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## CHAPTER III

### FORMS OF BUSINESS ENTERPRISES

#### 1 Swiss company law

Swiss company law is laid down in the Swiss Code of Obligations (CO, *Schweizerisches Obligationenrecht*). The CO contains the most important forms of business organizations in Switzerland.

Associations and foundations are regulated by the Swiss Civil Code (CC, *Schweizerisches Zivilgesetzbuch*).

Generally, anyone conducting a trading, manufacturing or other business carried out in a commercial manner is required to enter the company's name in the Commercial Register (CO, Art. 934 et seq.; HRegV, Art. 52). Each canton has a registry office, supervised by the Federal Office of the Commercial Register, which forms part of the Federal Department of Justice and Police.

A fundamental distinction is to be made between those enterprises that are run by individuals or groups of individuals, and those set up in the form of a corporate entity with a separate legal personality. The most common forms of business organizations are as follows:

- sole proprietorship (*Einzelfirma*);
- simple partnership (*Einfache Gesellschaft*; CO, Art. 530 et seq.);
- general partnership (*Kollektivgesellschaft*; CO, Art. 552 et seq.);
- limited partnership (*Kommanditgesellschaft*; CO, Art. 594 et seq.);
- company limited by shares (*Aktiengesellschaft*; CO, Art. 620 et seq.);
- company with unlimited partners (*Kommandit-Aktiengesellschaft*; CO, Art. 764 et seq.);
- limited liability company (*Gesellschaft mit beschränkter Haftung*; CO, Art. 772 et seq.);
- cooperative (*Genossenschaft*; CO, Art. 828 et seq.);

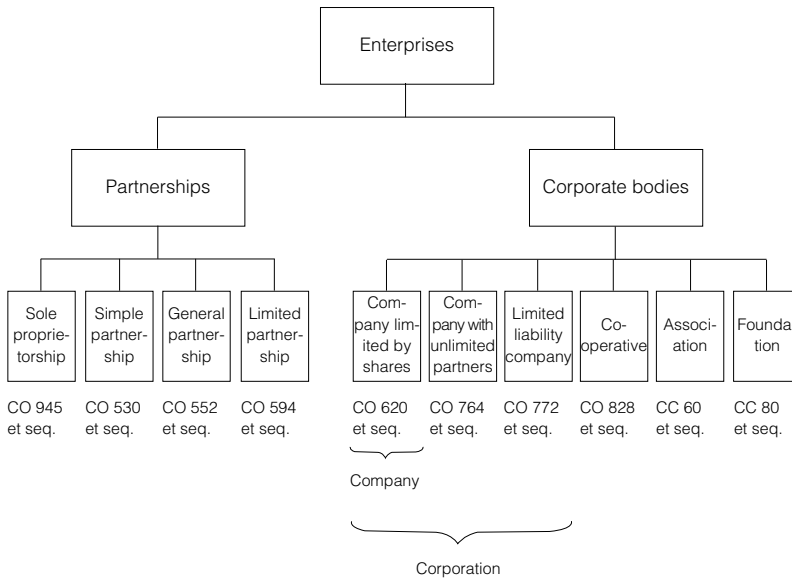
} hereinafter referred to as corporation

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- association (*Verein*; CC, Art. 60 et seq.); and
- foundation (*Stiftung*; CC, Art. 80 et seq.).

### Common Forms of Business Organizations



## 2 Partnerships

### 2.1 Sole proprietorship

A sole proprietorship is the business of an individual where liability for the debts arising from this business is unlimited. The legal existence of a sole proprietorship carrying out operations of a kind other than the basic business activities commences with its registration. The sole proprietorship is obliged to apply for registration if the size of its operations requires an administrative or commercial organization (HRegV, Art. 52).

A sole proprietorship must utilize as the essential element of its name the family name with or without the first names. No addition

suggesting a company relationship may be added to the firm name (CO, Art. 945).

A sole proprietorship may apply for liquidation proceedings only in the case of insolvency.

