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FACULTY OF LAW

# Sustainable purpose-driven enterprises

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Swiss legal framework in a comparative law perspective

Prof. Giulia Neri-Castracane\*

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\*Giulia Neri-Castracane, Associate Professor, Commercial Law Department and Geneva Centre for Philanthropy, University of Geneva. The author warmly thanks Prof. Henry Peter (UNIGE), Prof. Jean-Luc Chenaux (UNIL), Umberto Milano (UNIGE) – who also kindly shared a portion of his doctoral work on benefit corporations under Swiss law–, and Jonathan Normand (B Lab (Switzerland)) for their valuable feedbacks, Bernard Vischer (B Lab (Switzerland)) for the comments, as well as Laurie Liccardo, William Gerosa and Sara Andrade, all assistants at the Department of Commercial Law of University of Geneva for the proofreading of this report and their help for the preparation of the appendices. All credit for the layout goes to the B Lab team.

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## List of abbreviations

§	chapter
&	and
%	percentage
3d Cir.	Third Circuit
9th Cir.	Ninth Circuit
A.A.R.P.I	Association d'avocats à responsabilité professionnelle individuelle
AJP/PJA	Aktuelle Juristische Praxis/Pratique Juridique Actuelle
AktG	Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089) (German Stock Corporation Act)
ALI	American Law Institute
APRES-BEJUNE	Association pour la promotion de l'économie social et solidaire dans la région Berne – Jura – Neuchâtel
APRES-GE	Association pour la promotion de l'économie social et solidaire du canton de Genève
APRES-VD	Association pour la promotion de l'économie social et solidaire du canton de Vaud
Art.	article
aSCO	Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations) (SR 220) (Status as of 1 January 2022)
ATF	Recueil officiel des arrêts du Tribunal fédéral suisse
BCP	Public Benefit Corporation
BK	Berner Kommentar
BGB	Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S.738) (German Civil Code)
BGBl	Bundesgesetzblatt
BIC	Beneficio e Interés Colectivo
BLV	Base légale vaudoise

BPQR	Best Price Quality Ratio
BR/DC	Zeitschrift für Baurecht und Vergabewesen/Revue du droit de la construction et des marchés publics
BSK	Basler Kommentar
c.	considérant
Ca. Corp. Code	California Corporations Code, Enacted by Stats. 1947, Ch. 1038
C.D. Cal.	Central District of California
CanLII	Canadian Legal Information Institute
CBCA	Canada Business Corporations Act (R.S.C., 1985, c. C-44)
CBS	Community Benefit Society
CC	= SCC
CEO	Chief Executive Officer
CHF	Swiss franc
CIC	Community Interest Company
CISL	Cambridge Institute for Sustainability Leadership
Circular n° 12	Swiss Federal Tax Administration, Circular n° 12 of 8 July 1994
CO	= SCO
Codice Civile	Codice Civile, REGIO DECRETO 16 marzo 1942 , n. 262 (Italian Civil Code)
COM	communication
CP	= SCrC
CR	Commentaire romand
CSC	Cour suprême du Canada
CSDDD	Proposal for a directive of the European Parliament and of the Council of 30 November 2022 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, No 15024/1/22 REV 1
CSR	Corporate Social Responsibility

CSRD	Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance)
D.C. Super. Ct.	Superior Court of the District of Columbia
D. Kan.	District of Kansas
DDETS	Direction départementale de l'emploi, du travail et des solidarités
DDTrO	Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour of 3 December 2021 (SR 221.433)
Decree 117/2017	DECRETO LEGISLATIVO 3 luglio 2017, n. 117, Codice del Terzo settore, a norma dell'articolo 1, comma 2, lettera b), della legge 6 giugno 2016, n. 106. (17G00128) (Italian Legislative Decree on the Third Sector Code)
Del. C.	Delaware Code
Del. Ch.	Court of Chancery of Delaware
Del. Super.	Superior Court of the State of Delaware
Del. Super. Ct.	Superior Court of the State of Delaware
DFF	Département fédéral des finances
DFJP	Département fédéral de la justice et de la police
Directive 2014/23/EU	Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Text with EEA relevance)
Directive 2014/24/EU	Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance)
DLA	Dispositif Local d'Accompagnement
Dodd-Frank Act	Dodd–Frank Wall Street Reform and Consumer Protection Act of July 21, 2010 (Pub. L. 111-203)
e.g.	exempli gratia (for example)
EC	European Commission

ECFR	European Company and Financial Law Review
ECGI	European Corporate Governance Institute
ECJ	European Court of Justice
ed.	Editor
eds	Editors
EFS	entreprise à finalité sociale
EMAS	Eco-Management and Audit Scheme
ERA Forum	Academy of European Law Forum
ESF+	European Social Fund Plus
ESG	Environmental, Social, and Governance
ESS	Economie sociale et solidaire
ESUS	Entreprise solidaire d'utilité sociale
ETS	Third Sector Entity
EU	European Union
EUR	Euro
F. Supp.	Federal Supplement
F. Supp. 2d	Federal Supplement, 2 <sup>nd</sup> Series
FF	Feuille fédérale
ff	following pages
FIFA	Fédération Internationale de Football Association
FINMA	Swiss Financial Market Supervisory Authority
Fn	footnote
FTC	Federal Trade Commission
FTC Act	Federal Trade Commission of September 26, 1914 (15 U.S.C. 41 ff.)
FTE	Full-time equivalent

GenG	Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften (Genossenschaftsgesetz - GenG) in der Fassung der Bekanntmachung vom 16.10.2006 (BGBl. I S. 2230) zuletzt geändert durch Gesetz vom 20.07.2022 (BGBl. I S. 1166) m.W.v. 27.07.2022. Stand: 01.08.2022 aufgrund Gesetzes vom 15.07.2022 (BGBl. I S. 1146)
GmbH-gebV	Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG) des Gesetzes durch Artikel 5 des Gesetzes vom 15. Juli 2022 (BGBl. I S. 1146) (German Act on Limited Liability Companies)
Grenelle I	LOI n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement (1), NOR : DEVX0811607L
Grenelle II	LOI n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement (1), NOR : DEVX0822225L
HGB	Handelsgesetzbuch (HGB) vom 10.05.1897 (RGBl. I S. 219) zuletzt geändert durch Gesetz vom 10.03.2023 (BGBl. I S. 64) m.W.v. 16.03.2023 (German Commercial Code)
HL	House of Lords
i.e.	id est (in other words)
IAPP	Intercantonal Agreement of Public Procurement of 25 November 1994/15 March 2001 (AS 2003 196)
IDDEA	Idées de développement durable pour les entreprises d'avenir
IFF Forum	Institut für Finanzwissenschaft, Finanzrecht und Law & Economics Forum
IFS	impresa a finalità sociale
IRS	Internal Revenue Service
ISBN	International Standard Book Number
JdT	Journal des Tribunaux
KBOB	Koordinationskonferenz der Bau- und Liegenschaftsorgane der öffentlichen Bauherren
KUKO	Kurzkommentar



L3C	Low-Profit Limited Liability Company
LACI	Loi fédérale sur l'assurance-chômage obligatoire et l'indemnité en cas d'insolvabilité du 25 juin 1982 (RS 837.0) (Federal Act on Invalidity Insurance)
LAI	Loi fédérale sur l'assurance-invalidité du 19 juin 1959 (RS 831.20) (Federal Act on Unemployment Insurance)
LCD	= UCA
LDD	Loi sur l'action publique en vue d'un développement durable (Agenda 21) du 12 mai 2016 (rsGE A 2 60) (Geneva Cantonal Act on Public Action for Sustainable Development)
LEXIS	LexisNexis
LGT	Liechtenstein Global Trust
LHID	Loi fédérale sur l'harmonisation des impôts directs des cantons et des communes du 14 décembre 1990 (RS 642.14) (Federal Act on the Harmonisation of Direct Taxes of Cantons and Municipalities)
LIFD	Loi fédérale sur l'impôt fédéral direct du 14 décembre 1990 (RS 642.11) (Federal Act on the Direct Tax)
LIPPI	Loi fédérale sur les institutions destinées à promouvoir l'intégration des personnes invalides du 6 octobre 2006 (RS 831.26) (Federal Act on institutions for the promotion of the integration of disabled persons)
LkSG	Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021 (BGBl. I S. 2959) (German Act on Corporate Due Diligence Obligations in Supply Chains)
LLC	Limited Liability Companies
LLP	Limited Liability Partnership
LOI n° 47-1775	Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération (French Law on the statutes of cooperation)
LOI n° 2014-856	LOI n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire (1), NOR : ERNX1315311L (French Law on the Social and Solidarity Economy)
LR	Law Reports
LSC	Ley de Sociedades de Capital

MD & A	Management Discussion and Analysis
Mich.	Supreme Court of Michigan
Mio	million
MitbestG	Mitbestimmungsgesetz vom 4. Mai 1976 (BGBl. I S. 1153), das zuletzt durch Artikel 17 des Gesetzes vom 7. August 2021 (BGBl. I S. 3311) geändert worden ist (German Co-determination Act)
Model Law	Model Benefit Corporation Legislation
N	side note
No./no.	number
N.W.	North Western Reporter
NA-CH	Normes suisses d'audit des états financiers
NCR	Norme suisse relative au contrôle restreint
NOR	standardized numbering system (système normalisé de numérotation)
NPO	Non-Profit Organisation
NRE Law	Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques, NOR : ECOX0000021L (French Law on New Economic Regulations)
NY Supr. Court	New York Supreme Court
OECD	Organization for Economic Co-operation and Development
OR	Official Compendium of Swiss Federal Legislation
ORC	Ordonnance sur le Registre du commerce (RS 221.411) (Federal Ordinance on Commercial Register)
PACTE Law	LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (1), NOR : ECOT1810669L
para.	paragraph
PBC	Public Benefit Corporation
PBLLC	Public Benefit Limited Liability Company

PPA	Federal Act on Public Procurement of 21 June 2019 (SR 172.056.1)
PPA-VD	Loi vaudoise sur les marchés publics du 14 juin 2022 (BLV 726.01) (Vaud Cantonal Act on Public Procurement)
PRI	Program-Related Investments
R&D	Research and Development
RS	= SR
rsGE	Recueil systématique du canton Genève
RUNTS	Registro Unico Nazionale del Terzo Settore
S.D. Ind.	Southern District of Indiana
SA	société anonyme
Sapin II Law	LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (1), NOR : ECFM1605542L (Law on transparency, the fight against corruption and the modernisation of economic life)
Sàrl	société à responsabilité limitée
SAS	société par actions simplifiée
SB	società benefit
SBIC	sociedad de Beneficio e Interés Común
SCBP	Swiss Code of Best Practice for Corporate Governance
SCC	Swiss Civil Code of 10 December 1907 (SR 210)
SCHUB	Social Cooperative Hub
SCIC	société coopérative d'intérêt collectif
SCO	Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations) (SR 220)
Scop	société coopérative et participative
SCrC	Swiss Criminal Code of 21 December 1937 (RS 311.0)
SDGs	Sustainable Development Goals

SE	social enterprise
SEC	Securities and Exchange Commission
Sect.	Section(s)
SEIF	Social Entrepreneurship Initiative & Foundation
SENS	Social Entrepreneurship Schweiz
SFC	Swiss Foundation Code
SICAF	société d'investissement à capital fixe
SICAV	société d'investissement à capital variable
SIS	société d'impact sociétal
SITR	Social Investment Tax Relief
SJ	Semaine judiciaire
SME	small and medium-sized enterprise
Smic	salaire minimum de croissance (national minimum wage)
SR	Systematic Compendium of Swiss Federal Legislation
SPC	Social Purpose Corporation
SPD	Social Sustainable purpose-driven
SPDE	sustainable purpose-driven enterprises
SSE	Social and Solidarity Economy
Swiss GAAP RPC	Swiss Generally Accepted Accounting Principles of the Foundation for Financial Reporting Standards
SZO	soziales zielorientiertes Unternehmen
SZW/RSDA	Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht/Revue suisse de droit des affaires et du marché financier
TF	Tribunal fédéral suisse (Federal Supreme Court)
UCA	Federal Act on Unfair Competition of 19 December 1986 (SR 241)
UK	United Kingdom

UK Companies Act 2006	United Kingdom Companies Act 2006 c. 46
UK Income Tax Act 2007	United Kingdom Income Tax Act 2007 c. 3
UNIGE	Université de Genève
UNIL	Université de Lausanne
US Dist.	United States district courts
US Model Act	Model Business Corporation Act of 1984
US/USA	United States of America
v.	versus
VAT	Value Added Tax
Vigilance Law	LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1), NOR : ECFX1509096L
vol.	volume
W.D. Wash	Western District of Washington
WISE	Work Integration Social Enterprises
ZGB	= SCC
ZSR/RDS	Zeitschrift für Schweizerisches Recht / Revue de droit suisse

## Executive summary

Over the last fifteen years, many countries have adopted legal frameworks dedicated to social enterprises in a broad sense, including those launched by social (or sustainable) entrepreneurs. While there is no universally agreed definition of these enterprises (or “Sustainable Purpose-Driven Enterprises” (SPDEs)), for the purposes of this paper, we consider a SPDE as an organization that commits to pursuing a positive impact in the territory and the community in which it operates and thus embraces a societal purpose while carrying out an ongoing commercial activity. A positive impact simply means contributing to the achievement of the Sustainable Development Goals (SDGs).

Promotion of the growth of the SPDEs sector has been a priority of the European Union (EU) in the last decade because SPDEs are key drivers of sustainable business models and the necessary bridge between State efforts and those of traditional private companies toward sustainability and inclusivity. SPDEs have recently been endorsed by the United Nations General Assembly as important players for the achievement of the SDGs. Legal forms and legal qualifications have served in European countries as a basis for policy levers: they were related to dedicated public benefits, ranging from tax benefits to special subsidies and grants and even advantages in public procurement procedures. The European Commission (EC) continues its efforts to ensure national parliaments utilize all available possibilities to support SPDEs at the policy level and the United Nations General Assembly is joining forces to promote a legislative framework. Specific funding schemes are being reinforced to support the expansion of SPDEs in the EU and are called upon at the UN level to be included in national parliaments agenda.

In general, legislative intervention in favour of specific legal forms or legal qualifications for SPDEs has both legal and extra-legal justifications. Extra-legal justifications are related to the recognition of the SPDEs movement and the opportunity to level the playing field and create a category of enterprises that may later benefit from further policy interventions (such as the introduction of public support schemes).

The three main legal justifications are:

- 1) The absence, in most jurisdictions, of a broad scope of possible end-purposes (“but final”: “Endzweck”) to all available legal forms.

Fundamentally, these jurisdictions distinguish between “social entities” (with a social (ideal) purpose) and “business entities” (with a for-profit (lucrative) purpose). A legislative intervention was thus necessary to allow “social entities” to have a for-profit purpose and “business entities” to have a social purpose. A legislative intervention was notably necessary in France to allow dual-purpose entities, in Italy to transform business entities into dual-purpose entities, and in the United Kingdom (UK) and the United States of America (USA) to transform social entities into dual-purpose entities.

- 2) The prevailing interpretation of legislators and courts posits that, for for-profit entities, directors’ duty of loyalty is equated with the creation of value for shareholders exclusively.

Historically, stakeholder governance has been interpreted by legislators and courts as a means to achieve long-term value for shareholders (also referred to as “Enlightened Shareholder Value” or “instrumental stakeholder governance”), rather than a pluralistic stakeholder governance model aimed at creating a “shared value” for all stakeholders (without shareholders’ interests systematically prevailing over the interests of the other stakeholders).

- 3) Renunciating to distribute dividends to shareholders as well allocating the liquidation proceeds to non-members (so-called “distribution constraints”) is deemed to be contrary to the essence of the for-profit purpose.

In every jurisdiction, it is possible to draft or amend articles of association to implement a partial relinquishment of dividends distribution and liquidation proceeds to shareholders. Nevertheless, the application of such a distribution constraint must be in the company’s best interests. The degree to which shareholders’ interests need to be taken into account and prioritized remains ambiguous. The validity and enforceability of these provisions within the articles of association has not yet been examined in a court of law.

In the context of Swiss law, the first justification is applicable to associations, as they are prohibited from engaging in for-profit activities. Similarly, this principle extends to cooperatives, even though modifications to their articles of association concerning profit can align them more closely with the characteristics of companies limited by shares.

The second and third justifications are likely applicable to Swiss companies limited by shares, limited liability companies, and all forms of partnerships. Although the most recent iteration of the Swiss Code of Best Practice for Corporate Governance (SCBP) endorses a pluralistic approach to stakeholder governance – one in which all stakeholders are considered on equal footing, Swiss legislator continues to adhere to an instrumental approach to stakeholder governance. This approach prioritizes long-term shareholders’ interests, also known as the pursuit of the Enlightened Shareholder Value. The recent Swiss corporate law reform appears to confirm this stance. The position of Swiss courts is less clear (because the cases were limited and mainly related to disputes between majority and minority shareholders or between shareholders and the management) but tends to lean (in the author’s opinion) toward an instrumental approach of stakeholder governance. In any event, even if Swiss courts would adhere to a pluralistic approach of stakeholder governance, there is uncertainty as to whether the articles of association may validly give primacy to a group of stakeholders over the others. Consequently, any amendments to the articles of association aiming to redirect directors’ duty of loyalty towards achieving the SDGs, prioritizing stakeholders over shareholders (with no foreseeable advantage for shareholders, even in the long term), or implementing constraints on dividend distribution, may be subject to reversal by Swiss courts to ensure the primacy of shareholders or members’ (or other stakeholders’) interests, as has occurred in the United States of America.

Furthermore:

- The diversity of approaches permitted under Swiss law inevitably results into non-comparable situations, particularly regarding reporting aspects (content, assurance, and application of the same third-party standard), which is counterproductive in combating greenwashing. There is thus a need for identification of clear, objective, qualitative and quantitative, forward-looking, comparable and verifiable commitments and targets on which to report to help sustainable entrepreneurs.
- The lack of a legal framework impedes the implementation of public support schemes in favor of SPDEs and is a barrier to private and public funding. The sector has made substantial efforts to establish a network of companies, identify the key players (including funding providers), and develop private labels that grant visibility and credibility to its adherents. These private labels have attained a quasi-legal status as they fulfill sustainability-related criteria in public procurement procedures. To achieve scalability, clarity, and legitimacy, the sector is requesting State initiatives, and particularly a legal framework. This rationale has been a significant driving force for legislative intervention in foreign jurisdictions as well;

- Swiss law imposes constraints that hinder foundations, associations, cooperatives and limited liability companies from being attractive SPDEs for investors.

In conclusion, a legislative intervention in Switzerland seems highly advisable. Simply relying on the (apparent) flexibility offered by Swiss law does not appear to be without any legal risk. Moreover, a legal framework inspired by the benefit corporation model may not be an optimal solution either, as these foreign regulations have exhibited limits concerning (i) interpretation of the stakeholder governance clause, thus securing the primacy of the social purpose, (ii) distribution constraints, and (iii) stakeholders' engagement.

A legal framework built around the corporate purpose theory (*raison d'être*), based on the SDGs and creating a opting-in category/qualification of "Sustainable purpose-driven enterprises" appears to be the best option in terms of providing clarity to the sector, establishing a solid basis for additional policy levers benefiting the category and clarifying the applicable standards while keeping the freedom of organization that is in line with Swiss tradition. This alternative aligns with proposals to amend corporate law put forward in the UK, Canada, and Spain as well as with the approaches taken by the European Commission and the United Nations General Assembly concerning social enterprises. Additionally, modifications could be considered to other laws and regulations, such as tax legislations (notably LHID, LIFD, and the Federal Act of 12 June 2009 on Value Added Tax), UCA and financial market regulations, to introduce benefits and remedies.

## Résumé exécutif

Au cours des quinze dernières années, de nombreux pays ont adopté des cadres juridiques dédiés aux entreprises sociales au sens large, soit y compris celles de l'entrepreneuriat social (ou durable). Bien qu'il n'y ait pas de définition universellement acceptée de ces entreprises (ou « Entreprises à finalité durable » (EFD)), aux fins du présent document, nous considérons une EFD comme une organisation qui s'engage à poursuivre un impact positif sur le territoire et la communauté dans laquelle elle opère et adopte ainsi une vocation sociétale tout en menant une activité commerciale continue. Un impact positif signifie la contribution à la réalisation des Objectifs de Développement Durable (ODD).

La promotion de la croissance du secteur des EFD a été une priorité de l'Union européenne (UE) au cours de la dernière décennie, car les EFD sont des moteurs clés des modèles économiques durables et le lien nécessaire entre les efforts des États et ceux des entreprises privées traditionnelles en matière de durabilité et d'inclusivité. Les EFD ont récemment été approuvées par l'Assemblée générale des Nations Unies en tant qu'acteurs importants pour la réalisation des ODD. Les formes juridiques et les qualifications juridiques ont servi de base aux leviers politiques dans les pays européens : elles étaient liées à des avantages publics dédiés, allant des avantages fiscaux aux subventions et aides spéciales, voire à des avantages dans les procédures de passation des marchés publics. La Commission européenne (CE) poursuit ses efforts pour garantir que les parlements nationaux utilisent toutes les possibilités disponibles pour soutenir les EFD au niveau politique et l'Assemblée générale des Nations Unies se joint aux efforts pour promouvoir un cadre législatif. Des dispositifs de financement spécifiques sont renforcés pour soutenir l'expansion des EFD dans l'UE et sont appelés à être inclus dans l'agenda des parlements nationaux selon le souhait des Nations Unies.

En général, l'intervention législative en faveur de formes légales spécifiques ou de qualifications juridiques pour les EFD trouve des justifications à la fois légales et extra-légales. Les justifications extra-juridiques sont liées à la reconnaissance du mouvement des EFD et à l'opportunité d'uniformiser les standards de durabilité et de créer une catégorie d'entreprises qui pourraient bénéficier ultérieurement d'autres interventions politiques (telles que l'introduction de dispositifs de soutien public).



Les trois principales justifications juridiques sont :

- 1) L'absence, dans la plupart des juridictions, d'une large portée de buts finaux possibles (« Endzweck ») pour toutes les formes juridiques disponibles.

Fondamentalement, ces juridictions distinguent entre les « entités sociales » (ayant un but sociétal (idéal)) et les « entités commerciales » (ayant un but lucratif). Une intervention législative était donc nécessaire pour permettre aux « entités sociales » d'avoir un but lucratif et aux « entités commerciales » d'avoir un but idéal. Une intervention législative a notamment été nécessaire en France pour autoriser les entités à double buts, en Italie pour transformer les entités commerciales en entités à double buts, et au Royaume-Uni et aux États-Unis pour transformer les entités sociales en entités à double buts.

- 2) L'interprétation prédominante des législateurs et des tribunaux estime que, pour les entités à but lucratif, le devoir de loyauté des administrateurs équivaut à la création de valeur pour les actionnaires exclusivement.

Historiquement, la gouvernance des parties prenantes a été interprétée par les législateurs et les tribunaux comme un moyen d'atteindre une valeur à long terme pour les actionnaires (également appelée « valeur actionnariale éclairée » ou « gouvernance des parties prenantes instrumentale »), plutôt qu'un modèle de gouvernance des parties prenantes pluraliste visant à créer une « valeur partagée » pour l'ensemble des parties prenantes (sans que les intérêts des actionnaires prévalent systématiquement sur les intérêts des autres parties prenantes).

- 3) Renoncer à distribuer des dividendes aux actionnaires ainsi qu'à allouer le solde de liquidation à des non-membres (dénommées « restrictions de distribution ») est considéré comme contraire à l'essence du but lucratif.

Dans chaque juridiction, il est possible de rédiger ou de modifier les statuts pour mettre en œuvre un abandon partiel de la distribution de dividendes et du solde positif de liquidation aux actionnaires. Néanmoins, l'application d'une telle restriction de distribution doit être dans l'intérêt de la société. Le degré de prise en compte et de priorité des intérêts des actionnaires reste ambigu. La validité et l'exécutabilité de ces dispositions statutaires n'a pas encore été examinée par un tribunal.

Dans le contexte du droit suisse, la première justification est applicable aux associations, car elles ne peuvent poursuivre un but lucratif. De même, ce principe s'étend aux coopératives, même si des modifications de leurs statuts concernant les bénéficiaires peuvent les rapprocher davantage des sociétés anonymes.

La deuxième et troisième justifications sont probablement applicables aux sociétés anonymes suisses, aux sociétés à responsabilité limitée et à toutes les formes de partenariats. Bien que la version la plus récente du Code suisse de bonnes pratiques pour la gouvernance d'entreprise soutienne une approche pluraliste de la gouvernance des parties prenantes - où toutes les parties prenantes sont considérées sur un pied d'égalité, le législateur et les tribunaux suisses continuent d'adhérer à une approche instrumentale de la gouvernance des parties prenantes. Cette approche privilégie les intérêts des actionnaires à long terme, également connus sous le nom de poursuite de la valeur actionnariale éclairée. La récente réforme du droit des sociétés suisse semble confirmer cette position. La position des tribunaux suisses est moins explicite (parce que le nombre de cas est limité et les affaires concernaient principalement des litiges entre actionnaires majoritaires et minoritaires ou entre actionnaires et direction) mais penche (selon l'auteur) vers une approche instrumentale de la gouvernance des parties prenantes. En tout état de cause, même si les tribunaux suisses adhéraient à une approche pluraliste de la gouvernance des parties prenantes, il n'est pas certain que les statuts puissent valablement donner la priorité à un groupe

de parties prenantes par rapport aux autres. Par conséquent, toute modification des statuts visant à rediriger le devoir de loyauté des administrateurs vers la contribution aux ODD, en privilégiant les parties prenantes sur les actionnaires (sans avantage prévisible pour les actionnaires, y compris sur le long terme), ou en mettant en œuvre des restrictions de distribution des dividendes, peut être sujette à annulation par les tribunaux suisses pour favoriser les actionnaires (ou d'autres parties), comme cela s'est produit aux États-Unis.

De plus :

- La diversité des approches permises par le droit suisse conduit inévitablement à des situations non comparables, en particulier en ce qui concerne les aspects de *reporting* (contenu, assurance et application du même référentiel tiers), ce qui est contre-productif dans la lutte contre le *greenwashing*. Il y a un réel besoin d'identification des informations claires, objectives, qualitative, quantitative, prospectives, comparables et mesurables sur lesquelles être transparent pour aider les entrepreneurs de la durabilité ;
- L'absence de cadre juridique entrave la mise en place de dispositifs de soutien public en faveur des EFD et constitue un obstacle au financement privé et public. Le secteur a fait d'importants efforts pour créer un réseau d'entreprises, identifier les acteurs clés (y compris les fournisseurs de financement) et développer des labels privés qui accordent visibilité et crédibilité à ses adhérents. Ces labels privés ont acquis un statut quasi juridique, car ils remplissent les critères liés à la durabilité dans les procédures de marchés publics. Pour atteindre une mise à l'échelle, une clarté et une légitimité, le secteur demande des initiatives de l'État, et en particulier un cadre juridique. Cette logique a été une force motrice importante pour l'intervention législative dans d'autres juridictions également ;
- Le droit suisse impose des contraintes qui rendent les fondations, les associations, les coopératives et les sociétés à responsabilité limitée peu attrayantes pour les investisseurs en tant qu'EFD.

En conclusion, une intervention législative en Suisse semble vivement conseillée. Se fier simplement à la (apparente) flexibilité offerte par le droit suisse ne semble pas être sans risques légaux. De plus, un cadre juridique inspiré du modèle de société d'intérêt général (*benefit corporation*) peut ne pas être une solution optimale non plus, car ces réglementations étrangères ont montré des limites concernant (i) l'interprétation de la clause de gouvernance des parties prenantes et partant la primauté de l'objectif sociétal, (ii) les restrictions de distribution et (iii) l'engagement des parties prenantes.

Un cadre juridique fondé sur la théorie de la raison d'être (*corporate purpose*), basée sur les ODD et créant une catégorie/qualification optionnelle d'"entreprises à finalité durable" semble être la meilleure option en termes de clarté pour le secteur, d'établissement d'une base solide pour des leviers politiques supplémentaires, d'identification des standards applicables et afin de bénéficier à la catégorie tout en préservant la liberté d'organisation propre à la tradition suisse. Cette alternative s'aligne avec les propositions visant à modifier le droit des sociétés présentées au Royaume-Uni, au Canada et en Espagne, ainsi qu'avec les approches adoptées par la Commission européenne et l'Assemblée générale des Nations Unies concernant les entreprises sociales. Des modifications pourraient être envisagées pour d'autres lois et réglementations, telles que les législations fiscales (notamment la LHID, la LIFD et la Loi fédérale du 12 juin 2009 sur la taxe sur la valeur ajoutée), la LCA, et les réglementations des marchés financiers, afin d'introduire des avantages et des remèdes.

## Kurzfassung

In den letzten fünfzehn Jahren haben viele Länder Rechtsrahmen für Sozialunternehmen, einschliesslich solcher, die von sozialen (oder nachhaltigen) Unternehmern gegründet wurden, eingeführt. Obwohl es keine allgemein anerkannte Definition dieser Unternehmens (oder *Sustainable Purpose Driven Enterprises* (SPDEs)) gibt, betrachten wir in dieser rechtlichen Analyse eine SPDE als eine Organisation, die sich dazu verpflichtet, einen positiven Einfluss auf die Gesellschaft auszuüben und somit einen sozialen Zweck zu verfolgen, während sie eine fortlaufende gewerbliche Tätigkeit ausübt. Ein positiver Einfluss bedeutet, dass ein Beitrag zur Erreichung der Ziele für nachhaltige Entwicklung (SDGs) geleistet wird.

Die Förderung des Wachstums des SPDE-Sektors ist in den letzten zehn Jahren eine Priorität der Europäischen Union (EU) gewesen, da SPDEs wichtige Treiber für nachhaltige Geschäftsmodelle und die notwendige Brücke zwischen staatlichen Anstrengungen und denen traditioneller Privatunternehmen hin zu Nachhaltigkeit und Inklusion sind. SPDEs wurden kürzlich von der UN-Generalversammlung als wichtige Akteure für die Erreichung der SDGs anerkannt. Neue Rechtsformen und rechtliche Qualifikationen haben in europäischen Ländern als Grundlage für besondere öffentliche Vorteile gedient, die von Steuervorteilen über besondere Subventionen und Zuschüsse bis hin zu Vorteilen in öffentlichen Beschaffungsverfahren reichten. Die Europäische Kommission (EK) setzt ihre Bemühungen fort, um sicherzustellen, dass nationale Parlamente alle verfügbaren Möglichkeiten nutzen, um SPDEs auf politischer Ebene zu unterstützen, und auch die UN-Generalversammlung schliesst sich diesen Bemühungen an. In der EU werden zusätzliche finanzielle Mittel bereitgestellt, um die Expansion von SPDEs zu unterstützen und auf UN-Ebene werden nationalen Parlamente dazu aufgerufen, solche Finanzierungsprogramme auf die Agenda zu setzen.

