their authority – declared family foundations *originally null and void* because their purpose (or parts of it) no longer corresponded to the current legal interpretation of Art. 335, para. 1. This original nullity (*ex tunc*) had a variety of legal and tax consequences for existing contracts and other performance relationships of the foundation. Many family foundations found themselves forced to establish their legal existence in costly proceedings before the civil judge. 8

4. Judicial supervision upon application instead of state supervision (Art. 87 para. 1 and para. 2)

a. General

Family foundations are not subject to any state supervisory authority (Art. 87 para. 1). Accordingly, family foundations are not required to submit either an annual report or a compensation report (see Art. 84b) to the supervisory authority. The exception to the state supervision requirement is justified by the 9 fact that the family foundation is a private entity and has little contact with legal transactions. The argument that family foundations are rarely involved in legal transactions is, however, as simplistic as it is wrong. The authors are aware of many family foundations that have large assets, including real estate, and are involved in legal transactions to the same extent as other legal entities under private law. The exception from state supervision is correct because, in the case of family foundations, the family members involved (above all the actual and potential beneficiaries) control the conduct of the foundation and the actions of the foundation's bodies and can appeal to the civil court in the event of (potential) misconduct. While the solution of the Swiss legislator to resolve the control deficit typical of family foundations by means of application-related governance of the private foundation participants is to be endorsed, the that the current law does not recognize any legally enshrined rights of inspection, information or disclosure for the beneficiaries of a family foundation, although the arbitrary refusal of information can at least be challenged in court. The exemption of family foundations from state supervision is not without controversy and some legal scholars are calling for such state supervision for family foundations as well.

10 Pursuant to Art. 87, para. 2, the court decides on objections of a private-law nature (in particular in the presence of subjective private rights against the foundation, for example as a beneficiary or creditor), and thus exercises application-related supervision of the family foundation. This means that the civil court does not decide ex officio, but only upon application, and thus assumes selective supervision in disputed cases. In the area of dispute, the court acts as a supervisory authority with the corresponding powers, so that Art. 83*d* Para. 1–3 and Art. 84 Para. 2 are to be applied mutatis mutandis. The functions of the foundation supervisory authority complaint are replaced by actions for performance, injunctive relief, declaratory relief and reorganization. A one-month period is assumed for contesting foundation board resolutions, by analogy with Art. 75.

b. Proceedings

11 While the principle of party disposition applies to the initiation of proceedings under Art. 87, para. 2, i.e. the court only acts at the request of the parties and within the scope of the legal protection sought, the principle of official action applies when proceedings are initiated if the existence of the founda-

tion is in dispute. Legal recourse to the court is mandatory and cannot be excluded by statute.

c. Arbitration agreement

The admissibility of arbitration agreements integrated into foundation statutes is controversial, but in our opinion it should be affirmed in any case where the existence of the family foundation is not at issue, which, due to the prohibition of self- and under Art. 88 para. 2 CC is not subject to the disposition of the parties and is therefore not arbitrable within the meaning of Art. 354 CPC. 12

5. Changes in the purpose and organization of family foundations

The law contains no provisions regarding changes in the purpose or organization of family foundations. In particular, there is no authority that could order changes in the purpose or organization within the meaning of Art. 85, 86 or 86*b*, since family foundations lack a supervisory or conversion authority in terms of legal concept, which is why there is a genuine gap in the law. This raises the question of whether the governing bodies of a family foundation can amend the statutes on their own authority or whether the civil court must order or approve an amendment to the statutes. In legal doctrine, different views are held on this, with the prevailing view being that the board of trustees has the authority to amend the statutes. In a recent decision, the Federal Administrative Court ruled that the consent of the civil court is required for amendments to the statutes, with the result that an amendment to the statutes made by the foundation's own governing bodies (in this case, a change of purpose with a view to the pending entry of the family foundation in the commercial register) was found to be invalid. In earlier rulings, the Federal Court had clearly decided the question of the authority to amend the foundation charter in favor of the foundation board. In a later ruling, however, the question of authority was left open (for no apparent reason), and in a further ruling the authority of the foundation board was only implicitly affirmed. 13

According to the view represented here, the genuine legal gap in the purpose and organizational changes in family foundations is to be closed by analogy: In the non-contentious area, the supreme foundation body is authorized to amend the foundation charter independently, with regard to amendments of purpose by analogy with Art. 86 and with regard to amendments of organization by analogy with Art. 85 (significant amendment of organization) and Art. 14

86*b* (insignificant amendment of organization). The changes must be made in the form of a public notarization. The public notarization of changes to the statutes at least goes some way to compensating for the lack of a supervisory authority in the interests of protecting the public. Accordingly, there is no scope for analogous application of Art. 86*c*, which came into force on January 1, 2024, according to which the decision of the competent authority is sufficient for classical foundations. It is the responsibility of the foundation's governing bodies to check the requirements for amending the articles of association and to pass a corresponding resolution. Parties involved in the foundation, such as the other foundation bodies, beneficiaries or the founder, can have the amendment of the articles of association reviewed by the court within the scope of their petition-related supervision in accordance with Art. 87 para. 2. The court can correct the amendment to the articles of association and/or examine the possible liability of the foundation's bodies.

15 It is recommended that the details of the organization of the family foundation and the order of beneficiaries be set out in regulations. Unlike the foundation deed, regulations can be issued and modified in accordance with the procedure laid down in the deed. In most cases, the authority to enact and amend regulations is assigned to a foundation body that decides by majority vote. However, it is also fundamentally permissible to assign this authority to other persons (such as the descendants of the founder or even the founder himself or herself). However, regulations may not contradict the provisions of the foundation deed. In the somewhat undifferentiated opinion of the Federal Court, regulations that grant beneficiaries rights to the foundation's assets that go beyond the limits of Art. 335 CC result in the invalidity of the family foundation.

6. No reservation on changes to the purpose and organization pursuant to Art. 86*a*

16 According to the prevailing view, pure family foundations are not entitled to the reservation of the right to amend the purpose and organization of the foundation under Art. 86a. This is justified by a qualified silence on the part of the legislator in the legislative materials, according to which the introduction of a reservation of purpose (the reservation of organizational change was only introduced on January 1, 2024) for family foundations would have had to be made by means of a special provision. Of course, the legislator overlooked the

fact that there is basically no genuine law for the family foundation, but that the special provisions of Art. 87, Art. 88 Para. 2 and Art. 335 of the general foundation law of Art. 80 et seq. only selectively restrict or modify, which means that, in the opinion expressed here, no special provisions would have been needed to extend the reservation of amendments to family foundations as well. Since the founders of family foundations may also have a legitimate need to amend the purpose and organization, it would be desirable *de lege ferenda* to extend Art. 86*a* CC to family foundations as well. It is perfectly permissible to convert a classical foundation into a family foundation by means of a reservation of purpose in accordance with Art. 86*a* (subject to tax-exempt foundations, where the new purpose must also be tax-exempt in accordance with Art. 86*a* para. 2).

7. No auditor requirement (para. 1^{bis})

Pursuant to Art. 87 para. 1^{bis}, family foundations are exempt from the requirement to appoint an auditor. The exception to the auditor requirement applies generally, is based on the legal form, and – in contrast to other legal forms such as associations or stock corporations – is not tied to size criteria such as balance sheet total, sales revenue or number of full-time employees. This exception to the auditor requirement is also justified by the legislator on the grounds that family foundations are private in nature and rarely participate in legal transactions. While the private character of a family foundation justifies an exemption from the state supervision requirement, this applies only to a limited extent to an exemption from the statutory auditor requirement. All parties involved have an interest in an independent audit of the annual financial statements of the family foundation. The founder is free to introduce an auditor by means of a corresponding provision in the statutes, which often happens in practice. It would be recommendable *de lege ferenda* to consider the introduction of a general obligation for family foundations to appoint auditors, not least in order to meet the constantly growing demands for transparency and to counter the accusations that family foundations are prone to abuse. 17

C. Mixed family foundations

If a foundation has multiple purposes (which is perfectly permissible), this may constitute a so-called mixed foundation. Mixed foundations are founda- 18 tions that have the purposes of different foundation types. If a family foundation is established not only for the benefit of members of a family, but also has other natural or legal persons as beneficiaries or pursues other purposes, such as those of a charitable nature, a mixture of different foundation types arises and a mixed family foundation comes into existence. According to the view represented here, a mixed family foundation also exists if the other purposes are merely of a subordinate nature.

19 The legal framework of a mixed foundation is determined by the types of foundation that are mixed. It is conceivable that a family foundation may pursue classic foundation purposes, ecclesiastical purposes or staff welfare purposes. Whether a mixed foundation actually exists can often only be determined by interpreting the foundation's purpose: It may be that a purported genuine sub-purpose actually turns out to be a condition, special right or substitute provision for how the foundation's assets are to be used if the primary purpose can no longer be fulfilled (for example, if a family becomes extinct and the foundation is supposed to pursue charitable purposes).

20 If various purposes are pursued *in succession* (which is also permissible without further ado within the scope of the founder's freedom), a successive foundation exists. According to the view presented here, a change of system without a conversion in the sense of Art. 86, i.e. in particular also to supervision by the foundation supervisory authority, only occurs when the successive purpose occurs (e.g. when the time has expired or when the conditions specified by the founder have been met). In the absence of a legal basis and given the uncertainty as to whether the successive purpose is actually being pursued, there is no room for *anticipated supervision* of mixed family foundations.

21 The legal framework of the mixed foundation differs from that of the pure family foundation:

- The mixed family foundation is subject to overall foundation supervision; Art. 87 para. 1 CC does not apply. Instead, Art. 84 applies, with the consequence that the foundation must submit an annual report and a compensation report to the competent authority, which also covers the part of the activity that would be classified as a family foundation.
- Amendments to the deeds are ordered by the supervisory authority (Art. 85, 86, 86*b)*, although since January 1, 2024, no public notarization is required for this (Art. 86*c*).

- The foundation participants (which also includes beneficiaries of the family-related sub-purpose) are in principle entitled to file a foundation supervisory complaint pursuant to Art. 84 para. 3, whereby, in the opinion represented here, the supervisory authority should continue to examine private-law objections (in particular questions regarding the amount of distributions) only with restraint.
- The foundation must appoint an auditor if the conditions of Art. 83*b* CC are met; Art. 87 para. 1^{bis} does not apply.
- In the view presented here, mixed foundations should have the right to reserve the right to amend the purpose and organization in accordance with Art. 86*a*, at least with regard to the classic sub-purpose.
- It can be assumed that the authorities have the power to dissolve a mixed family foundation (Art. 88 para. 1).

III. ECCLESIASTICAL FOUNDATIONS

The CC does not define an ecclesiastical foundation. Accordingly, there are different descriptions in the doctrine. The Federal Supreme Court's case law requires that, in order for a foundation to be considered ecclesiastical, it must, on the one hand, pursue an ecclesiastical purpose and, on the other hand, have an organic link with a religious community. If there is no organic link to a religious community or if the purposes cannot be qualified as ecclesiastical within the meaning of Art. 87 para. 1, a classic foundation is deemed to exist, which is subject to the state supervisory authority. 22

A foundation purpose is ecclesiastical if it directly or indirectly serves faith in God or concerns the connection with the transcendental, for example by maintaining and financing persons with ecclesiastical offices or ecclesiastical institutions or by promoting ecclesiastical doctrine or ultimately faith (which can occur through the training of dignitaries or the financing of research, preservation and dissemination of religious teachings). 23

Even more than the purpose, the special treatment of ecclesiastical foundations is based on their organic connection with a religious community: in the context of the codification of civil law under positive law, it became clear – albeit only at the request of the Catholic-conservative cantons of Obwalden, Zug and Lucerne – that many significant assets and properties of ecclesiastical or religious origin (especially bishoprics, sanatoriums, parishes) were held 24 through *foundation-like* institutions with their own legal personality, particularly in Catholic circles. These foundation-like assets were usually – in some cases for several centuries – incorporated into the legal and control structure of the respective church community or its representatives and authorities. Consequently, they were already subject to their own, namely ecclesiastical, supervision, which made a superordinate, "duplicated" state supervision redundant. Not least out of respect for the autonomy of the church, state supervision of church foundations was withdrawn (Art. 87 para. 1). Despite the diverging reasons for the waiver of state supervision of foundations, church foundations and family foundations are covered by the law together. The exclusion from state supervision is mandatory; it is not at the discretion of a founder to subject the ecclesiastical foundation to state supervision.

25 An ecclesiastical foundation is only considered to be organically linked to a religious community if the latter has the possibility of exerting influence and a right of supervision over the foundation's activities. Since the waiver of state supervision of ecclesiastical foundations is based on the fact that ecclesiastical supervision already exists through the organic connection with a religious community, the question arises as to what requirements ecclesiastical supervision must meet in order to justify the waiver of state supervision. In particular, it is controversial whether the internal ecclesiastical supervision must be *equivalent* or merely *comparable* to state supervision. In particular, the assessment is difficult when the *independence of* the supervision of the ecclesiastical foundation is at issue, for example because persons who are also part of the religious community organically connected with the foundation or even serve on the foundation board itself participate in the supervision, but withdraw from the supervisory decisions. Although recusal rules help to resolve conflicts of interest in individual cases, they cannot permanently compensate for a lack of organizational, personnel and factual independence between the supervisory body and the foundation. The decision on the independence of the supervisory body – and thus the question of whether a church foundation is exempt from state supervision – is correctly a legal question that is beyond the jurisdiction of the commercial registry authorities. If there is doubt as to whether Art. 87 para. 1 applies to a particular foundation, the state supervisory authority will decide on this initially.

