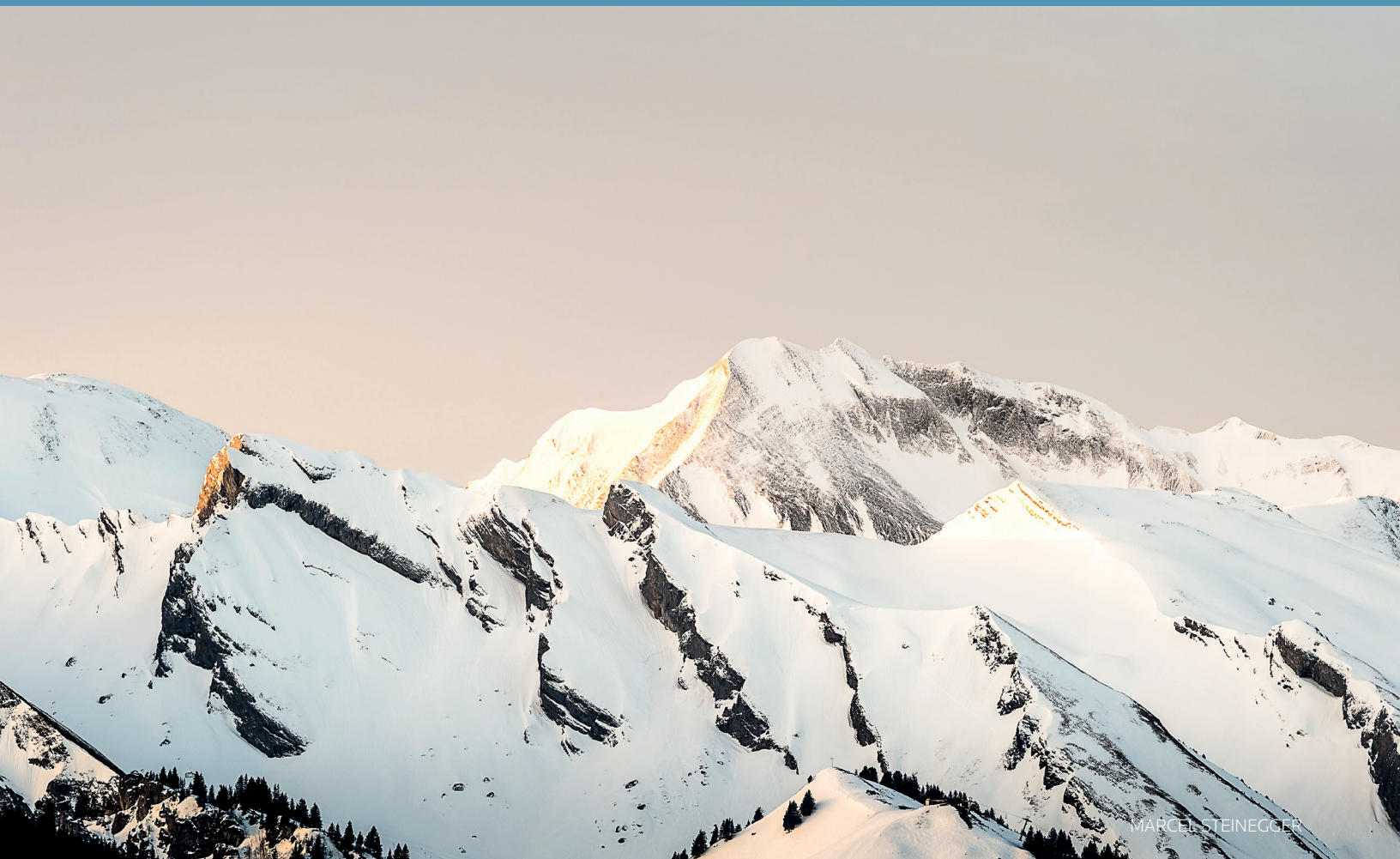


# PHILANTHROPY AND SOCIAL ENTREPRENEURSHIP

A GUIDE TO LEGAL STRUCTURES FOR NGO'S  
AND SOCIAL ENTREPRENEURS IN SWITZERLAND  
2017



MARCEL STEINEGGER



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The Thomson Reuters Foundation is extremely grateful to the co-authors of this Guide, Julie Wynne (Attorney at Law and Partner at Froriep) and Vincent Pfammatter (Attorney at Law and Partner at Sigma legal) for their time, expertise and commitment to making this Guide possible. This Guide will be a valuable resource for the social sector in Switzerland and Julie and Vincent's considerable efforts and dedication are to be highly commended.

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Sigma legal is a Swiss innovative boutique law firm, assisting for- and non-profit organizations at every step of their life. Sigma legal is the result of the association of attorneys who have considerable experience in high profile matters, both from a legal advice and from a litigation perspective. Vincent Pfammatter, co-author of this Guide, has a longstanding experience in advising international non-profit organizations, on matters such as structuring, tax, regulatory, contractual matters, governance issues, privileges and immunities. Vincent also specializes in innovation and technology law.

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# CONTENTS

1. DECISION TREE .....	10
2. GENERAL INTRODUCTION TO TAX EXEMPTION .....	12
3. LEGAL STRUCTURES IN SWITZERLAND .....	15
ASSOCIATION .....	16
1. SETUP AND REGISTRATION .....	18
2. STRUCTURE.....	18
3. ACCOUNTING .....	19
4. LIABILITY .....	20
5. AVAILABLE FUNDING MECHANISMS .....	20
6. COMMERCIAL PURPOSE AND ACTIVITY .....	20
7. EXCURSUS: FEDERATIONS .....	21
8. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES.....	21
CASE STUDY – RÉALISE.....	22
FOUNDATION .....	23
1. SETUP AND REGISTRATION .....	25
2. STRUCTURE.....	26
3. ACCOUNTING REQUIREMENTS .....	27
4. SUPERVISION .....	27
5. BENEFICIARIES .....	27
6. LIABILITY .....	27
7. AVAILABLE FUNDING MECHANISMS .....	27
8. SHELTERED FUNDS .....	28
9. EXCURSUS: HOST STATE ACT .....	29
10. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES.....	29

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CASE STUDY – APOPO FOUNDATION .....	30
CASE STUDY – THE ELLA FUND SHELTERED BY THE SWISS PHILANTHROPY FOUNDATION.....	31
<b>SOLE PROPRIETORSHIP .....</b>	<b>32</b>
1. OVERVIEW.....	34
2. SETUP AND REGISTRATION .....	34
3. STRUCTURE.....	34
4. ACCOUNTING REQUIREMENTS .....	35
5. LIABILITY .....	35
6. FUNDING AND INVESTORS .....	35
7. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES.....	35
CASE STUDY – FLOW IN ACTION .....	36
<b>COMPANY LIMITED BY SHARES (LTD.) .....</b>	<b>37</b>
1. OVERVIEW.....	39
2. SETUP AND REGISTRATION .....	39
3. STRUCTURE.....	40
4. ACCOUNTING REQUIREMENTS .....	41
5. LIABILITY .....	42
6. AVAILABLE FUNDING AND INVESTMENT MECHANISMS .....	42
7. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES.....	42
8. EXCURSUS: B CORP CERTIFICATION .....	43
CASE STUDY – OPALINE SA .....	44
<b>LIMITED LIABILITY COMPANY (LLC) .....</b>	<b>45</b>
1. OVERVIEW.....	47
2. SETUP AND REGISTRATION .....	47
3. STRUCTURE.....	47
4. ACCOUNTING REQUIREMENTS .....	49

---



5. LIABILITY .....	49
6. AVAILABLE FUNDING AND INVESTMENT MECHANISMS .....	49
7. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES.....	49
CASE STUDY – SOFTWEB.....	50
<b>COOPERATIVE .....</b>	<b>51</b>
1. OVERVIEW.....	53
2. SETUP AND REGISTRATION .....	53
3. STRUCTURE.....	54
4. LIABILITY .....	56
5. AVAILABLE FUNDING AND INVESTMENT MECHANISMS .....	56
6. COMMERCIAL ACTIVITY .....	56
7. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES.....	57
CASE STUDY – ONE CREATION.....	57
<b>BRANCH OFFICE OF A FOREIGN SOCIAL VENTURE – IN BRIEF .....</b>	<b>58</b>
<b>REPRESENTATIVE OFFICE – IN BRIEF .....</b>	<b>61</b>
<b>TANDEM STRUCTURES (NON-PROFIT &amp; FOR-PROFIT ENTITY) .....</b>	<b>62</b>
1. SISTER ORGANISATIONS .....	63
2. NON-PROFIT SUBSIDIARY OF A FOR-PROFIT ENTITY .....	63
3. FOR-PROFIT ENTITY AS SUBSIDIARY OF A NON-PROFIT .....	64
CASE STUDY 1 – SHARE A DREAM .....	65
CASE STUDY 2 – DIRECT COFFEE .....	66

# INTRODUCTION



# INTRODUCTION

This short Guide is an overview of the Swiss legal framework, which intends to help social entrepreneurs, non-profit organisations and philanthropists to select the most appropriate legal structure for their venture. The Guide is designed to clarify the existing options for setting up a charity or a social enterprise in Switzerland and the important strategic considerations related thereto.

This Guide covers the legal vehicles used by both non-profit (charitable) organisations and/or socially driven businesses, and it explores new ways of doing business, as the boundaries of non-profits and for-profit businesses tend to disappear.

For many social entrepreneurs, generating revenue (even outside of profit maximization) from their enterprises is a key driver, ensuring financial sustainability, generating returns for investors and avoiding the need to rely on charitable donations or grants. On the other hand, other entrepreneurs wish to pursue a mission solely focused on the promotion of public benefit purposes and, when possible, benefit from related tax exemptions.