Im Allgemeinen hat die gesetzgeberische Intervention zugunsten spezifischer Rechtsformen oder rechtlicher Qualifikationen für SPDEs sowohl rechtliche als auch ausserrechtliche Begründungen. Ausserrechtliche Begründungen umfassen sowohl die Anerkennung der SPDE-Bewegung als auch die Möglichkeit, gleiche Ausgangsbedingungen zu schaffen und eine Kategorie von Unternehmen zu schaffen, die später von weiteren politischen Interventionen profitieren können (wie zum Beispiel der Einführung von öffentlichen Unterstützungsprogrammen).

Zu den drei wichtigsten *rechtlichen* Begründungen zählen:

1. Die Schwierigkeit in den meisten Rechtsordnungen mehrerer Endzwecke in allen verfügbaren Gesellschaftsformen zu verfolgen.

Grundsätzlich unterscheiden diese Rechtsordnungen zwischen "sozialen Einrichtungen" (mit einem sozialen (idealen) Zweck) und "Wirtschaftseinrichtungen" (mit einem gewinnorientierten (lukrativen) Zweck). Eine gesetzgeberische Intervention ist daher notwendig, um "sozialen Einrichtungen" einen gleichzeitig gewinnorientierten Zweck und "Wirtschaftseinrichtungen" einen gleichzeitig sozialen Zweck zu ermöglichen (dualer Zweck). Eine gesetzgeberische Intervention war insbesondere in Frankreich notwendig, um eine doppelte Zielsetzung im Unternehmenszweck zu ermöglichen, in Italien, um bestehende Betriebe mit gewerblichem Zweck in solche mit dualen Zweck umzuwandeln, sowie im Vereinigten Königreich (UK) und den Vereinigten Staaten von Amerika (USA), um sozialen Einrichtungen in Betriebe mit dualen Zweck umzuwandeln.

2. Die vorherrschende Interpretation von Gesetzgebern und Gerichten besagt, dass sich bei gewinnorientierten Einrichtungen die Treuepflicht der Geschäftsführer ausschließlich auf die Schaffung von Wert für die Aktionäre beschränkt.

Historisch gesehen wurde die *Stakeholder-Governance* von Gesetzgebern und Gerichten als Mittel zur Erzielung langfristiger Werte für Aktionäre interpretiert (auch als *Enlightened Shareholder Value* oder instrumentelle *Stakeholder-Governance* bezeichnet), anstatt als ein pluralistisches *Stakeholder-Governance*-Modell, das darauf abzielt, einen "geteilten Wert" für alle Stakeholder zu schaffen (ohne dass die Interessen der Aktionäre systematisch über die Interessen der anderen Stakeholder gestellt werden).

3. Der Verzicht auf die Ausschüttung von Dividenden an Aktionäre sowie die Zuweisung der Liquidationserlöse an Nichtmitglieder (sogenannte "Verteilungsbeschränkungen") wird als dem Wesen des gewinnorientierten Zwecks widersprechend angesehen.

In jeder Rechtsordnung ist es möglich, Satzungen zu entwerfen oder abzuändern, um eine teilweise Aufgabe der Dividendenausschüttung und der Liquidationserlöse an die Aktionäre umzusetzen. Dennoch muss die Anwendung einer solchen Ausschüttungsbeschränkung im besten Interesse des Unternehmens liegen. Inwieweit die Interessen der Aktionäre berücksichtigt und priorisiert werden müssen, bleibt unklar. Die Gültigkeit und die Durchsetzbarkeit dieser Bestimmungen innerhalb der Satzung sind bisher noch nicht gerichtlich geprüft worden.

Im Kontext des schweizerischen Rechts ist die erste rechtliche Begründung auf Vereine anwendbar, da ihnen untersagt ist, gewinnorientierten Zweck zu haben. Ähnlich erstreckt sich dieses Prinzip auf Genossenschaften, obwohl Änderungen in ihren Satzungen in Bezug auf den Gewinn sie stärker an die Merkmale von Aktiengesellschaften angleichen können.

Die zweite und dritte Begründung ist wahrscheinlich auf schweizerische Aktiengesellschaften (AG), Gesellschaften mit beschränkter Haftung (GmbH) und alle Formen von Partnerschaften anwendbar. Obwohl die jüngste Fassung des *Swiss Code of Best Practice for Corporate Governance* (SCBP) einen pluralistischen Ansatz zur *Stakeholder-Governance* befürwortet – bei dem alle Stakeholder gleichberechtigt betrachtet werden, hält schweizerische Gesetzgeber und Gerichte weiterhin an einem instrumentellen Ansatz zur *Stakeholder-Governance* fest. Dieser Ansatz priorisiert langfristige Aktionärsinteressen, auch bekannt als *Enlightened Shareholder Value*. Die jüngste Reform des schweizerischen Gesellschaftsrechts scheint diese Haltung zu bestätigen. Die Position der schweizerischen Gerichte ist weniger klar (weil die Fälle begrenzt waren und sich hauptsächlich auf Streitigkeiten zwischen Mehrheits- und Minderheitsaktionären oder zwischen Aktionären und der Geschäftsführung bezogen), tendiert aber (nach Meinung des Autors) zu einem instrumentellen Ansatz der *Stakeholder-Governance*. Selbst wenn die schweizerischen Gerichte einem pluralistischen Ansatz der *Stakeholder-Governance* folgen würden, besteht in jedem Fall Unsicherheit darüber, ob die Statuten einer Gruppe von Stakeholdern gegenüber dem anderen rechtsgültigen Vorrang einräumen können. Folglich könnten Änderungen der Satzung, die darauf abzielen, die Treuepflicht der Direktoren zur Erreichung der SDGs umzulenken, Stakeholder über Aktionäre zu priorisieren (ohne vorhersehbaren Vorteil für die Aktionäre, auch ein langfristigen Vorteil) oder Beschränkungen bei der Dividendenausschüttung durchzusetzen, von schweizerischen Gerichten zur Wahrung der Interessen von Aktionärs oder anderer Stakeholdern aufgehoben werden, wie es in den Vereinigten Staaten von Amerika geschehen ist.

Darüber hinaus:

- Die Vielfalt der Ansätze, die das schweizerische Recht zulässt, führt zwangsläufig zu nicht vergleichbaren Situationen, insbesondere im Hinblick auf Berichterstattungsaspekte (Inhalt, Sicherheit und Anwendung desselben externen Standards), was im Kampf gegen *Greenwashing* kontraproduktiv ist. Ausserdem müssen klare, objektive, qualitative und quantitative, vorausschauende, vergleichbare und

überprüfbare Verpflichtungen und Ziele festgelegt werden, über die zu berichten ist, um den Unternehmern zu helfen, die wirklich nachhaltig sein wollen.

- Das Fehlen eines rechtlichen Rahmens erschwert die Umsetzung von öffentlichen Unterstützungsprogrammen zugunsten von SPDEs und stellt eine Barriere für private und öffentliche Finanzierung dar. Der Sektor hat erhebliche Anstrengungen unternommen, um ein Netzwerk von Unternehmen aufzubauen, die Hauptakteure (einschliesslich Finanzierungsgeber) zu identifizieren und private Labels zu entwickeln, die ihren Anhängern Sichtbarkeit und Glaubwürdigkeit verleihen. Diese privaten Labels haben einen quasi-rechtlichen Status erreicht, da sie Nachhaltigkeitskriterien in öffentlichen Beschaffungsverfahren erfüllen. Um Skalierbarkeit, Klarheit und Legitimität zu erreichen, fordert der Sektor staatliche Initiativen, insbesondere einen Rechtsrahmen. Diese Begründung war auch ein wichtiger Antrieb für gesetzgeberische Eingriffe in ausländischen Rechtsordnungen.
- Das schweizerische Recht legt Beschränkungen fest, die SPDEs in der Form von Stiftungen, Vereinen, Genossenschaften und GmbHs für Investoren unattraktiv machen.

Insgesamt erscheint eine rechtliche Intervention in der Schweiz sehr ratsam. Sich einfach auf die (scheinbare) Flexibilität des schweizerischen Rechts zu verlassen, scheint nicht ohne juristische Risiken zu sein. Darüber hinaus dürfte auch ein Rechtsrahmen, der sich am Modell der *Benefit Corporation* orientiert, nicht die optimale Lösung sein, da diese ausländischen Regelungen Grenzen in Bezug auf (i) die Auslegung der breiten *Stakeholder-Governance*-Klausel und damit den Vorrang des sozialen Zwecks sicherstellen (ii) Verteilungsbeschränkungen (Dividenden & Liquidationserlöse) und (iii) das Stakeholder-Engagement haben.

Ein Rechtsrahmen, der sich auf die Theorie des Unternehmenszwecks (*raison d'être*) stützt, der auf den Zielen für nachhaltige Entwicklung (SDGs) basiert und eine einsteigende Kategorie/rechtliche Qualifikation von *Sustainable Purpose-Driven Enterprises* schafft, erscheint als die beste Option, um Klarheit für den Sektor zu schaffen, eine solide Grundlage für zusätzliche politische Hebel zugunsten der Kategorie zu schaffen, die Klärung der anwendbaren Standards und gleichzeitig die Organisationsfreiheit zu bewahren, die im Einklang mit der Schweizer Tradition steht. Diese Alternative steht im Einklang mit Vorschlägen zur Änderung des Gesellschaftsrechts, die im Vereinigten Königreich, Kanada und Spanien vorgebracht wurden, sowie mit den Ansätzen der Europäischen Kommission und der Generalversammlung der Vereinten Nationen im Zusammenhang mit Sozialunternehmen. Zusätzlich könnten Änderungen an anderen Gesetzen und Vorschriften in Betracht gezogen werden, wie etwa Steuergesetze (insbesondere LHID, LIFD und das Bundesgesetz vom 12. Juni 2009 über die Mehrwertsteuer), UCA, und Finanzmarktregulierungen, um Vorteile und Abhilfemassnahmen einzuführen.

## I. Mandate

This report was prepared at the behest of B Lab (Switzerland) to evaluate the potential, from a legal perspective, of implementing a specific legal framework for SPDEs under Swiss law.

The author did not receive any compensation for the preparation of this report. However, B Lab (Switzerland) provided funding and employed a research assistant.

## II. Context

### A. Efforts at the EU level

Efforts to promote SPDEs at the EU level commenced in 2010 with the introduction of the Europe 2020 strategy. In response to the various crises that had destabilized the European economic model since 2008, the Europe 2020 strategy delineated three independent objectives: smart growth, sustainable growth, and inclusive growth. The European Commission (EC) launched several measures to unlock new growth potential within the European single market. Consequently, the 2010 flagship initiative "Innovation Union" underscored the necessity of cultivating social innovation in tandem with economic, ecological, and digital innovations to stimulate growth and bolster employment.

Following the Single Market Act, in which social entrepreneurship is mentioned as a possible tool to diversify and enhance growth, the EC published two communications in October 2011 – the Social Business Initiative and the Corporate Social Responsibility (CSR) Strategy 2011-2014 – which for the first time openly distinguished between “traditional” and “social” enterprises. To develop social entrepreneurship in Europe, the EC proposed a three-step action plan: (i) improving access to finance, (ii) improving the visibility of social entrepreneurship and (iii) improving the legal environment. In December 2021, the EC presented an action plan to boost the social economy and job creation in Europe. Through a series of actions – planned to span from 2021 to 2023 – the EC aims at strengthening the potential for the social and economic transformation of actors contributing to the ecological and digital transition as well as to a more just and inclusive Europe.

To facilitate the growth of the social economy and to secure its recognition, the Organisation for Economic Co-operation and Development (OECD) was commissioned by the EU to develop a practical guide for legislators aimed at establishing the legal frameworks and conditions for SPDEs. This guide was published in late 2022<sup>1</sup>.

### B. Swiss Parliament’s interest and Federal Council’s position

SPDEs have also attracted the attention of the Swiss Parliament over the last ten years.

The topic was the subject of the following postulates and interpellations:

- Postulate [13.3079](#) Marina Carobbio Guscetti of March 14, 2013 (Faire le point sur les entreprises sociales)
- Interpellation Fabian Molina [18.3455](#) of June 6, 2018 (La Suisse va-t-elle rater le train de l'entrepreneuriat social ?)

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<sup>1</sup> OECD, *Designing Legal Frameworks* 2022.

- Postulate [18.4073](#) Fabian Molina of September 28, 2018 (Procéder à un tour d'horizon sur l'entrepreneuriat social en Suisse)
- Postulate [20.3499](#) Eric Nussbaumer of June 3, 2020 (Etablir un plan d'action pour l'économie sociale)
- Postulate [20.3559](#) Fabian Molina of June 10, 2020 (Economie sociale, gestion participative, service public. Quelles leçons pour la Suisse ?)
- Postulate [20.4302](#) Fabian Molina of October 30, 2020 (Procéder à un tour d'horizon sur l'entrepreneuriat social en Suisse)
- Interpellation [21.3411](#) Niklaus-Samuel Gugger of March 19, 2021 (La Suisse a besoin d'un entrepreneuriat social)

A report<sup>2</sup> issued in 2016 and mainly focusing on Work Integration Social Enterprises (WISEs) was the answer to the first postulate. Subsequent postulates or interpellations were each time rejected and the Federal Council refused a complimentary report on the topic. In relation to the last interpellation, the Federal Council expressed the opinion that there was no need for a social entrepreneurship public label, to fill a gap or for incentives, and that the legal existing framework was sufficient<sup>3</sup>.

The Federal Council continues however to promote sustainable business through the concept of CSR, notably in its 2015 action plan on CSR, as amended in 2020<sup>4</sup>. The promotion of sustainable business is now also part of the Swiss strategy for the Agenda 2030 confirming that any entity (whatever legal form it takes) has a role to play in sustainable development<sup>5</sup>. Impact investment and green bonds have also been identified by the Federal Council as an area of action for the period 2022-2025<sup>6</sup>.

## C. Endorsement of social entrepreneurship by the United Nations General Assembly

On April 19, 2023 the United Nations General Assembly approved the resolution “*Promoting the Social and Solidary Economy for Sustainable Development*”<sup>7</sup> recognizing the role to be played by SPDEs for the achievement of the SDGs. This resolution encourages Member States to “*promote and implement national, local and regional strategies, policies and programmes [...] by, inter alia, developing specific legal frameworks [...] and providing fiscal and public procurement incentives, [...] and reinforcing entrepreneurship and business support, including by facilitating access for social and solidarity economy entities to financial services and funding, and encourages the participation of social and solidarity economy actors in the policymaking process*”<sup>8</sup>.

<sup>2</sup> FEDERAL COUNCIL, Report 2016.

<sup>3</sup> Federal Council adopts postulate report on corporate governance, 26 May 2021, press release (available under <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?Affhttps://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20213411>, last consulted on April 24, 2023).

<sup>4</sup> FEDERAL COUNCIL, CSR Action Plan 2020-2023, summary.

<sup>5</sup> FEDERAL COUNCIL, 2030 Sustainable Development Strategy.

<sup>6</sup> FEDERAL COUNCIL, Sustainable Finance in Switzerland 2022, 19 ff.

<sup>7</sup> Resolution “*Promoting the social and solidary economy for sustainable development*”, A/77/L60

<sup>8</sup> Resolution “*Promoting the social and solidary economy for sustainable development*”, A/77/L60, 3, N. 1.

### III. Methodology

After describing the concept of SPDEs and providing a general overview of the legislative situation in Switzerland and abroad, this report addresses whether legislative intervention in this area is necessary or advisable. The question is approached from a comparative corporate law perspective with a view to understand whether a legislative intervention was necessary in countries that have adopted a specific legal framework for SPDEs and whether it would also be justified in Switzerland – according to an analysis of current corporate law. The comparative law approach essentially focuses on the laws of France, Italy, Germany, the United Kingdom (UK), and the United States of America (USA).

The analysis covers the five characteristics of social enterprises<sup>9</sup>, i.e. (i) the primacy of the social purpose aiming at the creation of a positive societal impact, (ii) the ongoing business activity, (iii) the possibility to implement a distribution constraint (on dividends and on liquidation proceeds), (iv) the stakeholders' engagement at the governance level and (v) the reporting on the positive societal impact.

Drawing from the conclusions, this report examines potential possible legislative alternatives, considering the most recent legislative proposals inspired by the corporate purpose theory.

### IV. Concept of social enterprises

#### A. Definitions

SPDEs are anchored in Europe in the social and solidarity economy<sup>10</sup>. WISEs were the first type of SPDEs across Europe<sup>11</sup>: they are focused on the training and integration of people with disabilities and unemployed people. The operative ambit of SPDEs has however extended over the years to all aspects of the common good, as framed by the SDGs. Today, SPDEs are those that contribute to achieve the SDGs<sup>12</sup>.

Over the years, various definitions were suggested. The most authoritative are the following:

- The definition from the EMES Research Network for Social Enterprise identifying the following nine indicators that serve to define the three dimensions<sup>13</sup> of the ideal type<sup>14</sup> of SPDEs<sup>15</sup>:

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<sup>9</sup> For more explanations on these characteristics, please refer to Sect IV.A

<sup>10</sup> On the fact that some stakeholders and international organizations also use terms such as “*social economy enterprises*”, “*social and solidary enterprises*” or “*third sector entities*” to refer to social economy entities, see EUROPEAN COMMISSION, *Building an Economy 2021*, 5.

<sup>11</sup> DEFOURNY/NYSSENS, *Social Enterprise*, 8.

<sup>12</sup> NÄGELI, 19.

<sup>13</sup> EUROPEAN COMMISSION, *Comparative synthesis report 2020*.

<sup>14</sup> VARGAS VASSEROT, 28.

<sup>15</sup> DEFOURNY/NYSSENS, *L'approche EMES*, 13-15.



Economic and entrepreneurial dimension	Social dimension	Governance dimension
<ul style="list-style-type: none"> <li>- ongoing activity of producing goods and/or selling services</li> <li>- significant level of economic risk</li> <li>- a minimum amount of paid work</li> </ul>	<ul style="list-style-type: none"> <li>- explicit aim to benefit the community</li> <li>- initiative launched by a group of citizens</li> <li>- limited profit distribution</li> </ul>	<ul style="list-style-type: none"> <li>- high degree of autonomy</li> <li>- decision-making power not based on capital ownership</li> <li>- participatory nature, which involves various parties affected by the activity</li> </ul>

- the 2021 EC's (more realistic) definition<sup>16</sup>:

*“an undertaking, regardless of its legal form, [...] or a natural person which:*

- a) *in accordance with its articles of association, statutes or with any other legal document [...], has the achievement of measurable, positive social impacts, which may include environmental impacts, as its primary social objective rather than the generation of profit for other purposes, and which provides services or goods that generate a social return or employs methods of production of goods or services that embody social objectives;*
- b) *uses its profits first and foremost to achieve its primary social objective, and has predefined procedures and rules that ensure that the distribution of profits does not undermine the primary social objective;*
- c) *is managed in an entrepreneurial, participatory, accountable and transparent manner, in particular by involving workers, customers and stakeholders on whom its business activities have an impact”.*

- The latest definition by the United Nations General Assembly<sup>17</sup>, which cancels the historic gap between the European and the North American approaches to SPDEs<sup>18</sup>:

*“the social and solidarity economy encompasses enterprises, organizations and other entities that are engaged in economic, social and environmental activities to serve the collective and/or general interest, which are based on the principles of voluntary cooperation and mutual aid, democratic and/or participatory governance, autonomy and independence and the primacy of people and social purpose over capital in the distribution and use of surpluses and/or profits, as well as assets, that social and solidarity economy entities aspire to long-term viability and sustainability and to the transition from the informal to the formal economy and operate in all sectors of the economy, that they put into practice a set of values which are intrinsic to their functioning and consistent with care for people and planet, equality and fairness, interdependence, self-governance, transparency and accountability and the attainment of decent work and livelihoods and that, according to national circumstances, the social and solidarity economy includes cooperatives, associations, mutual societies, foundations, social enterprises, self-*

<sup>16</sup> Regulation (EU) 2021/1057 of the European parliament and of the Council of 24 June 2021 establishing the ESF+ and repealing Regulation (EU) No 1296/2013 (13).

<sup>17</sup> Resolution “Promoting the social and solidary economy for sustainable development”, A/77/L60, 2.

<sup>18</sup> VARGAS VASSEROT, 29, explaining that the North American approach focuses on a larger purpose, without caring too much about the formal requirements at a governance level.

*help groups and other entities operating in accordance with the values and principles of the social and solidarity economy”.*

These definitions share the following five characteristics, which define the scope of this report:

1. the primacy of social purpose – aiming at creating a “positive impact” (or societal impact), i.e., aiming at contributing to the achievement of the SDGs);
2. an ongoing business activity;
3. the (partial) allocation of assets, profit and liquidation proceeds to the social aim (so-called “*distribution constraints*”<sup>19</sup>);
4. the stakeholders’ engagement (beneficiaries, employees, customers and other affected stakeholders) at the governance level (participatory governance concept); and
5. the reporting on the positive societal impact (transparency and accountability).

For purpose of this report, the first two characteristics are analyzed together.

## B. One single entity

Some definitions of SPDEs led some scholars<sup>20</sup> to include hybrid venture structures within the concept of SPDEs. Hybrid venture structures are those meeting SPDEs’ characteristics through two or more separate legal entities. Holding (or shareholder) foundations (or associations)<sup>21</sup> are a typical example of such hybrid forms. The recent restructuring of Patagonia Inc is shedding more light on them<sup>22</sup>. These forms are not in line with the European approach to SPDEs and the EC’s definition of SPDEs which refers to one single entity.

Within the meaning of this report, SPDEs are thus only those entities structured as follows:

- a legal entity with (only) a social purpose but (also) exerting to that effect a commercial activity (Category 1 SPDEs);
- a legal entity with a dual-purpose (for-profit purpose and social purpose, but with the social purpose prevailing in case of conflict between the two purposes) exerting a commercial activity (Category 2 SPDEs).

## C. Distinction with other “sustainable businesses”

Despite the hardening of the soft law requirements for sustainability in business, there are still distinctions between the entities applying hard and soft law sustainability requirements (referred to as “*sustainable businesses*” for simplification reasons) and the SPDEs on how they map against four aspects of sustainability<sup>23</sup>.

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<sup>19</sup> Asset lock – as required under French SCIC regulation or to obtain the ESS legal qualification, under Italian law for the legal qualification of “*impresa sociale*” or to become a social cooperative or under UK law to be incorporated as a CIC – means that the transfer of assets and profit during the lifetime of the entity is made at full market value and that – at liquidation – all remaining assets are transferred to another similar entity or for the benefit of the community.

<sup>20</sup> See notably PLERHOPLES, 913.

<sup>21</sup> BOTTGE, 13.

<sup>22</sup> Patagonia’s founder recently decided to transfer all Patagonia Inc’s voting rights to a trust and all dividend rights to a charity.

<sup>23</sup> Inspired and aligned with the sustainability framework proposed by the Institute for Sustainability Leadership of the University of Cambridge, see CISL, 6-7.

Table 1: Distinctions between SPDEs and sustainable businesses

	Sustainable businesses	SPDEs
Aim	Get the social license to operate	Achieve a positive societal impact
Value creation	Long-term financial value for shareholders (also referred to as Enlightened Shareholder Value)	Long term shared value for everyone
Stakeholder governance approach	Instrumental approach, i.e. shareholders' interests prevail.  Stakeholders are not beneficiaries of the business activities but actors of the ecosystem in which the business company operates. Their health is needed by the company to obtain the social license to operate.	Pluralistic approach, i.e. no priority is by principle given to shareholders, coupled with primacy given to the societal purpose.  Stakeholders are the beneficiaries of the business activities.
Interaction with SDGs	One or more of their products and/or services are aligned with one or more of the SDGs or contribute to one or more of the SDGs.	All of their products and services are aligned with or contribute to the achievement of one or more of the SDGs.

## V. Legal situation in Switzerland

### A. No specific legal framework

In Switzerland, there is no specific legal form or legal qualification for SPDEs.

Swiss law is highly flexible in terms of end-purpose (*but final, Endzweck*). Almost any legal form may opt for a public utility purpose (*but idéal*) and exercise a commercial activity. However, not all legal forms may combine a for-profit purpose with a non-economic purpose while conducting an economic activity (see Sect. VII.A.2 below).

### B. No targeted public support scheme

#### 1. Tax benefits

Under Swiss law, there are no specific tax benefits for SPDEs.

Swiss tax authorities' requirements for obtaining a tax exemption<sup>24</sup> do not reflect SPDEs' reality. Currently, there are two main barriers to the tax exemption of SPDEs:

- A commercial activity is deemed compatible with a tax exemption only if it remains marginal<sup>25</sup>.

The position adopted by Swiss tax authorities preventing social purpose entities to get a (full) tax exemption if they have a (non-accessory) commercial activity is founded on the principle of competitive neutrality<sup>26</sup>, and on a judicial interpretation of the prohibition to

<sup>24</sup> To obtain a tax exemption for public utility purposes an entity must meet other conditions than just pursuing a public purpose, notably agree in the articles of association on a waiver of distribution of dividends and on a devolution of assets – at liquidation – to a tax-exempt entity (so called in French “*clause de non-retour*”). See Federal Tax Administration, Circular no. 12 of 8 July 1994 for exhaustive criteria.

<sup>25</sup> Federal Tax Administration, Circular no. 12 of 8 July 1994, § II.3.b.

<sup>26</sup> MERKT/PETER, 210; LIDEIKYTE HUBER, 216; ATF 121 I 279, c. 4.a.

have an economic purpose<sup>27</sup>. Scholars<sup>28</sup> have called for a reconsideration of this position without success so far. In theory, a partial tax exemption could be obtained if there is a clear separation (with separate accounts) between the taxable commercial activity and the non-taxable charitable activity. Implementation of this kind of scheme in practice is however rare<sup>29</sup>.

- The requirements of exclusive and irrevocable use of funds for public utility purposes are deemed to prohibit remuneration of shareholders and distribution of liquidation proceeds.

Under the practices of Swiss tax authorities, the exclusive and irrevocable allocation of funds to the public utility purpose necessitates a complete renunciation of dividend distribution. This represents a major obstacle for SPDEs (Category 2 SPDEs) formed as companies limited by shares, limited liability companies, or partnerships limited by shares. The transfer of shares is also problematic<sup>30</sup>.

Amendments to articles of association to limit the transfer of shares and the distribution of dividends have not yet convinced Swiss tax authorities to grant tax exemptions to companies limited by shares or limited liability companies, despite the fact that tax law does not limit tax exemptions to associations and foundations<sup>31</sup>.

As pointed out by some scholars, the interpretation of these requirements by Swiss tax authorities might be too drastic, since part of the funds could validly be allocated to the for-profit purpose leading to at least a partial tax exemption. This led GANI to suggest that *“it should not be strictly prohibited to distribute a dividend but rather limit the distribution in relation to the outlay so that the “social” investor can still obtain a limited form of remuneration, without which they will not make the investment”*<sup>32</sup>.

Besides, contrary to the UK (with the UK Social Investment Tax Relief (SITR)) or Netherlands (with the Dutch Green Funds Scheme), and despite the important leeway of Swiss cantons<sup>33</sup> (in the absence of a strict State aid rule), no tax relief scheme has been introduced in Switzerland so far to target SPDEs funders<sup>34</sup>. SPDEs may use tax incentives that have been introduced in the areas of R&D, innovation<sup>35</sup>, promotion of tourism, and cantonal aids to local businesses<sup>36</sup>.

## 2. Subsidies

At the federal level, subsidies have been introduced for entities favouring work integration<sup>37</sup>. At the cantonal and communal level, subsidies have also been introduced to favour innovation<sup>38</sup> or

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<sup>27</sup> Art. 56 (g) LIFD; TF 2C\_251/2012 of August, 17 2012, c. 3.1.1.

<sup>28</sup> MERKT/PETER, 209 ff.

<sup>29</sup> PETER/PFAMMATTER, Social Enterprises, 853 and references.

<sup>30</sup> PETER/PFAMMATTER, Social Enterprises, 851.

<sup>31</sup> PETER/PFAMMATTER, Social Enterprises, 851 rightly point out that *“article 56 LIDF refers to “legal entities”, without any restriction as to their type”* and that *“Circular no. 12 of the Federal Tax administration admits that Corporations may benefit from tax exemptions under certain conditions”*.

<sup>32</sup> GANI, 538.

<sup>33</sup> PETER/LIDEIKYTE HUBER, 216 and references.

<sup>34</sup> PETER/LIDEIKYTE HUBER, 216-218 who promote the introduction of such a tax incentive.

<sup>35</sup> See Art. 5 LHID.

<sup>36</sup> PETER/LIDEIKYTE HUBER, 216 and references.

<sup>37</sup> Art. 18-18d LAI; Art. 59-75b LACI; Art. 3 (1)(c) LIPPI.

<sup>38</sup> See for instance in Geneva, Règlement régissant les conditions d’octroi des subventions municipales (LC 21 195) and LDD.

local businesses<sup>39</sup>. Depending on their activity, SPDEs may thus benefit from such subsidies. There are however no subsidies targeting SPDEs only.

### 3. Advantages in public procurement procedures

The Swiss Public Procurement Act (PPA) has been amended to depart from the lowest price criteria in favour of the Best Price Quality Ratio (BPQR). At the federal level – and at the cantonal level for cantons having translated the Intercantonal Agreement of Public Procurement (IAPP) – contracting authorities may include and impose adjudication criteria other than price and quality, such as appropriateness, timeframes, technical value, economic efficiency, life cycle costs, aesthetics, sustainable development, plausibility of the tender, the different price levels in the countries where the supply is provided, reliability of the price, creativity, customer service, delivery conditions, infrastructure, innovation content, functionality, service readiness, expertise or efficiency of the methodology<sup>40</sup>.

Amongst the criteria that could favour SPDEs there are advantageous product and company characteristics (notably on sustainability), the quality of the supply chain and the life cycle cost<sup>41</sup>.

PPA and IAPP do not specify the indicators to be complied with to meet the sustainable development criteria. Eco-labels may serve as such indicators<sup>42</sup>. Canton of Vaud has made use of this possibility and lists eco-labels as elements of decision making<sup>43</sup>. Private labels such as B Corp certifications are part of these eco-labels<sup>44</sup>.