## 2.2 Simple partnership

A simple partnership is a contractual relationship between two or more persons who combine their efforts and means for the purpose of attaining a common objective (CO, Art. 530 et seq.). Any company or association of persons which does not show the characteristics of one of the other entities governed by the CO or the CC is regarded as a simple partnership. Persons who intend to establish other associations of persons or capital often form the simple partnership. The simple partnership may not be entered in the Commercial Register and does not have a company name of its own.

Its main characteristic is the joint and several liability of the partners for the partnership's liabilities towards third parties. A simple partnership is not a legal entity. It cannot acquire rights or assume obligations, and it has no standing to sue or to be sued. Goods, rights or credits which have been transferred or acquired by the simple partnership become the joint property of the partners in accordance with the terms of the partnership agreement. The partners are jointly and severally liable for obligations towards a third party (CO, Art. 544).

Unless otherwise agreed, each partner must make a contribution either in cash, kind, claims or labour to the ordinary partnership and all partners participate equally in the profits or losses of the partnership. All partners participate jointly in the management unless they agree otherwise (CO, Arts. 531, 533 and 535). No partner may compete with the objectives of the simple partnership (CO, Art. 536).

If the management of the partnership has been granted to a partner by the partnership agreement, third parties may assume that the

respective partner can act in a legally binding way for the partnership (CO, Art. 543).

Unless otherwise provided for in the partnership agreement, the personal creditors of one partner may only execute against the liquidating interest of their obligor. However, the partners are jointly and severally liable for the liabilities entered into jointly by the simple partnership or their representative (CO, Arts. 544 and 548).

A simple partnership is terminated if it has attained the purpose for which it has been formed, by agreement, death, incapacity or bankruptcy of a partner, dissolution for cause ordered by the court, and, in some circumstances, giving 6 months' notice in good faith and not at an improper time. The partners remain, after the dissolution of the simple partnership, liable to third parties for obligations of the simple partnership (CO, Arts. 545 and 551).

The simple partnership is not subject to income or capital taxation. Profits of the simple partnership are taxable income of the respective partners. Assets of the simple partnership are subject to the net wealth tax of the respective partner.

### 2.3 General partnership

A general partnership is a commercial company in which two or more individuals (legal entities cannot be partners) unite under a common firm name to exercise a business activity according to commercial principles (CO, Art. 552 et seq.). All the partners are liable, to the extent of their private assets, for the obligations of the general partnership. General partnerships are formed under a partnership agreement and must be entered in the Register of Commerce, but they are not legal entities nor, as a rule, taxable entities.

The company name must include the family name of at least one partner and indicate the existence of the general partnership (CO, Art. 947).

The relationship between the partners is laid down by the partnership agreement or, in the absence of an agreement, is governed by the rules for simple partnerships, with certain modifications relating to accounting and profit distribution (CO, Arts. 557-561).

A general partnership is not a separate legal entity. Nevertheless, it can acquire rights and assume liabilities, and it has standing to sue and to be sued (CO, Art. 562). The general partnership is liable for torts committed and legal transactions carried out by a partner when acting in a legally binding way for the general partnership (CO, Art. 567).

Restrictions on the representation of the partnership must be entered in the Commercial Register. Otherwise, third parties may assume in good faith that the individual partner is entitled to act for the general partnership. Partners may be limited in their right to represent the general partnership with cause. Third parties may be appointed to act for the general partnership only with the consent of all partners (CO, Arts. 563-565).

The partners are jointly and severally liable with the whole of their property for all debts of the partnership (CO, Art. 568). A new partner is also liable for pre-existing liabilities of the partnership. Bankruptcy of the general partnership does not entail bankruptcy of the individual partners, nor vice versa (CO, Art. 571). In order to satisfy or secure their claims, the obligees of the general partnership are entitled to satisfy their claims out of the partnership's assets to the exclusion of the respective partners' personal obligees (CO, Art. 572).

A partner may only be held liable for claims against the partnership and may only be sued if the partnership is bankrupt, dissolved or executed and if the creditors have not been satisfied. This does not prejudice a partner's personal guarantee (CO, Arts. 568-573).