Swiss law does not provide for legal entities specially designed for social ventures, but almost every type of organisation may serve this purpose, each with advantages and disadvantages that this guide tries to highlight.

The present Guide is divided in three parts:

- Part 1 is a decision tree, which is intended to be a starting point to assist non-profit organisations and social entrepreneurs in selecting the most appropriate legal structure for their organisation;
  - Part 2 contains a general introduction to tax exemption that may apply for social ventures that are for the public benefit. These general principles apply to each legal form; and
  - Part 3 describes each legal form in more detail and provides for its advantages and disadvantages, as well as case studies, which provide concrete examples.
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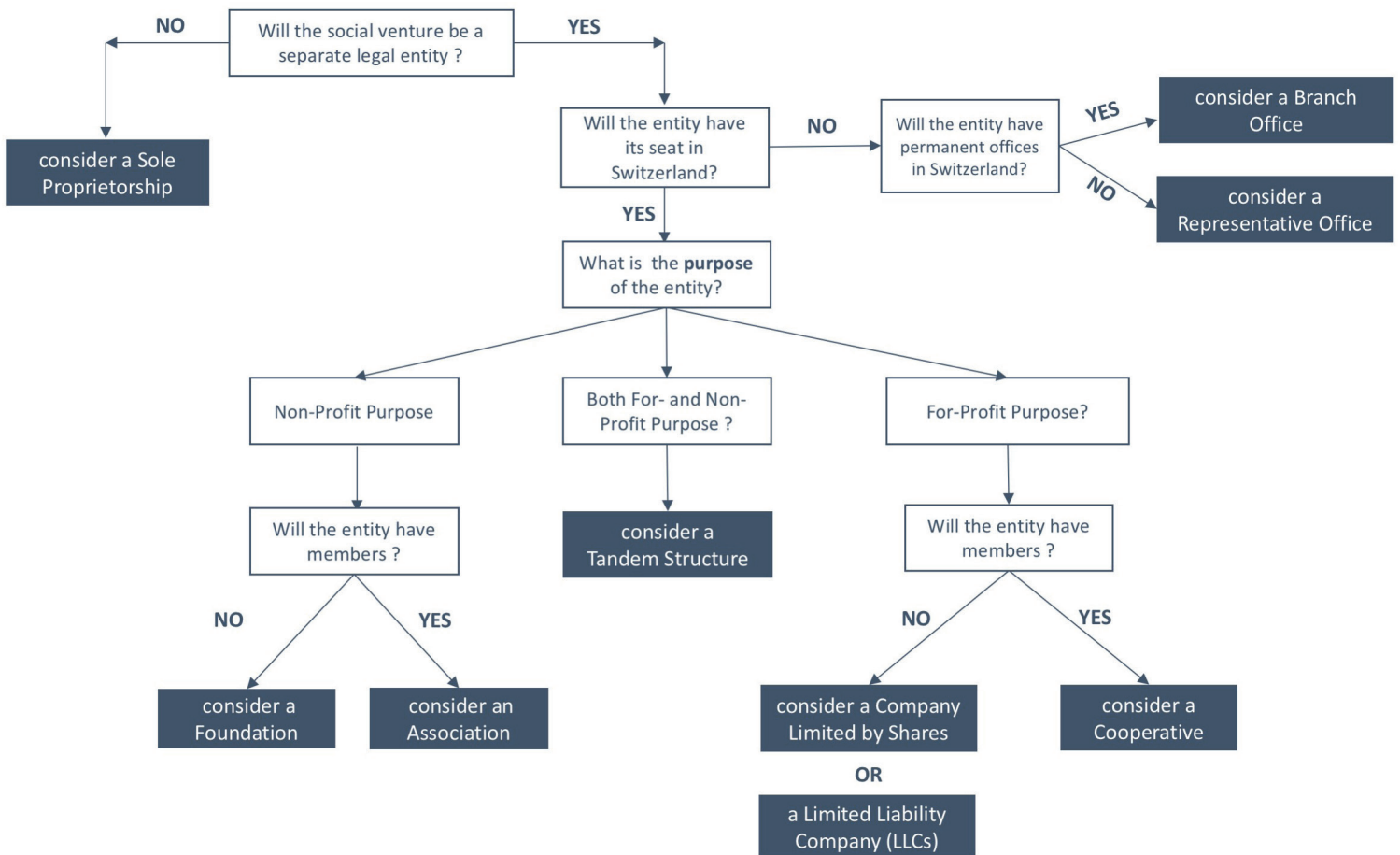
# 1. DECISION TREE:

Which type of legal structure is right for my social venture?





# 1. DECISION TREE: WHICH TYPE OF LEGAL STRUCTURE IS RIGHT FOR MY SOCIAL VENTURE?



1. NB: This high level flowchart is intended to help social entrepreneurs identify the possible legal structures which may be suitable for their social ventures. This flowchart is not exhaustive and does not consider the factual circumstances that may be relevant to an individual situation.

## 2. GENERAL INTRODUCTION TO TAX EXEMPTION



## 2. GENERAL INTRODUCTION TO TAX EXEMPTION

In Switzerland, tax exemption is not limited to specific types of legal entities. The most common legal forms for tax-exempt organisations are associations and foundations. Other entities, such as companies limited by shares and limited liability companies, may also be granted a tax exemption, even though there are fewer cases.

Tax exemption is not automatic and must be formally requested from the tax authority of the canton in which the non-profit organisation has its seat. It is highly advisable to request such an exemption prior to the setup of the organisation. As a matter of principle, a tax exemption will be granted if the following cumulative conditions are met<sup>1</sup>:

1. The purpose of the organisation must be of **public benefit** exclusively. This includes activities of charitable, humanitarian, health, ecological, educational, scientific or cultural nature;
2. The organisation may not **remunerate its Board members**: to benefit from a tax exemption, the organisation and its representatives (i.e. the Board), shall be considered as lacking self-interest. This however does not preclude the organisation from having remunerated employees.
3. The organisation must **effectively undertake activities for the public benefit**: a tax-exempt organisation may not hoard its assets. It must have a proper and effective activity and pursue the objectives described in its Articles of Association.
4. The **commercial (profit-making) activities shall be secondary to the activities for the public benefit**, and any revenue from this activity shall be used to serve the public benefit purpose of the entity.
5. Its assets must always be used in furtherance of its public benefit purpose and they may never return to the founder, members or shareholders of the entity, nor to its donors (**irrevocability of the**

<sup>1</sup> See Article 56g of the Federal Act on Direct Taxes (LIFD) and Article 23 para 1f of the Federal Law on Harmonization of Direct Taxes of Cantons and Communes (LIHD). See also Federal Tax Administration Circular n° 12 of 8 July 1994.



**funds**). In case of dissolution of the entity, any remaining funds must be transferred to another tax-exempt non-profit organisation, which pursues similar purposes.

6. In addition, Companies Limited by Shares and Limited Liability Companies must **prohibit any distribution of dividends** or other type of financial benefits in favour of their shareholders.

Each cantonal tax authority has its own practice with regards to the interpretation of the conditions for tax exemption.

Provided that an organisation meets the above requirements, it will benefit from:

1. an exemption of taxes on the initial capital;
2. a full exemption from federal and cantonal income taxes;
3. a full exemption from capital tax levied at cantonal level on the net wealth of the entity.

In addition, a tax exemption also allows Swiss-resident donors (individuals or legal entities) to deduct donations made to such tax exempt organisations from their annual net taxable income or profits of a company. At the federal level, gifts to tax exempt organisations are deductible up to 20% of the income. For cantonal taxes, the deductible amount depends on each cantonal legislation. Whether donors domiciled abroad are entitled to a deduction in their home state depends on their domestic laws.

The tax exemption for public benefit purposes does not, however, comprise VAT exemption, which remains due even for tax-exempt entities. However, a specific regime applies to tax-exempt organisations: the minimum annual turnover that requires VAT registration amounts to CHF 150,000 for such entities (instead of CHF 100,000 for for-profit entities). Below this amount, a non-profit organisation is not subject to VAT.

Finally, it may be relevant to note that organisations may also benefit from a **partial tax exemption**. As a consequence, the commercial activities of the organisation that do not support the public benefit purpose would be subject to taxes, whereas the rest of the organisation's activities, which are considered for the public good, may benefit from tax exemption. In practice, such cases are however rare since they require a clear separation of both activities (and generally also different books), which tends to be burdensome. In practice organisations combining for profit and non-profit activities tend to establish tandem structures with two separate entities, one non-profit and one for-profit, either through a mother-daughter combination or with sister entities collaborating through service agreements or similar arrangements.



### 3. LEGAL STRUCTURES IN SWITZERLAND



# ASSOCIATION





# ASSOCIATION

## SUMMARY

An association (*Verein / association / associazione*) is an independent legal entity formed by individuals or corporate members. An association is composed of its members (there must be at least two). It does not need to be registered with the Trade Register unless it undertakes commercial activities. Unlike foundations, associations are not subject to the supervision of a State Authority.

Associations are governed by Articles 60 to 79 of the Swiss Civil Code.

An association is a flexible vehicle, easy to setup and subject to few organisational requirements. This flexibility has made it the most commonly used legal form in the social and non-profit sector, including for sports ventures, social clubs, unions, trade or professional groups, Non-Profit Organisations, International Non-Governmental Organisations and International Sports or Professional Federations.

To date, there are approximately 80,000 associations in Switzerland, even though this figure is difficult to evaluate precisely given that not all associations need to register with the Trade Register (less than 1/10 are estimated to be registered).

In Switzerland, associations may apply for full tax exemption, provided they comply with the legal requirements for such an exemption.