26 The remaining legal framework of ecclesiastical foundations is similar to that of family foundations. Regarding the exemption from the statutory audit re-

quirement (Art. 87 para. 1bis) and the exception to the reservation of the right to amend the purpose and organization pursuant to Art. 86*a*, reference can be made to the above.

Changes to the purpose and organization within the meaning of Art. 85, 86 and 86*b* are the responsibility of the ecclesiastical supervisory authorities, which are also responsible for supervisory measures (see Art. 84 para. 2). Changes to the purpose or organization are permissible if the substantive requirements of Art. 86, 86, or 86*b* are met. In the event of disputes under private law, the civil court has jurisdiction over church foundations (Art. 87 para. 2), while church supervision has jurisdiction in non-contentious matters. The dissolution of a church foundation is carried out by the court (Art. 88 para. 2). 27

Ecclesiastical foundations can also qualify as mixed foundations if they also pursue traditional purposes or – which is rare – family-related purposes or personnel welfare purposes. In this case, the legal consequences must be evaluated depending on the specific mixed form. As with mixed family foundations, an ecclesiastical foundation with partial traditional purposes is subject overall to the state supervisory authority and must appoint auditors. 28

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COMMENTARY ON

Art. 88 and 89 CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 88 and 89 CC, in: Nils Güggi/Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 85 and 86 CC N. XXX.

F. Dissolution and deletion from the register

I. Dissolution by the competent authority

Art. 88

[1] The competent federal or cantonal authority shall dissolve the foundation on application or of its own accord if:

its objects have become unattainable and the foundation cannot be maintained by modifying its charter; or
its objects have become unlawful or immoral.

[2] Family and ecclesiastical foundations shall be dissolved by court order.

II. Right to apply for dissolution, deletion from the register

Art. 89

[1] Any interested party may file an application or bring an action for the dissolution of a foundation.

[2] Dissolution must be reported to the commercial registrar so that the entry may be deleted.

CONTENT

I. SUBJECT MATTER

1 Articles 88/89 CC deal with the dissolution of existing foundations and regulate the conditions, procedures, and consequences of winding up a foundation.

II. DISSOLUTION OF FOUNDATIONS

A. General

2 Unlike other legal entities, foundations do not have the option of dissolving themselves due to their institutional nature: the organs of the foundation cannot take an autonomous decision on the dissolution of the foundation and the termination of its legal existence; this would contradict the nature of the foundation, which is governed by the will of the founder and not by that of the organs. If a founder grants himself, the organs or the beneficiaries a genuine right to self-dissolution, this right shall be deemed non-existent and, depending on the circumstances, shall even result in the nullity or partial nullity of the establishment of the foundation within the meaning of Art. 52 para. 3 CC. Any resolution to dissolve the foundation that is nevertheless passed shall be null and void.

3 However, the founder may control the end of the foundation and thus its dissolution by means of private autonomy, for example by determining the duration of the foundation in advance (e.g., dissolution after twenty years of existence, known as a temporary foundation) by stipulating that the foundation must continuously use its assets (so-called consumption foundation) or by the occurrence of a defined event in the sense of a condition subsequent. In our opinion, it is permissible to grant the foundation bodies a certain degree of discretion, as long as the bodies cannot decide freely on the dissolution. Such provisions may be introduced not only when the foundation is established, but also subsequently as part of an organizational change pursuant to Art. 85 or 86*b* CC. In these cases too, the dissolution of the foundation must be formally confirmed by the competent supervisory authority or, in the case of family foundations and ecclesiastical foundations, by the court.

B. Distinctions

1. Purposes that are inadmissible from the outset and defective intentions of the founder

If a foundation pursues an unlawful, immoral or unattainable purpose from the outset or has been established despite a defective intention of the founder (in addition to the lack of capacity of the founder, this could include error or deception), the foundation does not have to be dissolved in accordance with Art. 88 CC. Rather, there is a defect in its establishment and the foundation, despite its entry in the commercial register, never came into existence and is therefore reversed. However, its non-existence must be determined in proceedings analogous to Art. 88 CC. 4

2. Bankruptcy

The dissolution of a foundation as a result of bankruptcy must be distinguished from its revocation. Pursuant to Art. 39 para. 1 no. 12 SchKG, foundations are subject to ordinary bankruptcy proceedings from the day following the announcement of their registration in the Swiss Official Gazette of Bankruptcies (Art. 39 para. 3 SchKG). The place of bankruptcy is the registered office of the foundation. Foundations may file for their own insolvency in accordance with Art. 191 SchKG, but must obtain the prior consent of the supervisory authority. 5

3. Merger

The merger of foundations pursuant to Art. 78–85 FusG must also be distinguished from Art. 88/89 CC. In the case of foundation mergers, all assets and liabilities of the transferring foundation are transferred to the receiving foundation without liquidation. The transferring foundation is therefore dissolved (absorption merger) or a new foundation is created as a result of the merger (combination merger). Foundation mergers are permitted under Art. 78 para. 2 FusG if they are objectively justified and, in particular, serve to preserve and fulfill the purpose of the foundation. Foundation mergers must be approved by the supervisory authorities, with the transferring supervisory authority being responsible in the case of absorption mergers (Art. 83 para. 1 and 2 FusG). Upon completion of the foundation merger, the competent supervisory authority notifies the commercial register, which enters the transfer of the trans- 6 ferring foundation (Art. 83 para. 3 FusG). When forwarding their decision to the commercial register, the supervisory authorities often formally dissolve the foundation on the grounds of lack of assets and thus the unattainability of its purpose as a result of the merger in accordance with Art. 88 CC.

7 In the case of family foundations and ecclesiastical foundations, a publicly certified merger agreement is required for the merger (Art. 79 para. 3 FusG). The foundation bodies are responsible for implementing the merger, but every beneficiary with a legal claim and every member of the supreme foundation body has the right to challenge the merger resolution (Art. 84 FusG).

4. Emigration abroad

8 Swiss foundations may also cease to exist without liquidation if the foundation emigrates from Switzerland to another country, whereby the various procedures are governed by the provisions of the PILA. According to Art. 163 PILA, a Swiss company (which, according to the definition in the PILA, also includes foundations) may submit to foreign law without liquidation and reestablishment if the requirements under Swiss law are met and it continues to exist under foreign law. It is also possible for a foreign foundation to take over a Swiss foundation by way of emigration absorption or to merge with it (Art. 163*b* PILA). In such cases, the Swiss foundation is deleted from the commercial register in accordance with the requirements of Art. 164 PILA.

9 Emigration abroad requires the approval of the supervisory authority for foundations subject to supervision. In the case of family foundations, it is disputed whether the consent or approval of the court is required for emigration.

10 The procedure for an emigration merger abroad is governed by a large number of PILA provisions and references to the FusG and commercial register law (see Art. 163–164*b* PILA for details). In addition, the substantive provisions of foundation law apply, especially if a change in organization is necessary. Tax considerations should also be taken into account, as emigration abroad usually leads to the disclosure of hidden reserves in Switzerland for tax purposes.

III. REQUIREMENTS FOR DISSOLUTION

11 Foundations may only be dissolved if at least one legal reason for dissolution is met, namely if the purpose has become unattainable and the foundation

cannot be maintained by amending the foundation statutes (Art. 88 para. 1 no. 1 CC) or the purpose has become unlawful or immoral (Art. 88 para. 1 no. 2 CC).

A. Unattainability of the purpose

The purpose of a foundation is unattainable if a foundation can no longer fulfill its tasks, either because the foundation permanently lacks sufficient assets to effectively pursue its purpose (i.e., the purpose-means relationship is no longer maintained) or because the purpose has become invalid or obsolete. Typical cases of the purpose becoming obsolete are the extinction of a family for whose benefit a family foundation was established, the end of a war, or research into an eradicated disease. The unattainability must be definitive and apply to the entire purpose. It is clear from the wording of the law that the dissolution is subsidiary to an amendment of the foundation's statutes (Art. 86, 86*b* CC). 12

B. Subsequent illegality or immorality

A purpose that was permissible when the foundation was established may become impermissible due to subsequent changes in the law (changes in legislation or practice, or the formation of new customary law) or changes in public morality. A typical example is a foundation established to support a prohibited party or a prohibited ideology. Here too, the entire purpose must have become unlawful or immoral and it must not be possible to rescue the foundation in any way. 13

IV. DISSOLUTION PROCEEDINGS

A. Classic foundations

The competent supervisory authority (Art. 88 para. 1 CC) is responsible for the dissolution of classic foundations and brings about the dissolution by means of a constitutive disposition. The law does not provide for any special dissolution and liquidation proceedings for foundations. Articles 57 and 58 CC of the general section on legal entities therefore apply, according to which, after liquidation proceedings have been carried out, the beneficiaries of the foundation's assets are determined in accordance with the statutes. The liquidation procedure for foundations is governed by Art. 58 CC, which refers to 14

Art. 913 para. 1 CO and the latter's further reference to the substantive provisions of stock corporation law, i.e. Art. 739–747 CO. Whereas in the past the competent supervisory authorities often contented themselves with a summary examination and brief confirmation by the foundation board that the requirements of Art. 88 CC had been met, formal liquidation proceedings are now generally required. However, in simple and transparent cases, the competent supervisory authorities continue to resort to simplified dissolution. For example, ESA practice provides that a single order to dissolve the foundation and delete it from the commercial register may suffice. Simplified dissolution takes place in the following steps: The foundation bodies submit a reasoned application for dissolution of the foundation and present a valid resolution on the disposal of the remaining assets in accordance with the statutes. If the foundation has only minor assets, confirmation must be provided that the foundation board will bear the costs of dissolution. In addition, an unaudited final account must be available and a call for creditors must be published in the Swiss Official Gazette of Commerce.

15 Liquidation shall be initiated by resolution of the supreme foundation body and the foundation must henceforth bear the addition "in liquidation." The liquidation may, but need not, be carried out by the foundation bodies themselves in accordance with Art. 740 para. 1 CO. In addition to drawing up a balance sheet (Art. 742 para. 1 CO), a public call to creditors (Art. 742 para. 2 CO) is also required.

16 After the debts have been settled in the liquidation proceedings, the assets are distributed in accordance with the provisions of the foundation statutes. In the case of charitable foundations that have been granted tax exemption, the assets must generally be transferred to another tax-exempt legal entity based in Switzerland in accordance with a provision in the statutes required by the tax authorities. If the statutes do not contain any provisions, the default provision of Art. 57 para. 1 CC applies, according to which the assets in the event of dissolution fall to the community (federal government, canton, municipality) to which they belonged according to their purpose. If a legal entity is dissolved due to the pursuit of immoral or unlawful purposes, its assets shall fall to the community, even if something else has been specified (Art. 57 para. 3 CC).

Upon completion of liquidation, the foundation must be deleted from the commercial register (Art. 746 CO in conjunction with Art. 97 para. 2 CRO and Art. 89 para. 2 CC). 17

B. Right to file a petition or bring an action

Unless dissolution is ordered ex officio, those persons who have an interest are entitled to file a petition with the supervisory authority or bring an action in the case of family foundations and ecclesiastical foundations (Art. 89 para. 1 CC). These include beneficiaries, creditors (such as the tax authorities) or the members of the foundation's governing bodies. The founder is also entitled to apply for dissolution. In order to reduce the group of persons who can initiate dissolution to a reasonable size, it makes sense to require that they have a *legitimate* interest in the dissolution of the foundation, which must be examined on a case-by-case basis in the case of mere potential beneficiaries, persons entitled to benefits in the future, or former members of the foundation's governing bodies. The legislature has failed to align the group of persons entitled to file a motion or action for dissolution of the foundation with the group entitled to lodge a complaint with the foundation supervisory authority under Art. 84 para. 3 CC. In our opinion, persons other than those specified in Art. 84 para. 3 CC may also be entitled to dissolve a foundation, such as the spouse or descendants of the founder. In the case of ecclesiastical foundations subject to internal church supervision, the application for dissolution of the foundation must first be approved by the internal church supervisory authority. 18

C. Dissolution of family foundations and ecclesiastical foundations

Pursuant to Art. 88 para. 2 CC, the civil court has jurisdiction over the dissolution of family foundations and ecclesiastical foundations. This solution seems appropriate for family foundations, especially since they are not subject to any supervisory authority and the foundation bodies are not permitted to decide on their dissolution themselves due to the institutional nature of the foundation. However, the court's power to dissolve church foundations seems questionable, as these are subject to internal church supervision and, for this very reason, are not subject to state supervision. 19

20 The judicial dissolution procedure is a contentious two-party procedure in which the plaintiff (any person with an interest) is opposed by the foundation, represented by the members of its supreme body. If there is a conflict of interest in this situation between the person authorized to represent the foundation and the foundation itself (for example, because the person seeking dissolution is otherwise responsible for representing the foundation), the foundation must either be represented by another member of the highest foundation body who is authorized to represent it, or an external representative must be appointed. The type of proceedings is not entirely clear. According to Riemer, the proceedings are subject to the official principle under Art. 58 para. 2 CPC. Accordingly, recognition of the action or a settlement on the dissolution of the foundation would be excluded. However, the principle of party disposition applies to the initiation of proceedings, and the plaintiff may terminate the proceedings by withdrawing the action until the final decision is announced, especially since this is also possible under the principle of officiality. It is disputed whether actions for dissolution of the foundation are arbitrable. If a family foundation or a church foundation pursues classic foundation purposes at the same time, it becomes a mixed foundation, in which case the supervisory authority has the power to dissolve it.