The life cycle cost is listed amongst the possible adjudication criteria<sup>45</sup>. This concept refers to both the total costs of ownership as well as the external costs<sup>46</sup>. The external costs include the financial aspects of the service that are not borne by either the adjudicator or the tenderer, but by the community at large (e.g. deforestation or air pollution). In other words, these are costs that are not included in the remuneration to be paid by the adjudicator, so they are outside the envisaged commercial transaction<sup>47</sup>.

For standardized services, federal law stipulates that the award may be made exclusively based on the lowest total price criterion, provided that the technical specifications for the goods, work, or services guarantee high sustainability standards in social, environmental, and economic terms<sup>48</sup>. This wording has not been taken up in the IAPP because Cantons saw a contradiction between the lowest price criterion and the high sustainability standards<sup>49</sup>, so that the condition precedent referring to ESG standards has been removed.

For all markets outside the scope of international treaties, the contracting authority may additionally take into account the extent to which the tenderer provides apprenticeship places,

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<sup>39</sup> For instance, in Geneva there is the prize IDDEA for social entrepreneurship.

<sup>40</sup> Art. 29 para. 1 PPA; Art. 29 para. 1 IAPP.

<sup>41</sup> Of the same opinion, NÄGELI, 70.

<sup>42</sup> *European Commission v. Netherlands*, ECJ, 10 May 2012 (Max Havelaar), ECLI:EU:C:2012:284 (available under <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62010CJ0368>, last consulted on March 31, 2023).

<sup>43</sup> Art. 9 para. 2 PPA-VD; CONFÉRENCE ROMANDE DES MARCHÉS PUBLICS, Annexes T5 et Q5.

<sup>44</sup> This is notably the case of B Corp certification.

<sup>45</sup> Art. 29 para. 1 PPA.

<sup>46</sup> KBOB, 3.

<sup>47</sup> DI CICCIO, 10.

<sup>48</sup> Art. 29 para. 4 PPA.

<sup>49</sup> Message accompanying IAPP of November 15, 2019, 71.

jobs for older employees, or jobs to reintegrate long-term unemployed people<sup>50</sup>. These are tasks assumed notably by WISEs.

WISEs may also benefit from the exemption of Art. 10 para. 1 (e) PPA which stipulates that PPA does not apply to contracts with institutions for the disabled, work integration organizations, charities and penal institutions.

While the reform of the PPA is a paradigm shift on the adjudication criteria with the introduction of the quality criteria on top of the price, there is no duty for contracting authorities to take other criteria, such as sustainable development<sup>51</sup>.

## C. Community

There is no public national platform specifically targeting SPDEs. The Swiss Innovation Agency promotes small and medium-sized enterprises (SMEs), start-ups, and other Swiss organizations and thus also SPDEs.

A private national platform – SENS Social Entrepreneurship Schweiz – was created in 2017. At the cantonal level, three Chambers of Social and Solidarity Economy (SSE) regroup mainly Category 1 SPDEs. APRES-GE covers the Geneva region, APRES-VD the one of Canton of Vaud, and APRES-BEJUNE the regions of cantons of Neuchâtel, Jura, and Jura Bernois.

Other private foundations and associations, like Ashoka, Impact Hub, Social Entrepreneurship Initiative & Foundation (SEIF), Schwab Foundation for Social Entrepreneurship, or B Lab (Switzerland) are also promoting the growth of the SPDEs in Switzerland.

## D. Labels and certification

There is no public label for certification for sustainable business. Various private labels<sup>52</sup> have been promoting social transformation within all sectors of the economy (bank, industry, construction, social services, technology etc.) and significant players<sup>53</sup> have obtained or are trying to obtain such labels. The phenomenon has gained traction in Switzerland with for instance the certification of 280 B Corp entities<sup>54</sup>.

Each label relies on different approaches to sustainability and on different tools and systems for measuring and reporting the societal impact. For instance, they have different ways to assess the impacts of the business model, to request transparency or are not systematically accredited with an independent private third-party control<sup>55</sup>.

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<sup>50</sup> Art. 29 para. 2 PPA; Art. 10 (a) IAPP. While this exception was deemed justified because the tenderer had a non-profit purpose (TF 2C\_861/2017 of October 12, 2017, c. 3.7), it shall be noted that these services may also be granted by for-profit or dual-purpose entities.

<sup>51</sup> NÄGELI, 55.

<sup>52</sup> Notably B Corp certification, Ecoentreprises, Entreprise citoyenne or other international labels such as Ecovadis or EMAS.

<sup>53</sup> Banque Lombard Odier & Cie SA and Nespresso SA have joined the B Corp movement in the last five years.

<sup>54</sup> See My B plan campaign (available under <https://my-planb.ch/>, last consulted on April 24, 2023).

<sup>55</sup> B LAB SWITZERLAND, Report 2022, 5.

## E. Social investment markets

Specific funds targeting SPDEs are limited. When available, they were conceived by private actors<sup>56</sup>. Swiss Alternative Bank, Migros, and its SCHUB Migros Pioneer Fund<sup>57</sup>, Social Investors, LGT Venture Philanthropy, Blue Orchard, SoSense and Fondetec<sup>58</sup> are the main organizations financing SPDEs.

In 2021, for the first time outside the COVID financial aids, the Economic Development Direction of the Canton of Geneva allocated a CHF 2.5 Mio budget for result-based financial aid to support the companies' ecological and digital transformation. Such aid could have been used to transform an enterprise into a SPDE in terms of ecological footprint.

The Federal Council recently acknowledged the importance of fostering impact investment and the lack of supportive legislations. Public authorities, together with the industry, are examining how financial market legislations can be amended to promote the expansion of impact investments. SPDEs might then well be placed as beneficiaries of these investments<sup>59</sup>.

## F. Request for policy intervention from the community of SPDEs

A 2022 survey of social enterprises in Switzerland<sup>60</sup> shows that social entrepreneurs in Switzerland are requesting a form of policy intervention. Amongst the top ten reasons supporting this need for legislative intervention, interviewees mention low political support, which is confirmed from a European comparative perspective<sup>61</sup>, not enough *“patient capital”* (i.e. investments made with the forgoing of an immediate return in anticipation of more substantial returns in the future), difficulties in retaining or attracting clients, low awareness of SPDEs amongst banks and financing organizations, the absence of targeted funding as well as weak public support and financing schemes<sup>62</sup>. The survey report indicates that *“the absence of a dedicated legal framework remains an important obstacle for social enterprises”*<sup>63</sup>.

## VI. Status of the situation abroad

### A. Specific legal framework

There is a growing legal recognition of SPDEs around the world. There is however no uniformity in the ways this legal recognition is achieved. While some countries have adopted specific legal forms for SPDEs (e.g. UK<sup>64</sup> and USA<sup>65</sup>), others have rather created a legal qualification available to

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<sup>56</sup> EUROPEAN Commission, A map of social enterprises 2014, 7-8.

<sup>57</sup> Details available under <https://www.migros-engagement.ch/en/news-projects/community/schub> (last consulted on February 16, 2023).

<sup>58</sup> See for more details, EUROPEAN COMMISSION, A map of social enterprises 2014, 7-8.

<sup>59</sup> FEDERAL COUNCIL, Sustainable Finance in Switzerland 2022, 20 (see measure 12).

<sup>60</sup> SENS.

<sup>61</sup> NEVES/KLIJN/DUPAIN/GAZELEY, 42.

<sup>62</sup> SENS, 26.

<sup>63</sup> SENS, 26.

<sup>64</sup> MORRISON & FOERSTER LLP, LexMundi England and Wales 2023 Report; ANDREADAKIS; OFER; Companies (Audit, Investigations and Community Enterprise) Act 2004; The Community Interest Company Regulations 2005 No. 1788; The Community Interest Company (Amendment) Regulations 2009 No. 1942.

<sup>65</sup> As of March 2018, 39 states and Washington, D.C., have passed legislation allowing for the creation of benefit corporations. Source: Social Enterprise Law Tracker, <https://socentlawtracker.org/#/bcorps>, accessed on 23 April, 2023. For a details of these forms, requirements and benefits, see MORRISON & FOERSTER LLP, LexMundi USA Delaware 2023 Report; MORRISON & FOERSTER LLP, LexMundi USA California 2023 Report; COHEN/ LIGENFELTER; MURRAY, Social Enterprise Innovation; OFER; PLERHOPLES;

one or several legal forms that meet specific criteria (e.g. Denmark, Luxembourg, France<sup>66</sup>, Spain<sup>67</sup> and Canada<sup>68</sup>) or both (e.g. Italy<sup>69</sup>).

Other countries (e.g. Germany<sup>70</sup> and Australia<sup>71</sup>) have decided so far not to create any legal form, considering that their corporate law was flexible enough to allow companies to amend their articles of association to match SPDEs' criteria. Germany is however considering introducing a new form of limited liability company with full prohibition to distribute profits to shareholders (*“die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen (GmbH-gebV)”*)<sup>72</sup>. This new legal form would however not only target SPDEs as the objectives pursued by the company can be decoupled from the sustainable development. Appendix 3 summarizes the main features of the German legislative proposal.

There is also no uniformity in the features of SPDEs under these (new) legal forms or legal qualification. Appendix 1 summarizes the existing legal framework for Category 1 SPDEs and their requirements under Italian, French, and UK laws. Appendix 2 focuses on the requirements (and benefits) for Category 2 SPDEs' legal forms and legal qualification in these same countries, as well as in the USA and Spain.

## B. Targeted and generic public support schemes

### 1. Tax benefits

Countries that have adopted a SPDE legal form or legal qualification have all granted fiscal benefits with diversity both in range and kind.

Tax benefits for Category 1 SPDEs range from tax exemption, notably on corporate income tax<sup>73</sup> and locked assets<sup>74</sup> to tax reduction, notably on VAT<sup>75</sup> or tax credits<sup>76</sup>. Donors to Category 1 SPDEs

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<sup>66</sup> GIDE LOYRETTE NOUËL A.A.R.P.I., LexMundi France 2023 Report ; SCHILLER ; LOI n° 47-1775 ; Loi n° 92-643 du 13 juillet 1992 relative à la modernisation des entreprises coopératives, NOR : SPSX9100064L; Décret n° 2015-1381 du 29 octobre 2015 relatif aux éléments d'informations sur l'évolution du projet coopératif d'une société coopérative d'intérêt collectif à inscrire dans le rapport de gestion ou le rapport du conseil d'administration ou du directoire, NOR : EINS1519579D; LOI n° 2014-856; Code du travail français, Partie législative, 3<sup>ème</sup> partie, Livre III, Titre III, Chapitre II, Sect. 3, L3332-17-1 and Partie réglementaire, 3<sup>ème</sup> Partie, Livre III, Titre III, Chapitre II, Sect. 3, R3332-21-1-5; Arrêté du 5 août 2015 fixant la composition du dossier de demande d'agrément « entreprise solidaire d'utilité sociale », NOR : EINT1511156A ; Code de commerce français, Partie législative, Livre II, titre 1<sup>er</sup>, L210-10-L210-12 and Partie réglementaire, Livre II, R 210-21; Décret n° 2020-1 du 2 janvier 2020 relatif aux sociétés à mission; PACTE Law.

<sup>67</sup> Ley 1901 de 2018, no. 50.628 de 18 de junio de 2018; VILLAMIZAR; GABEIRAS/BARAHONA.

<sup>68</sup> Amendment to corporate law (*Canada Business Corporations Act – CBCA*), Sections 122(1), 122(1.1), 6 and 155A; AKINTUNDE/JANDA.

<sup>69</sup> CHIOMENTI, LexMundi Italy 2023 Report ; VENTURA ; LEGGE 28 dicembre 2015, n. 208, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2016) (15G00222); Codice Civile, § 2630; DECRETO LEGISLATIVO 3 luglio 2017, n. 112, Revisione della disciplina in materia di impresa sociale, a norma dell'articolo 2, comma 2, lettera c) della legge 6 giugno 2016, n. 106 (17G00124); Decree 117/2017; LEGGE 8 novembre 1991, n. 381, Disciplina delle cooperative sociali; DECRETO-LEGGE 18 ottobre 2012, n. 179, Ulteriori misure urgenti per la crescita del Paese. (12G0201); LEGGE 28 dicembre 2015, n. 208, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2016) (15G00222).

<sup>70</sup> For the situation in Germany, see SPINDLER, 585-600.

<sup>71</sup> For explanations on the failed attempt to enact a benefit company legislation in Australia with the response of politicians, the business community and the academic community to such a draft legislation, see RAMSAY/UPADHYAYA, 379-424.

<sup>72</sup> MAYER/OSBAHR; SANDERS; KLESEN; SANDERS/DAUNER-LIEB/VONFREEDEN/KEMPNY/MÖSLEIN/VEIL; STIFTUNG VERANTWORTUNGSEIGENTUM.

<sup>73</sup> This is the case in Denmark, for SIS in Luxembourg, and for Spanish social initiative cooperatives. In Italy profits set aside to tax-deferred reserves for statutory activity are excluded from the taxable income of enterprises with the SE qualification (thus not-for-profit entities).

<sup>74</sup> This is the case in France for SCIC.

<sup>75</sup> This is the case in France for SCIC; The same in Denmark for entities with the public benefit legal qualification (i.e. requiring other criteria to be met on top of the social purpose); The same in Italy for the A-type social cooperative. See OECD, *Designing Legal Frameworks 2022*, 46-48.

<sup>76</sup> This is the case in Italy under Decree 117/2017.



also benefit in some countries from a tax deduction (the donation amount is deducted from personal taxable income)<sup>77</sup>, sometimes even to the same extent as for donations made to purely charitable entities<sup>78</sup>. Appendix 1 shows the tax benefits granted to Category 1 SPDEs in France and Italy.

Category 2 SPDEs do not benefit from any tax exemption on their profits<sup>79</sup>: their commercial income overpasses the threshold for tax exemption<sup>80</sup>.

Some countries have however introduced some tax-related benefits for Category 2 SPDEs, notably in Italy in the form of a tax credit equal to 50% of the incorporation or transformation expenses of a *società benefit*, up to a maximum of EUR 10,000 for each company<sup>81</sup>. Donations to Category 2 SPDEs are in most cases not eligible for tax breaks and when tax assignment systems<sup>82</sup> are in place they do not specifically target SPDEs<sup>83</sup>. In the UK, Netherlands and the USA fiscal policy has been used to support financing (investments and loans) in SPDEs<sup>84</sup>.

WISEs benefit from reduced social security contributions<sup>85</sup> as well as in Belgium from a reduced VAT rate and tax reduction on scheme preventing the distribution of residual assets to members<sup>86</sup>.

## 2. Subsidies and grants

SPDEs (whatever category) also benefit in Europe from subsidies or grants – especially for WISEs or innovating SPDEs<sup>87</sup>. The EC also developed prizes to reward and incentivize social innovation in Europe<sup>88</sup>. Some countries have also allowed workers to use their accumulated unemployment benefits to capitalize a cooperative. This is the case in Italy under the Marcora Fund law<sup>89</sup> and in Spain<sup>90</sup>.

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<sup>77</sup> This is the case in the Netherlands and Belgium.

<sup>78</sup> This is the case in Italy for donations made to ETS organizations. At present and considering the definition of the ETS legal qualification it is not possible to consider that *società benefit* are ETS entities that can benefit from such tax advantages, see BUONTEMPO.

<sup>79</sup> For the UK, see ANDREADAKIS, 896. For Italy, see VENTURA, 665; In general, see HEMELS, 78-100.

<sup>80</sup> OECD, Taxation and Philanthropy 2020, § 3.4.1 distinguishing three categories of countries in relation to taxation of commercial income, and notably those as Germany and USA differentiating between income related to the public utility purpose and unrelated income and those as Germany, United States, France and Switzerland taxing commercial income above a threshold, it being specified that some countries (such as Germany and the United States) combine various approaches.

<sup>81</sup> Art. 38-ter of DECRETO-LEGGE 19 maggio 2020, n. 34, Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19. (20G00052); CHIOMENTI, LexMundi Italy 2023 Report.

<sup>82</sup> Systems that allow taxpayers to assign a certain proportion of their tax due to an organization.

<sup>83</sup> HEMELS, 87-89, explaining that donations by individuals to SEs that do not have the charitable status are not eligible for tax breaks, that donation by corporation can in some cases be deducted as business cost if it is in line with a CSR policy and that in most of the countries charities are not allowed to donate to SEs without risking to lose their charitable status.

<sup>84</sup> See below Sect. VI.D.

<sup>85</sup> This is the case in Belgium, France and Spain.

<sup>86</sup> OECD, Designing Legal Frameworks 2022, 46.

<sup>87</sup> This is the case in Belgium, France, Italy (with Marcora Fund notably), in Spain.

<sup>88</sup> There are two categories, the Challenge Prize which focuses on the year's particular focus, and the Impact Prize.

<sup>89</sup> LEGGE 27 febbraio 1985, n. 49, Provvedimenti per il credito alla cooperazione e misure urgenti a salvaguardia dei livelli di occupazione.

<sup>90</sup> OECD, Designing Legal Frameworks 2022, 46-48.

### 3. Advantages in public procurement procedures and concession contracts

Directive 2014/23/EU on the award of concession contracts (Directive 2014/23/EU) as well as Directive 2014/24/EU on public procurement (Directive 2014/24/UE) have been adapted to achieve the so-called “*best value for money*” and include social clauses.

Both Directive 2014/23/EU and Directive 2014/24/EU provide the following possibilities to (directly or indirectly) advantage SPDEs in the adjudication of concession contracts or public procurement proceedings:

- Under Directive 2014/23/UE: Member States may provide for reserved concessions.

Member States may indeed reserve the right to participate in concession award procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such concessions to be performed in the context of sheltered employment programs, provided that at least 30 % of the employees of those workshops, economic operators or programs are disabled or disadvantaged workers<sup>91</sup>. This is a possibility left to Member States to advantage WISEs.

- Under Directive 2014/24/EU:

- o Member States may provide for reserved contracts.

The introduction of reserved contracts is permitted under the conditions<sup>92</sup> that (i) the public contract covers exclusively some specific health, social, and cultural services, (ii) the maximum duration of the contract shall not be longer than three years and (iii) the awarded organization fulfills the following conditions:

- its objective is the pursuit of a public service mission linked to the delivery of the above-mentioned services;
  - profits are reinvested to achieve the organization’s objectives. Where profits are distributed or redistributed, this should be based on participatory considerations;
  - the structures of the management or ownership of the organization are based on employee ownership or participatory principles, or require the active participation of employees, users, or stakeholders; and
  - the organization has not been awarded a contract for the services concerned by the contracting authority concerned within the past three years.
- o Member States may introduce social considerations or better conditions for SPDEs at the four stages of the public procurement procedures.

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<sup>91</sup> Art. 24 Directive 2014/23/UE.

<sup>92</sup> Art. 77 Directive 2014/24/UE.

Table 2: Social considerations in public procurement procedure stages

	Public procurement procedure stages			
	Structure of the tender	Technical specifications	Attribution criteria	Implementation conditions
Possible social or SPDEs-related considerations	Reserved contracts (social integration, disadvantaged persons, disabled) (Art. 20)	Focus on the production process (e.g. integration of disadvantaged people, use of more environmentally friendly substances) (Art. 42)	Principle of the most economically advantageous tender (Art. 67) can be evaluated based on: <ul style="list-style-type: none"> <li>- Full life-cycle cost (including carbon footprint) (Art. 68)</li> <li>- Social, environmental, and innovative characteristics (Art. 67)</li> <li>- Labels (Art. 43)</li> </ul>	Labels (Art. 43)  Economic, innovation, environmental, social, or employment considerations (Art. 70)
	Better accessibility to SMEs by dividing into lots (Art. 46)	Labels (Art. 43)		
	Rejection of any abnormally low tenders (Art. 69) that prove to breach environmental, social, and labour law obligations (Art. 18 para. 2) (in addition to the grounds for exclusion in Art. 57)			

These directives are however mainly instruments for enabling contracting authorities to promote sustainable public procurements. With the exceptions of the question of accessibility, and to some extent, that of abnormally low tenders, they do not push contracting authorities to embrace socially responsible public procurement or sustainable public procurement more generally<sup>93</sup>. It appears indeed that most public tenders are still awarded based only on price criteria<sup>94</sup>. Therefore, the EC wants to reinforce good practices to make use of public procurement and concessions procedures to achieve social policy objectives and ensure that EC's tendering procedures make use – when possible – of social clauses<sup>95</sup>.

<sup>93</sup> CARANTA, 161.

<sup>94</sup> EUROPEAN COMMISSION, Building an Economy 2021, 10.

<sup>95</sup> EUROPEAN COMMISSION, Building an Economy 2021, 10.

At present, Italy has merely reproduced the EU Directive<sup>96</sup>. France has made use of the possibilities offered by the EU Directives, by:

- including social and environmental considerations in public procurement proceedings as execution conditions<sup>97</sup> and attribution criteria<sup>98</sup>;
- referring to labels<sup>99</sup> and the concept of life cycle<sup>100</sup> in the context of attribution of the public contracts;
- adopting a reserved concession for WISEs – increasing the requirement of 30% of employees being disabled or disadvantaged workers to 50%<sup>101</sup>;
- reserving contracts on services covered by Art. 77 of Directive 2014/24/UE to entities that have an ESS legal qualification<sup>102</sup> or by equivalent entities<sup>103</sup>.

## C. Government support to SPDEs

European SPDEs also benefit from other support mechanisms. Some countries have created specific public centres dedicated to the regional or national support of SPDEs, which also provide business support and help inform and connect the actors of the sector. This is the case in Belgium, France, and Spain<sup>104</sup> or – outside Europe – in New Zealand, Lebanon, Singapore, and Thailand<sup>105</sup>. In Poland, SPDEs support centres distribute funds from the European Social Fund in the form of subsidies and loans<sup>106</sup>. In the UK, governments websites offer a research tool to find any government funding program available to SPDEs according to their size or the industry in which they operate<sup>107</sup>.

In Luxembourg, a ministry has been given the responsibility for the social and solidarity economy and the government has run an incubator supporting SPDEs.

At the EU level, as part of the Social Economy Action Plan 2021, there is a plan to launch a unique website regrouping all (legal, financial, and practical) information for SPDEs. Besides, the two-year EU-supported Better Incubation project (2021-22)<sup>108</sup> seeks to mobilize mainstream business incubators to expand their outreach to social and inclusive entrepreneurship.

## D. Specific funding schemes

EC is working on new financial products within InvestEU Programme and for social innovation within the ESF+. Under the InvestEU Programme, the following instruments are available for SPDEs:

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<sup>96</sup> DECRETO LEGISLATIVO 18 aprile 2016, n. 50 (Codice dei contratti pubblici), Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonche' per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture. (16G00062), as further amended.

<sup>97</sup> Art. L2112-2 Code de la commande publique.

<sup>98</sup> Art. R2152-6 to R2512-8 Code de la commande publique.

<sup>99</sup> Art. L2111-12 to Art. L2111-17 Code de la commande publique.

<sup>100</sup> Art. R2152-9 and R2512-10 Code de la commande publique.

<sup>101</sup> Art. L2113-12 to L2113-14 Code de la commande publique.

<sup>102</sup> As per LOI n° 2014-856.

<sup>103</sup> Art. L2113-15 and L2113-16 Code de la commande publique.

<sup>104</sup> OECD, Designing Legal Frameworks 2022, 46-48.

<sup>105</sup> LEXMUNDI PRO BONO FOUNDATION, 54.

<sup>106</sup> LEXMUNDI PRO BONO FOUNDATION, 40.

<sup>107</sup> See <https://www.gov.uk/business-finance-support> (last consulted on February 27, 2023).

<sup>108</sup> See <https://betterincubation.eu/> (last consulted on March 24, 2023).

- The InvestEU Microfinance & Social Entrepreneurship Guarantee to guaranty: a maximum amount for SPDEs of EUR 2 mio for a transaction maturity of minimum of 3 months and a guaranteed rate of up to 80%, free of charge<sup>109</sup>;
- InvestEU Capacity Building Investment Product: mainly in the form of subordinated loans for organizational capacity purposes, operational capacity purposes, or debt capacity purposes;
- InvestEU Equity Product: addresses financing gaps via investments in venture capital, private equity, or private credit funds and targets SPDEs as a thematic strategy for investment.

The following countries have also used fiscal policy to incentivize financing in SPDEs:

- In the UK, SITR offers individual investors various types of income tax relief, as long as the investment is made in SPDEs (notably CIC) and the investment is held for at least three years<sup>110</sup>;
- In the Netherlands, the scheme is not targeting only SPDEs but rather entities proposing green projects. The Green Funds Scheme of the Netherlands is a tax incentive for private investors who invest in certified “green” projects or “green” fund<sup>111</sup>;
- In the United States, L3C may benefit from funding and investments from foundations for program-related investments (PRI). The US Internal Revenue Service (IRS) imposes that foundations direct 5% of their annual funds to charitable purposes. This can also be done via PRIs. L3Cs may qualify as PRIs beneficiaries without foundations losing their tax exemption. The qualification is not automatic, and the IRS shall confirm that the L3C meets all requirements<sup>112</sup>.

## E. Justifications for legislative intervention

The following four primary reasons have been posited for legislative intervention in countries that have opted for a dedicated legal form or an *ad hoc* legal qualification<sup>113</sup>:

- Clarity and visibility: Lack of knowledge is always at the root of the difficulties encountered by social entrepreneurs. Therefore, legal intervention is often called for by the community of social enterprises itself<sup>114</sup>. The definition of the nature, mission, and activities of SPDEs brings recognition and signals that social entrepreneurs are important to public decision-makers. Intervention is thus justified because “[a]n *enshrined definition approved by the Parliament carries more authority than a working definition*”<sup>115</sup>. It has also the advantage of levelling the playing field.
- Policy levers to promote SPDEs: A legal framework clarifies the requirements for social enterprises to qualify for public support<sup>116</sup>. This support may encompass tax benefits, access to public procurement, funding schemes, subsidies, and reduced incorporation costs. The legal framework serves as the foundation for additional policy levers to promote SPDEs.

<sup>109</sup> See <https://engage.eif.org/investeu/guarantees#Micro&Social-PG> (last consulted on March 24, 2023).

<sup>110</sup> Art. 257K UK Income Tax Act 2007; Art. 257JA UK Income Tax Act 2007; HM REVENUE & CUSTOMS.

<sup>111</sup> OECD, Developing Sustainable Finance 2020, § 11 Sustainable finance definitions in the Netherlands.

<sup>112</sup> PLERHOPLES, 915, explains then that “L3Cs have not found much success in the United States because IRS never sanctioned their *resumptive use by private foundations for PRIs*”.

<sup>113</sup> OECD, Designing Legal Frameworks 2022, 27-31.

<sup>114</sup> This was notably the case in Italy.

<sup>115</sup> OECD, Designing Legal Frameworks 2022, 27.

<sup>116</sup> OECD, Designing Legal Frameworks 2022, 27.

- Facilitated access to finance and support by authorities: A well-defined legal framework is considered an effective means to help funders and authorities recognize the potential benefits of investing in or collaborating with SPDEs<sup>117</sup>. It also enables funders and authorities to comprehend the unique characteristics of SPDEs and adapt their support schemes accordingly.
- Distinction with traditional entrepreneurs: A legal framework for SPDEs is also deemed helpful for third parties to fully grasp how SPDEs differentiate themselves from conventional business ventures<sup>118</sup>. This distinction underscores their commitment to generating positive societal impact<sup>119</sup> and redefining the role and expectations of members regarding profit and asset allocation.

## VII. Legal analysis: Necessity of intervention?

### A. Primacy of social purpose with ongoing business activity

#### 1. Category 1 SPDEs: possibility to combine a social purpose with a commercial activity.

Under Swiss law, as well as in the EU and the USA, all entities with a non-economic (social) objective may exercise a commercial activity.

Legal systems traditionally distinguish “*business entities*”<sup>120</sup> (established to conduct commercial activities) and “*social entities*”<sup>121</sup> (established on a collaborative or social basis). This dichotomy<sup>122</sup> has given rise to various approaches to (and restrictions on) the possible end purpose (“*but final*”; “*Endzweck*”), with a distinction between economic and non-economic objectives.

Table 3: Possible end purposes

<sup>117</sup> OECD, Designing Legal Frameworks 2022, 28.

<sup>118</sup> In France, the legal recognition was spurred by the wish of a new generation of entrepreneurs wanting to prove that business could be operated differently (*entreprendre autrement*).

<sup>119</sup> OECD, Designing Legal Frameworks 2022, 28.

<sup>120</sup> Sole proprietorship (*Einzelfirma; raison individuelle*), limited liability companies (LLC, *Gesellschaft mit beschränkter Haftung société à responsabilité limitée*), general partnership (*Kollektivgesellschaft; société en nom collectif*), limited partnership (*Kommanditgesellschaft; société en commandite*), partnership limited by shares (*Kommanditgesellschaft auf Aktien; société en commandite par actions*) and company limited by shares (*Aktiengesellschaft; société anonyme*) are “*business entities*”. Cooperatives were traditionally business entities, but new forms of social cooperatives have been developed over the years.

<sup>121</sup> Foundations and associations are “*social entities*”.

<sup>122</sup> This dichotomy and the special status of cooperatives are also revealed by the collocation of these legal forms in the national legal corpus. Foundations and associations tend to be found in the book devoted to legal persons and the family, while business entities are grouped in a separate book and cooperatives receive special treatment.

Main category	Sub-categories	Interests served
Economic Purpose	For-profit purpose	Financial interests of the members
	Economic purpose	Economic (non-financial) interests of the members
Non-economic Purpose	Not-for-profit purpose	Non-economic interests of the members
	Social purpose	Non-economic interests of third parties

Legislative approaches to end purpose may be divided into three groups:

- Group 1: Jurisdictions linking any entity or only business entities to only one category of end purpose (economic or non-economic purpose), e.g. France<sup>123</sup> and Italy<sup>124</sup>.
- Group 2: Jurisdictions linking social entities to a non-economic purpose, leaving business entities free to opt for an economic or non-economic purpose, e.g. UK<sup>125</sup> and US State of Delaware<sup>126</sup>.
- Group 3: Jurisdictions flexible in terms of end purpose and allowing both business entities and social entities to choose an economic or non-economic purpose, e.g. Germany<sup>127</sup>.