## ADVANTAGES

- ✓ Easy and quick setup
- ✓ Very flexible structure
- ✓ Not subject to supervision by a State Authority
- ✓ Registration with the Trade Register is mandatory only under certain circumstances
- ✓ Well-suited for tax exemption

## DISADVANTAGES

- ✗ unsuitable for seeking investment
- ✗ mostly unsuitable for organisations which intend to have a commercial activity
- ✗ For tax-exempt associations:
  - members of the Board may not be remunerated, and
  - commercial activities are limited

# 1. SETUP AND REGISTRATION

Associations are relatively straightforward to establish and run. An association can legally be established by the will of two or more members. It acquires legal personality as soon as their intention to exist as a legal entity is expressed in its Articles of Association. No minimal capital is required. Upon its constitution, an association becomes an autonomous legal entity, with its own rights and obligations.

Concretely, the founding members must hold a constitutive assembly to (i) adopt the Articles of Association (which include the purpose of the organisation), (ii) appoint the members of the mandatory bodies of the organisation (such as the Board), and (iii) determine the registered office (the seat) of the association.

As stated in Article 60 of the Swiss Civil Code, the purpose of an association may be “*political, religious, scientific, artistic, charitable, social or any other non-economic purpose*”.

There is no requirement to register with the Trade Register, unless the association carries on commercial activities or if it is subject to mandatory external audit (Art. 60 para 2. SCC). In any event, it is always advisable to register in order to facilitate relations with authorities and have a public existence.

The charitable status of an association is obtained only once the tax authorities grant a tax exemption. (See Chapter 2).

## 2. STRUCTURE

Swiss law contemplates only two mandatory bodies for associations, namely (i) the General Assembly (*Vereinsversammlung / assemblée générale / assemblea sociale*, Art. 64-68 SCC) and (ii) the Board (*Vorstand / direction / direzione*; Art. 69 SCC). An external auditor is required only in certain circumstances.

### A. GENERAL ASSEMBLY

The General Assembly, which is composed of all members, is the supreme body of the association (Art. 64 para. 1 SCC). In general, the General Assembly has the following powers:

- i. adoption and amendments of the Articles of Association,
  - ii. admission and exclusion of members,
  - iii. appointment and dismissal of Board members,
  - iv. appointment and dismissal of other bodies,
  - v. dissolution of the association, and
-



- vi. dealing with all matters that are not attributed to another body.

The General Assembly shall hold at least one ordinary meeting per year. It shall also hold an extraordinary general meeting whenever requested by the Board or by at least one-fifth of all members.

## **B. BOARD**

The Board is the executive body of the association (Art. 69 SCC). It is in charge of managing the daily business and representing the association. The Board may be composed of members of the association or of third parties, and they may be individuals or representatives of legal entities.

The Board may delegate some of its tasks to additional bodies. It is possible to provide for such additional bodies or committees (such as Secretariat, Advisory Board) on a permanent or ad hoc basis.

## **C. AUDITORS**

Swiss associations are subject to ordinary (full) external audit if, over two successive business years, two of the following values have been exceeded: (i) a balance sheet over CHF 10 million, (ii) a turnover of CHF 20 million and/or (iii) a staff of 50 or more full-time employees.

Associations are subject to a limited audit, if this is requested by a member of the association.

In all other cases, the association is free to decide whether or not to have an ordinary or limited audit carried out, or no audit at all.

The auditors must report to the General Assembly. The auditors are appointed by the General Assembly; they may not be Board members or employees of the association.

# **3. ACCOUNTING**

The Board must keep formal accounts. The books (inventory, operating account, and statement of account) must be complete, clear, and easy to consult, so that anyone interested may have a picture as accurate as possible of the financial health of the association.

Small associations can limit themselves to simplified bookkeeping, whilst large associations will have to keep their books in accordance with the ordinary standards which apply to all other forms of companies.

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## 4. LIABILITY

Associations have their own legal personality. Therefore, associations are solely liable for their debts. Members have no personal liability for the association's debts and shortfall, beyond their membership fees.

## 5. AVAILABLE FUNDING MECHANISMS

The first source of funding for associations is the membership fees that are collected from its members. Grant funding may also be available, especially when the association benefits from tax exemption. Associations may also raise funds through commercial activities.

Equity-based funding is not open to associations, given that they have no shares and may not distribute dividends.

Associations may raise funds through loans by which they borrow money for a certain period of time from investors in exchange for the payment of interest.

Crowdfunding and crowd-donating are new ways for associations to raise funds.

## 6. COMMERCIAL PURPOSE AND ACTIVITY

An association may not have a *purely commercial purpose* (Art. 60 SCC), which is to be understood as the search of benefits to be distributed to its members. An association shall have a "*political, religious, scientific, cultural, charitable, social or [an]other non-commercial purpose*".

A Swiss association may however have an *indirect economical purpose*, as recognized by a long-standing tradition and Supreme Court case law. An association can pursue commercial activities, but the primary purpose of the association shall be to represent its members and act on their behalf.

The above is to be distinguished from a *commercial activity*, which an association may undertake to achieve its non-commercial purpose. It is common for an association to run a business (for instance a restaurant, a sports club, etc.), as long as the profits of its activity are used in the furtherance of its non-profit purpose.

Additional requirements apply if an association is tax exempted (which is not always the case). If an association benefits from a tax exemption, only a *limited commercial activity* will be tolerated. The extent of the "limited" commercial activity which is authorised depends on the practice of each cantonal tax authority.

## 7. EXCURSUS: FEDERATIONS

A federation is a non-governmental umbrella organisation, whose purpose is to group and/or lead organisations of various countries or locations that have the same purpose or goal. It is generally used to group organisations from different countries so they can operate globally under one brand and present themselves internationally as a single organisation.

In Switzerland, federations are generally incorporated as associations. Well-known examples include international sports federations (e.g. FIFA, FIA or FIS), the International Federation of the Red Cross and Red Crescent Societies (IFRC), the world's largest humanitarian network, or the World Heart Federation.

In structural terms, a federation is an association, which serves its members, and is based in Switzerland. It has all features of a standard association (General Assembly, Board, Auditors, see above) and may benefit from the same tax treatment (see hereafter).

## 8. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES

Provided it complies with the general requirements set out in Chapter 2, an association is perfectly fitted to benefit from a full tax exemption.

### CASE STUDY

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## RÉALISE

*Réalise* is a non-profit association established in 1984 that endeavors to support individuals at risk of social exclusion by providing training, job coaching and offering concrete jobs. Trainees spend around 6 months learning by working in one of their departments (industry, logistics, gardening, outdoor maintenance, laundry and cleaning).

The organisation chose the legal form of the association, which it found the most appropriate and simplest at that time. With such legal form, *Réalise* was also able to apply for tax exemption, and receive then both public funding and private grants.

*Réalise* describes itself as a “social enterprise” since the emergence of this concept in the 90s. This is not in contradiction with the form of the association as in Switzerland, associations are allowed to pursue economic activities, as long as the organisation’s purpose remains for the public benefit. All revenues shall be used to cover operating expenses and the furtherance of the association’s purpose. The potential benefits are reinvested to finance new projects, alongside with private donations.

Nowadays, *Réalise* is considering whether it would be appropriate to change its legal status into a foundation, in order to better secure its capital accumulated since 1984 which comprises in particular of their building, the large production equipments, vehicles, etc.

*Réalise* does not need a corporate vehicle like an LLC or a Company Limited by Shares, given that it is not looking for (impact) investors.

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# FOUNDATION





# FOUNDATION

## SUMMARY

A foundation (*fondation* / *Stiftung* / *fondazione*) is an independent legal entity, with full legal personality. It is composed of a pool of assets, which are dedicated to a specific purpose. A foundation has no members. Foundations are subject to the supervision of the federal or cantonal Supervisory Authority for foundations.

The foundation is governed by Articles 80 to 89bis of the Swiss Civil Code.

In Switzerland, foundations are active in a large variety of fields, from philanthropy, social entrepreneurship, development, humanitarian aid, health, medical research, etc.

To date, there are over 13,000 foundations in Switzerland.

Foundations may benefit from full tax exemption, provided they comply with the legal requirements for such an exemption.

## ADVANTAGES

- ✓ Structure, governance and organisation are liberal and flexible
- ✓ Well-suited for tax exemption
- ✓ Well-suited for local or international non-profit ventures
- ✓ Very stable organisation (in principle, the Articles of Association may not be amended)
- ✓ Supervision by a Supervisory Authority guarantees a high level of trust and confidence for donors

## DISADVANTAGES

- ✗ Reporting requirements to the Supervisory Authority may be burdensome, in particular for smaller entities
- ✗ If tax exempted:
  - members of the Board may not be remunerated, and
  - commercial activities are limited

# 1. SETUP AND REGISTRATION

A foundation is a segregated pool of assets, organised as a legal entity and dedicated to a specific purpose. It has no members.

A foundation is established by one or more founder(s), which can be individuals, legal entities or even International Organisations and/or States.

A foundation is established by public deed in front of a notary public. It must also be registered with the Trade Register.

Foundations are subject to supervision of a state authority. Foundations that are active at the national or international level are subject to the supervision of the Federal Supervisory Authority (Federal Department of Home Affairs), while locally active entities are subject to the supervision of the competent cantonal supervisory authority.

A foundation requires a minimum initial capital to be launched. Foundations subject to the Federal Supervisory Authority are required to have assets of at least CHF 50'000.-, while those subject to the supervision of a cantonal supervisory authority need at least CHF 20'000.- (e.g. in Geneva).

The organisation and functioning of a foundation as well as its purpose are set out in its Articles of Association. Once adopted, the Articles of Association can only be amended under very restrictive circumstances. The Articles of Association may be completed by internal regulations, often referred to as bylaws.