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COMMENTARY ON

Art. 252 CC

A commentary by Sandra Viertler

SUGGESTED CITATION

Sandra Viertler, Kommentierung zu Art. 252 ZGB, in: Christoph Hurni (Hrsg.), Onlinekommentar zum Zivilgesetzbuch

Short citation: OK-Viertler, N. XXX zu Art. 252 ZGB.

Division Two: Kinship

Title Seven: Formation of the Parent-Child Relationship

Chapter One: General Provisions

A. Formation of parent-child relationship in general

Art. 252

[1] The parent-child relationship is formed between child and mother on the birth of the child.

[2] It is formed between child and the other parent by virtue of the latter being married to the mother, or, if provided for by law, by recognition or by court declaration.

[3] Moreover, the parent-child relationship is formed by adoption.

CONTENT

I. THE CHILD RELATIONSHIP AND ITS FORMATION IN GENERAL

A. The child relationship as a legal relationship

The child relationship is a legal relationship that is embodied in a family law relationship, namely the parent-child relationship. Legal effects, i.e. rights and duties of the parents or the children, can only be derived from this legally recognised parent-child relationship; in contrast, they cannot be derived from parentage or the spiritual-social relationship. The child relationship as a personal relationship receives an entry in the civil status register (Art. 7 para. 2 lit. a ZStV), which has probative force. 1

B. Purpose of the child relationship

The child relationship is the legal assignment of a child to a mother (maternity) and to another parent. It thus establishes the legal parenthood of the child and at the same time the legal kinship and the legal affinity. 2

Genetic or biological and socio-psychological or intentional parenthood must be distinguished from legal parenthood. Although most legal systems still assume a correspondence between genetic and socio-psychic parenthood, a correspondence between the two forms of parenthood is not mandatory for the legal relationship. 3

C. Grounds of origin

The grounds for the creation of the child relationship standardised in the law are conclusive and in principle mandatory. Accordingly, the legal relationship generally exists both between the child and the mother and between the child and the other parent. However, while the former is absolutely mandatory, there does not necessarily have to be a child relationship between the child and the other parent. While the child's relationship to the mother arises genetically - in concreto by means of birth - the relationship to the other parent requires either a marriage between the mother and the parent, a recognition or a judicial determination. By way of adoption, the child relationship can take place without biological descent. 4

II. THE CHILD RELATIONSHIP BETWEEN THE CHILD AND THE MOTHER (PARA. 1)

A. In general

5 Between the woman giving birth as mother and the child, the so-called maternal child relationship is established with the fact of birth. In this respect, the traditional principle mater semper certa est applies. It thus arises ex lege and does not require formal recognition, so that the obligatory notification of maternity to the civil registry office within three days pursuant to Art. 40 CC in conjunction with Art. 34 ff. of the Civil Code is not required. Art. 34 ff. ZStV has a purely declarative effect. A challenge of maternity is not permissible in Switzerland de lege lata, but may be considered for the future.

B. Special constellations

1. Anonymous birth

6 The legal institution of anonymous birth, which allows an expectant mother to give birth to a child anonymously in hospital, is foreign to Swiss law and would contradict the obligation to report births. Thus, only an anonymous child delivery is possible due to the existing possibility of delivering the child in a baby window. In this case, even if the mother is unknown, the maternal child relationship is established. The child that is anonymously handed over in this way is legally treated as a foundling, which is given the surname and first name assigned to it by the authorities (cf. Art. 38 para. 2 ZStV).

2. Confidential birth

7 The purpose of confidential birth is to protect women in emergency situations, for example because they are exposed to violence or threats due to their existing pregnancy. The identity of the woman giving birth and placing her child for adoption is entered in the civil status register, but only a small circle of authorities takes note of the birth. This extensive secrecy is intended to prevent close relatives or third parties from becoming aware of the birth, which would aggravate the existing plight.

3. Stillbirth and miscarriage

In the case of a stillbirth or miscarriage, no child relationship can arise due to the lack of a live birth. Stillbirths must be registered in the same way as live births (Art. 9 para. 1 ZStV), a miscarriage can be reported to the civil registry office. 8

4. Mixed-up child

If a child is mixed up in hospital, this has no effect on the creation of the legal relationship: the child relationship is between the mixed-up child and its true, biological mother. 9

5. Multiple or split motherhood

The cases of so-called "multiple or split motherhood" include egg and embryo donation as well as surrogacy. Although they are all prohibited under current Swiss law (see Art. 119 para. 2 lit. d FC and Art. 4 FMedG), they nevertheless find their way into Swiss legal practice through enforcement abroad. Under Swiss law, even in the case of split motherhood, the birth remains decisive for the determination of the mother, so that any contractual agreements deviating from this are invalid and cannot be enforced in court. In contrast, in countries where surrogacy is legally permitted, for example, only the genetic father is registered as the father, while the woman giving birth does not become the mother of the child. 10

III. THE CHILD RELATIONSHIP BETWEEN THE CHILD AND THE OTHER PARENT (PARA. 2)

A. Dualism

Child law in Switzerland is characterised by duality. While duality consisted only of motherhood and fatherhood until the opening of marriage for all, today co-motherhood is also possible in addition to motherhood. 11

Under current law, a mother is mandatory, so that paternity and co-paternity are not conceivable. 12

B. Different-sex parents

13 If the parents are of different sexes, the child's relationship to the father is primarily established by operation of law, or more precisely by legal presumption, on the basis of existing marriage to the mother (cf. Art. 255 CC). If the mother is not married or if the husband's paternity has been successfully contested, the relationship may be established by formal recognition (cf. Art. 260 CC). If the aforementioned cases do not exist, the only remaining option is to establish the child's relationship by means of a judgement, the paternity action (Art. 261, 263 CC).

C. Same-sex parents

14 If the child has same-sex parents, Art. 255a CC provides for the possibility of the child relationship with the co-mother coming into existence by operation of law under certain conditions. Formal recognition or a formative judgment is not provided for in the case of same-sex parents.

IV. THE CHILD RELATIONSHIP BY ADOPTION (PARA. 3)

15 In addition to the biological creation of the child relationship, there is the possibility of establishing the legal relationship by a formal legal act - adoption (cf. Art. 264 ff. CC), both for the mother and the other parent. The adoption may involve both parents or only one.

16 The adoption creates a new child relationship, which means that the legal relationship with the genetic parents ends. It is therefore not possible to establish or create a child relationship under Art. 252, paras. 1 and 2 CC.

17 Art. 252 para. 3 CC is merely a reference to Art. 264 ff. CC, so that the provision has no independent significance.

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COMMENTARY ON

Art. 335 CC

A commentary by Lukas Brugger / Claude Humbel

SUGGESTED CITATION

Lukas Brugger/Claude Humbel, Commentary of art. 335 CC, in: Nils Güggi/Lukas von Orelli (eds.), Online Commentary of the Civil Code

Short citation: OK-Brugger/Humbel, art. 335 CC N. XXX.

Chapter Three: Family Property

A. Family foundations

Art. 335

[1] A body of assets may be tied to a family by means of a family foundation created under the law of persons or inheritance law in order to meet the costs of raising, endowing or supporting family members or for similar purposes.

CONTENT

I. PRELIMINARY REMARKS

A. Importance of Swiss family foundations

As of January 1, 2024, Switzerland has a total of 17,874 foundations registered in the commercial register, of which around 13,880 are charitable foundations. Compared to charitable and other traditional foundations (such as crypto foundations, corporate foundations, employee welfare foundations and art foundations), the number of family foundations is low: as of the end of 2021, the Swiss Foundation Report identified 356 family foundations entered in the commercial register. Despite the fact that some family foundations are not yet entered in the commercial register – which is not only due to the hardly avoidable “stragglers” among family foundations, but also to the sometimes restrictive practice of some commercial registry offices – the actual number of family foundations is probably not much higher than this figure. Grüninger estimates the total number of Swiss family foundations at around 500. There are no reliable studies on the assets of family foundations. In addition to large and very wealthy family foundations that hold significant shareholdings, works of art or real estate, there are many, primarily older family foundations whose assets are only sufficient to maintain a family grave. 1

Even in comparison with the foundation locations of Liechtenstein and Austria, Switzerland has only a negligible number of family foundations: as of December 31, 2023, there were 7 '662 unregistered, so-called deposited foundations with predominantly private-benefit purposes, as well as 1'774 foundations registered in the commercial register, with many of them being structured as mixed foundations and thus serving at least partially as family foundations. In Austria, there are around 2'370 family private foundations. 2

The comparatively low importance of family foundations in Switzerland is mainly due to Art. 335 and the related practice of the courts and authorities, which can only be explained by the historical context of the norm. 3

B. History and interpretation of Art. 335

With the mandate to develop and introduce a civil code at the federal level, given to Eugen Huber at the end of the 19th and beginning of the 20th century, a review of the various legal institutions in the cantons for the preservation 4 of the assets of a natural person after his or her death was carried out. The focus was on the two legal institutions of the *family foundation* and the *family entailed estate*. Although both institutions occurred in different forms, they can be summarized as follows: a family entailed estate is a special fund without its own legal personality, inalienably linked to a family by private disposition and intended for the enjoyment of family members in a specific succession order (usually the oldest male descendant). The special assets were the property of the respective owner and beneficiary, but were subject to the condition that the assets be preserved and passed on to a natural person upon the owner's death. The family foundations, on the other hand, were legal entities with their own legal personality and thus themselves the holders of the assets dedicated to them. The foundation's beneficiaries were members of a particular family who could have certain mandatory claims against the foundation. One of the most significant differences between these two legal institutions is that the assets of the entailed estate pass unconditionally to a beneficiary, while the beneficiaries of a family foundation are only to receive benefits for specific purposes or in specific situations (e.g. in the event of need). However, it was Eugen Huber himself who rejected this absolutism with regard to the different purposes ("full economic enjoyment" in the case of the entailed estate, "specific purposes" in the case of the family foundation) in view of the heterogeneity ity of the cantonal provisions, and stated that – albeit not very common – a family fideicomiso could also provide for other purposes, such as the care of heirs who had been passed over by the commission.

5 Eugen Huber was open to both legal institutions, both in terms of their existence (he wanted to enshrine both the entailed estate and family foundations in law) and in terms of the permissible purposes: within the framework of a family foundation, "*the income from real estate or capital therein is to be allocated to a specific family for any purpose*". Of course, Eugen Huber did not fail to deal at length with the various cantonal reservations regarding multiple reversion in the context of a *fideicommissum substitution* (which some French-speaking cantons had banned altogether, while Ticino and the German-speaking cantons had provided for restrictions to one or two reversioners).

6 In a departure from Eugen Huber's pronounced liberality, the commission of experts decided to introduce the CC to completely prohibit the re-establishment of the family entailed estates, which were regarded as "plutocratic, un-

democratic" institutions of the aristocracy (Art. 335 para. 2). The following quote shows how far this result of the legislative process diverges from Eugen Huber's view: "*In our opinion, the social views of our population are in and of themselves strong enough to prevent the overgrowth of the closed family estate, and we never attributed any dangerous effect to a mere occasional exception, when a family entailed estate was newly established here and there. On the contrary, it can only be to the good if the accumulation of economic power in the possession of individual families increases the prosperity of the country in general.*" Eugen Huber wanted to leave the power to prohibit the establishment of family entailed estates to the cantons.

The Expert Commission decided to continue to allow family foundations, but only for specific purposes: education, endowment, support and similar purposes (Art. 335 para. 1). The model for the defined purposes of the family foundation was primarily the Zurich family funds (which often provided for the support of poor family members) and the Bernese family chests (which, in addition to supporting the poor, often included education). The restriction of the permissible purposes of the family foundations was based on the political views of the time, which were aimed at preventing "idleness" and a "dissolute way of life" in subsequent generations. 7

From the explanations in the materials and the interplay of Art. 335 para. 1 (purpose) and para. 2 (prohibition of the reestablishment of entailed family estates), the Federal Court concludes that the "similar purposes" prescribed by law must not be interpreted generously either – on the contrary: because the economic (full) enjoyment of the assets is to be prevented (which should follow from the prohibition of the family entailed estate), pure maintenance or enjoyment foundations should also be prohibited, i.e. foundations that provide benefits to family members "just like that" without any special conditions or that are merely intended to enhance the family's reputation. In a nutshell, the *ratio legis* is that a family foundation should not achieve what is prohibited by the ban on the entailment of family estates, namely that assets should pass unconditionally to certain persons over generations. 8

The Federal Supreme Court reached this conclusion in a judgment on the defense tax from 1945 (BGE 71 I 265) and has since confirmed it in consistent case law. In the opinion of the Swiss Federal Supreme Court, maintenance foundations, i.e. family foundations whose purposes go beyond Art. 335 para. 1 and as a result allow beneficiaries to enjoy the foundation's assets uncondi- 9 tionally, are prohibited; since this decision, existing foundations with such purposes have been declared null and void. This is the case even though the practice of setting up family foundations was initially more family-friendly after the CC came into force on January 1, 1912, and maintenance foundations were also considered permissible.

