

Social Enterprises and Benefit Corporations in Switzerland



Henry Peter and Vincent Pfammatter

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H. Peter (✉) · V. Pfammatter

Geneva Centre for Philanthropy, University of Geneva, Geneva, Switzerland

e-mail: henry.peter@unige.ch; vincent.pfammatter@sigmalegal.ch

1 Introduction

In today's world, it appears obvious that corporations may not continue to operate with the maximization of shareholder's profits as their sole objective. As a sign of the times, the influential Business Roundtable,¹ an association of US leading companies working to promote the US economy, has recently issued a statement² according to which they were now committed to considering the interests of *all* stakeholders when conducting their business (customers, employees, suppliers, communities, and shareholders). This statement was signed by almost 200 CEOs, which pledged to lead their companies in consideration of these principles,³ stating, in sum, that they were shifting from a shareholder-centered to a multi-stakeholder approach of business.

In many ways, this corresponds to what social entrepreneurs and B corp advocates had been promoting for years, if not decades. Although criticisms have been raised as to the real intentions of the CEO's Business Roundtable Statement,⁴ it is nevertheless a significant step forward, as *shareholder primacy* has been its official position since 1997.⁵ How to achieve such results is now the question.

Without any doubt, B corps, benefit corporations and other types of social enterprises are part of the solution, and the objective of this contribution is to analyze how these structures and labels fit today in Switzerland, and what opportunities and likely evolution the Swiss legal system offers in this regard.

As a matter of fact, there is not a single definition of *benefit corporations*, but it is commonly admitted that they are companies that have a multi-stakeholder approach at heart and consider not only economic parameters, but also social and environmental ones.

Across jurisdictions, and depending on their specificities, they are referred to as blended enterprises,⁶ social enterprises,⁷ for-benefit enterprises,⁸ hybrid entities,⁹ dual- or multipurpose entities, flexible- or social purpose corporations, etc. In the present contribution, we will use the term "*benefit corporation*" as the overarching term.

¹<https://www.businessroundtable.org> (18/01/22).

²<https://opportunity.businessroundtable.org/ourcommitment> (18/01/22).

³See also McGregor (2019).

⁴B corp leaders have publicly called the leaders of the Business Roundtable to get to work and "to put their words into action," by publishing a full-page print in The New York Times of 25 August 2019, see article here <https://bthechange.com/dear-business-roundtable-ceos-lets-get-to-work-25f06457738c> (18/01/22); Rinne (2019).

⁵Winston (2019).

⁶Brakman Reiser (2010), pp. 105 et seq.

⁷Ventura (2019), p. 170.

⁸Sabeti (2011).

⁹Pfammatter (2019), pp. 175 et seq.

Certain countries have introduced specific legal forms to meet the needs of benefit corporations and encourage their development. This is the case of the United States of America, where a number of states have enacted new legal forms such as Low-Profit Limited Liability Company (L3C), Social Purpose Corporation (SPC) or Public Benefit Corporation.¹⁰ It is also the case of Italy, which introduced the *società benefit* (SB) in 2016,¹¹ Columbia that enacted in 2018 the *Sociedades de Beneficio e Interés Colectivo* (BIC),¹² or France, where in 2019 the hybrid model of “*entreprise à mission*” has been introduced.¹³

Each of these models show similarities given that they blend the intention of making profits with a non-profit ideology. But they also differ, be it in the predominance of one purpose over the other (is it primarily a profit-making entity, or does the profit serve the non-profit purpose?)¹⁴ or in the legal form they adopt.

At this juncture, a semantic element needs to be clarified. Profit-making purposes are often described with synonyms such as “for-profit,” “economic” or “commercial,” and non-profit-making purposes with words such as “social,” “ideal,” “charitable,” or “non-profit.” For the sake of coherence and simplification, in the present contribution, we will use “*economic purpose*” to encompass all profit-making objectives, and “*ideal purpose*” when describing non-profit-making objectives. These concepts—and definitions—are to be distinguished from the “public utility purpose” which, in Switzerland, is defined and used in tax laws. It must also be distinguished from the “commercial activity,” which can be a mean to achieve a purpose, and not a purpose in itself.

Unlike other jurisdictions, Switzerland’s legislator has decided—so far—*not* to provide for a dedicated legal structure for benefit corporations. And this stance is unlikely to evolve soon, as the Federal Council, Switzerland federal executive body, stated in 2018 that it did not intend to encourage the creation of a new legal structure for benefit corporations, although it supported private initiatives in this sector, such as the B corp movement.¹⁵

In this contribution, we will therefore first focus on the B corp movement in Switzerland, and complete our analysis with a case study. We will then analyze the specificities of the “social enterprise” model, which, in Switzerland are dual-purpose companies sponsored by the state. Given the absence of any specific legal form for benefit corporations, we will then review whether existing legal forms in Switzerland

¹⁰Ventura (2019), p. 171.

¹¹Introduced with the 2016 “Stability Law,” Law No. 208 of December 28, 2015 (G.U. 30.12.2015).

¹²*Sociedades de Beneficio e Interés Colectivo* (BIC) were introduced in Columbia by a new law in July 2018, Ley n° 1901, 18 June 2018.

¹³Law No. 2019-486 of May 22, 2019. On this, see Ventura (2019), pp. 172–173.

¹⁴On this subject, see Brakman Reiser (2010), pp. 105 et seq.

¹⁵See below, section *Legislative initiatives*. Interpellation 13.3689 of Mr. Eric Nussbaumer, member of the Swiss parliament (national council), and related statement of the Federal Council of September 12, 2013. Interpellation 18.3455 of Mr. Fabian Molina, member of the Swiss parliament (national council), and related statement of the Federal Council of 22 August 2018.

may be adopted to satisfy multiple purposes. To this end, we will review the legal contours of corporations (LLC or LTD), cooperatives, and charities, namely, associations and foundations. Before concluding, we will address certain tax-related aspects, as well as past and current legislative initiatives intended to make Swiss law evolve towards a legal structure specific to benefit corporations.

2 The B Corp Movement in Switzerland

Given that Switzerland does not have a specific legal form for benefit corporations, we will first focus on the B corp movement, and how it developed in Switzerland. In this section, we will also analyze the specificities of the “social enterprise” model, which resemble hybrid entities, with the specificity however of being sponsored by the state.

2.1 Generalities¹⁶

The absence, in Switzerland, of a dedicated legal status enabling to address the needs and goals of benefit corporations and the willingness to dispose of internationally comparable criteria has led to initiatives from the private sector, particularly to the birth of assessment standards and “*certification systems aimed at measuring a company’s social and environmental impact.*”¹⁷ The most prominent and well-known of these third-party accountability standards is the B corporation certification of the B Lab organization.¹⁸

B Lab defines itself as a nonprofit that serves a global movement of people using business as a force for good. In B Lab’s view, prosperity and sustainability are indeed not incompatible,¹⁹ and in fact, if one—as it should—adopts a long-term perspective, they complement each other. Launched in 2006 by the American non-profit organization B Lab, the label now exists in over 64 countries around the world, including Switzerland, and more than 3000 companies, spread over 150 industry types, bear the label.²⁰

¹⁶The following section is based on an article, which has been published in ExpertFocus 2019/3, p. 176, by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland.”

¹⁷Ventura (2019), p. 170. In Switzerland, the social economy is also being encouraged through other means, notably the Chambers of social and solidary economies (*Chambres de l’économie sociale et solidaire*), which exist in Geneva, Vaud, and Jura notably.

¹⁸<https://www.bcorporation.net/en-us/movement/about-b-lab> (18/01/22).

¹⁹Richterich (2019).

²⁰Richterich (2019).

The certification is the result of a careful assessment of the company that may be granted by B Lab. Such assessment measures the relevant entity's "*entire social and environmental performance*" and holistically²¹ evaluates how the company's operations and business model impact workers, community, environment, and customers.²² In other words, the B Lab label stands for companies which have, globally, a positive impact on society rather than a focus on the maximization of shareholders' profits. Companies which, in other words, commit to a "triple bottom line approach" to business.²³

The B corp assessment process includes several steps. The starting point is a self-evaluation performed by the company itself, by means of the completion of a thorough form containing 280 questions.²⁴ Various parameters are scrutinized, ranging from the respect of human rights, gender and salary equality and energy management. The result of this self-analysis is a score, which may reach a maximum of 200 points, with a limit set at 80 points to pass the cut.²⁵ A noteworthy requirement in that context is transparency that is required from the company,²⁶ the latter having *inter alia* to disclose (legal) issues it may have had in the past. The second step is that the company must embody its commitments in its articles of incorporation and other corporate documentation, thus making such commitments mandatory for all its stakeholders, including its directors and shareholders.²⁷

The B corp certification is not a one-time effort, but rather an ongoing process and commitment. A first assessment is followed by a continuous monitoring and periodic re-assessment which incentivizes permanent initiatives, aiming at improving the score. In any event, the label should not be seen as an objective in its own, but rather as a mean to measure, compare and improve.²⁸ There are many examples worldwide of commercially successful B corporations, such as Patagonia,²⁹ Ben & Jerry's³⁰ (a group subsidiary of Unilever³¹), Kickstarter,³² or Nature & Découvertes.³³

²¹ Richterich (2019).

