

International Co-operation and Tax Administration Division
Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
2 rue André-Pascal
75775, Paris, Cedex 16, France
Submitted by email: taxpublicconsultation@oecd.org

Zurich/Geneva, 28 April 2022

Statement of SwissFoundations, the association of Swiss grant-making foundations, in the context of the public consultation on the adaptation of the Common Reporting Standards (CRS) regarding the treatment of non-profit Entities

Dear Members of the OECD

With over 13,500 charitable foundations Switzerland is one of the leading countries in terms of the quantity of foundations. **SwissFoundations** (www.swissfoundations.ch) is the largest Swiss umbrella organization of grant-making foundations.¹ Its now more than 200 members are responsible for over one third of all annual foundation donations in Switzerland. As the voice of Swiss grant-making foundations, we are strongly committed to a liberal legal framework and thank you for the opportunity to give an opinion on the adaptation of the Common Reporting Standards (CRS), which we gladly accept.

The OECD Common Reporting Standards's main purpose is to enable tax authorities to automatically exchange certain types of information on an annual basis to better detect tax evasion and tax offences and is primarily aimed at banks and other institutions providing financial management services. Under the current wording, public-benefit foundations as well as Non-Profit Organisations (NPOs) can qualify as Financial Institutions (FI) and hence be put under additional reporting requirements.

We welcome that the OECD consultation on possible amendments to the CRS recognises that this can lead to "highly undesirable outcomes" and will focus our contribution to provide input on the specific questions on p. 61 and 62 of the consultation document. The OECD asks there for measures or criteria that could be envisaged to ensure that genuine non-profit Entities are effectively excluded from reporting obligations as an Investment Entity in a manner that would not give rise to potential circumvention.

¹ A grant-making foundation is a non-profit foundation that does not rely on donations or endowments to finance its activities, as it has its own assets and thus finances its grant-making activities with the income generated by those assets (or, in the case of endowment foundations, with the assets themselves).

SwissFoundations is clearly in favour of exempting non-profit foundations from the reporting obligations of the Common Reporting Standard (CRS) as there is no risk of tax evasion.

In addition to the existing criteria currently provided for the qualification of non-profit organisations as active Non-Financial Entities (NFEs), SwissFoundations proposes the following as **additional and cumulative** criteria:

- **the supervision by a state authority as well as**
- **registration in a state register**

Swiss public-benefit foundations already fulfil these requirements today. Through these criteria, **the risk of tax evasion can be excluded**. As there is no risk of tax evasion with these additional criteria, **reporting obligations do not bring any added value**. As the voice of Swiss grant-making foundations, SwissFoundations is strongly committed to ensuring that **public-benefit funds continue to flow to the public good in the future** and are not withdrawn from public-benefit status due to useless reporting costs.

Public-benefit foundations

Public-benefit foundations use their own financial and non-financial resources for the public good as opposed to private interests. These organisations have their own assets, which are dedicated to a public-benefit purpose. Philanthropic organisations support programmes from which we all benefit, in areas such as education, health, science, environment, culture and international development.

SwissFoundations advocates the creation of an exemption clause from the reporting obligations for public-benefit foundations for the following reasons:

No risk of tax evasion

The subordination of public-benefit foundations to the CRS cannot be justified from a Swiss perspective, as the legal structure of the foundations and existing control mechanisms rule out their use for tax evasion:

- Public-benefit foundations under private law must be entered in a **public register**. Only then do they acquire their legal personality.
- Non-profit foundations are subject to **public supervision** (foundation supervisory authority and, as a rule, tax authorities) and must submit an audited annual report consisting of an activity report and annual financial statements every year.
- Non-profit foundations are generally subject to the **audit obligation**.
- In order to obtain **tax exemption**, public-benefit foundations must meet **strict requirements**.
- Public-benefit foundations are clearly distinct from private interest foundations such as family foundations/trusts.
- Foundations are **independent special-purpose funds with their own legal personality**. The assets belong **exclusively and irrevocably** to the foundation. Neither the founder nor the foundation board members or beneficiaries have any claim to them. There is no beneficial owner.
- In the event of the liquidation of a public-benefit foundation, **reversion of the assets to the founder or his legal successor is also excluded**. In this case, it must be transferred to another tax-exempt organisation with an identic or similar purpose.

- The **foundation board members are not decision-makers**, but "serving" persons who must implement the foundation's purpose in a fiduciary capacity. They are fully liable for their actions.
- These characteristics of the Swiss public-benefit foundation are known to the OECD.² It would therefore be wrong to classify founders and foundation board members as "equity beneficial owners".
- The **Swiss Federal Council** is also of the opinion that public-benefit foundations are *not* suitable as instruments for tax evasion. On January 1st, 2017, it created exemptions from AEOI in Swiss law (Articles 5 and 6 AEOI and Articles 10 and 11 AEOI³) for public-benefit foundations and their accounts, and even explicitly confirmed this in the first revision of the AEOI law in 2019: **public-benefit foundations are subject to sufficient controls** and cannot be misused as instruments for tax evasion. The costs associated with the reporting obligations would unnecessarily burden these legal institutions.⁴
- Foundations can also not be misused as instruments for money laundering. **The current regulations for foundations, especially those on transparency, are considered adequate by the Financial Action Task Force (FATF)**. The existing regulation, with the obligation to be entered in the public register and to designate an auditor, as well as state supervision are considered sufficient.⁵ Supervision by a state authority and entry in a register are precisely the additional criteria that SwissFoundations also proposes for the CRS.