C. Effects of restrictive practice

10 Due to the limited possibilities for use for the purposes of education, endowment or support and similar purposes, Swiss family foundations are hardly suitable for the long-term preservation and transfer of family assets. The main objective of cross-generational estate planning, namely the maintenance and financing of *general living expenses*, is not possible due to the Federal Supreme Court's ban on maintenance foundations. As a result, hardly any new Swiss family foundations are being established. However, the authors are aware of cases in which Swiss family foundations have been deliberately set up as an “emergency fund” – including by foreign founders – to be used only if the family finds itself in dire financial straits. Those who consider *genuinely* planning their estate by means of a family foundation usually have to resort to neighboring jurisdictions (e.g. the Principality of Liechtenstein or Austria) that do not have corresponding restrictions on purpose. Foreign family foundations – even in the form of a pure maintenance foundation – are generally recognized in Switzerland (see below).

11 Another consequence of the restrictive practice of the Federal Court is that family foundations often have no reason to make distributions to their beneficiaries. In certain cases, this leads to family foundations accumulating large assets that they realistically will hardly ever be able to distribute. In the case of over-endowed family foundations, various options are available, depending on the constellation: For example, an expansion of the beneficiary regulation or a partial liquidation of the family foundation can be examined, taking into account the hypothetical will of the founder, in which the unneeded assets are transferred to a more flexible structure (e.g. a foreign family foundation or a trust). It is also conceivable to transfer the registered office abroad in accordance with Art. 163 PILA.

D. Recognition of foreign family foundations and family trusts

Most of the neighboring foundation jurisdictions do not have restrictions comparable to Art. 335. Accordingly, family foundations (or trusts) can usually also be established abroad to provide descendants with funds for their general living expenses. From Switzerland's perspective, foreign family foundations are governed by the law of the state under which they are organized (the so-called foundation or incorporation theory) in accordance with Art. 154 PILA. If a foreign family foundation has been validly established in accordance with the provisions applicable in the state in question, it is in principle recognized in Switzerland. However, a foreign foundation will be refused recognition in Switzerland if it would violate Swiss *ordre public* (Art. 17 PILA) or if recognition would be contrary to a provision that is to be qualified as mandatory in international relations (Art. 18 PILA, so-called *loi d'application immédiate*). 12

In a leading decision from 2009 regarding a Liechtenstein family foundation, the Federal Supreme Court ruled that Art. 335 para. 2 does not constitute a *loi d'application immédiate* within the meaning of Art. 18 PILA. As a consequence, Switzerland recognizes foreign family foundations (in their pure form or as mixed family foundations), even if they would be classified in Switzerland as impermissible maintenance foundations and even if the founder is a person domiciled in Switzerland or is a Swiss citizen. 13

In particular, the recognition of foreign maintenance foundations while simultaneously prohibiting such foundations in Switzerland has led a large part of the doctrine to state that the Swiss family foundation is self-discriminating and that the current legal situation is in need of reform. 14

E. Reform efforts

On February 27, 2024, the motion 22.4445 “Strengthening the Swiss family foundation. Lifting the ban on maintenance foundations” by SR Thierry Burkart was passed. This motion instructed the Federal Council to present a draft for the amendment of Art. 335 within two years. The reasons given for the motion included the fact that the ban on maintenance foundations was based on outdated values and that Switzerland lacked a suitable instrument for the controlled transfer of family wealth to descendants. However, it was also argued that today there was a tendency to turn to foreign institutions such 15 as trusts, but also to foundations that were recognized in Switzerland without any control.

16 It is not yet possible to say what form a reform of the Swiss family foundation would take. Various models are on the table: on the one hand, the scope of application of family foundations could be significantly improved by repealing Art. 335 para. 2 (prohibition of family trusts) and amending para. 1 (expanding the permissible purposes of family foundations). However, a selective reform would also be possible, with the considerations already included in the explanatory statement of the motion, such as the time limitation of the family foundation or the introduction of rights of revocation or amendment.

17 Finally, it would also be possible for Switzerland to decide on a comprehensive reform in order to present a genuine alternative to the family foundations of the private foundation regimes such as Liechtenstein or Austria. In this regard, the following aspects could be taken into account:

- Time limitation of the family foundation (e.g. to 100 years with the possibility of a one-time extension for another 100 years);
- opening the family foundation to favor private individuals (instead of limiting it to the concept of family members, which is difficult to define anyway);
- introduction of rights of revocation and change of purpose;
- introduction of a general audit requirement for family foundations as well (also to counter accusations of susceptibility to abuse and to meet the constantly growing demands for transparency of legal entities);
- regulation of adequate governance of the family foundation (for example, by introducing beneficiaries' rights to information or a separate internal control body, but without subjecting the family foundation to state supervision); and
- statutory anchoring of the possibility for the supreme foundation body to amend the foundation statutes.

II. THE LEGAL FRAMEWORK OF THE FAMILY FOUNDATION

The general provisions of foundation law (Art. 80 et seq. CC) apply to family foundations. This is subject to the specific *special provisions* contained in various enactments (in addition to the CC, for example, the CRO or the FusG), which lead to a *selective deviation* of the legal framework of the family foundation from the legal framework of the classical foundation (for details, see the commentary on Art. 87, OK-Brugger/Humbel, Art. 87 N. 5 ff.). 18

When setting up a family foundation, the founder is not bound by the constitutional requirement of equality under Article 8 FC. The latter (with the exception of the principle of equal pay for equal work for men and women) is directed only at the state and does not affect the founder's freedom. Accordingly, the founder can only grant certain persons the position of beneficiaries of a family foundation (e.g. only male descendants, legitimate children, or persons of a particular faith). 19

III. THE PERMISSIBLE PURPOSES OF THE FAMILY FOUNDATION (PARA. 1)

A. Permissible purposes

Art. 335, para. 1 enumerates in a conclusive manner the purposes for which assets may be linked to a family by means of a family foundation. The provision stipulates the purposes for which the family foundation may be established and registered in the commercial register and at the same time defines which benefits may be permissibly provided to family members. 20

Under **education** training services are to be understood in the broader sense, i.e. in addition to direct costs such as school or university fees, expenses for accommodation, meals, etc. are also included. Education includes not only basic academic training, but also further training, which can be important in all phases of life (*lifelong learning*). Sports and cultural education can also fall under permissible educational services if they have a training character. 21

The **provision of** funds contributes to the establishment, improvement or safeguarding of the recipient's livelihood. Historically, the provision of funds often took the form of a dowry for the start of a marriage involving self-em- 22 ployment. Today, the provision of funds usually includes a parental start-up grant for a professional career or support for the financing of a home of one's own. The provision of funds is neither a pure gift nor parental maintenance, but a *causa sui generis* under family law.

23 **Support payments** in turn presuppose situations of need, which may consist of both subjective material emergencies and objectively determined stages of life (retirement age, living in a home, *etc.*), provided that comprehensible criteria are evident for this and no circumvention of the prohibition of maintenance payments is intended.

24 Finally, the Federal Supreme Court recognizes the **similar purposes** of maintaining a family grave or reading masses. The creation and preservation of a family monument, a family chronicle, a family library or similar are considered permissible ancillary sub-purposes, while the mere preservation of family assets, such as in the form of jewelry or a collection, becomes problematic. It is also disputed whether family gatherings may be financed. In our opinion, this should be affirmed, not least to avoid tightening the already narrow limits of Art. 335 even further. Financing family gatherings does not result in an unconditional increase in general living expenses; rather, it promotes a sense of belonging and connection to the family (and thus to the family foundation).

25 By contrast, the category of maintenance includes all benefits that are distributed to family members "just like that". The view of the highest court that this should also include the purchase or maintenance of a property is much more restrictive; what is still understandable for representative purposes is questionable in the case of recreational properties in the context of today's social security situation. In any case, a blanket classification must be avoided and each individual case considered; for example, a vacation property – depending on its type and purpose – can also be qualified as an endowment or support payment. Finally, it should be noted that the foundation's purpose cannot be limited to just one beneficiary (even per generation); this would contradict the conceptually required collectivity of the family and would come close to a disowned entailed estate.

26 In our opinion, however, Art. 335 CC – even according to the restrictive interpretation of the Federal Supreme Court – allows leeway with regard to the donation modalities. For example, the strict requirement that a donation may

only be granted *after* the purpose of the donation has been realized should not be inferred from the provision. In particular, if urgent financial need is foreseeable, it cannot be in line with the *ratio legis* to wait with the donation until the actual occurrence of the need or even the emergency; this applies all the more because the subsequent rectification of such a situation may require a higher expenditure (of the foundation's assets) than its anticipatory prevention. Precisely because a strict time sequence between the realization of the purpose and the donation of Art. 335 CC is not required, in principle a lump-sum donation should also be acceptable, which covers the expected need for several specifically foreseeable realizations of the purpose. Not least, such lump sums offer an instrument for reducing the administrative burden on the foundation, which ultimately promotes the effective use of the foundation's assets. Of course, if the restrictive view of the Federal Court is applied, neither the advance nor the lump-sum granting of donations may lead to the substantive link of the donation to a specific purpose within the meaning of Art. 335 CC being undermined. This is sometimes opposed by the restrictive attitude of some tax authorities, which only reluctantly recognize support payments as tax expenses, citing the principles of social assistance, which can result in multiple taxation.

The restrictions of Art. 335 para. 1 apply to distributions to the members of a 27
family. Bilateral transactions (e.g. sales, but also loans) are not covered by Art. 335 para. 1 provided that no hidden distributions are made (*dealing at arm's length*). Furthermore, distributions to third parties are not covered by Art. 335 para. 1. If a foundation has been set up with the purpose of making distributions not only to members of a family but also to third parties (natural or legal persons) or to promote institutions or pursue charitable purposes, it is a mixed foundation.

B. Consequences of impermissible purposes

If a family foundation has been set up for purposes that go beyond the limits 28
of Art. 335 para. 1, these purposes are unlawful, which may result in the invalidity of the foundation itself (Art. 20 para. 1 CO). Family foundations that have been set up for unlawful purposes cannot acquire legal personality (Art. 52 para. 3 CC). If only parts of the foundation's purpose or individual components of it are unlawful, this merely leads to a partial nullity of the foundation, provided that the foundation would have been established even without the

inadmissible partial component (Art. 20 para. 2 CO), which is to be determined by interpreting the hypothetical will of the founder. The incompatibility of a (partial) purpose with Art. 335 para. 1 must also be examined if the foundation also pursues other partial purposes; it is therefore not sufficient to add traditional partial purposes in order to circumvent the prohibitions in Art. 335 para. 1 CC. The entry of a family foundation with inadmissible purposes in the commercial register has no remedial effect.

29 Null and void family foundations have no independent legal existence and must be unwound: their assets revert to the founder or his heirs. Art. 57 para. 3 CC, which provides for the reversion of the assets to the community in the event of original nullity, does not apply to family foundations (see the details in the commentary on Art. 57 CC, OK ZGB-Brugger/Humbel, Art. 57 N. 8 ff.). Although nullity is an original one (effect *ex tunc*), in the opinion of the Federal Supreme Court and the prevailing legal opinion, the reversion of assets is preceded by liquidation proceedings (effect *ex nunc*), in which the claims of creditors and third parties are also settled (see details in the commentary on Art. 52 CC, OK-Brugger/Humbel, Art. 52 N. 12 f.).

30 Before a (partial) purpose is found to be unlawful and the foundation is declared (partially) null and void, it must be examined whether the inadequately expressed legal transaction can be reinterpreted as a valid substitute transaction and the inadmissible foundation can be "saved" by means of conversion into an admissible foundation.

31 Foundation bodies that do not observe the limits of Art. 335 para. 1 in the *actual distribution policy* act in violation of the law and the statutes and expose themselves to (personal) liability risks. However, any unlawful action by the foundation's governing bodies does not, in principle, affect the invalidity of the foundation (except in the case of simulated foundation transactions, in which the governing bodies collude to maintain the legal appearance of the foundation). However, the Federal Supreme Court has declared a family foundation null and void because its regulations, which could be amended at any time, were incompatible with Art. 335 para. 1. In our opinion, this view is too simplistic: insofar as regulations serve to substantiate a permissible, open-ended foundation purpose in accordance with the statutes, it should be possible to correct the unlawful regulations in order to prevent the threat of (partial) nullity of the foundation. If, however, the regulations merely contain more detailed explanations of a statutory purpose that is already inadmissible

in and of itself, the conclusion must be that the foundation is (partially) invalid.