Switzerland belongs to Group 3<sup>128</sup>. Thus, almost any Swiss legal form may opt for a social purpose and exercise a commercial activity<sup>129</sup>. This is true for foundations, associations, companies limited by shares, limited liability companies, general partnerships, limited partnerships, partnerships limited by shares and sole proprietorship. For companies limited by shares, former Art. 620 para. 3 aSCO expressly clarified the possibility to have a social purpose. The corporate law reform has

<sup>123</sup> In France, associations and foundations can only have a non-economic purpose, while business entities can only have an economic purpose. For associations, see Art. 1 of Loi du 1er juillet 1901 relative au contrat d'association. For foundations, see Art 18 of Loi n° 87-571 du 23 juillet 1987 sur le développement du mécénat (NOR : ECOX8700093L). For the economic purpose of business entities, see Art. 1832 of Code Civil français.

<sup>124</sup> In Italy, only the purpose of business entities is limited to for profit-purpose (see Art. 2247 of the Codice Civile provides that business entities are formed to pursue a for-profit purpose (*scopo di dividerne gli utili*), while associations and foundations can have either an economic or non-economic purpose (see Art. 16 Codice Civile that only refers to a purpose to be defined in the articles of incorporation).

<sup>125</sup> For business entities, see UK Companies Act 2006, Sect. 172 (2) where the concept of for-profit purpose is translated into “purpose to benefit the members”. For the not-for-profit purpose of an unincorporated association, see <https://www.gov.uk/unincorporated-associations> (last consulted on March 24, 2023).

<sup>126</sup> In Delaware, associations can only have a non-economic purpose (see Del. C. (Delaware Uniform Unincorporated Nonprofit Association Act), § 1901 (2)), while business entities can have either an economic or non-economic purpose (for companies limited by shares, see Del. C. (General Corporation Law), § 101 (b). For limited liability companies, see Del. C. (Limited Liability Company Act), § 18-106 according to which “a limited liability company may carry on any lawful business, purpose or activity, whether or not for profit”).

<sup>127</sup> See for companies limited by shares AktG, § 1 (Wesen der Aktiengesellschaft), for limited liability companies GmbHG, § 1 (Zweck; Gründerzahl), for associations, BGB, § 21-22 (with the distinction between commercial and non-commercial association) and for foundations, BGB, § 80 (which refers to the concept of the object of the foundation rather to purpose). For cooperatives, see GenG, § 1(1) which allows since the law reform of 2006 cooperatives that pursue social or cultural objectives as a primary objective.

<sup>128</sup> For companies limited by shares, see former Art. 620 para. 3 aSCO which referred to the not-for-profit purpose. For limited liability companies see Art. 764 para. 2 SCO cum former Art. 620 para. 3 aSCO. For associations, see Art. 60 para. 1 SCC on non-economic purpose and economic purpose (but not a for-profit one) without economic activity, ATF 90 II 333 and Art. 91 para. 1 ORC. For foundations see Art. 80 CC which refers to a “special purpose” and ATF 127 III 337. For cooperatives, see Art. 828 para. 1 SCO.

<sup>129</sup> For companies limited by shares, see former Art. 620 para. 3 aSCO which referred to the not-for-profit purpose and Art. 620 para. 1 SCO cum Art. 673 para. 2 for the for-profit purpose with FF 2017 353, 431. For limited liability companies see Art. 764 para. 2 SCO. For associations, see Art. 60 para. 1. SCC on non-economic purpose and economic purpose (but not a for-profit one) without economic activity, ATF 90 II 333 and Art. 91 para. 1 ORC. For foundations see Art. 80 SCC which refers to a “special purpose” and ATF 127 III 337. For cooperatives, see Art. 828 para. 1 SCO (only economic purpose); For sole proprietorship, see Art. 530 para. 2 SCO which refers to a common purpose of the members; For partnerships limited by shares, see Art. 764 para. 2 cum Art. 620 SCO.

removed this article, but the Message of the Federal Council clarifies that the removal is justified because, *“as for other legal forms, it is pointless to specify that the company limited by shares may pursue an economic or non-economic purpose”*<sup>130</sup>. It is worth noting that the reform has however not amended Art. 828 para. 1 SCO on cooperatives that mentions the two possible purposes. It is thus unfortunate that this possibility now relies on a message rather than on the law.

Jurisdictions then have a different approach to the tax treatment of commercial income of social purpose entities. Category 1 SPDEs may benefit in some countries from tax exemption or tax reduction on commercial income when the social purpose qualifies as a public utility purpose as per tax legislation. Only a small number of countries exempt all types of income of social (charitable) purpose entities (including income from commercial activities)<sup>131</sup>. The remaining countries may be regrouped into three categories, it being specified that some countries combine several approaches<sup>132</sup>:

- Countries granting full tax exemption but restricting entities from engaging in certain kinds of activities (e.g. real estate income as per Belgian law);
- Countries differentiating between income related to the social purpose and unrelated income (e.g. Austria, Finland, Germany and the United States);
- Countries taxing commercial income above a threshold (e.g. Austria, Germany, United States, France and Switzerland. For Switzerland’ model, see Sect.V.B.1 above).

In practice, associations and foundations vested solely with a social purpose are usually the initial legal form used by social entrepreneurs until the commercial activity scales to the point that the foundation or association is no longer dependent on donations and subsidies. At that point, the commercial activity’s importance imperils the tax exemption and a transformation (or dissolution and new incorporation) into a legal form which has a share capital that is attractive for investors makes more sense.

## 2. Category 2 SPDEs: dual-purpose and stakeholder governance

Placing the social purpose as the primary objective over the for-profit purpose (while maintaining ongoing commercial activity) in a dual-purpose entity requires, first, the right to pursue a dual-purpose with one single entity and, second, the certainty that corporate law recognizes a pluralistic approach to stakeholder governance in for-profit entities, i.e. the duty to pursue the creation of shared value for all stakeholders without specifying which interests shall prevail in case of conflict, and allows to give primacy to a group over another. Only if a pluralistic approach is acknowledged as a basic rule that can be amended, then the articles of association may validly be amended to favour some stakeholders over the others. If, on the contrary, corporate law recognizes an instrumental approach to stakeholder governance, i.e. the duty to pursue the long-term interests of shareholders, then the social purpose may not be given primacy over the for-profit purpose in situations where there might be a conflict (or misalignment) between the two, notably when an advantage for shareholders over the long term may not be identified or reasonably assumed.

### a. Available legal forms for dual-purpose entities

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<sup>130</sup> FF 2017 353, 431.

<sup>131</sup> OECD, Taxation and philanthropy 2020, § 3.4.2 giving the examples of Australia and New Zealand.

<sup>132</sup> OECD, Taxation and philanthropy 2020, § 3.4.2.



The possibility for an entity to pursue concurrently a for-profit purpose and a social purpose (so-called dual-purpose entity) depends first on the right for that legal form to pursue either a for-profit purpose (sub-category of the economic purpose) or a social purpose (a sub-category of the non-economic purpose). Then, the possibility to create a dual-purpose entity derives either explicitly (e.g. in Delaware<sup>133</sup> or UK<sup>134</sup>) or implicitly – as this is the case in Switzerland<sup>135</sup> – from the law.

A legislative intervention was thus necessary:

- in France, to allow dual-purpose entities;
- in Italy, to transform business entities into dual-purpose entities;
- in the UK and the US State of Delaware<sup>136</sup>, to transform social entities into dual-purpose entities.

As said above, Switzerland is very flexible on end purposes. Not all legal forms may however combine a for-profit purpose with a social purpose while carrying out an economic activity. Swiss law indeed prohibits associations and cooperatives from having a for-profit purpose<sup>137</sup>. Foundations, sole proprietorships, companies limited by shares, limited liability companies, general partnerships, limited partnerships, and partnerships limited by shares are legal forms available under Swiss law to incorporate a Category 2 SPDE.

In practice<sup>138</sup>, the possibility to provide a distribution of profit/surplus to members in the articles of association of a cooperative<sup>139</sup> could, from the members' perspective, bring this legal form close to dual-purpose limited liability companies or companies limited by shares<sup>140</sup>. Such a cooperative will however not strictly be a dual-purpose entity with a for-profit purpose.

Companies limited by shares appear nonetheless as being the most suitable legal form for a dual-purpose SPDEs for the following reasons:

- in comparison with foundations: legal restrictions on the amendment of the purpose of a foundation<sup>141</sup> prevent existing foundations to be transformed into a Category 2 SPDE, while a transformation of a company limited by shares requires a unanimous vote of shareholders<sup>142</sup>. Besides, the absence of a share capital makes foundations less attractive for investors.
- in comparison with cooperatives: contrary to companies limited by shares<sup>143</sup>, cooperatives may not issue (i) a "participation certificate capital"<sup>144</sup>, (ii) have non-

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<sup>133</sup> See Del. C. (General Corporation Law), §101 (b) referring to multiple purposes when stating that "a corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes".

<sup>134</sup> See UK Companies Act 2006, Sect. 172(2) with the plural form highlighted and underlined by the author, stating that "Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes".

<sup>135</sup> For the possibility to have a dual-purpose under Swiss law, see PETER/PFAMMATTER, *Sociétés hybrides*, 289-301, 293-294.

<sup>136</sup> OFER; CLARK/ VRANKA; MURRAY, *Social Enterprise Innovation*.

<sup>137</sup> For associations, see Art. 60 para. 1. SCC and ATF 90 II 333. For cooperatives, Art. 828 para. 1 SCO, see for explanation CR CO II-CHABLOZ, Art. 828, N 14. On both, see PETER/PFAMMATTER, *Social Enterprises*, 844-849.

<sup>138</sup> Under Swiss law, an amendment of the articles of association is needed to be able to distribute the profit amongst the members.

<sup>139</sup> Art. 859-860 SCO.

<sup>140</sup> PETER/PFAMMATTER, *Social Enterprises*, 845. See Sect. VII B below for more details on the distribution of profit.

<sup>141</sup> Art. 86 and 86a SCC.

<sup>142</sup> Art. 706 para. 2 (4) SCO.

<sup>143</sup> See Art. 656a SCO.

<sup>144</sup> ATF 140 III 206 c. 3.7.

members holding shares in the cooperatives<sup>145</sup>, and (iii) freely distribute profit, liquidation proceeds and take into account the agio in the repayment of the share value when the member leaves the company<sup>146</sup>. This, and the mandatory “one person one vote” principle<sup>147</sup>, renders the cooperative a less attractive legal form for investors than the company limited by shares<sup>148</sup>. Despite parliamentary motions and postulates to amend the cooperative law on the “participation certificate capital”<sup>149</sup>, the position of the authorities remains so far a no go, suggesting to cooperatives to be transformed into companies limited by shares<sup>150</sup>.

- in comparison with limited liability companies and all forms of partnerships: contrary to these legal forms, a company limited by shares may issue a “participation certificate capital”<sup>151</sup>.

## b. Approach to stakeholder governance

### i. The recognition over time of stakeholder governance

In all jurisdictions<sup>152</sup> – including Switzerland<sup>153</sup> – directors’ fiduciary<sup>154</sup> duty of loyalty<sup>155</sup> requires that companies act *“in the (best) interests of the company”*. Interpretation of this broad and undefined concept of the *“interest of the company”* (also referred to as the *“ends question”* of corporate governance<sup>156</sup>) has triggered a debate amongst scholars that has ultimately influenced court decisions.

<sup>145</sup> ATF 140 III 206 c. 3.6.5 when the Swiss Supreme Court expresses that *“[e]s kann daher nicht entscheidend sein, dass das Gleichbehandlungsgebot (Art. 854 OR) und die gesetzliche Ausschüttungsbeschränkung (Art. 859 Abs. 3 OR) nur auf Genossenschafter anwendbar seien und sich eine Genossenschaft grundsätzlich verpflichten darf, Dritte an ihrem Gewinn zu beteiligen”*.

<sup>146</sup> See below Sect. VII.B.

<sup>147</sup> Art. 885 SCO.

<sup>148</sup> MEIER-HAYOZ/FORSTMOSER, § 19 N 55.

<sup>149</sup> The motion 15.3220 was introduced to target only the banking cooperatives and was rejected by the Federal Council on May 8, 2015 (see <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20153220>, last consulted on April 24, 2023). Motions 20.3563, 20.478 and 21.3418 requesting amendments to the cooperative law have also been rejected (see <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20213652>, last consulted on April 24, 2023) and postulate 21.3783 which notably request (point 7) to introduce new investment means for cooperatives is under examination (see <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20213783>, last consulted on April 24, 2023).

<sup>150</sup> For a summary of the parliamentary motions rejected so far (see <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20213652>, last consulted on April 24, 2023) and recent acceptance on March 2, 2022 of postulate 21.3783 to reflect about an amendment of cooperative law (see <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20213652>, last consulted on April 24, 2023).

<sup>151</sup> ATF 140 III 206 c. 3.6.4.

<sup>152</sup> For France, see Art. 1848 of Code Civil français; In Italy, for companies limited by shares, see Art. 2392 of Codice Civile, for limited liability companies, see Art. 2476 of Codice Civile, for associations and foundations, see Art. 18 of Codice Civile, with Art. 1710 (application of the mandate agreement rules); In Germany, for companies limited by shares, AktG, Sect. 93(1), for cooperatives, see GenG, § 34 (1), for partnerships, see BGB, § 277. In the US, see US Model Act, § 8.30(b).

<sup>153</sup> For companies limited by shares, Art. 717 SCO. For limited liability companies, Art. 812 para. 1 SCO. For cooperatives, Art. 902 para. 1 SCO with Art. 717 SCO, see CR CO II-CARRON/CHABLOZ, Art. 902, N 4, N 4. For associations, application of Art. 398 para. 1 and 2 SCO (see CR CC I-JEANNERET/HARI, Art. 69, N 14 and 21). For foundations, there is a debate amongst scholars between the application of association law, see ATF 129 III 641, c. 3.4 or application of Art. 717 SCO by analogy (with possibly the same reasoning also for associations), see BK ZGB I-RIEMER, Art. 83, N. 30. The concept of harmonization of all legal forms mentioned by the Message of the Federal Council on the corporate law reform of 23 November 2016 (FF 2017 353, 421) would, in our opinion, support Riemer’s opinion.

<sup>154</sup> The corporate fiduciary duties apply both in decision-making and oversight (control and monitoring) tasks. These responsibilities are divided into two main duties: duty of care and duty of loyalty. See CORRADI. For the duty of loyalty under Swiss law, see notably CR CO II-PETER/CAVADINI, Art. 717, N 10. For the duty of loyalty under US law, see *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939).

<sup>155</sup> Duty of loyalty (in a broad sense) implies duties in the management of conflict, a duty of confidentiality, and a duty of loyalty toward the company.

<sup>156</sup> Term coined by BAINBRIDGE, Director Primacy, 557-606.

By the end of the nineteenth century, companies' articles of association were no longer a source of insights to identify the purpose(s) of the company and thus for the interpretation of the duty of loyalty. The simplification of the registration process led to an abandonment of the requirement to make the case for the social license to operate<sup>157</sup>. Concurrently, the *ultra vires* doctrine<sup>158</sup> lost its practical importance<sup>159</sup>. The purpose clause of the articles of association became then a catalog of permitted activities. The same phenomenon occurred in Switzerland, despite its non-adherence to the *ultra vires* doctrine<sup>160</sup>: the purpose clause ("*but social*"; "*Zweck der Gesellschaft*") of the articles of association imposed by Art. 626 para. 1 (2) SCO refers only to the permitted activities and scholars differentiate it from the end purpose ("*but final*"; "*Endzweck*")<sup>161</sup>.

At the onset of the twentieth century, there was a prevalent interpretation of the duty of loyalty that did not take into account the company's constituency or organizational documents. Additionally, this interpretation occurred in a context where the purpose and activities of the enterprise were often conflated, leading to potential confusion regarding the scope and nature of the duty of loyalty.

The test developed in all jurisdictions for the *ex-post* review of a business decision – so-called *Business Judgment Rule*<sup>162</sup> (or its equivalent)<sup>163</sup> – is also of no use to interpret the concept of the "*best interests of the company*", as it only requires that the decision is made according to an irreproachable decision-making process, on an informed basis, and free of any conflicts of interests.

In 1919, in the landmark decision *Dodge v. Ford Motor Company*<sup>164</sup>, the court of Michigan ruled that the directors' powers were to be employed for the profit of shareholders. Building on this court precedent, BERLE<sup>165</sup> defended in the 1930s the profit-maximization purpose of companies. DODD counter-argued that companies have a "*social service as well as profit-making function[s]*"<sup>166</sup>. In the 1970s, the opposition translated into the FREEMAN's Shareholder Theory<sup>167</sup> versus the FRIEDMAN's Stakeholder Theory<sup>168</sup>. The same debate occurred in Switzerland between BÄR – proposing to define the interests of the company according to the will of a typical shareholder (i.e., an investor that wanted to make a long-term profit)<sup>169</sup> – and SCHLUEP – advocating toward a balance between the different interests of shareholders and other stakeholders<sup>170</sup>.

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<sup>157</sup> See AKINTUNDE/JANDA, 5, referring notably to (i) the UK Bubble Act 1720 that mandated individual legislative approval for incorporating a company and that such approval was granted only when companies were deemed to further the public welfare, (ii) the French incorporation legislation until 1867 the general incorporation legislation that impose to make the case for the public utility recognition and (iii) the fact that under the UK Companies Act 2006 a purpose clause in the articles of association is no longer a requirement.

<sup>158</sup> *Ultra vires* means "*beyond the powers*" and refers to the nullity of acts made beyond the scope of objects identified in the articles of association, even if members have confirmed their approval or ratified this act by unanimous vote. See notably in the UK, *Ashbury Railway Carriage and Iron Co v. Riche* (1875) LR 7 HL 653.

<sup>159</sup> On the erosion of the *ultra vires* doctrine in the USA and UK, see AKINTUNDE/JANDA, 19 and references.

<sup>160</sup> TF 4A\_122/2013, c. 3.5; CR CO II-LOMBARDINI, Art. 626, N 28.

<sup>161</sup> CR CO II-LOMBARDINI, Art. 626, N 25-26; BSK OR II-SCHENKER, Art. 626, N 9.

<sup>162</sup> For the United States, see *Arosen v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *Kaplan v. Centex Corp.*, 284 A.2d 119, 124 (Del. 1971); *Robinson v. Pittsburgh Oil Refinery Corp.*, 126 A. 46 (Del. 1924), as well as the American law Institute formulation. The *Business Judgment Rule* has been recognized under Swiss law, see TF 4A\_623/2018 dated July 31, 2019, c. 3.1 and before ATF 139 II 24 of November 20, 2012, c. 3.2 and TF 4A-306/2009 dated February 8, 2010. In Germany, the concept of the *Business Judgment Rule* is codified at AktG, §93 (1) para. 2.

<sup>163</sup> Most civil law countries have not implemented the *Business Judgment Rule* but have an abstention doctrine in reviewing commercial decisions, see NERI-CASTRACANE, Responsabilité sociale de l'entreprise, 213 and references.

<sup>164</sup> *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 (Mich. 1919).

<sup>165</sup> BERLE, 1049.

<sup>166</sup> DODD, 1145-1146.

<sup>167</sup> FRIEDMAN.

<sup>168</sup> FREEMAN. See reaffirmation of the theory in FREEMAN/HARRISON/WICKS/PARMAR/DE COLLE.

<sup>169</sup> BÄR, 514-515.

<sup>170</sup> SCHLUEP, 400.

Before the financial crisis of 2008, US courts ruled in favour of shareholder value and profit-maximization<sup>171</sup>. At that time, shareholder primacy was then the dominant theory<sup>172</sup>. This led many US States to enact constituency statutes to clarify the position toward stakeholder governance<sup>173</sup>. After the 2008 financial crisis, scholars<sup>174</sup>, case law<sup>175</sup>, trade associations<sup>176</sup>, corporate governance codes<sup>177</sup> and corporate statutes<sup>178</sup> recognized that the “*interests of the company*” include both the interests of shareholders and those of other stakeholders (e.g. customers, suppliers, employees), and that no rule requires the primacy of the interests of one group over the other.

In general, civil law countries – among which Switzerland<sup>179</sup> – provide that directors and executive managers must take into account the interests of shareholders and stakeholders to ensure the continuity of the company and the creation of sustainable value<sup>180</sup>. In the last decade, stakeholder governance was then recognized as being part of directors’ duty of loyalty.

## ii. Stakeholder governance as part of risk management oversight

Stakeholders governance is also part of directors’ duties<sup>181</sup> of *risk mapping*<sup>182</sup> and *risk management*<sup>183</sup>. Sustainability reporting regulations and the related materiality concept further clarify<sup>184</sup> this duty to take them into account. Stakeholder governance as part of the risk management oversight varies however depending on the legislator’s approach toward the concept of materiality:

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<sup>171</sup> 506 A.2d 173 (Del. 1986).

<sup>172</sup> LIPTON; HANSMANN/KRAAKMAN, 468; Of the same opinion, RUBACH/SEBORA, 167, as well as BRADLEY/SCHIPANI/SUNDARAM/WALSH, 14 and also COFFEE, 641-707.

<sup>173</sup> 2022 Tentative draft no. 1 ALI Restatement of Corporate Governance Law, § 2.

<sup>174</sup> BLAIR/STOUT, 301; FERRARINI, 8-10; LIPTON et al., The New Paradigm.

<sup>175</sup> For Switzerland, ATF 95 II 157, c. 9b; ATF 59 II 44; ATF 51 II 412, c. 3; ATF 100 II 384, c. 4; ATF 105 II 114, c. 7c; ATF 110 II 384, c. 4; ATF 116 II 320, c. 3; ATF 126 III 266, c. 1c; ATF 138 III 407, c. 2.3. Abroad it is worth mentioning the Canadian Supreme Court decisions *Magasins à rayons Peoples Inc v. Wise*, 3 RCS 461, 2004 CSC 68 and *BCE Inc v. 1976 Debentureholders*, 2088 SCC 69 (CanLII), 3 SCR 560.

<sup>176</sup> SCHWAB explains that “*the purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders but all its stakeholders – employees, customers, suppliers, local communities, and society at large*”.

<sup>177</sup> The SCBP initially referred to the interests of shareholders and was amended to refer to the sustainable interests of the company, see SCBP 2016, 6. Similarly, German Corporate Governance Code was amended three times since 2002 to end up in 2019 with Principle 1 referring to the best interests of the company and the foreword highlighting “*the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise’s workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise’s best interests)*”. The first Principle of UK Corporate Governance Code 2018 states that “*successful company is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society*”.

<sup>178</sup> US States statutes have been adopted to reject Revlon decision on the absence of consideration of stakeholders’ interests, notably in Arizona, Illinois, Missouri, Ohio, Texas, Massachusetts, Tennessee, Virginia, Nevada and Iowa. For a full list, see 2022 tentative draft no. 1 of ALI restatement of corporate governance law, § 2, 53-54.

<sup>179</sup> See BAHAR, 280; MILANO, § 5, 1.2.2.2.

<sup>180</sup> For Germany, see BRADLEY/SCHIPANI/SUNDARAM/WALSH, 9 ff. In general, in European Union countries, FERRARINI/ZHU, 26. In general over the world, FERRARINI, 8-10; LIPTON/SAVITT.

<sup>181</sup> For reference to US law, see LIPTON/NILES/MILLER. For Swiss law, see Art. 961c SCO and Art. 716a SCO as well as on the later provision, CR CO II-PETER/CAVADINI, Art. 716a, N 26b.

<sup>182</sup> *Risk mapping* means the identification of the risks for the company and – depending on sustainability reporting regulations – of the risks created by the company’s activities for third parties.

<sup>183</sup> *Risk management* means the policies and procedures designed and implemented by the company’s senior executives and risk managers to neutralize, manage, and monitor material risks in line with the company’s strategy and its risk appetite.

<sup>184</sup> For defense of this position already under former law, see NERI-CASTRACANE, Diligence, 418-419.

- Under the financial materiality approach<sup>185</sup> stakeholders' interests are taken into account as long as the endangerment of their interests represents a risk that may in turn be translated into a (short term) financial risk for the company, so called "*financialization of sustainability*"<sup>186</sup>.
- Under the double materiality approach<sup>187</sup>, stakeholder's interests are taken into consideration by the managers even if there is no clear (short-term) tie with the financial value of the company.

US law adheres to the financial materiality concept<sup>188</sup>, while the EU promotes the double materiality concept<sup>189</sup>. Swiss law has followed the EU approach, although with incoherencies<sup>190</sup>.

It is admitted that the double materiality approach is not automatically linked with a pluralistic approach to stakeholder governance. Companies may indeed be concerned with double materiality "*because of its impact on the long-term financial performance (impact materiality)*"<sup>191</sup>.

### iii. The prevalence of the instrumental stakeholder governance

The consensus toward stakeholder governance did not put an end to the debate, which is currently focused around the following two approaches to stakeholder governance (*stakeholderism*):

- the Enlightened Shareholder Theory<sup>192</sup>, also known as "*instrumental stakeholderism*"<sup>193</sup>.

This is an attempt to reconcile Shareholder Theory and Stakeholder Theory<sup>194</sup> while focusing on the Shareholder Value in the long run<sup>195</sup>. Stakeholder governance must be practiced to ultimately serve shareholders' interests, under the idea – dating back to Biblical times<sup>196</sup> – that no one can properly serve two

<sup>185</sup> The financial materiality concept posits that are material only the risks that directly affect the financial value of the company.

<sup>186</sup> HÖSLI/WEBER, 968.

<sup>187</sup> The double materiality concept posits as material both risks to the company (so-called outside-in perspective and the financial materiality) and risks to third parties (so-called inside-out perspective and the impact materiality).

<sup>188</sup> KATZ/MCINTOSH.

<sup>189</sup> EUROPEAN COMMISSION, Guidelines on non-financial reporting 2019, § 2.4; Further confirmed in 2021 in COM(2021)189 Directive Amendment of Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 1.

<sup>190</sup> FEDERAL COUNCIL, Ordinance on Climate Disclosures for large Swiss companies of November 23, 2022, Art. 1 para. 2 (into force as of 1 January 2024); DÉPARTEMENT FÉDÉRAL DES FINANCES, sect. 4, ad Art. 1; FEDERAL COUNCIL, Explanatory report to DDTro, 25. For adherence to this double materiality approach also under Capital Markets Law, see DARBELLAY/CABALLERO CUEVAS, 44-59. This means then that distinction between the "*traditional*" (financial) management report and the non-financial report is not appropriate. This incoherence has been corrected under EU law since CSRD requires an integrated report.

<sup>191</sup> CISL, 6 on the definition of Enlightened Shareholder Value.

<sup>192</sup> JENSEN, 8-21; HARPER HO, 60.

<sup>193</sup> BEBCHUK/TALLARITA, 12.

<sup>194</sup> HARPER HO, 62.

<sup>195</sup> KEAY, 940; MAYER, The Governance, 3.

<sup>196</sup> Luke 16:13 states that "*no one can serve two masters. Either you will hate the one and love the other, or you will be devoted to one and despise the other. You cannot serve both God and money*".

or more masters at the same time<sup>197</sup> and that consequently, clear guidance and a clear primary master (or priority<sup>198</sup>) is needed<sup>199</sup>.

Sect. 172 (1) of the UK Company Act 2006, §2.01 (a)(1) of the 2022 tentative draft no. 1 of American Law Institute's (ALI) restatement of corporate governance law for common-law States (such as Delaware)<sup>200</sup> and some US States constituency statutes<sup>201</sup> adhere to this stakeholder governance instrumental approach.

- the pluralistic approach to stakeholderism<sup>202</sup>.

This approach – in line with the principle of the social market economy – aims to achieve Shared Value<sup>203</sup> (i.e. a value for all stakeholders, including shareholders), without however specifying which interests should prevail in case of conflict. It rejects the need for a single metric since directors can balance the interests of various stakeholders – as human beings balance their professional and family life<sup>204</sup>.

Art. 1833 para. 2 of the Code Civil français (Art. 169 PACTE Law)<sup>205</sup> as well as some US States' constituency statutes<sup>206</sup> recall this approach<sup>207</sup>.

Only the pluralistic approach to stakeholder governance is possibly compatible with SPDE's primacy of social purpose, its focus on "*prosperity*" rather than financial profitability, its mission to integrate the six forms of capital<sup>208</sup> and to interpret value as a "*growing pie*"<sup>209</sup>. Without this

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<sup>197</sup> On the two masters problem see BEBCHUK, 910–911; EASTERBROOK/ FISCHER, 38; CHOUDHURY, 3. This difficulty of serving two masters at the same time has been the reason for a shift in EC strategy. In its 2011 strategy for CSR (see EUROPEAN COMMISSION, A renewed EU strategy 2011, 4) the EC promoted a multi-stakeholder approach toward a shared value. In December 2012, the EC issued an alternative plan (EUROPEAN COMMISSION, Action Plan 2012, 740 final) based on shareholder primacy toward enlightened shareholder value. This led FERRARINI, 24, to say that "[o]n the whole, the shared value approach does not differ significantly from Enlightened Shared Value".

<sup>198</sup> MURRAY, Choose your own Master, 29, replying to STOUT's argument (see Fn 205) that human beings are able to balance professional and family life, by pointing that human beings set priorities.

<sup>199</sup> ROE, 2065, states that "a stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda." and BAINBRIDGE, Interpreting Nonshareholder, 1013, affirming that "[t]here is a very real possibility that unscrupulous directors will use nonshareholder interests to cloak their own self-interested behavior".

<sup>200</sup> 2022 Tentative draft no. 1 ALI Restatement of Corporate Governance Law, §2.01 (a)(1) ("[t]he objective of a corporation is to enhance the economic value of the corporation, within the boundaries of the law [...] in common-law jurisdictions: for the benefit of the corporation's shareholders. In doing so, a corporation may consider: (a) the interests of the corporation's employees, (b) the desirability of fostering the corporation's business relationships with suppliers, customers, and others, (c) the impact of the corporation's operations on the community and the environment, and (d) ethical considerations related to the responsible conduct of business".)

<sup>201</sup> For a list of US States having adopted such "modified shareholder primacy statutes", see 2022 Tentative draft no. 1 ALI Restatement of Corporate Governance Law, § 2, 53.

<sup>202</sup> BEBCHUK/TALLARITA, 18.

<sup>203</sup> PORTER/KRAMER, 1-17. For critics of the Creating Shared Value Theory, see FERRARINI, 24 (Fn 198).

<sup>204</sup> STOUT, 107-109. For a reply, see Fn 199.

<sup>205</sup> PACTE Law, available under [https://www.legifrance.gouv.fr/loda/article\\_lc/JORFARTL000038496242](https://www.legifrance.gouv.fr/loda/article_lc/JORFARTL000038496242) (last consulted on March 27, 2023). See PIETRANCOSTA, 55.