The definition of the purpose is at the heart of any foundation. A foundation may have any purpose(s) as long as they are clearly defined. As a matter of principle, such purposes are generally of ideal nature, but economic purposes are not excluded by Swiss law.

Amendments of the purpose clause are only allowed in very limited cases. A change to the purpose clause of a foundation is usually possible only (i) upon request of the founder, (ii) approval of the Supervisory Authority (iii), provided that the Articles of Association contemplate this possibility of amendment, and (iv) if at least ten years have elapsed since the incorporation of the foundation or the last amendment of the Articles of Association. Where the founder is a legal entity, this right expires twenty years after the incorporation of the foundation.

Foundations may carry on commercial activities only if provided for in the Articles of Association and as long as the commercial activities serve the public interest purpose of the foundation. Some restrictions may in addition apply for foundations benefitting from tax exemption.

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## 2. STRUCTURE

There are two mandatory bodies in a foundation: the Board and the External Auditors.

Beyond the mandatory bodies, the governance structure of a foundation is very flexible. Additional bodies, such as a Secretariat, permanent or ad hoc Committees, Advisory Boards, may be established; their functions and powers are usually set out in bylaws.

### A. BOARD

The Board is the supreme governing body in charge of the general management of the foundation. As a matter of principle, the Board has all competences that are not expressly delegated to other corporate bodies. The Board is vested with full fiduciary powers to represent the foundation and to approve its financial statements.

According to the practice of the supervisory authorities, the Board shall comprise of at least three directors. It may be composed of individuals and/or representatives of legal entities. Board members with signing powers must be registered with the Trade Register; and at least one Board member or officer, with signing powers, must be domiciled in Switzerland.

In general, the founder appoints the initial Board, then Board members are usually co-opted. The founder can appoint himself as Board member.

The Articles of Association can also provide for third-party organisations to have the power to appoint one or more Board members. They can further set forth the skills, knowledge or expertise required to be appointed as Board member.

### B. AUDITOR

As a matter of principle, a foundation is required by law to appoint an external Auditor to review its annual accounts. A limited statutory audit is usually sufficient. However, foundations must subject their accounts to a full ordinary audit if during two successive business years, two of the following values have been exceeded:

- Total Balance sheet: CHF 20 million;
- Turnover: CHF 40 million;
- Workforce: 250 full-time employees on average annually.

Foundations of a limited scope may obtain an exemption of the obligation to audit their accounts, upon approval by the Supervisory Authority if (i) they do not solicit public funding and, (ii) their total balance sheet for two successive business years amounts to less than CHF 200,000.

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### 3. ACCOUNTING REQUIREMENTS

Swiss foundations must prepare accounts in compliance with commercial standards (balance sheet; profit & loss accounts). These accounts must be submitted annually to the Supervisory Authority.

### 4. SUPERVISION

Supervision by the State Authority is extensive and applies to all activities of the foundation. Its main objective is to ensure that the foundation's assets are used according to its purpose. The Supervisory Authority also ensures that the corporate bodies of the foundation comply with applicable laws, the foundation's Articles of Association and any bylaws.

Foundations must submit annually a report to the Supervisory Authority, which includes (i) revised annual accounts, (ii) an annual activity report, (iii) minutes of the Board meeting approving the annual accounts and report, and (iv) any changes made to the Board membership during the past year.

Any amendment to the Articles of Association or to the bylaws of the foundation must obtain the prior approval of the Supervisory Authority.

### 5. BENEFICIARIES

A foundation always has beneficiaries. Generally speaking, beneficiaries are individuals or entities that ultimately benefit from the foundation's activities or funding, in accordance with the Articles of Association of the latter.

### 6. LIABILITY

Foundations have a full and independent legal personality. Therefore, a foundation is held liable for its debts. Except in exceptional circumstances (e.g. when acting with fault), Board Members have no personal liability for the foundation's debts and shortfall.

### 7. AVAILABLE FUNDING MECHANISMS

The main source of funding for foundations is donations as well as any grant funding which may be available. To a limited extent, foundations may also have a commercial activity in order to raise funds.

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Equity-based funding is not open to foundations, given that they have no shares and may not distribute dividends.

Foundations may raise funds through loans by which they borrow money for a certain period of time from investors, in exchange for the payment of interest.

## 8. SHELTERED FUNDS

Similar to donor-advised funds, well-known in Anglo-Saxon countries, *sheltered funds* are funds that are sheltered by an umbrella foundation (which legally speaking is an ordinary foundation under the Swiss Civil code).

Typically, donors are provided with the opportunity to establish their own fund, to name it and manage its donations through a steering committee, while pooling within the umbrella foundation administrative tasks, asset management, and sometimes operational support for projects. Operationally, a sheltered fund is managed similarly to an independent foundation, but it remains legally and administratively tied to the umbrella foundation who validates the donations and verifies their nature of public utility and conformity to the statutory purposes.

A sheltered fund constitutes an interesting alternative to the establishment of an independent foundation, notably for smaller pools of assets, for donors who are not interested in the management and operational aspects of an independent foundation or for donors who wish to have their own fund, but for a limited period of time.

By pooling the assets of all sheltered funds, an umbrella foundation can lower administrative and management costs and provide interesting cost-benefit ratios. In certain cases, the pooled assets can also offer interesting investment opportunities, portfolio management and risk diversification. Depending on its structure, an umbrella foundation may also provide a professional management structure and support, for day-to-day operations, as well as legal, accounting or operational aspects.

In Switzerland, there are typically two types of umbrella foundations, namely the independent ones and those operated by banks for their own clients.

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## 9. EXCURSUS: HOST STATE ACT

Since 2008, the Swiss Host State Act<sup>1</sup> has provided certain types of international entities headquartered in Switzerland with privileges and immunities. As such, so-called *other international bodies* (Art. 14 Host State Act), which typically include foundations<sup>2</sup>, can benefit from privileges and immunities if they comply with the requirements of the Host State Act.

These conditions entail, notably, that (i) they closely collaborate with governments or intergovernmental organisations based in Switzerland, (ii) they play a major role in an important field of international relations, (iii) they enjoy wide recognition at the international level and, (iv) the granting of privileges is likely to substantially contribute to the realization of their mandate.

Privileges and immunities available under the Host State Act range from inviolability of the premises, archives, documents and data support, immunity of jurisdiction and execution, complete exemption from all taxes including VAT, Swiss social security regulations (and tax exemptions may also apply to certain employees) and exemption of the obligation to obtain work and residence permits for foreigners.

Since 2008, at least 8 Swiss based foundations have been granted with privileges and immunities under the Host State Act, namely GAVI, DNDi, MMV, FIND, GAIN, the World Economic Forum Foundation, the Centre for Humanitarian Dialogue, and the Global Community Engagement and Resilience Fund<sup>3</sup>.

## 10. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES

Provided it complies with the general requirements set out in Chapter 2 above, a foundation is perfectly suited to benefit from a full tax exemption.

1. RS 192.12 <https://www.admin.ch/opc/en/classified-compilation/20061778/index.html> and its Ordinance RS 192.121 <https://www.admin.ch/opc/en/classified-compilation/20072457/index.html>

2. In theory, associations or other types of legal entities could also benefit from these privileges, but we the authors are not aware of any such cases to date.

3. GAVI: RS 0.192.122.818.12 / DNDi: RS 0.192.122.818.13 / MMV: RS 0.192.122.818.14 / FIND: RS 0.192.122.818.15 / GAIN: RS 0.192.122.818.16 / WEF: RS 0.192.122.945.1 / CHDDH: RS 0.192.120.192.1 / GCERF: RS 0.192.120.194.1 /

## CASE STUDY

# APOPO FOUNDATION

APOPO addresses the dependence of African communities on foreign expertise to solve difficult, dangerous and expensive humanitarian detection tasks, posed by scourges of the developing world, like the landmine legacy and the emergence of tuberculosis. The foundation researches, develops, deploys and disseminates the use of a sustainable local alternative: Detection Rats Technology – training giant African pouched rats to use their extraordinary sense of smell to save human lives.

In March 2015, APOPO registered as a foundation in Geneva, Switzerland, to promote and support rat detection technology around the world, through funding, outreach and programme development. The foundation was designed to be a donation facilitator and a supporter of APOPO's local programmes; the status of foundation was therefore a logical choice, given the purpose of the organisation.

In Switzerland, APOPO relies indeed on "traditional" philanthropy, its revenue model being solely composed of grants and donations. In addition, the foundation was not designed to generate profit, but to gather resources from donors, for a specific purpose – namely the support of APOPO's programmes, which had a clear humanitarian purpose. Finally, the status of foundation provides for a certain flexibility in terms of organisation and functioning, coupled with a full tax-exempt status granted by the tax administration given the public interest purpose of the entity.

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## CASE STUDY

# THE *ELLA FUND* SHELTERED BY THE SWISS PHILANTHROPY FOUNDATION

The *ella fund* is a philanthropic fund sheltered by the Swiss Philanthropy Foundation, a non-profit umbrella foundation based in Geneva.

The fund was established in 2016 by Dr. Erin Gainer, a successful scientist and entrepreneur in the fields of women's health and endocrinology. Its purpose is to empower girls and women through education, healthcare and entrepreneurship, while its philanthropy strategy relies on two pillars: supporting established NGOs and incubating emerging projects focusing on venture philanthropy and community-based efforts.

One of the first organizations which will be supported by the *ella fund* in 2018 is EspeRare, a nonprofit foundation based in Geneva, whose purpose is to promote research and development of new therapeutic solutions and more generally to improve medical care for patient suffering from rare diseases. The grant allocated by the *ella fund* will support the project JNK Inhibitor ER002, in view of developing a new therapy to fight rare pediatric cancers.