Finally, the declaration of nullity of a family foundation can also be averted by amending the statutes in good time. In the view presented here, this power of amendment falls within the competence of the foundation's governing bodies (for details, see the commentary on Art. 87 CC, OK-Brugger/Humbel, art. 87 N. 13 et seq.). 32

IV. PROHIBITION ON THE ESTABLISHMENT OF NEW FAMILY ENTAILED ESTATES (PARA. 2)

In Switzerland, the institution of the entailed estate has hardly caught on. The re-establishment of family entailed estates was already prohibited at the federal level with the introduction of the CC in 1912. Under cantonal and customary law, old family entailed estates continue to exist. In the absence of positive legal provisions, the private autonomous arrangements in statutes and other founding documents play a significant role. 33

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COMMENTARY ON

Art. 522 CC

A commentary by Christian Moser

SUGGESTED CITATION

Christian Moser, Commentary of art. 522 CC, in: Christian Moser/Philip R. Bornhauser (eds.), Online Commentary of the Civil Code

Short citation: OK-Moser, art. 522 CC N. XXX.

B. Action in abatement

I. Requirements

1. In general

Art. 522

[1] The heirs who receive less than the value of their statutory entitlement may request the abatement of the following acquisitions and gifts until their statutory entitlement becomes available:

acquisitions in accordance with the law on intestate succession;
bequests;
inter vivos gifts.

[2] Clauses in a testamentary disposition relating to the entitlements of the statutory heirs are deemed merely to be instructions for dividing the

estate unless it is evident from the disposition that the testator intended otherwise.

CONTENT

I. INTRODUCTION

1 The testator's freedom of disposition with regard to property rights is limited by the right to a compulsory portion (Art. 470 CC). The **compulsory portions** constitute that part of the estate that, in principle, cannot be deprived of the heirs entitled to a compulsory portion.

2 In the case of heirs protected by a compulsory portion, the first question that arises after the testator's death is whether their **compulsory portion has been preserved or violated**. The compulsory portion, which since January 1, 2023 corresponds to half of the statutory inheritance claim for the surviving spouse and descendants (Art. 471 in conjunction with Art. 457 et seq. CC, see N. 8), can be preserved or violated by dispositions of the testator during his or her lifetime or by disposition of property upon death. The amount of the compulsory portion is not determined by multiplying the compulsory portion quota by the net estate (or the division estate), but by the so-called compulsory portion calculation estate ("**PTBM**"), which also takes into account certain lifetime gifts (see N. 11). Accordingly, the compulsory portion can be preserved, for example, if an heir protected by the compulsory portion is excluded or disinherited by means of a disposition of property upon death, but the testator has sufficiently favored the heir in terms of property rights by means of lifetime dispositions. On the other hand, the compulsory portion can be violated, for example, even though no disposition of property upon death is left (and the statutory law of succession applies) or an heir protected by the compulsory portion is appointed as an heir or legatee with the compulsory portion quota or a higher quota (with a higher share) as an heir or legatee, but the testator has made significant pecuniary gifts in favor of co-heirs or third parties during his or her lifetime.

3 In a second step, the question arises as to what extent a **violation of the compulsory portion** can be **restored**: If the compulsory portion is violated by property dispositions inter vivos or mortis causa, it can be restored in three stages: If the testator leaves no disposition of property upon death or only a partial disposition, the statutory shares of the inheritance can be adjusted or reduced (so-called reduction of the acquisition inter vivos). If the testator leaves a disposition of property upon death, the inheritances and bequests contained therein can be adjusted or reduced (so-called reduction of the ac-

quisition testate). In the final step, lifetime gifts are reduced (for the order of reduction, see N. 21 and Art. 532 CC).

The rules of reduction are important for both steps. On the one hand, they determine which property dispositions are to be added to the PTBM, from which the value of the compulsory portion is derived. On the other hand, it is determined which acquisitions and donations can be reduced in order to restore the compulsory portion. The reduction thus serves to protect the heirs protected by the compulsory portion by determining the value of the compulsory portion – irrespective of the testator's will (see N. 30) – and enabling the procedural enforcement of the right to a compulsory portion. 4

II. REDUCTION (ART. 522 PARA. 1 CC)

A. Right to reduction

1. Requirements

Persons who have a claim to a compulsory portion (Art. 470 para. 1 CC) and who receive less than their compulsory portion "in terms of value" may, in accordance with Art. 522 para. 1 CC, demand the reduction of certain acquisitions and gifts. This **right to reduction** therefore requires that (i) the person concerned has a legal right to a compulsory portion within the meaning of Art. 470 para. 1 CC (see notes 7-8) and (ii) this compulsory portion exceeds the total value of the assets and benefits that the testator has received or will receive inter vivos, under a disposition of property upon death and/or under the intestate succession (see notes 9-14). 5

In principle, this is a quantitative and not a qualitative claim: if the above conditions are not cumulatively fulfilled, there is no violation of the compulsory portion or a claim for reduction, even if the compulsory portion is preserved by means of lifetime gifts and/or a legacy (see N. 2). There is no **right to inherit**, which is why the compulsory portion of a person entitled to a compulsory portion can also be preserved by means of lifetime gifts or a legacy. However, a certain qualitative claim can be recognized in the fact that a person entitled to a compulsory portion is entitled to assets that are easy to trade ("*biens aisément négociables*", i.e. in particular a sum of money, securities or real estate) and, in the amount of their compulsory portion, in particular, does 6 not have to accept any usufructuary or pension entitlement, even if the capital value of such an entitlement exceeds the amount of the compulsory portion.

2. Condition no. 1: Right to a compulsory portion

a. Entitlement to a compulsory portion

7 The first step is to determine whether there is a right to a compulsory portion. As of January 1, 2023, i.e., if the testator died on or after January 1, 2023, only descendants and spouses (or registered partners) have a **right to a compulsory portion** (Art. 470 f. CC). However, such persons have no right to a compulsory portion if they (i) did not survive the testator (Art. 542 et seq. CC), (ii) disclaim the inheritance (Art. 566 et seq. CC), (iii) have entered into a contract with the testator waiving their inheritance, which includes the compulsory portion (Art. 495 CC), (iv) are unworthy of inheritance (Art. 540 CC) or (v) have been legally disinherited (Art. 477 CC).

b. Statutory share

8 As of January 1, 2023, i.e. if the testator died on or after January 1, 2023, the **statutory share** for descendants and spouses is half of their statutory inheritance claim (Art. 471 CC). If the deceased leaves behind a spouse and two descendants, for example, the spouse's compulsory portion is ¼ (Art. 471 in conjunction with Art. 462 no. 1 CC) and the compulsory portion of the descendants is $^{1}/_{8}$ each (Art. 471 in conjunction with Art. 457 para. 2 in conjunction with Art. 462 no. 1 CC).

3. Requirement no. 2: Violation of the compulsory portion

a. Determining the amount of the compulsory portion

9 While there is usually clarity as to whether the person concerned has a claim to a compulsory portion and how high the compulsory portion rate is, the determination of the PTBM, at least in complex circumstances (in particular in the case of lifetime gifts of real estate or companies), entails a relatively high potential for conflict and negotiation. The **PTBM** is determined – as a “purely mathematical variable” – by adding (i) the pure estate assets (or net estate assets) (ii) the gifts subject to equalization within the meaning of Art. 626 et seq. CC and (iii) the gifts that can be reduced within the meaning of Art. 527 et seq. CC. The market value on the date of death is decisive (Art. 474 para. 1 CC).

The market value is the "market value" or "objective" value that would be achieved as proceeds (less any taxes, fees and costs) if the property were sold to an independent third party; in other words, the value that could be realized if the property were sold on the open market.

The **net estate** is determined on the basis of the testator's assets at the time of death (principle of the day of death, Art. 474 and Art. 537 para. 2 CC). To determine the amount of the net estate, the estate assets must be subtracted from the estate liabilities, i.e. the testator's debts and certain inheritance debts (see Art. 474 para. 2 CC; but not any legacies). In the case of a married testator, (i) the claims and/or debts under the matrimonial property regime (and here, inter alia, Art. 216 CC and Art. 241 para. 2 et seq. CC) as well as (ii) – if the estate of a predeceased spouse has not yet been divided – the inheritance claim in the estate of the predeceased spouse must also be taken into account. 10

All **compensable** contributions (cf. Art. 626 et seq. CC), all **diminishable contributions** made during the testator's lifetime (cf. Art. 527 CC) and the surrender values of certain insurance policies as well as claims under tied pension provision (see Art. 529 CC), also at the value at the time of the testator's death. 11

To determine the **size of the compulsory portion**, the PTBM is multiplied by the compulsory portion rate. 12

b. Determining the violation of the compulsory portion

In order to determine whether there has been a **violation of the compulsory portion**, the amount of the compulsory portion is compared with the total of the assets or benefits that the person concerned received from the testator during his or her lifetime and will receive in accordance with the disposition of property upon death and/or intestate succession. The doctrine of "*bienes aisément négociables*" remains reserved (see N. 6). 13

Changes in the value of the net estate occurring after the date of death are irrelevant for determining the violation of the compulsory portion: a subsequent decrease in value cannot lead to a violation of the compulsory portion that did not exist at the time of death, nor can a subsequent increase in value remedy a violation of the compulsory portion that existed at the time of death. A reduction in the reserved share determined at the time of death is fixed in amount and remains unchangeable. Changes in the value of a lifetime 14 gift between the date of death and the judgment of reduction generally only affect the lifetime beneficiary, subject to the option of Art. 526 CC, which also applies to lifetime gifts.

B. Procedural

1. Right to bring an action

15 Persons who (i) have a statutory share (cf. N. 7) and (ii) whose statutory share is infringed in terms of value, i.e. insofar as they in accordance with the disposition of property upon death or the statutory law of succession nor have already received during their lifetime (see N. 13); this in turn is subject to the "*biens aisément négociables*" doctrine (see N. 6).

16 If an active legitimized person **dies after** the testator, their heirs enter into their legal position, which also includes the right to a compulsory portion (Art. 560 CC), whereby (also) the active legitimization passes to them.

17 If a person with a right to claim legally **transfers their** share of the inheritance after the death of the testator, the acquiring party does not thereby become entitled to claim. This applies both to the sale of the estate liquidation proceeds in accordance with Art. 635 para. 2 CC and to the assignment of the inheritance share in accordance with Art. 635 para. 1 CC. However, this does not preclude the possibility of the heir selling the estate from being authorized by the enforcing heir to enforce the reduction in accordance with Art. 68 CPC.

18 There is no necessary, but only **simple joinder of parties** within the meaning of Art. 71 CPC between several persons whose compulsory portion has been violated. This means, among other things, that each person whose compulsory portion has been violated asserts independent claims and is authorized to conduct their case independently of other persons whose compulsory portion has been violated.

19 Under certain conditions, the following persons are also entitled to sue: (i) the bankruptcy trustee or creditors of an heir entitled to a compulsory portion (see Art. 524 CC), (ii) the legatee of a reduction debtor (see Art. 486 para. 1 and Art. 5 25 para. 2 CC) and (iii) a reduction debtor who has provided the testator with consideration under a positive, remunerated inheritance contract (see Art. 528 para. 2 CC).

2. Capacity to be sued

A person is **capacity to be sued** if they have benefited under the intestate succession, the testamentary disposition or the lifetime gifts of the testator, beyond any right to a compulsory portion of their own, , provided that the acquisitions and/or gifts in question are reducible and that their reduction is necessary in view of the order of reduction in order to establish the legal claim of the person(s) entitled to the inheritance. There is no necessary, but only simple passive joinder of parties between several persons with passive legitimation. The community of heirs is not passively legitimized. As a rule, the executor is also not a passive party. 20

3. Reduction order

In order to establish the (violated) claim to the compulsory portion, (i) acquisitions in accordance with the intestate succession (so-called intestate acquisition), (ii) donations mortis causa (so-called testate acquisition) and (iii) donations inter vivos are reduced in accordance with Art. 522 para. 1 CC and Art. 532 para. 1 CC (so-called intestacy acquisition), (ii) donations mortis causa (so-called testacy acquisition) and (iii) donations inter vivos; this is reduced to the extent that "until the compulsory portion is established". In the action to reduce the estate, particular consideration must be given to the persons against whom the reduction is asserted, in view of this **order of succession**. 21

4. Jurisdiction

The court at the last domicile of the deceased has local **jurisdiction** over the action to reduce the estate (Art. 28 para. 1 CPC, subject to Art. 17 f. CPC). The proceedings before the civil court are preceded by an attempt at conciliation before the conciliation authority (Art. 197 CPC), which may be waived under certain circumstances (Art. 199 CPC). 22

5. Time limit

The action for reduction is subject to a one-year relative and a ten-year absolute **forfeiture period**, which is supplemented by a temporally unlimited possibility of objection. It should be noted that a person protected by a compulsory portion who has been completely excluded or ignored by disposition of property upon death (so-called **virtual heiress**) only acquires the status of 23 heir (as a legal right in rem) by initiating an action for reduction within the time limit and the action for reduction is upheld.