<sup>206</sup> Some US States' constituency statutes put the interests of shareholders as of equal rank with other stakeholders (so-called *level-playing-field statutes*) while others even clearly state that directors may, without liability, give primacy to some factors over others (so-called *strong-form level-playing-field statutes*). For the distinction between the two and the list of States, see 2022 Tentative draft no. 1 ALI Restatement of Corporate Governance Law, § 2, 53-54 commenting § 2.01 (a)(2) ("[t]he objective of a corporation is to enhance the economic value of the corporation, within the boundaries of the law [...] in stakeholder jurisdictions: for the benefit of the corporation's shareholders and/or, to the extent permitted by state law, for the benefit of employees, suppliers, customers, communities, or any other constituencies").

<sup>207</sup> On the idea that PACTE Law is a failed attempt and does not propose a multi-fiduciary model, see PIETRANCOSTA/MARRAUD DES GROTTES.

<sup>208</sup> The six forms of capital are manufactured, natural, social, human, intellectual and financial capitals. See MAYER, Prosperity.

<sup>209</sup> A concept coined by EDMANS.

reconciliation of the social purpose and the for-profit purpose, a dual purpose is for directors concurrently a possibility to shield from personal liability (arguing that the other purpose prevailed) as well as a major risk of liability (if all stakeholders have the same weight)<sup>210</sup>.

To date, courts – and companies – have reconciled and continue to reconcile altruistic motivations with long-term shareholder value (instrumental stakeholder governance approach)<sup>211</sup>. For instance, the Caremark decision – which expanded the scope of the directors’ duty of care by setting the standard for oversight claims – drew a connection between climate change-related issues and financial performance because these issues “*present foreseeable, material and systemic financial risks*”<sup>212</sup>. Recent US case law on the duty of care on monitoring tasks (and not on decision-making) has also insisted on the financial performance of the company<sup>213</sup>. The same approach is taken with the Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (Final Rule) released by the Department of Labor<sup>214</sup>, as well as the Securities and Exchange Commission proposal for the Enhancement and Standardization of Climate-Related Disclosures for Investors<sup>215</sup>. The few existing cases interpreting US States’ constituency statutes do not help to support a pluralistic approach to stakeholder governance, with some stakeholder statutes even being converted into shareholder-primacy statutes<sup>216</sup>.

It is unclear at present whether Swiss courts promote a true pluralistic approach to stakeholder governance or rather an instrumental one<sup>217</sup>. Place has indeed been given in Swiss courts decisions to stakeholders but mainly to those having a financial interest (creditors or employees) and in disputes opposing majority to minority shareholders or shareholders to the management<sup>218</sup>. Even though there is no uniformity of doctrine, the consensus appears to lean toward an instrumental approach to stakeholder governance<sup>219</sup>. No Swiss court has yet reviewed a business decision made by directors of a dual-purpose entity (or B Corp-certified entity). The 2023 version of the SCBP takes a stand in favour of a pluralistic approach with the following statements<sup>220</sup>:

*“Business activities are sustainable when the interests of different stakeholders in the company are taken into account and economic, social and environmental goals are pursued holistically”.*

*“Sustainable growth of company value is not just in the interests of shareholders as the beneficial owners and/or risk capital providers of the company, but also in the interests of other stakeholders”.*

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<sup>210</sup> RAMSAY/UPADHYAYA.

<sup>211</sup> See *Dodge v. Ford Motor Co*, 170 N.W. 668 (Mich. 1919); *eBay Domestic Holdings Inc v. Newmark*, 16 A.3d.1, (Del. 2020); FERRARINI/ZHU, p. 26; MURRAY, Choose your own Master, 17.

<sup>212</sup> *In re Caremark International Inc*, 698 A.2d 959, Del. Ch. 25 September 1996.

<sup>213</sup> *Marchand v. Barnhill*, 212 A.3d 805, Del 18 June 2019; *In re Clovis Oncology Inc Derivative Litig.*, Del Ch 1 October 2019; *Hughes v Hu*, Del Ch, 27 April 2020; *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, Del Ch, 24 August 2020.

<sup>214</sup> EMPLOYEE BENEFITS SECURITY ADMINISTRATION.

<sup>215</sup> US Securities and Exchange Commission, Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures, Release Nos. 33-11042; 34-94478; File No. S7-10-22, RIN 3235-AM87.

<sup>216</sup> See 2022 Tentative draft no. 1 ALI Restatement of Corporate Governance Law, § 2, 54-56 commenting § 2.01 (a)(2) and referring notably to *Blasius Indus Inc. v. Atlas Corp*, 564 A.2d 651 (Del. Ch. 1998), *Flake v. Hoskins* 55F. Supp. 2d 1196 (D. Kan. 1999) or *Ipalco Enters v. PSI resources*, No. IP 93-325-C, 1993 US Dist. LEXIS 19805, no. 9 (S.D. Ind. June 18, 1993).

<sup>217</sup> See ATF 59 II 44, 48; ATF 51 II 412, c. 3; ATF 100 II 384 c. 4; ATF 105 II 114, c. 7c; ATF 116 II 320, c. 3; ATF 126 III 266, c. 1c; ATF 138 III 407, c. 2.3. For a comment of these decisions, see BAHAR, 278. See also ATF 130 III 213 c. 2.2.2 and ATF 139 III 24 c. 3.3 in which the court has set aside the interests of certain shareholders in the name of the sustainable interests of the company but always within a financial perspective.

<sup>218</sup> Of the same opinion, BAHAR, 278.

<sup>219</sup> BAHAR, 293 stating that the creation of profit remains the priority. See also VON DER CRONE, §18 N. 1517 interpreting the long-term interests of the company as meaning the increase of the value of the company (*Langfristig wird sich der Verwaltungsrat am Kriterium der Steigerung des Unternehmenswerts orientieren müssen*)

<sup>220</sup> SCBP 2023, preface and 6.

There is currently however no proof that “*traditional*” Swiss companies have truly shifted their mindset toward a pluralistic (non-instrumental) stakeholder governance as promoted by the new SCBP.

#### iv. No drastic change under recent corporate governance law reforms

Corporate governance reform at the EU and Swiss levels could have had the potential to impose a pluralistic approach to stakeholder governance for all companies.

The EU new corporate governance framework announced itself as revolutionary. Scholars<sup>221</sup> then affirmed that the adoption of benefit corporation legislation would not make sense anymore since all EU-operating businesses would become SPDEs.

In reality, ambitions have been scaled down. EU Corporate Sustainability Reporting Directive (CSRD)’s confirmation of the double materiality concept and duty to provide an integrated report (putting an end to the artificial divide between financial and non-financial matters) goes, in appearance only, in the direction of a pluralistic approach to stakeholder governance. As mentioned, the double materiality concept shall be attached to the Enlightened Shareholder Value (i.e. the pursuit of long-term interests of shareholders)<sup>222</sup>.

Besides, the scope of the report will be limited to activities aimed at mitigating the adverse consequences of companies’ commercial and operational activities<sup>223</sup> on people and the planet rather than the creation of positive (net) impact.

EC’s revolutionary ambition toward a pluralistic approach to stakeholder governance also resulted from Art. 25 of the draft CSDDD providing the following:

*“Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term”.*

The EC decided however to remove Art. 25 from the final draft “[d]ue to the strong concerns expressed by Member States that considered Article 25 to be an inappropriate interference with national provisions regarding directors’ duty of care, and potentially undermining director’s duty to act in the best interest of the company”<sup>224</sup>. National governments were at first thus not ready yet to embrace a pluralistic approach to stakeholder governance as a mainstream model and are not ready to look at board members as trustees of various interests rather than as agents of long-term oriented shareholders. Civil society actors

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<sup>221</sup> See ATF 59 II 44, 48; ATF 51 II 412, c. 3; ATF 100 II 384 c. 4; ATF 105 II 114, c. 7c; ATF 116 II 320, c. 3; ATF 126 III 266, c. 1c; ATF 138 III 407, c. 2.3. For a comment of these decisions, see BAHAR, 278, see BAHAR, 278. See also ATF 130 III 213 c. 2.2.2 and ATF 139 III 24 c. 3.3 in and ATF 130 III 213 c. 2.2.2 which have the court has set aside the interests of certain shareholders in the name of the sustainable interests of the company but always within a financial perspective).

<sup>222</sup> CISL, 6.

<sup>223</sup> BAHAR, 293 stating that the creation of profit remains the priority. See also VON DER CRONE, §18 N. 1517 interpreting the long-term interests of the company as meaning the increase of the value of the company (*Langfristig wird sich der Verwaltungsrat am Kriterium der Steigerung des Unternehmenswerts orientieren müssen*).

<sup>224</sup> Council’s General Approach to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 15024/1/22 REV 1, dated November 30, 2022, § F.31.



managed to force the reintegration of Art. 25 in the latest proposal<sup>225</sup> but the final text is as yet, unknown.

The Swiss corporate law reform also confirmed the double materiality approach in Art. 964b para. 2 (4)<sup>226</sup> and 964j-l<sup>227</sup> SCO. The reform thus clarified that ESG aspects are part of the risk management oversight tasks, by requiring companies (and thus indirectly boards of directors) to perform a due diligence also on risks for stakeholders deriving from the company's activities. The following elements of the reform support however an instrumental approach to stakeholder governance, i.e. the primacy of shareholders' interests over other stakeholders' interests:

- The Federal Council 2017 Message states that the new powers attributed to shareholders is a means to *“promote the long-term growth of companies and lead to improved financial performance”*<sup>228</sup>;
- The distinction between financial management report – which is part of the audited financial statements – and the non-financial (and non-audited) report;
- The aim of Art. 964a-l SCO to reduce (or eliminate) the adverse impact of companies' activities on stakeholders instead of creating a positive value for stakeholders<sup>229</sup>;
- The wording of the new Art. 673 para. 2 SCO providing that *“voluntary retained earnings may only be formed if justified in order to ensure the long-term prosperity of the undertaking, taking account of the interests of all the shareholders”*. In other words, the long-term interests of the company are still defined along the interests of the shareholders.

#### v. The articles of association as an orientation tool

Even though, as we have seen before, articles of association do not represent a reliable indication of the purpose of a company<sup>230</sup>, a certain wording of the articles of association could orient the interpretation of the *“interests of the company”*.

This leeway seems at first sight possible in jurisdictions, such as Switzerland, where corporate law does not at first sight impose the pursuit of an Enlightened Shareholder Value or where constituency statutes provide for the primacy of some stakeholders' interests over the ones of other stakeholders, as this is the case in some US States.

Based on this (apparent) leeway, some labels, such as B Corp certification, as well as Category 2 SPDEs legal forms or legal qualifications require an amendment of the articles of association toward a pluralistic approach to stakeholder governance<sup>231</sup>. The amendments consist of a

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<sup>225</sup> See COM (2022) 71 final: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

<sup>226</sup> As confirmed by Art. 1 para. 1 Ordinance on climate-related report which clearly refers to the double materiality concept, despite the Federal Office of Justice mentions that Swiss legislation does not clearly express in favour of the double materiality concept, see OFFICE FÉDÉRAL DE LA JUSTICE, § 7.3, 15.

<sup>227</sup> FEDERAL COUNCIL, Explanatory report to DDTro, 25.

<sup>228</sup> FF 2017 353, 600.

<sup>229</sup> For more explanations on this point, see Sect. VII.D.1.

<sup>230</sup> See above Sect. VII A 2b i.

<sup>231</sup> For special provisions to be included in the articles of association to become a B Corp-certified company, see <https://www.bcorporation.net/en-us/about-b-corps/legal-requirements> (last consulted on March 27, 2023). To note that the orientation toward a pluralistic approach to corporate governance is not complete as – for Swiss companies – the articles of association shall specify that *“nothing in this Article express or implied is intended to or shall create or grant*

*any right or any cause of action to, by or for any person (other than the Company)”*, whilst primacy of the social purpose could be a provision protection third-party interests so that the beneficiary could have standing under tort law.

reformulation of directors' fiduciary duties, with affirmation in the standard purpose clause of the intent to strive for a positive impact on society at large and the environment.

The latest trend<sup>232</sup> is the statements made by companies<sup>233</sup> on their corporate purpose, i.e. *“the reason for existence guiding a company’s business conduct”*<sup>234</sup>. Business Roundtable’s 2019 *“Statement on the Purpose of a Corporation”*<sup>235</sup>, the World Economic Forum’s 2016 New Paradigm<sup>236</sup>, the Davos Manifesto 2020<sup>237</sup>, BlackRock chief executive officer Larry Fink’s annual letters to CEOs since 2015 or the British Academy’s 2021 *“Policy & Practice for Purposeful Business”*<sup>238</sup> and renowned corporate law scholars<sup>239</sup> have advocated the necessity to reattribute a corporate governance role to the corporate purpose. The movement attempts to address the weaknesses of the benefit corporation statutory models<sup>240</sup>. Current momentum is to commit to the creation of positive impact and to identify the stakeholders that shall be given primacy since a single entity may not alone pursue the interests of the people. Thus, directors shall be held liable for not having pursued the social purpose (contrary to what was provided for in the US benefit corporation model law<sup>241</sup>). Such statements and amendments to the articles of association should help clarify that the directors’ fiduciary duties shall be understood as serving a pluralistic approach to stakeholder governance and give primacy to some stakeholders over others.

That being said, these amendments are truly valid and enforceable only if mandatory corporate law recognizes (i) a pluralistic approach to stakeholder governance and (ii) the possibility to always give primacy to the same group of stakeholders over the others. Only when corporate law does not impose the primacy of some stakeholders’ interests over the other stakeholders’ interests, there is true leeway for directors to decide how to manage the (possible) contradictions between the social purpose and the for-profit purpose. Then the question is whether primacy may be validly provided in advance (by amendment of the articles of association) to one group of stakeholders over the others and that the law does not mandate that this leeway is the remit of the managers or the judge on a case-by-case basis. Only under these circumstances will there be true leeway that permits to validly exclude directors’ liability when primacy is given to some stakeholders’ interests.<sup>242</sup>

This leeway seemed to exist in some US States where constituency statutes provided for the primacy of some stakeholders’ interests over other stakeholders’ interests. US courts have nonetheless converted such constituency statutes into shareholder primacy statutes<sup>243</sup>.

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<sup>232</sup> FISCH/DAVIDOFF SOLOMON, 1312, refer to the *“hottest topic of corporate governance”*.

<sup>233</sup> To name a few, this is the case of Patagonia, Tesla, Wallmarkt and in Switzerland of Nestlé, UBS and Richemont groups. For example in France, see SCHILLER.

<sup>234</sup> On the possible definitions of the concept of corporate purpose, see AKINTUNDE/JANDA, table 1, 16-17 with a general definition on page 5.

<sup>235</sup> BUSINESS ROUNDTABLE.

<sup>236</sup> LIPTON et al., *The New Paradigm*.

<sup>237</sup> SCHWAB.

<sup>238</sup> THE BRITISH ACADEMY.

<sup>239</sup> MAYER, *The Governance*; SJAFJELL/TAYLOR, 40 ff.; FERRARINI; POLLMAN, 1423 ff.; ECCLES/JOHNSTONE-LOUIS/MAYER/STROHELE, *The Board’s Role and reference to the Enacting Purpose Initiative led by University of Oxford in conjunction with the University of California, Berkley, the investment management firm Federated Hermes and the corporate law firm Watchell, Lipton, Rosen & Katz*. For the USA, FISCH/DAVIDOFF SOLOMON, 1309 ff.; ROCK; LIPTON/SAVITT/CAIN. For Switzerland, see notably BLANC/CHENAUX/PHILIPPIN, 124-126; BK OR I-CHENAUX/BLANC, §15 *Corporate Governance*, N 124-131, and PETITPIERRE SAUVIN, 433 ff.

<sup>240</sup> On the importance to request from benefit corporation disclosure on non-financial information, see COHEN/LIGENFELTER.

<sup>241</sup> § 301(c) (2) and (d) Model Benefit Corporation Legislation.

<sup>242</sup> For the same reasoning under Australian law, see RAMSAY/UPADHYAYA, 4; SOCIAL IMPACT HUB.

<sup>243</sup> See 2022 Tentative draft no. 1 ALI Restatement of Corporate Governance Law, § 2, 54-56 commenting § 2.01 (a)(2) and referring notably to *Blasius Indus Inc. v. Atlas Corp*, 564 A.2d 651 (Del. Ch. 1998), *Flake v. Hoskins*, 55F. Supp. 2d 1196 (D. Mo 1999) or *Ipalco Enters v. PSI resources*, No. IP 93-325-C, 1993 US Dist. LEXIS 19805, no. 9 (S.D. Ind. June 18, 1993).

To rely on amendments to articles of associations to orient the directors' fiduciary duties toward a pluralistic approach to stakeholder governance instead of clarifying it by law could thus not be sufficient. This is also why B Lab ANZ (reflecting on the opportunity to adopt a benefit corporation legislation in Australia) expressed skepticism that the ability of companies to modify their constitutions to permit directors to consider stakeholder interests could be an adequate solution<sup>244</sup>. Considering the lack of case law interpreting such clauses of the articles of association, it is difficult to say whether Swiss courts would rule differently than US courts. At present, it is uncertain whether dual-purpose companies incorporated under Swiss law may validly amend their articles of association toward a pluralistic (non-instrumental) approach to stakeholder governance. Assuming this is possible, one should probably be skeptical that provisions of the articles of association providing for the primacy of the interests of (always) the same group of stakeholders over the others be valid and enforceable under Swiss law.

To make it legally relevant and effective (or as in the UK to change the current mandatory interpretation of the duty of loyalty in favour of an Enlightened Shareholder Value), policy papers have been prepared in Canada<sup>245</sup>, and Spain<sup>246</sup>. Appendix 2 shows the features of recent legislative proposals in Spain. Guidelines have also been articulated by the Better Business Act Coalition in the UK<sup>247</sup> and in Canada, as detailed in Appendix 3 and in other jurisdictions, notably in Switzerland<sup>248</sup>.

### 3. Swiss law summary

Swiss law allows almost all legal forms to have a social purpose while exercising a significant commercial activity. Thus, there is no corporate law barrier to meeting the first two characteristics of SPDEs (i.e. the primacy of the social purpose while performing out ongoing commercial activity) with a single purpose entity. This might however not be compatible with a tax exemption under the current Swiss tax authorities' practice. As a consequence, foundations and associations are often used by social entrepreneurs as the initial form until the commercial activity reaches a certain scale that results in the loss of the tax exemption. At this point, the entity is transformed into a dual-purpose legal form (or the commercial activity transferred to a for-profit entity).

Many legal forms may also adopt a dual purpose while carrying out a commercial activity, except for associations and cooperatives. Provisions can however be introduced in the articles of association of cooperatives (on distribution of profit notably) to make it close to a dual-purpose company limited by shares. So far, in the absence of any investment supporting scheme, the most suitable legal form remains the dual-purpose company limited by shares because the latter can issue a "participation certificate capital" (contrary to the cooperatives and the limited liability companies) and, there is no cap on dividends imposed by law, nor on the value of the repayment of the shares and no mandatory application of the principle "one person one vote" (contrary to what is provided for by law for the cooperatives).

The question whether dual-purpose companies limited by shares (or any dual-purpose entity with a share capital) may amend their articles of association to make the social purpose prevail over the for-profit purpose remains unclear. If the leeway exists at first sight, the Swiss position on stakeholder governance might jeopardize the validity of such provisions. Is it a pluralistic

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<sup>244</sup> SOCIAL IMPACT HUB.

<sup>245</sup> AKINTUNDE/JANDA.

<sup>246</sup> GABEIRAS/BARAHONA, White paper announcing the work on a legislative proposal.

<sup>247</sup> For the same reasoning under Australian law, see RAMSAY/UPADHYAYA, 4; SOCIAL IMPACT HUB.

<sup>248</sup> See BLANC/CHENAUX/PHILIPPIN, 124-126, suggesting to (i) be selective on which stakeholders' interests are to be protected, (ii) impose a positive impact on society while avoiding negative impact of commercial and operational activities and (iii) implement rules on partnerships with shareholders that could be achieved through different channels – which can be combined, such as informal meetings, shareholder committees and a "say on purpose" vote, with reference for the say on purpose to EDMANS/GOSLING.

approach where no group of stakeholders (including shareholders) prevails over the other groups? And in such hypothesis, are the parties allowed to give primacy (in advance) to a group of stakeholders over another? Provisions of the articles of association giving primacy to the beneficiaries of the societal purpose over other stakeholders would then be valid and enforceable. Or is it an instrumental approach, meaning that, by law, for-profit entities (and thus also dual-purpose entities) must give primacy to the long-term shareholders' interests? Then, provisions of the articles of association providing guidance on the notion of the "interests of the company" in favour of stakeholders would not be valid and enforceable. The question is of essence for the (rare) occasions in which there is (or might be) a conflict or misalignment between the ideal purpose and the for-profit one, notably when directors may not identify or assume any long-term advantage for shareholders.

The truth is that the question has never been explicitly asked, and in any event, remains unanswered. Swiss courts recognized at various occasions the importance of stakeholder governance. That being said, this space given to stakeholders' interests seems rather a service of the for-profit purpose on a long-term perspective. Even though there is no uniformity of doctrine, the consensus appears to lean toward an instrumental approach to stakeholder governance. Significantly, the corporate law reform contains more hints in favour of that approach, while the new SCBP advocates for a pluralistic approach. In practice, there is no proof that businesses have shifted their mind toward a pluralistic approach. In any event, even admitting that Swiss law would adhere to a pluralistic approach to stakeholder governance, it remains uncertain whether primacy may be validly provided in advance (by amendment of the articles of association) to one group over the other and that Swiss law does not mandate that this leeway is the remit of managers or the judge on a case-by-case basis. It cannot thus be excluded that Swiss courts would follow the US courts' example and convert the articles of association prioritizing certain stakeholders' interests over others into shareholder primacy documents or give primacy to shareholders on a case-by-case basis.

Amendments made by many companies to their articles of association to match notably B Lab requirements for getting the B Corp certification might thus not (or not fully) be valid and enforceable under Swiss law. Companies' statements of corporate purpose, whose legal strength is even more unclear than an amendment to the articles of association, are not *per se* able to overcome the question. At present, a dual purpose is thus both a possibility for directors to shield from personal liability and a major risk of personal liability. Incentives for pursuing a dual-purpose are thus low.

## B. Distribution constraints

### 1. Leeway to provide for a distribution constraint

Distribution of profit and of liquidation proceeds to members is not automatically provided for by law when an economic (lucrative) purpose is pursued. This might even be excluded by law, as this the case for foundations, associations and, as a default rule, for cooperatives. The following rules apply in civil law countries:

- Associations: Distribution of profit is not envisaged since associations cannot pursue a for-profit purpose. Distribution to members of the liquidation proceeds is then – in

principle<sup>249</sup> – not an option<sup>250</sup> and assets are attributed to the public authority<sup>251</sup> or entities with an analogous purpose<sup>252</sup>;

- Foundations: The profit (if any) shall be attributed to the implementation of purpose and a supervisory authority is in charge of verifying that this is done. Foundations who have the discretion to attribute a certain amount of money to family members are a specific type of foundation that does not qualify as an SPDE. In the absence of a specific provision in the deed, the liquidation proceeds shall be attributed to a public corporation and/or for the pursuit of the same purpose<sup>253</sup>; and
- Cooperatives: Profit is used for company's purpose unless the articles of association provide otherwise<sup>254</sup>. In such hypothesis, profit may be attributed to the members in the form of refunds<sup>255</sup> but, in principle, based on their use of the company's installations (not on the percentage of their shareholding)<sup>256</sup>. Another distribution key can however be considered<sup>257</sup>. If shares are issued, the profit is attributed by distributing a dividend<sup>258</sup>, which must not exceed the usual rate of interest for long-term loans without special security<sup>259</sup>. The allocation of the liquidation proceeds is made as provided by the articles of association<sup>260</sup>. Articles of association may thus provide for a distribution of the remaining assets among the members, also as per their holding of the share capital<sup>261</sup>. In the absence of a specific provision in the articles of association, the liquidation proceeds are – in principle<sup>262</sup> – devolved to other cooperatives or to entities of public utility<sup>263</sup>. The same is true for the cooperatives assets on which departing members (or their heirs) have no right, except provided otherwise by the articles of association<sup>264</sup>. Besides, if the articles of association of a cooperative provide for full or partial repayment of the shares of the departing member (or their heirs), the amount may not exceed the par value of the share certificate excluding the entry fee (no agio)<sup>265</sup>. These restrictions render the cooperative not very attractive for investors<sup>266</sup>.

Thus, for dual-purpose cooperatives there is no need to amend the articles to provide for a distribution constraint.

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<sup>249</sup> In Germany, § 45 BGB provides for distribution to members under certain conditions. In France, Art. 18 Loi du 1er juillet 1901 relative au contrat d'association reserves a members' right to claimback some assets if they can prove that these assets were contributions made by them to the association capital and not pure donations, it being specified that there is a presumption of donation.

<sup>250</sup> For Switzerland, CR CC I-JEANNERET/HARI, Art. 76, N 11.

<sup>251</sup> For Switzerland, Art. 57 para. 1 and 2 CC; For Germany, § 45 BGB *in fine*.

<sup>252</sup> For Italy, Art. 31 Codice civile.

<sup>253</sup> For Switzerland, Art. 57 para. 1 and 2 SCC; For Italy, Art. 31 Codice civile.

<sup>254</sup> For Switzerland, Art. 859 para. 1 SCO.

<sup>255</sup> Art. 859 para. 2 SCO.

<sup>256</sup> Art. 859 para. 2 SCO.

<sup>257</sup> For Switzerland, see CR CO II-CHABLOZ, Art. 859 N 9 and REYMOND, 161, mentioning a distribution according to the percentage of the social capital as a frequent solution in practice.

<sup>258</sup> Art. 859 para. 3 SCO

<sup>259</sup> Art. 859 para. 3 SCO, with exceptions for cooperative banks.

<sup>260</sup> For Switzerland, Art. 833 (8) and Art. 913 CO. For France, Art. 19 of LOI n° 47-1775.

<sup>261</sup> See expressly under German law, § 91 GenG. For Swiss law, see Art. 913 para. 2 SCO. The allocation of the liquidation surplus of a cooperative society under Swiss law can be done on a per capita basis, according to other criteria (e.g. according to the use of the social facilities or the duration of the membership) or according to the amount of the shares held, see REYMOND, 169.

<sup>262</sup> Art. 19 of LOI n° 47-1775 referring to exceptions arising out of "special laws".

<sup>263</sup> For Switzerland, Art. 913 para. 4 SCO; For France, Art. 19 of LOI n° 47-1775; For Italy, Art. 2545-undecies Codice civile; For German law, §92 GenG .

<sup>264</sup> Art. 864 para. 1 SCO.

<sup>265</sup> Art. 864 para. 1 SCO.

<sup>266</sup> MEIER-HAYOZ/FORSTMOSER, § 19 N 55.

For dual-purpose companies limited by shares (and limited liability companies), it is widely admitted – following *Dodge v. Ford*<sup>267</sup> 1919 US decision<sup>267</sup> – that the for-profit purpose entails a right to a dividend, respectively a duty – when certain conditions are met – to distribute dividends to shareholders, as well as a right to the liquidation proceeds<sup>268</sup>. As this is the case under foreign legislation<sup>269</sup>, this right to a dividend may be restricted in the articles of association within the limits of equal treatment of shareholders, abuse of rights, and the company’s interests<sup>270</sup>.

The provision of the articles of association that would provide for a full and definitive renunciation to the distribution of dividends equates to a waiver of the for-profit purpose and requires shareholders’ unanimous approval<sup>271</sup>, since dividend payment is at the heart of a for-profit entity<sup>272</sup>. The same is true for renunciation to the liquidation proceeds<sup>273</sup>, which are a special kind of dividend<sup>274</sup>. The company will then be transformed into a single (social) purpose entity which, under Swiss law, may not provide for the distribution of profit. As a matter of fact, Swiss tax authorities require such a full distribution constraint in the articles of association to grant tax exemption to any entity (including corporations) pursuing a public utility purpose and they also require the absence of a for-profit purpose<sup>275</sup>.

The provision of the articles of association of a company limited by shares (with a for-profit (lucrative) purpose) that would provide for the partial non distribution of the profit to the members (e.g. by providing that a certain percentage of the profit is allocated to the social purpose) would however be valid.

## 2. Criteria of evaluation of the validity of such a decision

The validity of the decision to retain (in a company limited by shares or a limited liability company) part of the profit (or of the liquidation proceeds) will be evaluated based on the company’s interests. The right to a dividend may indeed not be restricted arbitrarily or for reasons unrelated to the company’s interests<sup>276</sup>. The company may however waive the payment of dividends for specific reasons<sup>277</sup>. Renunciation to the payment of the dividend at any point in time is thus possible but renunciation to the very principle of the dividend is not<sup>278</sup>. A long-term refusal to pay dividends cannot be accepted if the situation of the company does not require such a sacrifice<sup>279</sup>. As the decision shall be made each year, irrespective of the wording of the articles of association on the distribution constraint, evaluation will occur on a case-by-case basis.

If the profit carried forward is not immediately allocated to the pursuit of the social purpose but kept (for future use) in a voluntary reserve, the interests of the company are further defined by Art. 673 para. 2 SCO, which provides that “*voluntary retained earnings may only be formed if*

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<sup>267</sup> *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 (Mich. 1919) is a corporate law iconic decision on the dividend payment.

<sup>268</sup> Under Swiss law, Art. 745 para. 1 SCO for companies limited by shares and Art. 826 para. 1 SCO for limited liability companies; For this right under Italian law, see Art. 2350 Codice civile; For German law, see § 271 AktG; For US Delaware law, § 281 (b) Del. C.

<sup>269</sup> For Italy, see Art. 233 Codice Civile; For Germany, see § 58 Abs 4 AktG; For France, see Art. L232-12 of Code de commerce.

<sup>270</sup> For Swiss law, see ATF 99 II 55, ATF 91 II 298; CR CO II-CHENAUX/GACHET, Art. 660-661, N 33; ROUILLER/BAUEN/BERNET/LASSERRE ROUILLER, 259.

<sup>271</sup> BÖCKLI, § 8, N 668 (“*solange nicht alle Aktionäre auf die Gewinnstrebigkeit verzicht haben*”). For German law, some German scholars consider that this may be done without this being considered as a waiver of the for-profit purpose, see Münchener Kommentar-BAYER, § 58, N 121.

<sup>272</sup> BÖCKLI, § 8, N 664.

<sup>273</sup> CR CO II- RAYROUX, Art. 745, N 8; BSK OR II- STÄUBLI, Art. 754, N 1. For German law, see Münchener Kommentar-KOCH, § 271, N 5.