With certain exceptions the rules governing the dissolution of a simple partnership also apply to the dissolution of a general partnership. A general partnership can be dissolved if it declares bankruptcy. The partners being entitled to act for the general partnership take care of

the liquidation. If a general partnership is dissolved, the partners, in general, may appoint special liquidators. After the liquidation, the company name is deleted from the Commercial Register. The general partnership's books and documents must be deposited for 10 years in a place determined by the partners or, in the case of disagreement, at the office of the Commercial Register (CO, Art. 574 et seq.).

The general partnership is not subject to any taxes. However, profits of this business organization represent a part of the taxable gross income of the partners in question. The capital of the general partnership is subject to the individual net wealth tax of the partners.

### 2.4 Limited partnership

A limited partnership is an association of persons at least one of whom is liable to the creditors to the extent of all his assets; the other partner or partners are liable only up to the amount they have contributed to the limited partnership's capital. Only individuals may be partners with unlimited liability; entities and commercial companies that are not legal entities, as well as individuals, may join as partners with limited liability (CO, Art. 594 et seq.).

The formation of a limited partnership is similar to that of a general partnership. The company name must include the last name of at least one general partner and indicate the existence of the limited partnership (CO, Art. 947).

A partnership agreement defines the conditions of the relationship among the partners. In the absence of such an agreement, the provisions for general partnerships are applicable. In contrast to the general partnership, the general partners are in charge of managing the partnership whereas the limited partners have neither a right nor an obligation in this regard. Limited partners are entitled to receive a copy of the balance sheet and the profit and loss statement, which may be audited by them or by an independent auditor (CO, Arts. 598-601).

A limited partnership may acquire rights and incur liabilities, sue before courts, and may be sued (CO, Art. 602).

Limited partners are responsible for the liabilities of the partnership up to the amount of their contributions, unless they, or the limited partnership with their knowledge, have indicated towards third parties that they would be liable for a higher amount (CO, Art. 608). Limited partners are liable without limitation in the following cases (CO, Art. 605 et seq.):

- for transactions concluded by them on behalf of the limited partnership, without an express statement claiming that they acted as agents or under a power of attorney;
- for liabilities incurred before the registration of the limited partnership or of the limitation of their contributions in the Commercial Register, unless the creditor knew of their actual status; or
- if the last names of the limited partners form part of the limited partnership's firm name.

Generally, the provisions applicable for general partners in a limited partnership are the same as those for partners in a general partnership.

The provisions for dissolution and liquidation of a general partnership are applicable to a limited partnership, with the exception that the death or the incapacity of, or the establishment of a guardianship for a limited partner, does not cause dissolution of the limited partnership (CO, Art. 619).

Profits of the limited partnership are taxable income of the partners. The capital of the limited partnership is part of the partners' personal wealth and as such is subject to the cantonal and communal net wealth tax.

### 3 Legal entities

#### 3.1 Company limited by shares

The company limited by shares is the most widespread form of organization for business purposes in Switzerland. Based on its importance in practice, it is explained in detail below.

The corporation is characterized by the existence of a minimum capital divided into shares, which are usually freely transferable, and by the fact that it confers a limited liability on its shareholders. Shares may be paid up either in cash or in kind.

Companies limited by shares may be established for non-commercial as well as commercial purposes (CO, Art. 620).

##### 3.1.1 Formation

At least three founders, either individuals or legal entities, are necessary to form a company. If subsequently the number of shareholders falls below the minimum of three, a judge may, at the request of a shareholder or creditor, declare the dissolution of the company unless it takes corrective action within a reasonable period of time (CO, Art. 625). Such legal action has never, in practice, been required. As such, a company limited by shares with only one shareholder is a common form of business organization.

Founders and shareholders are not subject to any nationality or residence requirements. However, members of the board of directors must be shareholders and the majority of these members must have Swiss citizenship and be domiciled in Switzerland (CO, Arts. 707 and 708).

The company limited by shares is formed at the incorporation meeting, which is held in the presence of all the shareholders and a public notary. The founders declare that the capital stock is validly subscribed and that the promised contributions have been made. Afterwards, the articles of incorporation are adopted and the corpo-



rate bodies (board of directors, auditors, etc.) are appointed. Finally, a notarized deed is drawn up recording the resolutions of the meeting (CO, Art. 629 et seq.).