6. Burden of proof

24 The **burden of proof** for the existence of the conditions for a reduction, in particular for the existence of a reducible benefit and the exceeding of the available quota, lies with the person who asserts the reduction by way of action or objection (Art. 8 CC). The standard of proof applies here, whereby the court must be fully convinced; the evidentiary difficulties that regularly arise in practice do not lead to any easing of the burden of proof.

7. Amount in dispute

25 Because the **amount in dispute** is determined by the legal request and the action for reduction is pecuniary in nature, the amount in dispute in the action for reduction is based on the potential litigation profit, i.e. the amount to be reduced. If the action for reduction is combined with an action for distribution of the estate in objective joinder of actions (see N. 29), the amount in dispute is generally based (in the absence of an additional action for performance, see N. 28) on the action for distribution of the estate, i.e. generally on the estate being claimed – increased by the asserted reduction. If the action to reduce the inheritance is brought as an alternative to an action for annulment, the amount in dispute is generally based on the amount in dispute in the action for annulment.

C. Legal nature

1. Legal nature of the reduction and types of action

26 The action for reduction is a **procedural action** within the meaning of Art. 87 CPC. It has constitutive effect in that the judgment of reduction establishes a new legal situation; however, this only applies to the parties to the proceedings. The constitutive effect of a legally binding judgment of reduction is applied retroactively to the date of death.

27 Due to the fact that this is a declaratory action, in practice there is the problem or legal uncertainty of (i) whether a legally valid or legally constitutive reduction can be made with an **out-of-court agreement** and (ii) to what extent such an agreed reduction can lead to potentially taxable transfers. The first is-

sue is regularly addressed by concluding the agreement as part of the conciliation proceedings, especially since such a settlement has the effect of a legally binding decision (judgment surrogate according to Art. 208 para. 2 CPC). With regard to the second issue, however, it should be noted that tax authorities themselves are not bound by such an agreement under Art. 208 para. 1 CPC, which is not based on a court decision, and accordingly a tax ruling may be advisable.

If the net estate (or a reduction of the intestacy and/or testamentary acquisi- 28
tion of the co-heirs or legatees) is insufficient to cover the plaintiff's compulsory portion, the action for reduction should be combined with an action for performance in **objective joinder of actions**. Otherwise, an action for performance must be initiated and enforced subsequently to the reduction judgment, especially since the reduction judgment is a pure declaratory judgment that does not oblige the defendant to perform, but merely provides the plaintiff with the basis for helping his claim for performance to be enforced with a second action. Such a combination of actions is also recommended because the default of such a claim does not begin on the date of death, to which the constructive effect of the reduction is referred back, but only with the initiation of the corresponding action for performance. Because it is sometimes not (yet) possible to quantify the claim at the beginning of the proceedings when such an action for performance is brought, it can in principle be designed as an unquantified claim action, in which case a minimum value of the claim must be stated (Art. 85 para. 1 CPC).

It is admissible and relatively common in practice to combine the action for 29
reduction with an action for annulment and/or an action for the division of the estate by means of an objective joinder of claims. If, for example, a disposition of property upon death (will or inheritance contract) is deemed invalid because it violates mandatory portions, the invalidity of the disposition of property upon death is regularly requested in the main argument and the reduction of the disposition of property upon death is requested in the alternative argument.

2. Relatively mandatory nature of reduction

The rules on the reserved share and on reduction are, in principle, **mandato- 30
ry provisions**. This means that, from a legal point of view, the testator cannot derogate from them, in particular neither by disposition of property upon

death nor by legal or de facto acts during their lifetime, except for the possibilities of a contract waiving succession (Art. 495 CC) and disinheritance (Art. 477 CC).

31 However, persons protected by a compulsory portion whose claim to a compulsory portion is violated are not obliged to initiate a reduction action or to assert the reduction by way of objection, but may waive it. A **waiver** of the claim for reduction is possible after the death of the testator by means of a unilateral, informal declaration. Passive behavior on the part of the person whose right to a compulsory portion has been violated does not in principle constitute a waiver, but a waiver of the claim for reduction can also be implied. The assumption of an implied waiver requires that the heir was aware of the essential elements justifying the claim for reduction and that his declaration was sufficiently communicated to the beneficiary. If the person entitled to bring an action allows the time limit for filing an action under Art. 533 para. 1 CC to elapse, the action for reduction is waived, but this does not yet constitute a final waiver of the right to a reduction, because the defense of reduction may still be possible. If the right to a compulsory portion is waived, it should be noted that, from an inheritance law perspective, the waiver can be qualified as a gift subject to equalization or reduction, from a supplementary benefit law perspective as a waiver of assets within the meaning of Art. 9a para. 3 and Art. 11a para. 2 ELG and from a tax law perspective, it may be qualified as a (potentially taxable) (cross) gift.

3. Relationship between equalization and reduction

32 While equalization (Art. 626 et seq. CC) serves to ensure equal treatment of the heirs, the purpose of reduction is to protect the heirs with a protected statutory share. According to Art. 527 no. 1 CC, those bequests are to be reduced that by their nature would be subject to statutory equalization (Art. 626 para. 2 CC) but are not subject to equalization. This may be the case in particular if there is a (full or limited) dispensation from equalization (Art. 626 para. 2, Art. 629 CC) or if the recipient of the benefit disclaims the inheritance. The reduction under Art. 527 no. 1 CC is therefore subsidiary to the equalization. This means that a request for reduction cannot be granted as long as the decision on the equalization obligation has not been finalized. In other words, a gift can only be reduced if it is not subject to equalization. However, a gift that

is subject to equalization is relevant for the reduction insofar as it must be taken into account when calculating the PTBM (see N. 11).

III. DIVISION RULES VS. ADVANCE LEGACY (ART. 522 PARA. 2 CC)

If an heir is assigned a specific asset by disposition of property upon death, 33 the question arises as to whether this favoritism is to be qualified (i) as a division rule or (ii) as an advance legacy. With a division provision within the meaning of Art. 608 CC, the testator can influence the division of the estate among the heirs to the extent that he grants an heir the right to take over a specific estate asset, crediting it to his inheritance share. In contrast, a premortem legacy (Prälegat) is a legacy in favor of an heir within the meaning of Art. 484 CC, whereby the beneficiary heir does not have to credit the legacy-related pecuniary advantage to his or her inheritance.

If the testator has assigned certain assets to a statutory heir (or to an appoint- 34 ed heir in accordance with Art. 608 para. 3 CC) by disposition of property upon death, this is to be understood as **division provisions**, provided that no other will of the testator is apparent from the disposition (Art. 522 para. 2 CC). Consequently, there is a legal (and refutable) presumption that, in case of doubt, there is a mere division provision within the meaning of Art. 608 CC and no additional value-based (or extraordinary) benefit, i.e. no advance legacy (preferment).

In order to refute the legal presumption and to be able to accept a **prepaid** 35 **legacy** accordingly, a different intention must be “evident from the disposition”. However, the requirements for this counter-evidence, i.e. for refuting the presumption, are not too strict. As with other provisions of inheritance law, where the test is whether “no other will of the testator is apparent from the disposition”, such a will does not have to be expressly stated in the disposition of property upon death, but it must at least be possible to determine it by way of interpretation. In this context, it is not sufficient for such a “contrary will” of the testator to be evident only from external elements (e.g. letters, e-mails or notes).

If the testator has allocated certain assets to an heir by means of a disposition 36 of property upon death at a value below the market value, a so-called **quota legacy** is to be assumed. With regard to the allocation of the asset, there is generally (in accordance with the presumption rule of Art. 522 para. 2 and Art. 608 para. 3 CC) a division provision and, with regard to the difference in value, an advance legacy.

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COMMENTARY ON

Art. 523 CC

A commentary by Christian Moser

SUGGESTED CITATION

Christian Moser, Commentary of art. 523 CC, in: Christian Moser/Philip R. Bornhauser (eds.), Online Commentary of the Civil Code

Short citation: OK-Moser, art. 523 CC N. XXX.

2. Heirs with a statutory entitlement

Art. 523

In the case of heirs with a statutory entitlement, acquisitions in accordance with the law on intestate succession and bequests shall be abated in proportion to the amounts by which they exceed each co-heir's statutory entitlement.

CONTENT

I. INTRODUCTION

According to Art. 523 of the CC, acquisitions by "heirs entitled to a compulsory portion" in accordance with the statutory succession and gifts mortis causa shall be reduced in proportion to the amounts exceeding their compulsory portion. While a person entitled to a compulsory portion can only demand the reduction of acquisitions or gifts from persons entitled to inherit or bequeathed persons if they have "received less than their compulsory portion in terms of value" (Art. 522 para. 1 of the Swiss CC), acquisitions or gifts from persons entitled to a compulsory portion can only be reduced to the extent that they exceed their compulsory portion. Art. 523 CC thus stipulates, on the one hand, that the maximum amount that can be reduced for persons entitled to a compulsory portion is that which "exceeds their compulsory portion." On the other hand, Art. 523 CC contains a "principle of equal treatment," according to which acquisitions or gifts made by persons entitled to a compulsory portion must in principle (cf. N. 5) be reduced proportionally, i.e., in proportion to the amounts exceeding the compulsory portions (cf. N. 8). 1

II. SCOPE OF APPLICATION AND LEGAL NATURE

A. Scope of application

While Art. 525 para. 1 CC regulates the reduction of gifts mortis causa to several "appointed heirs and beneficiaries," Art. 523 CC refers to gifts mortis causa and acquisitions in accordance with the legal succession in favor of "heirs entitled to a compulsory portion." Art. 523 CC also applies analogously to lifetime gifts made simultaneously to persons entitled to a compulsory portion. 2

It should be noted that acquisitions in accordance with the statutory succession (so-called "intestate succession") in favor of persons entitled to a compulsory portion must be reduced in accordance with the order of reduction pursuant to Art. 532 CC before gifts mortis causa (so-called "testamentary succession") – as well as before (simultaneous) lifetime gifts – in favor of persons entitled to a compulsory portion. The principle of proportional reduction pursuant to Art. 523 of the CC therefore applies separately to each "**reduction level**" of Art. 532 of the CC. This means that the reduction limit, i.e., 3 the maximum amount that can be reduced for persons entitled to a compulsory portion on the basis of their own compulsory portion (see N. 8), – and accordingly also the reduction rate and the individual reduction amount (see N. 10) – must be determined separately at each reduction level (cf. Example 2 under N. 13 and Example 4 under N. 15). However, according to the opinion expressed here, the reduction limit (cf. N. 8) only applies at the reduction level within the meaning of Art. 532 CC at which the reduction affects the person's own compulsory portion (cf. N. 9).

4 If gifts to persons entitled to a compulsory portion as well as to other (non-entitled) persons are to be reduced, the literature refers to a “**combination**” of Art. 523 CC and Art. 525 para. 1 CC. Apart from the subjective scope of application (cf. N. 2) and the explicit reservation of deviation in Art. 525 para. 1 CC (cf. N. 6), the only material difference between Art. 523 and Art. 525 para. 1 CC is that the corresponding reduction limits must be taken into account when calculating the reduction rate for persons entitled to a compulsory portion. This means that the reduction limit (cf. N. 8) for beneficiaries within the meaning of Art. 525 para. 1 CC is limited solely by the gift (at a certain reduction level) and not additionally by a compulsory portion amount.

B. Legal nature

5 Art. 523 of the Swiss CC (CC) is a **dispositive right**. The testator may therefore deviate from the proportional reduction of acquisitions or gifts to persons entitled to a compulsory portion. However, it is not possible to deviate from the principle that only the amount exceeding the compulsory portion may be reduced. Any provision to the contrary would violate the right to a compulsory portion and would be reducible accordingly. However, if the testator exempts certain persons entitled to inherit or bequeathed from the (proportional) reduction, the question arises as to whether the testator can thereby indirectly influence the order of reduction in accordance with Art. 532 of the Swiss CC. Since Art. 532 of the Swiss CC is (at least largely) mandatory law, this question must be rejected – in accordance with the opinion expressed here – if a deviation from the proportional deviation results in an ‘impermissible’ (or reducible) change in the order of reduction. A deviation or exemption from the proportional reduction is therefore only possible at a certain reduction level and cannot result in a certain acquisition or gift at a cer-

tain reduction level being “skipped” – in whole or in part – at the expense of an acquisition or gift at a subsequent reduction level.