<sup>274</sup> MEIER-HAYOZ/FOSTMOSER, §16, n. 181 referring to a liquidation dividend/*Schlussdividende/dividende de clôture*.

<sup>275</sup> Federal Tax Administration, Circular no. 12 of 8 July 1994, sect. II 2 c.

<sup>276</sup> Kommentar Aktienrecht-DEKKER, Art. 660 SCO, N 2 ff; CR CO II-CHENAUX/GACHET, Art. 660-661, N 24; ROUILLER/BAUEN/BERNET/LASSERRE ROUILLER, 259.

<sup>277</sup> Kommentar Aktienrecht-DEKKER, Art. 660 SCO, N 10; CR CO II-CHENAUX/GACHET, Art. 660-661, N 24; BSK OR II-NEUHAUS/BALKANYI, Art. 660, N 17; KUKO OR-BURKHALTER, Art. 660, N 11.

<sup>278</sup> CR CO II-CHENAUX/GACHET, Art. 660-661 SCO, N 32; BSK-OR II-NEUHAUS/BALKANYI, Art. 660 SCO, N 17.

<sup>279</sup> MONTAVON/MONTAVON/BUCHELER/JABBOUR/MATTHEY/REICHLIN, 352-353.

*justified in order to ensure the long-term prosperity of the undertaking, taking account of the interests of all the shareholders*". The Message of the Federal Council further explains that "*the company may therefore not set up additional reserves on a discretionary basis. For example, it would not be allowed to set aside reserves for a purpose unrelated to the company's business, nor to "starve" persons holding minority interests, nor to keep the share price abusively low by means of low dividend distributions*"<sup>280</sup>.

These two texts clearly refer to the Enlightened Shareholder Value, i.e. to the duty to pursue long-term shareholder interests in a for-profit entity. Therefore, in a dual-purpose entity oriented towards a Category 2 SPDE there is a risk (once again) that the primacy given to the social purpose in the articles of association (as further stressed by the provision on the distribution constraint) be set aside by courts and that shareholders' interests (to receive a dividend or the liquidation proceeds) prevail. Courts might then consider that the decision not to distribute a dividend to shareholders is in breach of Swiss mandatory law (i.e. a breach of the for-profit purpose) and might (i) order the distribution of such a dividend and (ii) declare invalid the provision of the articles of association.

### 3. Swiss law summary

As a mandatory rule (or default rule in some cases) Swiss law already provides for the non-distribution of profit and of the liquidation proceeds to members (or founders) of associations, foundations and cooperatives. Moreover, Swiss corporate law enables dual-purpose companies limited by shares or limited liability companies to incorporate distribution constraints in their articles of association, aimed at promoting social benefits or social purposes. These constraints may apply to both dividends and liquidation proceeds, ensuring that the enterprise prioritizes its social objectives over profit maximization.

The latter may however only stipulate the possibility for partial distribution constraints, as a full waiver on distribution of dividends and/or of liquidation proceeds would equate to an abandonment of the for-profit purpose, transforming then the dual-purpose entity into a single (social) purpose entity which, under Swiss law, may not distribute profit.

In any event, the decision on the non-distribution of profit (or part of them) shall be made each year and can be challenged by unsatisfied shareholders. The validity of such a decision will be evaluated according to the interests of the company. This concept is further defined by Art. 673 para. 2 SCO which clarifies that to determine the company's interests those of all shareholders must be taken into account. There is once again the risk that the primacy of the social purpose (as clarified by the provisions of the articles of association on the distribution constraints) be set aside by courts and that shareholders' interests (to receive a dividend or the liquidation proceeds) prevail.

In other words, whether providing for a (partial) distribution constraint in the articles of association of companies limited by shares or limited liability companies to secure the allocation of assets and profit to the social purpose is valid and enforceable is uncertain.

## C. Stakeholders' engagement

### 1. No prescribed stakeholder engagement mechanism

Swiss law does not prescribe any stakeholder engagement mechanism. Over the past years, many large companies have introduced a stakeholders committee to facilitate the dialogue on ESG aspects with the external stakeholders. All jurisdictions, including Switzerland, give the

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<sup>280</sup> FF 2017 353, 473.

“supreme” governing body the sufficient leeway to structure stakeholders’ engagement as desired.

## 2. No disclosure duty on engagement with stakeholders

Swiss law does not require companies to disclose how they engaged with stakeholders. This is similar to EU law and US law<sup>281</sup>.

At present, there is even no duty to disclose how the board engage with shareholders, but the Federal Council is considering the adoption of such a transparency rule for the financial sector<sup>282</sup>.

Companies remain however free to disclose spontaneously.

## 3. Board structure

As shown in Appendix 1, some jurisdictions provide (mainly in the SPDEs legal framework) for a legal obligation regarding the representation of specific constituencies on boards. These constituencies typically include employees and, to a lesser extent, beneficiaries. The following jurisdictions have established such legal obligations:

- France: for SCIC (three colleges among which one is composed of beneficiaries and one of the employees), for Scop (indirectly since employees own at least 51% of the share capital and 65% of voting rights), and for enterprises with the mission enterprise qualification (at least one employee in the mission committee).
- Italy: to obtain the social enterprise qualification (duty to integrate employees and stakeholders at the governance level without however any structuration requirement).
- Germany: since 1976, employees of public and private companies with over 2,000 employees are allowed to elect representatives for almost half of the supervisory board of directors. For companies with 500 to 2,000 employees, one third of the supervisory board must be elected<sup>283</sup>.

As with US and UK law<sup>284</sup>, Swiss law does not require such a representation of constituencies at board level<sup>285</sup>. The sole exceptions are that the board of the cooperative shall comprise a majority of members<sup>286</sup>, and if different classes of shares exists in a company limited by shares the shareholders of each different class of shares are entitled to elect at least one representative to the board of directors<sup>287</sup>. Shareholders’ agreement or organizational regulations may however provide the representation of some constituencies (e.g. beneficiaries’, customers’ or employees’ representatives). There is also no legal requirement to consider the environmental, social and/or

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<sup>281</sup> CISL, 94 and 98.

<sup>282</sup> At present there is no equivalent to Art. 8 octies of the EU Shareholders Rights Directive II mandating institutional investors and asset managers to disclose their policy on engagement with shareholders. In its position paper on greenwashing, the Federal Council expressed its intention to present a proposal to force the service provider to provide precise information on the coordination with other investors and the process for influencing the target company, see FEDERAL COUNCIL, Greenwashing Position 2022, 3-4.

<sup>283</sup> MitbestG.

<sup>284</sup> CISL, 94 and 98.

<sup>285</sup> Art. 734f SCO providing for the representation of women on boards (on a comply or explain basis) only applies to some listed companies. At EU Level, the Women on Boards Directive will impose the gender representation to some listed companies.

<sup>286</sup> Art. 894 para. 1 SCO.

<sup>287</sup> Art. 709 para. 1 SCO.



human rights skills and expertise in the directors' nomination and selection process. The latest version of the SCBP provides however for such an approach<sup>288</sup>.

4. Standing against companies or their bodies
  - a. Under corporate law

Standing for a breach of the governance body's duties is also a means of involvement at the governance level. Corporate laws provide only shareholders and – under certain conditions – creditors, with such standing<sup>289</sup>. Stakeholders are usually barred from having standing<sup>290</sup>. Sustainability reporting regulations that implement new corporate duties have not provided standing under corporate law to stakeholders. At most, a breach of these duties ends up into a judicial order to adopt a revised report (as this is the case under the UK<sup>291</sup> and French<sup>292</sup> regulations).

Standing may not be given to stakeholders by amendment of the articles of association. This is the case even in jurisdictions where corporate law reserves the possibility to grant – at the moment of the incorporation of the company – special privileges to third parties if the articles of association indicate the names of the beneficiaries. Both German<sup>293</sup> and Swiss<sup>294</sup> corporate laws reserve this possibility. Under Swiss law, these privileges may only be of pecuniary nature<sup>295</sup>. Under German law, the possibility to also grant non-pecuniary advantages (i.e. social rights) is controversial<sup>296</sup>.

SPDEs' legal forms or legal qualifications could thus amend rules on standing to offer standing also to stakeholders. It shall however be noted that no regulations examined under this report offer standing to stakeholders under corporate law. In Category 2 SPDEs' legal forms or legal qualifications, shareholders' predominance is on the contrary reaffirmed to the detriment of stakeholders. For instance, US benefit corporation model legislation and Italian *società benefit* law only provide shareholders and directors with standing to compel the entity to create a general public benefit<sup>297</sup>. US benefit corporation model law goes even a step further by stipulating an express waiver of directors' liability for failing to create a general public benefit<sup>298</sup>.

- b. Under antitrust law
      - i. Current law

Standing under antitrust laws applicable for false or misleading information notably made in sustainability reports or reliance on labels is also a way of stakeholders' involvement at the governance level.

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<sup>288</sup> Principle 13 of the SCBP provides that “[t]he board of directors should aim for suitable diversity in its members with regard to competences, experience, gender, age, background and origin. The members should have the necessary skills and qualities to ensure that the board of directors can competently fulfil its management and supervision duties, that a variety of perspectives are incorporated into its decision-making, and that independent formation of opinions and decision-making are ensured in the critical exchange of ideas with the executive board”.

<sup>289</sup> Under Swiss law, see Art. 754 SCO. Foreign corporate laws known similar provisions.

<sup>290</sup> This is the case under US corporate law (see MONTGOMERY), under Swiss corporate law (see Art. 754 SCO), under German corporate law (AktG, § 93). Under Italian corporate law (Art. 2395 and Art. 2476 Codice civile), third parties have a claim against directors for breach of their duties if they suffer a direct property damage (see LONGO).

<sup>291</sup> FOERSTER.

<sup>292</sup> TAP, 10.

<sup>293</sup> AktG, § 26.

<sup>294</sup> Art. 636 SCO.

<sup>295</sup> BSK OR II-SCHENKER, Art. 628, N 15 cum FF 2017 353, 445; BÖCKLI, N 235-235.

<sup>296</sup> Münchener Kommentar zum Aktiengesetz (2008)-PENTZ, §26, N 11-16.

<sup>297</sup> For the USA, see MONTGOMERY; PLERHOPLES, 908. For Italy, see VENTURA, 662.

<sup>298</sup> PLERHOPLES, 908.

ESG reports and other public documents alleging companies' ESG performance or relying on specific labels have been the entry door of many sustainability claims. This is true both for reports and information whose disclosure is imposed by law and for those voluntarily disclosed or advertised as a distinctive sign of the company. Disclosure to the adherence to code of best practices, national or international initiatives as well as a private label may lead to a claim for breach of antitrust law.

Recent cases are targeting alleged false or misleading statements in annual sustainability reports, websites, and other marketing materials. The USA has known many of these cases which remained for the most part of them unsuccessful<sup>299</sup>. Under the FTC Act<sup>300</sup>, a company's conduct can be improperly deceptive even if the company does not actually deceive or even intend to deceive a consumer<sup>301</sup>. An act or practice is considered to be deceptive if *"there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment"*<sup>302</sup>.

The same applies under Swiss law. The communication of inaccurate or misleading information can be an unfair act or practice, committed intentionally or by omission<sup>303</sup>. Acts and practices violating either the principle of truth (inaccurate) or the principle of clarity (misleading) can be deemed as being deceptive<sup>304</sup>. The content of the claim must be verifiable and capable of influencing the decision of the unsuspecting customer in good faith; the inaccuracy must not be detectable at first sight<sup>305</sup>. An unfair practice within the meaning of Art. 2 of the Swiss Unfair Competition Act (UCA) means any behavior that is objectively capable of influencing the *"competition game"* or the market functioning<sup>306</sup>. A risk of deception is sufficient for an act or practice to be deceptive<sup>307</sup>.

US Courts have so far distinguished between aspirational statements<sup>308</sup> and concrete commitments<sup>309</sup>, the latter being the sole occasions to give a right to claim, while Swiss courts have distinguished between the statement of facts (opening a right to claim) and the mere value judgment<sup>310</sup>.

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<sup>299</sup> HACKETT/DEMAS/SANDERS/WICHA/FOWLER, 10849 ff.

<sup>300</sup> 15 U.S.C. §45(a)(1)-(2).

<sup>301</sup> FTC, FTC Policy Statement on Deception (Oct. 14, 1983),

[https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) (last consulted on April 25, 2023) (*"The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception"* (citing *Beneficial Corp. v. Federal Trade Comm'n*, 542 F.2d 611, 617 (3d Cir. 1976)).

<sup>302</sup> FTC, FTC Policy Statement on Deception (Oct. 14, 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) (last consulted on April 25, 2023) (*"The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception"* (citing *Beneficial Corp. v. Federal Trade Comm'n*, 542 F.2d 611, 617 (3d Cir. 1976)).

<sup>303</sup> CR LCD-KUONEN, Art. 3 (1)(b), N 26 ; K UWG-BLATTMANN, Art. 3 (1)(b), N 21 ; K UWG-JUNG, Art. 3 (1)(b), N 71.

<sup>304</sup> TF, 2C\_1008/2012 of March 1, 2013, c. 2.4; CR LCD-KUONEN, Art. 3 (1)(b), N 2.

<sup>305</sup> ATF 132 III 414, c. 4.1.2 = JdT 2006 I 359; ATF 129 III 426, c. 3.1.1 f. = JdT 2003 I 400; TF, 4A\_300/2013 of October 2, 2013, c. 6.1, JdT 2014 II 205; CR LCD-KUONEN, Art. 3 (1)(b), N 15.

<sup>306</sup> ATF 133 III 431, c. 4.1 = JdT 2008 I 34; ATF 126 III 198, c. 2.c.aa = SJ 2000 I 337; TF, 4A\_300/2013 of October 2, 2013, c. 6.1, JdT 2014 II 205; CR LCD-MARTENET, Art. 1, N 10.

<sup>307</sup> ATF 133 III 431, c. 4.1 = JdT 2008 I 34; ATF 126 III 198, c. 2.c.aa = SJ 2000 I 337; TF, 4A\_300/2013 of October 2, 2013, c. 6.1, JdT 2014 II 205; CR LCD-MARTENET, Art. 1, N 10.

<sup>308</sup> In *Ruiz v. Darigold, Inc.*, No. 14-1283, 2014 U.S. Dist. LEXIS 155384, (W.D. Wash. Nov. 3, 2014) the court determined that statements made by Darigold on sustainable farming and animal well-being were only aspirational and thus not sufficiently concrete for the plaintiff to reasonably rely on. In *People of the State of New York v. ExxonMobil*, NO.452044/2019 (NY Supr. Court, Dec 2019), the court considered that no reasonable investor would make investment decisions in the near term based on the projection 20 years plus out may not be the case in a different context.

<sup>309</sup> In the following cases, courts determined that statements were sufficiently concrete for the plaintiff to reasonably rely on: *Water & Sanitation Health, Inc. v. Chiquita Brands Int'l, Inc.*, No. C14-10 RAJ, 2014 U.S. Dist. LEXIS 70673 (W.D. Wash. May 22, 2014); *National Consumers League v. Wal-Mart Stores, Inc.*, No. 2015-CA-007731, 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016).

<sup>310</sup> TF, 4A\_300/2013 of October 2, 2013, c. 6.3.1, JdT 2014 II 205; see also K UWG-BLATTMANN, Art. 3 (1)(b), N 12.

The possibility to ask a neutral authority to intervene (e.g. in the US the Federal Trade Commission (FTC) and in Switzerland the Swiss Fairness Commission (*Schweizerische Lauterkeitskommission, Commission Suisse pour la Loyauté or the State Secretariat for Economic Affairs (SECO)*) has also been used for deceptive acts or practices<sup>311</sup>. The whistleblower has however no standing in such cases.

Standing is granted to anyone who, through a deceptive act or practice, suffers damage to his clientele, his credit or professional reputation, his business, his economic interests in general, or who is threatened by this<sup>312</sup>. Organizations protecting consumers as well as professional and economic associations also have standing if their members suffer harm<sup>313</sup>. People not injured but threatened by an infringement are protected and have standing<sup>314</sup>. As under Art. 28 SCC, the endangerment of economic interests through unfair conduct gives standing<sup>315</sup>. Some stakeholders, notably customers, employees and co-contracting parties may thus have standing if their economic interests are jeopardized, i.e. if there is only a potential damage but not an effective one. If only non-economic interests are endangered, then there is no standing. Legislative intervention is thus not necessary to give standing to financially endangered stakeholders. It would however be necessary to give standing – if desired – to stakeholders (or rather key stakeholders) whose non-financial interests are endangered. In both cases, the causal link between the threat and the report shall be proven by the claimant.

Consequences under antitrust law for deceptive acts or practices are however limited to a fine<sup>316</sup>.

## ii. In the legislative pipeline

Despite inappropriate use of sustainability labels and false or misleading information on sustainability aspects may (theoretically) already open a right to claim under unfair competition acts and/or tort law, some governments have decided to reinforce consumer's protection against greenwashing to empower them to contribute actively to the green transition. This is the aim of the recent EC's proposal for a Directive on Green Claims. This directive will amend the Unfair Commercial Practices Directive by<sup>317</sup>:

- Adding the “*environmental or social impact, ‘durability’ and ‘reparability’*” in the list of product characteristics about which a trader should not deceive a consumer.
- Providing that making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and an independent monitoring system is misleading.
- Considering an unfair practice (i) the display of a sustainability label which is not based on a certification scheme or not established by public authorities, (ii) making a generic environmental claim for which the trader is not able to demonstrate recognised excellent

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<sup>311</sup> In the FTC also started investigating supply chain contexts, in Canada Goose, Inc., FTC Matter No. 182-3146 (June 17, 2019), available under [https://www.ftc.gov/system/files/documents/closing\\_letters/nid/2019-06-17\\_canada\\_goose\\_closing\\_letter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/nid/2019-06-17_canada_goose_closing_letter.pdf) (last consulted on April 24, 2023). In Switzerland, Avocats pour le climat filed a complaint before the Swiss Fairness Commission against FIFA. Similar complaints against FIFA have been filed in other jurisdictions, see <https://avocatclimat.ch/revue-de-presse-de-multi-les-plaintes-ont-ete-deposees-contre-la-fifa-pour-greenwashing-dans-cinq-pays-en-suisse-lassociation-avocat-e-s-pour-le-climat-a-redige-la-plainte-de-l/> (last consulted on March 27, 2023).

<sup>312</sup> Art. 9 UCA.

<sup>313</sup> Art. 10 UCA.

<sup>314</sup> FF 1983 II 1307, 1045.

<sup>315</sup> ATF 96 II 439, c. 3b; ATF 111 II 284, c. 3b; ATF 126 III 361, c. 3a; TF 4C.77/2000 of July 3, 2000, c. 2a; TF 4A\_357/2007 of April 8, 2008, c. 4.2; TF 4A\_147/2014 of November 19, 2014, c. 3; FF 1983 II 1307, 1045.

<sup>316</sup> Art. 23 UCA.

<sup>317</sup> Proposal of Directive on Green Claims, available under [https://environment.ec.europa.eu/publications/proposal-directive-green-claims\\_en](https://environment.ec.europa.eu/publications/proposal-directive-green-claims_en) (last consulted on April 18, 2023), Sect. 1.2, which is not applicable to financial services (see Art. 1 para. 2 (o)).

environmental performance relevant to the claim, (iii) making an environmental claim about the entire product when it concerns only a certain aspect of the product or (iv) presenting requirements imposed by law on all products in the relevant product category as a distinctive feature of the trader's offer.

Legitimate interest will be sufficient to have standing, which will notably be the case of non-governmental entities or organizations promoting human health, environmental or consumer protection<sup>318</sup>. This enlargement of the standing will help enforce the Unfair Commercial Practices Directive. Offending companies will be subject to penalties ranging from fines to confiscation of revenues, and temporary exclusion from public procurement processes and public funding<sup>319</sup>.

Similarly, the Federal Council has expressed its intention to propose a legislative plan (by September 30, 2023) on the prevention of greenwashing in the financial sector<sup>320</sup>. The proposal will be based on a transparency duty about the sustainable investment objectives of financial services and products as well as the applied sustainability approaches, with a requirement to use recognized indicators and to have the report verified by an independent third party, which will open the clients' right to force enforcement of these duties<sup>321</sup>. At present, there seems to be no intention to amend or clarify the UCA nor to expand these reporting duties beyond the financial sector.

### c. Under tort law

Tort law may offer third parties standing for civil liability claims against companies or their corporate bodies. In jurisdictions adhering to the objective conception of wrongfulness, as is the case in Switzerland<sup>322</sup>, a norm protecting the interests of these third parties (*Schutznorm*) must be violated (*illicéité de comportement, Verhaltensunrecht* – so called third-party beneficiary provision<sup>323</sup>). In countries adhering (also) to a subjective conception of wrongfulness, a norm prohibiting the creation of a dangerous situation (*état de fait dangereux, Gefahrensatz*, also referred to as the common law negligence theory)<sup>324</sup> is sufficient.

At present, no court has recognized a general duty to protect others absent a “*special relationship*” such as an employer-employee or business owner-patron relationship<sup>325</sup>. Neither any agreement entered into by a company (notably with suppliers or State's authorities) has been recognized as protecting third parties unless expressly mentioned in said agreement<sup>326</sup>.

Attempts to clarify the nature of the new corporate duties implemented by sustainability reporting regulations through tort law-dedicated provisions have failed. The civil (tort law) liability provision initially provided in the French Vigilance Law was struck down by the French Constitutional Council for lack of clarity on the underlying obligation<sup>327</sup>. The proposed civil (tort law) liability provision of the Swiss Responsible Business Initiative has been removed from the final bill and Federal Council recently referred to a *status quo* in civil liability<sup>328</sup>. What has been

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<sup>318</sup> Art. 16 Proposal of Directive on Green Claims.

<sup>319</sup> Art. 17 Proposal of Directive on Green Claims.

<sup>320</sup> FEDERAL COUNCIL, Greenwashing Position 2022, 4.

<sup>321</sup> FEDERAL COUNCIL, Greenwashing Position 2022, 4.

<sup>322</sup> ATF 123 III 323, c. 5-1.

<sup>323</sup> *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009).

<sup>324</sup> AMERICAN LAW INSTITUTE, Restatement of the Law (Third) of Torts, § 3.

<sup>325</sup> *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174 MMJ, 2016 Del. Super. LEXIS 258 (Del. Super. Ct. May 4, 2016).

<sup>326</sup> *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) where claimants argued to be third-party beneficiaries of a supply contract; *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1121 (C.D. Cal. 2010) where claimants argued to have suffered an unjust enrichment.

<sup>327</sup> TAP, 9-10.

<sup>328</sup> OFFICE FÉDÉRAL DE LA JUSTICE, Annex 3, 37.

kept, notably in Germany<sup>329</sup> and Switzerland<sup>330</sup> is the administrative (criminal) fines sanctioning the missing, false or incomplete report.

The sole Court precedent (which has been appealed by Shell and is thus not final) is the Hague District Court decision in the *Milieudéfensie et al. v. Royal Dutch Shell plc* that recognized an “*unwritten standard of care*” arising out of Book 6 Sect. 162 of the Dutch Civil Code so that acting in conflict with what was generally accepted according to unwritten law is unlawful<sup>331</sup>.

Under Swiss law, there is currently a scholars’ debate whether sustainability reporting provisions, i.e. Art. 964a-c and 964a-l SCO, as well as the related criminal provision of Art. 325ter SCrC, qualify as third-party beneficiary provisions (*Schutznorm*)<sup>332</sup>.

In our opinion, considering the wording of current sustainability reporting regulations, we doubt that the related diligence provisions could qualify as third-party beneficiary provisions, as they do not entail a duty not to harm but only a duty to report on measures taken to mitigate adverse impacts of companies’ activities on third parties. Besides, considering any of these provisions as a *Schutznorm* goes (in our opinion) against the Parliament’s desire to remove a civil liability provision from the final bill presented as counter-proposal to the Swiss Responsible Business Initiative.

Any unfair competition practices under Art. 3 para. 1 (b) UCA and the breach of Art. 152 SCrC for false statements about commercial businesses may however be the wrongful act to enable to successfully file a civil liability claim against the company and bodies. Both provisions are protecting third-party interests (*Schutznorm*)<sup>333</sup>. Claims are currently brought on the breach of Art. 28 SCC (protecting the legal personality)<sup>334</sup> as well. In any event, the other requirements of Art. 41 SCO (notably proving the harm and the causal link) must be met to validly file a civil liability claim.

SPDEs’ legal forms or legal qualifications providing for the setting of clear positive impact objectives and reporting of measures taken to implement these objectives create new corporate duties that are third-party beneficiary provisions. Breach of these new duties would then offer the affected stakeholders standing for civil liability claims against companies and bodies. Under Swiss law, the company’s liability will indeed be at stake by application of Art. 722 SCO in conjunction with Art. 41 SCO.

## 5. Swiss law summary

Under Swiss law, there is no mandatory stakeholder engagement mechanism. Nor are companies required to disclose any engagement with stakeholders. Swiss law also does not provide for a legal obligation regarding the representation of specific constituencies on boards (except for cooperatives on representation of members and for companies limited by shares on

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<sup>329</sup> HGB, § 331 and § 334.

<sup>330</sup> Art. 325ter SCrC.

<sup>331</sup> The court took over the reasoning made in State of the *Netherlands v. Urgenda Foundation* and applied it to a private company.

<sup>332</sup> GSTOEHL, 11; CANAPA/SCHMID/CIMA, 576; VERDE, 4; WATTER/REICHENBERG, 977. *Contra* the qualification of Art. 325ter SCrC as a *Schutznorm*, see DARBELLAY/CABALLERO CUEVAS.

<sup>333</sup> On the *Schutznorm* quality of Art. 152 SCrC, see CR CP II-THORMANN/REMUND, Art. 152, N 1). On the purpose of UCA to protect fair competition, see Message accompanying the draft bill, FF 1983 II 1037, 1069, stating that with the new UCA “*both public and private interests are protected*”.

<sup>334</sup> In Switzerland, a claim is pending against Holcim for breach of the legal duty to protect legal personality (Art. 28 SCC), see NUSSBAUMER-LAGHAOUI and <https://www.eper.ch/blog/2022/questions-la-procedure-juridique> (last consulted on May 1, 2023)

representation of at least one representative of each different class of shares if different classes exist).

Swiss companies are however free (with the approval of their members) to structure their governance to cater for stakeholder engagement (e.g. with a stakeholder committee or representation of beneficiaries, customers or employees at board level).

Stakeholders have no direct standing in corporate law to make their voice count. At present, Swiss courts have not yet ruled on the question of whether sustainability reporting duties could qualify as third-party beneficiary provisions whose breach could give stakeholders standing for civil liability claims against companies. Considering the way these provisions are drafted, we consider that Swiss courts would probably not rule in that direction. At the same time, Art. 2, 3 para. 1 (b) and 9 of the UCA and Art. 152 SCRc provide the legal basis – in our opinion – for stakeholders to act against companies (or their bodies) in case of a false or misleading report or deceptive use of labels. A civil liability claim would however require proving the harm (damage) and the causal link.

A legislative proposal is in the pipeline focusing on the prevention of greenwashing in the financial sector. The plan is to introduce a new reporting duty that will give clients of financial services or financial products standing in case of greenwashing.

## D. Reporting on positive societal impact

### 1. No reporting duties on the creation of a positive impact

Jurisdictions tend to make a clear distinction between traditional management reports and non-financial reports. The first contain a description of the business (or activities) evolution, a risk assessment as well as a description of the future prospects<sup>335</sup>, or, in associations and foundations, the purpose, the objectives, and the activities<sup>336</sup>. The second, required by recent legislations, focuses on ESG risks<sup>337</sup>. In both cases, focus is not on the positive impact of companies' activities but rather on the risks or the mitigation of adverse consequences on people and the planet<sup>338</sup>. A positive impact evaluation is only recommended by the codes of best practices for NPOs. In

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<sup>335</sup> For Swiss law, see Art. 961c SCO, also application to associations through Art. 69a SCC and to foundations through Art. 83a SCC.

<sup>336</sup> For explanations on the content of the management report for NPOs, see in general Swiss GAAP RPC 21 and for foundations, documents prepared by supervisory authorities (e.g. As-so, see <https://www.as-so.ch/fondations-classiques/comptes-annuels>, last consulted on March 27, 2023).

<sup>337</sup> In France, see Vigilance Law; NRE Law; Code de commerce; Code de l'environnement; Décret n° 2022-982 du 1er juillet 2022 relatif aux bilans d'émissions de gaz à effet de serre, NOR : ENER2117548D; Sapin II Law; Grenelle I; Grenelle II. In Italy, see DECRETO LEGISLATIVO 8 giugno 2001, n. 231, Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300; DECRETO LEGISLATIVO 30 dicembre 2016, n. 254, Attuazione della direttiva 2014/95/UE del Parlamento europeo e del Consiglio del 22 ottobre 2014, recante modifica alla direttiva 2013/34/UE per quanto riguarda la comunicazione di informazioni di carattere non finanziario e di informazioni sulla diversità da parte di talune imprese e di taluni gruppi di grandi dimensioni. (17G00002). In Germany, see Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten (CSR-Richtlinie-Umsetzungsgesetz) vom 11. April 2017 (BGBl. I 2017 S. 802); Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz - LkSG) vom 16. Juli 2021 (BGBl. I S. 2959); Bundes-Klimaschutzgesetz (KSG) vom 12. Dezember 2019 (BGBl. I S. 2513). In the UK, see The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 No. 31; The Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022 No. 46; Modern Slavery Act 2015 c. 30; The Reports on Payments to Governments Regulations, ISBN 978-0-11-112223-5. In the USA, see Dodd-Frank Act; SEC proposed rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042; 34-94478; File No. S7-10-22, RIN 3235-AM87; THE WHITE HOUSE. In Switzerland, see SCO; 2016/01 FINMA Circular; 2016/02 FINMA Circular; Ordinance on Climate Disclosures (into force as of 1 January 2024); DDTrO.

<sup>338</sup> NERI-CASTRACANE, Art. 964j-1 CO, 54-55.

Switzerland such a recommendation can be found in Zewo Principles and the Swiss Foundation Code<sup>339</sup>.

The adoption of the CSRD will not change the focus. CSRD still does not impose a reporting on positive impact but at least puts an end to the unhelpful divide between financial and non-financial reporting by regrouping both aspects into the management report which must integrate the financial report<sup>340</sup> and will impose uniform reporting standards<sup>341</sup>.

Abroad, as shown by Appendix 2, regulations specifically targeting SPDEs thus require a report of positive impacts (public benefit) of company's activities. Not all however impose an external assurance on the benefit report and the application of a specific third-party standard. This is only mandatory in the UK for the CIC report (subject to both an external audit and monitoring by CIC Regulator) and in France for the biennial report of *entreprise à mission*. This does not facilitate the comparison of the reports, since the scope and quality of the opinion (assurance) as well as the criteria identified by the applied standard may highly differ.