²² <https://www.bcorporation.net/en-us/certification> (18/01/22).

²³ Concept developed by John Elkington and other Scholars. Elkington (1994), pp. 90–100. For a summary of this concept, see for instance: Slaper and Hall (2011); Pfammatter and Wynne (2017), p. 43.

²⁴ Richterich (2019).

²⁵ Richterich (2019).

²⁶ B-Corp Certification - Disclosure Questionnaire Documentation.

²⁷ Richterich (2019).

²⁸ Richterich (2019).

²⁹ <https://bcorporation.net/directory/patagonia-inc> (18/01/22).

³⁰ <https://bcorporation.net/directory/ben-and-jerrys> (18/01/22).

³¹ Richterich (2019).

³² <https://bcorporation.net/directory/kickstarter-pbc> (18/01/22).

³³ <https://bcorporation.eu/directory/nature-et-decouvertes> (18/01/22).

It is difficult to find disadvantages to such label, for those who adopt it. One difficulty faced by companies who have adhered to the B corp certification system is that they must live up to the expectations they create. As such, they are more exposed to criticism in case a problem occurs. Another *prima facie* downside is that the certification comes with a cost; however, this should not be seen as a deterrent considering the many upsides of the label.

2.2 B Corps in Switzerland (See Table 1)³⁴

In Switzerland, the B corp movement is quite recent. The first B corp certification was issued in 2014, the only one that year.

As of today, there are close to sixty entities certified as B corps, across all sectors of the industry (see Table: B corps in Switzerland hereafter). Although, it is difficult to draw trends from such a rather limited number of entities, one can note the following:

- *Legal structure*: about two-thirds of the B corps are LTDs, and the remaining third is split between LLCs and cooperatives;³⁵
- *Geographical distribution*: interestingly, most B corps are located in the French-speaking part of Switzerland, while three are in Ticino (Switzerland's Italian-speaking canton) and only six in the German-speaking part, although the latter by far represents the largest part of the country. This might be because B Lab Switzerland,³⁶ the Swiss branch of B corp, is located in Geneva, but perhaps also to a different sensitivity to these issues in the Romandie region, including the fact that Geneva is growingly developing as an international sustainable finance hub;
- *Activity sector*: while B corp in Switzerland belongs to a wide variety of industries and activities, most of them are active in the services' industry. This is in line with the importance of the type of industry mainly represented in Switzerland.

From a legal and corporate perspective, B corps have to find common ground between the existing legal framework and the requirements imposed by the B corp label. In practice, this means that companies must amend their articles of association to reflect the following principles:

³⁴The following section is based on an article that was published in ExpertFocus 2019/3, p. 176, by Vincent Pfammatter, under the title "Hybrid Entities in Switzerland," pp. 175 et seq.

³⁵The website <https://bcorporation.net/certification/legal-requirements> (18/01/22) proposes to choose between an LLC, and LTD or a Cooperative if a Swiss company intends to become a B corp. It does not, however, exclude other legal forms.

³⁶<https://www.blab-switzerland.ch> (18/01/22).

Table 1 B corps in Switzerland^a

#	Name	Legal structure	Sector	Business	Date of certification
1.	Enki Capital	Ltd.	Service	Private equity	2022
2.	Légumes Perchés	LLC	Service	Agriculture/growers	2022
3.	Foound	LLC	Service	Coworking and more	2021
4.	Lukevent	Ltd.	Service	Travel industry	2021
5.	Sigma legal	Partnership	Service	Law	2021
6.	conexkt	LLC	Service	Innovation consulting	2021
7.	SCB Group	Ltd./Group	Service	Renewable energy	2021
8.	Naef Holding	Ltd.	Service	Real estate	2021
9.	Banque Bonhôte	Ltd.	Service	Banking	2021
10.	Redsen Group	Ltd./Group	Service	Digital consulting	2021
11.	Reform	LLC	Service	Design	2021
12.	La Maison Creative Direction	Ltd.	Service	Communication and luxury retail performance	2021
13.	KAMPOS	Ltd.	Manufacturing	Luxury swimwear and ready-to-wear apparel	2021
14.	AdvantiKA	LLC	Service	Business transformation consulting	2021
15.	Eclosions	Sole proprietorship	Service	Marketing and communication	2021
16.	SmartHelio	LLC	Service	Energy	2021
17.	Symbiotics	Ltd.	Service	Impact investment solutions	2021
18.	Vestergaard	LLC/Group	Wholesale/Retail	Public health innovative technology	2021
19.	Weleda Group	Ltd./Group	Manufacturing	Organic natural cosmetics, anthroposophic therapy medicines	2021
20.	Vivent	Ltd.	Wholesale/Retail	Bio-signals and electroceuticals technology	2021
21.	SEP Jordan	Ltd.	Wholesale/Retail	Fashion and home accessories	2020
22.	Enoki	LLC	Service	Sustainable urban planning	2020
23.	Domicile & Co.	Ltd.	Service	Real estate	2020
24.	OA Legal	Ltd.	Service	Law	2020
25.	CleanGreens Solutions	Ltd.	Manufacturing	Clean aeroponics systems	2020
26.	GAIA Insights	LLC	Service	Leadership development solutions	2020
27.	Watalux	Ltd.	Wholesale/Retail	Water disinfection and treatment	2020

(continued)

Table 1 (continued)

#	Name	Legal structure	Sector	Business	Date of certification
28.	The Rainforest Company	Ltd.	Wholesale/ Retail	Açaí products	2020
29.	Evian Volvic Suisse	Ltd.	Wholesale/ Retail	Water and aqua-drinks	2020
30.	The Positive Project	LLC	Service	Financial and sustainability management support services	2020
31.	Ethos Services	Ltd.	Service	Sustainable investment solutions	2020
32.	Sofies International	Ltd.	Service	Land resource development & waste management	2020
33.	Impact Finance	Ltd.	Service	Investment advisory	2020
34.	L'écoline	Ltd.	Service	School	2019
35.	Mobilidée	LLC	Service	Mobility management	2019
36.	B+G and Partners	Ltd.	Service	Design	2019
37.	7 Peaks Brasserie	LLC	Manufacturing	Craft beer	2019
38.	Twist Communication	Ltd.	Service	Communication, etc.	2019
39.	Serbeco	Ltd./Group	Manufacturing	Waste management, etc.	2019
40.	ecoRobotix	Ltd.	Manufacturing	Autonomous solar-powered weeding robot	2019
41.	Lombard Odier	Ltd./Group	Service	Wealth and asset management	2019
42.	Raiffeisen GE-Rhône	Cooperative	Service	Banking	2019
43.	ARU	Ltd.	Service	Human resources	2019
44.	Impact Hub Bern	Cooperative	Service	Coworking space	2018
45.	Alaya	Ltd.	Service	Communication, volunteering, etc.	2018
46.	Relevant	Ltd.	Service	IT consulting, IT security, digital marketing	2018
47.	Coninco	Ltd.	Service	Sustainable finance & investment solutions	2018
48.	MagicTomato	Ltd.	Wholesale/ Retail	Local online groceries	2017
49.	Baabuk	LLC	Wholesale/ Retail	100% natural wool footwear	2017
50.	One Creation	Cooperative	Service	Sustainable investment cooperative	2017

(continued)

Table 1 (continued)

#	Name	Legal structure	Sector	Business	Date of certification
51.	Conser Invest	Ltd.	Service	Sustainable investment advisory and digital tools	2016
52.	Accès Personnel	Ltd.	Service	Delegation of temporary and fixed staff	2016
53.	Opaline	Ltd.	Manufacturing	Fruit juices	2015
54.	Globalance Bank	Ltd.	Service	Wealth management, private bank	2015
55.	Loyco	Ltd.	Service	Administrative services	2015
56.	Abhati	LLC	Wholesale/Retail	Holistic skincare & lifestyle brand	2015

^a According to information published on www.bcorporation.net and <https://fr.blab-switzerland.ch> (06/02/2022)

- (i) pursue the company's (and therefore its shareholders') interest, but also have a material positive impact on society and the environment at large,
- (ii) consider a range of stakeholder's interests (including shareholders, employees, suppliers, society, and the environment), and, therefore,
- (iii) consider that shareholder value is not prevailing—and certainly not prevailing in a short-term perspective—and is only one factor amongst others, which board members need to consider when running the business.

On tax incentives, it is important to bear in mind that B corp entities generally do not benefit from tax exemptions by virtue of their multi-stakeholder approach. As a matter of principle, they remain for-profit entities and are taxed as such.³⁷

2.3 A Recent Leading Example in Switzerland: Lombard Odier Becoming a B Corp³⁸

Founded in 1796, Lombard Odier is one of Switzerland oldest private banks. It holds more than USD 300 billion of client's assets.³⁹ “*Lombard Odier provides wealth and asset management services, private banking services, and technology services for*

³⁷ See below, section *Tax aspects*.

³⁸ See B corp directory website <https://bcorporation.eu/directory/lombard-odier> (18/01/22) and press release of the bank: <https://www.lombardodier.com/fr/contents/corporate-news/media-releases/2019/march/lombard-odier-group-awarded-b-co.html> (18/01/22).

