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## Foundation and family governance: how can values be passed down through the generations?

*The creation of a foundation makes perfect sense within the framework of well thought-out family governance: it facilitates the family's adherence to its own values and the understanding of the destination of the family patrimony across generations, by anchoring the commitment of family members in a common philanthropic project that is both comprehensible and unifying.*

*Foundation law is very liberal, giving the founder considerable autonomy at the time of incorporation to express his or her wishes and determine the most appropriate form of governance to ensure the long-term commitment of family members.*

### The foundation as a family governance tool

In a previous article, we emphasized the extent to which the reflections that accompany family governance can not be limited to a simple transfer of assets. It fosters family unity around a common, comprehensible and unifying project, built for the benefit of the company's longevity, its various assets and long-term family values. It provides a framework for communication within the family and with third parties, and sets out explicit rules for transmission. It ensures family identity and cohesion, a sense of belonging to a lineage and prevents confrontation.

Establishing family governance is a path, a process that brings a clear organization to exchanges and decision-making within the family. It requires working on the values specific to the family, as the unifying cement, and establishing an ethic in the generational transmission of the skills and responsibilities that will be the corollary of prosperity and contribute to the longevity of the family fortune and/or business. This family dimension is essential to enable each member of the family to understand and pass on to others the meaning that the family gives to its assets, its purpose. It calls for an exercise in dialogue and discussion between the generations, taking a deeper path, one that aims for the continuity of the family's wealth and its purpose, and integrates the aspirations of each member individually, his or her role as a member of the family, evolving within a family vision in line with its values.

The foundation can be a genuine synthesis of family governance incentives. On one hand, it ensures the expression of the family's own values and philanthropic project: areas of support, donation strategy, levels of commitment and visibility are multiple and differ from one family to another. On the other hand - and this is highly relevant - the foundation makes it possible, whilst respecting the governance decided by its founder, to unite family members around this expression, often by bringing together several generations on its board (intergenerational dimension), over time, thanks to its immutable nature (transgenerational dimension). In this way, the Foundation Board takes on its role as a forum for exchanging ideas, and for putting family values into practice over the long term.

The creation of a foundation can also address the concerns of entrepreneurs who wish to ensure the continuity of the family business, and who do not wish to favour one of their children, or to split up the assets and unity between siblings. They will be able to transfer all or part of the family business to a foundation, whose statutory purpose will be either economic (the sole ownership of shares in the business and its long-term survival) or charitable (the ownership of shares being a simple means enabling the foundation to achieve this purpose)<sup>5</sup>. It will thus play the role of neutral third party, moderator, federator and even watchdog within the framework of well-thought-out family governance, alongside the family shareholders who will remain, from generation to generation. A Family Charter will anchor the principles of this governance and establish the rules applicable to the transfer or sale of company shares.

### **Evolving inheritance law**

Structured family governance will take into account the limits imposed by inheritance law, in particular hereditary reserves (art. 493 CC and art. 471 CC). It should be noted that the recent revision of inheritance law, which came into force on January 1, 2023, introduced the spouse and descendants as the only reserved heirs. While the spouse's reserve remains unchanged, that of descendants has been reduced to half their inheritance rights. This reinforcement of the *de cuius*' freedom of decision facilitates the transfer of family businesses. It can also encourage the *de cuius* to dedicate a larger proportion of his capital to the creation of a foundation, for example shares in the family business, without even having to use an inheritance agreement<sup>6</sup>. With the agreement of the heirs with right of succession, the family can even, if it so wishes, shape the family project around its own vision and allocate to a foundation a capital exceeding, if it makes sense, the available portion, by entering into an inheritance agreement, in which they agree, in particular, to waive inheritance rights and allocate to the foundation.

### **The deed of foundation: a family governance document not to be overlooked**

Swiss foundation law is very liberal: the freedom of the founder is one of its cardinal principles. The founder is free to conceive and design a foundation according to his or her own wishes, within the limits set by Swiss law. Once a foundation has been set up, it becomes a legal entity independent of its founder, who can only modify its articles of association under restrictive conditions.

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<sup>5</sup> For more information on this foundation-owned company model, see Delphine BOTTGE, "Holding Foundations in Switzerland – The Foundation-owned company model from theory to practice", ISCA, 2022.

<sup>6</sup> It should also be noted that this new law applies to any death occurring after the revision comes into force, including in the case of testamentary provisions drawn up before 1 January 2023. This may raise thorny questions of interpretation, for example if the will refers to the generic term "available portion" - a term frequently used when the deceased wishes to make a substantial bequest to a charitable organisation. In the absence of new transitional provisions, it is questionable whether the "available portion" referred to by the deceased in his will should be understood as the portion in force before or after the revision on 1 January 2023. For this reason, it would be advisable to encourage any person making a will to review any provisions previously made, in the light of the new law of succession, and to make the necessary clarifications or changes to them so that they correspond to his or her wishes (FF 2018 5865, p. 5918).