## 2. Elective transparency

In all jurisdictions, companies remain free to voluntarily issue a report on the positive impact of their activities and operational management. In the absence of a regulation mandating for such a report, third parties – if requested to provide an opinion (assurance) on the (positive impact) report<sup>342</sup> – will systematically neither be required to meet the requirements imposed on auditing firms in charge of the audit of the (financial) management report<sup>343</sup> nor will be bound by the same requirements in terms of the extent and accuracy of the opinion (reasonable assurance under a full audit or review under a limited audit)<sup>344</sup>.

Besides, there is at the moment no uniformity in the non-financial reporting standards, even though progresses (notably through the EU Sustainability Reporting Standards draft presented by EFRAG) are underway to match the reasonable discrepancies that exist for financial reporting<sup>345</sup>. There is thus huge discrepancy on the quality and type of information disclosed and thus the need for identification of the clear, objective, comparable, qualitative, quantitative, and forward-looking non-financial information to be disclosed.

The extent and accuracy of the third-party opinion (assurance), the methods applied, the standards used, the quality of the disclosed information, as well as the third party's qualifications will vary on a case-by-case basis depending on the outcome of contractual negotiations.

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<sup>339</sup> Recommendation 20 of the SFC 2021 pertains to the impact measurement and the project evaluation, including the evaluation of the NPOs' own impact. Standard 10 of "*The 21 Zewo Standards*" provides that an organization shall continually monitor the effectiveness of its core activity. It shall also incorporate the topic of effectiveness in an appropriate form in its public reports. In contrast, the SCBP 2023 does not mention the impact evaluation.

<sup>340</sup> Recital (79) CSRD.

<sup>341</sup> See Art. 19a para 4 CSRD providing that undertakings that shall issue a sustainability report must report "*in accordance with the sustainability reporting standards adopted pursuant to Art. 29b*", i.e. the European Sustainability Reporting Standards (ESRS).

<sup>342</sup> Social enterprises laws do not necessarily provide for an external audit of public benefit reports. See Appendix 2. The same is true for some non-financial reports imposed by law: e.g. in Switzerland, where this is not mandatory but recommended by the SCBP 2023 (sect. 34).

<sup>343</sup> See Art. 728 SCO.

<sup>344</sup> See for Switzerland, NA-CH for a full audit and NCR for a limited audit.

<sup>345</sup> As a matter of facts, for financial reporting, if the company applies Swiss GAAP RPC, IFRS, US GAAP or the rules of the SCO the results will vary. The market is however rather comfortable with this variation.

### 3. Swiss law summary

Swiss reporting regulations do not require companies to disclose the positive impacts of their activities on society at large. However, companies can choose to voluntarily create and publish a public benefit report, which highlights their positive societal contribution. Companies also have the option to choose the applicable standards and engage an independent third party to provide the appropriate assurance with regard to the content of their report.

While this flexibility in reporting standards allows for customization, it introduces potential risks related to the scope and quality of the information contained in the report and of the assurance. Since the assurance is contractual and not legally mandated, there may be inconsistencies in the qualifications and criteria that independent third party need to fulfil, leading to variations in the overall process and its outcomes. There is indeed huge discrepancy in the reporting standards and impact measurement mechanisms.

## E. Conclusions

The number of legislations having adopted a legal form, a legal qualification or both is growing rapidly. Adoption of a specific legal form or legal qualification allowed foreign legislators to implement supporting schemes, ranging from fiscal benefits, and funding schemes to advantages under public procurement laws.

In all these foreign countries the legislative intervention had legal and extra-legal justifications. Extra-legal justifications are related to the recognition of the SPDEs movement and the opportunity to level the playing field and create a category of enterprises that may later benefit from further policy interventions (such as the introduction of public support schemes or funding schemes). Legal justifications pertained to the inability to pursue an ideal purpose or a dual-purpose, and a shareholder centric approach to the duty of loyalty of directors and managers.

In Switzerland, there is no specific legal form or legal qualification for Sustainable Purpose-Driven Enterprises (SPDEs). At present, the Swiss Federal Council decided not to intervene because Swiss law was flexible enough to amend the articles of association to transform any legal form into a SPDE. This reasoning applies to both the transformation into a Category 1 SPDE, i.e., a SPDE with a sole ideal purpose and an ongoing commercial activity, or a Category 2 SPDE, i.e., a SPDE with a dual purpose (ideal and for-profit purposes pursued concurrently) with an ongoing commercial activity.

In the absence of a framework defining the features of SPDEs, the flexibility offered by Swiss law however results in a wide diversity of practices. The five components (i.e. primacy of the social purpose, ongoing business activity, distribution constraints, stakeholders engagement and reporting on positive societal impact) are rarely addressed concurrently and, when they are, not all entities necessarily adopt the same approach. There is a lack of homogeneity in the quantity and quality of the information that are disclosed, on assurance of the voluntary reports, on stakeholder engagement, as well as the meaning of positive impact. There is thus a need notably for identification of clear, objective, qualitative and quantitative, forward-looking, comparable and verifiable commitments and targets on which to report to support the entrepreneurs wanting to be sustainable. This will level the playing field of the enterprises currently applying private labels.

Besides, a legal analysis shows that not many legal forms are actually able to match all the characteristics of a SPDE while remaining attractive. Foundations and associations seem to be the most appropriate legal forms for a Category 1 SPDE. However, current tax authorities' practice make them unappealing for donors and investors. Cooperatives may be modified to resemble dual-purpose companies limited by shares, but they remain unattractive to donors due to the legal



cap on dividends, the inability to issue participation certificate capital and the “one person one vote” principle. As companies limited by shares are able to issue participation certificate capital, they appear to be the most suitable legal form for a Category 2 SPDE. Swiss law indeed provides ample flexibility to amend the articles of association to accommodate the representation of specific constituencies on boards, establish stakeholder engagement mechanisms, and set up reporting practices. These practices can include social/public benefit and engagement with stakeholders, which can be done with or without third party assessments.

It is however unclear if Swiss courts would consider valid and enforceable provisions of the articles of association that would always give primacy of the societal purpose over the for-profit purpose and provide for partial distribution constraints on profit and liquidation proceeds in favour of the social purpose.

The potential flexibility provided by Swiss corporate law regarding the orientation of the duty of loyalty, as well as the allocation of profits and liquidation proceeds in a dual-purpose entity, has not yet been tested before a Swiss court. A reinterpretation toward shareholder primacy – similar to what has happened in the USA where courts converted constituency statutes prioritizing certain stakeholders’ interests over others – cannot be ruled out, particularly because Swiss law seems to adhere to an instrumental approach to stakeholder governance (i.e. a for-profit entity should in any event pursue the long-term interest of shareholders). Even if Swiss law would adhere to a pluralistic approach to stakeholder governance uncertainty remains on whether primacy may always be given to the same group of stakeholders over the others.

In conclusion, assuming that meeting all five characteristics concurrently and similarly is desired politically, legislative intervention under Swiss law is recommendable to set clear, objective, qualitative and quantitative, forward-looking, comparable and verifiable commitments and targets, with an independent monitoring system. Such intervention would then also secure the validity and enforceability of provisions of the articles of association giving primacy to the societal purpose in dual-purpose companies with share capital and ensure any distribution constraints are upheld.

Such intervention would consequently:

- enable better differentiation between SPDEs from other business forms;
- simplify claims from beneficiaries and third parties against SPDEs for breach of their undertakings, unfair competition practices, or false statements about commercial business;
- facilitate the implementation of supporting schemes and encourage impact investment flows.

## VIII. Policy options

### A. No intervention

Maintaining the status quo would fail to provide the clarity and predictability that SPDEs need.

The somewhat ambiguous leeway offered by Swiss law currently translates in a range of non-comparable practices and situations. Not all entities that are deemed to be SPDEs focus on the same features. For instance, entities certified with a label that meets the criteria of sustainable development within the meaning of public procurement laws, do not adhere to the same (strict) approach and differ in the wording adopted in their articles of association. Also, reports on public benefit – when present – are not necessarily subject to third-party assurance. Even when they are, independent third parties are not bound by the same requirements and scope of review given that these requirements are not set by law but are agreed in a negotiated contract.

Furthermore, this apparent leeway to draft or amend the articles of association along the characteristics of a SPDE is insufficient to guarantee the primacy of the societal purpose over the for-profit purpose. Additionally, it would leave the matter of implementation of distribution constraints unresolved.

An absence of legislative intervention would continue to make it difficult to properly identify SPDEs and would contribute to the persistence of the current legal uncertainty regarding the validity and enforceability of some provisions of the articles of association that are usually adopted by SPDEs.

## B. A legal qualification of benefit corporation

The adoption of a legal qualification for SPDEs along the lines of the US or Italian benefit corporation legal form or qualification would not be recommendable because the downsides would potentially outweigh the advantages.

The addition of the denomination at the end of their corporate name and the possibility to search for entities having obtained such a legal qualification on the online commercial registry constitute clear advantages. It also prevents shareholders from retracting their decision because the loss of the legal qualification would entail a change in the company name. These advantages should be introduced in any future policy proposal.

That being said, the downsides of benefit corporation legal forms or legal qualifications are notably the following:

- they do not necessarily impose a third-party opinion (assurance) on the benefit report nor a specific third-party standard and certainly no clear, objective, quantitative, qualitative, forward-looking, and measurable commitments and targets;
- they do not resolve the issue of the interpretation of the duty of loyalty toward an Enlightened Shareholder Value and even contribute to it by stating (for the US Model Act) that the liability of the board is excluded if the public benefit is not pursued;
- they are silent on stakeholders' engagement.

## C. A Swiss opting-in legal qualification and framework

A new legal framework surpassing the benefit corporation model would be recommendable.

Such a legal framework could consist of an opt-in legal qualification (e.g. “*sustainable purpose-driven*” (SPD)<sup>346</sup> qualification), available to any legal form, and would (ideally) require:

- the insertion, in the articles of association, of:
  - o the corporate purpose and the identification of the targeted stakeholders.

The targeted stakeholders could be selected through the application of a materiality method.

Clarification that SPDEs' products and services (all and not only part of them) shall either be aligned with one or more specific SDGs or contribute to the achievement of one or more SDGs would ensure coherence with the Federal

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<sup>346</sup> Suggestion of wording in Switzerland national languages could be “*nachhaltige es zielorientiertes Unternehmen* (NZO); *entreprise à finalité durable* (EFD), *impresa a finalità sostenibile* (IFS)”.

Council's position paper on greenwashing which defines sustainable financial products and services as those *"either aligned with one or more specific sustainability goals or contributing to the achievement of one or more sustainability goals"*.<sup>347</sup>

Ideally, what should be pursued is the creation of a net positive societal impact, i.e. that the qualified entity contributes to the achievement of the Sustainable Development Goals (SDGs) more than what it takes in.

- the legal qualification at the end of the corporate name, with the consequent duty to amend the articles of association in case of loss of the qualification.
- provisions on distribution constraints on profit, liquidation proceeds, or both.

Three options could be envisaged, without rendering SPDEs not attractive for investors:

- partial distribution constraints on profit and liquidation proceeds;
  - full distribution constraints on liquidation proceeds only;
  - partial distribution constraints on liquidation proceeds only.
- an annual description, in the management report (integrated reporting), according to a specific third-party standard referring to clear, objective, quantitative, qualitative, forward-looking, and measurable commitments and targets, of:
    - how the corporate purpose is actually carried out, consistent with the company's chosen societal objectives and specifying the targeted stakeholders for each objective.

For coherence with what was suggested above on the corporate purpose, the objectives shall be identified by reference to one or more SDGs.

- how stakeholder engagement activities are implemented.
  - how specific stakeholders are impacted.
  - how adverse negative impacts are mitigated and prevented.
- a third-party opinion (assurance) on the qualification as a SPDE and on management report.
  - the registration with the commercial registry.

This proposal would have the following advantages:

- it would be available to any legal form, which is in line with EC's<sup>348</sup> and the United Nations General Assembly's<sup>349</sup> proposals;
- it would offer a clear way for regulators and the general public alike, to differentiate these enterprises from self-proclaimed 'sustainable businesses';
- it would level the playing field of sustainable entrepreneurship;
- it would be consistent with other instruments announced by the Federal Council (notably in its position paper on greenwashing and in the report on sustainable finance in Switzerland) and other legislative proposals under discussion such as the possible reform of cooperative law;
- it would be easy to implement;

<sup>347</sup> FEDERAL COUNCIL, Greenwashing Position 2022, 3.

<sup>348</sup> OECD, Designing Legal Frameworks 2022.

<sup>349</sup> Resolution "Promoting the social and solidary economy for sustainable development", A/77/L60, 3, N. 1.

- it would cover the five characteristics of SPDEs (primacy of the social purpose, ongoing business activity, distribution constraints, stakeholder engagement and transparency on the positive societal impact);

Such a qualification would then create the legal basis for additional policy levers, such as:

- tax advantages:
  - o for investors (e.g, tax incentive or tax relief for investors who keep their investment for a certain number of years, as done in the UK and Netherlands);
  - o for donors (e.g. tax deduction, as done in many countries, notably in Netherlands and Belgium);
  - o for the companies:
    - on incorporation/transformation costs (e.g. tax credit of a certain percentage of these costs, as implemented in Italy),
    - on locked assets if there is a distribution constraint on profit (e.g., reduced VAT rate or tax reduction, as seen in Belgium or Denmark, or even tax exemption as done in France for SCIC);
- the possibility, for awarding authorities, to introduce reserved contracts for specific services and a maximum duration (and/or a subset of qualified SPDEs) (as provided at EU level by Art. 77 Directive 2014/24/UE);
- a dedicated website platform of the Swiss Confederation where all information (on criteria to get the legal qualification, advantages, and community websites) would be accessible.

The legal qualification could be strengthened through amendments to:

- the Unfair Competition Act, to:
  - o give standing to the targeted stakeholders (in line with the idea brought by the proposal of Green Claims Directive);
  - o Expand the set of available sanctions, notably to cover deregistration from the commercial registry, temporary ban on public procurement proceedings, no access to public funding (in line with the remedies articulated in the proposal of the Green Claims Directive), and publication of the court judgment.
- Financial market regulations and/or the law on cooperative (Art. 828 ff SCO), to introduce one or more instruments to make SPD entities, particularly cooperatives, attractive for investors.

## VIII. Options législatives

### A. Aucune intervention

Le maintien du statu quo ne fournirait pas la clarté et la prévisibilité dont les EFD ont besoin.

La marge de manœuvre quelque peu ambiguë offerte par le droit suisse se traduit actuellement par une série de pratiques et de situations non comparables. Toutes les entités considérées comme des EFD ne se concentrent pas sur les mêmes caractéristiques. Par exemple, les entités certifiées avec un label répondant aux critères de développement durable au sens des lois sur les marchés publics n'adhèrent pas à la même approche (stricte) et la formulation adoptée dans leurs statuts diffère. De plus, les rapports sur la contribution sociétale - lorsqu'ils sont présents - ne sont pas nécessairement soumis à l'assurance d'un tiers. Même lorsqu'ils le sont, les tiers indépendants ne sont pas liés par les mêmes exigences et périmètre d'examen étant donné que ces exigences ne sont pas fixées par la loi mais sont convenues dans un contrat négocié.

En outre, cette marge de manœuvre apparente offerte par le droit suisse pour rédiger ou modifier les statuts selon les caractéristiques d'une EFD est insuffisante pour garantir la primauté de l'objectif sociétal par rapport au but lucratif. De plus, cela laisserait la question de la mise en œuvre des restrictions aux distributions sans réponse.

L'absence d'intervention législative continuerait de rendre difficile l'identification correcte des EFD et contribuerait à la persistance de l'incertitude juridique actuelle concernant la validité et l'exécutabilité de certaines dispositions des statuts généralement adoptées par les EFD.

### B. Une qualification légale de “benefit corporation”

L'adoption d'une qualification légale pour les EFD sur le modèle des formes ou qualifications légales de *benefit corporation* américaines ou italiennes ne serait pas recommandée, car les inconvénients devraient l'emporter sur les avantages. L'ajout de la dénomination à la fin du nom de l'entreprise et la possibilité de rechercher des entités ayant obtenu une telle qualification légale sur le registre du commerce en ligne constituent des avantages indéniables. Cela empêche également les actionnaires de revenir sur leur décision, car la perte de la qualification légale entraînerait un changement de nom de l'entreprise. Ces avantages devraient être introduits dans toute future proposition de politique.

Cela étant dit, les inconvénients des formes légales ou qualifications légales de *benefit corporation* sont notamment les suivants :

- elles n'imposent pas nécessairement une opinion d'un tiers (assurance) sur le rapport d'intérêt général ni une norme spécifique de tiers et certainement pas des objectifs clairs, qualitatifs, quantitatifs, mesurables et vérifiables;
- elles ne résolvent pas la question de l'interprétation du devoir de loyauté en faveur d'une valeur actionnariale éclairée et y contribuent même en stipulant (pour le US Model Act) que la responsabilité du conseil d'administration est exclue si l'intérêt général n'est pas poursuivi ;  
elles sont muettes sur l'engagement des parties prenantes.

### C. Une qualification et un cadre juridique suisse facultatifs

Un nouveau cadre dépassant le modèle de *benefit corporation* serait recommandable.

Un tel cadre juridique pourrait consister en une qualification juridique facultative (par exemple, une qualification d'« entreprise à finalité durable » (EFD)<sup>350</sup> disponible pour toute forme juridique, et exigerait (dans l'idéal) :

- L'insertion, dans les statuts, de :
  - la raison d'être de l'entreprise et l'identification des parties prenantes ciblées.
  - les parties prenantes ciblées le seraient selon une méthode de matérialité.

La clarification selon laquelle les produits et services des EFD (tous et non seulement une partie d'entre eux) doivent être alignés sur un ou plusieurs Objectifs de Développement Durable (ODD) spécifiques ou contribuer à la réalisation d'un ou plusieurs ODD assurerait la cohérence avec le document de position du Conseil fédéral sur le *greenwashing*, qui définit les produits et services financiers durables comme ceux « alignés sur un ou plusieurs objectifs de durabilité spécifiques ou contribuant à la réalisation d'un ou plusieurs objectifs de durabilité ».<sup>351</sup>

Idéalement, ce qui devrait être poursuivi est l'impact sociétal positif net, soit que l'entreprise qui obtiendrait la qualification contribuerait aux ODD dans une mesure plus importante que ce qu'elle y nuirait.

- la qualification à la fin du nom de l'entreprise, avec l'obligation consécutive de modifier les statuts en cas de perte de la qualification.
- des dispositions sur les restrictions de distribution des bénéfices, du solde de liquidation ou des deux.

Trois options pourraient être envisagées, sans rendre les EFD moins attractives pour les investisseurs :

- o restriction partielle de distribution des bénéfices et du solde de liquidation ;
  - o restriction totale de distribution du solde de liquidation uniquement ;
  - o restriction partielle de distribution du solde de liquidation uniquement.
- une description annuelle, dans le rapport de gestion (rapport intégré), selon une norme tierce spécifique qui se réfère à des engagements et objectifs clairs, qualitatifs, quantitatifs, prospectifs, comparables et vérifiables, concernant :
    - la manière dont la raison d'être est effectivement mis en œuvre, en cohérence avec les objectifs sociétaux choisis par l'entreprise et en précisant les parties prenantes ciblées pour chaque objectif.

Pour assurer la cohérence avec ce qui a été suggéré précédemment sur la raison d'être, les objectifs doivent être identifiés en se référant à un ou plusieurs ODD.

- la manière dont l'engagement des parties prenantes est mis en œuvre.
  - comment les parties prenantes ciblées sont impactées.
  - comment l'entreprise diminue et prévient les effets négatifs de ses activités.
- une opinion (assurance) d'un tiers indépendant sur la qualification comme EFD et le rapport de gestion.
  - l'inscription au registre du commerce.

<sup>350</sup> La proposition de libellé dans les autres langues nationales suisses pourrait être "nachhaltiges zielorientiertes Unternehmen (SZO), impresa a finalità sostenibile (IFS)".

<sup>351</sup> CONSEIL FEDERAL, Position du Conseil fédéral en matière de prévention de l'écoblanchiment dans le secteur financier. 16 Décembre, 2022, 3.

Cette proposition aurait les avantages suivants :

- elle serait disponible pour toute forme juridique, ce qui est conforme aux propositions de la Commission européenne<sup>352</sup> et de l'Assemblée générale des Nations Unies<sup>353</sup> ;
- elle offrirait un moyen clair pour les régulateurs et le grand public de différencier ces entreprises des entreprises se proclamant « durables » ;
- elle harmoniserait la réalité des entrepreneurs de la durabilité ;
- elle serait cohérente avec d'autres instruments annoncés par le Conseil fédéral (notamment dans sa prise de position sur le greenwashing et dans le rapport sur la finance durable en Suisse) et d'autres propositions législatives en discussion, telles que la possible réforme du droit des coopératives ;
- elle serait facile à mettre en œuvre ;
- elle couvrirait les cinq caractéristiques des EFD (primauté de l'objectif social, activité commerciale continue, restrictions de distribution, engagement des parties prenantes et transparence sur l'impact positif sociétal).

Une telle qualification créerait alors la base juridique pour des leviers politiques supplémentaires, tels que :

1. avantages fiscaux :
  - pour les investisseurs (par exemple, incitation fiscale ou allègement fiscal pour les investisseurs qui conservent leur investissement pendant un certain nombre d'années, comme cela est fait au Royaume-Uni et aux Pays-Bas) ;
  - pour les donateurs (par exemple, déduction fiscale, comme cela est fait dans de nombreux pays, notamment aux Pays-Bas et en Belgique) ;
  - pour les entreprises:
    - o sur les coûts de constitution/transformation (par exemple, un crédit d'impôt d'un certain pourcentage de ces coûts, comme mis en œuvre en Italie),
    - o sur les actifs bloqués s'il y a une restriction de distribution sur les bénéficiaires (par exemple, un taux de TVA réduit ou une réduction d'impôt, comme on le voit en Belgique ou au Danemark, voire une exonération fiscale comme cela est fait en France pour les SCIC)
2. la possibilité, pour les autorités attributaires, d'introduire des contrats réservés pour des services spécifiques et une durée maximale (et/ou un sous-ensemble de EFD qualifiées) (comme prévu au niveau de l'UE par l'Art. 77 Directive 2014/24/UE) ;
3. une plateforme internet de la Confédération suisse dédiée où toutes les informations (sur les critères pour obtenir la qualification légale, les avantages et les sites web communautaires) seraient accessibles.

La qualification juridique pourrait être renforcée grâce à des modifications apportées :

- à la Loi fédérale contre la concurrence déloyale afin de :
  - o Accorder la qualité pour agir aux parties prenantes ciblées (en accord avec l'idée présentée par la proposition de Directive sur les allégations environnementales) ;
  - o Élargir l'ensemble des sanctions disponibles, notamment pour inclure la radiation du registre du commerce, l'interdiction temporaire de participer aux procédures de marchés publics, l'absence d'accès aux financements publics (en accord avec les recours énoncés dans la proposition de Directive sur les allégations environnementales) et la publication du jugement ;

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<sup>352</sup> OECD, *Designing Legal Frameworks* 2022,

<sup>353</sup> Resolution "Promoting the social and solidary economy for sustainable development", A/77/L60, 3, N. 1.

- aux régulations des marchés financiers et/ou la loi sur les coopératives (Art. 828 et suivants CO), afin d'introduire un ou plusieurs instruments pour rendre les entités à finalité durable (EFD), en particulier les coopératives, attrayantes pour les investisseurs.

## VIII. Politische Optionen

### A. Keine Eingreifen

Das Beibehalten des Status quo würde den SPDEs nicht die erforderliche Klarheit und Vorhersehbarkeit bieten.

Des Weiteren resultiert der Spielraum, den das schweizerische Recht bietet, derzeit in einer Vielzahl nicht vergleichbarer Praktiken und Situationen. Nicht alle als SPDEs geltenden Unternehmen konzentrieren sich auf dieselben Merkmale. Zum Beispiel halten sich Unternehmen, die mit einem Label zertifiziert sind, das den Kriterien der nachhaltigen Entwicklung im Sinne der öffentlichen Beschaffungsgesetze entspricht, nicht an denselben (strengen) Ansatz und unterscheiden sich in der Formulierung ihrer Satzung. Auch Berichte über den öffentlichen Nutzen – sofern vorhanden – unterliegen nicht notwendigerweise einer Drittprüfung. Und selbst wenn sie einer solchen unterliegen, sind unabhängige Dritte nicht an dieselben Anforderungen und Prüfungsumfang gebunden, da diese Anforderungen nicht gesetzlich festgelegt, sondern in einem ausgehandelten Vertrag vereinbart werden.

Darüber hinaus der scheinbare Spielraum, den das schweizerische Recht für die Erstellung oder Änderung der Satzung im Einklang mit den Merkmalen einer SPDE bietet, reicht nicht aus, um der Vorrang des sozialen Zwecks gegenüber dem Gewinnzweck zu gewährleisten. Darüber hinaus würde es die Frage der Umsetzung von Verteilungsbeschränkungen ungeklärt lassen.

Das Fehlen einer gesetzlichen Intervention würde es weiterhin erschweren, SPDEs korrekt zu identifizieren, und zur Fortdauer der gegenwärtigen Rechtsunsicherheit in Bezug auf die Gültigkeit und Durchsetzbarkeit einiger Bestimmungen der Satzung beitragen, die von SPDEs üblicherweise angenommen werden.

### B. Eine gesetzliche Qualifikation "Benefit corporation"

Die Einführung einer gesetzlichen Qualifikation für SPDEs nach dem Vorbild der US-amerikanischen oder italienischen *Benefit Corporation* Rechtsform oder Qualifikation wäre nicht empfehlenswert, da die Nachteile die Vorteile möglicherweise überwiegen würden.

Die Hinzufügung der Bezeichnung am Ende des Firmennamens und die Möglichkeit, im Online-Handelsregister nach Unternehmen zu suchen, die eine solche gesetzliche Qualifikation erhalten haben, stellen klare Vorteile dar. Sie verhindern auch, dass Aktionäre ihre Entscheidung rückgängig machen, da der Verlust der gesetzlichen Qualifikation eine Änderung des Firmennamens zur Folge hätte. Diese Vorteile sollten in jeden zukünftigen politischen Vorschlag aufgenommen werden.

Abgesehen davon sind die Nachteile von *Benefit Corporation* Rechtsformen oder gesetzlichen Qualifikationen insbesondere die folgenden:

- sie schreiben nicht zwingend eine Drittmeinung (Garantie) zum Benefit-Bericht oder einen bestimmten Drittstandard vor und schon gar keine klaren, objektiven,



- quantitativen, qualitativen, vorausschauenden und messbaren Verpflichtungen und Ziele;
- sie lösen das Problem der Interpretation der Loyalitätspflicht gegenüber einem aufgeklärten Shareholder Value nicht und tragen sogar dazu bei, indem sie (im Falle des *US-amerikanischen Model Act*) feststellen, dass die Haftung des Vorstands ausgeschlossen ist, wenn der öffentliche Nutzen nicht verfolgt wird;
  - sie äussern sich nicht zum Stakeholder-Engagement.

## C. Ein schweizerischer Rechtsrahmen mit einer Opt-In-Rechtsqualifikation

Ein neuer Rechtsrahmen, der über das *Benefit-Corporation*-Modell hinausgeht, wäre empfehlenswert.

Ein solcher Rechtsrahmen könnte aus einer Opt-In-Rechtsqualifikation (z.B. *sustainable purpose-driven* (SPD)<sup>354</sup> Qualifikation) bestehen, die für jede Rechtsform verfügbar ist und folgendes (im Idealfall) erfordern würde:

1. Die Hinzufügung folgender Inhalte in der Unternehmensatzung:
  - den Unternehmenszweck und die Identifikation der anvisierten Stakeholder. Die anvisierte Stakeholder könnten durch die Anwendung einer Wesentlichkeitsmethode ausgewählt werden.

Eine Klarstellung, dass die Produkte und Dienstleistungen von SPDEs (alle und nicht nur ein Teil davon) entweder mit einem oder mehreren spezifischen SDGs übereinstimmen oder zur Erreichung eines oder mehrerer SDGs beitragen, würde die Kohärenz mit dem Positionspapier des Bundesrates zum Greenwashing gewährleisten, das nachhaltige Finanzprodukte und -dienstleistungen als solche definiert, die "entweder mit einem oder mehreren spezifischen Nachhaltigkeitszielen übereinstimmen oder zur Erreichung eines oder mehrerer Nachhaltigkeitsziele beitragen"<sup>355</sup>.

Im Idealfall sollte ein positiver gesellschaftlicher Nettoeinfluss erzielt werden, d.h. die qualifizierte Einrichtung trägt mehr zur Erreichung der Ziele für nachhaltige Entwicklung (SDGs) bei als sie einnimmt.

- Die Rechtsqualifikation am Ende des Firmennamens mit der daraus resultierenden Pflicht, die Satzung im Falle des Verlusts der Qualifikation zu ändern.
- Bestimmungen über die Verteilungsbeschränkungen für Gewinne, Liquidationserlöse oder beides.

Drei Optionen könnten in Betracht gezogen werden, ohne dass SPDEs für Investoren unattraktiv werden:

- teilweise Verteilungsbeschränkungen für Gewinne und Liquidationserlöse;
- vollständige Verteilungsbeschränkungen nur für Liquidationserlöse;
- teilweise Verteilungsbeschränkungen nur für Liquidationserlöse.

2. Eine jährliche Beschreibung im Geschäftsbericht (integrierte Berichterstattung) nach einem spezifischen Drittstandard, der sich auf klare, objektive, qualitative, quantitative, zukunftsorientierte, vergleichbare und messbare Verpflichtungen und Ziele bezieht:

<sup>354</sup> Formulierungsvorschlag in den Landessprachen der Schweiz: "nachhaltiges zielorientiertes Unternehmen (SZO); entreprise à finalité durable (EFS), impresa a finalità sostenibile(IFS)"

<sup>355</sup> BUNDESRAT, Standpunkt des Bundesrates bezüglich Greenwashing-Prävention im Finanzsektor, 16. Dezember 2023, 3.

- wie der Unternehmenszweck tatsächlich umgesetzt wird, konsistent mit den gewählten sozialen Zielen des Unternehmens und unter Angabe der anvisierten Stakeholder für jedes Ziel.