This raises the question of the **form** in which such a deviation from proportional reduction must be recorded. When reducing gifts mortis causa in favor of persons entitled to a compulsory portion, it is obvious to apply Art. 525 para. 1 of the Swiss CC (CC) analogously, according to which “a different intention of the testator” must be “apparent” from the disposition. The testator's intention to deviate from the proportional reduction does not have to be expressly stated in the disposition of property upon death, but must be ascertainable by means of interpretation. 6

The question then arises as to (a) whether a deviation from the proportional reduction contained in a disposition of property upon death also applies to the reduction of acquisitions in accordance with the statutory succession and (simultaneous) lifetime gifts, and (b) whether such a deviation with regard to the reduction of (simultaneous) lifetime gifts can also take a form that does not comply with the provisions of Art. 498 ff. of the CC. The first question must be answered by interpreting the disposition of property upon death, in accordance with the opinion expressed here. If it is expressed therein that the testator generally wished to deviate from the reduction method within the meaning of Art. 523 of the Swiss Civil Code (CC) – subject to the restrictions mentioned under N. 5 – this applies, in our opinion, to every reduction level within the meaning of Art. 532 of the Swiss Civil Code (CC). For the second question, an analogous application of the case law on the form of a waiver of equalization within the meaning of Art. 626 para. 2 of the Swiss CC could be considered. However, due to the associated uncertainty, it is advisable to record the deviation from the proportional reduction by means of a disposition of property upon death. 7

III. PROPORTIONAL REDUCTION

A. Calculation method

Pursuant to Art. 523 of the CC, the reduction is made in proportion to the amounts exceeding the compulsory portions (“proportional reduction”). Accordingly, if there are several defendants in the reduction proceedings (or persons against whom the reduction objection is raised), the maximum amount that could be reduced (“**reduction limit**”) must be determined at each reduc- 8 tion level (see N. 3). For persons who are not entitled to a compulsory portion, this corresponds to the total gift (cf. Art. 525 para. 1 of the Swiss CC). For persons entitled to a compulsory portion, the reduction limit generally corresponds to the difference between (a) their own acquisitions or gifts and (b) their own compulsory portion.

9 If the person entitled to a compulsory portion has received their acquisitions or gifts at different reduction levels (within the meaning of Art. 532 of the Swiss CC), it is questionable at which reduction level they have received them. gifts at different reduction levels (within the meaning of Art. 532 CC), it is questionable at which reduction level (within the meaning of Art. 532 CC) the **reduction limit** (pursuant to Art. 523 CC) applies. The question here is whether the compulsory portion protection of the person with passive legitimacy (and entitled to a compulsory portion) (a) only applies at the reduction level at which the reduction affects their own compulsory portion ("**Thesis 1**"), or (b) already applies at the "first" reduction level at which the person with passive legitimacy is confronted with the reduction ("**Thesis 2**"). Even though convincing arguments can be made for both theses, "Thesis 2" conflicts to a certain extent with the (at least largely) mandatory reduction order of Art. 532 CC (see N. 5), which is why "Thesis 1" deserves preference. According to the opinion expressed here, Art. 523 CC merely clarifies in this regard that the person with passive legitimacy (entitled to a compulsory portion) does not have to accept a reduction that would ultimately result in them receiving less than their compulsory portion. As long as the reduction at a certain reduction level does not lead to such an encroachment on the compulsory portion, the person with passive legitimacy cannot – in contrast to "Thesis 2" – object that only the amount exceeding their compulsory portion should be reduced. According to the opinion expressed here (in line with "Thesis 1"), the reduction limit therefore only applies once the reduction at a reduction level affects the person's own compulsory portion (see Example 2 under N. 13). Since, as far as can be seen, there is currently neither a prevailing opinion nor established case law on this issue, there is considerable legal uncertainty in this regard. In such cases, the person whose compulsory portion has been infringed should therefore not rely on the reduction defense (cf. Art. 533 CC), because it can be assumed that the person with passive legitimacy will represent "Thesis 2," and this may mean that the compulsory portion cannot be restored by way of defense.

10 Once the reduction limits ("**L**") of the defendants (or persons affected by the reduction defense) have been determined in a first step at the relevant reduction level (see N. 9), the total reduction limits ("**T**") must be determined in a second step. In a third step, the individual reduction limits ("L") must then be set in relation to the aforementioned total reduction limits ('T'), which results in the individual **reduction quotas** ("**Q**"). If the reduction amount, i.e. the amount required to restore the compulsory portion of the reduction claimant (or the person raising the reduction objection) ("**B**"), can be covered at the reduction level in question, these reduction quotas ('Q') must be multiplied by the reduction amount ("B") in a fourth step. Otherwise, i.e. if the reduction amount ("B") cannot be covered at the reduction level in question, the reduction rates ('Q') must be multiplied by the total reduction limits ("T"). This results in the individual reduction amount ("**H**") for the recipient of the grant at a specific reduction level. The **formula** is therefore "H = (L / T) x B", whereby – as mentioned – 'B' may correspond to "T" under certain circumstances, i.e. if the reduction amount can be covered at the relevant reduction level (see examples 1-4 under N. 12-15).

11 In cases where a usufruct has been ordered within the meaning of Art. 473 of the Swiss CC, the literature suggests that the value of the compulsory portion should be calculated on the basis of the compulsory portion that would have existed if the surviving spouse had opted for his or her inheritance share (and corresponding ownership) instead of the corresponding usufructuary legacy. In our opinion, this suggestion is irrelevant insofar as the compulsory portion of the surviving spouse and descendants exists regardless of whether the spouse opted for the usufructuary legacy or – in accordance with a corresponding right of choice or by applying the "*biens aisément négociables*" doctrine – for the inheritance or ownership. Even if the surviving spouse has opted for the usufructuary legacy, the compulsory portion of the surviving spouse is calculated as of the date of death without taking the usufructuary legacy into account. The joint descendants must accept such usufruct in favor of the surviving spouse, even if the value of the "bare ownership" is less than the compulsory portion. However, this does not mean that the descendants in such constellations have no compulsory portion, which can be claimed as a reduction limit within the framework of Art. 523 of the CC.

B. Calculation examples

1. Reduction at the expense of persons entitled to a compulsory portion (Art. 523 CC)

a. Gifts at the same reduction level

12 **Example 1**: The testator "E" leaves behind a net estate of 600, his three descendants "A," "B," and "C," and a will in which he appoints A as heir with a share of 2/3 and B as heir with a share of 1/3. A's share of the inheritance is 400 (2/3 of 600), B's is 200 ($^{1}/^{3}$ of 600) and C's is 0. The descendants' compulsory portions are 100 each (1/6 of 600). C's compulsory portion is therefore violated by 100. The reduction limit for A is 300 (testamentary acquisition of 400 minus compulsory portion of 100) and that for B is 100 (testamentary acquisition of 200 minus compulsory portion of 100). The total reduction limits amount to 400 (300 from A plus 100 from B). The reduction rate is 75% for A (300 in relation to 400) and 25% for B (100 in relation to 400). At the reduction level of the testamentary acquisition, the inheritance of A is reduced by 75 (75% of 100) and that of B by 25 (25% of 100). As a result, A receives 325, B 175, and C 100.

	A	B	C	
Nachlassvermögen				600
Testaterwerb	$^{2}/_{3}$	$^{1}/_{3}$		
Total	400	200	0	
Pflichtteil	$^{1}/_{6}$	$^{1}/_{6}$	$^{1}/_{6}$	600
	100	100	100	
Differenz	300	100	-100	

Herabsetzung	A	B	C	
Herabsetzungslimiten	300	100		400
Herabsetzungsquoten	75%	25%		100
Herabsetzungsbetrag	-75	-25	100	
Ergebnis	**325**	**175**	**100**	600

b. Gifts at different reduction levels

13 **Example 2**: The testator "E" leaves behind a net estate of 60, a will (with bequests), and his four descendants "A," "B," "C," and "D." Two years before his death, E – with a compensation exemption – gifted 420 to C ("gift T-2"). One

year before his death, E – at the same time and in each case with a compensation exemption – gifted 180 to A, 240 to B and 60 to C (“gifts T-1”) . The will contains a bequest of 5 to A and a bequest of 15 to B. The estate is worth 40, the compulsory portion calculation base (“PTBM”) is 960, the inheritance shares are 10 each, and the compulsory portions are 120 each (1/8 of 960). In total (without reduction), A would therefore receive 195, B 265, C 490, and D 10. D's compulsory portion is violated by 110. At the reduction stage of intestate succession (“1st reduction stage”), the inheritance shares of A, B, and C are therefore reduced by 10 each. This means that D's compulsory portion is still violated by 80. At the reduction level of testamentary acquisition (“2nd reduction level”), A's legacy is reduced by 5 and B's legacy by 15. This means that D's compulsory portion is still violated by 60. At the reduction level for (more recent or most recent) lifetime gifts (“3rd reduction level”), the reduction limit is 60 for A, 120 for B, and 60 for C; the reduction limit of Art. 523 of the Swiss CC applies to A and B (see calculation overview below). The total reduction limit is 240. The reduction rate is 25% for A and C (60 in relation to 240) and 50% for B (120 in relation to 240). Accordingly, the lifetime gifts from A and C are reduced by 15 (25% of 60) and those from B by 30 (50% of 60). As a result, A receives 165, B 210, C 465, and D 120.

	A	B	C	D	
Nachlassvermögen					60
Testaterwerb	5	15			20
Intestaterwerb	1/4	1/4	1/4	1/4	40
	10	10	10	10	
Zuwendungen T-1	180	240	60		480
Zuwendung T-2			420		420
Total	**195**	**265**	**490**	**10**	
Pflichtteil	1/8	1/8	1/8	1/8	960
	120	120	120	120	
Differenz	75	145	370	-110	

1. Herabsetzungsstufe	A	B	C	D	
Herabsetzungslimiten	10	10	10		30
Herabsetzungsquoten	1/3	1/3	1/3		30
Herabsetzungsbetrag	**-10**	**-10**	**-10**	**30**	
Zwischenergebnis	185	255	480	40	
Differenz	65	135	360	-80	

2. Herabsetzungsstufe	A	B	C	D	
Herabsetzungslimiten	5	15			20
Herabsetzungsquoten	25%	75%			20
Herabsetzungsbetrag	**-5**	**-15**		**20**	
Zwischenergebnis	180	240	480	60	
Differenz	60	120	360	-60	

3. Herabsetzungsstufe	A	B	C	D	
Herabsetzungslimiten	60	120	60		240
Herabsetzungsquoten	25%	50%	25%		60
Herabsetzungsbetrag	**-15**	**-30**	**-15**	**60**	
Zwischenergebnis	165	210	465	120	
Differenz	45	90	345	0	
Ergebnis	**165**	**210**	**465**	**120**	960

2. Reduction at the expense of persons entitled to a compulsory portion and other persons (Art. 523 in conjunction with Art. 525 para. 1 of the Swiss CC)

a. Gifts at the same reduction level

Example 3: The testator "E" leaves behind a net estate of 1200, his three de- 14
scendants "A," "B," and "C," and a will in which he appoints A as heir with a share of 2/3 and B as heir with a share of 1/3, and also bequeaths 300 to his girlfriend "F." The estate is worth $900, the PTBM is $1,200, and the compulsory portions of the descendants are $200 each (1/6 of $1,200). A's share of the inheritance is 600, B's share is 300. C's compulsory portion is therefore violated by 200. The reduction limit for A is 400, for B 100, and for F 300. The total reduction limit is 800. The reduction rate is 50% for A (400 in relation to 800), 12.5% for B (100 in relation to 800), and 37.5% for F (300 in relation to 800). At the reduction stage of the acquisition of the certificate, the inheritance of A is reduced by 100 (50% of 200), that of B by 25 (12.5% of 200) and the bequest of F by 75 (37.5% of 200). As a result, A receives 500, B 275, C 200, and F 225.

	A	B	C	F	
Nachlassvermögen					1'200
Testaterwerb				300	300
	$^2/_3$	$^1/_3$			900
	600	300			
Total	**600**	**300**	**0**	**300**	
Pflichtteil	$^1/_6$	$^1/_6$	$^1/_6$		1'200
	200	200	200		
Differenz	400	100	-200	300	

Herabsetzung	A	B	C	F	
Herabsetzungslimiten	400	100		300	800
Herabsetzungsquoten	50%	12.5%		37.5%	200
Herabsetzungsbetrag	-100	-25	200	-75	
Ergebnis	**500**	**275**	**200**	**225**	1'200

b. Gifts at different reduction levels

Example 4: The testator "E" leaves behind a net estate of 60, a will (with be- 15
quests), his four descendants "A," "B," "C," and "D," and his girlfriend "F." Two years before his death, E gave C a gift of 420 (gift T-2), again with a waiver of equalization. One year before his death, E gave 160 to A, 140 to B, 60 to C, and 120 to F ("gifts T-1"), each at the same time and with a compensation exemption. The will contains a bequest of 5 to A, a bequest of 10 to B, and a bequest of 5 to F. The estate is worth 40, the compulsory portion calculation

base ("PTBM") is 960, the inheritance shares are 10 each, and the compulsory portions are 120 each (1/8 of 960). In total (without reduction), A would therefore receive 175, B 160, C 490, D 10, and F 125. D's compulsory portion is violated by 110. At the reduction stage of intestate succession, the inheritance shares of A, B, and C are reduced by 10 each. This means that D's compulsory portion is still violated by 80. At the reduction stage of testamentary succession, A's bequest is reduced by 5, B's bequest by 10, and F's bequest by 5. This means that D's compulsory portion is still infringed by 60. At the reduction level of the (more recent or most recent) lifetime gift, the reduction limit for A is 40, for B 20, for C 60, and for F 120. The total reduction limit is 240. The reduction rate is 1/6 (40 in relation to 240) for A, 1/12 (20 in relation to 240) for B, 25% (60 in relation to 240) for C, and 50% (120 in relation to 240) for F. Accordingly, the lifetime gifts from A are reduced by 10 (1/6 of 60), from B by 5 (1/12 of 60), for C by 15 (25% of 60) and for F by 30 (50% of 60). As a result, A receives 150, B 135, C 465, D 120, and F 90.