³⁹ <https://www.lombardodier.com/home/about-us/la-maison.html> (18/01/22).

*banking. The company employs more than 2,400 individuals throughout its global operations spanning Europe, Asia, and the Americas.”*⁴⁰

As a privately-owned bank, Lombard Odier is free from market pressure and external public shareholders pressure for increasing financial results.⁴¹ Lombard Odier describes the obtention of the label as a major step forward. The bank has long looked for an external certification to get a perspective as to where it stands and identify areas of potential improvements.⁴² From a governance perspective, the B corp label has requested amending the purpose clause of the group’s holding entity, as well as amendments of internal regulations.⁴³

It is noteworthy that, although the B corp label exists since more than ten years, Lombard Odier is, worldwide, one of the first financial institutions of this importance to have accessed the label.⁴⁴

3 The Swiss Social Enterprise Model (State Sponsored Entities)

Swiss authorities sponsor certain companies that aim at reintegrating workers in the professional and social life. They are generally referred to as Social and Professional Integration Enterprises (SPIEs).⁴⁵ It is estimated that there are currently about 1200 SPIEs in Switzerland, which achieve together a global yearly turnover of CHF 630 million, mainly in the industry, food and commerce fields.⁴⁶

SPIEs are private companies exposed to entrepreneurial risks⁴⁷ and pursuing a dual mission (or hybrid mission): making profits to be partially self-financed and accomplishing a social mission. They are hybrid entities in the sense that they do pursue simultaneously an ideal and an economic purpose.⁴⁸ From a legal structure

⁴⁰B-Corp Certification - Disclosure Report of Lombard Odier, available at <https://bcorporation.net/directory/lombard-odier> (18/01/22).

⁴¹<https://bcorporation.eu/directory/lombard-odier> (18/01/22).

⁴²Richterich (2019).

⁴³Lombard Odier has kindly provided this information. Mr. Patrick Odier, Chairman of the Board and Mr. Bertrand Gacon, Head of Corporate Sustainability, are herewith thanked by the authors for their time and the explanation they have provided.

⁴⁴A few other financial institutions have accessed the label in Switzerland, namely, Globalance Bank and Bank Raiffeisen Région Genève Rhône, or investment advisors such as Conser Invest and Coninco.

⁴⁵In French “*Entreprises d’Intégration Sociale et Professionnelle (EISP)*.”

⁴⁶Ferrari et al. (2016), pp. 10–11.

⁴⁷*Convention de prestations entre les organismes de la sécurité sociale et les entreprises d’intégration sociale et professionnelle (EISP); Guide à l’intention des organes d’exécution de l’aide sociale, de l’assurance-chômage et de l’assurance-invalidité*, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 3.

⁴⁸*Convention de prestations entre les organismes de la sécurité sociale et les entreprises d’intégration sociale et professionnelle (EISP); Guide à l’intention des organes d’exécution de*

point of view, it is interesting to note that such social enterprises can adopt various legal forms, from foundations or associations, to LTD and LLCs.⁴⁹

Compared to Europe, the SPIE model is relatively new in Switzerland.⁵⁰ In Switzerland, they are not subject to minimum requirements concerning the number of distressed employees they are hiring, or the level of self-financing that they must achieve.⁵¹ To date, they act in a fairly unregulated market, which raises certain concerns, particularly from an unfair competition perspective. However, several conditions and restrictions are imposed by the Swiss social insurance which sponsors them, particularly, the use of profits is limited and non-compete restrictions are imposed to limit unfair competition effects.⁵²

The common denominator of all SPIEs is that (i) they do pursue a hybrid purpose as aforesaid, (ii) they hire socially impaired individuals as well as ordinary employees⁵³ and (iii) they are partially sponsored or supported by the state.⁵⁴ This latter point is key in distinguishing such enterprises from other type of benefit corporations which are considered in the present contribution. For this reason, the specific model will not be further explored and developed here.

4 Existing Legal Structures

Given the absence of a specific legal form for benefit corporations, the following section will review whether and which Swiss existing legal forms may be used to pursue hybrid purposes. To this end, corporations (LLC or LTD), cooperatives, and charities, namely, associations and foundations, will be assessed in turn.

l'aide sociale, de l'assurance-chômage et de l'assurance-invalidé, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 3. See also the cited reference, namely, the International Comparative Social Enterprise Models, ICSEM.

⁴⁹For examples of each of these entities, refer to the *Convention de prestations entre les organismes de la sécurité sociale et les entreprises d'intégration sociale et professionnelle (EISP)*; *Guide à l'intention des organes d'exécution de l'aide sociale, de l'assurance-chômage et de l'assurance-invalidé*, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 3.

⁵⁰Ferrari et al. (2016), p. 12.

⁵¹*Convention de prestations entre les organismes de la sécurité sociale et les entreprises d'intégration sociale et professionnelle (EISP)*; *Guide à l'intention des organes d'exécution de l'aide sociale, de l'assurance-chômage et de l'assurance-invalidé*, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 3. See also the cited reference, namely, the definition of the Social Firms Europe (CEFEC), according to which a social enterprise should cover at least 50% of its spending by profits coming from its commercial activity.

⁵²*Convention de prestations entre les organismes de la sécurité sociale et les entreprises d'intégration sociale et professionnelle (EISP)*; *Guide à l'intention des organes d'exécution de l'aide sociale, de l'assurance-chômage et de l'assurance-invalidé*, published by Federal Social Insurance Office, Federal Department of Home Affairs, p. 4; Ferrari et al. (2016), p. 11.

⁵³Ferrari et al. (2016), p. 12.

⁵⁴In principle by the social assistance, the unemployment insurance or the disability insurance.

4.1 Ordinary Corporations (*LTDs and LLCs*)⁵⁵

The two main forms of corporate vehicles in Switzerland are the limited by shares company (“*LTD*”)⁵⁶ and the limited liability company (“*LLC*”)⁵⁷ (together referred to as “*Corporations*”). Both are entities held by shareholders and have their own legal personality, the result being that they are solely responsible for their (own) debts. The core structure and purpose(s) of these entities are set in their articles of association, which can be supplemented by organizational and governance rules. The purpose of Corporations must in principle be of an economic nature (i.e., a for-profit purpose).⁵⁸ A Corporation must therefore, as a rule, pursue the objective of making profits for the benefit of its shareholders.⁵⁹

Traditionally, corporate law has required that directors place profits and shareholder value (maximization of financial returns for shareholders) above all other objectives. This is generally referred to as the *shareholder primacy principle*.⁶⁰ Swiss corporate law therefore contained (and still does) mechanisms and provisions aiming at forcing directors to adopt an approach which primarily benefits the shareholders and leaves the ultimate control with them.⁶¹ Particularly, directors could not decide unilaterally to retain or use profits for other purposes than distributing them to the shareholders.⁶²

This rather inflexible view of corporate law does not accommodate well with the multi-purpose approach of benefit corporations. However, the shareholder primacy principle is increasingly counter-balanced by a few other forces. Corporate social responsibility,⁶³ economic, social, and moral requirements,⁶⁴ ESG expectations, increasing awareness towards environmental priorities,⁶⁵ all result in changing the “*rules of the game*.”⁶⁶ Principles and limits are not solely imposed by state laws and regulations anymore,⁶⁷ but corporations are forced, by virtue of a bundle of para-

⁵⁵The following section is based on an article published in ExpertFocus 2019/3 by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

⁵⁶Article 620 et seq. of the Swiss Code of Obligations (“SCO”), RS 220.

⁵⁷Article 772 et seq. SCO.

⁵⁸Article 620 para. 3 SCO, *a contrario*, for LTDs and Article 772 SCO for LLCs.

⁵⁹Forstmoser and Meier-Hayoz (2015), p. 490.

⁶⁰See, for instance, Friedman (1970).

⁶¹Jacquemet and Peter (2015), p. 173.

⁶²Jacquemet and Peter (2015), p. 172.

⁶³Peter (2016), pp. 469 et seq. See also publication of *economiesuisse*, Corporate Social Responsibility from a Business Perspective, July 2015.

⁶⁴Jacquemet and Peter (2015), p. 173, and the cited references.

⁶⁵By way of an example, see the 17 UN Sustainable Development Goals of the World’s Agenda for 2030.

⁶⁶Jacquemet and Peter (2015), p. 173, and the cited references. Mayer et al. (2020).