Im Einklang mit den oben zum Unternehmenszweck gemachten Vorschlägen sollen die Ziele unter Bezugnahme auf einen oder mehrere SDGs identifiziert werden.

- wie Stakeholder-Engagement Aktivitäten umgesetzt
  - wie Stakeholder jeweils betroffen sind.
  - wie negative Auswirkungen gemindert und verhindert werden.
3. Eine Drittmeinung (Garantie) zur Qualifikation als SPDE und zum Geschäftsbericht.
  4. Die Eintragung im Handelsregister.

Dieser Vorschlag hätte folgende Vorteile:

- er stünde jeder Rechtsform zur Verfügung, was im Einklang mit den Vorschlägen der Europäischen Kommission<sup>356</sup> und der UN-Generalversammlung<sup>357</sup> steht;
- er würde Regulierungsbehörden und der breiten Öffentlichkeit gleichermaßen eine klare Möglichkeit bieten, diese Unternehmen von selbsternannten "nachhaltigen Unternehmen" zu unterscheiden;
- er wäre die Ausgangsbedingungen für nachhaltige Unternehmer angleichen;
- er wäre kohärent mit anderen Instrumenten, die vom Bundesrat angekündigt wurden (insbesondere in seinem Positionspapier zum *Greenwashing* und im Bericht über nachhaltige Finanzen in der Schweiz) und anderen zur Diskussion stehenden Gesetzesvorschlägen, wie der möglichen Reform des Genossenschaftsrechts;
- er ließe sich leicht umsetzen;
- er würde die fünf Merkmale von SPDEs abdecken (Vorrang des sozialen Zwecks, fortlaufende Geschäftstätigkeit, Verteilungsbeschränkungen, Stakeholder-Engagement und Transparenz über den öffentlichen Nutzen).

Der geeignetste Ansatzpunkt für einen solchen Gesetzesvorschlag könnten die Bestimmungen zur Finanzberichterstattung (Art. 957 ff OR) sein, die für jede Rechtsform gelten.

Eine solche rechtliche Qualifikation würde dann die rechtliche Grundlage für zusätzliche politische Hebel schaffen, wie zum Beispiel:

1. Steuerliche Vorteile:

- für Investoren (z. B. Steueranreize oder Steuererleichterungen für Investoren, die ihre Investitionen über eine bestimmte Anzahl von Jahren halten, wie es in Grossbritannien und den Niederlanden der Fall ist);
- für Spender (z. B. Steuerabzug, wie es in vielen Ländern üblich ist, insbesondere in den Niederlanden und Belgien);
- für die Unternehmen:
  - o bezüglich Gründungs-/Umwandlungskosten (z. B. Steuergutschrift in Höhe eines bestimmten Prozentsatzes dieser Kosten, wie in Italien umgesetzt),
  - o bezüglich gebundener Vermögenswerte, falls es eine Verteilungsbeschränkung bei Gewinnen gibt (z. B. reduzierter Mehrwertsteuersatz oder Steuersenkung, wie

<sup>356</sup> OECD, Designing Legal Frameworks 2022

<sup>357</sup> Resolution "Promoting the social and solidary economy for sustainable development", A/77/L60, 3, N. 1.

- in Belgien oder Dänemark gesehen, oder sogar Steuerbefreiung, wie in Frankreich für SCICs getan);
2. die Möglichkeit für Vergabestellen, reservierte Verträge für spezielle Dienstleistungen und eine maximale Laufzeit (und/oder eine Teilmenge qualifizierter SPDEs) einzuführen (wie auf EU-Ebene durch Art. 77 Richtlinie 2014/24/EU vorgesehen);
  3. eine eigene Webplattform der Schweizerischen Eidgenossenschaft, auf der alle Informationen (über die Kriterien für die Erlangung der rechtlichen Qualifikation, Vorteile und Gemeinschaftswebsites) zugänglich wären.

Die rechtliche Qualifikation könnte durch die Anpassung folgender Gesetzestexte verstärkt werden:

- Gesetz gegen den unlauteren Wettbewerb:
  - o Den betroffenen Stakeholdern Klagerecht wird ein Klagerecht gewährt (in Übereinstimmung mit der Idee, die von dem Vorschlag der Green Claims-Richtlinie eingebracht wurde);
  - o Die Bandbreite der verfügbaren Sanktionen wird um folgende Elemente erweitert; Streichung der Qualifikation aus dem Handelsregister, ein vorübergehendes Teilnahmeverbot in öffentlichen Beschaffungsverfahren, keinen Zugang zu öffentlichen Mitteln (in Übereinstimmung mit den in dem Vorschlag der Green Claims-Richtlinie formulierten Rechtsbehelfen) und die Veröffentlichung des Gerichtsurteils.
- Finanzmarktregulierungen und/oder das Gesetz über Genossenschaften (Art. 828 ff OR):
  - o Es sollen ein oder mehrere Instrumente eingeführt werden, die SPDE, insbesondere Genossenschaften, für Investoren attraktiv machen.

## IX. Appendices

## Appendix 1 – Overview of legislation on single purpose social businesses in foreign jurisdictions (Category 1 SEs)

- 1) France – Société coopérative d'intérêt collectif, société coopérative et participative, ESS entities
- 2) Italy – Third sector entities (ETS), impresa sociale (social enterprise), social cooperatives (Type A or B)
- 3) UK – Co-operative or Community Benefit Society (CBS)

### 1) France

#### SOCIÉTÉ COOPÉRATIVE D'INTÉRÊT COLLECTIF (SCIC) *(Legal qualification)*

Conditions	<ul style="list-style-type: none"> <li>- Social utility purpose pursued by a company limited by shares or limited liability company (SA, SAS, Sàrl)</li> <li>- One person, one vote principle</li> <li>- 3 colleges represented at the supreme governing body: beneficiaries, employees and others</li> <li>- Limited distribution of profits (57.50% to the non-divisible reserve, cap, and prohibition to convert reserve into equity after 5 years of the sale of the shares)</li> <li>- Special review (with the evolution of the project)</li> </ul>
Benefits	<p><b>Tax benefit:</b> right to offset against their taxable income for corporate income tax purposes the income incorporated to the legal and statutory reserves.</p>

#### SOCIÉTÉ COOPÉRATIVE ET PARTICIPATIVE (SCOP) *(Legal qualification)*

Conditions	<ul style="list-style-type: none"> <li>- Company limited by shares or limited liability company (SA, SAS, Sàrl)</li> <li>- Employees own at least 51% of the share capital and 65% of voting rights</li> <li>- One member one vote principle</li> <li>- asset lock (in the event of liquidation, the bonus may be paid to a Scop, to the union or federation of Scops, to a legal person governed by public law, or to a public utility, cooperative, or any other non-profit entity).</li> </ul>
Benefits	<p><b>Tax benefits:</b></p> <ul style="list-style-type: none"> <li>- Right to offset the taxable income distributed to employees under employee profit-sharing schemes.</li> <li>- Exemption from the territorial economic contribution.</li> </ul>

#### ESS ENTITIES *(Legal qualification)*

Conditions	<ul style="list-style-type: none"> <li>- The social purpose must consist of supporting people in fragile situations, contributing to the development of social ties, education for citizenship, contributing to sustainable development, energy transition, cultural promotion, or international solidarity.</li> <li>- Democratic governance</li> <li>- Asset lock/distribution constraint (allocation of half of the profits to the preservation of the company, non-divisible and non-distributable mandatory reserves, distribution of assets at liquidation to another ESUS entity) + if stock corporations: public utility purpose, further restriction on profit allocation and restrictions on capital transactions (share reduction only to reduce losses, limited right to purchase own shares)</li> </ul>
Benefits	<p><b>Reputational advantage.</b></p> <p><b>Facilitated access to funding:</b> regional subsidies and of Bpifrance.</p> <p>Other benefits only if ESUS qualification is obtained</p>

## 2) Italy

### THIRD SECTOR ENTITY (ETS) *(Legal qualification)*

Conditions	<ul style="list-style-type: none"> <li>- Public utility purpose</li> <li>- No for-profit purpose</li> <li>- Accessory commercial activity</li> <li>- one or more of the activities of general interest listed in Art. 5 of the above-mentioned Legislative Decree (e.g. health services, environmental safeguard, scientific research, humanitarian aid)</li> </ul>
Benefits	<p><b>Tax benefits:</b></p> <ul style="list-style-type: none"> <li>- Option for a derogatory flat-rate scheme.</li> <li>- Exclusion from the taxable income of: <ul style="list-style-type: none"> <li>(i) the public funds and contributions (e.g., goods of modest value received in connection with celebrations).</li> <li>(ii) the contributions granted by public administrations, for carrying out non-commercial activities.</li> </ul> </li> <li>- Possible tax credit equal to: <ul style="list-style-type: none"> <li>(i) 65% of the cash donations made by individuals.</li> <li>(ii) 50% of the cash donations made by legal entities.</li> </ul> </li> <li>- VAT exemptions: <ul style="list-style-type: none"> <li>- on supply of social-health services.</li> <li>- on advertising services provided (free of charge) to “third sector entities”.</li> </ul> </li> <li>- Municipality property tax exemption for buildings owned by “third sector entities” and exclusively used by the latter for their non-commercial activities</li> </ul>

### SOCIAL ENTERPRISE (IMPRESA SOCIALE) *(Legal qualification)*

Conditions	<ul style="list-style-type: none"> <li>- Public utility purpose</li> <li>- No for-profit purpose</li> <li>- No majority of voting rights in hands of sole proprietorships, for-profit entities, or State-owned entities</li> <li>- Integration (participation or consultation) of employees and stakeholders at the governance level, as provided in the articles of association.</li> <li>- Drafting of a social balance sheet (as per guidelines from the Minister of Social Policies)</li> <li>- Limited distribution of assets</li> <li>- Min 50% of profits allocated to the public utility purpose</li> <li>- Residual assets distributed at liquidation to an ETS or Fondazione Italia Sociale</li> <li>- Additional supervision by a special mayor</li> <li>- Registration with the special RUNTS register</li> </ul>
Benefits	<p><b>Tax benefits:</b> Exclusion from the taxable income of:</p> <ul style="list-style-type: none"> <li>(i) the amounts representing the contribution for the inspection activities of the Minister of Labor and Social Policies;</li> <li>(ii) the profits set aside to tax-deferred reserves for the statutory activity;</li> <li>(iii) the capital increases deriving from the application of the relevant corporate income tax provisions.</li> </ul>

#### SOCIAL COOPERATIVE (TYPE A OR B) *(Legal form)*

Conditions	<ul style="list-style-type: none"> <li>- Social services purpose or purpose aiming at the employment of vulnerable people</li> <li>- Limited distribution of assets</li> <li>- Min 30% of profit allocated to the legal reserve</li> <li>- 3% of annual net profit to a promotion fund for social enterprises created by Fondazione Italia Social or any similar fund</li> <li>- Residual assets distributed at liquidation only to an ETS or Fondazione Italia Sociale</li> </ul>
Benefits	<p><b>Tax benefit:</b> tax deduction of the profit allocated to the legal reserve</p>

### 3) UK

#### CO-OPERATIVE OR COMMUNITY BENEFIT SOCIETY (CBS) *(Legal form)*

Conditions	<ul style="list-style-type: none"> <li>- Community benefit purpose</li> <li>- One member one vote principle</li> <li>- Allocation of profits and use of assets exclusively for the community benefit (no distribution to members)</li> </ul>
Benefits	<p><b>Reputational advantage</b></p> <p><b>Financial benefit:</b> benefits under the Financial Services and Market Act 2000: no need to comply with restrictions on financial promotions when withdrawable shares are issued.</p>

## Appendix 2 – Overview of legislation on dual-purpose social businesses in foreign jurisdictions (Category 2 SEs)

- 1) USA - Benefit Corporation Legislation (Delaware example)
- 2) UK – Community Interests Companies
- 3) France – Société à Mission and Entreprise solidaire d'utilité sociale (ESUS) qualification
- 4) Italy – Società Benefit
- 5) Spain - Sociedad de Beneficio e Interés Común

### 1) USA – Benefit Corporation Legislation (Delaware example)

Legal form or qualification	<b>Legal form.</b>
Type of registration	Registration with State registry with <b>Public Benefit Corporation (“PBC”) or Public Benefit Limited Liability Company (“PBLLC”) designation</b> in the entity’s name.
Dual-purpose	<p><b>Yes.</b> For-profit purpose and pursuit of one or more Specific Public Benefit(s).</p> <p>The Specific Public Benefit is a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities, or interests (other than shareholders or members) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature.</p> <p>No General Public Benefit is required.</p>
Competent body	<b>All members of the board of directors.</b> Duty to manage (1) shareholders’ interests, (2) stakeholders’ interests, and (3) the Specific Public Benefit.
Report	<p><b>Biennially benefit (separate) report (statement) addressed to shareholders</b>, which shall include:</p> <ul style="list-style-type: none"> <li>● the objectives set to promote the dual purpose;</li> <li>● the standards adopted to measure the corporation’s progress in promoting the dual purpose;</li> <li>● objective factual information on the company’s success in meeting the said objectives, and</li> <li>● an assessment of the company’s success in meeting the objectives and promoting the dual-purpose.</li> </ul> <p>Leeway is left to (i) provide the report more frequently than biennially, (ii) make the report available to the public and (iii) use a third-party standard for the assessment of the promotion of the public benefit(s).</p>

Audit and Monitoring	<b>No mandatory audit or monitoring.</b> Third-party certification is optional (no clarification of the standard).
Sanctions and Liabilities	<b>No specific penalties.</b> <b>No directors' fiduciary duty</b> toward non-shareholders.
Distribution constraints	<b>None.</b>
Asset lock	<b>None.</b>
Tax Benefits	<b>N/A</b>



## 2) UK Community Interest Companies

Legal form or qualification	<b>Legal form.</b>
Type of registration	Registration with State registry with <b>“CIC” designation</b> in entity’s name.
Dual-purpose	<p><b>Yes.</b> For-profit purpose and statement of pursuit of the community's interest as the primary social objective.</p> <p>Community interest is given if a reasonable person might consider that its activities are being carried on for the benefit of a community (in the UK or outside) (community interest test).</p>
Competent body	<b>All members of the board of directors.</b>
Report	<p><b>Annual CIC Report.</b> A copy is to be addressed to the registrar of companies which forwards it to the CIC Regulator.</p> <p>The CIC Report shall include:</p> <ul style="list-style-type: none"> <li>• what the CIC has done to benefit the community during the year;</li> <li>• how stakeholders are involved;</li> <li>• information about the remuneration of directors;</li> <li>• which assets are transferred other than for full consideration;</li> <li>• which dividends were paid, and</li> <li>• which performance-related interest was paid on loans or debentures.</li> </ul>
Audit and Monitoring	<p><b>Audit by a qualified auditor appointed by the Regulator.</b> The costs are borne by the Regulator.</p> <p><b>Monitoring by the CIC Regulator</b> officer appointed by the Secretary of State for a five years).</p>
Sanctions and Liabilities	<p><b>Sanctions.</b> Judicial order to adopt a revised report with leeway left to the CIC Regulator to remove or suspend the director or transfer some CIC’s shares to specific persons.</p> <p><b>No specific liabilities.</b></p>
Distribution constraints	<p><b>Yes.</b></p> <p>For companies limited by guarantee: Full restriction on the distribution of dividends</p> <p>For companies limited by shares: Partial restrictions on the distribution of dividends (distribution constraints) (cap at five percent over the Bank of England base lending</p>

	rate or in any case 35% of distributable profits of the company for profits that can be allocated to shareholders).
Asset lock	<b>Yes.</b> Liquidation proceeds must be transferred to one or more CICs.
Tax Benefits	<b>Social Investment Tax Relief (SITR).</b> Tax reliefs to investors in social enterprises (notably CIC) if the investment is held for a least three years.

### 3) France

#### a) Société à mission

Legal form or qualification	<b>Legal qualification</b> (available for companies limited by shares, limited liability companies, general partnerships, and limited partnerships).
Type of registration	<b>Registration with State registry with “société à mission” designation.</b>
Dual-purpose	<b>Yes.</b> For-profit purpose with the description of one or more social and environmental objectives. Clarification in the articles of association of the <i>raison d’être</i> , the objectives, and the monitoring, and control procedures is mandatory.
Competent body	<b>Mission committee (<i>comité de mission</i>)</b> , as an independent body comprising at least one employee, or for companies with less than 50 FTE a mission representative ( <i>réfèrent de mission</i> ).  In charge of the mission report and the monitoring of the implementation of the objectives.
Report	<b>Annual (benefit) report attached to the management report.</b>
Audit and Monitoring	<b>Biennially audit</b> of the implementation of social and environmental objectives by an independent third party to be accredited by the French Accreditation Committee. The auditor’s reasonable review shall be attached to the company’s report and be published on the company’s website for at least five years.
Sanctions and Liabilities	<b>Sanction: Loss of the “société à mission” designation</b> , by order of the court, if requirements to qualify as a “société à mission” are not complied with or if the auditor’s review is negative.  <b>No specific liabilities.</b>
Distribution constraints	<b>None.</b>
Asset lock	<b>Yes.</b> Duty to allocate part of the assets to the achievement of the social and environmental objectives but no strict percentage imposed by law.
Tax Benefits	<b>N/A</b>

b) Entreprise solidaire d'utilité sociale (ESUS) qualification

Legal form or qualification	<p><b>Legal qualification</b> (available for companies limited by shares, limited liability companies, general partnerships, limited partnerships, sole proprietorships, associations, and foundations).</p> <p>Exclusion for listed companies.</p>
Type of registration	<p><b>Publication of the ESUS approval decision</b> in the administrative acts collection of the departmental prefecture. A national list of approved companies is drawn up by the Minister for the Social Economy.</p>
Dual purpose	<p><b>Yes.</b> For-profit purpose and pursuit of a social purpose (<i>but d'utilité sociale</i>). A social utility consists, through its activities, in:</p> <ul style="list-style-type: none"> <li>- either an objective to provide support to people in vulnerable situations;</li> <li>- or to fight against exclusion and inequality;</li> <li>- or to contribute to sustainable development.</li> </ul>
Competent body	<p><b>Board of directors</b> (or its equivalent).</p>
Report	<p><b>The annual report added in the annex of the financial report</b> attests the respect of the conditions necessary to have the ESUS qualification.</p>
Audit and Monitoring	<p>None. However, as ESUS qualification is granted for 5 years, a renewal application, accompanied by up-to-date supporting documents (including an activity report), must be addressed to the <i>direction départementale de l'emploi, du travail et des solidarités</i> (DDETS) of the relevant French department.</p>
Sanctions and Liabilities	<p><b>Sanction: Non-renewal</b> of ESUS approval.</p> <p><b>No specific liabilities.</b></p>
Distribution constraints	<p>Yes. At least half of the profit for the financial year must be allocated to the statutory and legal compulsory reserves or the profit carried forward. At least 20% of the profit must be allocated to the <i>fond de développement</i> (statutory mandatory reserve fund). This allocation is mandatory as far as the total amount of reserves does not reach 20% of the share capital.</p> <p>Cap on remuneration (max. 7 times Smic)</p>

Asset lock	None.
Benefits	<p><b>Reputational advantage.</b></p> <p><b>Easier access to public funding</b> (i.e. <i>BPI France, France Active, Caisse des Dépôts et Consignations, ...</i>) <b>and funds</b> (i.e. <i>Fond d'épargne salarial solidaire</i>).</p> <p><b>Eligibility for funding from life insurance funds</b> for “life-generation” contracts that provide tax allowances for their beneficiaries.</p> <p><b>Various forms of support, as:</b></p> <ul style="list-style-type: none"> <li>- potential beneficiaries of served contracts and reserved concessions;</li> <li>- increased access to municipal premises offered, the ability to create or join a <i>Pôle Territorial de Coopération Economique</i> (PTCE), and</li> <li>- the eligibility for local support schemes (<i>Dispositif Local d'Accompagnement, DLA</i>).</li> </ul> <p><b>Incentives for investors</b> (Madelin/IR-PME arrangement): individuals contributing in cash to the social capital of the enterprises that have been granted the ESUS qualification benefit from a tax reduction (corresponding to 18% or 25% of the amount contributed).</p> <p>No tax advantages.</p>

#### 4) Italy – Società Benefit

Legal form or qualification	<b>Legal qualification</b> (available for companies limited by shares, limited liability companies, general partnerships, limited partnerships, sole proprietorships, and cooperatives).
Type of registration	Registration with State registry with “ <b>Società benefit</b> ” or “ <b>SB</b> ” designation in the entity’s name.
Dual-purpose	<b>Yes.</b> For-profit purpose, a General Public Benefit (responsible, sustainable, and transparent management toward people, employees, customers, communities, territories, associations, and other stakeholders), and one or more Special Public Benefit(s) (pursuit of one or more positive impacts or mitigation of adverse impacts on one or more beneficiaries of the General Public Benefit).
Competent body	One or more <b>impact managers</b> (director, employee, or third party), designated by the company as per applicable company law (depending on the selected legal form).
Report	<p><b>Annual (benefit) report (<i>bilancio societario</i>) attached to the management report, which shall include:</b></p> <ul style="list-style-type: none"> <li>● the description of the specific objectives and actions implemented to pursue the public benefit purposes as well as of the circumstances which have prevented or slowed up their achievement;</li> <li>● the impact evaluation - as per the third-party standard - on corporate governance, workers-related, other stakeholders-related, and environmental aspects;</li> <li>● the description of the new objectives for next financial year in a separate section.</li> </ul> <p>The report must be published on the company’s website.</p>
Audit and Monitoring	<p><b>No audit.</b></p> <p><b>Monitoring by the national Antitrust Authority (<i>Autorità Garante della Concorrenza e del Mercato</i>), with the power to apply the regulation on misleading advertising and misleading business practices.</b></p>
Sanctions and Liabilities	<p><b>Fine (up to EUR 1032)</b> in case of failure in preparing and filing the annual report.</p> <p><b>No specific liabilities.</b></p>
Distribution constraints	<b>None.</b>

Asset lock	None.
Tax Benefits	A tax credit equal to 50% of the incorporation or transformation expenses of a <i>società benefit</i> , up to a maximum of EUR 10,000.

### 5) Spain - Sociedades de Beneficio e Interés Común

Legal form or qualification	<b>Legal qualification</b> (available for companies limited by shares, limited liability companies, limited partnerships).
Type of registration	To be determined via implementing regulations
Dual-purpose	<b>Yes.</b> A Society of Benefit and Common Interest is defined as a commercial company that is also committed to 1) “the explicit generation of positive social and environmental impact through their activity”, 2) “higher levels of transparency and accountability in the pursuit of the aforementioned social and environmental objectives”, and 3) “the consideration of relevant stakeholders in their decision-making.”
Competent body	To be determined via implementing regulations
Report	To be determined via implementing regulations
Audit and Monitoring	To be determined via implementing regulations
Sanctions and Liabilities	To be determined via implementing regulations
Distribution constraints	None.
Asset lock	None.
Tax Benefits	To be determined via implementing regulations

## Appendix 3 – Overview of proposals in foreign jurisdictions (Category 1 or 2 SEs)

- 1) UK – Proposal of the Better Business Act Coalition
- 2) Germany – Proposal for Steward-owned Companies
- 3) Canada – Changes to Business Corporations Act

### 1) UK – Proposal of fiduciary duty modifications to the Company Act

UK	
Type of legislative document	Amendment to corporate law (UK Company Act 2006), <b>Sect. 172 and 414CZA</b>
Targeted companies and shareholders	Public companies limited by shares, private companies limited by shares, private companies limited by guarantee, unlimited companies, and community interest companies (CICs), to the extent the latter are not governed by CIC legislation. Exemption of the strategic report for medium-sized companies.
Statement of purpose	<b><u>New section 172:</u></b> (...) <i>(3) A company may specify in its Articles a purpose that is more beneficial to wider society and the environment than the purpose set out in subsection (2).</i> (...)
Duty of loyalty	<b><u>New section 172:</u></b> Duty to advance the purpose of the company <i>(1) A director of a company must act in the way the director considers, <u>in good faith</u>, would be most likely to advance the purpose of the company, and in doing so must have regard (among other matters) to the following considerations:</i> <i>(a) the likely consequences of any decision in the long term,</i> <i>(b) the interests of the company’s employees,</i> <i>(c) the need to foster the company’s business relationships with suppliers, customers and others,</i> <i>(d) the <u>impact of the company’s operations on the community and the environment</u>,</i> <i>(e) the desirability of the company maintaining a well-deserved reputation for trustworthiness and <u>high standards of business conduct</u>, and</i> <i>(f) the need <u>to act fairly</u> as between members of the company.</i>  <i>(2) The purpose of a company shall be to benefit its members as a whole, while operating in a manner that also:</i> <i>(a) benefits wider society and the environment in a manner commensurate with the size of the company and the nature of its operations and</i> <i>(b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs.</i>



	<p>(...)</p> <p>(4) <i>The duty imposed upon directors by this section:</i></p> <p>(a) <i>has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company, and</i></p> <p>(b) <i>is owed solely to the company and not to any other interested parties.</i></p>
Reporting duties	<p><b>New section 414CZA: Section 172(1) statement</b></p> <p>(1) <i>A <u>strategic report</u> for a financial year of a company must include a <u>statement</u> (a “section 172(1) statement”) that describes how the directors when performing their duty under section 172:</i></p> <p>(a) <i><u>have advanced the purpose of the company</u> and</i></p> <p>(b) <i>have had regard to the matters <u>set out in section 172(1)(a) to (f).</u></i></p> <p>(2) <i>Subsection (1) does <u>not apply if the company qualifies as medium-sized in relation to that financial year (see sections 465 to 467).</u></i></p> <p>Exemption for SME</p>
Monitoring (internal/external)	Internal, and external audit by auditors regulated by the Financial Reporting Council)

## 2) Germany – Proposal for ‘Steward-owned companies’

Germany	
Type of legislative document	Amendment to the <i>Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)</i> with a new chapter establishing a legal basis for steward ownership: a Limited liability company with bound capital (“die <i>Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen</i> ” ( <i>GmbH-gebV</i> )).
Targeted companies and shareholders	Limited liability companies.  Only natural persons, other GmbH-gebVs and other legal persons with a comparable capital lock may be shareholders ( <b>§ 77a (2) GmbH-gebV Draft</b> ), to prevent that the company is a subsidiary company for “greenwashing” or “purpose-washing”.
Freedom of purpose	The company pursues an economic or charitable purpose (freedom of the end purpose) ( <b>77a (1) GmbH-gebV Draft</b> ).
Asset lock and distribution constraint	<p>The company shall provide for an asset lock, which shall specify (<b>§ 77b (2) GmbH-gebV Draft</b>):</p> <ul style="list-style-type: none"> <li>● the principle of the asset lock;</li> <li>● the beneficiaries;</li> <li>● the ultimate transferee, if the partnership agreement provides, that, upon the death of a shareholder, his share in the business shall pass to the company;</li> <li>● the independent audit entity</li> <li>● the consequences of the permanent asset lock for the employees and their representative bodies and the measures provided for in this respect.</li> </ul> <p>The GmbH-gebV implies a full distribution constraint: the shareholders may not decide to pay out profits exceeding the minimum capital and have no claim to the liquidation proceeds (<b>§ 77f-77l GmbH-gebV Draft</b>).</p> <p>The GmbH-gebV shall be reimbursed for payments made to shareholders in violation of the asset lock and distribution constraint (<b>§77h (1) GmbH-gebV Draft</b>).</p> <p>The asset lock and distribution constraint cannot be circumvented by transforming a GmbH-gebV into another corporate form or by merging it with another company (<b>§77n-p GmbH-gebV Draft</b>).</p>

<p>Transfer of shares</p>	<p>There are restrictions on the transfer of shares: the consent of shareholders is required (also for heirs) (<b>§77c GmbH-gebV Draft</b>).</p> <p>The price for the transfer of shares shall not exceed the nominal value of the shares (<b>§77c (3) GmbH-gebV Draft</b>).</p>
<p>Monitoring (internal/external)</p>	<p>Duty to issue an annual report on the state of the capital lock.</p> <p>Internal, and external audit of the report by a “special” auditor (who is not auditing the financial accounts or has not done that in the last five years). The results of the auditor’s report must be published on the company’s website. The “special” auditor shall be changed every five years at least (<b>§77j (2) GmbH-gebV Draft</b>)</p> <p>At the moment, two options are envisaged for the special auditor (usual independent special auditor or State supervisory authority).</p>

### 3) Canada – Changes to Canada Business Corporations Act

Canada	
Type of legislative document	Amendment to corporate law ( <i>Canada Business Corporations Act – CBCA</i> ), Sections 122(1), 122(1.1), 6 and 155A
Targeted companies (personal scope)	All corporations subject to CBCA.  Exemptions for small or medium- sized companies on the statement of purpose and the public explanation (if limited purpose).
Duty of loyalty	<p><b><u>New section 122(1):</u></b> Duty of care of directors and officers</p> <p><i>122(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall:</i>  <i>. . . . . pursue the purpose of the corporation honestly and <u>in good faith</u> with a view to its best interests.</i></p> <p><b><u>New subsection 122(1.1):</u></b> Best interests of the corporation</p> <p><i>When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors:</i>  <i>(...)</i>  <i>d. <u>impacts on the community,</u></i>  <i>d. <u>high standards of business conduct and</u></i>  <i>d. <u>fairness as between stakeholders of the corporation.</u></i></p>
Statement of purpose	<p><b><u>New section 6:</u></b> Articles of incorporation</p> <p><i>6(1) Articles of incorporation shall follow the form that the Director fixes and shall set out, in respect of the proposed corporation,</i>  <i>...</i>  <i>(f) <u>a statement of purpose</u> setting out the reason for existence guiding its business conduct; and</i>  <i>(g) any restrictions on the businesses that the corporation may carry on.</i></p> <p><b><u>New stipulation:</u></b>  <i>If the statement of purpose makes no reference to considerations in subsection 122(1.1) other than (1.1)(a)(i), the corporation shall issue <u>a public explanation.</u></i></p> <p>Exemption for SME</p>
Reporting duties	<p><b><u>New section 155A:</u></b> Disclosure</p> <p><i>The directors of a corporation shall place before the shareholders at every annual meeting <u>a statement of purpose</u> setting out the reason for existence guiding its business conduct.</i></p>

	<p><b><u>Amended provision of the CBA:</u></b></p> <p><i>An <u>annual statement</u> by the board explaining how the directors and officers <u>have advanced the purpose of the company</u> and have had regard to the matters <u>set out in subsection 122(1.1)</u>.</i></p> <p>Exemption for SME</p>
<p>Monitoring body (internal/ external)</p>	<p>Internal audit</p>

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