After incorporation, the company must be registered in the Commercial Register (CO, Art. 640). Companies become legal entities upon registration. This registration is published in the *Swiss Official Business Gazette*. The Commercial Register discloses details such as the purpose of the company, the name of the members of the board of directors and of the persons authorized to represent the company (CO, Art. 641), but not necessarily the names of its founders. Shares may not be issued prior to registration (CO, Art. 644).

### 3.1.2 Share capital

A company is required to have a minimum share capital of CHF 100,000, divided into shares with a nominal value of not less than CHF 0.01 (CO, Art. 621 et seq.). The issue price for each share may not be lower than the nominal value (CO, Art. 624). One fifth of the nominal value of the capital, but not less than CHF 50,000, must be paid in before the incorporation meeting (CO, Art. 632). The balance is payable on call. All shares must be subscribed at the time of formation (CO, Art. 633).

Capital contributions may be in cash or in kind. If in kind, the company must have access to such assets immediately after its registration. The articles of incorporation must describe the property, its value, the shareholder from whom it is received, and the number of shares issued in return (CO, Art. 634). The acceptance by the company of contributions in kind requires the approval of at least two thirds of the shares represented at the incorporation meeting (CO, Art. 704).

There are three possible ways to increase the share capital:

(1) Ordinary increase of capital

An increase of the share capital may be agreed upon by the general meeting of shareholders, and be carried out within 3 months by the board of directors (CO, Art. 650).

(2) Authorized increase of capital

A general shareholders' meeting may authorize the board of directors to increase the share capital within a period of not more than 2 years following the authorization. It is within the competence of the board of directors to decide if, when, and to what extent the capital is increased (CO, Art. 651).

(3) Capital increase subject to a condition

The general meeting may decide on an increase of capital subject to a condition by amending the articles of incorporation to provide for a conditional capital increase (CO, Art. 653). The purpose of issuing conditional capital is either to secure options and conversion rights in connection with warrant issues or convertible bonds, or to create employee shares. The increase in capital takes place as and when the respective rights are exercised.

The articles of incorporation of a company may provide for the following categories of shares:

(1) Bearer shares

Bearer shares may not be issued until the full nominal value has been paid (CO, Art. 683). They are transferable by delivery and the company may not restrict their transfer. Bearer shares are very popular in Switzerland because many holders prefer the anonymity that they provide.

(2) Registered shares

Registered shares are subscribed as called by the company and do not need to be fully paid on issue. They are transferable by endorsement or assignment, generally without restriction. The company must keep a register of shareholders listing the owners' names and places of residence. The entry must be certified on the share certificate by the board. The purchaser of incorrectly transferred registered shares cannot exercise personal membership rights. The articles may provide for subsequent conversion of registered shares into bearer shares and vice versa (CO, Arts. 622, 630, 685 et seq.).

(3) Restricted transferability of registered shares

There are special rules to restrict the transfer of registered shares. As a rule, the CO distinguishes between non-quoted and quoted companies. In the first case, the company may deny entry into the register of shareholders if there is an "important reason" (listed in the articles of incorporation) or if the company offers to acquire the shares of the seller at a fair market price. "Important reasons" are provisions regarding the shareholder structure that justify the refusal in view of the purpose or economic independence, such as unfriendly takeovers of the company (CO, Art. 685(b)). As a consequence of a non-entry to the register of shareholders, the CO provides that ownership and all rights connected with the shares remain with the seller before the formal registration (CO, Art. 685(c)).

A shareholder of a quoted company may only be rejected if the articles provide for a maximum shareholding (e.g. 2 per cent, 5 per cent of the total share capital) and if the purchaser exceeds this. Non-quoted and quoted companies may both refuse the registration if the shares have been acquired only on a fiduciary basis (CO, Arts. 685(b) and 685(d)). If quoted registered shares are sold at the stock exchange, the bank of the seller has to inform the company of the name of the seller and the number of shares sold (CO, Art. 685(e)).