⁶⁷Jacquemet and Peter (2015), p. 173, and the cited references.

normative obligations⁶⁸ to consider other purposes than purely economic ones.⁶⁹ As recently stated by the Business Roundtable, and acknowledged by the Washington Post, “Corporations are [...] facing increasing pressure - whether from customers, employees or public groups - to take stands on issues that affect society at large.”⁷⁰

In Swiss corporate law, one may consider that a legal basis has always existed for for-profit entities to include ideal objectives. Indeed, under Article 717 para. 1 of the Swiss Code of Obligations (“SCO”), board members and corporate directors must exercise their duties by taking into consideration not only the interest of the shareholders, but also the interest of the company itself. In other words, one must consider that a company has a distinct and autonomous interest, which differs from the sole pursuit of profit making for its shareholders. According to leading legal scholars, this could be the legal basis of the *stakeholder value theory* in Switzerland,⁷¹ in the sense that it would legitimate decisions made in the interest of stakeholders other than shareholders (e.g., of employees, the community, etc.), for as long as such decisions would also serve the company’s interest in the long term.⁷²

From this perspective, Swiss corporations might not need a new legal structure to allow pursuing ideal purposes, besides a (more or less) primary economic purpose. The current legal system might in other words already concede enough flexibility in this respect. One question, however, remains: is it sufficient? Does Swiss law allow to go one step further and consider, or even require, that the interests of all stakeholders be considered at the same level (and profit-making for shareholders not being above any other)? The latter conception is being designated by scholars as the “*stakeholder-mandatory*” conception, as opposed to the “*stakeholder-optional*” conception.⁷³

4.2 Corporations with Non-Profit Purposes (Article 620 al. 3 SCO)⁷⁴

Another existing option, which is rarely used,⁷⁵ is to set up a non-profit corporation or, better said, a corporation with a non-economic purpose.⁷⁶ Under Article

⁶⁸Neri-Castracane and Peter (2018), § 6.

⁶⁹Neri-Castracane and Peter (2018), § 6.

⁷⁰McGregor (2019). See also the Statement issued by the Business Roundtable in 2019, available at <https://opportunity.businessroundtable.org/ourcommitment> (18/01/22).

⁷¹Jacquemet and Peter (2015), p. 173, and the cited references.

⁷²Neri-Castracane (2016), p. 224.

⁷³See notably McDonnell (2019).

⁷⁴The following section is based on an article published in ExpertFocus 2019/3 by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

⁷⁵Baudenbacher (2016), Article 620, n° 2.

⁷⁶Baumann and Markowitsch (2016), pp. 136 et seq.

620 para. 3 SCO, a company limited by shares may in fact also be established with a non-economic purpose,⁷⁷ meaning with an “ideal” or non-profit purpose.⁷⁸ Such a purpose can for instance lean towards culture, philosophy, public-utility, religion, politics, or leisure. The existence of corporations with non-economic purposes is widely recognized by legal scholars,⁷⁹ as well as by the Swiss Supreme Court case law.⁸⁰ Recently, the Swiss Federal Council has also reiterated that the current state of Swiss law authorizes the creation of corporations with non-economic purposes.⁸¹

Although the possibility of setting-up a corporation with a non-economic purpose exists, it is largely unknown or, in any event, used.⁸² The reasons thereof might be the following: viewed as an alternative to a charity (foundation or association), a corporation with a non-economic purpose is likely to face difficulties with fundraising and public subsidies.⁸³ It might also be less able to benefit from tax exemptions. In addition, Swiss law requirements are often stricter for corporations than they are with respect to associations and foundations, particularly when it comes to equity requirements, fiduciary duties of the management, mandatory statutory rules, and accounting requirements.⁸⁴ These may be some of the reasons why, up to now, social entrepreneurs willing to pursue non-economic purposes have favored foundations or associations over corporations.

4.3 Cooperatives⁸⁵

Cooperatives⁸⁶ are corporate entities composed of an unlimited number of individuals or commercial companies (but at least 7), who join forces for the primary

⁷⁷ Lombardini (2017), Article 620, n° 42-43; Baudenbacher (2016), Article 620, n° 2.

⁷⁸ The situation is identical for LLCs. Since the reform of Swiss comparative law in 2007, the previously existing condition of Article 772 para. 3 old SCO (which provided that LLCs could only be established for an economic purpose) has been removed, with the intention to confirm that LLCs could pursue either economic or non-economic purposes. The Report of the Federal Council on the amendment expressly specifies that LLCs should, besides economic purposes, be authorized to pursue ideal purposes of public utility.

⁷⁹ Forstmoser and Meier-Hayoz (2015), p. 490; Montavon et al. (2017), p. 236.

⁸⁰ Swiss Federal Court decision, 25 February 2016, B_3502/2014, para. 4.1.

⁸¹ Interpellations 18.3455 and 13.3689, op.cit.

⁸² For a few examples of corporation with non-economic purposes, see Bui (2013), which cites Sotweb Sàrl, Friends of Humanity SA, CauseDirect SA and Assurethic Sàrl.

⁸³ This view is shared by Baumann and Markowitsch (2016), pp. 136 et seq.

⁸⁴ Jakob et al. (2009), p. 16.

⁸⁵ The following section is based on an article published in ExpertFocus 2019/3 by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

⁸⁶ Articles 828 to 926 SCO.

purpose of promoting or safeguarding their own interests.⁸⁷ They may pursue a commercial activity to this end.⁸⁸

As opposed to corporations, the purpose of cooperatives is based on a member-centered concept (similar to an association), rather than on making profits at the entity level and distributing it to its shareholders. In other words, while corporations can be seen primarily as a capital divided into shares, cooperatives have an “*ad personam*” character and are based on the concept of pooling economic forces in the direct interest of its members.⁸⁹

Under Article 828 para. 1 SCO, cooperatives pursue primarily economic purposes, or more precisely the economic interests of their members. However, they may also pursue other purposes, in addition to such economic purposes, for as long as they also serve the interests of their members.⁹⁰ Cooperatives can thus also favor other stakeholders’ interests (i.e., the interests of non-members).⁹¹

Well-known examples of cooperatives in Switzerland are the two largest retail food-store business, Coop and Migros. In both instances, their articles of association contemplate that the cooperative must foster the interests of its members but also of all consumers and other stakeholders.

Notwithstanding the fact that cooperatives are not supposed to make themselves any profit but to directly favor their members,⁹² a limited distribution of dividends is allowed under the strict conditions of Article 859 para. 2 and 3 SCO. This compulsory provision means that any return on the capital invested resembles more an interest than a dividend payment. Another significant difference with corporations is the principle known as “one man, one vote.” Under Article 885 SCO, each member of a cooperative is entitled to one and only one vote, irrespective of the number of “shares” that he/she owns. This rule echoes the principle of equality of all members contemplated under Article 854 SCO and is part of the social philosophy of the cooperative.⁹³ As a consequence, no member may take control of the cooperative, nor, for that matter, assign such control.

⁸⁷ Pfammatter and Wynne (2017), p. 53.

⁸⁸ Jakob et al. (2009), p. 14.

⁸⁹ Forstmoser and Meier-Hayoz (2015), p. 744.

⁹⁰ Forstmoser and Meier-Hayoz (2015), p. 747. The ordinance on the Register of commerce seems to push it even further since it contemplates that cooperatives with pure public utility purposes may also validly be registered (Article 86 let. b para. 2 Swiss Ordinance on Register of Commerce, “ORC”).

⁹¹ Forstmoser and Meier-Hayoz (2015), p. 749 and cited references.

⁹² Raymond (1996), pp. 162 et seq. For such a distribution to take place, the following conditions must be met: (i) the cooperative must have made profits, (ii) the articles of associations of the cooperative must contemplate the possibility of a distribution of dividends, (iii) the distribution must be made in proportion to the share of capital, and (iv) the percentage of the distribution may not exceed the usual rate of interest for long term loans without special security (which means that the shareholder of a cooperative may not be remunerated more than an ordinary lender); Balkanyi and Neuhaus (2016), Article 859, n° 6.

⁹³ Chabloz (2017), Article 885, n° 2 et seq.

The cooperative can be an appropriate legal vehicle when it comes to pursuing economic and ideal purposes at the same time, particularly given that (i) it may pursue various purposes and favor various categories of stakeholders, and (ii) it is not centered on profit-making but nevertheless allows distribution of (limited) dividends. It has been—and still is—used by very large, successful, and sustainable businesses, which may be considered as visionary. In fact, it is a model of “social entrepreneurship” that existed even before the concept became an economic theory. However, this vehicle is rarely considered nowadays (in fact, the number of cooperatives in Switzerland is lower today than it was 50 years ago), particularly in the non-profit sector.⁹⁴ Whether this is justified is not quite clear, although an explanation could be that the mandatory “one man one vote” principle might discourage social entrepreneurs to choose this type of entity, particularly because this entails that they would not be able to maintain full control over the entity, which might be difficult to reconcile with non-profit purposes one wishes to achieve.

4.4 *Associations and Foundations (Charities)*⁹⁵

Under the term “charities” are encompassed associations and foundations⁹⁶ which are the two main legal forms of charitable ventures in Switzerland.

The fact that associations and foundations are not corporations makes them, per se, improper to qualify as benefit *corporations*. Nevertheless, the perspective that they offer in terms of hybridity is worth being analyzed in the present contribution. To that effect, the following section will particularly consider whether, in Switzerland, charities may pursue an economic purpose alongside an ideal purpose, and thus have dual—or multi—purposes.

At the outset of this section, a few clarifications are necessary:

- (i) **Economic purpose vs commercial activity:**⁹⁷ A distinction must be made between an “economic purpose” and a “commercial activity.” The purpose, which may be either economic (for-profit) or ideal (not-for-profit), or both at the same time, is the objective (i.e., the aim) of the entity. The commercial activity, in turn, is the mean to achieve such a purpose.
- (ii) **No shareholders:** charities do not have shareholders because they do not issue shares and have no “owners.”⁹⁸ An association has members, but no shareholders. A foundation has neither members, nor shareholders; it only has

⁹⁴ Jakob et al. (2009), p. 14.