The *ella fund* illustrates well the reasons why an entrepreneur like Dr. Erin Gainer may opt for a sheltered fund to set up her philanthropic project. This option allowed her to act efficiently, be advised by philanthropy professionals from the Swiss Philanthropy Foundation and use the existing structure of the umbrella foundation, while remaining personally and actively involved in the project.

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# SOLE PROPRIETORSHIP





# SOLE PROPRIETORSHIP

## SUMMARY

Sole proprietorship (*entreprise individuelle / Einzelunternehmen / ditta individuale*) is the most common legal form in Switzerland for small business. However, it is not very common in the non-profit sector. It is ideal for activities personally related to the entrepreneur him/herself, such as coaching or consultancy of any kind.

There are no specific provisions in the Swiss Code of Obligations governing the legal form of sole proprietorship, except in relation to the obligation to register with the Trade Register under certain circumstances.

To date, there are an estimated 327,000 sole proprietorships in Switzerland, most of which are not registered with the Trade Register.

There is no separate taxation for the entrepreneur between his personal and commercial income and wealth. Sole proprietorship may therefore not benefit from a tax exemption, which is the reason why it is not often used for non-profit ventures.

## ADVANTAGES

- ✓ Easy to establish
- ✓ No minimum capital
- ✓ Maximum flexibility

## DISADVANTAGES

- ✗ No limited liability for the sole trader
- ✗ Not appropriate to receive grants and other forms of support that are available to non-profit organisations
- ✗ Cannot include other investors

## 1. OVERVIEW

Young entrepreneurs who want to launch a one-person business often choose the sole proprietorship. Sole proprietorships can easily be transformed into corporations at a later stage and they are also easy to dissolve.

There are no minimum capital requirements.

As a sole proprietorship is not a separate legal entity, the founder (the "Sole Trader") does not benefit from limited liability like ordinary shareholders. The Sole Trader will thus be personally liable for all debts and obligations of the business. This is one of the main disadvantages of operating a business through a sole proprietorship in comparison to corporate forms that offer limited liability.

## 2. SETUP AND REGISTRATION

A Sole Trader establishes his sole proprietorship by obtaining self-employed status with the Social Insurance Office. Individuals who act in their own name and for their own account and bear the economic risks of their actions are considered as self-employed.

Registration with the Trade Register is compulsory only if there are commercial activities and the annual income exceeds CHF 100,000. Once registered, the sole proprietorship is subject to debt collection in the bankruptcy regime in the same way as corporations.

The Registration also grants protection of the company name that needs to comprise the family name of the Sole Trader and may associate additional words. A disadvantage to non-registration to the Trade Register is that Sole Traders are not able to register their company name; therefore, they run then the risk that their company name could be registered by another company. To grant some protection to the company name, it is possible to trademark or protect the copyright of any names/logos used in the business.

## 3. STRUCTURE

With a sole proprietorship, there is no separate legal entity from the sole trader.

Therefore, no constitutional documents or other corporate bodies are required.

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## 4. ACCOUNTING REQUIREMENTS

For sole proprietorships with a turnover of less than CHF 500,000, it is only required to keep accounts of income and expenses.

Sole proprietorships with a turnover higher than CHF 500,000 must keep standard financial accounts and prepare the annual accounts in accordance with Art. 957 ff of the Swiss Code of Obligations.

## 5. LIABILITY

As a sole proprietorship has no legal personality, the Sole Trader is liable for any debts and obligations of the sole proprietorship. This means that his personal assets are at risk.

## 6. FUNDING AND INVESTORS

Financing opportunities for sole proprietorships are limited. Usually funds are raised through loans from banks and other lenders, often using the Sole Trader's personal assets as security or giving personal guarantees. Crowdfunding is a new way for Sole Traders to raise capital for starting a business.

## 7. TAX TREATMENT AND TAX EXEMPTION SPECIFICITIES

Sole Traders include the benefit and capital of the sole proprietorship in their own tax return. They must nevertheless keep accounts for the sole proprietorship.

Sole proprietorships are required to register for value added tax (VAT) if taxable supplies made by the business in the previous 12 calendar months exceed the threshold for registration (currently CHF 100,000). Below this threshold, the sole proprietorship may voluntarily register for VAT.

As a sole proprietorship is inseparable from the Sole Trader and as it is not a distinct legal entity, it may not benefit from tax exemption.

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## CASE STUDY

### FLOW IN ACTION

Elaine France owns and operates a sole proprietorship, *Flow In Action*, a social business that builds leadership, resilience and entrepreneurial mind-set in young people, equipping them to become agents of change in their communities.

Her events, consultancy, resources and training, for young people and the key stakeholders around them, are grounded in Positive Education principles and Social Innovation expertise. She works in schools and with organisations running youth-focused leadership and entrepreneurship programmes. Elaine works to increase young people's wellbeing at a time when mental health issues globally are rising rapidly. As young people understand how they can take action and make a positive impact, their optimism and sense of purpose in the world increases.

With the idea of creating a sustainable business, rather than taking on a legal status simply to access grant funding, *Flow In Action* decided to launch as a sole proprietorship, mainly for purposes of flexibility at the on-set. This also allowed the founder to retain full control of direction and intellectual property, and not take on debt financing at start-up. This choice allowed her to keep her options open for the long-term, in case she later decided to scale up the business.

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# COMPANY LIMITED BY SHARES (LTD.)





# COMPANY LIMITED BY SHARES (LTD.)

## SUMMARY

Company limited by shares (*société anonyme* / *Aktiengesellschaft* / *società anonima*) is the most common legal form for for-profit corporations. It is a corporation with legal personality whose liabilities are covered exclusively by its own assets.

The company limited by shares is governed by Articles 620 to 763 of the Swiss Code of Obligations.

To date, there more than 100,000 companies limited by shares in Switzerland.

Standard corporate taxation applies to companies limited by shares. Under certain restrictive conditions, a non-profit company limited by shares should be entitled to apply for tax exemption. Cases are however rather rare in practice.

## ADVANTAGES

- ✓ Most common form for for-profit entities
- ✓ Easy to reach investors – flexibility to increase the share capital and/or to trade shares
- ✓ Liability is limited to the share capital of the entity

## DISADVANTAGES

- ✗ Not readily identifiable specifically as a social venture vehicle
- ✗ Not appropriate to receive grants and other forms of support that are available to non-profit organisations

# 1. OVERVIEW

A company limited by shares is a form of company commonly used by for-profit organisations. A company limited by shares is typically established with commercial aims, to distribute profits to its shareholders.

A company limited by shares has its own legal personality.

A company limited by shares must have a minimum share capital of CHF 100,000.-. When the company is established, an equivalent of 20% of the nominal value of each share must be paid up. In all cases, the capital contributions must be at least CHF 50,000. The capital shall be divided in shares with a value of minimum CHF 0.01.

Despite the fact that Companies limited by shares are generally used for for-profit endeavors, they may also be appropriate for social enterprise ventures. Typically, the Articles of Association of a company limited by shares can be drafted to provide for the features of a social enterprise, and they can even have a non-commercial purpose. For example, the Articles of Association can include social purposes and provisions that cap the dividends that can be paid to shareholders.

# 2. SETUP AND REGISTRATION

Companies limited by shares are established through a public deed passed in front of a notary public, in which the founders approve the Articles of Association and appoint the governing bodies.

In order to be incorporated, and therefore have its own legal personality, the company must then be registered with the Trade Register of the canton in which it has its registered office (seat).

The name of a company limited by shares may, in principle, be chosen freely, provided that it includes a mention of the legal form, it does not conflict with an existing name of another company, it is not misleading, and it is not purely descriptive. References in the name to any geographical areas (local, national, international) are allowed if they properly reflect the company's business area and if they are not contrary to any public interests.

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## 3. STRUCTURE

The three mandatory bodies of a company limited by shares are the General Meeting of Shareholders, the Board of directors and the Auditor.

### A. GENERAL MEETING (OF SHAREHOLDERS)

The supreme governing body of a company limited by shares is the General Meeting of Shareholders, which has the following non-transferable rights and duties:

- establish and amend the Articles of Association;
- appointing and removing the members of the Board of directors and the Auditor;
- approve the annual management report and the consolidated financial statement;
- give liability discharge to the Board of directors;
- approve the annual accounts and resolutions on the allocation of the disposable profit, and in particular determine the dividend;
- take all such decisions that are attributed to it by law or by the Articles of Association (e.g. share capital increase or reduction; dissolution of the corporation, etc).

### B. BOARD OF DIRECTORS

The Board of directors is responsible for the administration and management of the company. It may delegate part or all of the management to one or several of its members and/or third parties. In general, an executive board or management is appointed, even in relatively small companies.

The Board of directors has in particular the following non-transferable rights and duties (the board cannot delegate these duties, and neither the General Meeting nor the Articles of Association can assign these duties to other corporate bodies):

- Overall management of the company;
  - Determination of the company's organisation;
  - Organisation of the accounting, financial control and financial planning systems as required for management of the company;
  - Overall supervision of the management of the company, in particular with regard to compliance with the law, Articles of Association, bylaws and guidelines;
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- Preparation of the annual report, preparation of the general meeting and implementation of its resolutions;
- Duty to inform the courts of any over indebtedness of the company.

The Board of directors represents the company vis a vis third parties.

Swiss law provides for a domicile requirement: A company limited by shares must be able to be represented by either one Swiss-domiciled director with individual signing powers or two Swiss-domiciled directors or managers with joint signing powers.

## C. AUDITOR

A company limited by shares is required by law to appoint an external Auditor to review its annual accounts. In most cases, a limited statutory audit is sufficient.

Companies limited by shares must subject their accounts to a full ordinary audit if they qualify as a public company or if, during two successive exercises, two of the following values have been exceeded:

- Total Balance sheet: CHF 20 million;
- Turnover: CHF 40 million;
- Workforce: 250 full-time employees on average annually.