	A	B	C	D	F	
Nachlassvermögen						60
Testaterwerb	5	10			5	20
Intestaterwerb	$^{1}/_{4}$	$^{1}/_{4}$	$^{1}/_{4}$	$^{1}/_{4}$		40
	10	10	10	10		
Zuwendungen T-1	160	140	60		120	480
Zuwendung T-2			420			420
Total	**175**	**160**	**490**	**10**	**125**	
Pflichtteil	$^{1}/_{8}$	$^{1}/_{8}$	$^{1}/_{8}$	$^{1}/_{8}$		960
	120	120	120	120		
Differenz	55	40	370	-110	125	

1. Herabsetzungsstufe	A	B	C	D	F	
Herabsetzungslimiten	10	10	10			30
Herabsetzungsquoten	$^{1}/_{3}$	$^{1}/_{3}$	$^{1}/_{3}$			30
Herabsetzungsbetrag	**-10**	**-10**	**-10**	**30**		
Zwischenergebnis	165	150	480	40	125	
Differenz	45	30	360	-80	125	

2. Herabsetzungsstufe	A	B	C	D	F	
Herabsetzungslimiten	5	10			5	20
Herabsetzungsquoten	25%	50%			25%	20
Herabsetzungsbetrag	**-5**	**-10**		**20**	**-5**	
Zwischenergebnis	160	140	480	60	120	
Differenz	40	20	360	-60	120	

3. Herabsetzungsstufe	A	B	C	D	F	
Herabsetzungslimiten	40	20	60		120	240
Herabsetzungsquoten	$^{1}/_{6}$	$^{1}/_{12}$	$^{1}/_{4}$		$^{1}/_{2}$	60
Herabsetzungsbetrag	**-10**	**-5**	**-15**	**60**	**-30**	
Zwischenergebnis	150	135	465	120	90	
Differenz	30	10	345	0	90	
Ergebnis	**150**	**135**	**465**	**120**	**90**	960

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COMMENTARY ON

Art. 533 CC

A commentary by Christian Moser

SUGGESTED CITATION

Christian Moser, Commentary of art. 533 CC, in: Christian Moser/Philip R. Bornhauser (eds.), Online Commentary of the Civil Code

Short citation: OK-Moser, art. 533 CC N. XXX.

IV. Prescription

Art. 533

1 A claim in abatement prescribes one year after the date on which the heirs learned of the infringement of their rights and in any event after ten years have elapsed since the succession, in the case of testamentary disposition, or since the testator's death, in the case of other dispositions.

2 If the declaration of the invalidity of a later disposition revives an earlier one, the prescriptive periods begin on the date on which invalidity was declared.

3 The entitlement to abatement may be invoked as a defence at any time.

CONTENT

I. INTRODUCTION

The action to reduce the inheritance is subject to a limitation period of one year from the time when the violation of the reserved portion becomes known (see N. 3-5), but no later than ten years after the opening of the testamentary disposition or the date of death (see N. 6), in accordance with Art. 533 para. 1 CC. These are not limitation periods, but **forfeiture periods**. Accordingly, it is not possible to interrupt the period in accordance with Art. 135 CO or to restart the period in accordance with Art. 137 f. CO. These deadlines are met by filing a claim in due time, i.e. by submitting a request for arbitration (with the corresponding legal requests), whereby the provisions of Art. 77 f. OR (and not of Art. 142 ff. ZPO) are applicable for calculating the deadline. The court will review compliance with the deadline ex officio (and not merely upon objection). Failure to file a reduction action within the deadline will result in a dismissal. 1

Irrespective of the deadline for filing a reduction action, the right to a reduction under Art. 533 para. 3 CC may – under the given conditions – be asserted at any time by way of objection (see N. 7 et seq.). 2

II. TIME LIMITS FOR FILING

A. Relative limitation period

The action for reduction is subject to a limitation period of one year "calculated from the time when the heirs became aware of the violation of their rights" (Art. 533 para. 1 CC). This relative limitation period therefore begins to run when the person whose right to a compulsory portion has been violated "is aware of the factual elements that give rise to confidence in the favorable outcome of a possible action for reduction" or "that give rise to expectations of the possible success of an action for reduction". The beginning of the period therefore presupposes **knowledge of the cause of action**, i.e. knowledge of the necessary elements for substantiating an action for reduction. "Absolute certainty" or knowledge of the 'exact extent of the violation of the compulsory portion' is not required for the period to begin. Nor does the start of the period depend on whether an action for reduction can already be quantified in accordance with the ultimately achievable amount of the reduction. It is 3 sufficient if the person entitled to a compulsory portion can recognize that their compulsory portion claim has been violated. If the person concerned has been completely excluded from the succession or has been passed over, or if, for example, they have only been given a usufruct, they will learn of the violation of the compulsory portion from the disposition of property upon death, due to the lack of (their own) lifetime gifts. Otherwise, an approximate knowledge of the size of the estate is sufficient. Any lack of knowledge of the law on the part of the person entitled to a compulsory portion is irrelevant.

4 In the case of a **plurality of** dispositions and allocations by the testator that infringe the compulsory portion or can be reduced, the relative forfeiture period begins separately for each cause of action according to the opinion represented here. If a testator leaves two descendants and appoints the descendants as heirs with inheritance shares of 4/5 and 1/5, the disadvantaged descendant – in the absence of (his or her own) lifetime gifts – is already aware of the violation of the compulsory portion based on the disposition of property upon death. The relative forfeiture period for reducing the disposition of property upon death therefore begins at the point in time at which the disadvantaged descendant becomes aware of the disposition of property upon death (but no earlier than the time of death). If this descendant allows the one-year (relative) forfeiture period to elapse and subsequently becomes aware of a reducible lifetime gift, a separate one-year (relative) forfeiture period begins for this lifetime gift – according to the understanding represented here. In the case of a reduction by way of legal action, the person whose right to a compulsory portion has been violated can, however, only enforce the reduction to the extent of the violation of the right to a compulsory portion that results from the lifetime gift (and not already from the disposition of property upon death), subject to the defense of reduction.

5 The **point in time of knowledge** is to be determined in each case according to the overall circumstances of the individual case. While the question of what a particular person knew or did not know at a particular time is a factual one, the question of whether the elements known to that person are sufficient to trigger the forfeiture period is a legal one.

B. Absolute forfeiture period

6 The action for reduction “in any case forfeits after ten years” (Art. 533 para. 1 ZGB). This absolute forfeiture period begins for the reduction of a disposition

of property upon death from the time of the "**opening of the will**" (in the sense of Art. 557 ZGB) and for "other" (i.e. lifetime) gifts from the time of the testator's **death** (Art. 533 para. 1 ZGB). If the disposition of property upon death is declared invalid (see Art. 519 et seq. ZGB), the period begins with the entry into force of the invalidity judgment (Art. 533 para. 2 ZGB).

III. DEFENSE OF REDUCTION

A. General

A person who is entitled to claim a reduction and who has "(co-)ownership" of the estate (see notes 11-15) may assert the reduction by way of objection **at any time**. This objection may be raised, for example, in the context of an action to divide the estate or an action to claim a legacy, irrespective of whether the person raising the objection is the plaintiff or the defendant. 7

The **defense of reduction** – in contrast to the action to reduce the inheritance – is not subject to forfeiture, but it also requires that the right to a reduction has not already been waived. In addition, the defense of reduction is only possible to the extent of those estate assets in which the person raising the defense has "(co-)ownership" (see N. 11-15). If the estate is worth less than the claim for reduction, the defense of reduction is possible, but in the end the compulsory portion cannot be fully established by way of objection. 8

In line with the aforementioned limitation of the scope of the defense of reduction (see N. 8), **changes in the value** of the estate can have a significant influence on the extent to which the compulsory portion can be safeguarded by means of the defense of reduction. On the one hand, a person entitled to a compulsory portion who, due to sufficient estate assets, refrains from filing a reduction action and "relies" on the defense of reduction risks that the estate assets will decrease – in particular due to economic conditions – and that the compulsory portion can no longer be established (in full) by means of the defense. On the other hand, a person entitled to a compulsory portion can benefit from an increase in the value of the estate to the extent that the compulsory portion can be established retroactively (in full or in part or by means of a settlement with a smaller loss). For example, if a testator dies after January 1, 2023, leaves two descendants (A and B), no disposition of property upon death and net estate assets worth "10", and has made a lifetime gift to made a gift (not subject to equalization) to descendant A, which has a value of "70" at 9 the time of death, the compulsory portion of descendant B ("20", corresponding to 1/4 of "80") is violated. If descendant B does not file a reduction action within the time limit, he would only receive "10" by means of a reduction of the intestacy acquisition by way of objection. However, if the estate assets (e.g. consisting of a stock portfolio) increase to "20" by the time of the distribution of the estate, in which descendant B raises the objection, the compulsory portion is preserved.

10 It is disputed whether the defense of reduction is still possible after the **distribution of the estate** has already taken place. According to the view represented here, the defense of reduction is not waived or forfeited when the estate is distributed, but the extent to which the reduction can be asserted by way of defense is limited in this case to the estate assets that were allocated to the affected forced heir as part of the distribution of the estate. If the heir of the compulsory portion has received less than the value of his compulsory portion in the division of the estate, he can still raise the objection of reduction against a legacy claim of a third party directed against him, who was not directly involved in the division of the estate (as a contracting party) or indirectly (as a beneficiary under a contract in favor of third parties).

B. Requirement of ownership

11 In connection with the requirement of (co-)ownership of the estate (see N. 7-8), there are various ambiguities, which in practice lead to the fact that persons entitled to a compulsory portion only rarely "rely" on the defense of reduction and deliberately allow the time limit for the action for reduction to expire. One ambiguity concerns the question of what **type of ownership** is required to assert the defense of reduction. Apart from legal ownership in the case of easements and land charges, a distinction must be made as follows in the case of material ownership: According to Art. 920 para. 2 ZGB, a person who possesses an object as the owner is considered to be an independent possessor, and a person who possesses the object without being the owner is considered to be a dependent possessor. A further distinction is made between direct and indirect possession: If an independent owner transfers custody (i.e. actual control or power) of the property to a third party based on a special legal relationship (e.g. a lease), the owner has independent indirect possession, while the third party (non-owner, e.g. tenant) has dependent indirect possession.

Especially since the heirs acquire the "inheritance as a whole by operation of law upon the death of the testator" and, in particular, ownership and possession of the testator pass to the heirs on the day of death (so-called **universal succession**, Art. 560 ZGB), the heirs become independent owners of the assets in the estate on the day of death (and until the execution of the division of the estate). If the estate includes a property that is rented to a co-heir, that co-heir exercises independent direct ownership, while the other co-heirs exercise independent indirect ownership. If the estate includes a movable object, the (independently) directly holding co-heir exercises ownership for the heirs as a whole (joint ownership), which is why the (independently) indirectly holding heirs can invoke the "heir ownership" in accordance with Art. 560 para. 2 CC. 12

It is undisputed that an heir who is an independent and direct possessor can raise the defense of reduction. However, the defense of reduction is also possible if an **executor** (or an administrator of the estate or heir representative) has been appointed and the heir merely has independent indirect possession. The executor has dependent (direct or indirect) ownership of the entire estate, while the heirs have independent indirect (and in some cases also direct) ownership. 13

Accordingly, **independent (direct or indirect) possession** is sufficient for the defense of reduction. In contrast, according to the view represented here, mere dependent (direct or indirect) possession is not sufficient. In conclusion, this means that, according to the view represented here, the assertion of the defense of reduction requires **heirship or (joint) ownership** of the person raising the defense. Accordingly, a virtual heir who has allowed the forfeiture period for the assertion of his right to a compulsory portion by way of legal action to elapse, has dependent direct (or indirect) possession of an object of the estate and is requested by the heirs to surrender this object, cannot object to such a claim for surrender with the defense of reduction. 14

In this context, the question may be raised as to whether the requirement of possession means that the defense of reduction only applies to "things" in the sense of property law, in which "possession" can be exercised in accordance with Art. 919 et seq. ZGB. According to the view expressed here, such a substantive restriction of the scope of the defense of reduction is not justified. Accordingly, the objection under Art. 533 para. 3 ZGB can extend to all **assets**, i.e. also to claims (in particular against banks in the context of a bank 15 account relationship) or to “intangible assets” such as cryptocurrencies. The above comments are also applicable, mutatis mutandis, to assets in which no “ownership” can be exercised in the sense of property law.

C. Procedural

16 The possibility of a defense of reduction does not exclude the right to bring an action for reduction. Accordingly, an action for reduction can be brought – if the conditions are met – even if the reduction could also be enforced by way of a defense.

17 The defense of reduction must be asserted in court, especially since the court does not officially review a violation of the compulsory portion. Although the defense of reduction does not have to be asserted in the first judicial document (statement of claim or statement of defense), the facts and evidence necessary for its assertion must be submitted in good time, in accordance with the rules of civil procedure regarding new evidence.

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