⁹⁵ The following section is based on an article published in ExpertFocus 2019/3 by Vincent Pfammatter, under the title “Hybrid Entities in Switzerland,” pp. 175 et seq.

⁹⁶ Articles 80 SCC et seq.; Articles 60 SCC et seq.

⁹⁷ For a more detailed analysis of the question, see Merkt and Peter (2019), pp. 209 et seq., and the cited references.

⁹⁸ Wynne (2016).

beneficiaries. Given that both types of entities have no shareholders, they may not distribute them any profit,⁹⁹ which makes them unsuitable for investments.

- (iii) **Tax exemption:** tax exemptions are essential for charities but because of the tax rules currently applicable in Switzerland, they are subject to strict requirements, amongst which that they may only exercise limited commercial activities. The present section deals with civil law constraints, while related tax aspects will be analyzed further below (section *Tax aspects*).

4.5 Foundations

Foundations are widely considered to be the most suitable legal vehicle for a charity. As such, foundations generally do not have economic purposes, nor commercial activities. But in fact, they could. Indeed, legal scholars are of the opinion that the principle of freedom of foundations and the lack of a provision prohibiting it allows foundations to pursue an economic purpose.¹⁰⁰ From the perspective of a foundation's **purpose**, there is no legal impediment or restriction to the type of objective that a foundation may pursue, save illegal purposes or purposes that are impossible to achieve.¹⁰¹

Although this question has been long disputed amongst legal scholars,¹⁰² the Swiss Supreme Court has now confirmed that nothing in the Swiss civil legal framework restricts foundations from having an economic purpose,¹⁰³ as long as such purpose is not contrary to law.¹⁰⁴

On a possible commercial **activity**, there are various ways for a foundation to engage in it, which range from owning all or part of a for-profit entity (a so-called *holding foundation*¹⁰⁵), to conducting a commercial activity on its own.¹⁰⁶ De facto limitations to such activities are however set by tax law,¹⁰⁷ as it will be discussed further below (section *Tax aspects*).

In practice, however, some specificities of foundations often outweigh their potential advantages, which is why this type of entity is rarely used to pursue an

⁹⁹ Merkt and Peter (2019), p. 209.

¹⁰⁰ Grüniger (2014), Article 80 SCC, n° 17-22. Of the same view are Merkt and Peter (2019), p. 210.

¹⁰¹ Merkt and Peter (2019), p. 210, who cite the appropriate legal references, namely, Art. 52 para. 3 SCC and Art. 19 and 20 SCO.

¹⁰² Merkt and Peter (2019), p. 210 and the cited references; Vez (2010), Article 80, n° 15.

¹⁰³ As recognized by the Swiss Supreme Court in Swiss Federal Court decision, 75 II 81 (Holding-Foundation) and Swiss Federal Court decision, 120 II 137, para. 3 d; See also Swiss Federal Court decision, 127 III 337, para 2a; Merkt and Peter (2019), p. 210.

¹⁰⁴ Swiss Federal Court decision, 110 Ib 17, para. 3d.

¹⁰⁵ Delphine Bottge (2022).

¹⁰⁶ Merkt and Peter (2019), p. 210; Bottge (2019), pp. 180 et seq; Riemer (1980), pp. 489 et seq.

¹⁰⁷ Merkt and Peter (2019), p. 210.

economic purpose.¹⁰⁸ The specific disadvantages of foundations are mainly that a foundation is an inflexible structure (for instance, its purpose may, in principle, not be amended) and it does therefore have a difficult time to adapt to—and evolve in—a changing environment. In addition, foundations are subject to the supervision of a state authority, which sometimes renders their operations more burdensome.

4.6 Associations

Under Article 60 para. 1 SCC and Article 91 ORC, an association may in principle *not* pursue an economic purpose.¹⁰⁹ It must pursue an ideal purpose (non-profit),¹¹⁰ examples¹¹¹ of which are provided by Article 60 para. 1 SCC, namely, purposes related to politics, religion, science, art, charity, or recreational activities.

In other words, an association may in principle not pursue or run a commercial activity which generates profits and distribute it to its members.¹¹² This would indeed mean that it has an economic purpose. If an entity wants to generate a profit and distribute it to its members, it must opt for another type of legal form of the Code of Obligations (i.e., a corporation).¹¹³

There are, however, situations in which associations may be involved in commercial activities, or even have an economic purpose, under certain restrictions:

- (i) First, an association may run a commercial activity of its own, provided it is for the benefit of third parties (i.e., to the exclusion of its members).¹¹⁴ In such a case, the association is generally considered as pursuing an ideal purpose.

¹⁰⁸ Swiss Federal Court decision, 127 III 337.

¹⁰⁹ Forstmoser and Meier-Hayoz (2015), p. 133.

¹¹⁰ Swiss Federal Court decision, 127 III 337, para.2b; See Article 60 para. 1 SCC which reads, in the translation available at <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html> (18/01/22): “Associations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association.” See also Merkt and Peter (2019), p. 209.

¹¹¹ Article 60 para. 1 SCC provides for examples, not for a comprehensive list; Heini and Scherrer (2014), Article 60, p. 481 n° 4.

¹¹² Hari and Jeanneret (2010), Article 60, n° 7; Chappuis and Perrin (2008), pp. 3, 4 and 5; Heini and Scherrer (2014), Article 60, p. 482 n° 5.

¹¹³ Chappuis and Perrin (2008), p. 3.

¹¹⁴ Hari and Jeanneret (2010), Article 60, n° 8.

- (ii) Second, pursuant to the case law of the Swiss Federal Court, an association may have an economic purpose, as long as it does *not* engage in a commercial activity itself.¹¹⁵ This is for instance the case of professional associations,¹¹⁶ syndicates, employer's associations or even cartels.¹¹⁷ Such associations represent or defend the economic interests of their members, but they do not make nor distribute profits to their members.¹¹⁸ If an association wishes to have an economic purpose and, at the same time, a commercial activity, applicable laws on ordinary Corporations will apply and the entity will have to be restructured as a Corporation (Article 59 para. 2 of the SCC).¹¹⁹

Having a hybrid purpose within an association is not excluded by law, nor by case law,¹²⁰ even though it is criticized by some legal scholars.¹²¹ In any event, whenever an association has a hybrid purpose, it cannot have a commercial activity simultaneously, which makes it improper for qualifying as a proper hybrid structure or benefit corporation.

5 Tax Aspects

This section will first summarize the general principles of tax exemption in Switzerland. These principles will then be applied to legal entities structured as corporations with multiple purposes. The question of potential tax relief for B corps will then be briefly addressed and, in an *excursus*, the issue of tax exempted entities having a commercial activity will be discussed.

¹¹⁵ Swiss Federal Court decision 90 II 333, section 7, p. 345, which states (in French) that: “[...] une association n’a un but économique – qui l’empêche d’acquérir la personnalité morale – que si elle exerce elle-même une industrie en la forme commerciale. En revanche, les groupements qui se proposent des objectifs économiques généraux, sans exercer eux-mêmes une telle activité, demeureront constitués en association.” About this, see also Forstmoser and Meier-Hayoz (2015), pp. 134 et seq.

¹¹⁶ Hari and Jeanneret (2010), Article 60, n° 8; Chappuis and Perrin (2008), p. 3, who cite relevant case law, particularly Swiss Federal Court decision 131 III 97, para. 3.1. See also Swiss Federal Court decision 90 II 333, section 7, p. 345.

¹¹⁷ Chappuis and Perrin (2008), p. 4; Forstmoser and Meier-Hayoz (2015), p. 801.

¹¹⁸ Chappuis and Perrin (2008), p. 4.

¹¹⁹ Hari and Jeanneret (2010), Article 60, n° 14.

¹²⁰ See Swiss Federal Court decision 90 II 333, section 3, p. 338.

¹²¹ Heini and Scherrer (2014), Article 60, p. 483 n° 11.

5.1 Principles of Tax Exemption

As foreseen in Article 56 (g) of the Swiss Federal Law on Direct Taxes (LIFD),¹²² to enjoy tax exemption a Swiss legal entity must pursue a **public utility purpose**, which typically includes charitable, humanitarian, health, ecology, education, science and culture related activities.¹²³ The notion of public utility tends to be interpreted restrictively by the tax administration and courts.¹²⁴

Case law and directives issued by the tax authorities (particularly the often-criticized Circular n° 12)¹²⁵ in fact set the following mandatory conditions for obtaining tax exemptions:¹²⁶

- **Exclusivity:** all funds must be used in furtherance of the public utility purpose of the entity;
- **Irrevocability:** all funds must be irrevocably attributed to the purpose of the entity, and may never be returned to the founder or the donor;
- **Effective activity:** the entity must pursue an effective activity in line with its purpose, and may not limit itself to holding assets;
- **Large circle of beneficiaries:** the scope of the beneficiaries may not be limited to a small circle, but it must be large, if not limitless. Particularly, beneficiaries may not only be a close group of individuals;
- **Lack of self-interest** (altruism): board members of a tax exempted entity must act on a *pro-bono* basis and may therefore not be remunerated.