Nonpublic companies subject to ordinary audit shall appoint a Swiss chartered auditor. A company that does not have more than 10 full-time employees can opt out of a limited audit subject to approval of all the shareholders.

Shareholders may elect one or more auditors. The auditors must be independent, which means they may not be Board members or employees, and at least one must be resident in Switzerland.

Auditors must prepare a report for the Board of directors and must be present at the annual general meeting, unless the shareholders unanimously waive their presence.

## 4. ACCOUNTING REQUIREMENTS

A company limited by shares must keep company accounts in compliance with the recognized accounting principles provided by the Swiss Code of Obligations (SCO). It shall have double entry bookkeeping with a balance sheet, a profit and loss account and an inventory.

Annual reports must include the turnover for the preceding financial year and must follow in particular the principles of full disclosure, fair presentation, prudence and continuity.

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## 5. LIABILITY

A company limited by shares has a full and independent legal personality. Therefore, each shareholder's liability towards the company is limited to the amount that they have invested in the company and the amount, if any, unpaid on the shares held by them. Shareholders are not ordinarily liable for the debts of the company, except under exceptional circumstances (piercing of the corporate veil).

## 6. AVAILABLE FUNDING AND INVESTMENT MECHANISMS

Subject to any restrictions set out in the company's Articles of Association, a company limited by shares can access external investments by offering equity in the company or loans or other forms of debt.

This process is subject to the pre-emption rules set out in Article 652b SCO, which can only be ignored in certain circumstances. Pre-emption is a right of first refusal for existing shareholders over issues of new shares, allowing them to preserve their percentage shareholding in the company (provided they have sufficient funds available to subscribe for the new shares).

An investor who makes an equity investment into the company by purchasing shares, will become a shareholder of the company.

If the investor is providing a loan or purchasing bonds, there is no requirement for an investor to become a member.

## 7. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES

Companies limited by shares are subject, among others, to income and capital taxes. The corporate income tax is levied on the federal, cantonal and municipal level at a variable rate depending on taxable income. The capital tax is levied on the cantonal and municipal level at variable rate depending on taxable capital.

A company limited by shares may apply for tax exemption (see Chapter 2 above), though this is not very common. Tax authorities are generally reluctant to grant tax exemptions to companies limited by shares, even if the company exclusively pursues purposes of public interest. To benefit from tax exemption, companies limited by shares must, in addition to

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the general principles of tax exemption set out above (see Chapter 2), prohibit any dividend distribution or other type of financial benefits in favour of their shareholders.

In practice, it is more common to establish a combination of both a company and a foundation/association, the latter being tax exempted (see below, Tandem Structures).

## 8. EXCURSUS: B CORP CERTIFICATION

Nowadays, companies may apply for the B Corp certification, a certification for for-profit companies granted by the non-profit organisation B Lab if rigorous standards of social and environmental performance, accountability, and transparency are met. This certification allows companies to become more identifiable as impact-driven businesses.

To become a B Corp, a company needs to successfully complete an assessment that evaluates the overall impact of the company on its stakeholders. The assessment is reviewed by B Lab, which does background checks and can request further documentation to ensure that the company is really in line with the impact standards defined by B Lab.

Once approved, the companies are required to have or adopt governing documents, which include a commitment to a “triple bottom line” approach to business. They shall have in particular a purpose clause, which states that the entity exists to promote the success of the business for the benefit of its shareholders, but also to have a material positive impact on society and environment. The governing documents of B Corps also need to state that the board members of the company need to consider a range of “stakeholder interests” – including shareholders, employees, suppliers, society and the environment – when making decisions. Shareholder value may therefore not be the supreme consideration but it is one factor amongst the many stakeholder interests which board members need to take into account when running the business.

The value of meeting the legal requirement for B Corp certification is that it bakes sustainability into the DNA of the company as it grows, brings in outside capital, or plans succession, ensuring that its mission can better survive new management, new investors, or new ownership.

Companies registered in Switzerland may apply for the B Corp certification, provided they meet the requested criteria.

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## CASE STUDY

### OPALINE SA

Opaline produces a selection of high quality fruit juices and lemonades. Every fruit is selected and purchased locally before being pressed and bottled within a 20-km range. Its mission is to enhance Switzerland's agricultural heritage, ensure that margins are shared fairly all along its value chain and grow to maximize positive impact on 3 pillars: environment, people and shared financial value.

All drinks are produced in a factory fueled by solar panels. They are distributed nationally, in Switzerland, through a range of independent shopkeepers, cafés and hotel owners. Since its beginning in 2009, the company has grown to cover all regions of Switzerland with products available in over 1,800 points of sale.

Opaline has been incorporated as a company limited by shares (Ltd.) as it thrives to prove that a company funded by shareholders, based on a profit-generating model, can operate for the well-being of a large community whilst creating considerable wealth for all involved. And the more it grows, the more wealth is distributed.

Each individual working for Opaline has access to the capital and can thus be empowered to contribute to the success of its mission. Opaline operates on a circular management basis. Each employee has a responsibility, but strategic decisions are shared and made by all, regardless of the capital invested. Consumers equally become part of Opaline's mission as their decision to buy the product means Opaline can re-inject profit margins to support local initiatives and businesses. All members of the supply chain are considered as equally important to the viability of the company. Thus, they are not only remunerated fairly, they contribute to keeping Opaline's mission alive.

Opaline is B Corp certified. It has undertaken this process as a natural pursuit of its mission: seeking profit as a means to achieve its mission's purpose, evaluating the impact of that purpose and ensuring that it could thrive to continually improve that impact throughout every segment of its operations.

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# LIMITED LIABILITY COMPANY (LLC)





# LIMITED LIABILITY COMPANY (LLC)

## SUMMARY

A limited liability company (*société à responsabilité limitée* / *Gesellschaft mit beschränkter Haftung* / *società a garanzia limitata*) is an incorporated company with its own legal personality and share capital, established by one or more individuals or legal entities (partners). Each partner participates by paying in an initial share of the capital.

The LLC is a combination of aspects of share capital companies and partnerships, which makes it distinctive from other types of entities.

The LLC is governed by Articles 772 to 827 of the Swiss Code of Obligations.

To date, there are approximately 92,000 LLCs in Switzerland.

Standard corporate taxation applies to LLCs. Under certain restrictive conditions, a non-profit LLC should be entitled to apply for tax exemption. Cases are however rare in practice.

## ADVANTAGES

- ✓ Common form for for-profit
- ✓ Low minimum capital
- ✓ Adapted to appeal to investors
- ✓ Limited liability for partners

## DISADVANTAGES

- ✗ The partners are registered with the Trade Register and any transfer of shares needs to be announced
- ✗ Not readily identifiable specifically as a social venture vehicle
- ✗ Not appropriate to receive grants and other forms of support that are available to non-profit organisations

# 1. OVERVIEW

The Limited Liability Company (LLC) is an incorporated company with its own legal personality and share capital, established by one or more individuals or legal entities (partners). Each partner participates by paying in an initial share of the capital.

The LLC is a combination of features of corporations and partnerships, which makes it distinctive from other type of entities.

A limited liability company shall have a minimum capital of CHF 20,000 that shall be fully paid-up. It can be divided in shares of minimum CHF 100 each. Each partner shall have at least one share.

Limited liability companies can be used for social enterprise ventures. The Articles of Association of an LLC can be drafted to provide for the features of a social enterprise and they can even have a non-commercial purpose. For example, the Articles of Association can include social purposes and provisions that cap the dividends that can be paid to partners.

# 2. SETUP AND REGISTRATION

LLCs are established through a public deed passed before a notary public, in which the founders approve the Articles of Association and appoint the governing bodies.

The company shall be registered with the Trade Register to acquire legal personality.

The name of an LLC may, in principle, be chosen freely, provided that it includes a mention of the legal form, does not conflict with an existing name of another company, is not misleading, and is not purely descriptive. References in the name to any geographical areas (local, national, international) are allowed if they properly reflect the company's business area and if they are not contrary to any public interests.

# 3. STRUCTURE

## A. GENERAL MEETING OF PARTNERS

The General Meeting of partners is the supreme governing body of a limited liability company. The General Meeting of partners has notably the following non-transferable rights and duties:

- To adopt and amend the Articles of Association;
  - To appoint and revoke the Managing Officers and the auditors;
  - To approve the financial accounts and to decide the profit allocation and the distribution of dividends;
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- To approve the annual report and the consolidated accounts;
- To determine the remuneration of the Managing Officers and give them liability discharge;
- To pass resolutions concerning all matters which are reserved to the General Meeting of partners by law (e.g., dissolution of the entity, excluding a partner, etc.), the Articles of Association or any other regulations of the company.

Unless otherwise provided by law or the Articles of Association, resolutions by the General Meeting of partners are adopted by an absolute majority of the votes cast. The voting rights of each partner are proportionate to the amount of their shares.

## **B. MANAGING OFFICERS**

All the partners share joint executive powers, i.e. the partners also act as managing directors, unless provided otherwise in the Articles of Association (for example, management delegated to only one partner or to a third party).

Swiss law provides for a domicile requirement. A limited liability company must be able to be represented by either one Swiss-domiciled managing officer with individual signing powers or two Swiss-domiciled managing officers with joint signing powers.

## **C. AUDITOR**

A limited liability company is required by law to appoint an external Auditor to audit the annual accounts. In general, a limited statutory audit is sufficient.

Limited liability companies must subject their accounts to a full ordinary audit if, during two successive exercises, two of the following values have been exceeded:

- Total Balance sheet: CHF 20 million;
- Turnover: CHF 40 million;
- Workforce: 250 full-time employees on average annually.