Consequences for public-benefit foundations

If no exception is created for public-benefit foundations, they may qualify as a reportable FI. This has the following consequences:

- The CRS lacks a threshold value according to which, for example, only legal entities with a certain amount of assets can fulfil the "income test"⁶. **Very small foundations may also be affected**.
- The additional CRS reporting obligations lead to an **outflow of funds that should not be underestimated and that are actually intended for public-benefit purposes**. The Federal Department of Finance estimates the implementation costs at CHF 5,000-10,000 and the annual costs for ongoing reporting at up to CHF 10,000.⁷ However, in the opinion of SwissFoundations, this is a very conservative estimate. The costs can also be significantly higher. It should be made clear that the know-how for such reporting is largely lacking in the foundation sector, which is why external expertise would have to be requested.
- Given that 80% of Swiss foundations have assets of less than CHF 3 million, they can generally expect a maximum return of CHF 100,000-150,000 per year to finance their grant-making activities. With accounting, fiduciary, auditing, supervisory and other reporting fees and expenses for reporting obligations, these foundations run the risk of having to spend a large part of their income outside their

² Cf. Peer Review Report, Phase 2, p. 66 ff.

³ Ordinance on the International Automatic Exchange of Information in Tax Matters (AEOI Ordinance) of 23 November 2016, SR 653.11, available at <<https://www.fedlex.admin.ch/eli/cc/2016/786/en>> (24 April 2022).

⁴ Message on the amendment of the Federal Act on the International Automatic Exchange of Information in Tax Matters, p. 10 ff., available at <<https://www.news.admin.ch/newsd/message/attachments/59205.pdf>> (24 April 2022).

⁵ Message on the amendment of the Money Laundering Act of 26 June 2019, BBl 2019 5451 ff., p. 5487, p. 5489 available at <<https://www.fedlex.admin.ch/eli/fga/2019/1932/de>> (24 April 2022).

⁶ The requirements of the so-called "income test" are met if the gross income of the foundation is primarily attributable to the investment or reinvestment of financial assets or trading in them.

⁷ Explanatory report of the Federal Department of Finance of 27 February 2019, p. 23, available at <<https://www.news.admin.ch/newsd/message/attachments/55936.pdf>> (24 April 2022).

actual purpose. **The additional financial expense endangers the existence of smaller foundations in particular. This is an alarming signal to the foundation sector and its potential donors.**

- **Even larger foundations would have to spend a great deal of senior staff time ensuring that the management system generates the information required for CRS reporting** and extracting that information from the system in a form that could be used to complete the CRS schema. Moreover, foundations would have to design their own due diligence forms for grant applicants to complete (the models generally in use are designed for genuine FIs, not for NPOs), train their staff to deal with queries from applicants, and delay making grant payments until the beneficiary had provided satisfactory responses to the due diligence questions.
- Public-benefit foundations would have to fulfil a whole series of reporting obligations which are very complex and punishable by law. This increases the liability risks for the foundation boards and **would lead to a drastic reduction in the attractiveness of a foundation board mandate, since most foundation board members in Switzerland work on a voluntary basis and are fully liable with their private assets.**
- The Swiss Foundation Code⁸, which is an important tool in the foundation sector beyond national borders, contains detailed recommendations on the management of foundation assets. According to these recommendations, asset management is generally carried out by external asset managers or banks and only in exceptional cases by the foundation board members itself.⁹ The outsourcing of asset management is therefore recommended to ensure the necessary expertise and to avoid conflicts of interest. **In practice, however, the integration of public-benefit foundations into the CRS will have precisely the opposite consequence as foundations will be tempted to take asset management into their own hands again so as not to qualify as "managed-by"¹⁰ and thus not as FIs. This undermines the principles of Good Foundation Governance.**

How many Swiss foundations would be affected?

Foundations can qualify as FIs if they are to be classified as investment entities because they meet the requirements of "income test" and "managed-by test".

Of the 13,524 foundations, 6,626 are considered so-called grant-making foundations, i.e., foundations that are financially independent because they have their own assets and finance their grant-making activities with the income generated by those assets (or, in the case of endowment foundations, with the assets themselves). Thus, such foundations regularly meet the "income test". Even though around 80% of public-benefit foundations in Switzerland have assets of less than CHF 3 million, in most cases these are now professionally managed or invested. Thus, such foundations also regularly fulfil the "managed-by test".

Reporting obligations only arise for an FI if there are significant international relations. According to the database of the Center for Philanthropy Studies (CEPS) of the University of Basel, 2,939 foundations are internationally active, i.e. they make grants to foreign recipients. This means that they run the risk of being subject to reporting obligations.