The purchaser acquires the shareholder rights with the transfer of the shares. Until the entry into the register of shareholders, the voting rights and all connected rights may not be exercised. The new acquirer may, however, use all other rights, especially the monetary rights (CO, Art. 685(f)).

### (4) Preferred shares

The general meeting of shareholders is entitled to issue preferred shares or to convert existing common shares into preferred shares, if stated in the articles of incorporation or a modification thereof. The holders of preferred shares enjoy preferences decided by the shareholders, such as dividends, priority in the proceeds of liquidation and a preferential right to subscribe to newly issued shares. These preferential treatments must be provided for by the articles of incorporation or by an amendment agreed upon at the general meeting (CO, Arts. 627 and 654).

### (5) Voting shares

As a rule, there is one vote for each share. However, because shares of different nominal value may be issued, each vote may not represent the same amount of nominal value. Shares with privileged voting rights may, therefore, provide the decision-making power within a company to shareholders that represent a financial minority. The nominal value of other shares must not exceed ten times the nominal value of the voting shares (CO, Art. 693). In this case, shares which have a smaller nominal value than other shares of the company may be issued only as registered shares.

### (6) Profit-sharing certificates

The articles of incorporation may foresee profit-sharing certificates in favour of persons who have an interest in the company through previous capital contributions, shareholdings, creditors claims, employment, etc. Profit-sharing certificates may grant rights to a share in profits, a share in the liquidation proceeds, or rights to subscribe to newly issued shares. They do not procure any membership rights. Profit sharing certificates may neither

have a nominal value nor be issued in exchange for contributions that come under the heading of assets in the balance sheet (CO, Art. 657).

#### (7) Participation certificates

Participation certificates are non-voting shares, the holder of which has essentially the same status as a shareholder, except the right to vote. The participation capital has to be equal to or less than twice the amount of the share capital (CO, Art. 656(a) et seq.).

### 3.1.3 Shareholder

The general shareholders' meeting is the supreme corporate body of the company limited by shares and is composed of all shareholders. There are two types of general meetings:

- ordinary general meetings, to be held annually, not more than six months after the close of the business year; and
- extraordinary general meetings, to be held whenever required.

A general shareholders' meeting has the right to adopt and amend the articles of incorporation, to appoint directors and auditors, to approve the financial statements and the directors' report, to ratify certain decisions of the board and, in general, to make all important decisions that are not delegated to any other body. The shareholders must also approve the board's proposal for the distribution of annual profits (CO, Art. 698).

A general shareholders' meeting is called by the board of directors or, if the board fails in this duty, by the auditors. One or more shareholders, representing a total of at least 10 per cent of the share capital, may, at any time, request the calling of an extraordinary general shareholders' meeting. The request must be made in writing, indicating the purpose of the meeting (CO, Art. 699 et seq.).

The CO distinguishes between two kinds of shareholders rights: financial rights and personal membership rights.

Shareholders may not be deprived of their acquired financial rights without their consent. Financial rights include the right to subscribe to newly issued shares, to receive dividends and a share of the liquidation proceeds (CO, Art. 660 et seq.).

Moreover, shareholders have personal membership rights. Personal membership rights include the following rights:

(1) Attendance at general shareholders' meetings

Shareholders exercise their rights at general shareholders' meetings. Every shareholder may attend meetings in person or be represented by a proxy. The holder of bearer shares, or any proxy of the holder, may attend if the share is presented, but a holder of registered shares may only be represented by a proxy if a written proxy form is produced (CO, Arts. 689 and 698 et seq.).

(2) Voting rights meeting in proportion to the total nominal value of their shares

In general, the shareholders exercise their voting right at the general shareholders' meeting (CO, Art. 692).

(3) Information to shareholders

Shareholders are entitled to review the financial statements, which must be available for inspection at the registered address of the corporation at least 20 days prior to the annual general shareholders' meeting. Any shareholder may request to be sent a copy before the meeting (CO, Art. 696).

At the general shareholders' meeting, any shareholder is entitled to request information from the board of directors concerning the affairs of the company and from the auditors concerning the execution and the results of their examination (CO, Art. 697).