A company that does not have more than 10 full-time employees can opt out of a limited audit subject to approval of all the partners.

Partners may elect one or more auditors. The auditors must be independent, which means they may not be Managing Officers or employees, and at least one must be resident in Switzerland.

Auditors must prepare a report for the Managing Officers and must be present at the annual general meeting, unless the partners unanimously waive their presence.

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## 4. ACCOUNTING REQUIREMENTS

A limited liability company must keep company accounts in compliance with the recognized accounting principles provided by the Swiss Code of Obligations. It shall have double entry bookkeeping with a balance sheet, a profit and loss account and an inventory.

Annual reports must include the turnover for the preceding financial year and must follow in particular the principles of full disclosure, fair presentation, prudence and continuity.

## 5. LIABILITY

Partners are in principle not liable for the debts of the company. The Articles of Association may provide payment of an additional contribution, the amount of which is however limited to twice the amount of the initial contribution.

## 6. AVAILABLE FUNDING AND INVESTMENT MECHANISMS

Subject to any restrictions set out in the company's Articles of Association, a limited liability company can access external investment by offering equity in the company or loans or other forms of debt.

This process is subject to the pre-emption rules set out in Articles 781 cum 652b SCO. Pre-emption is a right of first refusal for existing partners over issues of new shares, allowing them to preserve their percentage shareholding in the company (provided they have sufficient funds available to subscribe for the new shares).

An investor who makes an equity investment into the company by purchasing shares will become a partner of the company.

If the investor is providing a loan or purchasing bonds, there is no requirement for an investor to become a partner.

## 7. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES

LLCs are subject to income and capital taxes. The corporate income tax is levied on the federal, cantonal and municipal level at a variable rate depending on taxable income. The capital tax is levied on the cantonal and municipal level at variable rate depending on taxable capital.

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An LLC may apply for tax exemption (see Chapter 2 above), though this is not very common. Tax administrations are generally reluctant to grant tax exemptions to LLCs, even if the company pursues purposes of public interest exclusively. To benefit from tax exemption, LLCs must, in addition to the general principles of tax exemption set out above (see Chapter 2), prohibit any dividend distribution or other type of financial benefits in favour of their partners.

## CASE STUDY

### SOFTWEB

Established in 2001, Softweb Sàrl acts as a social innovation enabler. Its mission is to support project owners, companies and institutions in creating meaningful projects.

Softweb offers professional advisory services at a reduced rate. The financial sustainability of the project comes from both subsidies on specific projects and from fees for consultancy mandates with companies and institutions.

Initially established as a standard limited liability company, Softweb decided to become a non-profit mission-driven limited liability company in 2011. It amended its purpose to be non-profit and chose not to distribute dividends to its shareholders. As such Softweb was able to receive funding from the government for advocacy activities with project owners and individuals, while securing commercial mandates with companies and institutions.

Softweb is also certified as a B Corp. The certification was in line with the vision of the company and it ensures a strong commitment towards impact on society and environment. Softweb was recognised in 2017 as one of the “Best for the Community” companies for its empowerment role towards grassroot project owners.

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# COOPERATIVE





# COOPERATIVE

## SUMMARY

Cooperatives (*société coopérative* / *Genossenschaft* / *società cooperativa*) are corporate entities consisting of an unlimited number of persons or commercial enterprises who join together for the primary purpose of promoting or safeguarding their own interests..

Cooperatives are governed by Articles 828 to 926 of the Swiss Code of Obligations.

To date, there are approximately 12,000 cooperatives in Switzerland.

Standard corporate taxation.

## ADVANTAGES

- ✓ Flexible governance arrangements
- ✓ Not subject to prudential supervision

## DISADVANTAGES

- ✗ Restrictions on distribution of profits (rarely used to conduct profit driven commercial activities)
- ✗ Minimum of seven members
- ✗ Not appropriate to receive grants and other forms of support that are available to non-profit organisations.

# 1. OVERVIEW

A cooperative is a corporate entity consisting of an unlimited number of persons or commercial enterprises who join together for the primary purpose of promoting or safeguarding their own interests.

Cooperatives are businesses owned and run by and for their members.

Development and mutual assistance are at the forefront of cooperatives. The corporate purpose of the cooperative must not exclusively or primarily be of a financial nature.

The cooperative is a “partnership” company and not a corporation. In a cooperative, the members usually participate in the running of the company’s business and their contributions are not merely financial.

The cooperative is a very flexible structure that can be adapted to the founders’ requirements. It must have a minimum of seven members. In general, all members have equal rights and obligations.

# 2. SETUP AND REGISTRATION

There is no compulsory initial capital.

To set up a cooperative, the founding members shall call an incorporating assembly, to discuss and adopt the Articles of Association. There shall be a minimum of seven members for the incorporation of the cooperative.

In case there are contributions in kind and/or assets are to be taken over by the cooperative, the founders must draft a written report that must be discussed by the incorporating assembly.

The name of a cooperative may, in principle, be chosen freely, provided that it includes a mention of the legal form, does not conflict with an existing name of another company, is not misleading, and is not purely descriptive. References in the name to any geographical areas (local, national, international) are allowed if they properly reflect the company’s business area and if they are not contrary to any public interests.

Cooperatives must be registered with the Trade Register. They only acquire legal personality through entry in the Trade Register of the canton where they have their registered office.

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## 3. STRUCTURE

### A. GENERAL ASSEMBLY OF MEMBERS

The supreme governing body of a cooperative is the General Assembly of members.

The first members of the cooperative are the founding members, who approve the initial Articles of Association at the time of the incorporation. Subsequent members are those who are admitted in accordance with the Articles of Association.

Only members have a voting right at the meetings of the general meeting.

In general, all members have equal rights and obligations. There might be some adjustments to the “equal treatment” principle as long as differentiation criteria are in line with the nature and purpose of the cooperative and are objectively justified. Differentiation may be based on the use of the cooperative’s institutions, on the contributions of the members to the cooperative or on the length of their membership. In principle, differentiation based on capital contributions are not considered acceptable considering the nature of cooperatives.

The General Assembly of members has the following non-transferable rights and duties:

- Adopt and amend the Articles of Association;
- Appoint the directors and the auditors;
- Approve the management report and the consolidated accounts;
- Discharge the directors; and
- To make resolutions concerning the matters reserved to the General Assembly of members by law or by the Articles of Association.

If a cooperative comprises more than 300 members or if the majority of its members are cooperatives themselves, the General Assembly may transfer some or all decision-making powers to a delegates’ meeting.

### B. BOARD OF DIRECTORS

The Board of directors is in charge of the management of the cooperative.

Board members have a duty to call the general meeting of members and implement its resolutions; and to supervise the officers of the cooperative with regard to compliance with the law, the Articles of Association and any applicable regulations.

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Board members are also in particular responsible for ensuring that the minutes of their meetings, the minutes of the general meeting, the necessary accounts and the membership list are kept properly, that the profit and loss account and the annual balance sheet are prepared and submitted to the auditor for examination in accordance with the statutory provisions.

A minimum of 3 directors is required. Only individuals may become directors; however, authorized representatives of legal entities may be appointed to the Board.

Some duties and powers of the Board of directors may be delegated to one or several committees, elected by the Board of directors.

The Articles of Association may further authorize the Board of directors or the General Assembly of members to delegate the management and the representation of the cooperative to one or more managers, directors or other persons, who may or may not be members.

A cooperative must have a Swiss-domiciled director with individual signing powers or two Swiss-domiciled directors with joint signing powers.

## C. AUDITOR

Cooperatives are subject to audit in the same manner as corporations.

A cooperative is required by law to appoint an external Auditor to audit the annual accounts. In general, a limited statutory audit is sufficient.

Cooperatives must subject their accounts to a full ordinary audit if, during two successive exercises, two of the following values have been exceeded:

- Total Balance sheet: CHF 20 million;
- Turnover: CHF 40 million;
- Workforce: 250 full-time employees on average annually.

A cooperative that does not have more than 10 full-time employees can opt out of a limited audit subject to approval of all the partners.

Members may elect one or more auditors. The auditors must be independent and at least one must be resident in Switzerland.

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## 4. LIABILITY

The cooperative has legal personality and therefore it is solely liable for its own debts and liabilities unless otherwise provided in the Articles of Association (limited or full liability of members may for instance be contemplated).

Articles of Association may also provide for payment of additional contributions by the members to cover net losses.

## 5. AVAILABLE FUNDING AND INVESTMENT MECHANISMS

Cooperatives can attract investors who can invest through equity or loan.

The assets of the cooperative belong to the cooperative. Unless the Articles of Association provide otherwise, any net profit generated by the cooperative's business operations accrues to the company's assets. The Articles of Association may provide however for the distribution of whole or part of net profit among the members. The dividend allocation may be proportional to the number of shares held by each member or may be determined on another basis (this is to be specified in the Articles of Association).

A cooperative may have shares, but it is not mandatory. If a cooperative decides to create a share capital through share certificates, it must provide for this in the Articles of Association. The membership carries a voting right. Each member has one vote, independently from the number of shares they hold. The Articles of Association may provide that the members must make a one off or regular contributions.

Third parties may also invest in the cooperative by way of debt. In such case, obviously, non-member investors do not have a voting right.

## 6. COMMERCIAL ACTIVITY

The primary purpose of a cooperative must be to promote or safeguard the specific economic interests of the company's members by way of collective self-help but the cooperative can undertake commercial activity.

A cooperative may hold a subsidiary, as long as it is in line with the purpose of the cooperative.

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## 7. TAX TREATMENT AND TAX EXEMPTION - SPECIFICITIES

Cooperatives are taxed in the same way and subject to the same taxes and tax rates as corporations. They are subject to income and capital taxes.