As provided by Article 56 (g) LIFD, irrespective of its legal form, any entity which fulfills the aforesaid requirements can, as a matter of principle, benefit from tax exemption.¹²⁷ Thus, although tax exemption is primarily meant to apply to associations or foundations, if they fulfill all requirements, LLCs and LTDs, or even partnerships limited by shares could benefit therefrom, as discussed hereafter.¹²⁸

¹²²RS 642.11 (LIFD). See also Article 23 para. 1 let. f of the federal law on harmonization of the direct taxes of the cantons and communes, of 14 December 1990 (LHID), RS 642.14.

¹²³Pfister (with Lurà) (2017), p. 239; Pfammatter and Wynne (2017), p. 13.

¹²⁴Pfister (with Lurà) (2017), p. 239 and the cited references; Swiss Federal Court decision, 114 Ib 277, para 2b and 113 Ib 7, para. C 2.b.

¹²⁵Federal Tax Administration, Circular No. 12, *Exonération de l'impôt pour les personnes morales poursuivant des buts de service public ou de pure utilité publique (art. 56, let. g LIFD) ou des buts culturels (art. 56, let. h LIFD); déductibilité des versements bénévoles (art. 33, 1er al, let. i et art. 59, let. c LIFD)*.

¹²⁶Lideikyte Huber (2019), p. 215; Maillard and Urech (2017), Article 56, pp. 1028 et seq.; Pfister (with Lurà) (2017), p. 239; Pfammatter and Wynne (2017), pp. 13–14.

¹²⁷Pfammatter and Wynne (2017), p. 13.

¹²⁸Maillard and Urech (2017), Article 56, p. 1028; Pfammatter and Wynne (2017), p. 13.

(1) *Tax exemption for corporations with multiple purposes?*

As seen above, associations are improper legal vehicles for hybridity. Foundations may present a certain interest, but since they do not have a share capital, they are unsuitable for investment purposes. These two types of legal entities will therefore not be analyzed here from a tax perspective. Turning therefore to Corporations with a share capital (particularly LTDs, LLCs), the main issue on a possible tax exemption lies, precisely, in the fact that they have a capital divided in shares.

When purchasing or subscribing shares, shareholders of Corporations, in substance, become co-owners of the entity. Such shares can be traded and sold to third parties, and shareholders thus may leave the entity and are free to receive an appropriate compensation (price) for their investment.¹²⁹ This violates the principle of *irrevocability* (see above, *Principles of tax exemption*), in the sense that it can be considered that funds provided to the entity are in that case returned to the investor later on in time.

A second issue lies in the distribution of dividends, a form of retribution that is not authorized if an entity intends to remain tax exempted. Indeed, according to the principle of *exclusivity* (see above, *Principles of tax exemption*), all profits must be used in furtherance of the public-utility purpose of the entity if it wants to be tax exempted.¹³⁰ They may therefore not be distributed to shareholders, which conflicts with the concept of investment, pursuant to which a financial return is expected by those who put equity at the company's disposal.

Some scholars argue that to circumvent these hurdles, the articles of incorporation could limit the transfers of shares,¹³¹ and prohibit distribution of dividends.¹³² However, save for exceptional cases, such measures seem to have been insufficient to convince Swiss tax authorities to grant tax exemptions to Corporations, even if they pursue purposes of public utility.¹³³

The Swiss tax authorities' reasoning is debatable, and probably unfortunate. The legislator did in fact expressly not limit tax exemptions to foundations or associations.¹³⁴ Indeed, article 56 LIFD refers to "legal entities," without any restriction as to their type. Besides, even the Circular n° 12 of the Federal Tax administration

¹²⁹ Baumann and Markowitsch (2016), p. 166.

¹³⁰ Interpellation 13.3689 of national council Mr. Eric Nussbaumer, and related statement of the Federal Council of September 12, 2013.

¹³¹ See, for instance, Article 822 para. 2 SCO for LLCs.

¹³² Maillard and Urech (2017), Article 56, p. 1028.

¹³³ However, the Swiss executive authorities do not seem to be in favor of adopting a different approach. See Interpellation 13.3689 of national council Mr. Eric Nussbaumer, and related statement of the Federal Council of 12 September 2013. For further developments about this, see below section *Legislative initiatives*, related to past and current legislative initiatives; Pfammatter and Wynne (2017), p. 14; Pfammatter (2019), p. 177.

¹³⁴ Maillard and Urech (2017), Article 56, p. 1028.

admits that Corporations may benefit from tax exemptions under certain conditions.¹³⁵

With little creativity tax authorities could set a framework of conditions thanks to which tax exemptions could apply to Corporations having a share capital. Some of these, as seen above, could be to limit the transfers of shares,¹³⁶ to prohibit the distribution of dividends¹³⁷ and of all types of financial benefits in favor of shareholders.¹³⁸

(2) *B corp status: No tax exemptions for B corporations*

For the reasons stated above, a B-Corp status (as well as any other similar label), does not as such trigger any tax relieves. They remain considered as for-profit entities and are taxed as such.

(3) *Excursus: Tax exemptions in favor of entities with a public-utility purposes and a commercial activity*

It appears appropriate to consider the option of pursuing an ideal purpose and having at the same time a commercial activity to generate revenues to achieve this purpose, although, strictly speaking, such a setup does not give rise to a hybrid or benefit corporation.

From a civil law perspective, nothing prevents a foundation, an association, or a corporation from having simultaneously an ideal purpose and a commercial activity. Restrictions thereto are however imposed by tax requirements, which strongly limit the possibility for tax exempted entities to have a commercial activity.¹³⁹

The rationale behind this restriction is that competitive neutrality would be impacted, in the sense that a tax exemption granted by the state would amount to a competitive advantage or even a form of subvention, whereas the entity's competitors which do not enjoy any tax exemption are therefore comparatively disadvantaged. This would result in creating an unfair competition or even a distortion of competition.¹⁴⁰

This position so far adopted by the Swiss tax authorities as well as by the Swiss Supreme Court deserves to be reconsidered for the following reasons. First, having some level of commercial activity to generate revenues has become a necessity for most non-profit entities if they want to be able to achieve their missions without relying exclusively on donations. Second, the fact that non-profit entities pursue a

¹³⁵Federal Tax Administration, Circular No. 12, *Exonération de l'impôt pour les personnes morales poursuivant des buts de service public ou de pure utilité publique (art. 56, let. g LIFD) ou des buts culturels (art. 56, let. h LIFD); déductibilité des versements bénévoles (art. 33, 1er al, let. i et art. 59, let. c LIFD)*, p. 2.

¹³⁶See for instance Article 822 para. 2 SCO for LLCs.

¹³⁷Maillard and Urech (2017), Article 56, p. 1028.

¹³⁸Pfammatter and Wynne (2017), p. 43.

¹³⁹Merkert and Peter (2019), p. 210.

¹⁴⁰Merkert and Peter (2019), p. 210; Lideikyte Huber (2019), p. 216 and the cited references; Swiss Supreme Court decision 121 I 279, para. 4a.

public-utility purpose means that there is no real competitive relationship between them and for-profit entities. Third, a limitation of the commercial activity could be imposed—as suggested by the Swiss Supreme court—which would also prevent a distortion of competitive neutrality.¹⁴¹

Finally, an alternative remains to seek to obtain a partial tax exemption, which allows to have, under the same roof, a commercial activity that is taxed, and a non-profit activity that is tax-exempted. Although this solution exists, it is rarely implemented in practice.¹⁴²

6 Legislative Initiatives

Past and current legislative initiatives aiming at promoting the adoption of benefit corporation status in Switzerland are struggling with the same recurring question: is a new legal structure really needed to meet the expectations of social enterprises and benefit corporations, or can the existing legal system satisfy these needs, if needed by stretching the scope of existing legal structures? This question seems not only to be a Swiss issue, but rather a hot topic around the world.¹⁴³

In Switzerland, there have been two noteworthy, but unsuccessful, attempts by politicians to get the Federal Council, Switzerland federal executive body, to move towards creating a new legal form for benefit corporations, or at least encouraging this movement.¹⁴⁴

¹⁴¹These suggestions have been developed by Merkt and Peter (2019), pp. 209 et seq.

¹⁴²Lideikyte Huber (2019), p. 217; Pfammatter and Wynne (2017), p. 14.

¹⁴³Ventura (2019), p. 170.

¹⁴⁴Interpellation 13.3689 of Mr. Eric Nussbaumer, member of the Swiss parliament (national council), and related statement of the Federal Council of 12 September 2013; Interpellation 18.3455 of Mr. Fabian Molina, member of the Swiss parliament (national council), and related statement of the Federal Council of 22 August 2018. For the sake of completeness, it must be mentioned that an initiative n° 14.470 from State Counsellor Werner Luginbühl is currently under discussion in the context of the Swiss parliament and aims at reinforcing the attractiveness of Switzerland for foundations. This initiative has legal and tax components which might change the legal panorama for foundations in the future, although it will not have a significant impact for hybrid entities.