### 3.1.4 Board of directors

The board of directors manages the company limited by shares insofar as it has not delegated its powers to the management. The board of directors is composed of one or more individual directors who must be shareholders. Furthermore, a majority of board members must be Swiss citizens residing in Switzerland. If the board consists of a single member, he or she must be a Swiss citizen residing in Switzerland (CO, Art. 707 et seq.).

The directors are elected at a general shareholders' meeting for a period fixed by the articles of incorporation, which by law may not exceed 6 years. The directors may, however, be re-elected indefinitely (CO, Art. 710). The articles of incorporation may require that, during their term of office, the directors deposit a specified number of shares at the company's registered address. This is to protect the company against any damages caused by the directors in the exercise of their duties.

The board may delegate part of its authority to either an executive committee or to individual directors, officers or agents. At least one director must have unrestricted authority to represent the company. The board designates the individuals authorized to represent the company vis-à-vis third parties and determines the signatory powers (CO, Art. 718 et seq.).

The board is responsible for the organization of general shareholders' meetings. It gives the necessary instructions to management for the proper conduct of the business and supervises those authorized to act on behalf of the company. It is the primary responsibility of the board, although generally delegated to management, to keep the accounting records and to prepare the annual financial statements. In addition, the board is required to submit a written annual report on the corporation's financial position and the results of its activities to each ordinary general shareholders' meeting.

### 3.1.5 Auditors

The general shareholders' meeting elects one or more independent auditors who may be individuals or legal entities but who are required to be professionally qualified. At least one auditor must have a domicile, registered office or registered branch in Switzerland. The auditors may not serve as directors nor be otherwise employed by the company, nor may they assume managerial functions for the company (CO, Art. 727 et seq.).

The auditors must report on whether the accounting records and the financial statements, as well as any proposal concerning the appropriation of available profit, comply with the law and the articles of incorporation (CO, Art. 728).

If the auditors, in the course of their examination, find violations either of law or of the articles of incorporation, they report this in writing to the board of directors and, in serious cases, to the general shareholders' meeting. In the event of obvious over-indebtedness, the auditors must notify a judge of the commercial court if the board fails to do so (CO, Art. 729(b)).

Auditors are liable to the shareholders and creditors for damage caused by intentional or negligent failure to perform their duties. They are required to attend each general shareholders' meeting. However, in practice they may be released from this duty by a unanimous decision of the shareholders' meeting (CO, Art. 729(c)).

## 3.2 Company with unlimited partners

A company with unlimited partners (hereinafter: KoAG) is a legal entity combining the features of a company and a limited partnership. The capital is divided into shares. One or more shareholders are liable jointly to the extent of all their assets for the obligations of the KoAG, and the others are liable only to the extent of their shares (CO, Art. 764 et seq.).



Unless specifically provided otherwise, the rules governing the company limited by shares are applicable (CO, Art. 764). The KoAG name must contain the family name of at least one partner with an addition indicating the existence of a company (CO, Art. 947).

The names of the general partners must be stated in the articles of incorporation. The general partners conduct the business, act and sign for the KoAG with unlimited partners and form the board of directors (CO, Art. 765). In general, the majority of the general partners must be resident Swiss citizens. At least one general partner must be domiciled in Switzerland.

The KoAG with unlimited partners is by itself subject to taxation.

### 3.3 Limited liability company

The limited liability company (hereinafter: GmbH) is a separate legal entity incorporated by two or more individuals or commercial companies under a common company name with a predetermined capital. The GmbH may be founded for conducting a trading, manufacturing or other business carried out in a commercial manner or for other business purposes (CO, Art. 772 et seq.).

The registered capital must amount to at least CHF 20,000 and must not exceed CHF 2 million (CO, Art. 773). The amount of the company contribution (*Stammeinlage*) shall be at least CHF 1,000 or a multiple of CHF 1,000. Every shareholder has to pay in cash or in kind at least 50 per cent at the time of foundation of the GmbH (CO, Art. 774).

The articles of incorporation must contain provisions on the GmbH name, the domicile of the GmbH, the purpose of the enterprise, the amount of the registered capital contribution of each member and the form in which the GmbH shall publish its notices (CO, Art. 776). There are no restrictions as to the nationality of the members, but at

least one of the managing officers of the limited liability company must have his or her domicile in Switzerland (CO, Art. 813).