The corporate income tax is levied on the federal, cantonal and municipal level at a variable rate depending on taxable income. The capital tax is levied on the cantonal and municipal level at variable rate depending on taxable capital.

As a matter of principle, cooperatives cannot be granted tax-exemption due to the fact that by their very nature they support their own members.

### CASE STUDY

## ONE CREATION

ONE CREATION Cooperative is an investment platform that offers democratic governance and a hybrid investment class portfolio (both listed, non-listed companies and start-ups) all directed into companies that have a positive impact on the environment and that are key industrial players in the building of a truly sustainable world. ONE CREATION believes in the real economy and, through its business model, seeks to reallocate capital to start-up companies of the future.

ONE CREATION is incorporated as a cooperative company, which makes it a non-speculative investment platform. Being a cooperative company also means that the smallest associate (CHF 10'000 of capital invested) has one vote at the General Assembly, just like the largest institutional associates (CHF 5 million of capital invested to this date).\*

The investment universe of ONE CREATION is purely dedicated to companies whose products or services serve an environmental purpose. ONE CREATION strives to be a catalyst as well as a supporter of Environmental Technologies that are shaping the sustainable society it wishes to build.

\* It is certified as a B Corp.

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# BRANCH OFFICE OF A FOREIGN SOCIAL VENTURE – IN BRIEF



# BRANCH OFFICE OF A FOREIGN SOCIAL VENTURE – IN BRIEF

A branch office is an organisation existing in a relation of dependence towards a parent company. It engages in business activities similar to those of the parent company, in a continuous manner, but in a separate location.

A branch office does not have an independent legal personality.

According to Swiss law, a branch office must therefore comply with the following requirements :

- Its business purpose is similar to the one of the parent's company,
- It has its own premises,
- It has a representative who is domiciled in Switzerland,
- It keeps proper accounts.

There are no mandatory corporate bodies in a Swiss branch office but there shall be at least one representative with signing powers domiciled in Switzerland.

The registration of a branch office with the Trade Register has a declarative value.

From a tax perspective, the Swiss branch of a foreign entity is subject to Swiss taxes. In case the parent company and its branch pursue public benefit purposes and comply with the other conditions of tax exemption (see Chapter 2), the branch office could apply for a tax exemption in Switzerland. That said, given that branches are not independent legal entities, if the parent company is located abroad, donations made to the branch may not be tax deductible for the donor. This is part of the reason why branches are not frequently chosen as a legal presence in Switzerland for a foreign non-profit entity.

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## CASE STUDY

### THE FOREST TRUST, BRANCH IN NYON

THE FOREST TRUST (TFT) is a global non-profit organisation working to transform supply chains for nature and people. It believes in leveraging the transformative power of companies to bring positive change to how products are sourced. Their supply chain, social and environmental experts work to ensure that global commodities like palm oil, pulp and paper, rubber, stone, cocoa, charcoal and timber are produced responsibly.

They innovate with companies to bring value to everyone in the supply chain – from grower to customer. Considering the urgent needs of the planet, due to climate change, population growth and food security becoming priority issues, TFT focuses on creating solutions that can be adopted and scaled up.

Established in 1999, the TFT is a company limited by guarantee with its seat in Southampton (UK). It opened its branch in canton of Vaud in 2003 to be closer from Geneva's cluster of UN organisations and NGOs. The form of a branch was used as a way to test whether a presence in Switzerland was useful and could help it pursue its mission.



## REPRESENTATIVE OFFICE — IN BRIEF

A representative office (or liaison office) is deemed not to engage in trade, sales, manufacturing or other commercial activities, but rather to perform only auxiliary functions and preparatory work for a foreign company. No further activities, such as rendering advice or carrying out transactions, are allowed to be carried out.

The representative office is dependent on the parent company both from a legal and economic point of view and cannot enter into any agreements in its own name.

There are no mandatory corporate bodies in a Swiss representative office.

Unless it engages in commercial activities, a representative office is in principle not subject to taxation in Switzerland.



# TANDEM STRUCTURES (NON-PROFIT & FOR-PROFIT ENTITY)





# TANDEM STRUCTURES

## (NON-PROFIT & FOR-PROFIT ENTITY)

### 1. SISTER ORGANISATIONS

Social entrepreneurs can consider using a tandem structure with two independent entities, one for-profit entity and one non-profit organisation, operating in a complementary fashion. Typically, it is not uncommon to have a foundation operating side by side with an LLC or a corporation, towards a common goal.

In such a set up, it is important to ensure the correct planning of the collaboration between both entities, notably to avoid jeopardizing the tax exemption of the non-profit organisation.

It is indeed key that the non-profit organisation ensures that all its activities are done for the public benefit and that they do not serve the for-profit sister organisation. The non-profit should be able to demonstrate at all times sufficient independence and focus on its own non-profit goals.

The collaboration can be detailed in licensing, services, resource sharing, or other agreements. It is also possible to have some overlap in board members and possibly executive management.

This combination allows a clear separation and accountability between the business activities and the social projects. While both aspects are inter-dependent, the legal distinction also gives flexibility.

### 2. NON-PROFIT SUBSIDIARY OF A FOR-PROFIT ENTITY

A for-profit entity may establish a non-profit “daughter” organisation to deploy activities for the public benefit and pursue the corporate social responsibility objectives of the for-profit parent entity. This setup is a classic in many industrial groups willing to have charitable activities beside their commercial goals, without mixing them. And it is still appreciated nowadays, since it allows the for-profit entity to focus on making profits and developing commercial activities whilst the non-profit organisation can focus on pursuing public benefit projects and reaching positive impacts.

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The advantage of creating a link between the two entities is to provide the charitable organisation with a greater and constant support from the for-profit entity, as well as the benefit of the name and reputation of the for-profit entity.

The for-profit entity would typically be an LLC or a Ltd and the non-profit organisation a foundation. The for-profit entity would act as founder and then have one or more representative on the Board of the foundation. In these circumstances, the charity can be viewed as a subsidiary but, as a foundation has no shares, it cannot be “owned” by a for-profit entity.

The liability associated with this legal structure depends on the type of entity chosen for the for-profit entity and the non-profit subsidiary.

Both entities will be taxed independently and subject to the taxation regime applying to their legal form and activities, given that they are independent entities. The fact that a link exists between them has no direct impact on their taxation.

### 3. FOR-PROFIT ENTITY AS SUBSIDIARY OF A NON-PROFIT

A non-profit entity may establish a commercial subsidiary (or hold shares of such existing entity). This is typically done in two scenarios:

1. The non-profit entity holds all shares of one or more commercial companies in order to ensure the unity and non-dispersion of the shares of the commercial entity. In such a scenario, the non-profit entity serves as the cement of the commercial group.
2. The second instance in which this happens is generally when the non-profit entity wants to conduct a commercial activity, and decides to split this activity from the non-profit entity in order to ensure compliance with the conditions of the tax exemption (which prevent a tax-exempt entity from actively conducting primary commercial activity).

In both scenarios, the profits generated by the commercial entities are distributed to the non-profit entity by way of dividends and/or grants. The non-profit entity must then use these dividends in furtherance of its public benefit purpose.

Another restriction imposed by the tax-exempt status of the non-profit parent benefit is that the holding tax-exempt organisation shall not have management powers in the for-profit subsidiary. Management of both entities shall therefore be independent; tax authorities generally tolerate one individual being the liaison board officer, i.e. that he/she

sits in both boards of the parent non-profit entity and the daughter commercial company.

The liability associated with this legal structure depends on the type of entity chosen for the non-profit parent organisation and the for-profit subsidiary.

## CASE STUDY 1

# SHARE A DREAM

*Share A Dream's* mission is to create a personal and sustainable link between local NGOs suffering from a lack of visibility, passionate volunteers and companies willing to get engaged with humanitarian projects.

*Share A Dream* has two very different stakeholders: NGOs and companies, and a two-sided mission. This is why *Share A Dream* chose to adopt a hybrid legal model. The social start-up is divided into two separate legal entities: A non-profit association called *Share A Dream* and a LLC called *Share A Dream Solutions*. The LLC is certified as a B Corp.

The association's mission is to give visibility to non-profit organisations to boost their access to resources. The association transfers 100% of all the donations towards the target NGOs and all services for NGOs are totally free of charge.

The LLC's mission is to link companies from the private sector and bigger grant-making foundations with humanitarian projects of their choice. The core mission of the LLC is to deliver online and offline employee engagement services to companies on the platform.

By separating the financial flux from the donations and the services, *Share A Dream* ensures transparency about the use of the donations and revenues.

This hybrid legal model also offers differentiation in terms of decision-making. For all activities concerning the NGOs, all the members vote for strategic decisions inside the general assembly. However, for strategic decisions concerning the business, the shareholders can make independent decisions within the LLC. To ensure independence, it is crucial that the decision-making bodies of both entities are different.



## CASE STUDY 2

# DIRECT COFFEE

*Direct Coffee* is a Swiss social enterprise that imports coffee directly traded with smallholder farmers in Africa. *Direct Coffee* co-founders Marie and Michaël Tuil want to maximize the financial, social and ecological value in each business decision – equally so for strategic and for daily decisions. This is explicitly specified in the statutes of the company and corresponds to the motivation for the founding of *Direct Coffee*.

*Direct Coffee* is incorporated as a LCC in Zürich. This entity is in charge of the business aspects and it is the contractual partner for buying and selling coffee. It employs the co-founders and can employ further people or freelancers. It has a board of advisors constituted of experts (specialty coffee, global health, IT architecture, business strategy).

*Direct Coffee* also created an association called *Direct Impact Verein*. The association receives 1 CHF for each package of coffee sold through the company. Additionally, the association receives grants and donations from private and institutional donors. With these funds, the association is in charge of implementing the social projects in the sourcing countries.

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