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## COMMENTARY ON

# Art. 88 and 89 CC

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F. Dissolution and deletion from the register

I. Dissolution by the competent authority

Art. 88

<sup>1</sup> 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.

<sup>2</sup> Family and ecclesiastical foundations shall be dissolved by court order.

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

**Art. 89**

<sup>1</sup> Any interested party may file an application or bring an action for the dissolution of a foundation.

<sup>2</sup> Dissolution must be reported to the commercial registrar so that the entry may be deleted.

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## 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 86b 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

- 4 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.

#### 2. Bankruptcy

- 5 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.

### 3. Merger

- 6 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 transferring 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. 163b 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. 163–164b 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

- 12 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, 86b CC).

## B. Subsequent illegality or immorality

- 13 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.

# IV. DISSOLUTION PROCEEDINGS

## A. Classic foundations

- 14 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 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).

- 17 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).

## B. Right to file a petition or bring an action

- 18 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.

## C. Dissolution of family foundations and ecclesiastical foundations

- 19 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.
- 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.

## BIBLIOGRAPHY

Aebersold Thomas/Leimer Rahel, in: Jolanta Kren Kostkiewicz/Stephan Wolf/Marc Amstutz/Roland Fankhauser (Hrsg.), Kommentar Schweizerisches Zivilgesetzbuch, 4. Aufl., 2021 (zit. OFK ZGB-Aebersold/Leimer).

Grüninger Harold, in: Geiser Thomas/Fountoulakis Christiana (Hrsg.), Basler Kommentar, Zivilgesetzbuch I, Art. 1–456 ZGB, 7. Aufl., Basel 2022.

Grüninger Harold, Grenzüberschreitende Sitzverlegung aus der und in die Schweiz, in: Dominique Jakob (Hrsg.), Perspektiven des Stiftungsrechts in der Schweiz und in Europa, Basel 2010, 119 ff.

Hausheer Heinz/Aebi-Müller Regina Elisabeth, Das Personenrecht des Schweizerischen Zivilgesetzbuches, 5. Aufl., Bern 2020.

Jakob Dominique, in: Bächler Andrea/Jakob Dominique (Hrsg.), Kurzkommentar ZGB, Schweizerisches Zivilgesetzbuch, 2. Aufl., Basel 2018.

Jakob Dominique, Time to say goodbye – Die Auswanderung von Schweizer Familienstiftungen aus stiftungsrechtlicher und internationalprivatrechtlicher Perspektive, in: Pascal Grolimund/Alfred Koller/Leander D. Loacker/Wolfgang Portmann (Hrsg.), Festschrift für Anton K. Schnyder zum 65. Geburtstag, 2018, S. 171 ff. (zit. Jakob, FS Schnyder).

Riemer Hans Michael, Stämpfli Handkommentar, Vereins- und Stiftungsrecht (Art. 60–89bis ZGB) mit den Allgemeinen Bestimmungen zu den juristischen Personen (Art. 52–59 ZGB), Bern 2012.

Riemer Hans Michael, Berner Kommentar, Schweizerisches Zivilgesetzbuch, Die juristischen Personen, Die Stiftungen, Art. 80–89c ZGB, 2. Aufl., Bern 2020 (zit. BK-Riemer).

Sprecher Thomas, Stiftungsrecht in a nutshell, 2. Aufl. Zürich 2023.

Vez Parisima, in: Pichonnaz Pascal/Foëx Bénédict/Fountoulakis Christiana (Hrsg.), Commentaire Romand, Code civil I, 2. Aufl., Basel 2023.