The GmbH is incorporated by the founders in a publicly authenticated deed which includes the articles of incorporation and a declaration on the part of the shareholders stating that they have subscribed all capital contributions and that the amount required by law or by the articles of incorporation has been paid up. The limited liability company, like for example the company limited by shares, is incorporated upon its entry into the Commercial Register (CO, Arts. 779 and 783).

All capital contributions and alterations thereof must be recorded and communicated to the Commercial Register. In contrast with the anonymity afforded to the company in the case of a GmbH, the names of the shareholders are, therefore, publicized in the Commercial Register. The allotment of a share requires a public deed and becomes effective with respect to the GmbH only after it has been notified and the transfer has been entered in the share register. Unless otherwise stated in the provisions of the articles of incorporation, the entry requires the consent of at least three quarters of the members representing at the same time three quarters of the capital of the limited liability company (CO, Arts. 789-792).

The members' meeting is the supreme body of the GmbH. Every member has one vote for each CHF 1,000 of his or her contribution, unless the articles of incorporation provide otherwise. The members' meeting has exclusive competence to take certain measures, e.g. the adoption and amendment of the articles of incorporation, appointment and removal of managing officers and auditors, adoption of the balance sheet and the profit and loss statement, distribution of profits and discharge of managing officers (CO, Art. 808 et seq.).

As a rule, all members participate jointly in the management and the representation of the GmbH, unless the articles of incorporation or a resolution of the members' meeting provides otherwise. As a result, management may be delegated to non-members (CO, Arts. 811 and 812). The rules for the company limited by shares apply with certain

modifications with respect to representation of a limited liability company (CO, Art. 814).

The dissolution of a limited liability company is effected by a publicly authenticated resolution of at least three fourths of the members, representing at least three fourths of the registered capital. It is also effected in the event of bankruptcy, by court judgment or for other reasons provided by the law or the articles of incorporation (CO, Arts. 820 and 822). The same provisions applying to the company limited by shares apply to the liquidation procedure of a limited liability company.

### 3.4 Cooperative

A cooperative is a legal entity with variable capital that is organized primarily to promote or safeguard specific economic interests of its members through mutual aid. Membership, which is unlimited, is open to commercial companies as well as to individuals. At least seven members must participate at the formation of a cooperative (CO, Art. 828 et seq.).

The capital is not fixed in advance and the liability of the cooperative is limited to its own assets unless the articles of incorporation contain express stipulations to the contrary (CO, Arts. 828 and 868).

The articles of incorporation may provide for certificates of membership. The certificates are issued in the members' names. The transfer of these certificates of membership confers membership rights to the transferee if a resolution of admittance is passed (CO, Arts. 849, 852 and 853).

The general members' meeting is the supreme authority of the cooperative, having the following powers: to adopt and to amend the articles of incorporation; to elect members of the administration and auditors; to approve and accept the profit and loss statement and balance sheet; to distribute profits and to grant releases to members of the administration; and to exercise other powers provided for by law

or by the articles of incorporation (CO, Art. 879). The majority of the members of the administration must be members and Swiss citizens residing in Switzerland (CO, Art. 895). The auditors must examine the conduct of business and the financial statements (CO, Art. 906). The members of the administration, the members of the executive committee, the auditors and the liquidators are liable for damages due to negligence or wilful breach of their duties (CO, Art. 916 et seq.).

A cooperative can admit new members at any time. As long as the winding up of the cooperative has not been decided upon, the members may withdraw at any time, unless there are restrictive conditions set up in the articles of incorporation (CO, Arts. 839 and 842).

The dissolution takes place as provided for in the articles of incorporation upon resolution of the general members' meeting, in the case of bankruptcy or in other cases provided by law (CO, Art. 911).

At the federal level (DBG, Art. 49), cooperatives are subject to regular income taxes like legal entities (e.g. corporation). According to the StHG, cooperatives are subject to the same income and capital taxes.