⁸ SPRECHER THOMAS/EGGER PHILIPP/VON SCHNURBEIN GEORG, Swiss Foundation Code, Grundsätze und Empfehlungen zur Gründung und Führung von Förderstiftungen, 4th ed., Basel 2021.

⁹ SPRECHER/EGGER/VON SCHNURBEIN, p. 164.

¹⁰ The foundation must be managed professionally (the so-called "managed-by test"), which is met if the foundation or its assets are managed by a financial institution within the meaning of the AEOI.

According to the CEPS, there are also 1,951 foundations with one or more members of the foundation board who are foreign nationals. However, surveys on how many of these foundation boards also have their tax domicile abroad are still lacking. Here, too, reporting obligations are to be expected.

It is therefore difficult to estimate how many foundations would actually be affected by the reporting obligations. **According to estimates made by SwissFoundations, around 3,000 foundations are likely to be affected.**

Assuming that the annual reporting costs amount to up to CHF 10,000 (according to the estimate of the Federal Department of Finance, see above) and that approximately 3,000 public-benefit foundations are affected, **the foundation sector would be burdened with total annual costs for CRS reporting of up to CHF 30 million. This amount is thus lost annually to philanthropy in Switzerland without any added value being created.**

Switzerland as an example

Consultation with various European foundation associations shows that numerous countries currently consider that their non-profit organisations should not be subject to reporting requirements.

This is also the case in Switzerland: In Switzerland, **exemption provisions from the AEOI** (Articles 5 and 6 AEOI and Articles 10 and 11 AEOI¹¹) **were introduced in Swiss law** on 1 January 2017 for public-benefit foundations and their accounts. During the first revision of the AEOI law in 2019, the Swiss Federal Council explicitly **confirmed: that public-benefit foundations are under sufficient control (supervision, registration) and that they cannot be misused as instruments for tax evasion. The costs associated with the reporting obligations would thus unnecessarily burden these legal institutions** (see above).

Exemption also with FATCA

In addition, the Foreign Account Tax Compliance Act (FATCA) agreement with the US - which to a certain extent served as a model for the AEOI - also contains an exemption provision for non-profit institutions.¹² Under FATCA, non-profit entities are considered deemed compliant financial institutions and therefore not subject to reporting obligations. There have not, as far as SwissFoundations is aware, been any indications that this was misused for purposes circumventing FATCA reporting obligations.

CRS implementation

To achieve a global level playing field, however, it is necessary to specify the requirements for public-benefit foundations under the AEOI.

To ensure that foundations are in no way misused as instruments for tax evasion, SwissFoundations proposes the application of two cumulative criteria in addition to the existing criteria that are currently provided for the qualification of non-profit organisations as active NFEs:

- **Supervision by a state authority**
- **Registration in a state register**

Tax evasion is made *impossible* by these two criteria.

¹¹ Ordinance on the International Automatic Exchange of Information in Tax Matters (AEOI Ordinance) of 23 November 2016, SR 653.11, available at <<https://www.fedlex.admin.ch/eli/cc/2016/786/en>> (24 April 2022).

¹² Cf. Annex 2/II./B./para. 1 of the FATCA agreement.

The above proposal can be achieved through the following two options:

1. The issue could be addressed by including tax exempt public-benefit foundations that are registered and under supervision as non-reporting financial institutions according to section VIII B.
2. The issue could also be addressed by extending the carve-out foreseen in the definition of Investment Entities with respect to active NFEs to include those entities that are Active NFEs by virtue of being a non-profit entity, as described in subparagraph section VIII D(9)h. The carve-out could be limited to those non-profit entities, which are supervised by a state authority and registered in a state register. This would have the additional benefit of aligning the treatment of non-profit entities under the CRS and FATCA.

Conclusion

SwissFoundations is clearly in favour of exempting public-benefit foundations from the reporting obligations of the Common Reporting Standard (CRS).

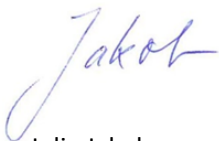
As additional criteria for exemption from the reporting obligations, SwissFoundations proposes **supervision by a state authority and entry in a state register**. Swiss public-benefit foundations already fulfil these requirements today. The risk of foundations being misused as instruments for tax evasion is thus excluded.

If abuse is ruled out, **reporting obligations bring no added value**. As the voice of Swiss grant-making foundations, SwissFoundations wants to ensure that **public-benefit funds continue to be used for the public good** and are not withdrawn from the public good because of disproportionate reporting costs.

The proposal made by SwissFoundations can be implemented in two ways. On one hand tax-exempt public-benefit foundations that are registered and under supervision could be included as non-reporting financial institutions according to section VIII B. On the other hand the carve-out foreseen in the definition of Investment Entities could be extend with respect to active NFEs to include those entities that are Active NFEs by virtue of being a non-profit entity, as described in subparagraph section VIII D(9)h.

We hope that our concerns will be heard, and we thank you for your consideration.

Kind regards,



Julia Jakob
Co-CEO SwissFoundations



Ivana Savanovic
Law & Politics SwissFoundations