6.1 *Interpellation 13.3689 of National Council Mr. Eric NUSSBAUMER (2013)*

The first of these two attempts was made in 2013 by socialist national council member Eric NUSSBAUMER.¹⁴⁵ In his submission to the Federal Council, Mr. NUSSBAUMER highlighted the fact that in recent years, numerous business had been created with a view not only to maximize profits, but also to foster public utility (e.g., business focused on soil decontamination, or addressing social challenges). Acknowledging that other countries were making efforts to structure and support such “benefit” corporations, Mr. Nussbaumer questioned the Federal Council on several related issues, and got the following answers:¹⁴⁶

- First, the Federal Council confirmed that the Swiss Confederation did not possess official statistics about public utility corporations.¹⁴⁷
- Second, the Federal Council recalled that a commercial entity may pursue purposes other than the pure maximization of its profits (i.e., it could pursue purposes that are ideal and/or of public utility¹⁴⁸) and that the possibility of creating an association or a foundation having public utility purposes already existed in Switzerland. Based on this, the Federal Council considered that there was no need to amend the existing legal framework.¹⁴⁹ It also refused to analyze in depth whether the US benefit corporation model¹⁵⁰ could be transposed in the Swiss legal system.
- Third, on tax advantages, the Federal Council considered that public utility corporations could *not* benefit from tax advantages, unless a few Swiss laws were amended, which it did not intend to do.¹⁵¹
- Fourth and finally, the Federal Council noted that Switzerland did not have a dedicated program to support social entrepreneurship and benefit corporations,

¹⁴⁵ The following section is based on the Interpellation 13.3689 of national council member Mr. Eric Nussbaumer, and the related statement issued in relation thereto by the Federal Council on 12 September 2013.

¹⁴⁶ The present publication presents a not exhaustive selection of the most relevant section of the exchange between national council member Nussbaumer and the Federal Council.

¹⁴⁷ In French: *entreprises d'utilité publique*.

¹⁴⁸ See above section *Existing legal structure*.

¹⁴⁹ In French “[...] le Conseil fédéral estime qu’il n’y a pas lieu de modifier le cadre réglementaire des sociétés.”

¹⁵⁰ In the text of the Interpellation, referenced to <http://benefitcorp-net/>.

¹⁵¹ The Federal Council estimated that the Swiss Code of Obligations (RS 220), the Federal Law on Direct Federal Taxes (RS 642.11) and the Federal Law on Harmonization of Direct Taxes of Cantons and Municipalities (RS 642.14) would have to be amended to render possible the exemption of corporations pursuing public utility purposes. About this, see also section *Tax aspects* hereabove.

but that it did encourage the movement through the support of private initiatives.¹⁵²

6.2 *Interpellation 18.3455 of National Council Mr. Fabian MOLINA (2018)*

The second attempt was made five years later, in 2018, by socialist national council member Fabian MOLINA.¹⁵³ In his statement to the Federal Council, Mr. MOLINA emphasized that social entrepreneurship was gaining importance in Switzerland, as it was around the world. He thus questioned the Federal Council on several related issues, and received the following answers:¹⁵⁴

- First, on the legal framework, the Federal Council restated its position, as expressed five years earlier, that the existing legal framework was sufficient to allow social enterprises to exist in Switzerland.
- In addition, it made the argument that the priority of the Federal Council was to focus on Corporate Social Responsibility (CSR). In its view, business that did properly consider CSR in all their activities were contributing to the 17 Sustainable Development Goals of the United Nations and, even if CSR was different from social entrepreneurship, both had the same objectives and were thus comparable. By stating so, it appears that the Federal Council took an undesired shortcut. Can it really be stated that social entrepreneurship does not need to be supported given that it is nothing else than some sort of duplication of CSR? Second, the Federal Council reiterated that, in addition to not being willing to create a new legal structure for benefit corporations, it also did not intend to provide for an official definition of social entrepreneurship. The Federal Council stated that it supported private initiatives in that sector, such as the B corp movement, but that it did not intend to interfere with such private initiatives.

¹⁵² See, particularly, the Social Entrepreneurship Initiative and Foundation (seif), <https://seif.org/en/>, which is supported directly by the Swiss Confederation through Innosuisse, the Swiss Innovation Agency, as well as the private organisation *Fachverband unternehmerisch geführter Sozialfirmen* (FUGS), <https://www.sozialfirmen.ch/> (18/01/22), which is also cited in the statement of the Federal Council of 12 September 2013 in response to the Interpellation 13.3689 of national council member Mr. Eric Nussbaumer.

¹⁵³ The following section is based on the Interpellation 18.3455 of socialist national council member Mr. Fabian Molina, and the related statement issued by the Federal Council on 22 August 2018.

¹⁵⁴ The present publication presents a not exhaustive selection of the most relevant section of the exchange between national council member Molina and the Federal Council.

- Third, the Federal Council confirmed that it still had not made a detailed analysis on the sector of social entrepreneurship, but that it was closely following the evolution of CSR.¹⁵⁵ The Federal Council mentioned that private initiatives were performing such analysis. By way of an example, it cited the survey conducted by the Thomson Reuters Foundation in 2016 in 45 of the world's biggest economies to find out which countries were creating the best environment for social entrepreneurs.¹⁵⁶ It resulted from that survey that Switzerland was ranked 11th out of 45,¹⁵⁷ which the Federal Council seemed to consider as a satisfactory ranking.

7 Conclusions and Proposals for the Future

As a matter of fact, Swiss corporate law has not been thought for benefit corporations, and there is currently no specifically dedicated legal vehicle to this end.¹⁵⁸

However, Swiss corporate law is flexible enough to allow considering other interests alongside shareholders' benefits. Also, corporations may express in their articles of incorporation their intention to pursue multiple purposes, some of which may be of a non-economic nature.¹⁵⁹ Furthermore, labels, such as B corp, allow Swiss corporation to bound themselves to triple-bottom line principles.¹⁶⁰ In view thereof, the Swiss legislator does not currently seem to be willing to develop the legal framework towards the creation of a benefit corporation status.

Against this background, unlike other countries in which existing laws would prohibit a multi-stakeholder approach, one must acknowledge that Swiss law offers the requested flexibility, at least to a certain extent.

Despite this, a specific legal status for benefit corporations could still be advisable, for the following reasons:

- First, a new statutory regulation on benefit corporations would simplify and clarify this status, and send a strong signal to society that such structures are encouraged in Switzerland.
- Second, the tax treatment of such structures should—and would—be clarified, which appears urgent since unjustified tax requirements for obtaining tax exemption should be eliminated for the Swiss tax environment to become more “public utility friendly.”

¹⁵⁵ And published a large study in May 2018 on the Relevance and Significance of the “OECD Guidelines for Multinational Enterprises” in Switzerland, available at www.seco.admin.ch (18/01/22).

¹⁵⁶ Thomson Reuters Foundation, the best countries to be a Social Entrepreneur 2016.

¹⁵⁷ Thomson Reuters Foundation, the best countries to be a Social Entrepreneur 2016.

¹⁵⁸ Pfammatter (2019), p. 177.

¹⁵⁹ Pfammatter (2019), p. 177.

¹⁶⁰ Elkington (1994), pp. 90–100.

- Third, it would allow social enterprises to go one step further by formally recognizing that the interests of all stakeholders can (or even have to) be considered at the same level (“*stakeholder-mandatory*” conception, as opposed to the “*stakeholder-optional*” conception).¹⁶¹

However, the advantages arising out of the creation of a legal status for benefit corporation must be balanced with its downsides. Voices are being raised, in Switzerland and abroad, against the idea of introducing benefit corporations as new statutory alternative, since this could have the negative consequence of splitting the panorama of corporations into the “good” ones (the benefit corporations) and all the other ones which would be stigmatized as “bad” companies. This is the position defended at this stage by the Swiss government,¹⁶² and some scholars have also started to criticize and question the exclusionary effect that the introduction of a benefit corporation status might lead to.¹⁶³

A solution could therefore reside in inducing changes for *all* corporations, irrespective of their legal form, rather than polarizing the corporate world. As often, the stick or the carrot could be used to achieve this purpose. The stick could be to impose all existing businesses to set a “limit harm” in their statutes to push business in the right direction.¹⁶⁴ In other words, all corporations would have to do certain efforts towards a more sustainable economy. The carrot, in turn, could be to introduce incentives to become more SDG (or CSR) oriented. In exchange of pursuing a triple bottom line approach, companies could be granted certain tax benefits. This system is closer to what has been adopted recently by the French government.¹⁶⁵ In parallel, tax reliefs could also be introduced for investors who would invest in such “benefitable” corporations. This system already successfully exists since many years in the UK¹⁶⁶ and in the Netherlands.¹⁶⁷

¹⁶¹ See notably McDonnell (2019).

¹⁶² Interpellation 18.3455 of socialist national council member Mr. Fabian Molina and related statement issued by the Federal Council on 22 August 2018.

¹⁶³ See notably McDonnell (2019).

¹⁶⁴ This idea is being put forward in the United Kingdom by a draft Bill labelled Responsible Business Bill which intends to amend the UK Companies Act 2006 in material ways. Such Bill is being drafted and pushed forward by the law firm Bates Wells Braithwaite, in collaboration with Bill Clark, Of Counsel at Drinker Biddle & Reath. As the draft Bill states, the purpose of the proposed amendment is to “provide that companies must comply with the ten principles of the United Nations Global Compact and seek to do no harm and to provide an additional legislative option for those companies who wish to adopt a purpose to advance the United Nations Sustainable Development Goals.”