## 4 Other legal entities

### 4.1 Association

Associations are foreseen for organizations that pursue non-commercial purposes and are active in political, religious, scientific, artistic, charitable and social activities (CC, Art. 60).

In reality, however, many associations have been established to pursue economic goals, e.g. trade unions and professional organizations.

Non-profit associations may carry out an industrial or commercial activity (CC, Art. 61). However, such additional activity must be of

an ancillary function and must not be the principal goal of an association.

When the constitution of an association has been passed and its directorate appointed, it can be registered in the Commercial Register (CC, Art. 61). Nonetheless, registration is compulsory for associations carrying on a commercial activity (CC, Art. 61).

The articles of incorporation must be drawn up in writing and state the intention to have a corporate existence, the objectives, the capital and the organization of the association (CC, Art. 60).

Whether registered or not, the association does not have any company name. Therefore, the legal provisions for the protection of company names (CO, Art. 956) do not apply. The name of the association is protected by the general provisions (CC, Art. 29 et seq.).

In general, associations that act in the public interest are exempt from federal as well as cantonal taxation. Otherwise, associations are taxed at a flat rate of 4.25 per cent at the federal income tax level. The cantons usually provide for a reduced flat rate for income as well as for net wealth tax purposes. However, membership fees are not subject to taxation.

## 4.2 Foundation

In order to constitute a foundation it is necessary to set apart a fund for a specific objective (CC, Art. 80). The intention of the founder is the essential part of a foundation.

In contrast to all other forms of organization, the foundation is not an entity constituted by members. Moreover, it is an institution without any members and endowed with its own assets to achieve a specified objective.

In principle, the objective is fixed and cannot be changed after the incorporation of the foundation. Fixed objectives and the absence of

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members make any provision for a specific decision-making process unnecessary. The managers of the foundation have, generally, no decision-making power, only an executive function.

A foundation must be constituted in the form of a publicly authenticated deed or by a will. The registration in the Commercial Register is only of declaratory nature.

Family and ecclesiastical foundations do not need to be registered (CC, Art. 87).

Foundations established with the intention of violating the rights of creditors or heirs can be opposed by the injured party (CC, Art. 82). The same rules are applicable as in the case of a gift to a third party where the heirs of the donor may have the right to revoke the donation (CO, Art. 250).

The instrument of the foundation must indicate its organs and the method of its administration (CC, Art. 83). At least one body must be defined to manage and represent the foundation according to the objectives (CC, Art. 81). An individual or a legal entity may discharge the function of this administrative body. In the absence of organizational provisions in the instrument of foundation, the supervisory authority must make all the necessary provisions (CC, Art. 84). If the foundation cannot be organized in accordance with its object “e.g. if the fund is clearly not adequate for the carrying out of the foundation’s object”, the supervisory authority must devote the fund to another foundation that has a similar purpose, unless the founder objects and the instrument of foundation contains provisions to the contrary (CC, Art. 83).

Foundations are subject to the supervision of the administrative body (confederation, canton, commune; CC, Art. 84). The supervisory authority must ensure that the fund is applied in accordance with the objective of the foundation. The competent cantonal authority or the federal supervising authority can institute changes in the foundation’s organization, if such changes are urgently required for the preservation of the fund and the maintenance of the foundation’s objective (CC, Art. 85). The same authorities may

modify the objective of the foundation where the objective has acquired a totally different significance or effect, so that the foundation has manifestly ceased to carry out the intentions of the founder.

The dissolution of a foundation takes place de jure if its objective has become unattainable. It is dissolved by a judge where its objective has become illegal or immoral (CC, Art. 88). The governing bodies do not have any right to dissolve voluntarily a foundation.

Pension funds and other welfare schemes of corporations are mostly organized in the form of a foundation. For these specific types of foundations, special provisions are additionally applicable (CC, Art. 89<sup>bis</sup>).

Staff welfare and other welfare foundations are exempt from income and capital taxes. Ordinary foundations are taxed at a flat rate of 4.25 per cent at the federal direct tax level. For cantonal tax purposes, foundations are usually also taxed at a reduced tax rate. However, contributions are neither subject to federal nor to cantonal income taxes.