The drafting of the deed of foundation is therefore decisive, much more so than for other legal structures. Each clause of the articles of association must be aligned with the provisions of family governance, in the interests of consistency. The articles of association can therefore include specific rules for managing the foundation's assets in line with agreed family governance principles (for the capital, the business, the art collection that will be donated to the foundation), as well as foundation governance principles and intervention rights, which will ensure the involvement of family members over the generations<sup>7</sup>.

Under article 86a para. 1 CC, the founder can expressly reserve the right to modify the foundation's purpose in the articles of association, after a period of 10 years from its creation or last modification. Strictly personal in nature, the right to modify the purpose may be exercised upon presentation of a request for modification by the founder, either during his lifetime or by disposition upon death. This right cannot be transferred to heirs or third parties (art. 86a III CC).

With effect from January 1, 2024 and the entry into force of the revised article 86a CC<sup>8</sup>, the founder's rights will be extended by extending his right to modify the organization under the same conditions. Thus, the new art. 86a para. 1 CC stipulates that "the competent federal or cantonal authority may, at the request of the founder or as a result of a disposition mortis causa taken by the founder, modify the purpose or organization of the foundation, when the deed of foundation reserves this possibility and at least 10 years have elapsed since the establishment of the foundation or since the last modification of the purpose or organization requested by the founder".

This revision increases the freedom to adapt the governance of a foundation to the reflections that would be held within a family after its constitution. Prior to the revision of the Civil Code, the founder could already provide in the deed of foundation for different successive forms of foundation governance, for example, one for the first generation, another for subsequent generations. Henceforth, he will also be able to provide for this at a later date, or by means of provisions for the cause of death which he will draw up at a later date, subject to compliance with the new article 86a CC.

### **Consistency, essential for the legal anchoring of the Family Charter**

It is not always easy to transcribe the content of a Family Charter into the legal instruments that anchor it (testamentary dispositions, inheritance agreements, shareholders' agreements, marriage contracts, etc., but also deed of foundation). If each of these instruments failed to reflect the will and values expressed in a coherent whole, there would be a risk of dissent between family members and a loss of meaning, which could jeopardize the long-term vision and continuity of the transmission of family heritage and values.

*Me Delphine Bottge / September 2023*

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<sup>7</sup> The founder can stipulate that family members will sit on the Foundation Board and grant them this right for life. He may also reserve the right to appoint members of the Foundation Board for himself and his subsequent descendants (ATF 144 III 264) or reserve a right of veto for family members on important decisions.

<sup>8</sup> The Swiss Federal Supervisory Authority for Foundations already accepts new foundation deeds that provide for a change of organisation reservation (ASF, Memento relatif à l'introduction d'une réserve liée à un changement d'organisation avant l'entrée en vigueur des nouvelles dispositions du code civil sur les fondations (09.01.2023); Mémentos (admin.ch)) before art. 86a nCC comes into force.

*Amadeus' experience :*

*Like Me Bottge, we see the value of the foundation as an instrument of governance for families whose assets are mainly held within a family company, as well as for families who have sold all or part of their company.*

*In our experience, this interest is also proportional to the care taken in defining the foundation's mission, parameters and operating procedures. The family charter is, as mentioned above, essential: precision, clarity and simplicity are the key words that should guide its drafting, also to ensure - as the geography of families becomes ever more extensive - that the shared goals of the foundation will be perceived in the same way in all jurisdictions.*

*In the 40 years we've been working alongside our family clients, we've been confronted with many different scenarios when it comes to organizing assets around family businesses. The most traumatic experience we've had by proxy - for people we've subsequently looked after - is that of a family who hastily sold their eponymous business, created two generations earlier, without having taken the time to organize the aftermath of the sale from the point of view of family assets. The company's shareholders, living in two European countries, were 5 great-grandchildren/cousins of the founder, who themselves had children.*

*Several chapters could be written on the financial consequences of this unpreparedness, but in retrospect, the most difficult part for the family to deal with was the loss of family landmarks and values, the loss of the notion of collective interest, and ultimately the loss of a certain family cultural heritage.*

*The existence of a foundation, which at the time would have been deliberately set up, would at the very least have made it possible to unite all the heirs around common causes, not just cultural and charitable ones, and thus keep the family name, meaning and spirit alive.*

*Approached after the sale of the company, Amadeus Capital is now in charge of managing the assets of one of the branches of this family; among other things, we are currently discussing with its members the creation of a company dedicated to investment in the water sector in the broadest sense, with the intention of bringing parents and children together around the same cause and the same table.*

*Creating substance, content, meaning, conveying, so many subjects on which we support our clients.*