¹⁶⁵ Law No. 2019-486 of 22 May 2019: *Entreprise à mission*.

¹⁶⁶ Since 2014, policy measure called Social Investment Tax Relief (SITR). See also Lideikyte Huber and Peter (2020), pp. 207–221.

¹⁶⁷ Since 1995, the Dutch Green Funds Scheme. See also Lideikyte Huber and Peter (2020), pp. 207–221.

References

- B Corporation, *B Corp Directory*, [<https://bcorporation.eu/find-a-b-corp/>] (18/01/22)
- B Corporation, *B Lab*, [<https://www.bcorporation.net/en-us/movement/about-b-lab>] (18/01/22)
- B Corporation, *Certification*, [<https://www.bcorporation.net/en-us/certification>] (18/01/22)
- Balkanyi P, Neuhaus MR (2016) In: Watter R, Vogt H-U (eds) *Basler Kommentar zum Obligationsrecht II*. Helbing Lichtenhahn, Basel. Art. 859
- Baudenbacher C (2016) In: Watter R, Vogt H-U (eds) *Basler Kommentar zum Obligationsrecht II*. Helbing Lichtenhahn, Basel. Art. 620
- Baumann RL, Markowitsch S-J (2016) Die Gemeinnützige GmbH, Auslegeordnung einer kaum genutzten Alternative zur Stiftung. *Expert Focus* 3:163–167
- Botte D (2019) Shareholder foundations (holding foundations) in Switzerland, overview from a legal perspective. *Expert Focus* 3:180–184
- Botte D (2022) *Les Fondations Actionnaires en Suisse*. Slatkins, Geneva
- Brakman Reiser D (2010) Blended enterprise and the dual mission dilemma. *Vermont Law Rev* 35: 105–116
- Bui A (2013) Une entreprise à but non lucratif. *Bilanz Magazine*, 8 December 2013
- Chabloz I (2017) In: Amstutz M, Trindade RT, Tercier P (eds) *Commentaire Romand du Code des Obligations II*. Helbing Lichtenhahn, Basel. Art. 885
- Chappuis C, Perrin J-F (2008) *Droit de l'association*, 3rd edn. Schulthess, Basel
- Elkington J (1994) Towards the sustainable corporation: win-win-win business strategies for sustainable development. *Calif Manag Rev* 36(2)
- Federal Social Insurance Office, Federal Department of Home (2018) *Convention de prestations entre les organismes de la sécurité sociale et les entreprises d'intégration sociale et professionnelle (EISP); Guide à l'intention des organes d'exécution de l'aide sociale, de l'assurance-chômage et de l'assurance-invalidité*. Available at: https://www.contre-la-pauvrete.ch/fileadmin/kundendaten/Dokumente/Web_fr_NAP_Broschuere_Leistungsvereinbarungen.pdf (18/01/22)
- Ferrari D, Schmitz D, Wüthrich B, Zöbeli D (2016) *Les entreprises sociales en Suisse*. Sécurité sociale CHSS 4:10–12
- Forstmoser P, Meier-Hayoz A (2015) *Droit Suisse des sociétés, avec mise à jour 2015*. Stämpfli, Berne
- Friedman M (1970) A Friedman doctrine: the social responsibility of business is to increase its profits. *The New York Times Magazine*, 13 September 1970
- Grüniger H (2014) In: Geiser T, Honsell H, Vogt NP (eds) *Basler Kommentar Zivilgesetzbuch I*, 5th edn. Helbing Lichtenhahn, Basel. Art. 80
- Hari O, Jeanneret V (2010) In: Foëx B, Pichonnaz P (eds) *Commentaire Romand du Code Civil I*. Helbing Lichtenhahn, Basel. Art. 60
- Heini A, Scherrer U (2014) In: Geiser T, Honsell H, Vogt NP (eds) *Basler Kommentar Zivilgesetzbuch I*, 5th edn. Helbing Lichtenhahn, Basel. Art. 60
- Jacquemet G, Peter H (2015) Corporate social responsibility, sustainable development et corporate governance: *quelles corrélations?* *SZW/RSDA* 3:170–178
- Jakob D, Huber R, Rauber K (2009) *Non-profit law in Switzerland*. Working Papers of the John Hopkins Comparative Nonprofit Project. WP-47. Baltimore
- Lideikyte Huber G (2019) *Activité à but lucratif d'une entité d'utilité publique exonérée d'impôt*, Notion et limites. *Expert Focus* 3:215–217
- Lideikyte Huber G, Peter H (2020) Encouraging sustainable investment through direct tax relief: Swiss and US State Aid Legal Framework. IFF Forum für Steuerrecht
- Lombardini C (2017) In: Amstutz M, Trindade RT, Tercier P (eds) *Commentaire Romand du Code des Obligations II*. Helbing Lichtenhahn, Basel. Art. 620
- Maillard GL, Urech N (2017) In: Girardin FA, Noël Y (eds) *Commentaire Romand de la loi fédérale sur l'impôt direct*, 2nd edn. Schulthess, Basel. Art. 56 LIFD

- Mayer C, Strine LE, Winter J (2020) 50 years later, Milton Friedman's shareholder doctrine is dead. *Fortune*. 13 September 2020
- McDonnell BH (2019) The corrosion critique of benefit corporations. Available at SSRN: <https://ssrn.com/abstract=3450747> (18/01/22) or <https://doi.org/10.2139/ssrn.3450747> (18/01/22)
- McGregor J (2019) Group of top CEOs says maximizing shareholder profits no longer can be the primary goal of corporations. *The Washington Post*, 19 August 2019
- Merkel B, Peter H (2019) Utilité publique et activité économique: *possibilités et limites de l'exonération fiscale*. *Expert Focus* 3:209–214
- Montavon P, Montavon M, Bucheler R, Jabbour I, Matthey A, Reichlin J (2017) *Abrégé de droit commercial*. Schulthess, Zürich
- Neri-Castracane G (2016) Les règles de gouvernance d'entreprise comme moyen de promotion de la responsabilité sociale de l'entreprise – Réflexions sur le droit suisse dans une perspective internationale, *Collection genevoise*. Schulthess, Genève/Zürich
- Neri-Castracane G, Peter H (2018) Einfluss und Wirkungen von Corporate Social Responsibility auf den Finanzplatz. In: Sester P, Brändli B, Bartholet O, Schiltknecht R (eds) *St. Galler Handbuch zum Finanzmarktrecht, Finanzmarktaufsicht und Finanzmarktinfrastrukturen*. Dike, St-Gallen, Chapter 6
- Peter H (2016) La Corporate Social Responsibility 2.0, concrétisation d'un principe acquis. *Expert Focus* 6–7:469–470
- Pfammatter V (2019) Hybrid entities in Switzerland: can Swiss entities pursue for-and non-profit purposes at the same time? *Expert Focus* 3:175–179
- Pfammatter V, Wynne J (2017) *Philanthropy and social entrepreneurship: a guide to legal structures for NGOs and social entrepreneurs in Switzerland*. Thomson Reuters Foundation, London
- Pfister L, Lura F (2017) *La fondation*, *Collection Guide pratique des personnes morales et des sociétés*. Schulthess Editions Romandes, Genève/Zürich
- Reymond J-A (1996) *Traité de droit privé suisse*, Volume VIII, *Droit commercial*, Tome III/1, *La Coopérative*. Helbing Lichtenhahn, Basel/Francfort-sur-le-Main
- Richterich R (2019) Andrey Kassoy: "Prosperité et durabilité sont compatibles" pour B Corps. *LeTemps*, 1 April 2019 [<https://www.letemps.ch/economie/andrew-kassoy-prosperite-durabilite-compatibles-b-corp>] (18/01/22)
- Riemer MH (1980) Rechtsprobleme der Unternehmenstiftungen. *ZBJV* 116:489 et seq
- Rinne A (2019) 4 ways to build businesses that work for good, right now. *World Economic Forum*, 22 November 2019 [<https://www.weforum.org/agenda/2019/11/from-b-corps-to-zebras-4-ways-to-build-businesses-that-work-for-good/>] (18/01/22)
- Sabeti H (2011) The for-benefit enterprise. *Harv Bus Rev*, 1 November 2011
- Slaper TF, Hall TJ (2011) Triple bottom line: what is it and how does it work? *Indiana Bus Rev* 86(1):4–8
- Thomson Reuters Foundation, *The best countries to be a social entrepreneur 2016*
- Ventura L (2019) The social enterprise development and the birth of hybrid entities, a comparative law perspective. *Expert Focus* 3:170–173
- Vez P (2010) In: Foëx B, Pichonnaz P (eds) *Commentaire Romand du Code Civil I*. Helbing Lichtenhahn, Basel. Art. 80
- Winston A (2019) Is the business roundtable statement just empty rhetoric? *Harv Bus Rev*, 30 August 2019
- Wynne J (2016) *La société à but non lucratif, un nouveau modèle pour l'entrepreneur social?* Newsletter of Sustainable Finance Geneva, 26 May 2016

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